



**Kemboi & another v Republic (Criminal Appeal E014 of 2022)
[2023] KEHC 24802 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24802 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL APPEAL E014 OF 2022
JR KARANJA, J
OCTOBER 25, 2023**

BETWEEN

NAOH KIPNGETICH KEMBOI 1ST APPELLANT

THOMAS KIPLAGAT MAIYO 2ND APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Being dissatisfied with the decision and judgment of the Resident Magistrate at Kapsabet in CMCC NO. 1021 of 2020 in which the Appellants Noah Kipngetich Kemboi and Thomas Kiplagat Maiyo were convicted and sentenced to a fine of five (5) million Kenya Shillings in default to ten (10) years imprisonment, the present appeal was preferred on the basis of the grounds set out in the petition of appeal filed herein on 1st July 2022.
2. The charge against the appellants was vandalism of energy installation and infrastructure of electrical apparatus, Contrary to Section 169 (1) (b) of the *Energy Act* No. 1 of 2019
The particulars were that on the night of 1st/ 2nd June, 2020 at Sinendet Village Nandi East within Nandi County jointly with others not before the court the Appellants vandalized low voltage line an energy installation and infrastructure all valued at Kshs. 350,000/- under the Control and property of the Kenya Power.
3. After a full trial, the appellants were convicted and sentenced accordingly, hence, this appeal which is a consolidation of separate appeals preferred by each of the appellants and argued together by way of written submissions filed by Messrs. Kipkosgei Choge & Company Advocates on behalf of the Appellant and in opposition thereto by the State/ Respondent through the Director of Public Prosecution (DPP).



4. Learned Counsel, Mr. Choge, appeared for the Appellants on the appointed date of the hearing of the appeal while the Learned Senior Principal Prosecution Counsel (SPPC) Ms. Brenda Oduor, appeared for the State/ Respondent.

Having considered the appeal on the basis of the supporting grounds and the rival submissions the duty of this court was to revisit the evidence adduced at the trial and draw its own conclusion bearing in mind that the trial court had the advantage of seeking and hearing the witnesses.

5. Accordingly, the prosecution case was summarily that on the material date a farmer, Sally Kemei (PW1) proceeded to a farm far away from her home where she noticed that an electric wire had been removed from an electric pole. She reported the matter to the area chief who referred her to the police. She then made the necessary report at Chemwani Police Post and was assured that investigations would be carried out. This was followed by a visit to the scene by security officers from the Kenya Power Company. On 12th June 2020 and later on 19th June, 2020, she (PW1) was called by the Chief and informed of the arrest of some suspects and recovery of a pole. She identified the pole and learnt that the two Appellants, her neighbours, were the suspects.
6. Ernest Kipchumba Ruto (PW2), was the Area's Assistant Chief at the material time. He was at work when he received a report from Sally (PW1) that an electric line in her plot of land had been vandalized. He referred her to the police and on 3rd June, 2020, visited the scene where he noted that electric lines had been cut from a pole which was in place. He decided to investigate the matter together with his colleagues and while on patrol at night during the curfew period on 18th June 2020, he proceeded to the home of the second Appellant (Accused two) where he found him together with the first Appellant (Accused one). Besides them, was at electricity pole. He (PW2) arrested both Appellants and alerted the Area Chief before taking them to Nandi Hills Police Station.
7. A technician with Kenya Power, Jonah Kiplating Miso (PW3), received the necessary report on 12th June, 2020 and on 19th June, 2020 proceeded to Nandi Hills where he found the recovered pole besides the road. It had some electric wire or remainder thereof on it.

CPL Felix Mutai (PW4), was attached to Kenya Power as an investigator at the time. He received the necessary report on 12th June, 2020 and on proceedings to Nandi Hills on 19th June, 2020, he saw the material pole and identified it as one of those that had been stolen. It had a flash stay wire. He produced the pole and wire as exhibits (P. Exhibit 1 & 2) after having arraigned the Appellants in court.

