

REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL NO. E054 OF 2023

KENYANYA MOKORO HASSAN.....
APPELLANT

VERSUS

REPUBLIC.....RESPOND
ENT

1. This appeal arises from the judgment of the Trial Court, Hon. C.N. Sindani (PM) given on 18.7.2023 in Ogembo SPMCCR No. E188 of 2022.
2. The Appellant was charged with 3 counts of attempted murder contrary to Section 220(a) of the Penal Code. The particulars of the offence in each of the counts were that the Appellant, on 17.12.2021 at Maroo Police patrol base at Nyabera Sublocation, Etago subcounty, within Kisii County attempted and unlawful to respectively cause the death of No. 224411 PC Evans Odhiambo by stabbing on the stomach with a knife, No. 77858 CPL Charles Chamwada by cutting him on the arm with a knife and No. 229617 PC Harrison Mnjala, stabbing on the stomach with a knife.

3. The Appellant was also charged in count IV with stealing stock contrary to Section 278 of the Penal Code. The particulars of the offense were that the Appellant, on 17.12.2021 at Maroo Police patrol base at Nyabera Sublocation, Etago subcounty within Kisii County stole four goats valued at Ksh. 16,000/= the property of Joshua Ochieng.
4. On Count V, the Appellant was charged with resisting a police officer's arrest contrary to section 103(a) of the National Police Service Act, 2011.
5. The trial court considered the case and, having found the Appellant guilty on all five counts, sentenced the Appellant to serve 20 years for count I, 20 years for count II, 20 years for count III, 1 year in count IV, and 10 years imprisonment in count V. The terms were directed to run consecutively.
6. Aggrieved, the Appellant lodged the Grounds of Appeal vide the memorandum of appeal dated 3.11.2023 as follows:
 - a) That the trial learned magistrate erred in both law and fact in convicting the appellant on an equivocal plea of guilty.
 - b) That the trial magistrate further lost direction while convicting the appellant to serve a 71-year sentence

without assessing his mental status and whether he fit to take a plea before sentencing.

- c) That the trial magistrate erred in both points of law and fact by convicting him without observing that he was prejudiced when substantial injustice occurred in his case, as he was not represented by a lawyer as stipulated in the Constitution under Article 50(2)(h).
- d) That the sentence awarded is highly excessive and punitive.

Submissions

- 7. I have not had sight of the Appellant's submissions. The Respondent filed submissions dated 22.8.2025. It was submitted that the Appellant never raised the defence of insanity or requested to be taken for mental assessment.
- 8. It was also submitted that the Appellant was duly notified of his right to legal representation. Reliance was placed on Article 50(2)(h) of the Constitution.
- 9. On sentence, it was submitted that the maximum sentence for the offence of attempted murder was life imprisonment and the granted 20 years should be enhanced to life imprisonment.

Analysis

- 10. This Appeal turns on sentence only. There is no utility in analysis the testimonies and evidence lead by the parties.

The court's role is limited to finding whether the trial court's discretion in sentencing was exercised in accordance with the law. In the case of **Mbogo and Another vs. Shah** [1968] EA 93, the Court stated:

"...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

11. Discretion in sentencing is a matter of justice and pertains to fair trial. Therefore, a person who suffers this deprivation may claim violation of the right to appropriate or less severe sentence- a principle embodied in the Constitution including article 50(2)(p) of the Constitution as follows:

Every accused person has the right to a fair trial which includes the right:

... to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the

offence was committed and the time of sentencing.

12. Sentencing merely provides an effective remedy to an injustice that may arise from a violation of a right or fundamental freedom. This was equally the view of this Court in **Michael Kathewa Laichena & Another -v- Republic** (2018) eKLR thus:

“ ...by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence.’

13. There is no straight jacket formula for sentencing an accused person on proof of crime. As was held by the Court of Appeal in **Thomas Mwambu Wenyi Vs Republic** (2017) eKLR citing the decision of the Supreme Court of India in *Alister Anthony Pereira Vs State of Maharashtra* at paragraph 70-71:

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is the imposition of an appropriate, adequate, just, and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is committed. There is no straight jacket formula for

sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

14. This court is not entitled to reverse or alter a sentence on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity

has occasioned a failure of justice. This is premised on Section 382 of the Criminal Procedure Code as doth:

“382: subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

15. The court’s duty too is to establish whether the sentence is manifestly excessive in view of the circumstances of this case. The Court of Appeal in the case of **Ogolla s/o Owuor vs Republic, [1954] EACA 270**, pronounced itself on this issue as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka -vs- R. (1989 KLR 306)"

16. Did the court grant the sentences herein in accordance with the law? In the case of **K- VS - REPUBLIC (NBI) CRIMINAL APPEAL NO.248 OF 2014(C.A)(2015)** **eKLR**, the Court of Appeal stated as follows:-

...The inference is that the proviso does not create a minimum sentence. The phraseology and

wording in the proviso is that the accused shall be liable to imprisonment for life.

