



**Marsack v Republic (Criminal Appeal E002 of 2025)
[2025] KEHC 6807 (KLR) (27 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6807 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MANDERA
CRIMINAL APPEAL E002 OF 2025**

JN ONYIEGO, J

MAY 27, 2025

BETWEEN

ALLOW EDIN MARSACK APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence of Hon. M kimani(PM)
delivered on 25-04-2023 in Mandera PM's court criminal case No. E019 OF 2023)*

JUDGMENT

1. The appellant herein was charged with two counts. In respect to count I, he was charged with the offence of being unlawfully present in Kenya C/S 53(2)(1)(J) as read with Section 53(2) of the [Kenya citizenship and immigration Act](#) No.12 of 2011. Particulars were that on 21st day of April 2023 at around 13 hours at Wargadud township within Mandera Central Sub-County in Mandera County, being a Somali National, he was found unlawfully present Kenya without a valid passport or permit authorizing him to stay in Kenya.
2. In respect to count two, he was charged with entering Kenya through a place not designated as a place of entry contrary to section 15(2)(A) as read with section 57 of the Kenyan citizenship and immigration Regulations 2012 legal notice No. 64. Particulars were that on diverse dates of April, 2023 at Damasa within Lafey Sub-County of Mandera County, he entered Kenya without reporting to the Immigration authority through the said point, a place not designated as a point of exit/entry.
3. Upon being read the charges, he pleaded guilty. Consequently, he was convicted and sentenced to serve three years' imprisonment for each count and same to run consecutively.
4. Aggrieved by both the conviction and sentence, he filed the instant appeal vide a petition of appeal dated 23-10-2024 citing the following grounds; his rights were violated during the trial due to lack of legal representation; prosecution failed to prove the requisite mens rea; court failed to consider



humanitarian grounds before sentencing him and; that the court erred by sentencing him to a consecutive period instead of a concurrent sentence.

5. When the matter came up for hearing, the appellant elected to argue only one ground challenging sentence. He urged the court to substitute the order that he serves consecutive sentence to that of concurrent. In essence, he abandoned the appeal against conviction. In response, prosecution counsel did not oppose the same.

6. I have considered the appeal herein challenging the legality of the sentence imposed by the trial court. The same is not opposed. It is trite that sentencing is at the discretion of the trial court and that an appellate court can only interfere with it if the same is excessive, illegal, irregular or that the trial court failed to take into account relevant factors or that it considered wrong legal principles. See *Bernard Kimani Gacheru V Republic* [2002] KECA 94 (KLR) where the court held 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 stated is shown to exist”

7. In the instant case, the appellant has argued that he should have been sentenced to a concurrent period not consecutive. 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”.

8. In the case of *Peter Mbugua Kabui vs Republic* [2016] eKLR the Court of Appeal expressed itself on the subject as to 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. Similarly, in *Sawedi Mukasa s/o Abdulla Aligwaisa* [1946] 13 EACA 97, the Court of Appeal for Eastern Africa considered the issue of a consecutive as opposed to a concurrent sentence and expressed the view that it was still good practice to impose concurrent sentences where a person commits more than one offence at the same time and in the same transaction save in very exceptional circumstances.



10. Further guidance can be drawn from the judiciary Sentencing Policy Guidelines which contain specific provisions explaining circumstances when a court should impose consecutive or concurrent sentence. The Guidelines provide 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”.

11. After having carefully considered the two counts, it is apparent that the appellant immediately he entered Kenya without a valid document or visa through an unauthorized entry or exit point, he committed the two offences in a continuous chain of events or common transaction. The two offences are inseparable. In view of that finding, the appropriate sentence should have been that; the sentences to run concurrently and not consecutively. Accordingly, it is my holding that the trial court applied wrong principles by imposing an illegal and excessive sentence in the circumstances.

12. Accordingly, the sentence imposed by the trial court is hereby set aside and the same substituted with the order that the appellant shall serve three years imprisonment for each count and the sentences to run concurrently. The said sentence to be computed from the date the trial court’s sentence was pronounced.

ROA 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27TH DAY OF MAY 2025

J. N. ONYIEGO

JUDGE

