**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT VOI**

**CRIMINAL APPEAL NO 10 OF 2015**

**ILIA MUSAU…….... APPELLANT**

**VERSUS**

**REPUBLIC……..… RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 221 of 2013 in the Senior Principal Magistrate's Court at Voi delivered by Hon Nyakundi L.M.(Ag.PM) on 2nd October 2013)**

**JUDGMENT**

1. The Appellant herein, Ilia Musau, alongside Abraham Willy Kiberenge (hereinafter referred to as "his Co-Accused"), were jointly charged with two (2) Counts. Count 1 was in respect to the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code Cap 63 (Laws of Kenya).The particulars of that offence were that on 23rd March 2013 at Mwakingali Estate in Voi town within Taita Taveta County, jointly being armed with dangerous weapons namely pangas attempted to rob one Renson Mwanjala (hereinafter referred to as "PW 1") of Motor Vehicle Registration Number KTX 296 Datsun Pick-Up (hereinafter referred to as "the subject Motor Vehicle") valued at Kshs.350,000/- and at or immediately before or immediately after the time of such attempted robbery threatened to use personal violence to the said PW 1.

2. Count II was in respect to the offence of malicious damage to property contrary to Section 339(1) of the Penal Code. The particulars of this charge were that on 23rd March 2013 at Mwakingali Estate within Taita Taveta County, the Appellant and his Co-accused, jointly, wilfully and unlawfully damaged a wind screen of the subject Motor Vehicle valued at Kshs15,000/- the property of PW 1.

4. The Learned Trial Magistrate Hon Nyakundi L.M. concluded that the intention behind the Appellant's and his Co-accused's actions was not clear and acquitted them of the Count I. He also acquitted them on Count II. However, he convictedthem for offence of preparation to commit a felony contrary to Section 308 of the Penal Codeas he said that it was clear that they had intended to commit a felony. He sentenced both of them to seven (7) years imprisonment.

4. Before this court could render its decision in respect of the Appeal herein, on 14th December 2016, the State filed a Notice of Motion application dated 7th December 2016 urging this court to amend the said Learned Trial Magistrate's decision because he had failed to impose a sentence in respect of Count II.

5. In dismissing the aforesaid application, on 15th June 2017, this court held as follows:-

**"Appreciably, the State appeared to have misapprehended what the Learned Trial**

**Magistrate said in his judgment as nowhere did he indicate that he had convicted the Appellant and his Co-Accused of the offence of attempted robbery and malicious damage as it had set out in Prayer No (1) of its application."**

6. The decision herein is now the final judgment in the Appeal that was lodged by the Appellant.

**LEGAL ANALYSIS**

7. This being the first appellate court, this court is under a duty to re-examine the evidence that was adduced in the lower court as was held by the Court of Appeal in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where it was stated that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour."**

8. The Appellant relied onfour (4) Grounds of Appeal.A perusal of the said Grounds of Appeal and his Written Submissions as well as those of the State revealed that the issues that had been placed before this court for determination were as follows:-

**a. Whether or not the Prosecution had proved its case beyond reasonable doubt;**

**b. Whether the Learned Trial Magistrate erred in law and fact by convicting the Appellant on the charge of preparing to commit a felony.**

9. This court therefore dealt with the said issues under different heads shown hereunder.

**I. PROOF OF THE PROSECUTION'S CASE**

10. The Appellant argued that the law provides that a person who asserts a fact must prove the same. In this regard, he placed reliance on the provisions of Sections 109 and 110 of the Evidence Act Cap 80 Laws of Kenya and on the case of **Stephen Mungai Macharia vs Republic Criminal Appeal No 1 of 1994**where the Court of Appeal held as follows:-

**"An accused person is under no obligation to prove his own innocence as the burden of proving a case against an accused remains on the prosecution throughout the trial."**

11. He contended that the evidence adduced by the prosecution was that of **"preparation to commit a felony"** and not that of **"attempted robbery with violence".** He contradicted himself when he averred that the offence of preparation to commit a felony was just an allegation that was not proved. It was his argument thatthe Prosecution failed to discharge the burden of proof in its case and thus hedid not warrant a full conviction in excess of the one prescribed penalty by the law**(sic)**.

