

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL REVISION NO. E107 OF 2025

EVANS OCHIENGAPPLICANT

VERSUS

**REPUBLIC
RESPONDENT**

RULING

1. The applicant herein filed a Notice of Motion dated 13/10/2025 pursuant to the provisions of Section 362, 364 and 333 (2) of the Criminal Procedure Code seeking the following relief:

- i) That this Honourable court be pleased to call for and examine the records of the proceedings and sentences in Criminal Case No 217 of 2024 and Criminal Case No. E160 of 2025 both before the Principal Magistrate’s Court at Madiany for purposes of satisfying itself as to the

correctness, legality and propriety of the sentences imposed therein.

- ii) That the Honourable court be pleased to find that the order made on 25th June 2025 in Criminal case No. E217/2024 revoking the probation sentence and substituting it with two (2) years imprisonment on each count to run consecutively, was irregular, unlawful and excessive, having been made contrary to Section 13 and 14 of the Probation of Offenders Act (Cap 64).
- iii) That the Honourable court be pleased to set aside the said order and substitute it with concurrent sentences or such other non-custodial or reduced sentence as the court may deem fit in the circumstances.
- iv) That the Honourable court be pleased to direct that the sentences in Criminal case No. E217 of 2024 and Criminal Case No. E160/2025 shall run concurrently pursuant to Section 14 of the Criminal Procedure Code.
- v) That the Honourable court be pleased to direct that the sentences in Criminal Case No. E217 of 2024 and Criminal Case No. E160/2025 shall run concurrently pursuant to Section 14 of the Criminal Procedure Code.

- vi) That the Honourable court be pleased to invoke Section 333(2) of the Criminal Procedure Code to credit the Applicant with all the period spent in custody prior to conviction and sentencing in the two cases.
- vii) Any other orders that this Honourable court may deem just and expedient in the circumstances.

2. The application is supported by the affidavit of the Applicant sworn on even date as well as the grounds set out thereunder. The Applicant gravamen is inter alia; that the Applicant was convicted on his own plea of guilty in Criminal Case No. 217 of 2024 for the offences of stealing in a dwelling house contrary to Section 279 (b) of the Penal Code under Count 1 and stealing from a locked room contrary to Section 279 (g) of the Penal Code under Count 2 and was on 1/8/2024 sentenced to twelve (12) month's imprisonment; that on 12/6/2025, he was re-arrested and presented before the same court on allegations of absconding probation; that the trial court without a proper inquiry as required by law, revoked the probation order and sentenced the Applicant to two (2) years imprisonment on each count to run consecutively; that the alleged breach of probation was not willful; the applicant having moved to a new area and being unfamiliar with reporting arrangements; that the court erred by imposing consecutive sentence for offences that

arose from the same transaction; that the sentence was harsh, excessive and failed to take into account the period already served on probation; that in criminal case No. E160/2025, the Applicant was again convicted on his plea of guilty for stealing from the same complainant and sentenced to three(3) years imprisonment; that both cases involve the same complainant and occurred within a short period warranting concurrent treatment of the sentences; that the cumulative imprisonment resulting from the consecutive and separate sentences is unjust and disproportionate; that it is in the interest of justice that this Honourable court exercises its revisionary jurisdiction to correct the illegality and ensure a fair and proportionate outcome.

3. The Respondent did not file a response to the application despite being given an opportunity to do so.
4. The application was canvassed by way of written submissions. However, it is only the Applicant who complied.
5. The Applicant's submissions are dated 14/12/2025.
6. The Applicant herein, **Evans Ochieng**, was on **1st August, 2024** sentenced to serve **12 Months'**

Probation Sentence, following his conviction on his own plea of guilty, for the offence of Stealing in a dwelling house contrary to **Section 279 (b) of the Penal Code** in Count 1, and Stealing from a Locked room, contrary to **Section 279 (g) of the Penal Code**, in **Madiany Criminal Case No. E217 of 2024**.

