



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CRIMINAL APPLICATION NO. 180 OF 2018**

**HUMPHREY WANYAMA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Arising from Chief Magistrate's Criminal Case No. 326 of 2010 & HCRA No. 158 of 2011 & Criminal Case No. 327 of 2010 & HCRA 34 OF 2012)**

**JUDGMENT**

The applicant in this case was the accused in two cases before two separate trial magistrates. In Eldoret **CMCR No. 326 of 2010** the applicant was charged with Robbery with violence contrary to Section 296(2) of the Penal Code. The particulars in that case were that on 16<sup>th</sup> November, 2009 at Marura Centre in Uasin Gishu District with Rift Valley Province jointly with others not before court while armed with dangerous weapon namely knives robbed Victor Odhiambo a motor vehicle Registration No. KAC 389X Toyota Corolla Saloon white in colour, one mobile phone Nokia 1100, radio and cash 700 all valued at Kshs. 192,200 and immediately before the time of such robbery used actual violence against the said Victor Odhiambo.

In Eldoret **CMCR No. 327 of 2010** the charge was also robbery with violence contrary to Section 296(2) of the Penal Code whose particulars were that on 24<sup>th</sup> November, 2009 at Chepkanga Centre in Uasin Gishu District within Rift Valley Province jointly with other not before court while armed with dangerous weapons namely knives robbed Patrick Ndingiri of a motor vehicle Registration No. KZN 994 Nissan Sunny Saloon white in colour, one mobile phone Nokia 1650 and cash Kshs. 700 all valued at Kshs. 97,200 and immediately before the time of such robbery used actual violence against the said Patrick Dingiri.

In criminal case CMCR 326 of 2010 Trial Magistrate Anne Onginjo, as she then was, sentenced the appellant to thirty years imprisonment. He did not appeal. CMCR 327 of 2010 was heard by D. Kemei who sentenced the appellant to death. He appealed in HCCRA 34 of 2012 but the two judges who heard the appeal found no merit in it and it was dismissed. He appealed to the Court of Appeal in Eldoret Court of Appeal CRC No. 49 of 2017. The appeal against conviction was dismissed. However the sentence of death was set aside and substituted with one for 20 years imprisonment. His application before this court is that the sentences for imprisonment in the two cases be consolidated.

At the hearing of the application the applicant relied on written submissions to which prosecution counsel replied orally. I have considered the rival submissions carefully. I am not persuaded that the applicant was discriminated or that his right to a fair trial was violated in the manner the sentences in the two cases were imposed. **Section 14(1) of the Criminal Procedure Code** gives a court discretion to determine whether sentences should run consecutively or concurrently. However the practice is that where offences are committed in one transaction the sentences ought to run concurrently. See **Njoka Vs Republic[2001] KLR 175 at holding No. 7 on page 176**. The proper construction of the phrase "**same transaction**" was considered in the case of **Nathan V. Republic (1965) E.A 777** where the court held: -

**“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 offences constituted by these series of acts are committed in the course of the same transaction.”**

In the instant case the offences were committed on totally different dates and places and in my view they do not fit into the above definition of "**same transaction**" and the sentences thereof cannot properly be ordered to run concurrently. As for the combination of sentences provided in section 12 of the Criminal Procedure Code my view is that it refers to combining one of sentence say imprisonment with another of say a fine and does not in any way refer to combination of sentences in two different cases where the same were not committed in the same transaction. The application is devoid of merit. Moreover even if it was merited this court would have had no jurisdiction to interfere with the sentences. To begin with in CMCR 326 of 2010 there was no appeal even on the severity of the sentence and as for CMCR 327 of 2010 the case went up to the court of Appeal. The record shows that the Court of Appeal was aware of the sentence in CMCR 326 of 2010. It nevertheless reduced the sentence of death to twenty years imprisonment and ordered that the sentence would run consecutively with the sentence in the other case. That court held: -

**“the appeal against sentence is allowed to the extent that the sentence of death is set aside and substituted with a sentence of 20 years imprisonment to run consecutively with the sentence he is now serving.”**

For this court to order the sentences to run concurrently it would be sitting on appeal against the decision of the Court of Appeal and it has no jurisdiction to do so. A convicted person has a right to review. However, **Article 50(2)(g)** of the Constitution is emphatic that the right to apply for review is by a higher court as prescribed by law. This is not the court envisaged by the Article and the application is therefore not properly before this court. It is dismissed.

**SIGNED DATED AND DELIVERED AT IN ELDORET THIS 3<sup>RD</sup> DAY OF SEPTEMBER, 2019.**

**E. N. MAINA**

**JUDGE**

**In the presence of: -**

1. Ms. Kagali/ Busienei for the State
2. The Appellant in person
3. Joseph Mwelem - Court Assistant