12. He placed reliance on the case of **Muiruri Njoroge vs Republic Criminal Appeal No 115 of 1982** where the court held:-

**"It is a well established rule of practice that a court of las does not act on mere assertions not unless such assertions is(sic) proved by evidence beyond reasonable doubt."**

13. He argued that the offence he had been charged with was committed at night and that visibility was a challenge as it impaired the witnesses' ability to **"positively perceive and certainly identify the culprit or where the incident last for a short time in the instant case**(sic)**."** He pointed out that witnesses gave chase to people who were approximately one hundred (100) metres away, which he termed an extra ordinary distance, when there was poor visibility but failed to demonstrate how they chased the assailants until they arrested them.

14. He asserted that there was a possibility that they might have arrested an innocent person who was also pursuing the assailants because the people chasing him did not establish who he was.He therefore submitted that his defence, despite being unsworn, was firm and unrebutted.

15. To buttress his submission, he referred this court to the case of **Abdallah bin Wendo vs Republic (1953) E.A. C.A. 166**where the court therein held as follows:-

> **"But on identification issue a witness may make erroneous assumptions particularly if he believes that what he thinks is likely to be true."**

16. On its part, the State was emphatic that the Appellant was positively identifiedby PW 1's wife namely Irene Wakio Mwanganyi (hereinafter referred to as "PW 2")who told the Trial Court that there was moonlight on that material date and timewhich allowed visibility over a distance of approximately two hundred (200) metres. She said that the Appellant and his Co-Accused were holding a club and panga respectively and that when she screamed and alerted neighbours, they chased and arrested them about hundred (100) metres away from their house.

17. It added that Messo Mjomba (hereinafter referred to as "PW 3"), boda boda operator also identified the Appellant as he beamed his boda boda lights on his way back from dropping a customer near PW 1's and PW 2's home. PW 3 also identified the Appellant's Co-Accused as the person who was holding a machete.

18. On the issue of the identification, the State relied on the case of **Kiilu & Another vs Republic (2005) 1 KLR 174**, the Court of Appeal held as follows;

> **"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error."**

19. It averred that the Appellant had no water tight defence that could dissuade the trial court from his guilt because he failed to call any of relatives or wife to corroborate his testimony or support his alibi. It stated that the trial court acted correctly when it found his defence to have been implausible.

20. A perusal of the proceedings showed that on the material date and time, PW 1 arrived at the gate of his house driving the subject Motor Vehicle. As he reversed into his compound, the Appellant and his Co-Accused jumped from the fence and tried to attack him with a club and machete. He was able to identify them because there was moonlight as had been corroborated by PW 2.

21. When neighbours and/or members of public were alerted by PW 2's screams, they ran after the assailants. They gave chase and arrested the Appellant herein near PW 1's and PW 2's home. The Appellant's Co-Accused was caught near Voi cemetery carrying a panga that was adduced as evidence before the Trial Court.

22. PW 3 confirmed having seen the Appellant and his Co-Accused near PW 1's and PW 2's house lying in a trench and jumped into their compound when the headlights of his boda boda beamed on them. He sped off after the Appellant's Co-Accused ran charging at him. He then shouted for help. Later, he heard that the Appellant and his Co-Accused had been arrested.He stated that he was able to identify the Appellant and his Co-Accused because there was moonlight.

23. The Investigating Officer, No 83933 PC Edwin Wakoli (hereinafter referred to as "PW 4") reiterated the evidence that was adduced by all the Prosecution witnesses and confirmed how the Appellant and his

Co-Accused were first arrested by members of the public. The Scene of Crime Officer No 93081 PC Shem Asher (hereinafter referred to as "PW 5") submitted in evidence the photographs of the damaged subject Motor Vehicle.