7. It was submitted that on 12th **June, 2025**, the issue of absconding the Applicant was re-arrested and presented before the same Court on allegations of absconding the Probation Sentence. Without a proper inquiry as required by the Law, the Court proceeded to and revoked the same, and Sentenced the Applicant to **Two (2) years' imprisonment on each count to run consecutively**.
8. That on the same day, again before the same Trial Court, the Applicant was charged in a separate file, the same being **Madiany Criminal Case No. E160 of 2025**, for the offence of Stealing in a dwelling house contrary to **Section 279 (b) of the Penal Code**. On pleading guilty to the charge, he was sentenced to serve **3 years**. That in all the subject counts, the complainant was the accused's grandmother, one **Jennifer Adhiambo Ochieng**.
9. Vide an application dated **13th October, 2025**, the Applicant has now approached this Court, under its

revisionary jurisdiction, pursuant to **Sections 362 and 364 of the Criminal Procedure Code** urging for the grant of the following reliefs;

- a. **The Court be pleased to call for and examine the records of the proceedings and sentences in Criminal Case No. E217 of 2024 and Criminal Case No. E160 of 2025, both before the Principal Magistrate's Court at Madiany, for the purpose of satisfying itself as to the correctness, legality and propriety of the sentences imposed therein.**
- b. **The Honourable Court be pleased to find that the Order made on 25th June 2025 in Criminal Case No. E217 of 2024, revoking the probation sentence and substituting it with two (2) years' imprisonment on each count to run consecutively, was irregular, unlawful and excessive, having been made contrary to Sections 13 and 14 of the Probation of Offenders Act (Cap 64).**
- c. **The Honourable Court be pleased to set aside the said order and substitute it with concurrent sentences, or such other non-**

custodial or reduced sentence as the Court may deem fit in the circumstances.

d. The Honourable Court be pleased to direct that the sentences in Criminal Case No. E217 of 2024 and Criminal Case No. E160 of 2025 shall run concurrently, pursuant to Section 14 of the Criminal Procedure Code.

e. The Honourable Court be pleased to invoke Section 333 (2) of the Criminal Procedure Code to credit the Applicant with all the period spent in custody prior to conviction and sentencing in the two cases.

10. As at the time of the instant submissions, the Respondent had not filed its response to the application, despite having sought for **three (3) days** to respond, on **2nd December, 2025**. The Court shall therefore, be called to determine the subject application, on the basis that the same is unopposed.

11. From the record, it is notable that the Applicant herein was sentenced to **twelve (12) Months'** probation on **1st August, 2024**. On **12th August, 2025**, the matter was placed before the Trial Court on allegations that the Applicant had absconded probation, culminating in a

Ruling delivered on **25th June, 2025**, revoking the probation order, and in its place, imposing **two (2) years'** imprisonment on each count, to run consecutively.

12. That from the proceedings of **12th June, 2025**, the issue of absconding the probation order was raised by one **Mr. Obange**. He alleged that the accused had moved to Nakuru and failed to report to the Nakuru Probation Office. The record however, does not demonstrate if the said **Mr. Obange** was ever **put on oath prior to making such allegations**.
13. Nevertheless, the accused offered an explanation to the Court, stating that he was attending studies at **Salisali Institute of Technology**, where he was largely engaged in field work, and was not familiar with the environment. However, the Trial Court did not interrogate at all the said explanation, and made no finding that the alleged breach was deliberate, wilful and or unjustified.
14. **Section 8 of the Probation of Offenders Act** provides the manner and procedure to be adopted by a Court when dealing with an allegation of breach of the Probation Order. For clarity, the said provision provides thus;

“1. If, **after hearing information on oath**, it appears to a Judge or Magistrate that a Probationer

has failed to comply with any of the provisions of the Probation Order, he may issue a summons to the Probationer, requiring him to appear at the place and time specified therein or may issue a warrant of his arrest.”

From the plain reading of the above section, it is evident that the person alleging breach of the Probation Order, and in most cases, the Probation Officer, same has to give such information on oath.

15. Thereafter, the revocation of the Probation Order must then be preceded by a deliberate and reasoned inquiry, including consideration of the Probation Officer’s report, the explanation offered by the accused and a determination by the Court of whether such breach, if any, was deliberate and wilful. It was further submitted that the summary exchange as reflected in the proceedings of 12/6/2025, cannot be any stretch be construed as a proper inquiry under the law. We thus submit that the revocation of the Probation Order in the absence of statutory inquiry rendered the subsequent custodial sentence illegal, irregular and improper and in the view of the revisionary powers of this court, such an order is amenable to be interfered with.

