



**Kegengo v Republic (Miscellaneous Application E756 of 2024)
[2025] KEHC 8165 (KLR) (Crim) (27 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 8165 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS APPLICATION E756 OF 2024
MW MUIGAI, J
MAY 27, 2025**

BETWEEN

JOSEPHAT OKEO KEGENGO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant filed Certificate of Urgency and applied for sentence review for sentence delivered on 4/9/2023 by the Trial Court. The Applicant relied on Sections 362, 364 for review, the sentences in Count 1 & 2 to run concurrently and Section 333(2) of CPC for inclusion of time spent in custody to be part of the computation of sentence meted out by the Trial Court. The Applicant relies on Article 57 of *the Constitution*, the Court considers he is elderly and the law provides protection to receive reasonable care and assistance from family and the State.

Background

2. Josephat Okeo Kegengo, the Applicant, was charged with two counts
 1. Conspiracy to Defraud Contrary to Section 317 Of The Penal Code, Cap. Laws of Kenya.
 2. Forgery Contrary to section 345 as read with Section 349 Of The Penal Code, cap63, Laws of Kenya.
 3. The Particulars of the charge/Information were/are;
The Applicant & 4 Others were charged with 14 Counts of Conspiracy to Defraud and Forgery from Pembe Flour Mills of Ksh 218,665,038/-



3. The Trial Court heard from 23 witnesses and the 5 Accused persons placed on their Defenses. That on the 4th of September 2023, the Applicant herein 3rd Accused person during Trial was fined Ksh 1,000,000/- in default sentenced to serve two (2) years imprisonment in Count 1 and in Count 3 he was fined 200,000/- in default to serve 2 years imprisonment and sentences were to run consecutively.
4. He was convicted on the 4th day of September 2014, and his time in remand was not considered while computing his sentence contrary to Section 333(2) of the Criminal Procedure Rules. He is therefore asking for a review of his sentence, for it to be reduced.

Issues for Determination

1. Whether the applicant is eligible for the review of his sentence, having considered that the time spent in custody during trial was not considered when computing his sentence.
2. Whether the Applicant's age and illness should be considered when reducing his sentence.
3. Whether the applicant is eligible for a non-custodial sentence according to the Sentencing Policy Guidelines.

Analysis & Determination

5. The Applicant submitted the sentence was/is contrary to Section 28 of Penal Code & offends the principle of proportionality and sentence meted out ought to run concurrently.
6. Section 28 imposes fines and the maximum term that a person maybe committed to Prison in default to payment of fine. The provision of Section 28 is couched in mandatory terms and the position was/is affirmed by case of Mbaka v Republic 2024 KeHc 3763 KLR; Moses Mutembei Mbae v Republic [2021] eKLR & Gathii v Republic [2022] eKLR

The Judiciary of Kenya Sentencing Policy Guidelines 2016 provides at Paragraph 7 that where offences emanate from a single transaction the sentences should run concurrently.....

Court of Appeal at Nyeri held in John Waweru Njoka v Republic [2001] eKLR reaffirmed that in law it lies in the discretion of the Court to order whether sentences should run concurrently or consecutively. Nevertheless, it is an established principle of law that where offences are committed in one transaction, the sentences ought to run concurrently even when laid in separate Counts...

7. The ODPP found the instant Application an abuse of the Court process as it frustrates Section 362 of Criminal Procedure Code as it does not demonstrate any incorrectness, illegality or impropriety of the sentence meted out by the Trial Court.
8. The Prosecution opposed the review of sentences to run concurrently instead of consecutively and referred to Bernard Kimani Gicheru v Republic Cr App No 188 of 2000.....
9. In the case of BMN v Republic [2014]e KLR (Criminal Appeal No 97 of 2013)

“The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of Ogolla s/o Owuor, [1954] EACA 270 wherein the predecessor of this Court stated:

“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 In Omuse v R (Supra) while in the case of Shadrack Kipkoech Kogo v 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 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 v R. [1989 KLR 306]"

10. In the case of Kenneth Kimani Kamunyu v R. [2006] eKLR it is stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful.

