



REPUBLIC OF KENYA



KENYA LAW
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**Karanja & 3 others v Republic (Criminal Appeal E014 of 2022)
[2023] KEHC 19350 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19350 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E014 OF 2022
RB NGETICH, J
JUNE 29, 2023**

BETWEEN

**GERALD RUBIA KARANJA 1ST APPELLANT
PETER MATUNDA OKYOMA 2ND APPELLANT
PATRICK MWANGI MUTURI 3RD APPELLANT
JOSEPH NJUGUNA WAMBUI 4TH APPELLANT**

AND

REPUBLIC RESPONDENT

*(An appeal against the conviction and sentence from the Judgment of
Honourable R. Koech (SRM) delivered on the 9th Day of March, 2022
at Eldama Ravine Magistrate's Court Criminal Case No.1009 of 2018)*

JUDGMENT

1. The Four accused persons herein were jointly charged with two counts. Count I is the offence of stealing contrary to section 268 as read with section 275 of the penal code and count II is the offence of electrical apparatus contrary to section 64 (4) of the *Energy Act* No. 12 of 2012. The 1st accused Gerald Rubia Karanja was charged with a 3rd count of personation contrary to section 382 as read with section 36 of the penal code.
2. Particulars to count I are that on the 28th day of June 2018 at Koitebes area Mogotio subcounty within Baringo county, accused persons jointly with others not before court, stole three (3) blocks of copper windings from transformer of substation number 143/673-50KVA 33KV valued at Kshs 260,000 the property of Kenya power and Lighting company Limited.



3. Particulars to Count II are that on the 28th day of June 2018 at koitebes area of Mogotio subcounty within Baringo county, accused persons jointly with others not before court willfully vandalized one (1) transformer of sub-station number 143673 50KVA-33KV Valued at Kshs 1,500,000 the property of Kenya power and lighting company.
4. Particulars to count III are that on the 28th day of June 2018 at Mogotio police station in Mogotio subcounty within Baringo county, accused 1 Gerald Rubia Karanja falsely represented himself to be Stephen Mwangi NduatI of Nation Identity card number 13622811 during interrogation for the offence of stealing and vandalism of electricity apparatus by number 47795 police constable Charles Kipkoech and number 54133 Corporal Chacha Murimi who are investigating officers.
5. By judgment delivered on 9th March 2022, the four accused persons were found guilty of count 1 and II and were jointly convicted of the two counts. The 1st accused was also found guilty of count III and convicted accordingly. For count one, each accused was fined kshs 100,000 in default one-year imprisonment, count II fine of kshs 5,000,000 in default 10 years imprisonment and for count III, 1st accused was fined kshs 50,000 in default 6 months imprisonment.
6. Being dissatisfied by the said judgment, the accused persons filed separate appeals on both conviction and sentence through files HCRA NO.15,16 17 and 18 appeal all of 2022 which were consolidated in HCRA NO.14 of 2022 on the following grounds: -
 - i. That the trial magistrate erred in law and fact by convicting on circumstantial evidence
 - ii. That they were forced to proceed when the trial magistrate was transferred that the trial magistrate erred by bringing his own hypothesis on the photo of copper winding which the trial magistrate recorded to have been absent
 - iii. That the trial magistrate never read and determined the description given by the witness on the motor vehicle (kc) in re-examination.
 - iv. That the trial magistrate erred by failing to consider his defence which was sworn and not shaken by the prosecution.
 - v. That the trial magistrate erred by convicting the accused persons while evidence incriminating was not water tight on both exhibits and arrest.
 - vi. That the trial magistrate erred in law and facts by holding that their clothes had oil disregarding the oil was deliberately spilled by Pw6 Mr. chacha.
 - vii. That the trial magistrate erred in law and facts by rejecting their defence without giving reason for so doing.
7. In view of the fact that sentence to count I and III were one year and 6 months respectively, the two sentences have been served and remaining for appeal is count II where the accused persons were fined kshs 5,000,000 in default 10 years imprisonment.

