



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CRIMINAL APPEAL NO 10 OF 2015**

**ILIA MUSAU.....APPELLANT/RESPONDENT**

**VERSUS**

**REPUBLIC.....RESPONDENT/APPLICANT**

**RULING**

**INTRODUCTION**

1. The Appellant herein and his Co-Accused Abraham Willy Kiberenge, were both convicted by Hon Nyakundi L.M. Ag Principal Magistrate on 2<sup>nd</sup> October 2013 for the offence of preparation (**sic**) to commit a felony contrary to Section 308 of Penal Code Cap 63 (Laws of Kenya) after he found that the Prosecution had not proved the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code. He sentenced each one of them to serve seven (7) years imprisonment.

2. Being dissatisfied with the said Learned Magistrate's Judgment, the Appellant herein lodged a Petition of Appeal on 26<sup>th</sup> January 2015, which was erroneously bore a stamp of 26<sup>th</sup> January 2014. On 27<sup>th</sup> September 2016, this court directed the Appellant to file his Written Submissions. On 3<sup>rd</sup> November 2016, he filed the said Written Submissions and a Notice of Motion application seeking to amend his Grounds of Appeal. The State was directed to file its Written Submissions by 1<sup>st</sup> December 2016.

3. However, on the said date, counsel for the State informed the court that it wished to file a Cross-Appeal on the ground that although the said Learned Trial Magistrate found the Appellant and his Co-Accused guilty of the offences of attempted robbery and malicious damage to property, he failed to sentence the Appellant on the second offence. The State was therefore directed to file a formal application so that the issue could be dealt with before delving into the substantive appeal.

4. The State therefore filed its Notice of Motion application dated 7<sup>th</sup> December 2016 and on 14<sup>th</sup> December 2016. It was filed pursuant to the provisions of Section 354 of the Criminal Procedure Code and sought the following orders:-

**1. THAT leave be granted out of time for the Respondent/Applicant to seek to invoke the powers of this honorable court to ammend(**sic**) the judgment issued by the subordinate court criminal case no, 221 of 2013 R vs Ilia Musau & another on 2/10/2013 in the proceedings and issue sentence in the 2<sup>nd</sup> count of malicious damage to property contrary to section 339(1) of the penal code before the determination of the appeal.**

**2. THAT the honourable court be pleased to issue any such order as it may deem necessary to meet the demands of fair administration of justice.**

5. In response thereto, the Appellant filed a Notice of Motion application on 15<sup>th</sup> March 2017. It was filed pursuant to Section 348 of the Criminal Procedure Code and had sought the following orders:-

**1. THAT he begged leave to be granted out of time (sic) for the appellant to seek to invoke section 348 of the CPC to challenge the applicant (sic) request of the trial court in respect of criminal case No 221 of 2013 REP =VS=ILIA MUSAU AND ANOTHER judgment dated 2<sup>nd</sup> October, 2013.**

**2. THAT this honourable court be pleased to allow him to challenge the applicant (sic) request with the grounds as illustrated.**

6. Guided by the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to the procedural technicalities, this court directed that the said application would be deemed to have been a response to the State's application as counsel for the State indicated that she understood what the Appellant, who was appearing in person, intended to say.

7. When the matter came up on 12<sup>th</sup> April 2017, both the Appellant and the counsel for the State asked this court to deliver its Ruling based on the Written Submissions they had both filed without highlighting the same. The Ruling herein is therefore based on the said Written Submissions.

### **LEGAL ANALYSIS**

8. The Appellant's Written Submissions were filed on 15<sup>th</sup> March 2017 while those of the State were dated 11<sup>th</sup> April 2017 and filed on 12<sup>th</sup> April 2017. The State's application was premised on the ground that although the Learned Trial Magistrate convicted the Appellant of the offences of attempted robbery and malicious damages, he only sentenced him on the first offence.

9. It relied on the provisions of Section 348A of the Criminal Procedure Code Cap 75( Laws of Kenya) that stipulates as follows:-

**“Where an accused has been acquitted in a trial held by a subordinate court or where an order refusing to admit a complaint or formal charge or an order dismissing a charge has been made by a subordinate court the director of public prosecution may appeal to the high court from the acquittal or order on a matter of law.”**

10. It pointed out that the Appellant was not acquitted but was convicted and that the Learned Trial Magistrate erred when he issued an improper sentence. It submitted that it could not file a Cross-Appeal in the matter herein as the Appellant was not acquitted and that its present application was proper as it was merely responding to the Appellant's Petition of Appeal and seeking an enhancement of the sentence that was meted upon the Appellant herein.

