Owili v Republic (Criminal Appeal E048 of 2021)
[2022] KEHC 11587 (KLR) (26 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11587 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E048 OF 2021

RPV WENDOH, J

JULY 26, 2022

BETWEEN

JAMES OKINYI OWILI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. James Okinyi Owili, the appellant herein, was convicted by the Hon Chief Magistrate's Court Migori on August 24, 2021 for the following offences:-

   Count 1: Vandalism of Electrical Apparatus contrary to section 64 (4) of the *Energy Act* No 12 of 2012.

2. The particulars of the charge are that on the February 25, 2017 at Namba area in Suna West Sub County, within Migori County of the Republic of Kenya, jointly with others not before court, willfully vandalized a transformer make Dongmi 5KVA valued at Kshs 150,000/= under the control of Kenya Power the license.

   Count II: Stealing contrary to section 268 (1) as read with 275 of the *Penal Code*: The particulars are that on the February 25, 2017 at Namba ara in Suna West Sub County within Migori County of the Republic of Kenya, jointly with others not before court, stole a transformer make Dongmi 5KVA valued at Kshs 150,000/= the property of Kenya Power.

   Count III: Obtaining by false pretences contrary to section 313 of the *Penal Code*: That particulars are that on the diverse dates between January 4, 2017 and January 30, 2017 at Oyani Maasai area in Suna East Sub County within Migori county, jointly with others not before court , with intent to defraud obtained from Ben Leonard Okello identity card number 467000 by false pretending that he was a Kenya Kenya Power and lightening personnel and was in a position to install electricity to Scolfield School.

Count IV: Falsely representing to be a person employed in the Public Service contrary to section 105 (b) of the *Penal Code*. The particulars are that on the January 4, 2017 at Oyani market area in Suna East Sub County within Migori, the accused falsely represented himself to be a staff of Kenya Power and Lightening Company, a person employed in the Public Service assumed construction of electrical power line and installed a transformer at Oyani Maasai area by virtue of that employment.

3. After a full trial, the appellant was sentenced as follows, Count I fine Kshs 5 million in default ten years imprisonment.

   Court1I: Fine of Kshs 100,000/= in default of 12 months imprisonment.

   Count III: Fine of Kshs 100,000/= in default 12 months imprisonment.

   Court IV: Fine of Kshs 300,000/= in default 6 months imprisonment.

4. Aggrieved by the said judgment, the appellant filed Criminal Appeal E0147 of 2021 and later, he engaged Kisera Advocate who filed Criminal Appeal E048 of 2021. They were later consolidated and proceeded as Criminal Appeal E048 of 2021. The grounds of appeal can be summarized into the following: -

   1. That the charges that the appellant faced were not proved to the required standard;
   2. That the trial magistrate erred in failing to appreciate that the items which had been marked for identification were not produced as exhibits;
   3. That there was no nexus between the appellant and the offences as charged;
   4. That the prosecution failed to call crucial witnesses and that section 200 *Criminal Procedure Code* was not complied with.
   5. That the sentences were excessive and punitive in the circumstances.

5. The Court directed that the appeal be determined by written submission's Mr Kisera filed his written submissions on June 7, 2022 while the prosecution counsel Mr Omooria, filed his on June 10, 2022.

6. Mr Kisera argued that the conviction was unsafe due to the many gaps and lapses in the prosecution case. The first ground argued was that the prosecution failed to produce crucial exhibits in the case . Counsel urged that an agreement and photocopies of identity cards marked MFI (a) (b) (c) (d) and (e) respectively were not produced in evidence; that the agreement made on January 25, 2017 and mentioned as exhibit 2 at page 13 of record of appeal was not produced in evidence; that a receipt mentioned by PW1 for Kshs 157,000/= was not produced in evidence; that an agreement dated January 27, 2021 and mentioned as Exh No 4 allegedly made on the back of Ex No 2 was never produced in evidence and is not in the court records; that there is no evidence that the said items were ever produced in evidence as exhibits and that without the said exhibits being produced in evidence, the convictions are unsafe and the prosecution case was not watertight enough to found a conviction; that the only exhibits produced were photographs 6a – e certificates of scenes of crime officer Ex No 7 and letter from Kenya Power Exh 8.