Submissions by Appellants

8. The accused persons restated grounds of appeal. In respect to oil in the clothes, the appellants submitted that the analyst said there was no oil sent to him by the Investigating Officer for analysis.
9. They further submitted that no one gave testimony to the effect that all the accused persons/appellant brushed shoulders with the cooling oil of the transformer which they vandalized as observed by the magistrate; further that the driver was in the vehicle all through and it was not possible for the driver's



- clothes to have oil; they submitted that there must have been a foul play of the jackets and jumpers; they further posed the question as to why no other clothes of the accused persons had oil; and further the bottle of the investigating officer was not accounted for.
10. Further, pw2 who said he smelt transformer oil in motor vehicle KBT121C never asked them to remove clothes on 28th June 2018 at 3.40pm when they were arrested; that pw6 the investigating officer said he noticed oil on accused persons clothes on 29th June 2018. They further submitted that pw1 went to police station on 29th June 20218 and he never noticed accused persons' clothes were logged with oil.
 11. In respect to motor vehicle KBT121C, they submitted that the motor vehicle was not positively identified at the scene neither were they identified at the scene. That from evidence of pw3 and pw4 they saw a vehicle move front and back then they saw 4 people run and enter the vehicle. That the number of suspects is not consistent with the number of suspects seen at the road block; that the items found at the scene were found in motor vehicle KBT121C. They submit that KBT121C found at the road block cannot be conclusively said that it is the one seen by pw3 and pw4 at the site; further the prosecution failed to call the owner of the car to give account of movement of the car.
 12. 1st appellant submitted that the trial magistrate said he was in court on 29th June 2018 up to 1350Hours while that is the time, he was being booked at Mogotio police station and this can be confirmed through miscellaneous file. They submitted that pw2 said the cooper windings were recovered on 29th June 2018 hidden in a bush while led by 3rd accused and with his co accused. He posed a question as to whether it is 1st accused and 3rd accused who led police to the bush where cooper windings were recovered.
 13. The appellants submitted that if pw3 and pw4 said the cooper windings were put in the car, how could they be recovered in a bush; how did they find their way back to the scene. They further submitted that pw5 said he was not given photo of cooper windings.

Respondents Submissions

14. The prosecution submits that under section 64 (4)(b) of the *Energy Act* No.12 of 2012, the prosecution were required to establish that the appellants willfully or intentionally interfered with the electrical apparatus managed by the licensee who in this case is KPLC by vandalizing or damaging the same and from evidence of the 7 prosecution witnesses, there is no doubt that the KPLC transformer in question was vandalized and appellants were found in gate away vehicle intercepted and were smelling transformer oil as transformer oil had spilled to their clothes and further the appellants did not give a reasonable explanation on what they were doing at the area at that time of the night while in possession of the tools that were established to have been used to vandalize the transformer.
15. On whether there was overwhelming contradictory evidence and whether the magistrate relied on evidence not adduced by witnesses, the respondent submits that the record is clear the appellants did vandalize the transformer belonging to KPLC and stole copper windings which upon their arrest, they led the police into recovery.
16. The state counsel further submitted that the appellants were found in a white probbox KBT 121C with clothes with oil spills confirmed to be transformer oils plus items used to vandalize the transformer found in the vehicle which were produced in court as exhibits; and copper windings found few meters from the vandalized transformer show there was no overwhelming contradictory evidence.
17. The stat counsel further submitted that Dw3 and Dw4 indicated that they had been hired to transport donkeys but did not adduce any evidence to confirm this and it was not disputed that all the appellants were in white probbox at the time of arrest; and further DW1 confirmed the registration number of the



probox and he was the driver at the time of the arrest; and all jackets were produced as exhibits 4a-d which contained transformer oils which position was confirmed by the government analyst PW7.

18. Further, the appellants did not challenge or dispute identification of jackets by PW2 neither did the Appellants deny ownership of the jackets; that the jackets had oils suspected to be transformer oils and none of the appellants explained during the defence how the clothes came in contact with the oil; that their defence was therefore a sham and prosecution's case was not challenged.
19. On sentence, the state counsel submitted that the trial magistrate did not rely on wrong principles or overlooked some material factors and cited the case of *Ogola s/o Owuor (1954) EACA270*.

