



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Criminal Appeal 332 of 2011**

**BASHIR NYANGWESO WANZETSE.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence in criminal case Number 220 of 2007 in the Chief Magistrate's Court at Nairobi – Mrs. E Ndiritu (SRM) on 23/05/2011)*

**RULING**

**1.**The Applicant was charged with 8 counts of the offence of stealing by servant contrary to **Section 281** of the **Penal Code**, 2 counts of the offence of forgery contrary to **Section 349** of the **Penal Code** and 2 counts of uttering a false document contrary to **Section 353** of the **Penal Code** in Nairobi Chief Magistrates Court, **Criminal Case No. 220 of 2007**. He was acquitted of offences in **Count IX** and **X** of offences of forgery and uttering a false document and convicted on all counts of stealing by servant, one count of forgery and one count of uttering a false document.

**2.**The trial Court sentenced him to serve 6 months on each of the 7 counts of the offence of stealing by servant and in the alternative pay a fine of Ksh. 30,000; 12 months on one count of stealing by servant and in the alternative pay a fine of Ksh. 100,000; 8 months on one count of forgery and in the alternative pay a fine of Ksh. 50,000 and 6 months on one count of uttering a false document and in the alternative pay a fine of Ksh. 50,000. All the sentences were to run consecutively and this meant that the Applicant was to serve an aggregate of 70 months imprisonment and in the alternative pay a fine in the sum total of Ksh. 410,000.

3.The Applicant filed an application for revision of the sentence and Supplementary Grounds of Mitigation against the sentence. The grounds raised mainly are towards mitigating the sentence and thus not relevant for consideration of the application before Court exercising its revisionary jurisdiction. The only ground therefore relevant for this Application is the prayer for review of the sentences to run concurrently as opposed to consecutively since the offences in questions are of similar character. This is the main issue for determination of the Application. The conviction is not contested and it is not within the jurisdiction of this Court to determine matters outside the scope of a revision application

4.The scope of a revision process as defined in **Section 362** of the **Criminal Procedure Code** is to determine,

*“...the correctness, legality or propriety of any finding, sentence or order recorded or passed, and ...the regularity of any proceedings of any such subordinate court.”*

**Whether the application is properly before Court:**

5.On the onset, it is important to first determine whether the Application is properly before me for purposes of establishing jurisdiction. To determine this, I refer to **Section 364(5)** of the **Criminal Procedure Code** which puts limitations on matters that may be brought before the High Court under a revision application. It provides thus,

*“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.”*

6.To determine the issue of whether or not sentences ought to run concurrently as opposed to consecutive sentences is a matter that ought to have been pursued by way of appeal. I revert to the provisions of **Section 364** of the **Criminal Procedure Code** which provides for the powers of the High Court in a revision application as the 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.*

When exercising powers under **Section 354(3) (b)** where the sentence is challenged, the Court has power to 'increase or reduce the sentence or alter the nature of the sentence'

7.I find that in the instant case, the Court has jurisdiction to examine the sentence meted out and determine whether it was proper for the trial court to order the sentences to run consecutively within the context of the *'nature of the sentence.'*

**Whether it was proper to make an order for sentences to run consecutively:**

8.A court has power to pass and combine sentences as authorized by the law. **Section 12** of the **Code** in this regard provides that,

*“court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass”*

9.On consecutive sentences, **Section 14** of the **Code** provides that,

*(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.*

From the above provision, it is clear that: firstly, the Court can order sentences to run consecutively where the accused person is convicted of two or more distinct offences and secondly, the Court can exercise discretion to order that sentences do run concurrently even where it is proper to issue consecutive sentences

10. From case law, it is also well settled that concurrent sentences should be awarded in instances where offences are committed in one criminal transaction as held in **Nganga v Republic [1981] KLR 530**. In **R v. Sawedi Mukasa s/o Abdulla Aligwaisa 13 E.A.C.A. 97**, the Court set out the factors to take into consideration and stated that,

*“While we recognize that the accused is a hardened criminal deserving of a severe sentence, our view is that where, as here, both offences have been committed at the same time and in the same transaction, the practice referred to should be adhered to save in very exceptional circumstances, where, for instance, a person breaks and enters a house and commits the felony of rape therein where an order that the sentences on both counts might be directed to run consecutively...”*

11. The consideration is not, as stated in the above case, that the offence in question is severe or not, or whether or not the offender is a repeat offender, but rather whether the offences in question were committed in the course of one single transaction. In this case, when sentencing, the trial Magistrate held thus,

*‘I have duly considered the fact that accused is first offender. Mitigation too considered. I do agree that cases of persons enriching themselves from other persons sweat are indeed common particularly in Nairobi and there is need for deterrence. Accused is hereby fined Ksh 30,000 i/d default 6 months in each count i - vii, Ksh 100,000 i/d 12 months in count viii, Ksh 50,000 i/d 8 months imprisonment in court xi and xii. Sentences to run consecutively.’*

**Whether the offences committed by the Applicant form part of a single transaction or are distinct offences?**

12. From the record of proceedings, it was stated that the accused person forged bank deposit slips which were presented as evidence of deposit of payments received from customers. It was later discovered, during the reconciliation process that some of the deposits presented by the Applicant were not reflected in the company’s bank statements, thus showing that no money was in fact credited into the company’s bank account.

13. The offences in question were committed on different dates. Each criminal transaction entailed the receipt of payment by the applicant from customers, the forging of a bank deposit slip to reflect the corresponding received payments even when no deposit was being made and the submission of the said forged deposit slips to the relevant company officer.

14. In light of the foregoing, I find that the sentences with regard to the offences of stealing by servant in

**counts I to VIII** ought to run consecutively, while the sentences pertaining to the offences of forgery and uttering a false document in **count XI** and **count XII** respectively ought to run concurrently to the corresponding sentence of the offences of stealing by servant. Each act of stealing in the described procedure constituted a complete criminal transaction.

15. The offences in this case as prescribed by the law attract a custodial sentence only without the option of a fine. In view of the fact however, that option of fine was provided in the sentence in each count, the sentences cannot be ordered to run concurrently without withdrawing the option of fine. The Applicant is therefore ordered to continue serving the remainder of the sentence as imposed by the trial court.

The application is dismissed.

**SIGNED, DATED and DELIVERED in open court this 2<sup>nd</sup> day of May 2013**

**L. A. ACHODE**

**JUDGE**