REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 2 OF 2015

DANCUN CHOVU KOSKEY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in the Criminal Case No. 546 of 2014

of the Senior Principal Magistrate's Court at Kilifi – L.N. Juma, RM)

JUDGEMENT

1. Dancun Chovu Koskey, the Appellant was on 12th January, 2015 convicted on his own plea of guilty in respect of four counts. In counts 1 and 2 he was charged with malicious damage to property contrary to Section 339 (1) of the Penal Code. On count 1 he was fined Kshs.20,000 in default to serve six(6) months imprisonment and on count 2 he was fined Kshs.10,000 in default to serve three(3) months imprisonment.

2. In count 3 the Appellant was charged with being found in possession of a narcotic drug contrary to Section 3 (1) as read with Section 2 (a) of the Narcotic Drugs and Psychotropic Substances Control Act, 1994. He was sentenced to serve one year imprisonment. Finally in count 4 he was charged with threatening to kill contrary to Section 223 (1) of the Penal Code. For this offence he was sentenced to serve one year imprisonment. The trial Court directed the sentences to run consecutively.

3. In his appeal, the Appellant asserts that his plea was equivocal and that the trial Magistrate ought to have seen that he was of unsound mind at the time he took plea. He also challenges the sentences.

4. Mr. Fedha for the State conceded the appeal on the ground that the sentences imposed were excessive.

5. Section 12 of the Penal Code, Cap. 63 (P.C.) establishes the defence of insanity. However section 11 of the same P.C. provides for the presumption of sanity thus: -

> **"Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes into question, until the contrary is proved."**

6. A perusal of the court record does not show that any red flag was raised in respect of the Appellant's sanity. The trial Magistrate had no reason to doubt the sanity of the Appellant. It has now emerged that the Appellant is mentally unstable. However, apart from the communication by Mr. Fedha for the Respondent, there is no medical report to show that the Appellant is mentally challenged. Even if such a

report was availed, the same cannot be evidence in support of the Appellant's allegation that he was of unsound mind at the time he took plea. The appeal on conviction therefore fails.

7. Where an accused person is charged with more than one count and prison sentences are imposed in default of payment of fines, then if the fines are not paid, the prison sentences will be served one after the other. Assuming that the Appellant did not raise fines in respect of counts 1 and 2, and then the alternative prison sentences were to be served consecutively as the trial Magistrate had correctly directed.

8. However, where an accused person is charged with more than one count and prison sentences are imposed for those counts, ordinarily, the sentences should run concurrently unless for special reasons to be stated in the record the trial court deems it necessary to have the sentences run consecutively.

9. This principle of the law finds support in The Judiciary Bench Book For Magistrates in Criminal Proceedings published in 2004 by the Kenyan Judiciary where at pages 78 and 79 (paragraphs F and G)it is stated that: -

> **"F. Where the accused is convicted of two or more offences and sentenced to two or more terms of imprisonment, the Court should state whether the sentences are to run concurrently or consecutively (*Owiti v R [1984] KLR 733*). This is because S 14 (1) of the CPC provides that in such cases the sentences are to commence the one after the expiration of the other, unless the Court directs that sentences shall run concurrently.**
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> **G. The general rule is that concurrent sentences rather than consecutive sentences should be awarded for offences committed in the same transaction (*R v Sawedi Mukasa s/o Abdulla Aligwansa (1946) 13 EACA 97, Ondiek v R [1981] KLR 430 and Ng'ang'a v R [1981] KLR 531).* In *Odero v R [1984] KLR 621* the High Court held that if a series of acts are so connected together by proximity of time, community of criminal intent, continuity of action and purposes or by the relation of cause and effect as to constitute one transaction, the offences constituted by the series of acts are committed in the course of the same transaction and deserve concurrent rather than consecutive sentences."**

10. In the case at hand no reason was given as to why the trial Court deemed it necessary that the jail terms for counts 3 and 4 were to run consecutively. The concession by the State on sentence is therefore proper. I thus allow the appeal on sentence and set aside the order that the sentences in counts 3 and 4 were to run consecutively and substitute the same with an order that counts 3 and 4 were to run concurrently. Taking this factor into account, it means that the Appellant ought to have been released from jail after serving the nine (9) months for counts 1 and 2 and one (1) year for counts 3 and 4.

11. I allow the appeal on sentence and the appropriate order is that the Appellant is henceforth set at liberty unless otherwise lawfully held.

Dated, signed & delivered at Malindi this 27th day of July, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT