IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.177 OF 2008

JAMES KIMANI NGUGI……....….APPELLANT

VERSUS

THE REPUBLIC……RESPONDENT

[An Appeal from original conviction and sentence in Naivasha P.M.CR.C.NO.385 of 2008 (K) by Hon F. K. Gitonga, Snr. Resident Magistrate dated 4th May, 2008]

JUDGMENT

The appellant pleaded guilty to all the five (5) counts in the court below and was sentenced to serve two (2) years imprisonment on each count and the sentences were ordered to run consecutively.

In the first court the appellant was charged with **stealing** contrary to **Section 275** of the Penal Code, 2nd count, **breaking into a building and committing a felony** contrary to **Section 306(a)** of the **Penal Code,** 3rd count, **breaking into a building and committing a felony contrary** to **section 306(a)** of the **Penal Code,** 4th Count, **malicious damage to property** contrary to **Section 339(1)** of the **Penal Code** and 5th counts, **committing a breach of the peace with intent to alarm a person in a dwelling house** contrary to **Section 95(2)(c)** of the **Penal Code.**

Facts of the case as outlined by the prosecution were that on 24th June, 2006, the appellant was with Mary Wanjiku who is the complainant's employee. The complainant had given Mary Wanjiku Kshs.15,000/= to buy stock. The appellant spent the night with Mary Wanjiku. She woke up the following morning and went for a short call. She returned to find the appellant missing and he had disappeared.

On 28th June, 2008, the appellant went and locked up the complainant in her house. He then proceeded to break into the bar and steal mobile phones and cash.

On 7th July, 2008, the appellant threw stones at the complainant's house. He did this for 3 consecutive nights and broke windows. A trap was laid and he was apprehended. 3 mobile phones were recovered from him and kept as exhibits. He also led police to where he had kept the 4th phone. He was charged with the present offences.

Having confirmed and admitted the facts, the trial magistrate, F. K. Gitonga, Senior Resident Magistrate proceeded to sentence the appellant as explained earlier.

The appellant has brought this appeal challenging the procedure and the sentence on the grounds that:

i) the sentence was manifestly excessive;

ii) the order that the sentences on the five counts to run consecutively was irregular;

iii) the exhibits in counts 2 (mobile phones) were not produced;

iv) the section of the law cited under count V is non-existent;

v) the learned trial magistrate was biased against the appellant.

Learned counsel for the respondent did not take any position in the matter. Following the decisions of the Court of Appeal and the High Court, it is now settled law that although **section 348** of **Criminal Procedure Code** limits appeals arising from a plea of guilty to the extent and legality of the sentence, the section does not impose an absolute bar to an appeal against a conviction entered after the appellant's plea of guilty. See **Ndeda** V. **Republic** (1991) KLR 567.

Starting with the sentence, the learned trial magistrate imposed two years imprisonment on each count, to run consecutively, translating to a total of ten (10) years. From the facts of the case as outlined by the prosecutor and from the particulars of the offences as shown in the charge sheet, the offences related to one transaction although committed on different days.

The general rule is that concurrent as opposed to consecutive sentences should be awarded for offence committed in the same transaction. See **Odero** V. **Republic** (1984) KLR 621. It was therefore, irregular for the trial magistrate to order consecutive sentences in the circumstances of this case. The other grounds relate to count V which the appellant argues was based on a non-existent provision of the law and the other ground is that the mobile phones, the subject of count ll were not produced.

Starting with the last ground, it must be emphasized that any exhibit forming the basis of a charge must be produced for the completeness of proof of the offence. The prosecution is not relieved of its duty to prove the ingredients of the offence even where the accused person pleads guilty. The omission to produce the exhibits was fatal to the relevant count.

I reiterate that in count V, the appellant was charged with *"**committing a breach of the peace with intent to alarm a person in a dwelling house** contrary to **section 95(2)(c)** of the **Penal Code**."* The above charge is clearly in violation of the rules of drawing a charge as provided for in **Section 137** of **Criminal Procedure Code**. The statement of the offence must be concise and must avoid technical language.

For the reasons stated, the conviction in counts 11, IV and V were irregularly entered. Regarding counts 1 and lll, the sentence ought to have been ordered to run concurrently as explained earlier. To the extent stated, the appeal succeeds and the conviction in counts ll, lV and V are quashed and the sentences thereon set aside. The sentences in counts l and lll are confirmed but ordered to run concurrently translating to two years imprisonment from the date of the sentence.

Dated, Signed and Delivered at Nakuru this 16th day of February, 2012.

W. OUKO
JUDGE