7. The second point taken by Mr Kisera is that nobody saw the appellant vandalize the transformer and the case against the appellant is anchored on circumstantial evidence but that the said evidence is unreliable; that PW1 told the court that she was told by her employee that the appellant had taken the transformer to the school. But the said employees were never called as witnesses and failure to call the two crucial witnesses raises a presumption that their evidence would have been adverse to the

prosecution case; that though PW5 told court that he witnessed PW1 pay the appellant Kshs 40,000/ = there was no tangible evidence to confirm that fact; that the threshold set down in Abanga alias *Onyango v Republic* Criminal Appeal 32 of 1990 on when a court can rely on circumstantial evidence was not satisfied.

8. The last point was allegedly falsely representing himself as an employee of the public service; it was argued that PW1 told court that the appellant represented himself to her on January 2, 2017 as an employee of Kenya Power and Lighting Co and showed him his staff identification; that PW3 testified to having arrested and searching the appellant who was in possession of the staff identification but the said identification card was never produced in evidence.

   On the arrest of the appellant, it was submitted that when police went to the school, PW1 refused to take police to the appellant's home but Asked another teacher to take police to the said home. However, the said teacher was never called as a witnesses nor was his identity known. Counsel urged the court to quash the conviction and set aside the sentences.

9. Mr Omooria also filed submissions and generally conceded to the appeal. He considered all the submissions of the appellant and agreed with counsel that the crucial exhibits mentioned in the evidence were never produced in evidence; that crucial witnesses Joel and Petronalla were never called as witnesses; that the prosecution failed to produce the staff identification card. H e did not oppose the appeal and observed that the prayer for retrial would not serve any purposes in light of the evidence tendered.

   This being a first appeal, it behoves this court to exhaustively re-examine all the evidence that was tendered before the trial court and make its own determination and conclusions. This court should however make some advance due to the fact it never saw or heard the witnesses testify. The court is guided by the decision of *Okeno v Republic* (1971) EA 32.

10. The prosecution called a total of six witnesses. PW1 Ben Leonard Okello, the Manager of Schofield Christian School in Suna told the court that the school depended on generators for power and they had lighting problems. On January 2, 2017, while on the way to school, he saw the applicant in a pick up vehicle which was carrying electric posts. He stopped the pick-up, introduced himself and the appellant introduced himself as a staff of Kenya Power. PW1 explained to him his predicament and they agreed to go and survey the school next day which the appellant did and gave him a form to fill; that on January 4, 2017, the appellant informed him that he first needed a transformer and asked for Kshs 200,000/=. PW1 paid him Kshs 120,000/= and they signed an agreement before an advocate, called Chepkwony and witnessed by Emily and Rashid. PW1 paid further sums to the appellant; i.e. Kshs 100,000/=; 157, 000/= and 50,000/= on January 25, 2017, January 26, 2017 and January 27, 2017 respectively and agreements were signed to that effect; that on February 25, 2017 while away from school, he was informed by his workers Joel and Petronalla that the appellant had delivered the transformer.

    On February 26, 2017 when the appellant threaten ed to repossess the transformer, PW1 paid him a further Kshs 40,000/= in presence of Rashid , and Gilbert Ombuya; that on February 26, 2017 the appellant caused an electric cable line to be connected from Awendo to the school; that on May 31, 2017 Kenya Power employees went to the school and identified themselves as from Kenya Power claimed that the transformer was not properly obtained and demanded to know who gave it o him. He asked a teacher to take them to the appellant's home and they repossessed the transformer. PW1 identified the photographs taken by the staff of Kenya Power.