16. On the issue of whether the imposition of consecutive sentence was lawful and proper, the counsel submitted that it was not in dispute that the two counts in criminal cases No. 217/2024 to which the Applicant pleaded guilty to, arose from the same transaction, same date concerning the same complainant. That upon the court revoking the probationary sentence of one year that had been earlier imposed, it proceeded to and sentenced the Applicant to two (2) years imprisonment each of the count to be served consecutively. That the Applicant had been earlier sentenced to 12 months' probation on 11/8/2024 and that he had actually served approximately a period of 11 months of the 12 months hence it is evident that the Applicant was only remaining with one month to finish his term. That Section 14 of the Criminal Procedure Code vests discretion in the sentencing court but that discretion must be exercised judiciously and that where offences arise from the same transaction, the general rule is that sentences should run concurrently. Reliance was further placed in the case of **Ondiek v R, (1981) eKLR**. Further, in the case of **Simiyu v Republic (Criminal Revision No. E320 of 2024) [2025] KEHC 5159 (KLR) 29 April 2025) (Ruling)** where it was emphasized thus:

“The general principle of law under our penal system is that sentences should only run consecutively where the offences are committed separately. However, if

sentences are committed in the same transactions, or a series of transactions, and within a short period of time, the trial court should order the sentences to run concurrently. Similarly, a court will be entitled to order the sentences to run concurrently when it is clear if they are ordered to run consecutively, they will result in an extra ordinarily excessive sentence.”

Counsel further submitted that if it was found that the revocation of the Probation sentence was lawful, then the imposition and concerning the same complainant, same was irregular and overly excessive hence warranting interference by this court. Counsel further urged the court to consider the cumulative effects of separate and consecutive custodial sentences that has resulted in a punishment that is disproportionate and excessive. In **Ogalo s/o Owuor V R (1954) 21 EACA 270**, the court held that where offences are of the same or similar character and form part of a single course of conduct, sentences should ordinarily run concurrently. Further, the counsel urged the court to find the orders issued by the trial court were irregular and thus amenable to be interfered with and or disturbed in the manner sought in the Applicant’s instant revision application.

17. I have considered the application as well as the submissions filed. It is not in dispute that the Applicant had been charged before Madiany Law Courts where he faced two cases namely Criminal Case No. E217/2024 and E160/2025 and that both the two cases were presented to the court on diverse dates. It is also not in dispute that the Applicant faced several counts in those cases. It is also not in dispute that the offences were committed on diverse dates. It is also not in dispute that the Applicant entered plea of guilty in both cases. It is also not in dispute that vide Criminal case Number E217/2024 the Applicant faced three (3) counts comprising assault causing actual bodily harm, stealing in a dwelling house, stealing from a locked room contrary to Section 251, 279(b) and 279(g) of the Penal Code respectively. It is also not in dispute that the Applicant vide Criminal Case E217/2024 was initially sentenced to serve twelve (12) months under probation and upon his failure to comply with the probationary order, the order was later vacated and substituted to two (2) years' imprisonment on Count I and another two years' imprisonment on Count II which were ordered to run consecutively. It is also not in dispute that vide Criminal Case E160/2025 where the Applicant faced a charge of stealing in a dwelling house contrary to Section 279(b) of the Penal Code and was sentenced to serve three (3) years' imprisonment. I find the issues for determination are firstly whether the revocation of the probation sentence and

resentencing was lawful and regular; secondly whether the imposition of consecutive sentences by the trial court was lawful when the offences in both cases occurred in the same transaction which would have attracted an order for concurrent sentences.

18. As the application is predicated on provisions of Section 362, 364 and 333 of the Criminal Procedure Code, I find the said provisions are a rubric under Article 165(6) and (7) of the Constitution:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

19. As regards the first issue, it is noted that the Applicant's grouse with the trial court is that he had been serving under probation for eleven months and was left with only one month to complete the same when the trial court revoked the probationary order and ordered him to serve several custodial sentences which were to run consecutively despite the fact that the offences were

committed within the same transaction. It was further contended that the allegations by the probation officer were not put to test by being ordered to present his claims under oath so as to establish the truth or otherwise of the same. Learned counsel for the Applicant has further contended that the trial court ought to have complied with the provisions of Section 8 of the Probation Offenders' Act which provides that if after hearing information on oath, it appears to a Judge or Magistrate that a probationer has failed to comply with any of the provision of the probation order, he may issue summons to the probationer requiring him to appear at the place and time specified therein or may issue a warrant of his arrest. Indeed, the trial court did not conduct such an enquiry as sought by the Applicant and which the Applicant now seeks this court to overturn the orders of the trial court. Whereas the issue and concerns of the Applicant could be legitimate, the same has been white washed by the conduct of the Applicant when he committed an offence while still under probation. It is instructive that the probationary order issued vide Criminal case E217 of 2024 had explicit conditions that in the event of non-compliance, the probation order would be cancelled and substituted with a custodial sentence regardless of any period served under probation. This then, rubbishes the Applicant's claim that he had served almost fully the probationary sentence as he was left with

