REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Criminal Appeal 160 of 2007

EVANS NYAMWOGO……ACCUSED

-VERSUS-

REPUBLIC……..PROSECUTOR

JUDGMENT

(From original conviction and sentence by the Resident Magistrate's Court at Ogembo Criminal case no. 1016 of 2007 by J.K.NGARNGAR(Ag .SRM)

This is an appeal against the sentence of three and two years imprisonment respectively imposed on the appellant by the Senior Resident Magistrate's court at Ogembo on 27th September, 2007 for the two offences of Assault Causing Actual bodily harm contrary to section 251 of the **Penal Code** and stealing in a dwelling house contrary to section 279 (b) of the **Penal Code.** The two sentences were ordered to run consecutively. In respect of the 1st count, it was alleged that the appellant on 15th September, 2007 at Nyamache market in Gucha District within Nyanza Province unlawfully assaulted **Linet Charles.** And in respect of 2nd count it was claimed that the appellant on 19th September, 2007 at Nyamache market in Gucha District within Nyanza Province stole one radio make Frising valued at Kshs. 900/= and cash Kshs. 3,300/= all valued at Kshs. 4200/= the property of **Job Basweti.**

The record shows that the appellant duly admitted the charges and was accordingly convicted on his own plea of guilty whereupon he was sentenced as aforesaid. The material facts to the somewhat limited extent to which they have been proved or admitted are simple and can be shortly stated thus in the words of the prosecutor:-

> ***"On 18/9/2007, the complainant and his (sic) one of his elders went to Nyamache to record for (sic) statements. She met the accused at the market. The accused told the complainant that he wanted to embarrass him. The accused was armed with a sword. For no genuine reason the accused started beating the complainant. He sustained injuries on her thighs. In the process members of the public witnessed and raised the alarm. The accused ran away and the complainant went and reported the matter to Nyangusu Police Station. She was issued with a P3 form. It was filled and the degree of injury was assessed as harm. This is the P3 form-Exhibit No. 1. On the 19/9/2007, the accused was***

in court No. 2. Job Basweti left his home area at Nyamache and went to the nearby shop and on reaching the house he found that his radio was missing together with cash Kshs. 3300/=. He did not know who entered the house immediately. He started investigating. He later made a report to Nyangusu police station. In the process of investigations the radio was found at the home of one Jane. Jane told the police it is the accused who took the radio to her. Subsequently the accused was arrested. He was charged with the two offences…….”

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal . He blamed the learned magistrate for his conviction and sentence on the grounds that:

- ***THAT the learned trial magistrate erred in law and facts in concurring and recording that the plea had properly been taken and the prosecution had presented before a court consistent facts of the case your ladyship. (sic).***

- ***THAT the learned trial magistrate erred in law and facts in NOT upholding my plight as an accused person who has a right to have the charge read and explained in a manner and language I could understand and that I did not understand the same your ladyship.(sic).***

- ***THAT the learned trial magistrate erred in omitting and/or closing out on important part of due court process as in calling for a probation report which would have aided take court greatly in arriving at a constructive decision even after the prosecution had informed the court that I was a first offender your ladyship.(sic).***

- ***THAT the learned trial magistrate erred in imposing harsh sentence of five (5) years imprisonment in total disregard to my apparent age vis a vis the foregoing your ladyship.(sic).***

When the appeal came up for hearing, the appellant elected to abandon the appeal on conviction. Instead he elected to pursue the appeal on sentence. His wish was duly granted. In his submission in support of the appeal on sentence, he only prayed that this court directs that the sentence passed as aforesaid be ordered to run concurrently instead of consecutively as ordered by the trial court.

Mr. Gitonga, learned state counsel in response submitted that that the trial court properly sentenced the appellant. The offences were committed separately and on different occasions. It is trite law in the circumstances that sentences should run consecutively.

Before an appeal against sentence can succeed this court as a first appellate court, must be satisfied that there exists to a sufficient extent circumstances entitling it to vary the order on sentence of the court below. The principles upon which this court would act in exercising its jurisdiction to review sentences were firmly set out in the case of

Ogalo s/o Owuor .v.Republic (1954) 21 EACA 270. I need not restate them here. The appellant's beef is that much as he has no quarrel with the sentences imposed as aforesaid it is the order by the trial magistrate that the two sentences do run consecutively rather than concurrently that he has a quarrel with.

