



REPUBLIC OF KENYA



KENYA LAW
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**Mkalla v Republic (Criminal Appeal E041 of 2021)
[2022] KEHC 14455 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14455 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E041 OF 2021
JM MATIVO, J
OCTOBER 27, 2022**

BETWEEN

JAMES MWANGEMI MKALLA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against Conviction and Sentence in Criminal Case Number E184991 of 2021, Voi Republic v James Mwangemi Mkalla, delivered by C.Kithinji, PM on 28th September 2021)

JUDGMENT

1. The appellant was charged in criminal case number EO41 of 2021 at the Principal Magistrates Court, Voi with two counts of the offence of stealing of energy appliances and handling of energy appliances contrary to section 169 (1) (c) 4 (a) of the *Energy Act*¹ (the Act). It was alleged that on an unknown date of 2021, at Maungu in Voi sub-county within Taita Taveta county, he stole Kenya Power pre-paid meter No 14251697356 and one transformer fuse all valued at Kshs 5,000/= under control and property of Kenya Power the licensee in contravention of the said Act.
2. This being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up its own conclusion while at the same time bearing in mind that this court did not have the advantage of seeing the witnesses testify. (See *Kiilu & another v Republic*² and *Okeno v R*³). It is the function of a first appellate court to scrutinize the evidence to see if there was evidence to support the trial court's findings. Only then can it decide whether the magistrate's

¹ No. 1 of 2019

² {2005} KLR 174

³ {1972} EA 32 at 36.



findings should be supported. However, this court should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses testify.

The Trial At The Lower Court

3. The following is a proper evaluation and summary of the evidence led by the respective parties in the lower court. For starters, the prosecution case rested on the testimony of the three witnesses. In a nutshell, the crux of the prosecution case was that the appellant was an electrician who was found in possession of a stolen prepaid meter and a transformer fuse all belonging to Kenya power. The appellant's defence, on the other hand, was that the search conducted by the Kenya Power security officer did not yield any result and that all evidence against him was fabricated.
4. Monica Mary Mboje (PW1) a security officer working with Kenya Power testified that the appellant was a notorious electrician who would illegally reconnect power after disconnections and that on February 17, 2021 they had a breakthrough when the appellant was arrested and escorted to Maungu police station. Subsequently, a search at the appellant's home yielded a Kenya Power token meter serial No 14251697356 belonging Grace Samba Mwalimo a customer at Voi and a Kenya Power branded fuse. On cross examination PW1 confirmed that she did not have the dates of the report of the theft of the token meter, she did not go to the appellant's house and she did not know whether the token meter was installed.
5. Isaac Mutiso (PW2) attached to the DCI Kenya Power Mombasa stated that he received information from PW1 that there was an electrician going to a customer's house and illegally reconnecting electricity. On February 17, 2021, accompanied by Sergeant Ekidol, they visited Voi Kenya Power offices, and upon conducting investigations, they were directed to the appellant. They arrested him and upon interrogation, he admitted undertaking illegal connections. Thereafter, a search at the appellant's home within Maungu town yielded one Kenya Power prepaid meter registered to one Grace Samba Mwalimo who had initially complained of a missing meter. They also got one Kenya Power branded fuse, a pair of pliers and a tester. On cross examination, PW2 admitted that they never took photos of the recovered items at the scene since they do not take photographs. PW2 further confirmed that he was not aware that PW1 showed the meter to the appellant prior to the search. He also admitted that there were many fuses in the Kenya Power's vehicle however the subject fuse was found in the appellant's house and the appellant was present.
6. Sgt Ekidol Lenny (PW3) attached to Kenya Power DCI Mombasa reiterated PW2's testimony. On cross examination, he confirmed that he did not remember the exact spot where the meter was recovered and that he was not an officer mandated to process a scene of crime. He also admitted to not taking any photographs at the scene.
7. At the close of the prosecution case, the trial magistrate found that the prosecution had established a *prima facie* case and placed the appellant on his defence. The learned magistrate complied with the provisions of section 211 of the [Criminal Procedure Code](#)⁴The appellant elected to give sworn evidence. He did not call witnesses. His defence was that he was arrested outside a club and bundled into a vehicle. He testified that PW1 who sat at the co-driver's seat took out a prepaid meter and showed it to him asking him who it belonged to. He also saw PW2 and PW3 exchanging items wrapped in a pink polythene bag. A search was subsequently conducted in his house but nothing was recovered. On cross examination the appellant confirmed that Grace Samba was not known to him and that prior to his arrest he stayed at Meli Kubwa for 2 months with Kazungu.

