

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(MOROGORO DISTRICT REGISTRY)
AT MOROGORO

CRIMINAL REVISION NO. 27 OF 2023

*(Arising from Criminal Revision No. 21/2023 Kilombero District Court, Originating
from Mlimba Primary Court in Criminal Case No. 193 of 2022)*

FRANK WAMBASA @ TEACHER APPLICANT

VERSUS

RAYMOND MWALONGO RESPONDENT

RULING

Ruling date on: 13/07/2023

NGWEMBE, J.

This ruling is from the *suo motu* revision of this court made on the proceedings of the district court of Kilombero on the case which originated from Mlimba Primary Court (trial court).

The Applicant, namely Frank Wambasa @ Teacher was convicted by the trial court for two offences of burglary contrary to section 294 (2) and Stealing contrary to section 265 of the **Penal Code Cap 16**. The trial court sentenced the applicant to serve 12 months imprisonment for the first count and 10 months for the second count. The sentences were ordered to run consecutively.


The Resident Magistrate in charge of Kilombero District Court, having been instructed by this court, initiated a *suo motu* revision, since the applicant was among the inmates who presented their complaints



during my visit to Kiberege Prison. In her ruling, the magistrate observed that she examined the records and found one error committed by the trial court; failure to seek confirmation of the sentence, which obviously required confirmation for exceeding six months as per section 7 (1) of The **Magistrates Courts Act, Cap 11 RE 2019**. The district court proceeded to uphold the sentences, confirmed the same and set aside the consecutive order of the sentences, instead was replaced by an order for concurrence. The applicant was yet dissatisfied.

Having visited the proceedings in order to satisfy myself as to their propriety of proceedings and judgement of the lower courts, I found that, the two offences were proved beyond reasonable doubt, hence conviction by the trial court was proper. The sentences passed by the trial court required confirmation as pointed earlier, but this anomaly was cured by the district court. Even ordering the sentence to run consecutively was not justified, it is good that the district court rectified this as well. But reasoning was missing in the district court's ruling as to why the sentences were to run concurrently.

This court is therefore bound to address the legal basis of ordering the sentence to run concurrently or consecutively. The district court, despite having set aside the consecutive order, did not give any reason for the trial court's aid. I am of the determined view, that being a revision, the court was required to give a little reasoning to impart such knowledge to the lower court. This is what I will perform herein. Cognizant of many cases which primary courts have ordered sentences to run consecutively even when unnecessary, I have a legitimate expectation that the observation made herein will be of much assistance to subordinate courts. To start with, a general provision for consecutive sentences is that of section 36 of **The Penal Code, Cap 16 R.E 2022**, same provides: -



Section 36. *"Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death or of corporal punishment, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence unless the court directs that it shall be executed concurrently with the former sentence or any part of that sentence: Provided that, a court shall not direct that a sentence of imprisonment in default of payment of a fine be executed concurrently with a former sentence under section 29 (c)(i) or with any part of that sentence."*

A simple interpretation of the above provision is that, sentences will run consecutively when the offences were committed through different transactions. To understand the nature of the transaction, we look not only to time space, but also continuity of the acts in question and connection of each other.

A person who breaks into a building with intent of stealing, and thereafter steals anything from that building, commits two offences; housebreaking and stealing. The two offences of housebreaking and that of theft will be treated as offences committed in the same transaction. Yet there are offences which may be committed in different transactions but within related period of time, and others may commit different offences in different times but as part and continuity of the same transaction. This court gave its proper guidance in the case of **Jumanne Ramadhani Vs. Republic [1992] T.L.R 40** where some cases from the Queens Bench were referred. I find it proper to reproduce part of



what was borrowed from the English case of **R Vs. White [1972]**

Crim. L.R.193, where it was *inter alia* held: -

"The general principle that offences committed in close association with each other should not normally attract consecutive sentences applies only where the offences concerned are broadly similar in character or related in terms of subject - matter. Where two wholly different offences are committed at the same time, even against the same victim, consecutive sentences may properly be imposed."

