



**Nyainda v Republic (Criminal Miscellaneous Application
E112 of 2023) [2024] KEHC 15672 (KLR) (9 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15672 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL MISCELLANEOUS APPLICATION E112 OF 2023**

**DK KEMEL, J
DECEMBER 9, 2024**

BETWEEN

CALEB OCHOLA NYAINDA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein filed an application dated 23/6/2023 and filed on 3/8/2023 seeking principally an order that the sentence imposed against him vide Bondo PM’s Criminal Case No. 196 and 197 of 2020 be made to run concurrently.
2. The Applicant’s gravamen is *inter alia* that he had been charged with offense of grievous harm contrary to Section 234 of the penal Code and was sentenced to serve 5 years imprisonment in Bondo PM’s Cr. 196 of 2020 and three years in Cr. 197/2020; that he is suffering in prison as he has debilitating illness; that he is remorseful; that the sentence be ordered to run concurrently pursuant to the provisions of Section 12 of the Criminal Procedure Code.
3. The application was canvassed by way of written submission. Both parties duly complied.
4. Miss Onyole learned counsel for the Applicant, vide submissions dated 11/11/2024 submitted that Section 12 of the Criminal Procedure Code allows for sentences to be combined and likewise the Judiciary sentencing Policy Guidelines as long as the offences are computed in the same transaction and which calls for sentences to run concurrently while separate and distinct offences committed on diverse dates with different complainants should attract consecutive sentences. It was submitted that the two offences were committed within the same time involving the applicant and the victims who are neighbours and who had differed over grazing rights on a particular piece of land.

Counsel pointed out that the matters were handled by two different judicial officers thus leading to the sentences running consecutively. It was further submitted that since the acts leading to the Applicant’s



conviction were connected together by proximity of time, criminal intent, continuity of action and purpose and which constituted one transaction, counsel opined that this warrants the sentences to run concurrently and relied on the case of *William Kimani Ndichu v. R* [2015] eKLR.

It was finally submitted the Applicant is remorseful and is not in good health and now seeks thus court to consider his plea to have the sentences run concurrently.

5. M/s Kerubo learned counsel for the Respondent submitted that the Applicant had been charged with an offence of causing grievous harm to two complainants and that he was charged before two courts which determined the case separately. It was submitted that the sentences imposed were quite in order as the trial courts had exercised their discretion in sentencing. Learned counsel pointed out that Section 12 and 14 of the *Criminal Procedure Code* provides the instances where sentences may be ordered to run concurrently or consecutively. Learned counsel cited The case of *Ng'anga v. R* (1981) KLR 530 where the court stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentence is still good practice.

It was finally submitted by the Applicant's claim that the offence took place in the same transaction is not correct since the same happened on two different occasions involving different persons and hence the sentences should not be made to run concurrently. Finally, it was submitted that the sentences were imposed by different judicial officers on separate files and case numbers and thus they should not be made to run consecutively.

6. I have considered the Applicant's application together with submissions of both learned counsels. It is not in dispute that the Applicant had been charged before Bondo Law Courts for two offences of causing grievous harm contrary to Section 234 of the *Penal Code* vide Cr. No. 196 and 197 of 2020. It is also not in dispute that each of the cases was handled by a different judicial officer upto conclusion and that each trial court-imposed sentences in that the trial court, in Cr. 196/2020 sentenced the Applicant to five years imprisonment on 30/6/2020 while the court n Cr. 197/2020 sentenced him to three years imprisonment on 28/8/2020. It also transpired that the Applicant had also been convicted in an assault case namely Bondo PM Cr. 823 of 2011 where he was placed on probation for three years.
7. It is trite that sentencing is always at the discretion of the trial court. it is noted that both courts dealt with the Applicant separately and on different dates. In Cr. 196/2020, the incident took place on 20/4/2020 at 1830 hours while in Cr. 197/2020, the incident took place on 20/4/2020 at 1250 hours. It is instructive that the parties did not seek to consolidate the two cases which went on separately upto the conclusion. I find the issue for determination is whether the offences were committed within the same transaction so as to support a concurrent sentence.
8. A perusal of Sections 12 and 14 of the *Criminal Procedure Code* shows that trial courts are at liberty to pass both consecutive and concurrent sentences depending on the circumstances of each case as well as the manner in which the charges have been laid out by the prosecution. In either of the options, the trial court has discretion to make orders as are appropriate in the circumstances of the case. In the case of *Ng'anga v. R*, (1981) KLR 530 the court held that in situations where a person commits more than one offence at the same time and in the same transaction, save in vey exceptional circumstances, to impose concurrent sentences is still good practice. Again, in the case of *William Kimani Ndichu v. R* (2015) eKLR, the Court of Appeal held that if a series of acts are so connected together by proximity of time, criminality or criminal intent; continuity of action and purpose or by the relation of cause and effect as to constitute one transaction then the offence of acts are committed in the course of the same transaction.



Going by the above authorities, it is clear that if offences are connected within the same transactions, then ordinarily the sentences imposed would have to run concurrently. In the present case involving the Applicant, it is noted that the prosecution opted to open separate files for each case and that the two trial courts proceeded separately to hear and determine the matter. Indeed, the sentences were imposed by judicial officers on different dates namely 30/6/2020 and 28/8/2020. The ideal situation is that if the two matters had been consolidated and heard together by one trial magistrate, then the sentences would attract an order for the same to run concurrently. As matters stand now, the two matters were dealt with separately. It is instructive that the Applicant has not lodged an appeal on revision of sentence and thereafter seek to have the two appeals consolidated together. It is also instructive that the Applicant has not opted to prosecute his revision request separately on each file. I am not convinced that the Applicant has exercised his choices wisely since in the absence of consolidation of the two matters. This court will find it difficult to grant the order as sought.

9. In view of the foregoing observation, it is my finding that the application dated 23/6/2023 lacks merit. Same is dismissed.

RULING DATED AND DELIVERED THIS 9TH DAY OF DECEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

N/A for Applicant

M/s Onyoo for Applicant

M/s Mumu for Respondent

Ogendo Court Assistant