24. In his sworn evidence, the Appellant said that on the material date and time, he was walking to his sister's house at Mwakingali having arrived from Maungu when he saw three (3) men he did not know, armed with clubs. He had stopped to make a call to his sister to ask for more directions. The said men then took his phone and wallet and hit him with clubs on the ground that visitors like him were the ones spoiling Mwakingali area. He came round at Moi District Hospital and was arrested the following day.

25. Appreciably, as the Appellant and his Co-Accused were not convicted on Count I and Count II, this court did not deem it necessary to spend a lot of time analysing the evidence in respect of the said offences. What was of concern to this court was whether or not the Appellant and his Co-Accused were positively identified as having been at the scene of the incident herein while armed with a club and machete respectively.

26. PW 1, PW 2 and PW 3 were all in agreement that there was adequate moonlight on the material date and time. This court did not doubt their evidence as the Appellant was able to walk around in an area he was unfamiliar with and even see three (3) men holding clubs. In that regard, this court was satisfied that the moonlight provided sufficient light to have enabled the three (3) Prosecution witnesses identify the Appellant and his Co-Accused.

27. This court also believed PW 1's and PW 3's evidence that they managed to see the faces of the Appellant and his Co-Accused when light from the aforesaid Motor Vehicle and boda boda beamed on their faces. Indeed, it was clear that the Appellant and his Co-Accused had no good intentions as PW 3 first saw them hiding in a trench before they tried to attack him on his way back from dropping a customer.

28. The Appellant's evidence, though adduced on oath, appeared to have been fictitious and intended to exonerate him from the offence herein. It was not clear why he had to stop next to three (3) men with clubs to make a call to his sister's house. Legitimate expectation is that a person who is not familiar with an area is unlikely to stop next to men armed with clubs without fearing being attacked. This court found his evidence not to have plausible.

29. PW 2 screamed to alert neighbours. They gave chase to the Appellant and his Co-Accused who never left their line of vision during the entire time of the chase. Indeed, the Appellant was caught near PW 1's and PW 2's house while his Co-Accused was caught near the Voi Cemetery with a machete.There could not therefore have been an error or mistake in the identification of the Appellant and his Co-Accused.

30. In that regard, this court came to the firm conclusion that the Appellant and his Co-Accused were positively identified. If one was to assume for one moment that that the Appellant was not positively identified because the lighting conditions were not very favourable because lighting was from moonlight, it was difficult not to disassociate him with his Co-Accused because he had been seen near PW 1's and PW 2's house and on being chased, he was caught at the Voi Cemetery with a machete.

31. As the Appellant's Co-Accused was the same person PW1, PW 2 and PW 3 had seen, in the absence of any contrary evidence, this court found and held that the Learned Trial Magistrate was correct when he concluded that the evidence that was adduced by the Prosecution was cogent, consistent, coherent and well corroborated and that the same pointed to the fact that both the Appellant and his Co-Accused were up to no good.

32. As was held in the case of **Kiilu & Another vs Republic** (Supra), the circumstances relating to the Appellant's and his Co-Accused's arrest pointed to their guilt. This court therefore rejected the Appellant's assertions that PW 1, PW 2 and PW 3 could have been mistaken regarding their identification and found the case of **Roria vs Republic (1967) E.A.**on the question of identification of accused persons amongst several other cases the Appellant relied upon did not assist his case.

**II CONVICTION ON A LESSER CHARGE**

33. This court noted the Appellant's assertions that the Learned Trial Magistrate failed to re-analyse and re-evaluate the evidence adduced by the prosecution and went ahead to convict him for the offence of preparing to commit felony. He argued that the said Learned Trial Magistrate had no jurisdiction to amend the charge at the judgment stage because it was prejudicial and a failure of justice. In this regard he relied on a decision by Justice Mohamed Warsame who when dealing with a similar issue allowed the appeal. The Appellant did not quote the case he was seeking to rely on.

