



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 29 OF 2019

JULIUS MWANGI THUITA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against both conviction and sentence from the judgment of Hon.J.W.Gichimu

Senior Resident Magistrate, Runyenjes delivered on 25thOctober, 2019

in Criminal Case No. 339 of 2017)

JUDGMENT

FACTS

1. The appellant, **Julius Mwangi Thuita**, was charged with the offence of Severing with intent to steal contrary to **Section 32A** of the **Kenya Information and Communication Act**;
2. The particulars of the charge being that on the night of 21st and 22nd day of August, 2017 at Nyagaiya sub-location within Embu County, jointly with others not before the court severed a base transmission station under the control of Safaricom Company with intent to steal and stole 18 pieces of batteries, DC converter and 4 (four) comparators all valued at KShs.482,652/-
3. The prosecution called a total of five (5) witnesses to buttress its case; thereafter the appellant was convicted and was sentenced to a fine of KShs.5,000,000/- or in default to serve a term of ten(10) years imprisonment;
4. Being aggrieved by the conviction and sentence, the appellant filed a Petition of Appeal and Supplementary Grounds of Appeal and listed eleven (11) grounds of appeal as summarized hereunder;-
 - i. The charge preferred against the appellant was defective as there were no facts or evidence to support the involvement of the appellant in the commission of the crime; there were also no eye witnesses; no exhibits were recovered from the appellant nor were any produced;
 - ii. The prosecution failed to call crucial expert witnesses from Safaricom; the Investigation Officer was also not called; and investigations were not properly conducted; failure to call such witness violated the appellant's rights to a fair trial under Article 50(2)(p);
 - iii. The trial court based the appellants' conviction on the evidence of **PW5** which was unsatisfactory; therefore the conviction was unsafe;
 - iv. The trial court failed to consider the appellants defence and failed to comply with Section 169(1) of the Criminal Procedure Code;
 - v. The sentence was harsh and excessive; Section 333(2) of the Criminal Procedure Code was not applied when sentencing;

5. At the hearing hereof the appellant was unrepresented whereas the State was represented by Prosecuting Counsel Ms Mati; the parties were directed to canvass the appeal by filing and exchanging their respective written submissions; hereunder are the parties rival submissions;

APPELLANTS CASE

6. The appellant's contention was that the prosecution failed to call two crucial witnesses to testify; the trial court relied purely on the evidence of **PW5** who claimed to be a data expert whereas he was not an expert in that area;
7. The Investigating Officer who was also a crucial witness was not called by the prosecution to testify; the appellant was therefore denied an opportunity to cross-examine this witness on the investigations carried out at the scene of crime which was a violation of his right to a fair trial;
8. The appellant prayed that his appeal be allowed; the conviction be quashed and the sentence set aside and the appellant be set at liberty.

RESPONDENTS CASE

9. In response the respondent opposed the appeal and submitted that on the contention that the Charge preferred against him being defective, the appellant had not demonstrated how the Charge Sheet was defective and therefore this ground of appeal was not merited;
10. It was the respondents contention that the prosecution provided overwhelming evidence to support the indictment; the testimonies of the prosecution witnesses was credible and consistent; the appellant was accorded a fair trial and in his defence he merely denied the Charge and did not offer any explanation or adduce any evidence to dislodge the testimonies of the prosecution witnesses; the prosecution proved the ingredients of the offence and there was no basis for interfering with the trial court's decision;
11. One of the appellant's grounds of appeal was that the trial court failed to consider his defence; counsel submitted that the appellant failed to cross-examine the prosecution witnesses on relevant issues of fact and law; such cross-examination would have laid the foundation of his defence which amounted to a mere denial; otherwise the appellant had not demonstrated how the trial court failed to consider his defence;
12. Counsel conceded to the last ground of appeal as the record did not reflect that the trial court had taken into account the period that the appellant had spent in custody during the pendency of the trial; and prayed that the appeal be allowed only to that extent; and the conviction be upheld as it was proper in the circumstances.

ISSUES FOR DETERMINATION

13. After taking into consideration the respective written submissions this court has framed the following issues for determination;
 - i. Whether the charge preferred against the appellant was defective;
 - ii. Whether the appellant was accorded a fair trial;
 - iii. Whether the prosecution failed to call crucial witnesses to testify;
 - iv. Whether the prosecution evidence was contradictory;
 - v. Whether the prosecution proved its case to the desired threshold;
 - vi. Whether the trial court disregarded the appellants defence;
 - vii. Whether the trial court took Section 333(2) of the Criminal Procedure Code into consideration.

ANALYSIS

14. This being the first appellate court it is incumbent upon this court to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Reference is made to the case of **Okeno vs Rep (1972) EA 32**.

Whether the charge preferred against the appellant was defective;

15. The appellant contends that the Charge was defective in that the facts surrounding the scene of crime did not support the fact that the appellant was involved in the commission of the alleged crime particularly when there was no eye witness;
16. Upon perusal of the court record it shows that the Charge Sheet makes a clear reference and discloses the offence the appellant was facing; the record reflects that the Charge was read out to the appellant and he responded; and that the appellant followed and appreciated the evidence tendered against him and that he was able to cross-examine the prosecution witnesses and when called upon to defend himself was able to defend himself;
17. Indeed, a Charge Sheet can be defective if it is at variance with the evidence adduced; in this instance the prosecution relied on the evidence of an expert witness (**PW5**) and his evidence was that he did not personally witness the commission of the alleged crime by the appellant; but it is this court's considered view that the expert evidence adduced by **PW5** was not at variance with the Charge and places the appellant at the scene of crime; that the mere fact that he was not an eye witness to the commission of the offence does not render the charge

as being defective;

