



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL REVISION NO. 95 OF 2016**

**REPUBLIC.....APPLICANT**

**VERSUS**

**BERNARD KISOI MULI.....RESPONDENT**

**RULING ON REVISION**

The request for revision herein is in a letter dated 21<sup>st</sup> December 2016 by Hon. C. A. Ocharo, the Principal Magistrate at Machakos Law Courts, who forwarded the file for **R vs Bernard Kiso Muli, Machakos Criminal Case No. 642 of 2016** to this Court for revision.

The accused person in that case was charged with the three offences. The 1<sup>st</sup> count was that of causing grievous harm contrary to section 234 of the Penal Code, the particulars of which were that on 11<sup>th</sup> June 2016 at Ndune village, Kaewa sub location in Kathiani sub-county within Machakos County, he unlawfully chopped off the finger of and caused grievous harm to Joseph Munyao Muli.

The Accused person was also charged with a second count of threatening to kill contrary to section 223 (1) of the Penal Code, the particulars being that on 11<sup>th</sup> June 2016 at Ndune village, Kaewa sub location in Kathiani sub-county within Machakos County, he without lawful excuse uttered the words “Nitakua” in English meaning “I will kill you” while chasing one Teresia Wanjira while armed with a panga.

The third count was that of resisting arrest to police officers contrary to section 254(b) of the Penal Code. The particulars were that on the night of 27<sup>th</sup> June 2016 at about 10.30 pm at Ndune village, Kaewa sub location in Kathiani sub-county within Machakos County, he resisted or obstructed No. 48226 Sgt Stanley Muroria, No 101485 P.C Stephen Warui and No 75035 P.C driver Josphat Kiprono while acting in the due execution of their duties.

The accused person pleaded not guilty to the charges and after trial, Hon I.M Kahuya SRM in a judgment delivered on 24th November 2016 found the accused person not guilty of the first count of causing grievous harm; substituted the second count by invoking section 179 Criminal Procedure Code and found the accused guilty of the lesser charge of creating disturbance in a manner likely to cause a breach of the peace contrary to section 95 (1)(b) of the Penal Code; and convicted the Accused of the third count of resisting arrest contrary to section 253 (b) of the Penal Code under section 215 of the Criminal Procedure Code.

On 15th December 2016 the matter came up for sentencing before Hon. Kisiangani R.M who pronounced a sentence of payment of a fine of Kshs 8,000/= and in default two month’s imprisonment for the conviction of count III of resisting arrest. There was no sentence with regard to the conviction of the accused for the charge of creating disturbance in a manner likely to cause a breach of the peace contrary

to section 95 (1)(b) of the Penal Code.

The applicable law on sentencing where there is conviction of several offences at one trial is found in section 14 of the Criminal Procedure Code which 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 therefor 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.**

**(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.**

**(3) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences—**

**(a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or**

**(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.**

**(4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.**

Section 7(1) in this regard provides that subordinate courts of the first class held by a chief magistrate, senior principal magistrate, principal magistrate or senior resident magistrate may pass any sentence authorized by law for any offence triable by that court, and that a resident magistrate may pass any sentence authorized by law for an offence under section 278, 308(1) or 322 of the Penal Code or under the Sexual Offences Act, 2006.

There was therefore an error made by the Hon I. Kisiangani R.M. in sentencing the Accused person only for the offence of resisting or wilfully obstructing any police officer in the due execution of his duty, and not sentencing him for the offence of creating disturbance in a manner likely to cause a breach of the peace after the Accused person had been found guilty and convicted for both counts. The offence of resisting or wilfully obstructing any police officer in the due execution of his duty carries a maximum sentence of five years imprisonment under section 254(b) of the Penal Code, while the offence of creating disturbance in a manner likely to cause a breach of the peace carries a maximum sentence of imprisonment of six months under section 95 (1)(b) of the Penal Code.

Section 26 of the Penal Code in addition gives discretion to a court to impose a sentence of a fine in offences where imprisonment sentences are provided for as follows:-

**“ (1) A sentence of imprisonment for any offence shall be to imprisonment or to imprisonment with hard labour as may be required or permitted by the law under which the offence is punishable.**

**(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term.**

**(3) A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment:**

**Provided that—**

**(i) where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment”**

This Court’s powers as regards revision of sentence are provided in Section 364 of the Criminal Procedure Code as follows:

**“(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—**

**(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;**

**(b) in the case of any other order other than an order of acquittal, alter or reverse the order.**

**(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:**

**Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.**

**(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.**

**(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.**

**(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.”**

This Court therefore has power to enhance sentence upon revision, and as the subordinate court failed to pass a sentence it was required by law to pass, the Accused person is not required to be given an opportunity to be heard on the said enhancement.

As regards whether the two sentences can run concurrently, in *Ondiek – v- R* (1981) KLR 430, it was also stated by the Court that the practice is that if a person commits more than one offence at the same time in the same transaction save in exceptional circumstances, the sentences imposed ought to run concurrently. Likewise in *Nganga – v- R*, (1981) KLR 530, the High Court held that concurrent sentences should be awarded for offences committed in one criminal transaction. In the present revision, the two offences of occurred in two different and separate transactions, whereby the substituted offence of creating disturbance in a manner likely to cause a breach of the peace occurred on 11<sup>th</sup> June 2016, and the offence of resisting arrest occurred on the night of 27<sup>th</sup> June 2016. Concurrent sentences cannot therefore be given in the circumstances.

Arising from the above reasons I hereby set aside the sentence given by Hon. I. Kisiangani R.M given on 15<sup>th</sup> December 2016 and hereby pursuant to section 364 of the Criminal Procedure Code sentence the Accused person herein, Benard Kiso Muli to pay a fine of Kshs 10,000/= or three month’s imprisonment

in default for the offence of creating disturbance in a manner likely to cause a breach of the peace contrary to section 95 (1)(b) of the Penal Code; and to pay a fine of Kshs 8,000/= or two months' imprisonment in default for the offence of resisting or wilfully obstructing any police officer in the due execution of his duty contrary to section 253 (b) of the Penal Code. The imprisonment sentences shall run consecutively.

This ruling and orders to be furnished to, Hon. C. A Ocharo, Principal Magistrate at Machakso Law Courts, Hon. I Kisiangani Resident Magistrate at Machakos Law Courts; the Accused Person, namely Benard Kiso Muli; the Directorate of Public Prosecution, and the relevant Prison authorities without delay.

**DATED AT MACHAKOS THIS 12<sup>TH</sup> DAY OF JANUARY 2017.**

**P. NYAMWEYA**

**JUDGE**