

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MAKADARA**  
**CRIMINAL DIVISION**

**CRIMINAL REVISION NO E163 OF 2025**

**FRANCIS KARIUKI MUTUGI .....**

**APPLICANT**

**VERSUS**

**REPUBLIC .....**

**RESPONDENT**

**(Being a revision from the original conviction and sentence in Criminal case No 1329 of 2016 of the Chief Magistrates Court at Makadara)**

**RULING**

1. The applicant was charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code the particulars of which were that on the 1<sup>st</sup> day of march 2016 at Cieko Estate in Kasarani with Nairobi county jointly with others not before the court while armed with a kitchen knife robbed James Khamala Wambundo cash Kshs. 7500/= a laptop make Toshiba a shaving machine make WHL a solar torch 2 iPad make apple and Samsung a gas cylinder 13kgs a Meko gas and 4 mobile phones make 2 Tecno and Nokia Lumia 520 Nokia E 72 all valued at kshs 200,000 and at or immediately before or after such robbery threatened to use actual violence to the said James Khamala Wambundo.

2. On count two he faced a charge of gang rape contrary to section 10 of the sexual offences Act the particulars of which were that on the 15<sup>th</sup> of march 2016 at Cieko estate in Kasarani in association with others not before the court caused his genital organ to penetrate the genital organ of Grace Nzamba without her consent and at count 3 he faced a charge of indecent act to a woman contrary to section 11(1) of the sexual offences Act the particulars of which were that he jointly with others not before the court intentionally touched the buttocks and breasts of Grace Nzimbi .
3. He was tried and convicted on two counts and sentenced to 30 years' imprisonment on count one and two which sentences were ordered to run consequently the court having considered that he had been in custody for two years and six months.
4. Being aggrieved by the said conviction and sentence, he filed an appeal to the High Court being criminal appeal no 60 of 2019 at Ngenye Macharia as she then was dismissed the appeal on conviction but allowed the appeal on sentence and rendered herself as follows “  
60. Taking into consideration the totality of circumstances of the robbery in this case the appellant mitigation and the fact that nobody was injured in the course of the robbery I am of the considered view that the custodial sentence of thirty (30) years imprisonment was excessive. The same is set aside and substituted with ten years imprisonment .

61. As regards the offence of gang rape, the minimum sentence under section 10 of the sexual offences Act is a term not less than fifteen years which may be enhanced to life imprisonment. The appellant was sentenced to serve thirty (30) years imprisonment. Whereas I have no doubt that the offence was serious , it is my respectful view that the said sentence , although lawful was excessive. In light of the mitigating and aggravating factors , I set aside the thirty years jail term and substitute it thereof with seventeen (17) years imprisonment from the date of the appellants conviction

62. In the result , the appeal partially succeeds . I dismiss the appeal against the conviction for both offences. I however allow the appeal against the sentence to the extent set herein above. The sentences shall run consecutively from the date of the appellant's arrest which is May 2016".

5. What is not clear from the record herein, and the applicant is silent thereon is whether the same filed an appeal to the Court of Appeal from the determination of the court herein on appeal .

6. By an application dated 5<sup>th</sup> June 2025 under certificate of urgency as they now all do the applicant moved the court allegedly under Articles 22(1), 23(1)(a) and (f) and Article 159 of the Constitution and sections 14 and 329 of the CPC for sentence review for orders that: -

- a) the court be pleased to note that the two offences were committed on event relating to the same transaction and the High Court on appeal failed to order the sentences to run concurrently
- b) The court be pleased to review the applicants sentence and order the imposed sentence to run from the date of arrest on 6<sup>th</sup> June 2016.

7. The application was supported by his sworn affidavit wherein it was deposed that he filed an appeal to this court which partially succeeded and the sentences reduced to ten and seventeen years respectively on the two counts and that the cumulative sentence violates the law and the constitution as the sentencing court failed to observe that the evidence on record leads to the conclusion that the offences were committed on the same transactions or a series of transactions in the same environment hence the sentences ought to run concurrently.

8. it was deposed further that considering existing and emerging mitigating circumstances, the sentence of 27 years' imprisonment was excessive and should be reviewed downwards or ordered the same to run concurrently as the applicant has been in custody from the date of arrest and that the court should consider his good character on record.

### **SUBMISSIONS**

9. At the hearing hereof, it was submitted by the applicant that he was seeking a reduction on the

sentence on the ground that he had ben in prison for a long time and that during that period of time he had reformed. He submitted that he used to keep bad company which led him into the commission of the offence he was convicted on and that the cover should extend to him a second chance.

10. On behalf of the respondent it was submitted that the offences the applicant was charged with were not of a similar nature and as such the same could not run concurrently. It was contended further that the court had considered the period the applicant had served in remand custody and therefore the application lacked merit.

#### **DETERMINATION**

10. Having looked at the application herein and the brief submissions by the parties, it is clear that the both the trial court and this court on appeal took into account the pre-conviction detention and therefore the applicants prayer thereon has got no merit.

11. The only issue for determination on this application is whether this court has got jurisdiction and whether the applicant is entitled to the prayer of the two sentences herein running concurrently.

12. As this court has said before, once a convict has filed an appeal to this court from the decision of the lower court and the appeal determined on merit, this court then become functus officio and has no jurisdiction to once again revise the determination of

the lower court and that the best practice should dictate that the same files an appeal to the Court of Appeal. Section 239 of the CPC upon which the application is premised is directed to the trial court and upon perusing the sentence of the court it is clear that the same took into account all the relevant materials to enable it reach at its sentence, which was reduced by this court on appeal and it is therefore not open to this court to reduce the same further, as to do so would amount to this court sitting on appeal against its own decision.

13. In this cause, the applicant was silent on whether the same filed an appeal to the court of appeal and therefore whereas the court has found and held that it lacks jurisdiction to review the sentence which was confirmed by this court of appeal, since the applicant is under Article 47 of the Constitution entitled to fair Administrative Action, I will look at the merit of the application herein on the basis of when should a sentence run concurrently.

14. A concurrent sentence means that the sentences for multiple offences or crimes to be served at the same time as opposed to added together. For the same to be ordered the offences must be related or of the same incidence. This is provided for under section 14 of the Criminal Procedure Code which provides that where a person is convicted at one trial of two or more distinct offences, the court may sentence him for those offences

to several punishments prescribed thereof and those punishments shall commence the one after the other unless the court directs that the punishment shall run concurrently.

15. this position has been captured in the judiciary sentence policy guidelines and the Court of Appeal in ***Peter Mbugua Kabui versus Republic [2016] eKLR*** where the court stated that as a general principle the practise is that if an accused person commits a series of offences at the same time in a single act or 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 mate out a consecutive term of imprisonment.

16. In this matter, whereas the two offences occurred at the same time in the same transaction, they were not of a similar nature which would have entitled the applicant to an order for a concurrent sentence and therefore both the trial court and this court on appeal cannot to faulted in the sentence herein.

17. I have however notwithstanding lack of jurisdiction, taken into account the applicants plea herein and extended to the same mercy and noted that the court did not see any exceptional circumstances in this case thereby reducing the sentences mated out, I shall therefore allow the application herein on the account of the applicants claim of having reformed in prison and

order that the sentence herein run concurrently from 6<sup>th</sup> may 2015.

18 And it is ordered

**DATED SIGNED AND DELIVERED THIS 17<sup>TH</sup> DAY OF MARCH 2026**

**J WAKIAGA  
JUDGE**

**In the presence of; -**

Court assistant -

Counsel for the State -

Applicant -