



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**MISC. CRIMINAL APPLICATION NO. 33 OF 2018**

**MOSES KINYUA NJIRU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This is a ruling on an undated application filed on 21<sup>st</sup> September, 2018.
2. The background facts are that the applicant was convicted of the offence of shop breaking and committing felony contrary to Section 306 (a) of the Penal Code and sentenced to three (3) years imprisonment on the 4<sup>th</sup> March 2015 in Runyenjes Senior Principal Magistrates Case No. 73 of 2015. He appealed to the high court which dismissed the appeal and upheld the sentence.
3. In Runyenjes Principal Magistrate Criminal Case No. 72 of 2015 the applicant was convicted and sentenced to five (5) years imprisonment for the offence of breaking into a building and committing a felony contrary to **Section 306 (a) of the Penal Code**. The applicant alleges that he was convicted and sentenced to serve one (1) year imprisonment for the offence of escaping lawful custody in February 2016 but did not avail the proceedings of the case or give the case number.
4. However, the court registry procured the original files and certified copies of proceedings in the two cases where references were given. The applicant has since completed his first sentence of three (3) years.
5. The applicant moves the court to consolidate his five (5) year sentence with that of one (1) year so that they can run concurrently. Being an application for revision, the relevant law that empowers this court to exercise of the supervisory jurisdiction in criminal cases is **Sections 362 to 364 of the Criminal Procedure Code**.
6. The parties argued the application orally before the court.

**B. Applicant's Case**

7. It is the applicant's case that he is sickly and prays that the court consolidates his sentences in Runyenjes criminal case Nos. 72 and 73 both of 2015. He states that he has completed his three (3) year sentence for breaking into a building and committing a felony. It seems that the five (5) year sentence for the offence of breaking into a building and committing a felony and that of one (1) year for the offence of escaping lawful custody could still be pending.

**C. Respondent's Case**

8. The prosecution opposes the application on the ground that the consolidation and subsequent review of the sentences would not be appropriate as the retributive purposes for which the sentences were meted out shall not be served if the application is allowed.
9. Further it is the prosecution case that the applicant has not stated what illness he is suffering from, further that the sentence passed on the applicant is lenient as the maximum sentence for the offence of burglary is ten to fourteen years.

**D. Analysis of the Law**

10. The applicant is essentially moving this court to revise his sentence. **Article 165(6) and (7) of the Constitution** confers upon this Court supervisory jurisdiction over subordinate courts and empowers this Court to make any order to give any direction it considers appropriate to

ensure fair administration of justice. The said provisions are couched in the following terms: -

***“(6) 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.***

***(7) for the purpose of clause (6), the High Court may call for the record of any proceedings before any court or person, body of authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”***

11. As regards the ***Criminal Procedure Code***, the correct legal provision is **Section 362 of the Criminal Procedure Code** that provides as follows:

***“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose 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 367 of the Criminal Procedure Code**, on the other hand, provides as hereunder:

***“When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.”***

13. It is therefore clear that the powers of revision under **Section 362 of the Criminal Procedure Code** may only be invoked to enable this Court satisfy 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 subordinate court.

14. As has been earlier stated, the applicant’s appeals to the High Court have been dismissed. His application is for consolidation of sentences in the three different criminal cases. The applicant does not fault the magistrate in any way to justify the intervention of this court’s supervisory jurisdiction under Section 362 of the Criminal Procedure Code.

15. The other question which arises is whether this application is properly before the court. Section 364 (5) of the Criminal Procedure Code provides;

***“364. Powers of High Court on revision***

***(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”***

16. It is my considered view that the applicant having gone through an appeal is barred by Section 364 (5) from approaching this court for a revision.

17. I reach a finding that this application is not properly before the court and is hereby struck out.

18. It is hereby ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 7<sup>TH</sup> DAY OF JUNE, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for Respondent**

**Applicant present**