ANALYSIS AND DETERMINATION

20. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind the fact that I never had the opportunity to hear the witnesses and observe their demeanor. Principles that apply in the first appellate court are set out in the case of *Okeno VS Republic [1972] EA 32* where it was stated as follows: -

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v. Republic [1957] EA 570*.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (*See Peters v. Sunday Post, [1958] EA 424*.)”

21. In view of the above, I have perused the lower court record and wish to consider the following issues:-
 - i. Whether proved the charge against the appellants beyond reasonable doubt
 - ii. Whether the sentence imposed was harsh and excessive
 - i. Whether proved the charge against the appellants beyond reasonable doubt
22. From the evidence of the 7 prosecution witnesses, it is not in doubt that indeed the KPLC transformer in question was vandalized. Pw3 and pw4 saw the vandalized transformer being loaded to motor vehicle KBT121C a white probox. From the evidence adduced, the said vehicle was intercepted at a road block with the appellants were smelling transformer oil, their clothes had spills of transformer oil.
23. The appellants did not give a reasonable explanation on what they were doing at the area at that particular time of the night while in possession of the tools that were established to have been used to vandalize the transformer; why their jackets/jumper had and smelt transformer oil. These occurrences/evidence clearly link them to vandalism of the transformer.
24. On whether there was overwhelming contradictory evidence and the effect thereof and whether the magistrate brought forth and relied on evidence not adduced by witnesses, there is no dispute that all the appellants were found in a white probox KBT 121C and had clothes with oil spills confirmed to be transformer oils, the items used to vandalize the transformer were found in the said vehicle and were produced as exhibits.
25. The appellants led police to a bush where copper windings about 100 meters from the vandalized transformer. The alleged contradiction in my view do not raise any doubt on strong evidence adduced by the prosecution witnesses. There is no doubt that it is the appellants who vandalized the transformer belonging to KPLC and stole copper windings which were recovered by police led by the appellants.



26. To prove the charge of vandalism of power apparatus contrary to Section 64(4)(c) of the *Energy Act* by circumstantial evidence, the prosecution was required to adduce evidence to show appellant's involvement in the act of vandalism.
27. Record show that the appellants were arrested shortly after occurrence of the offence and were found with various tools used to vandalize the transformer and their clothes had and smelt transformer oil. The Appellants failed to explain how they came about to be in possession of the assorted tools including spanners, crowbar which were suspected to have been used to vandalize the transformer. Further, they led the officers to where they had hidden the stolen copper windings. It was not also disputed that it had rained in the area on the material day and appellants shoes were muddy. This clearly confirm that they were involved in vandalism of the transformer.
28. From the foregoing I agree with the trial magistrate that the prosecution proved the charge beyond any reasonable doubt. I see no merit in appeal against sentence and do uphold conviction.

ii. Whether sentence imposed was harsh and excessive

29. On sentence, the Appellant was sentenced under Section 64(4) of the *Energy Act* which provides for a mandatory minimum sentence of fine of not less than five million shillings or to imprisonment for a term of not less than ten years or both.
30. The Appellants were sentenced to a fine of five (5) million shillings or in default to serve ten (10) years imprisonment. Accordingly, the sentence imposed by the trial magistrate is legal. From the forgoing, I uphold sentence imposed by the trial court.
31. I take note of the fact that the trial magistrate did not indicate whether the sentences were to run consecutively or concurrently. I hereby order that the sentences imposed to run concurrently.
32. Final orders: -
 1. Appeal on both conviction and sentence is hereby dismissed.
 2. Period served from the date of arrest to be reduced from sentence imposed by trial court.
 3. Sentences imposed to run concurrently.
 4. Right of Appeal 14 days.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET THIS 29TH DAY OF JUNE 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Ms. Ratemo for state.

Mr. Nyagaka for accused persons.

Accused 1 present.

Accused 2 present.



Accused 3 present.

Accused 4 present.

