

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL REVISION NO. E005 OF 2025**

**PETER KIPKOECH ALIAS LUKA KIMELI.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. What is before this court is the Petitioners' Criminal Revision dated 7<sup>th</sup> January 2025. The brief facts underlying the revision are that the Petitioner was charged and convicted of the offence of robbery with violence contrary to **Section 296(2) of the Penal Code** in each of **Eldoret CMCRC No. E734 of 2024** and **CMCRC No. E735 of 2024**. He was sentenced to serve 2 years and 5 years respectively, pursuant to plea agreements in each matter with an order that the sentences run consecutively.
  
2. By way of Notice of Motion dated 7<sup>th</sup> January 2025, the Petitioner seeks for the following orders;
  - a) **That the petitioner is seeking for orders for a review of sentence under section 362 as read with section 364 of the criminal procedure code and in reliance to article 50 (2) (q) of the Constitution.**
  
  - b) **That the petitioners is seeking for orders for a reduction of his sentence on time spent in remand custody under section 333 (2) of the criminal procedure code cap 75 of the laws Kenya and the sentence policy guidelines 2023.**

- c) **That the petitioner is seeking for orders for his two sentences in 734 and 735 of 2024 to commence from the time he was placed in pre-trial custody on 15<sup>th</sup> February 2024.**
  - d) **That the petitioner is seeking for further orders on his two sentences of five (5) and two (2) years which are being served consecutively be ordered to run concurrently.**
  - e) **That the petitioner is praying to be present during the determination of this petition.**
3. In his affidavit in support of the application, the petitioner averred that he was charged with the offences of robbery with violence contrary to **Section 296 (2) of the Penal Code** and was convicted and sentenced to serve 5 and 2 years' imprisonment. That he does not wish to appeal these decisions as they were as a result of a negotiated process through a plea bargain with the prosecution. Further, that he filed this criminal review for consideration by the court under **Section 362 as read with sec 364 of the CPC** and in reliance to **Article 50 (2)(q) of the Constitution** on the following grounds.
- (a) **That, during the sentencing of the petitioner in both cases, the Hon. Magistrates *to wit* Hon N. Baraza, SPM and Hon C. Wattimah, PM in ELDORET CMCRC No. 734 and 735 of 2024 did order that the time spent in remand custody to be factored while determining his sentences of 5 and 2 years. The committal warrant indicated that the sentence to commence from dates of conviction on 23<sup>rd</sup> September 2024 and 19<sup>th</sup> December 2024 instead of his arrest date on 15<sup>th</sup> February 2024.**

**(b) That the petitioner was not able to be admitted on bond or cash bail as the granted bonds of Kshs. 300,000/= and Kshs. 400,000/- were unaffordable to him and he was in custody the whole period of his trial**

**(c) That (I) am praying to the court to review (my) sentence in compliance to Sec 333 (2) of CPC to correct this omission by the sentencing court by ordering (my) sentences to commence from 15<sup>th</sup> February 2024 or reduce (my) sentence of 5 and 2 years by a period of 7 months and 8 days & 10 months and 4 days respectively.**

**(d) That the court based on its judicial discretion and principle of concurrent sentences to issue orders the above sentences to run concurrently as they are very similar in nature and are being served cumulatively as a 7 years' sentence.**

### **Petitioners' Submissions**

4. The Petitioner submitted that he seeks to have his sentence reviewed in consideration of the time he spent in custody during the pendency of the trial. He urged that he was arrested on 15<sup>th</sup> February 2024 and sentence to serve 5 years' imprisonment and 2 years' imprisonment in **Eldoret CMCRC Nos. E734 and E745 of 2024** respectively vide a decision delivered on 23<sup>rd</sup> September 2024. He pointed out that in the third file, which is **Eldoret CMCRC No. E720 of 2024**, he was sentenced to serve 3 years' imprisonment on 17<sup>th</sup> march 2024. He urged the court to consider the time spent in custody in accordance with **Section 333 of the Criminal Procedure**

**Code** and further, **Section 14 of the Criminal Procedure Code** on the principle of concurrent and consecutive sentences.

5. He prayed that the court grants him a lesser sentence as he is remorseful and has learned his lesson in custody. Further, that he is fit to be reintegrated back to society, either through review of his sentence or having to serve the remaining period under community service organisation.
6. The Prosecution on its part by way of brief oral submissions made by the State Counsel Mr. S. G. Thuo stated that they have no objection to the court factoring in the time spent in remand custody during the trial as provided under Section 333(2) of the Criminal Procedure Code. Counsel however objected to the application that the court orders that the sentences run consecutively for reasons that they were committed under different circumstances and the complainants are also different.

