



REPUBLIC OF KENYA



KENYA LAW
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**Nderitu v Republic (Criminal Appeal E036 of 2022)
[2022] KEHC 15983 (KLR) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15983 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E036 OF 2022
HK CHEMITEI, J
NOVEMBER 30, 2022**

BETWEEN

MICHAEL NDERITU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Decision of Hon. A. Mukenga Nderitu (SRM) Dated
19th May 2022 in Molo Chief Magistrate Court Criminal Case No. 2489 of 2017)*

JUDGMENT

1. The appellant was charge on count 1 of vandalism of energy equipment contrary to section 169(1) (b) of the *Energy Act* No 1 of 2019. The particulars of the offence were that on the December 10, 2019 at Kwa Haraka farm Mau summit within Nakuru county jointly with others not before court vandalized at 25KVA transformer G No xxxx valued at Kshs 150,000/= the property of Kenya Power.
2. The appellant was charge on count II of stealing of energy equipment contrary to section 169 (1) (c) of *Energy Act* No 1 of 2019. The particulars of the offence were that on the December 10, 2019 at Kwa Haraka farm Mau Summit within Nakuru county jointly with others not before court stole two copper windings and transformer valued at Kshs 150,000/= the property of Kenya Power.
3. The alternative count was handling of energy equipment contrary to section 169 (1) (c) of the *Energy Act* No of 2019. The particulars of the offence were that on the December 10, 2019 at Total trading centre, jointly otherwise than in the course of stealing dishonestly retained copper windings in motor vehicle registration number KCE xxxA nissan saloon tiida knowingly or having reasons to believe them to be stolen equipment.
4. The appellant together with his co-accused persons were convicted on both counts and sentence to 5 years' imprisonment on each count which were to run concurrently hence this appeal. The appellant has raised the following grounds of appeal challenging the judgement: -



- a. That the learned magistrate erred in law by passing harsh sentence to the appellant without an option of a fine.
 - b. That the learned magistrate erred both in law and fact in failing to consider that the prosecution witness evidence was riddled with contradictions and thus totally insufficient to support a conviction.
 - c. That learned trial magistrate erred in law in placing on the accused the duty or burden of establishing his own innocence.
 - d. That the learned magistrate erred both in law and fact in failing to consider that an inventory was never produced as an exhibit.
 - e. That the learned trial magistrate similarly failed both in points of law and fact by failing to consider that the conviction was based on flimsy and insufficient: evidence a bulk of which was circumstantial.
 - f. That the prosecution failed to prove its case to the required standard of beyond reasonable doubt.
5. Before looking at the merits or otherwise of the appeal it shall be worthwhile to summarize the evidence as presented during trial.
 6. PW1, David Wanyoike testified that he worked with Kenya power as the in-charge operations and maintenance in Molo. That on December 11, 2019 while at the office, a customer called on emergency desk reporting that a transformer had been vandalized at Mau Summit. Upon arriving at the site he found that one transformer serial number 25KVA G No xxxx from a single phase had been pulled down from a pole, all the wires inside it that transmit power had been removed.
 7. PW1 testified further that when he called the in-charge security, he was informed that some people had been arrested with copper wires and the matter had been reported at Mau Summit police station. He produced photographs of the vandalized transformer and two copper wires which were marked as MFI-1 and MF1-2 respectively.
 8. On cross-examination by the appellant, he confirmed that a customer called the emergency office and reported the vandalism. That he however did not find out from the said customer how the vandalism was exactly done and who that customer was. He stated also that he responded to the call by going to the site which was on private land.
 9. PW2 was No xxxx CPL James Kosgei attached to the Mau Summit police station testified that on December 10, 2019 while on duty three people who claimed to be from Kenya Power & Lighting Company came to the station asking for help. They informed him that the vehicle suspected to have their property was at the centre. They proceed to the centre and they found the said vehicle with no occupants but later two people came to board it where they intercepted and ordered them to open the vehicle.
 10. PW2 went on to testify that they recovered from the boot of the said motor vehicle a spanner that had oil and coils on it. That the officer from Kenya Power told him that the said coils were called transformer and they took the said persons to the station for investigations. He produced the spanner, the coils and the photograph of motor vehicle registration number KCE 855A which were marked MF1-2 and MFI-3 respectively. He also stated that the four accused persons were arrested and he positively identified them as the ones before court.