18. This court is satisfied that the appellant was aware of the exact nature of the offence that he was alleged to have committed; he was also aware of the evidence presented and actively participated in the proceedings and was also able to defend himself when called upon to do so;

19. This ground of appeal is found to be an afterthought and lacking in merit and it is hereby disallowed;

Whether the appellant was accorded a fair trial;

20. This court reiterates that the court record reflects that the Charge was read out to the appellant in a language he understood, Kiswahili, and he responded; the appellant followed and appreciated the evidence tendered against him and that he was able to cross-examine the prosecution witnesses and when called upon to defend himself was able to defend himself;

21. This court finds nothing on the court record that demonstrates any miscarriage of justice or prejudice to the appellant; there is no evidence of any objection raised to the language or the manner in which the proceedings were conducted; and this court is satisfied that the appellant was accorded a fair trial;

22. This ground of appeal is found lacking in merit and is disallowed.

Whether the prosecution failed to call crucial witnesses to testify

23. The appellant submitted that the prosecution failed to call the Investigating Officer whom he deemed to be a crucial witness; and that failure to call the Investigating Officer denied him the right to cross examine this witness;

24. In this instance, the appellant did not point out in his submissions how the failure to call the Investigating Officer weakened the prosecutions' case; the prosecution relied on the expert witness' analysis of phone data that placed the appellant at the scene of crime; and the prosecution witnesses called to testify were able to fill the void that indeed a crime was committed and the appellant was one of the perpetrators;

25. This court finds that the failure to call the Investigating Officer to testify did not weaken the prosecutions' case;

26. This ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the prosecution witnesses evidence was contradictory

27. The appellant submitted that the prosecution witnesses gave contradictory evidence;

28. Indeed, the record reflects that the prosecution witnesses gave different evidence on the number of stones that were removed from the wall at the scene of crime; but their contradictory evidence on the number of stones removed can be resolved by the fact that the witnesses had visited the crime scene on separate occasions and the scene being unprotected could have been altered;

29. The record reflects that these witnesses were precise in their evidence that the stones were removed so as to gain access when the crime was committed; this court is satisfied that the cited contradictions were not material and did not impeach the credibility of these witnesses;

30. This ground of appeal is found lacking in merit and is disallowed.

Whether the prosecution proved its case to the desired threshold;

31. The appellant claims that the prosecution relied on the evidence of **PW5** who was not an expert and that he did not produce any document of certification to prove he was a certified data analyst; and the trial court's conviction was also based on the evidence adduced by this witness;

32. The court record reflects that the prosecution called **PW5** who produced a Site Analysis Profile Register (**'PEXh.2'**) which captured the particulars of the appellant's phone number 0724308720 at Nthagaiya Site on 22/08/2017 at 2.57am; he produced a Subscriber Registration Form (**'PEXh.3'**) which indicated that the phone was registered to Julius Thoita Mwangi, the appellant herein; Secondly, if the qualifications and expertise of **PW5** were in doubt the appropriate time the appellant ought to have raised these doubts would have been during cross-examination of this witness; to raise this issue on appeal is considered by this court to be an afterthought;

33. This court finds no good reason to interfere with the trial courts finding that **'.. the prosecution has proved its case against the accused person beyond reasonable doubt.'**

34. This ground of appeal is found lacking in merit and is disallowed.

Whether the trial court disregarded the appellants defence;

35. The court record reflects that when put on his defence the appellant gave an account of the events that happened on the 24/09/2017 whereas the material date was the night of 21st and 22nd August, 2017; the appellant failed to give any explanation to the trial court on why

his phone was captured at the crime scene at that ungodly hour; and never challenged the prosecution's evidence presented on the ownership of the phone nor on the site location of the phone on the material night;

36. It is trite law that an accused person has no burden to give testimony to prove his innocence but it is incumbent upon him to challenge the evidence presented by the prosecution;

37. When his defence is weighed against the prosecution's evidence this court is satisfied that it does not dislodge the prosecution's case which places him at the scene of the crime on the material date when '*the site was broken into and the items listed in the Charge Sheet were stolen*';

38. This court is satisfied that the trial court considered the appellants defence and gave reasons for disregarding it as it amounted to a mere denial; this ground of appeal is found lacking in merit and it is disallowed.

Whether the trial court took Section 333(2) of the Criminal Procedure Code into consideration;

39. The Charge Sheet reflects that the appellant was arrested on the 25/09/2017 and took plea on the 26/09/2017 and the record reflects that though granted bond was unable to raise it and therefore remained in remand for three (3) years during the pendency of his trial; when rendering sentence of a fine of Kshs.5,000,000/- or in default a term of ten (10) years imprisonment it is noted that the trial court did not accord the appellant the benefit of Section 333(2) of the Criminal Procedure Code;

40. This is the only ground of appeal that is found to have merit and it is hereby allowed.

FINDINGS & DETERMINATIONS

41. For those reasons this court makes the following findings and determination;

- i. This court finds that the Charge Sheet as drawn was not defective;
- ii. The appellant is found to have been accorded a fair trial;
- iii. The failure by the prosecution to call the Investigating Officer as a witness did not weaken its case;
- iv. The contradictions in the prosecution witnesses' testimonies are found to be minor and reconcilable;
- v. The prosecution is found to have proved its case to the desired threshold;
- vi. The trial court is found to have considered the appellants defence and gave reasons for disregarding it;
- vii. The appeal on conviction is hereby disallowed; the conviction is found to be safe and it is hereby upheld;
- viii. The appeal on sentence is found to be partially successful to the extent that the trial court failed to consider Section 333(2) of the Criminal Procedure Code; the sentence imposed is hereby upheld and shall run from the date of arrest effective 25/09/2017.

Orders accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 22ND DAY OF APRIL, 2021

HON.A. MSHILA

JUDGE