11. Tikise Ole Neusiet v Republic [2021] KEHC 3405 (KLR

"The principles upon which an appellate court may interfere with sentence were stated in the case of Bernard Kimani Gacheru v Republic [2002]E KLR Criminal Appeal No.188 of 2000 the Court of Appeal at Nakuru cited the case of Ogola S/O Owoura v Reginum [1954]21 270 as follows;

"The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v Republic [1950] 18 E.A.C.A. 147.

Therefore, sentence is a matter of discretion of the trial court which must, however, be exercised in accordance with the facts and circumstances of each case and the law applicable. An appellate court will not normally interfere with sentence unless the sentence is manifestly excessive or is based on wrong principles or law.

12. According to the Sentencing Policy Guidelines 2016 provides;

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.

7.14 The discretion to impose concurrent or consecutive sentences lies in the court.

13. Section 12 CPC Combination of sentences

Any court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass.

14. Section 14CPC Sentences in cases of conviction of several offences at one trial(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.



Section 28(b) of *Penal Code* provides; in the case of an offence punishable with a fine or a term of imprisonment, the imposition of a fine or a term of imprisonment shall be a matter for the discretion of the court;

15. From the evidence contained in the Trial Court record, there are 15 Counts ranging from conspiracy to defraud, making a false document, forgery, uttering a false document except for conspiracy to defraud where ALL 5 Accused persons jointly committed conspiracy. However, the assorted charges are of specific acts by each Accused person on specific Count that combined enabled siphoning of funds through 430 forged weighbridge tickets that cumulatively caused loss of funds from Pembe Flour Mills of Ksh 218,665,038/- The offences are separate and distinct transactions that occurred between 22/7/2013 – 8/2/2014.
16. Secondly, each of the 5 Accused persons was convicted on separate Counts and sentenced while they were acquitted in other Counts, 2, 5, 8, 11, & 12.
17. 1st & 3rd Counts ALL 5 Accused persons were convicted and sentenced the rest of the 15 Counts each Accused person was separately convicted and sentenced, the 1st convicted of 6, 7, 9, 10, 12 & 13 & 2nd 4, 7, 10 & 13 convicted. Clearly these are separate and distinct offences a series of transactions that cumulatively caused financial loss to the Complainant Company.
18. I find the Trial Court exercised its discretion judiciously and legally awarded consecutive sentences.
19. Secondly, the mandatory provisions prescribed in Section 28 of the *Penal Code* limits only up to KSh 50,000/- -12 months imprisonment but the said Section is not applicable in isolation of other provisions in CPC and circumstances of a specific case as the instant case involves colossal amount of funds stolen through various transactions that are specific and distinct. There is no legal basis for sentence to be reduced to 6 months. The sentences were properly and legally imposed in light of the Provisions of law of each Count.
20. On the first Issue, whether the Applicant is eligible for the review of his sentence having considered that the time spent in Remand during the trial was not considered when computing his sentence?
21. In the case of *Ahamad Abolfadhi Mohammed & Another v Republic*, 2018 eKLR the Court of Appeal held that:

“The failure of the Court to take into account the meaningful way, the period that the appellants had spent in custody as required by Section 333(2).’Section 333(2) of the *Criminal Procedure Code* states that: 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 for in the Code. Provided that where the person sentenced under subsection (1) has, before such sentence, been held in custody, the sentence shall take account of the period spent in custody.”
22. The accused person is entitled to a fair trial as outlined in Article 50 (2) of the 2010 Constitution of Kenya, which means that the sentence that he is to be given ought to reflect the current position of the law as stipulated in the statutes and *the Constitution* of Kenya. Thus, the accused person is eligible for the review of his sentence to have the time spent in custody during the trial reflected in the computation of his sentence.
23. The Trial Court Record was not availed despite seeking the Trial Court file through the Deputy Registrar Criminal Division High Court. The period the 3rd Accused person stay in custody before



being released on bond shall be confirmed and added to computation of his sentence and remission provided for under the *Prisons Act*.