11. On cross examination by the appellant, he stated that there was no hotline at the police station and that it was not a must for him to record every single detail in the witness statement which in itself was brief explanation of the facts of the case. He confirmed that the officers from Kenya Power reported that there was a vehicle parked at the trading centre in Mau Summit which them together with the members of public suspected that it had property belonging to Kenya Power.
12. On re-examination he testified that the photos presented in court showed what was recovered from the motor vehicle and that the spanners were assorted which included pliers and screws.
13. PW3 was No xxxx police constable Charles Kipkoech attached to Kenya power Security. He testified that on December 10, 2019 while on patrol together with his colleagues at Mau Summit police station where the vandalism of a transformer had occurred they got information that four people were at total trading centre looking suspicious and they were in motor vehicle registration number No KCE 855A. They reported the matter at Mau Summit police station and they were given reinforcement and they proceeded to the centre.
14. PW3 went on testify that upon arriving at the centre they found the said motor vehicle but it had no occupants and upon waiting for some few minutes the occupants came. They introduced themselves as police officers and ordered them to open the vehicle's boot and they found two copper windings and several spanners assorted sizes together with 2 adjustable spanners. That it was at this point that they arrested the said occupants, took them to Mau Summit police station and booked them. Further, that the copper windings were fresh with oil stains, photos of the same were taken and marked as MFI-1, MFI-2 and MFI-3 showing the transformer, copper windings together with assorted spanners and the motor vehicle respectively. He identified the accused person in court as the people they arrested.
15. On cross examination by the 4th accused, he stated that he was allowed to do patrol the whole Nakuru area all the way to Samburu- Mararal and on that day they had come to patrol Mau Summit area. He stated further that they do not wait until a blackout occurred or a report was made to them to conduct a patrol. That they did security patrol even when there were no vandalism reports and it was not a must they get a first report from the emergency departments. He also stated that they could get direct calls from members of the public as the security department.
16. PW3 went on to state that the photographed items were not in court and that PW1 was the Kenya Power staff in Molo who informed them in the morning that vandalism had occurred there. He confirmed that they arrested the appellant together with the other three accused persons and had started investigation on the vandalism.
17. PW4 was No 227438 police constable Francis Murage attached to Kenya power security department. He testified that he was the investigating officer in this case and on the December 10, 2019 while on patrol in Mau Summit area at around 11.00 pm together with police constable Koech, CPL Cheche and other several security officers they received information that there were four people that looked suspicious with a motor vehicle Nissan Tiida.
18. PW4 testified further they reported the incident to the duty officers Mau Summit who accompanied them to Mau Summit trading centre. That at the centre they found the occupants of the alleged motor vehicle and they ordered them to open the boot. The said motor vehicle had a smell of transformer oil and they also found 2 copper windings 23 spanners and pliers which the said persons could not explain where they got them from. That was when they arrested and escorted them to Mau Summit after having taken the photos of the motor vehicle.
19. PW4 went on to testify that the following morning they received a report from the in charge Molo Kenya Power & Lighting Company office on a vandalized transformer. That upon him being shown



- the items recovered the previous night he confirmed that the copper windings were from the vandalized transformer. It was also his testimony that he had visited the scene which looked fresh and the vandalized transformer was on the ground and there were foot prints.
20. He produced as exhibit the photographs from the scene, the items recovered from the suspects' vehicle, the motor vehicle, four people and copper windings and a certificate as to the photographic print all marked as exh-1, exh-2, exh-3 and exh-4 respectively. He also positively identified the accused persons in court as the people they had arrested.
 21. On cross-examination by the appellant, he stated that they concentrated patrols on hotspots and that at the particular time there were rampant incidences of vandalism in Molo area. He stated further that there were no limits as to where they could patrol and that it was an informer who had told them about him but he was not a witness. He stated that it was not true that another fifth person escaped from their office and that he had not released any other person.
 22. Upon re-examination he testified that the accused persons were arrested at around midnight and booked at 1.00 am. That he also did not get any information from phones belonging to the accused persons as the directorate of criminal investigation told that the pin given were incorrect.
 23. The prosecution case was closed at this point.
 24. When placed on his defence the appellant gave sworn evidence but did not call any witness. He stated that on December 10, 2019 he was called by Daniel who was the 2nd accused in the lower court case and he told him that there was a job of spare parts. That they left Nairobi at 7.00pm, made several stops at Limuru, Naivasha and Nakuru and that the man they were with would alight and make calls.
 25. He stated further that they proceeded to Mau Summit where they went to a hotel and bought food thereafter the said man in their company picked the keys from Julius the 1st accused and left. That Julius only realized after a while that man had left with the car and he returned at 11.00 pm and he told them that he had brought the spare parts. The appellant went on to state that when they left the hotel they found many police officers who arrested them and the 1st accused person was told to open the boot.
 26. That when the boot was opened he was surprised to see some strange objects and they were told that they had vandalized a transformer. Thereafter they were asked for Kshs 50,000/= so as to be released but they did not have the money and photos of them together with those items were taken. He also learnt that the man who had hired them was not there and one of the police officers said that the man had assaulted him and escaped.
 27. The court directed that the matter be disposed by way of written submissions which the parties have complied.