11. PW2 Japhther Omoso Obwogo of Kenya Power recalled that on February 25, 2017, he learnt that a transformer had been stolen from Namba. He reported to police On May 31, 2017 he got information

that the transformer had been seen in Kwa Area. He went to the scene with others and recovered it. He did not know who stole it and installed it where they found it.

PW3 Nyongesa Khisa, a security officer with Kenya Power recalled the February 25, 2017 when he received a report of a transformer having been vandalized and stolen in Migori. He proceeded to the scene with police and the same was photographed. On May 31, 2017, he got a tip off that the transformer had been seen at Oyani area; near Schofield School. He proceeded to the scene found the transformer, interrogated the director PW1 who told them that it was mounted by Kenya Power Staff, Owili and that he had paid 457,000/=. On November 6, 2017, he found the appellant had been arrested by police and that on being searched, in identification card of Kenya Power was found on the appellant. PW3 admitted that the poles he saw put up at the school belonged to Kenya Power and that there were other people a mentioned as being with the appellant that were not arrested.

12. PW4 PC Edwin Mahera of Kenya Power accompanied PW2 to the scene where the transformer had been stolen on February 15, 2017. He started investigations and on May 31, 2017, found the transformer installed at Oyani Area, Schofield School. He enquired from the director of the school, PW1 how he got the transformer and he said he had bought from Kenya Power personnel and they signed sale agreements totaling 467, 000/=. PW4 took the transformer to Migori police station and that Accused was arrested on November 6, 2017. PW4 denied that the appellant is an employee of Kenya Power and a letetr to that effect was produced in evidence..

    PW5 Gilbert Ombuya Juma recalled that on February 26, 2017, he was with his pastor, PW1 who was communicating with somebody on phone and he learnt that PW1 was buying a transformer and saw PW1 pay the appellant Kshs 40,000/=; that he drafted for them an agreement which they signed but he did not see it in court. He later learned that the transformer was stolen.

13. When called upon to defend himself, the appellant generally denied knowing PW1, or selling to him any transformer or receiving any money.

    I have now considered the evidence on record the grounds of appeal, the submissions by both counsel.

    In criminal cases, the burden always rests on the prosecution to prove their case beyond any reasonable doubt and at no time does this burden proof to the accused person. See section 107 of the *Evidence Act*.

14. I note that this case was partially heard by Hon Odenyo Senior Principal Magistrate who took the evidence of four witnesses. Hon Onyango, Chief Magistrate took over on the fifth witness and the defence. He then wrote the judgment in which he found the appellant guilty on all the four counts.

    As rightly submitted, nobody witnessed the vandalizing and theft of the subject transformer. The evidence against the appellant is circumstantial; that is the fact that PW1 linked him to the theft because the appellant allegedly sold the transformer to him.

15. When a case entirely rests on circumstantial evidence, the said evidence must be taken with care and it must satisfy three tests which were laid down in the case of Abang'a alias Onyango v Republic Criminal Appeal 32 of 1990. The said case which has been adopted in many other cases like *Sawe v Republic* (2003) eKLR. The Court of Appeal laid down the following tests:-

    1. The circumstances from which an interference of guilt is sought to be drawn, must be cogently and firmly established;

    2. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

3. The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

16. In the testimony of PW1, he said that when they made agreements with the appellant, he gave out a copy of his identity card and so did the appellant and the witnesses. The first agreement made before an Advocate Chepkwony was marked for identification MFI (a) but it was never produced in evidence. Similarly the copies of identity cards for Emily and Rashid witnesses, PW1 and the appellant MFI (b) – (e) were never produced in evidence . And not only that, even the agreements ,marked as exhibit 2 and 3 were never actually produced in evidence. PW5 also claimed to have witnessed an agreement between PW1 and the appellant for payment of Kshs 40,000/= on February 26, 2017, but again the said agreement was never produced in evidence. Though PW5 identified the appellants as the person who was paid 40,000/= yet there was no explanation as to what happened to the agreement that PW5 wrote to corroborate the testimonies of PW1 and PW5. The question is what is the effect of documents marked but not produced in evidence. Is a document that is marked but not produced as an exhibit, of any evidential value?. This issue was considered in the case of *Kenneth Nyaga v Austin Kigula & 2 others* (2015) eKLR where the court held as follows:-

16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence? What weight should be placed on a document not marked as an exhibit?