11. It referred this court to Section 354 (3) (a)(ii) of the Criminal Procedure Code that provides as follows:-

**“The high court has powers in an appeal against conviction alter the finding, maintaining the sentence or with or without altering the finding reduce or increase the sentence.”**

12. It was therefore its submission that this court ought to alter the nature of the sentence that was delivered by the Learned Trial Magistrate as it had power to do so. It placed reliance on the case of **Busiku vs Uganda Criminal Appeal no. 33 of 2011 [2015] UGSC 3** in this regard.

13. On his part, the Appellant argued that amending the decision of the Learned Trial Magistrate at this stage would amount to a failure of justice, mistrial and annuity (sic) of the case. It was evident from his submissions that the main ground he was relying upon was that the State would not suffer any prejudice because the Trial Court had discretion under Section 348 of the Criminal Procedure Code to charge him

on the main count without necessarily including the alternative charge.

14. He also raised the issue of his identification as the offence was said to have occurred in the night where positive identification was not possible. This court did not address itself to this issue as this would be delving into the merits or otherwise of his Appeal.

15. A careful perusal of the State's application showed that it was merely seeking leave to invoke the powers of this court to amend the decision of the Learned Trial Magistrate. It was not clear under what provision the State was seeking this leave as Section 354 of the Criminal Procedure Code is clear that the high court has power to move *suo moto* and alter the nature of the sentence with or without altering the finding of a trial court.

16. While hearing an appeal, Section 354(3)(ii) gives power to the High Court to alter the nature of the sentence. The said Section stipulates as follows:-

**(a) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—**

**(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence (emphasis court);**

17. It was therefore the view of this court that the said application was superfluous and misplaced as the State could have argued its submissions regarding the enhancement of the sentence during the hearing of the Appeal herein. Doing so at this stage was completely premature as it also had the potential of dragging this court into addressing the merits or otherwise of the Appellant's Appeal.

18. Having said so and in the spirit of moving this matter forward, this court looked at the substantive nature of the State's application as was set out in its Written Submissions and observed that the Learned Trial Magistrate was clear in his mind that he had convicted the Appellant and his Co-Accused of the offence of preparation (**sic**) of committing a felony and convicted them accordingly.

19. In convicting the Appellant and his Co-Accused as aforesaid, he must have had in mind the provisions of Section 179(2) of the Criminal Procedure Code that stipulates as follows:-

**“When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”**

20. In his Judgment, he rendered himself as follows:-

**“...Having found that the accused were the people who attacked the complainant and damaged his motor vehicle registration number KTX 296 Datsun pick-up, the question to answer now is whether the accused are guilty as charged. I find not. (emphasis court) The investigating officer in this case got it wrong when it came to preferring charges. 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.”**

21. It was evident from the above findings that the Learned Trial Magistrate was clear in his mind as to

what he felt ought to have been the proper charge against the Appellant and his Co-Accused.

22. Taking the interpretation that was adopted by the State would not only amount to a miscarriage of justice against the Appellant but it would be actually making an assumption that the Learned Trial Magistrate inadvertently failed to include the conviction of causing malicious damage to property an omission the State was contending could be corrected by this court.

23. Accordingly, having considered the affidavit evidence and the Written Submissions in support of the parties herein, this court came to the firm conclusion that the State's present application was misplaced. It was difficult to discern exactly what it wanted this court to do at this stage.

24. 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.

25. It was the considered view of this court that the case of **Busiku vs Uganda** (Supra) that was relied upon by the State was not relevant in the circumstances of the case herein and was distinguishable as it related to the procedure of enhancement of a sentence. It had nothing to do with leave by the State to seek to invoke the powers of this court to amend the judgment. The Learned Trial Magistrate addressed himself to the charge he was of the view ought to have preferred against the Appellant herein.

### **DISPOSITION**

26. In the circumstances foregoing, this court's decision was that the State's Notice of Motion application dated 7<sup>th</sup> December 2016 and filed on 14<sup>th</sup> December 2016 was not merited and the same is hereby dismissed.

27. It is hereby directed that this matter shall be mentioned on 20<sup>th</sup> June 2017 for further orders and directions.

28. It is so ordered.

**DATED and DELIVERED at VOI this 15<sup>th</sup> day of June 2017**

**J. KAMAU**

**JUDGE**

In the presence of:-

Ilia Musau - Appellant

Miss Karani - for State

Josephat Mavu