



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.271 OF 2010

MUSA KIPROTICH CHEPTARUS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**[An Appeal from original conviction and sentence in Eldama Ravine SNR.R.M.CR.C. NO.913/2010
by Hon. M. Kasera, Senior Resident Magistrate, dated 9th September, 2010]**

JUDGMENT

The appellant, **Musa Kiprotich Cheptarus**, who was charged with the offence of **malicious damage to property** contrary to **section 330 (1)** as read with **section 339 (2)** of the **Penal Code** pleaded guilty and upon conviction sentenced

“.....to pay Kshs.15,000/= to the complainant in default to serve 18 months in jail plus serve 8 months in jail.”

He had admitted that on 7/9/2010 at Mogotio Township he burnt a mattress, clothes, blankets, bed sheets, food stuff and plates valued at Kshs.12,180/=belonging to Gladys Kipkemoi, who was his tenant.

The appellant was aggrieved hence this appeal in which through counsel he has raised the following grounds:

1. that the trial court failed to consider in her sentence that the appellant had pleaded guilty, was a first offender and was repentant even offering to pay Kshs.15,000/= to the complainant as compensation;
2. that the court erred in failing to impose a non-custodial sentence;
3. that no social inquiry report was obtained before the sentence.

Learned counsel for the respondent observed that the order to pay compensation to the complainant was regular but the additional jail sentence of 8 months was without legal basis; that the court under the provisions of **section 175(2) (b)** of the **Criminal Procedure Code** ought to have imposed a period within which the compensation would be paid failing which the same would be enforced as a civil debt.

I have considered those arguments. Ordinarily, by dint of **section 348** of the **Criminal Procedure Code**, no appeal lies on a conviction arising from a plea of guilty except as to the extent and legality of the sentence. But it is now settled that the section is not a complete bar to appeal on conviction of a plea

of guilty based on any other ground. The appellant here is only concerned about the sentence.

I have set out above the sentence imposed by the learned magistrate. Although not expressly stated, the sentence was no doubt based on the provisions of **section 175**, an amendment of 2003 to the **Criminal Procedure Code**, which, for the first time introduced the concept of compensation in criminal cases. The learned trial magistrate ordered the appellant to compensate the complainant in the sum of Kshs.15,000/= and in default to serve 18 months imprisonment. In addition he was to suffer a further 8 months imprisonment. That sentence was clearly not lawful and certainly, not based on the provisions of section 175 aforesaid.

The sentence was unlawful for the following reasons:

- 1) the compensation order is only enforceable in the same manner as a judgment in civil proceedings for the amount awarded by the order. The default sentence of 18 months was not only irregular but also unlawful;
- 2) the additional eight months imprisonment has no basis in law once the court decided to order compensation
- 3) the learned magistrate ordered that the case be mentioned the day after her order so as to confirm if payment had been made. That was equally against the law. **Section 175 (4) (a)** aforesaid provides that no order for compensation can take effect before the expiry of the time limited for appeal against the conviction or sentence.

For these reasons, I allow the appeal on the sentence and in terms of **section 175 (5)** do vary it as follows:

It is apparent that there has been some difficulty in tracing the complainant for purposes of effecting the order of compensation. From 8th September, 2010 when the order was made, the efforts by the OCS, Mogotio to locate the complainant has been futile. The appellant having pleaded guilty and having been convicted accordingly is now sentenced to the period he has already served (6 months). He shall be set free unless lawfully held.

Dated, Delivered and Signed at Nakuru this 14th day of March, 2011.

**W. OUKO
JUDGE**