The general rule is that where a person commits more than one offence at the same time and in the same transaction, concurrent sentences should be imposed. (See **R.V.Sowedi Mukasa(1946)13 EACA 97.** In **R.V.Nathani (1965) EA 777 Newbold V.P.** held that in order that different acts should make up one transaction, it must be inherent in them that from the very beginning of the earliest act the other acts should either be in contemplation, or necessarily arise therefrom, as from the very nature of the transaction in view, form component parts of one whole. Concurrent sentences ought therefore to be exclusively imposed for related offences: they must arise from a series of incidents connected with each other. In the case of **Musa s/o Bakari .V. Republic (1963) 13 EACA 97**, it was stated emphatically that it is the universal practice, in the absence of good reason to the contrary, to order sentences for the related offences of house-breaking and stealing therefrom to run concurrently with one another. This practice extends to similar combinations such as theft and fraudulent false accounting, store breaking and theft, burglary and theft and or even assault. In a nutshell therefore concurrent sentences should normally be awarded for offences committed in the same transaction. The converse however should attract a consecutive sentence. In other words consecutive sentence should be imposed where the offences are not committed in the same transaction and are unrelated in a series of transactions.

In the circumstances of this case, the learned magistrate was in principle right in ordering that the sentences he had imposed ought to run concurrently. After all the first offence was committed on 15th September, 2007 on **Linet Charles** . It was an assault. The 2nd offence was however committed on 19th September, 2007 on **Job Basweti**. It was theft. The two incidents did not arise from the same transaction nor were they interrelated. It did not involve the same complainant nor were the offences committed at the same time and place.

Much as the appellant may have abandoned the appeal on conviction, that decision may have been informed by ignorance. After all he is a lay person who acted in person during the proceedings in the lower court. However there can be no compulsion and if a person charged with an offence prefers for any reason not to be professionally represented, the choice is his. Although there is some sense in the old saying that a man who acts as his own lawyer has a fool for a client nevertheless in practice the great majority of persons who are tried in our subordinate courts as the appellant, are not legally represented. Small wonder that he did not notice that the charges he was being called upon to plead to were fundamentally and fatally defective. Much as the appellant abandoned his appeal on conviction, this court cannot close its eyes to this grave injustice and or gloss over the irregular proceedings that culminated in the prosecution and subsequent conviction of the appellant. This court has the mandate and jurisdiction to remedy the situation, the position of the appellant on conviction in the appeal notwithstanding. A plea of guilty to a

defective charge cannot stand see **Christopher Aknobi .V.R. Cr.App.no. 135 of 1989 (UR).**

As already stated, the charges laid against the appellant arose from different and distinct incidents. They were committed on different occasions. The complainants were different. The charges were not related at all. One was assault whereas the other was stealing from a dwelling house. The two counts should not therefore have been combined in one charge sheet. Much as they were committed by the same person, they ought to have been preferred separately. My conclusion aforesaid is anchored on the provisions of section 135 (1) of the **Criminal Procedure Code** which provides interlia:

> ***"Any offences, whether felonies or misdemeanors, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character."***

In the instant case the offences charged were clearly not founded on the same facts, nor did they form or were they part of a series of offences of the same or similar character. See also **R.V. Dalip Singh (1943)EACA 121**. This then is a case of misjoinder of counts.

Ofcourse it is trite law that a misjoinder of counts will not necessarily lead to the conviction arising therefrom being quashed, unless and until the defect has occasioned a failure of justice. See **Kamwana s/o Mulia .V.R. (1958) EA 471.** In the circumstances of this case, the appellant was convicted on his own plea of guilty. It cannot therefore be said that the defect and or omission did not occasion the appellant a failure of justice.

Misjoinder of counts aside, the two counts were still defective on account of some missing material particulars. Indeed the particulars were at variance with the charges. In respect of the first count, there is no mention in the particulars that the assault allegedly occasioned, **Linet Charles,** actual bodily harm. The particulars merely state that the appellant unlawfully assaulted the complainant. With regard to the second count, the appellant is alleged to have stolen from a dwelling house. However in the particulars, there is no mention of a dwelling house.

Is it possible that had the particulars of the charges been in consonance with the charges, the appellant would have probably disputed the facts stated by the prosecution with the consequence that perhaps a plea of not guilty could have been returned? That possibility is not far fetched and or remote considering that the appellant was convicted on his own plea of guilty. I must also add that because of the failure aforesaid, it cannot therefore be said that appellant's plea was unequivocal.

For the above reasons, I do not think that the appellant's conviction and sentence should be allowed to stand much as the appellant had abandoned the appeal on conviction. No doubt the conviction and sentence is hoisted on shaky grounds. The appeal is allowed, conviction quashed and sentence imposed set aside. The appellant should forthwith be set free unless otherwise lawfully held.

Dated, signed and delivered at Kisii this 24th March, 2010.

ASIKE-MAKHANDIA

JUDGE