⁴ Cap 75 Laws of Kenya



8. Upon analyzing both the prosecution and the defence evidence, the learned magistrate was persuaded that the prosecution evidence was credible and not shaken by cross-examination and the testimony of the witnesses corroborated each other. He also found the appellant's evidence as fanciful and crafted to exonerate him and that his version was not plausible. He found the prosecution established its case against the appellant beyond reasonable doubt and convicted and sentenced the appellant to serve 3 years imprisonment.

The Appeal

9. The appellant seeks to overturn the conviction and sentence citing 9 grounds, namely:
 1. The learned magistrate erred in law and in fact in failing to properly apply the correct standard of proof in criminal cases thereby convicting the appellant in spite of existence of substantial and/or reasonable doubt and/or in spite of failure by the respondent to prove its case beyond reasonable doubt.
 2. The learned magistrate erred in law and fact by failing to properly apply rules relating to hearsay evidence and the *Evidence Act* (cap 80) thereby relying on defective and/or doubtful unsafe evidence obtained therefrom thereby resulting to a wrong and/or erroneous conviction.
 3. The learned magistrate erred in law and in fact by disregarding and/or failing to consider and/or misapplying the exculpatory evidence thereby convicting the appellant.
 4. The learned magistrate erred in law and in fact by disregarding the inherent contradictions and or glaring gaps in the evidence given by the respondent thereby erroneously convicting the appellant based on defective, incompetent and/or unsafe evidence.
 5. The learned magistrate erred in law and in fact in failing to safeguard the appellant's right to a fair trial during the trial process and/or by failing to inform and/or safeguard the appellant right to legal representation.
 6. The learned magistrate erred in law and in fact in finding that the prosecution had established and proved all the essential elements of the offence yet the same had not been adequately proved and or backed with evidence.
 7. The learned magistrate erred in law and in fact in failing to consider and/or disregard the defence raised by the appellant.
 8. The learned magistrate erred in law and in fact in failing to consider the proper search and evidence rules as outlined in the Police Act. The *Criminal Procedure Code* and the *National Police Service Act* and thus applied incompetent and unsafe evidence.
 9. That the conviction of the appellant was the result of a defective and/or erroneous investigations, doubtful and/or improperly obtained evidence, irregular and/or unfair trial and improper analysis of evidence and/or facts and therefore unsafe.
10. The appeal was canvassed by way of written submissions.



Determination

11. The legal burden of proof in criminal cases never leaves the prosecution's backyard. Viscount Sankey L.C in the celebrated case of *Woolmington v DPP*⁵ in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that:

“Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”
12. The appellant was tried and convicted of the offence of stealing of energy appliances contrary to section 169 (1) (c) of the *Energy Act*.⁶ The essential ingredients of the offence of stealing of energy equipment under the aforesaid section is that there has to be stealing or an attempt to steal or handling stolen energy equipment and or appliance. The other ingredient is knowing or having reason to believe the equipment or appliance may be stolen, or dishonestly receives or retains the equipment or appliance, or dishonestly undertakes, or assists in its retention, removal, disposal or realization by or for the benefit of himself or another person.
13. In determining whether the appellant's defence was considered, this court has a legal duty to re-analyse, re-evaluate and assess the evidence adduced in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify.⁷ This court must determine, what the evidence of the state witnesses was, as understood within the totality of the evidence, including evidence led on the part of the accused or defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its decisions / findings or judgment.⁸
14. Turning to the facts of this case, the appellant argued that the trial court relied on hearsay evidence to arrive at a conviction. Therefore, the charges against him were not proved beyond reasonable doubt, and that he was not informed of his right to legal representation.
15. I have carefully evaluated the prosecution evidence. First, on the issue of the trial court relying on hearsay evidence, and the issue of evidence having been acquired illegally by the prosecution witnesses. I have considered the prosecution evidence. I find that the same is not based on hearsay evidence. Investigations led to the arrest of the appellant and upon a search being conducted a token meter belonging to Kenya Power and a transformer fuse were recovered from the appellant's house. This testimony was not controverted by the appellant to the required standard.