8. The defence for both Appellants was a denial and an indication that they were arrested together on 18th June, 2020 after attempting to dodge the area chief who was on night patrol during the curfew period. They happen to have bumped into one another inside the home of the second Accused while trying to avoid the patrolling group of government officials. There was the material electricity pole beside them which they knew nothing about. They thus implied that they were not in possession of the pole when they were accosted by the Chief and arrested.
9. The trial court considered the evidence into totality and concluded that the appellants were guilty as charged. In that regard, the court rendered itself thus:

“from the evidence adduced, it is clear that electrically poles and wires were stolen from the farm of PW1 in the duration between 1st June, 2020 - 12th June 2020. She reported the incident at both the Police Station and Kenya Power Offices. Kenya Power visited the scene on 12th June, 2020 and found that 3 poles, conductor, and fits that hold the wires had been stolen. The pole recovered on the night of 18th June 2020 had flash stay. That was to show that it was an electricity pole. The pole was recovered 6 nights after it was discovered stolen.



From the evidence on record, no one saw the Accused Persons, uprooting the electricity poles or cutting the wires. All the witnesses who testified attested to events after the infrastructure had allegedly been vandalized. However, the two Accused Persons were found with the electricity pole lying next to them 6 nights after the poles were reported stolen The chief found then with a pole beside them. This, therefore, means the electricity pole was within the compound of the 2nd Accused and not out on the road as he alleged. The Accused Persons could not explain how the pole next to them got to the home.”

10. In this court's opinion, the evidence indicated that there was no dispute with regard to vandalism of energy installation and electrical infrastructure. Indeed the discovery of an uprooted electricity pole and remarks of the electrical wires mounted on it by Sally (PW1) and confirmation of the fact by the Assistant Chief (PW2) and official from the Kenya Power Company (PW3 and PW4) was enough evidence of the vandalism which would appear was rampant in the area as pointed out by the chief, (PW2).
11. The big question and indeed the basic issue for determination was whether the Appellants were the person /persons responsible for the vandalism. As was clearly noted by the trial court there was no eye witness to the vandalism. The Appellants were not seen or found by any of the prosecution witness in the act of vandalizing the electrical installation and/or infrastructure. This meant that the prosecution did not offer direct evidence against the Appellants and had therefore to rely on indirect or circumstantial evidence linked to the recovery of the electricity pole and wires (P. Exhibit 1 and 2) which had been vandalized and stolen.
12. The evidence by the Assistant Chief (PW2) clearly showed that he was the person who recovered the items while on patrol with his colleagues when his suspicion was aroused by the presence of the two Appellants at the recovery scene at that hour of the night. Both Appellants did not dispute that they were at that scene at the material time or that the pole was actually found there. They however, disputed the fact that they were in possession of the pole when it was recovered.
13. They (Appellants) attempted in their defence to justify their presence at the scene by each of them telling a “bull and cock” story of coincidentally bumping into each other inside the second Appellant’s home while each was allegedly dodging the Chief and his patrol team. The evidence against them strongly suggested that it was not a coincidence that they were together when the electricity pole and components were recovered lying down beside them. This fact overruled their contention that the pole was along a road and not within the house of the second Appellant at the time of recovery just next to them.
14. That evidence of recovery of the pole beside the Appellants established that they were in direct or constructive possession thereof. The possession itself was sufficient and evadible circumstantial evidence to prove that more likely than not, the Appellants were the person responsible for vandalizing the electrical installations and infrastructure.
15. For reasons foregoing, this court holds, that the Appellants conviction by the trial court was safe and proper and is hereby upheld.

With regard to the sentence imposed upon the Appellants, it was lawful and in tandem with Section 169 (1) (b) of the *Energy Act*. However, consideration being given to the fact that the Appellants were first offenders and persons of straw, the first Appellant being a toilet digger and the second Appellant, a tea picker the fine of five (5) million, was many light years away from their reach and hence, too excessive. The ten (10) years imprisonment was also too excessive in the circumstances of the case.



16. The sentencing provision of the *Energy Act* i.e. Section 169(1)(b) gives lee way for a trial court to either fine or imprison an offender or both. The prescribed minimum find of Kshs. 5 Million was probably informed by the offence of vandalism being classified as an economic crime. The term of ten (10) years imprisonment is not the minimum that a trial court can impose regard being given to the word. “be liable to a fine of not less than five Million Shillings or to a term of imprisonment of ten years or to both such fine and imprisonment.”
17. It is therefore the opinion of this court that the sentence imposed by the trial court was too harsh and excessive as to require interference at this juncture. In that regard, the sentence is hereby set aside and substituted for a sentence of two (2) years imprisonment for each of the Appellants.
18. Other than the alteration on the sentence, the appeal is largely dismissed for want of merit.
Ordered accordingly.

DELIVERED AND DATED THIS 25TH DAY OF OCTOBER, 2023

J. R. KARANJAH,

JUDGE