In another case of **Elias Joakim Vs. Republic [1992] T.L.R 220** where the appellant was convicted for house breaking c/s 294 (1) and stealing c/s 267 of the Penal Code, the district court sentenced him to 2 years' imprisonment on the first count and 5 years imprisonment, in the second court without ordering whether to run concurrently or consecutively. This court considered at length on whether to order a consecutive sentence in the following terms: -

"The judicial view and approach, on when concurrent sentences, should be ordered, is abundantly and oversupplied in the case law. Citing a few examples, will be as graphic, as will suffice in my view. In the case of Musa s/o Bakari v R. [1968] H.C.D. No. 239, it was held that, it was universal practice, in the absence of good reason to the contrary, to order the sentence for related offences, of house breaking and stealing, to run concurrently, or where the charged counts, attracting convictions, arose out of single transaction, or are part and parcel of the same transaction, or are part and parcel of single plan of campaign concurrent sentences will be ordered - see Jayantilar Laiji Kara Shah v R. [1968] H.C.D. No. 328, Ray Raphael Lameck v R. [1967] H.C.D. 190 27 and

Joseph A. Kashamakula v R. [1970] H.C.D. No. 201, Just to mention a few...a good working rule is that consecutive sentences, should not be passed for offences arising out of the same transaction, as the sum total sentence resulting therefrom, may often prove to be too great, considering the circumstances of the case. - See R. v Kaktercum [1972] 56 Cr. App. R. 298. In this case, house - breaking and stealing, are so related, and interconnected operationally, that the sentences should have been ordered to run concurrently."

In this case, the district court was correct to order the sentences to run concurrently. I would also encourage the magistrates to take heed to the test before they make an order on whether sentences to run consecutively or concurrently. They should follow the above precedents and relevant others whenever they encounter a situation of this nature, the position is settled.

Another procedural omission of the trial court which I think escaped the district court's scrutiny, is the requirement set out under section 35 (6) of The Third Schedule to the MCA in respect of recording the testimony of a witness. I ruled earlier in other criminal revisions that the law required a magistrate to read the testimony over to the witness and make any corrections if pointed out. At the foot of each witness's testimony, the trial magistrate must certify that he had complied with the provision. Appending a signature and date as the trial magistrate did, is a good practice, but usually falls short of the legal requirement if the magistrate does not state that he complied with section 35 (6) of the Third Schedule to the MCA because the section is in mandatory terms that: -

"The magistrate shall record the substance of the evidence of the complainant, the accused person and the witness and



after each of them has given evidence shall read his evidence over to him and record any amendment or corrections and thereafter the magistrate shall certify at the foot of such evidence, that he has complied with this requirement."

What subsection 6 requires the court to do after recording the testimony is to read the evidence to the witness and incorporate the observed amendments if any. Then the magistrate must show that he complied with the requirement at the end of each witness's testimony. The trial magistrate in this case omitted the requirement throughout the case. Failure to follow this requirement makes the proceedings fall short of the value. The remedy usually depends on the prejudice occasioned to any of the parties. The above provision is substantially in *pari materia* to section 210 (3) of **The Criminal Procedure Act, Cap 20 RE 2019 (now RE 2022)** which applies to other subordinate courts under the same spirit.

The rationale of this requirement is to safeguard accuracy in recording the witnesses' testimony and guarantee authenticity of court proceeding. It follows therefore when a particular testimony is not in dispute and no prejudice was occasioned to the parties, such omission will be curable. See the cases of **Iddy Salum @ Fredy Vs. Republic (Criminal Appeal No. 192 of 2018) [2020] TZCA 1853** and **Jumanne Shaban Mrondo Vs. Republic, Criminal Appal No. 282 of 2010**, among others. In this case, there was neither dispute on the testimonies nor was any prejudice occasioned to the parties.

Notwithstanding the aforesaid, I call upon all primary court magistrates when dealing with criminal cases, apart from other legal requirements prescribed in the procedural laws, they must also comply with section 35 of the Third Schedule to the MCA in order to stage the ground for the doctrine of sanctity of court record.



Save for the above rectifications and instructive observations, I accept the district court's ruling in its revision, and hence no variation is made in substance.

Order accordingly.

Dated at Morogoro this 13th July, 2023.



P. J. NGWEMBE

JUDGE

12/07/2023

Court: Ruling delivered this 13th July, 2023 in the absence of both parties.

A.W. Mmbando

DEPUTY REGISTRAR

13/07/2023

Court: Right to appeal fully explained.



A.W. Mmbando

DEPUTY REGISTRAR

13/07/2023