17. The respondents' contention is that the appellant by failing to object to the three documents marked as "MFI 1", "MFI 2" and" MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.

18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its

authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

21. In *Des Raj Sharma v Reginam* (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of *Michael Hausa v The State* (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondents' case. The documents did not become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa v The State (1994) 7-8 SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on "MFI 2" which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification. The respondents did not tender any formal evidence to challenge the defamation claim lodged against them.

17. The court was of the view that a document marked for identification must be formerly produced as an exhibit and failure to produce the said document is a fatal error on the part of the prosecution. I have read the judgment of the court and the magistrate totallyignored considering the exhibits produced or marked. It is only these exhibits that would have linked corroborated PW1's evidence that indeed he bought the transformer from the appellant.

I noted that the court marked as exhibit 2, 3 and 4 without any formal production of the agreements. Had they been produced, the appellant's counsel would have indicated whether or not he had objection to their production. I do agree with the defence counsel that they were not formally produced. The question then is why were they not produced? Apart from the failure to produce the documents marked for identification the prosecution also failed to call many key witnesses who were mentioned. For example, Emily and Joel who witnessed agreements; Joel and Patronalla who saw the appellant allegedly deliver the transformer to the school. It is settled law that failure to call crucial evidence may lead to the court concluding that had the witnesses been called, their evidence they have been adverse to

the prosecution case. In the case of *Bukenya v Republic* 1972 ED 548, the East Africa Court of Appeal held as follows:-

a) The prosecution must make available all witnesses necessary to establish the truth even if there evidence may be inconsistent.

b) The court has the right and duty to call the witnesses whose evidence appears essential to the just decision of the case.

c) When the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tender to be adverse to the prosecution.

18. In this case, there is no explanation as to why crucial exhibits and crucial evidence that would have linked the appellant to the offence was not called or produced. This court can only be left to infer that the said evidence may have tended to be adverse to the prosecution case. In fact I believe some Kenya Power and lightning staff may have been involved in the theft of the transformer and hence the deliberate failure to call witnesses or produced evidence in order to protect them. For example, it was admitted that the poles mounted at eth school were Kenya Power property. Some Kenya Power employee must have been the appellants' accomplices.

    PW1 alleged that the appellant represented himself as an employee of Kenya Power and had an identification card to that effect. PW3, a security officer with Kenya Power confirmed that on being searched the appellant had the Kenya Power Identification card. Surprisingly, the said identification was never produced in evidence and the prosecutor did not seem to be interested in finding out where the said card was or who took possession of it. My view is that the prosecution was very casual and did a very casual shoddy job in prosecuting the case there are serious issues that the trial court should have considered in its judgment which unfortunately it did not. For example, Production of the identification cards would have been full proof that the appellant represented himself as a person employed in the public service when he was not.

19. Having considered all the evidence on record, I am satisfied that the prosecution did not prove any of the charges against the appellant beyond all reasonable doubt. The trial magistrate glossed over the evidence on record and did not keenly consider the testimonies of the witnesses .

    The evidence was not watertight. It was scanty and left gaps. It is obvious that the evidence was interfered with and the prosecution did not seem to be keen on calling the relevant witnesses. For the above reasons, I find that the evidence on record was in sufficient to found a conviction. The conviction was made in error. I will therefore quash the conviction and set aside the sentences. The accused is set a liberty forthwith unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 26TH DAY OF JULY, 2022

R. WENDOH

JUDGE

Judgment delivered in the presence of:-

Mr. Omooria for State Counsel

Mr. Kisera for accused person

Ms Nyauke court assistant