



REPUBLIC OF KENYA



KENYA LAW
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**Muchiri v Republic (Criminal Revision E001 of 2021)
[2021] KEHC 318 (KLR) (6 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 318 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL REVISION E001 OF 2021
MW MUIGAI, J
DECEMBER 6, 2021**

BETWEEN

JOSEPH GUTHIGA MUCHIRI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Background

1. The Applicant was charged with 6 Counts before the Chief Magistrate's Court at Mavoko in Criminal Case No.198 of 2019.
2. On 1st October, 2020, the Trial Magistrate Hon. R.W Gitau (RM) convicted the Applicant in Count I, the offence of Obtaining goods by False Pretences contrary to Section 313 of the *Penal Code*, in Count II the offence of Forgery contrary to Section 349 as read with Section 350(1) of the Penal Code and in Count IV the offence being unlawful possession of an Identity Card belonging to other person contrary to Section 14(1) (f) of the *Registration of Persons Act*.

Sentence

3. Upon considering the Applicant's mitigation and the period spent in custody, the Trial Magistrate sentenced the Applicant in Count I to serve imprisonment of 1 year, in Count II to serve imprisonment of 3 years and in Count IV the Applicant was fined Kshs.10,000/- only in default to serve 6 months imprisonment.

Application

4. The Applicant filed a Notice of Motion before this court on 8th January, 2021 wherein the Applicant seeks orders that pursuant to Section 333(2) of the *Criminal Procedure Code* (CPC), the period he



spent in remand prison while awaiting the final determination of the case to be considered and the court to order that the sentences that the Applicant is serving to run concurrently.

5. The Application is based on grounds that pursuant to Section 362 and 364 of the CPC and Article 165 of the *Constitution*, the court has the jurisdiction to review a sentence. According to the Applicant the Trial Magistrate pronounced the sentence to run consecutively. According to the Applicant, he has spent a period of one year and eight months in remand prison since he was arrested on 27th February, 2019. The Applicant has asked this court to invoke Section 333(2) of the CPC and grant the orders sought in the interest of justice.

Applicant's Submissions

6. On 2nd November, 2021 the Applicant orally submitted that the period he spent in custody should be taken into account and the sentence to run concurrently and not consecutively.

Respondent's Submissions

7. On behalf of the Respondent, Mr. Martin Mwongera, Senior Prosecution Counsel submitted that the Trial Court was lenient to the Applicant hence this court should enhance the sentence. According to counsel, the Applicant was arrested on 28th February, 2019 and appeared before the Trial Court on 7th March, 2019. The Applicant remained in custody until 1st October, 2020 prior to his conviction and sentence. The period spent is 581 days (1 year 7 months, 3 days).

Determination

8. The Court considered the application together with the supporting affidavit, oral and written submissions.
9. The Applicant is essentially seeking revision of the sentence imposed on him by the Trial Court. According to the Applicant, the period he spent in remand should be considered. The Applicant is also seeking an order that the sentences to run concurrently instead of consecutively as ordered by the Trial Magistrate.
10. Sentencing is a discretion of the Trial Court as held in *Bernard Kimani Gacheru vs. Republic [2002] eKLR* & only interfered with in terms of the law as was stated in *Evans Kalo vs Republic (2020) eKLR* as follows;

It is therefore clear that those powers are limited to what statute and Constitution of Kenya under Article 165 (6) & (7) provides. What this Court is called upon to determine is the legality, correctness or propriety of the sentence given by the Court on the Application or petition for resentencing. In order to exercise that power, the Court must be satisfied that the trial Court acted upon wrong principles or failed to consider some fundamental principles.

However, under Article 165(6) of the Constitution provides that:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

11. Section 362 of the Criminal Procedure Code(CPC) provides the scope of revision in criminal trial as follows:-

“The High Court may call for and examine the record of any Criminal proceedings before any Subordinate Court for the purposes of satisfying itself as to the correctness, legality or



propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate Court.”

12. Section 364 of the CPC provides that:-

- “(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –
- (b) in the case of any other order other than an order of acquittal, alter or reverse the order.”

13. As was stated by the High Court of Malaysia in *Public Prosecutor vs. Muhari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735:

“.....The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...”

The Period Spent In Custody

14. Section 333(2) of the Criminal Procedure Code provides that:

“

- “(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

15. The Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs. Republic* (supra) held that:-

“..Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person...”

16. According to The Judiciary Sentencing Policy Guidelines at paragraph 7.10 and 7.11:

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court



must take into account the period in which the offender was held in custody during the trial.”