⁵ {1935} A.C 462 at page 481

⁶ Act No. 1 of 2019.

⁷ See *Okeno vs Republic* {1972} E.A, 32at page 36, *Pandya vs Republic* {1957} EA 336, *Shantilal M. Ruwala vs Republic* {1957} EA 570 & *Peter vs Sunday Post* {1958}EA 424.

⁸ As was stated in *S vs Singh* 1975 (1) SA 227 (N) at 228.



16. Any other evidence given in court by a witness who did not perceive the fact in the manner defined is hearsay. Generally, hearsay evidence is not admissible. But this must be clarified further. In *Subramaniam v Public Prosecutor*⁹ Justice De Silva had this to say on hearsay evidence:-

“A statement made by a person not called as a witness which is offered in evidence to prove the truth of the fact contained in the statement is hearsay and it is not admissible. If however the statement is offered in evidence, not to prove the truth of the facts contained in the statement but only to prove that the statement was in fact made it is not hearsay and it is admissible.”

17. I find the prosecution evidence was overwhelming and the same was direct evidence and not hearsay as alleged by the appellant. The three prosecution witnesses were at the scene of crime and a search conducted in the appellant’s premises yielded a Kenya Power prepaid meter that had been reported to have been stolen and a transformer fuse.

18. On the issue of legal representation, article 50 (2) (g) (h) of the *Constitution* provides thus:

- (2) Every accused person has the right to a fair trial, which includes the right—
- (g) To choose, and be represented by, an advocate, and to be informed of this right promptly;
- (h) To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

19. Section 43 of the *Legal Aid Act*¹⁰ provides that:-

Despite the provisions of this section, lack of legal representation shall not be a bar to the continuation of proceeding against a person.

20. It is a requirement for the court to inform an accused person of the right to legal representation. But, failure to comply by the court cannot prevent a court from proceeding with the matter as provided by the procedure to be adopted by the court. The contention would be if an injustice would result. In *Karisa Chengo & 2 others v Republic*¹¹ the Court of Appeal stated that:

“It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the state’s expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the *David Njoroge Macharia case* (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result’ and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death.

⁹ (1956) WLR 965.

¹⁰ No. 6 of 2016.

¹¹ [2015] e KLR.



However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.”

21. It therefore behooved the appellant to establish that he was prejudiced as a result of a substantial injustice if any. The appellant herein understood the charges that were presented by the prosecution. He participated in the trial by cross examining witnesses and subsequently defended himself. The penalty provided for the offence does not result into his life being taken away. Consequently, this ground of appeal fails.
22. On the issue of a search being conducted illegally, it is not disputed that after arresting the appellant, PW1, PW2 and PW3 went and searched his house and recovered a token meter together with a fuse all belonging to Kenya Power. There is no averment by the appellant that section 57 of the *National Police Service Act*, cap 84 which allows police officers to carry out searches of premises in specified circumstances was violated. Consequently, this ground of appeal also fails.
23. In the end, the court finds that the appeal on both conviction and sentence has no merit and the same fails. Accordingly, it is dismissed.

It is so ordered.

DATED AND SIGNED AT VOI THIS 19TH DAY OF OCTOBER 2022

JOHN M. MATIVO

JUDGE

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF OCTOBER 2022

OLGA SEWE

JUDGE