What does “shall be liable” mean in law”. The court of Appeal for East Africa in the case of OPOYA - V - UGANDA(1967) EA 752 had an opportunity to clarify and explain the words “shall be liable on conviction to suffer death”. The court held that in construction of penal laws, the words “shall be liable on conviction to suffer death” provide a maximum sentence only; and the courts have discretion to impose sentences of death or imprisonment.

17. The Respondent submitted that the sentence given was lower than the maximum sentence of 20 years imprisonment and that this court should enhance the sentence. A lesser sentence was, in principle, correct. The sentence was lawful, despite being lenient.
18. The issue is the question of concurrent and consecutive offences. There were five different victims for the offence of attempted murder. It was, however, committed during the same fight or attack. It is surprising that the appellant was able to overpower and beat five police officers mercilessly. Unfortunately, circumstances did not allow a civilian to accomplish this. The five police officers suffered various degrees of injury. Only the first one sustained life-threatening

injuries. This calls into question the training levels of the five officers. The aftermath was five police officers sprawling on the ground with various levels of injuries, and the appellant fleeing.

19. On being pursued, he resisted arrest, hence the fifth count. All these were for the theft of a goat valued at Ksh. 16,000/= . The court gave the appellant a slap on the wrist for the said offence, one year imprisonment. For the offence of resisting arrest, 10 years imprisonment was meted out.

20. The question then we have to deal with is the length of sentences and the order in which they run consecutively. In considering these, the court must take into account the totality of sentences, not just the number of victims. In dealing with the sentence, the court is aware that, other than the question of sanity, there is no appeal on conviction.

21. The offence in count V is provided under section 103(a) of the police service Act as follows:

103. Any person who-

(a) assaults, resists or willfully obstructs a police officer in the due execution of the police officer's duties;

commits an offence and shall be liable on conviction to a fine not exceeding one million shillings or to

imprisonment for a term not exceeding ten years, or to both

22. The court gave the maximum sentence of 10 years. Liable to means that the 10 years is the maximum sentence. The court did not order a pre-sentence report and had no prior record. *Ipsa facto* the appellant did not have a previous record. He had also been convicted of the actual assault of the officers. Therefore, I set aside the 10-year sentence and replaced it with three years' imprisonment.
23. The other counts were given 20 years each. However, counts 1 and 3 resulted in more serious injuries. The sentence of 20 years is thus proper. However, the others suffered less severe injuries. those are therefore reduced to ten years.
24. The sentence for 1 year is lenient and thus not affected. An appeal in respect thereof is dismissed.
25. The next question is whether the sentences should run concurrently or consecutively. In determining whether the sentences should run consecutively or concurrently, recourse must be had to the law. These kinds of sentences have been addressed in part under Section 14 of the Criminal Procedure Code and for offences committed during the currency of an existing sentence or before sentencing for a previous

conviction, Section 37 of the Penal Code. To begin with, it provides that it is lawful for a person who is convicted at one trial for two or more distinct offences, the court may sentence him, for those offences, 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. The said section states 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.

(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.

26. On the other hand, Section 37 of the Penal Code provides that where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiry of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part of that sentence. The said section provides as follows:

37. Sentences when cumulative Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof: Provided that it shall not be

lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof.

27. It must, however, be conceded that sentencing is a complex arena and the court below must, as a corollary, seek guidance from the sentencing guidelines paragraphs 2.3.21 to 2.3.30. The discretion to impose concurrent or consecutive sentences lies with the court. It carries with it 2 elements: the concept of totality of sentence and double counting. That is to say that when sentencing for more than one offence, the court should pass a total sentence which reflects all the offending behaviour in a way that is just and proportionate. The courts should avoid double-counting, where the additional offences are ancillary to the primary offence and not independent offences—for example, breaking a dwelling house with the intention to steal and stealing in the same dwelling house. At the end of the day, the sentence must be proportional to the offending behaviour.