24. On the second Issue, whether the age and health of the applicant should be considered when reducing his sentence? The applicant is an elderly offender and according to Article 57 of *the Constitution* of Kenya, he ought to receive reasonable care and assistance from their family and the state. According to Section 20.25 of the Sentencing and Policy Guidelines 2016; there is no special consideration for terminally ill and elderly offenders. However, the consideration is whether, given the illness or age, the sentence is rendered excessive.
25. There are two dimensions worth considering. First, whether the illness or old age would cause the offender to experience undue and unjustifiable hardship in custody.
26. Further, whether the conditions in custody would be termed inhumane, bearing in mind the offenders' state. Second, whether the offender's condition would cause undue burden on other offenders and/or prison officers taking care of him/her.
27. The accused person has High blood pressure and Diabetes; hence, he may cause undue burden on the prison officers taking care of him, thus it would be preferable if he was taken care of by his family members while he serves a non-custodial sentence of community service for the remaining years and the payment of a reasonable amount.
28. In considering whether to impose a non-custodial or custodial sentence, the Sentencing Guidelines 2016 Clause 2.3.13 prescribes a few factors to consider. These include the gravity of the offence, the criminal history of the offender, children in conflict with the law, conduct of the offender, protection of the community, offenders' responsibility to third parties. Additionally, pursuant to Article 50 (2) (q) Of *the Constitution*; the accused has the right to appeal and apply for review of the sentence.
29. In considering whether to grant the accused person a non-custodial sentence, consider the following factors. The accused person has been charged with two counts of Conspiracy to Defraud Contrary to Section 317 Of The Penal Code, Cap. Laws of Kenya. Forgery Contrary to section 345 as read with Section 349 of the penal code, CAP 63, Laws of Kenya. Given the fine rendered is that of 1.5 million and 0.5 million having already paid 500,000 for bond which will help cover some of fine imposed. Additionally, the accused person as earlier stated has not had any criminal record and has cooperated with the investigation conducted by the police as well as the orders granted by the court.
30. This includes serving 20 months of the 48 months sentence that is consecutively serving from the two counts committed. Additionally, he is an old man of age 70 years, diabetic and has high blood pressure. Taking these facts cumulatively, they form compelling reasons to convert the remaining 28 months of prison to noncustodial sentence.
31. Examples of non-custodial sentence are provided by section 24 of the *Penal Code* and as in Clause 2.4 in the Sentencing Guidelines gives Community Service orders for a period that does not exceed the term of imprisonment that the accused should have served, that being 3 years.

Community Service Orders Act

32. Section 3. Community service orders
 - (1) Where any person is convicted of an offence punishable with—
 - (a) imprisonment for a term not exceeding three years, with or without the option of a fine; or



- (b) imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate, the court may, subject to this Act, make a community service order requiring the offender to perform community service.

33. Section 317 345 349 of *Penal Code* depict forms of stealing whose maximum prescribed sentence is 3 years. The applicant deposed medical challenges and advanced age. The Applicant is a 1st Offender and was convicted of the least Counts of the 15 Counts. However, in this case the accused person has already served two years which is one year and eight months.

Disposition

34. In conclusion, with the above compelling reasons of ill-health and advanced age subject to confirmation in the following manner;
- a. The Prisons Department to compute the remainder of the Applicant's sentence from period he was in custody Presentence and remission.
 - b. The Applicant and/or Prisons avail medical report treatment Notes to confirm the Applicant's medical status
 - c. Any document confirming the Applicant's advanced age
 - d. Probation Officer/Community Officer to prepare Resentencing Report on if Community service and/or Probation recommendation as possible non- custodial sentence is appropriate from outcome of investigation/interviews for placement of Community service order, a proper inquiry into the Offender's circumstances must be made and recorded by Probation/Community Service Officer; whether the Offender has fixed residence/abode; He/she has obligations taking care of children /elderly or persons with disability; he/she is employed, working hours and profession/skills; he/she is a 1st Offender, the distance from the nearest Community service Institution from Offender's home; Status, health and age of offender and the nature of the work available and the offender is willing to perform the public work. [Criminal Procedure Bench book 2018]
 - e. Further Mention on Directions on Way Forward on Resentencing on 11/6/2025.

RULING DELIVERED SIGNED DATED IN OPEN COURT IN HIGH COURT CRIMINAL DIVISION -NAIROBI ON 27/5/2025 VIRTUALLY/PHYSICALLY

M.W.MUIGAI

JUDGE