### **Analysis & Determination**

7. Having considered the Application and the submissions made, it is my finding that the following issues arise for determination;
  - i. **Whether the court should review the sentence of the Petitioner**
  - ii. **Whether the sentences should run concurrently**
  - iii. **Whether the trial court took account of the time spent in custody**
8. On the issue on whether the sentences merit a review, whereas **Section 362 of the Criminal Procedure Code** 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.**

- 9.** The powers of the High Court on Revision are as provided under **Section 364** of the **Criminal Procedure Code**. The above said, the court notes that **Section 348 of the Code** on the other hand provides that;

**No appeal on plea of guilty, nor in petty cases No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence**

- 10.**In applying its powers under **Section 364 of the Code**, the Court of Appeal in the case of **Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003** 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)”**

11. The Applicant herein entered into a plea bargain as already stated and in seeking that the court interferes with the sentences passed, he ought to have demonstrated to court that the sentences imposed were way too excessive and /or that they were tainted by an illegality. The first thing of note is that the issue of the illegality of the sentences imposed has been alleged and/or demonstrated by the applicant. Secondly, the maximum sentence for the offence of robbery with violence is the death sentence. In juxtaposing this sentence as against the sentences of 5 and 2 years' imprisonment imposed, I do not at all find the two sentences to be excessive in any way. In this regard, I find that this aspect of the Application lacks merit.

12. On the issue on whether the sentences should run concurrently, **Section 14 of the Criminal Procedure Code** 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 therefore 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.**

13. In **Peter Mbugua Kabui v Republic [2016] eKLR** and **B.M.N. v Republic, Criminal Appeal No. 97 of 2013 [2014] eKLR** the Court of Appeal stated as follows:

**“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.”**

14. Further the Judiciary's Sentencing Policy Guidelines, at paragraph 7 provide as follows: -

**“7.13 – Where the offence emanates from a single transaction the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims the sentences should run consecutively”.**

15. The Court of Appeal has defined the phrase ‘same transaction rule’ in the case of **Nathan v Republic [1965] EA 777** where the court stated as follows:

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**“If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by 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.”**

16. The court notes that **Eldoret CMCRC No. E735 OF 2024** is in regard to the offence of robbery with violence that was committed on 9<sup>th</sup> February 2024 whereas **Eldoret CMCRC No. E734 of 2024** is in regard to the offence of Robbery with violence committed on 13<sup>th</sup> February 2024. It follows therefore that these were two distinct offences committed in different criminal

transactions on different dates with different complainants. In applying the decision of the Court of Appeal in the cited cases as well as the directions in the Sentencing Policy as herein above, it is the court's finding that there are no grounds to order that the sentence run concurrently as prayed by the Applicant. In this regard, this limb of the Application also lacks merit.

17. On the last issue of whether the trial court took account of the time spent in prison the applicable section of the Criminal Procedure Code is **Section 333(2)** The section provides as follows:

**Subject to the provisions of section 38 of the Penal Code (Cap. 63) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.**

18. This is a mandatory provision which courts are enjoined to apply in sentencing as was held by the Court of Appeal in the case of **Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR** that:

**“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.**

**19.** Upon perusing the records of the trial courts, I note that in **CMCRC No. E0735 of 2024** the court stated that it took into account the time spent by the applicant in remand before entering into the plea agreement. However, in **CMCRC No. E0735** there is no indication of the same in the decision by the court. **The sentence in CMCRC No. E0735 of 2024** was meted out on 23<sup>rd</sup> September 2024 whereas the sentence in **CMCRC No. E0734** was meted out on 19<sup>th</sup> December 2024. He was placed in custody on 16<sup>th</sup> March 2024 according to the charge sheet in both cases. He therefore served 6 months before sentence in **CMCRC No. E0735 of 2024** and 9 months before sentence in **CMCRC No. E0734 of 2024**. In this regard I find that the Application under **Section 333(2) of the Criminal Procedure Code** has merit with respect to **Eldoret CMCRC No. E 0735 of 2024 only**.

**20.** Based on my conclusions as herein above, the court now hereby grants the following orders with respect to the Applicant's Application;

- 1. The Applications seeking that the sentence be reviewed, and that the sentences run concurrently lack merit and the same are each denied**
- 2. The Application seeking that the time spent in remand custody has merit with respect to Eldoret CMCRC No. E0735 of 2024 and the same is allowed. Accordingly, the period of six (6) months that the Applicant spent in custody before conviction is to be factored into the sentence of five (5) years imprisonment.**
- 3. Right of Appeal 14 days**

**Read dated and Signed at ELDORET on 20<sup>th</sup> February 2026**

**JUDGE**

**E.OMINDE**