28. The guidelines provide, and rightly so, that consecutive sentences will normally be appropriate where the offences arise out of unrelated facts or incidents. The sentence may also be appropriate where the offences are of the same or

similar kind, but where the court is of the view that a concurrent sentence will not sufficiently reflect the overall criminality.

29. In looking at the sentences, the court must address not only the offending behaviour as a whole but also the personal circumstances of the offender while bearing in mind the purposes of sentencing, that is, retribution, deterrence, rehabilitation, restorative justice, community protection, denunciation, reconciliation, and reintegration.

30. The applicant fits in the category where community protection is necessary by removing the offender from the community, thus avoiding the further perpetuation of the offender's criminal acts. Further, the Applicant needs punishment for two reasons; he threatened to kill his own father, who is old and vulnerable. Secondly, he attacked the law enforcement officers and members of the public who came to the aid of the law enforcement. The Applicant is a gross danger to himself and others. The Applicant placed others at risk through his conduct. The attack on police officers is anathema to good order and stands to erode confidence in the ability of the police force to safeguard the citizenry.

31. The guidelines provide that a consecutive sentence will generally be appropriate where the offences arise out of

unrelated facts or incidents such like attempting to obstruct the course of justice in relation to an unrelated offence. Further, a consecutive sentence may also be appropriate where the offences are of the same or similar kind but where the court is of the view that a concurrent sentence will not sufficiently reflect the overall criminality such like assault of a police officer whilst trying to evade arrest for the original offence; assault of the same victim committed in the context of domestic violence or where there are sexual offences against the same victim. This case falls in the latter category.

32. Consequently, this court finds that the Appellant was merited for a concurrent sentence. This is because the events occurred within the same transaction on 17.12.2021. The Appellant, having been suspected of having stolen stock, was arrested. He resisted the arrest, and a fight ensued, during which he injured the police officers. The offences were in a series and were committed on the same date. The Court of Appeal in **Peter Mbugua Kabui vs. Republic [2016] eKLR** expressed itself on the matter as hereunder:

“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. It is our considered view that the exception in Section 14 (3) of the Criminal Procedure Code is inapplicable to this case in light of the provisions of Section 7 (1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totalling 20 years imposed on the appellant, cannot be said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful" We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same."

33. It is also noted that the applicant was in custody since his arrest on 28.2.2022. The court did not indicate from whence the sentences were to begin. This effectively enhances the sentences without any basis contrary to the tenets set out

in Section 333(2) of the Criminal Procedure Code that requires that where the convict was held in custody, prior to the sentence, the period spent in custody should be taken into consideration. This is not a fictional consideration but a mathematical question.

34. On the time spent in custody, Section 333(2) of the Criminal Procedure Code provides that;

“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 sub section (1) has prior, to such sentence shall take into account of the period spent in custody”

35. To sum up on the issue is time spent in custody, the trial court did not state whether it considered time sent in custody. The law under Section 333(2) of the **Criminal Procedure Code** provides as doth:

“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 sub section (1) has prior, to such

sentence shall take account of the period spent in custody.”

36. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody. The Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs Republic** [2018]eKLR stated as follows as regards time spent in custody:

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*. By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “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. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

37. I am also guided by the Judiciary Sentencing Policy Guidelines, 2023 as follows:

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."

38. Consequently, the period the Applicant was in custody ought to be taken into consideration as required by law. In the circumstances, the consecutive sentence meted out shall commence on the date of arrest on 28.1.2022.

39. The upshot of the foregoing is that I make the following orders: -

A. Appeal on conviction is dismissed.

B. The appeal on sentence is merited and is allowed. The consecutive sentences are set aside. In lieu thereof, I make the following orders:

a) The sentence for count 1 & 3 is upheld.

b) The sentence for count 2 is reduced to 10 years.

c) The sentence for count 4 is upheld.

d) The sentence for count 5 is reduced to 3 years.

e) The sentence for count 1,2,3 and 5 shall run concurrently.

f) The sentence for count 4, that is 1 year, for the offence of stealing stock shall run consecutively with the other counts.

g) Right of appeal 14 days.

DELIVERED, DATED, and SIGNED Virtually at **NYERI** on this **20th** day of **November, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of:-

Mr. Koima for the State
Appellant - present
Court Assistant - Michael