

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CRIMINAL APPEAL NO E045 OF 2022**  
**MOSES TAABU alias KALESH.....**

**APPELLANT**  
**VERSUS**

**REPUBLIC.....**

**RESPONDENT**

*(Being an appeal against the sentence of Hon. Gesora  
(CM) delivered 21/4/2022 in Bungoma Chief Magistrates  
Court, Criminal Case No. E793 OF 2017)*

**JUDGMENT**

1. The appellant was charged and convicted of the following counts:

**COUNT I:** Being in possession of a firearm without a firearm certificate contrary to section 4 (2) (a) as read with section 4 (3) of the Firearm Act, Cap 114 Laws of Kenya.

**PARTICULARS:** The appellant, on the 11<sup>th</sup> June 2017 at Mufutu estate in Bungoma Township within Bungoma County, was found in possession of one firearm make carbine, serial number UG.PSO 12140329-04209 without a valid firearm certificate.

**COUNT II:** Being in possession of ammunition without a firearm certificate contrary to section 4 (2) (a) as read with section 4 (3) of the Firearm Act, Cap 114 Laws of Kenya.

**PARTICULARS:** The appellant, on the 11<sup>th</sup> June 2017 at Mufutu estate in Bungoma Township within Bungoma County, was found in possession of four rounds of 7.62

millimetres ammunitions without a valid firearm certificate.

**COUNT III:** Preparation to commit a felony contrary to section 308 (1) of the Penal Code.

**PARTICULARS:** The appellant, on the 11<sup>th</sup> June 2017 at Mufutu estate in Bungoma Township within Bungoma County, was found armed with a dangerous weapon, namely a firearm make carbine, serial number UG.PSO 12140329-04209, in circumstances that indicated that you were so armed with intent to commit a felony, namely robbery with violence.

2. After a full hearing, the trial court found him guilty of the charges and sentenced him to 10 years' imprisonment on each count.
3. The appellant, aggrieved by the sentence, has filed this appeal because the 30-year sentence is harsh and seeks a lenient sentence; he also avers that he is remorseful and the sole breadwinner for his family.
4. In his submissions, he avers that the sentence imposed by the trial court was harsh, given that he is a first offender and that there were mitigating circumstances. He also faults the trial court for failing to order that the sentences run concurrently. He further argues that he spent 2 years and 10 months in prison pending the hearing and determination of the case. Section 333(2) of the Criminal Procedure Code requires the convicting court to take into account the whole period of time spent in custody.

5. In its submissions, the respondent argues that the sentences imposed on the appellant were lawful. However, the learned trial magistrate did not specify whether the sentences should be served consecutively or concurrently.

### **ANALYSIS AND DETERMINATION**

6. The appeal is on sentence only. The Court of Appeal, in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR, stated that:

*“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”*

7. The trial magistrate did not specify whether the sentences imposed on the appellant were to run concurrently or consecutively.

8. The Court of Appeal in the case of *Peter Mbugua Kabui vs Republic* [2016] eKLR expressed itself on the subject of when a consecutive or concurrent sentence should apply:

*“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.”*

9. I have carefully reviewed the charge sheet, and it is my view that the three offences are inseparable. The Sentencing Policy Guidelines on whether a court should impose consecutive or concurrent sentences state as follows:

*7.13 Where the offences emanate 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 sentence should run consecutively.*

10. The upshot is that the appeal is meritorious. The 10-year sentence imposed by the trial court on the 1st, 2nd and 3rd counts shall run concurrently. The appellant was arraigned on 16/6/2017 and remained in custody until 6/08/2018, when he was released on bail. When he jumped bail, he was remanded in custody from 21/7/2020 until 7/4/2022. In total, he was in custody for 2 ½ years prior to conviction. This shall also be taken into account in his sentence.

**Dated, Signed and Delivered at BUNGOMA this 19<sup>th</sup> day  
of February 2026.**

**R.E. OUGO  
JUDGE**

**In the presence of:**

**Moses Tabu Muchinga alias Kalesh/ Appellant**

**Miss Matere**

**-For the**

**Respondent**

**Wilkister -C/A**

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