



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL APPEAL NO. 22 OF 2015**

**BETWEEN**

**ABDUL JUMA OPIYO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from the original conviction and sentence in Criminal Case No. 1286 of 2012 at the Chief Magistrates Court at Homa Bay, Hon. N. Kariuki, RM, dated 23<sup>rd</sup> May 2014)***

**JUDGMENT**

1. The appellant **ABDUL JUMA OPIYO** was charged and convicted of the offence of creating disturbance in manner likely to cause of a breach of the peace contrary to **section 95(1)(b)** of the **Penal Code (Chapter 63 of the Laws of Kenya)** and committing malicious damage to property contrary to **section 339(1)** of the **Penal Code**. The appellant was sentenced to serve 3 years imprisonment on the first count and 1 year imprisonment on the second count. The learned magistrate directed that both sentences run consecutively.

2. The appellant abandoned his appeal on conviction and urged that the sentence was harsh and excessive. Mr Oluoch, counsel for the State, conceded the appeal on the ground that the learned magistrate erred in imposing a concurrent sentence without any reason or explanation and that the sentence imposed under **section 95(1)** of the **Penal Code** was illegal since the maximum sentence prescribed is 6 months imprisonment.

3. The appellate court is entitled to intervene in a sentence where there is an error of principle (see **Ogolla s/o Owuora v R [1954] EA 270** and **Macharia v R [2003] 2 EA 559**). In this case, all the offences were committed on the same night and there was no reason given by the learned magistrate to impose consecutive sentences on the two counts when the offences proved were as a result of one transaction. The general principle was stated by Makhandia J., in **Elias Abdi Osman v Republic NRB HCCR No. 10 of 2005 [2006] eKLR** as follows;

***It has been repeatedly said that where a person commits more than one offence at the same time and in the same transaction, concurrent sentences of imprisonment should be imposed..... In the instance case, the complainants were assaulted by the appellant at the same time and at the same locus in quo. Accordingly the learned magistrate in sentencing the appellant on each count ought to have ordered that the sentences imposed do run concurrently.***

4. I also agree with the respondent that the sentence imposed under **section 95(1)** of the **Penal Code** was illegal in view of the maximum sentence prescribed by the law.

5. In the circumstances, I set aside the sentences and substitute the same with a sentence of 6 months imprisonment of Count 1 and 1 year imprisonment on Count 2. Both sentences shall run consecutively from the date of sentencing in the subordinate court.

**DATED and DELIVERED at HOMA BAY this 6<sup>th</sup> day of November 2015.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Director of Public Prosecutions for the respondent.