Appellants Submissions

28. The appellant in his submissions in support of grounds 2,3,5 and 7 of the memorandum of appeal, submitted that the four witnesses called by the prosecution did not witness the vandalism. That PW1 did not state what time he was informed the vandalism took place. Further, that PW2, 3 and 4 contradicted PW1's testimony on the date when the offence occurred because according to them it was on December 10, 2019 and not December 11, 2019. That therefore the offence happened after he had been arrested.
29. The appellant submitted further that only one person from the three who made the report to the police station testified yet they all were present during the arrest and recovery of the vandalized transformer. That during the said recovery none of the witness mentioned any stained clothing found in his



possession. It was also the appellant's submission that the circumstances of how the vandalism took place remained unknown. That therefore the same could not stand as an offence against him as eye witnesses were not present. He placed reliance on the case of *Ndungu Kimani v Republic* [1979] KLR 283 and submitted that the fact that PW1 evidence was not conclusive on the source of the wires occasioned a miscarriage thus the conviction was unsafe.

30. Regarding ground four, the appellant submitted that the lack of an inventory led to miscarriage of justice since the mode of recovery of the same was not free from error. Further, that the contradiction arising from the testimony of PW2 and PW3 on what was recovered from his means of transport warranted the need of an inventory so that the actual tools recovered could be known.
31. On ground six, the appellant draws the courts attention to the cases of *Kiarie v Republic* [1984] KLR, *Victor Mwendwa Mulinge v Republic* [2014] eKLR and *Mblungu v S* [AR 300 /13] [2014] ZAKZPHC 27 as cited in the case of *Erick Otieno Meda v Republic* [2019] eKLR on alibi defence. The appellant submitted that the trial magistrate did not interfere with the alibi defense he raised and thus the benefit of doubt should have been given to him. He further placed reliance on the case of *Samuel Mbugua Mwangi v Republic* [2018] eKLR and submitted that the role he played was passive and not active one.

Respondent Submissions

32. The respondent in its submissions identified the elements of vandalism which are equated to malicious damage. That the same must be proved collectively and an element not present or proved beyond reasonable doubt resulted in the count falling away. The said elements included proof of identity of the person vandalising the equipment, proof of damage, proof of ownership and proof that the destruction was wilful and unlawful.
33. It was also admitted that the investigators did not prove the windings formed part of the transformer and that data locator obtained from the appellant and his co-accused phones were not produced in court to establish if they were at the site. At this juncture the respondent submitted that since the identity of the persons who vandalized the transformer was never proved, then the element of wilful and unlawful could not apply. That therefore no evidence pinned any person who may have vandalized the transformer and so the entire count could not hold.
34. The respondent submitted further that in the case of stealing where by the elements are set out in section 268 of the *Penal Code*, none of the witnesses confirmed the appellant and his co-accused persons took the said copper windings and transformer oil from the vandalized transformer or whether the same were from that transformer. Also, that the people who reported the vandalism were not called to corroborate the act of theft and thus the evidence remained hearsay and same could not hold. Further, the appellant was not placed at the scene of crime.
35. On the alternative count, the respondent submitted that the person who drove the motor vehicle KCS 855A was the one who knew of how the items got into the boot. That the other three passengers including the appellant remained innocent until sufficient evidence was obtained and that this count should instead be preferred against the 2nd accused person. That the other three accused person including the appellant would have been treated as state witnesses. The respondent submitted that it was not safe to convict the appellant on the two counts and it urged the court to look at the facts and evidence comprehensively and come up with a fair judgment.



Analysis and Determination

36. Having perused the entire record herein, the proceedings and the parties' submissions, the duty of this court was clearly spelt out in the case of *Okeno v Rep* 1972 EA 32. The Court of Appeal stated that;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M Ruwala v R* [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.”

37. In the instant case I note that the prosecution concedes this appeal on the grounds that the threshold of proving the offence of vandalism of energy equipment as set out under section 169(1) (b) of the *Energy Act* and stealing of energy equipment as set out under section 169 (1) (c) of the said Act were never met. That no one saw who vandalized the transformer, although some copper windings had been recovered from the accused persons. Further, that the investigators did not prove the windings formed the part of the vandalized transformer and the four accused persons were the ones who vandalized the transformer. Also no data locator recovered from the accused persons phones so as to place them at the site was produced in court. Equally, that none of the persons who reported the incident at the police station were called as witnesses to corroborate the act of theft in court. Finally, the prosecution was of the view that since gaps had been noted in the instant case, it was not safe to convict the appellant on the two counts and that only the 2nd accused person ought to have been charged on the alternative count.