only one month to complete. Further, the enquiry contemplated in Section 8 of Probation of Offenders' Act is one where a probationer has failed to adhere to the probational terms such as on reporting etc but not when a probationer commits another offence while still under probation. It is my considered view that the Applicant's claim that the trial court did not comply with the aforesaid Act should be rejected because the Applicant committed another offence while still under probation namely Criminal Case No. E160/2025 to which he pleaded guilty and was subsequently convicted and sentenced. This therefore put paid the Applicant's claim that he had served a substantial portion of the probational sentence. Indeed, it was within the discretion of the trial court to consider the period spent in custody but then the conduct of the Applicant did not merit any such considerations from the court. It was therefore not necessary to comply with the provisions of Section 8 of the Probation of Offenders' Act when the Applicant committed another offence requiring the court to deal with it as is appropriate. Those circumstances are not the same as those in which a probationer fails to report as per the probation order. Once the probationer commits another offence during the pendency of a probation order, the said probation order must be cancelled to enable the court deal with the offender in the new case as well as substitute the appropriate sentence in the previous case.

20. As regards the second issue, it is noted that the trial court imposed consecutive sentences instead of concurrent sentences. It is noted that in criminal case No. E217/2024 the Applicant faced several offences which were committed on different dates. Whereas learned counsel for the Applicant contends that the offences arose from the same transaction, same date and same complainant, the record reveals otherwise as can be seen from the several counts which are clear as day and night. Indeed, it is trite law that in circumstances where offences are committed within the same transaction and on the same date, the same should attract concurrent sentences. In the case of **Ondiek Vs. R, [1981] eKLR**, the court held as follows:

“The general principle of law under our penal system is that sentences should only run consecutively where the offences are committed separately. However, if sentences are committed in the same transactions, or a series of transactions, and within a short period of time, the trial court should order the sentences to run concurrently. Similarly, a court will be entitled to order the sentences to run concurrently when it is clear if they are ordered to run consecutively, they will

result in an extra ordinarily excessive sentence.”

Flowing from the above decision, the offences the Applicant faced were committed separately on different dates. Hence, the trial court was within its discretion to impose such sentences as appropriate. In that regard, the complaint by the Applicant lacks any merit. The Applicant while being placed under probation for twelve months was aware that he had been convicted for more than one offence but then seemed to have forgotten about it and hence upon non-compliance of the probation order, the trial court had discretion to proceed to sentence him for each of the offences. It is instructive that the sentences imposed were not excessive and do not warrant interference by this court.

21. As regards the third issue, the Applicant has challenged the trial court in imposing separate sentences in the two cases yet according to him they ought to run concurrently. Even though the said consecutive sentences might appear to be disproportionate and excessive to the Applicant, it is not in dispute that he was charged under two separate files. It could have been improper for the Applicant to be charged over the new offence in the old file (Criminal E217/2024) which had already been determined. The Applicant was properly charged in a new file (Criminal E160/2025) and that it was improper to marry the two cases in order to

satisfy the Applicant's quest to have the sentences in both files to run concurrently. Indeed, the two files could not be consolidated in view of the fact that the previous file (E217/2024) had already been concluded and therefore the prosecution could not have presented a consolidated charge which would then satisfy the Applicant's opinion that the sentences imposed to run concurrently. That being the position, it is my finding that the imposition of the sentences by the trial court was quite proper and should be upheld.

22. In the upshot, it is my finding that the Applicant's application dated 13th October 2025 lacks merit. The same is dismissed. The sentences of the trial court are upheld.

Dated and delivered at Siaya 27th day of February 2026.

D. KEMEI

JUDGE

In the presence of:

Evans Ochiengy.....Applicant.

Akanga for Marita.....for Applicant.

Mocha for Soita.....for Respondent.

Maureen.....Court Assistant.

SIAYA HCCR. REVISION NO. E107 OF 2025 - RULING