



**Wanyonyi v Republic (Criminal Appeal E176 of 2023)
[2024] KEHC 11508 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11508 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E176 OF 2023
DR KAVEDZA, J
SEPTEMBER 30, 2024**

BETWEEN

MOSES WANJALA WANYONYI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. D. Kuto (PM) on 5th May 2022, at Kibera's Chief Magistrate Court, Criminal Case No. 464 of 2018 Republic v Moses Wanjala Wanyonyi & Cedric Shikoli Bulinda)

JUDGMENT

1. Moses Wanjala Wanyonyi, the appellant herein, jointly with another not before this court was charged and after a full trial, was convicted for the offence of tampering with a telecommunication plant contrary to Section 32(c) of the *Information and Communication Act*, Chapter 411(A) of the Laws of Kenya. He was sentenced to ten (10) years imprisonment.
2. Being aggrieved, he filed an appeal, challenging his conviction and sentence. In his appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He argued, that the prosecution's evidence was not proved beyond reasonable doubt. In addition, the trial court failed to consider the time spent in remand custody during sentencing. He urged the court to quash his conviction and set aside the sentence imposed.
3. This is the first appellate court. As expected, I have re-analysed and re-evaluated afresh all the evidence adduced before the lower court. I have drawn my own conclusions while considering that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of Okeno Vs. Republic [1972] EA 32. where the Court of Appeal set out the duties of a first appellate court.
4. The *Kenya Information and Communications Act*, cap 411A, laws of Kenya. Section 32 (c) of the Act reads as follows:



A person who willfully, with intent to—

- (a)
- (b) ...
- (c) unlawfully intercept or acquaint himself or herself with the contents of any message; vandalizes, damages, removes, tampers with, touches or in any other way whatsoever interferes with any telecommunication apparatus or telecommunication line, post, or anything whatsoever, being part of or used in or about any licensed telecommunication system, commits an offence and shall be liable, on conviction to a fine of not less than five million shillings or to imprisonment for a term of not less than ten years or to both.

5. On 31st March 2018, Hillary Kiptum Rono (PW1), monitoring Telkom property at Jamhuri Estate, was alerted by a passerby about individuals cutting cables. He quickly changed into civilian clothes, called for reinforcements, and proceeded to the scene. Upon arrival, he discovered two suspects in a hole arranging cut cables. Reinforcements arrived, leading to their arrest, and the recovery of cut cables, overalls, and tools including a spade, mattock, helmets, and hacksaws. He identified the appellant as one of the suspects arrested while cutting the said cables.
6. Laban Malonza (PW2) was part of the reinforcement team that arrived. When they confronted the suspects, they claimed to be Safaricom employees. However, they lacked any identification documents. The team confiscated 91 bags of copper wire and other equipment. Juma Ishmael Maruti (PW3) confirmed the arrests, stating that the appellant and another were caught with bags of cables. He also identified the appellant in court. CPL Florence Thurania (PW4) later interviewed the suspects at Kilimani Police Station, where they admitted their actions but lacked necessary permits, leading to the production of the seized items as evidence.
7. The evidence of PW1, PW2, and PW3 is that the appellant was arrested while committing the offence. I do not find the evidence of the three prosecution witnesses contradictory in any way. It placed the appellant at the scene of the offence and was armed with the tools for the commission of the offence.
8. In his defence, the appellant contended that on the day of his arrest, he was on Ngong Road heading to work at Yaya when he was put in a vehicle and taken to Kilimani police station. He alleged that he only heard of the charge when he appeared in court. He maintained his innocence.
9. The prosecution evidence on record was overwhelming against the appellant. He was found in the act. His defence was dismissed, and rightly so, after consideration by the learned trial magistrate. His defence was an afterthought. I hold that the prosecution proved its case to the required standard of proof on the charge of tampering with a telecommunication plant beyond reasonable doubt. The conviction of the trial court is therefore affirmed.
10. On sentence, the appellant was sentenced to serve ten (10) years imprisonment. The appellant was sentenced to serve 10 years imprisonment. It has been argued that this was harsh and excessive. In addition, the trial court failed to consider the time spent in remand custody. Section 32(c) of the [Kenya Information and Communications Act](#) provides that upon conviction to a fine of not less than five million shillings or imprisonment for a term of not less than ten years or to both.
11. The Court of Appeal in [Dismas Wafula Kilwake vs. Republic](#) [2019] eKLR Criminal Appeal No. 129 of 2014 was emphatic that minimum mandatory sentences violate the right of an accused to a fair trial in so far as such sentences take away the discretion of the court in considering the mitigation of the accused. Considering the circumstances of this case in totality, I find that even though the sentence passed by the trial court was legal, excessive punishment does not serve the interests of justice, and there



are exceptional instances where the trial court can depart from the prescribed minimum sentence. It is my finding that punishment imposed was excessive and ought to be set aside. I am guided by the decision in Wagude v R (1983) KLR 569 where Kneller, Hancox JJA. & Chesoni, Ag. JA. held that:

“The Court may interfere with the sentence only if it is shown that it was manifestly excessive....”

12. In the circumstances, it is my view that the sentence of ten (10) years imprisonment meted out though legal was harsh and excessive. I hereby exercise my discretion and substitute the sentence of ten (10) years with a sentence of five (5) years imprisonment. The sentence shall be computed less by nine (9) months and eighteen (18) days spent in remand custody pursuant to section 333 (2) of the Criminal Procedure Code.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER 2024

D. KAVEDZA

JUDGE

In the Presence of:

Appellant present

Maroro for the Respondent

Achode Court Assistant