38. In view of the above, courts have pronounced themselves extensively on the fate that an appeal should suffer in instances when the prosecution concedes to the appeal. In *Peter Njoroge Karanja v Republic* [2020] eKLR the court cited with approval the case of *Genya Mwasaba v Republic* [2018] eKLR where the court's position was that an appellate court is not enjoined to view the concession by the prosecution to the appeal as the sole basis of allowing it. The court may, as it deems fit and appropriate, conduct an assessment of the facts, evidence and the law by itself. The said court stated in paragraph 8 of the judgement as follows:

“The aforesaid concession notwithstanding, it is still our duty as the appellate court to subject the entire evidence to a fresh examination”.

39. Further, the same court cited with approval the sentiments of the High Court in Nyeri in *Norman Ambich Miero & another v Republic*, Cr App No 379 of 2005 where the court stated as follows:

“We restate that this court is not bound by the views of the state counsel as we have a duty to reassess the matter and make our own findings on whether or not the evidence presented before the trial court which was confirmed by the High Court support the conviction of the appellants”.



40. It went ahead to cited the case of *Paul Thiga Ngamena v Republic*, eKLR where the prosecution had conceded to the appeal on both conviction and sentence of two counts of dangerous driving Odunga J, posited in paragraph 31 of the judgement as follows:

“ Even though the state conceded the appeal, it does not follow that in those circumstances, this court must allow the appeal since the court has the duty to put the evidence to a fresh scrutiny and arrive at its own determination.

41. A common feature that runs through the above cited authorities is that before the appellate court allows the appeal in cases where the prosecution concedes to the same, the court must first satisfy itself that the prosecution properly conceded to the appeal. Suffice to say, the court must set out on a sojourn by itself to test the strength of the appeal.

42. In the instant case the appellant was convicted on two counts the 1st being the offence of vandalism of energy equipment and the 2nd count being stealing of energy equipment contrary to section 169 of the *Energy Act* which provides as follows;

1. A person who wilfully—

- (a) encroaches, illegally acquires or deals in public land set aside for energy infrastructure projects;
- (b) vandalises or attempts to vandalise energy installations and infrastructure;
- (c) steals or attempts to steal any energy equipment or appliance or handles any energy equipment or appliance (otherwise than in the course of stealing) 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 or if he arranges to do so;
- (d) destroys or damages energy infrastructure; or
- (e) maliciously misinforms the public on matters of energy with criminal intent or driven by gain leading to economic sabotage;

commits an offence which is deemed to be an economic crime and shall on conviction, 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.

43. Looking at the circumstances arising from this case as elaborated by the four witnesses called by the prosecution in the instant case none of them demonstrate any wilfulness from the appellant and his co-accused to vandalize the transformer. Reasons being that they were arrested after the unlawful act was committed and it was the suspicion from the members of the public that led to their arrest by the police. No witness was called who saw the appellant together with his co-accused persons wilfully encroach the area where the transformer was, vandalize it and steal the copper windings together with its oil.

44. What is not disputed however is that the appellant and his co accused were found in possession of the said electric equipment's a fact which he never denied. It is true that they were arrested that night on suspicion and when they checked the motor vehicle they were in the assorted items were recovered. The issue of inventory was not very necessary as they were recovered in the same vehicle at the same time and nothing else recovered elsewhere. The photos produced attest to this.



45. This court does not find the appellant truthful as he explained in his defence. Whatever the case this was the vehicle they had travelled with all the way from Nairobi. The driver of the vehicle and others were found in possession of the recently stolen items. Whatever spare parts they were to carry was part of the reasons he travelled from Nairobi.
46. The electricity transmission items are not items that are found and collected on the streets in a normal day. They are specialised items and this court highly doubts the veracity of the appellant's defence. In my view he was one of the organised gangs who vandalised the transformers as rightly stated by the respondents' witnesses., though they were not found at the scene.
47. I however agree with the prosecution that there were no eye witnesses to the first count as nobody saw them vandalise the said transformer. The items however were found in their possession as attested by the photos taken at the scene. The appellant and his accomplices were unable to explain how they came into possession of them. The issue of stating that there was another person who took off was a red herring in my view.
48. In the premises I found that the courts conviction of the appellant under the first charge was erroneous for the reasons stated above and the same is hereby set aside.
49. The conviction on the second charge was however lawful. The items recovered were stolen and they were found in their possession and the appellant and his co accused were unable to explain where they had found them. More importantly they were found in the same vehicle he had used all day long from Nairobi. I also note that the appellant though he incriminated his co accused did not endeavour to raise the issue during his defence.
50. In the premises, save that the conviction on the first count is set aside, the conviction on the second count was lawful.
51. In view of the above, it is noted that the sentencing provides a period of five years' imprisonment in the event of conviction. I do not see any prejudice as the sentences in any case were to run concurrently.
52. The appeal is therefore dismissed.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 30TH DAY OF NOVEMBER 2022.

H. K. CHEMITEI.

JUDGE