34. On its part, the State submitted that Section 179 (2) of the Criminal Procedure Code Cap 75 9Laws of Kenya) provides as follows;

> **"When a person is charged with an offence and facts are provedwhich reduce it to a minor offence, he may be convicted of the minoroffence although he was not charged with it."**

35. It submitted that the aforementioned section empowers the trial magistrate to exercise its discretion and substitute the first count of attempted robbery with violence with that of preparation to commit the felony. Moreover, the Appellant would have been sentenced to death on the first count but he was instead convicted to seven (7) years under Section 308 of the Penal Code which was a minor offence carrying a lesser sentence.

36. It averred that the question for the appellate court's determination was whether the Learned Trial Magistrate had discretion to substitute the first count and whether the ingredients forming the offence of preparing to commit a felony were sufficiently proven.

37. It relied on the case of **Moses Kabue Karuoya vs Republic [2016] eKLR** where the court laid down the essential ingredients of the offence to commit an offence as follows;

> "**In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An 'attempt' is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded"**

38. It was therefore its submission thatSection 308(1) of the Penal Code prescribes a minimum sentence of seven (7) years and the court after taking into consideration that the Appellant was a first offender, sentenced the Appellant to serve seven (7) years of imprisonment which was fair in the circumstances. Consequently, the State submitted that the appeal has no merit and prayed that the same be dismissed.

39. This court entirely agreed with the findings of the Learned Trial Magistrate when he stated as follows:-

> **"I do not agree that the accused person's intention was to rob the complainant of his motor vehicle. If it were, then they had no reason to damage it. My take it** (sic) **that the accused persons intended to either** (sic) **rob, injure or even kill the complainant. I therefore find the accused persons not**(emphasis court) **guilty of the offence of the attempted robbery violence** (sic) **contrary to section 297(2) of the Penal Code.What they intended to do to the complainant is not clear, but whatever it was, this court is convinced that the accused persons were prepared to commit a felony. I thus** (sic) **both accused person** (sic) **guilty of the offence of preparation to commit a felony contrary to section 308 of the Penal Code. The accused** (sic) **convicted accordingly under section 215 of the Criminal Procedure Code."**

40. As this court agreed with the State that the Prosecution proved that the Appellant and his Co-Accused were identified as having been near PW 1's and PW 2's house and in fact tried to attack PW 1 and PW 3 but did not steal anything from PW 1, this court reluctantly agreed with the Learned Trial Magistrate that they may have been preparing to commit a felony.

41. Indeed, as the State rightly submitted, the Learned Trial Magistrate had power under Section 179(2) of the Criminal Procedure Code. However, the Appellant and his Co-Accused were extremely lucky that the Learned Trial Magistrate convicted them on the lesser charge of preparing to commit a felony and sentenced them to seven (7) years. If this court were sitting as the trial court, it would have found the Appellant and his Co-Accused guilty of attempted robbery.

42. Having said so, this court was not aware if the Appellant's Co-Accused had lodged any appeal against the sentence that was imposed on them by the Learned Trial Magistrate. This court therefore opted to leave the sentence that was meted out undisturbed as the Appellant could end up suffering a stiffer sentence than his Co-Accused if he did not appeal despite them having been guilty of the same offence.

**DISPOSITION**

43. The upshot of this court's judgment, therefore, was that the Appellant's Appeal that was lodged on 26th January 2015 but erroneously stamped 26th January 2015 was not merited and the same is hereby dismissed.

44. It is so ordered.

**DATED** and **DELIVERED** at **VOI** this**30th** day of **November** 2017

**J. KAMAU**

**JUDGE**

In the presence of:-

Ilia Musau-Appellant

Miss Anyumbafor State

Susan Sarikoki– Court Clerk