17. The Trial Court record shows that on 1st October, 2020 during the Pre- sentencing proceedings the Accused/Applicant stated as follows: -

“ Accused: I am a single parent. I am sickly. I suffer from ulcers.....I pray that the court takes into account that I have been in custody since my arrest..

Prosecution: I am not aware of any prior convictions.

Court: I have considered the mitigation by the accused person and I also bear in mind that the accused person has been in custody since his arrest.....

I sentence him as follows

Count I: Imprisonment for a period of 1 year.

Count II: Imprisonment for a period of 3 years.

Count IV: Fined Kshs.10, 000/- or imprisonment for a period of 6 months.....”

18. The charge sheet shows that the Applicant was arrested on 28th February, 2019 and arraigned in court on 7th February, 2019. The Applicant remained in custody until he was sentenced on 1st October, 2020.

19. It will be noted that the Trial Magistrate meted less period of sentences as opposed to the stipulated maximum sentences for the offences. The circumstances of the case according to the Trial Court record, are that the Complainant Company represented by PW1 supplied doors worth Kshs.900,000/- whose payment was confirmed through online banking following a cheque deposit of the said amount. Upon delivery, the payment of the cheque was stopped. The matter was reported to Mlolongo Police Station and after 2 days the lorry that collected the doors was spotted at Gateway Mall. The Complainant followed the lorry and alerted the Police. Later the Accused was traced and arrested. The doors were never recovered nor was the Kshs. 900,000/- worth paid.

20. The Court finds that the period spent in remand by the Applicant was considered by the Trial Magistrate in sentencing as it is recorded by the Court and the sentences and not maximum sentences. The court will not review based on Section 333(2) of the CPC as it would amount to considering the period in remand twice as it has already been factored in the current sentence.

Whether To Order Sentences To Run Concurrently

21. The Trial Court record shows that on 1st October, 2020 the Trial Magistrate ordered the sentence to run consecutively. The total number of years to be served by the Applicant were 4 years and 6 months. In Count IV there was an alternative of paying a fine of Kshs.10,000/-.

22. Section 14 of the CPC provides as follows:

“(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.”



23. In *Peter Mbugua Kabui vs. Republic [2016] eKLR* the Court of Appeal stated as follows:

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

24. The Sentencing Policy Guidelines(supra)provide as follows:

“7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively.

7. The discretion to impose concurrent or consecutive sentences lies in the
14 court.”

25. In this case the counts show that the offences were committed on different and/or unknown dates and location against different complainants hence proper for the sentence to run consecutively. Furthermore in count IV the Trial Magistrate ordered payment of a fine of Kshs.10, 000/- in default imprisonment for a period of 6 months hence the sentence cannot run concurrently with the other sentence in Count I and II.

26. In *Mohammed Reza Nazari Sarabi vs. Republic [2020] eKLR*, Onginjo J. stated that:-

“..in the case of imprisonment in default of payment of a fine, the sentence cannot run concurrently with a sentence in another count. The trial Magistrate could not and this court cannot order for default sentences in the 2 counts to run concurrently” See Paul Tatizo Musai & another vs. Republic [2008] eKLR

27. The Trial Magistrate was correct to order the sentences to run consecutively.

28. The argument by DPP that this court should enhance the sentence is untenable. Sentencing is the discretion of the court and is not to be interfered with unless it is illegal, irregular or is manifestly excessive as held by Court of Appeal in *Ogolla s/o Owuor vs. Republic [1954] EACA 270*. See *Kenneth Kimani Kamunyu vs. R. (2006) eKLR* on the proposition that an appellate Court can only interfere with the sentence if it is illegal or unlawful. The court finds no illegality, irregularity or excessiveness in the sentences imposed by the Trial Magistrate.

29. Any enhancement of sentence is based on the special circumstances of the case and any compelling reasons not considered by the Trial Court or aggravating circumstances of the offences as to loss, injury, damage or adverse impact on victims, vulnerable persons and/or the public and threat to public security as provided by Paragraph 23.7 of Judiciary Sentencing Policy Guidelines of 2015

Disposition

- a. The Trial Court’s conviction and sentence are upheld. The Application filed on 8th January, 2021 lacks merit and is hereby dismissed.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 6th DAY OF DECEMBER, 2021.



M.W MUIGAI

JUDGE

IN THE PRESENCE OF:

Joseph Guthiga Muchiri Applicant – present (virtual)

Geoffrey – Court Assistant

