



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 33 OF 2019

1. ZABLON JOHNSON CHANGE.....1ST APPELLANT

2. PETER ACHINGA ONYAMBU.....2ND APPELLANT

3. ERICK MUSA CHANGE.....3RD APPELLANT

=VRS=

THE REPUBLIC.....PROSECUTOR

{Being an Appeal against the Judgement of Hon. B. M. Kimtai – PM Keroka dated and

delivered on the 31st day of July 2019 in the original Keroka Principal Magistrate’s Court Criminal Case No. 189 of 2019}

JUDGEMENT

The appellants were jointly with two others who are not parties to this appeal charged with two counts and an alternative charge.

On Count I, they were charged with vandalism of Electrical Conductors contrary to Section 64 (4) of the Energy Act No. 12 of 2006. The particulars of the charge being that on diverse dates between 21st and 26th February 2019 at Chitago village, Nyankoba Sub-location, in Masaba North Sub-county within Nyamira County, they vandalized 406 metres of low voltage conductors property of Kenya Power and Lighting Company.

On Count II, they were charged with stealing contrary to Section 268 (1) as read with Section 275 of the Penal Code and the particulars were that on diverse dates between 21st and 26th February, 2019 at Chitago village, Nyankoba Sub-location, in Masaba North Sub-county within Nyamira County they stole 400 metres of low voltage conductors amounting to Kshs. 80,000/= property of Kenya Power & Lighting Company.

The alternative charge was one of handling stolen goods contrary to Section 322 (1) as read with Section 322 (2) of the Penal Code the particulars of the offence being that on diverse dates between 21st and 26th day of February 2019 at Chitago village, Nyankoba Sub-location in Masaba North Sub-county within Nyamira County, otherwise than in the course of stealing, they dishonestly retained 400 metres of low voltage conductors knowing or having reason to believe it to be stolen property.

Upon a full hearing the trial Magistrate convicted the appellants on Counts I and II and sentenced them to a fine of Kshs. 5,000,000/= or imprisonment for a term of 10 years on Count I and gave them a conditional discharge in respect to Count II.

Being aggrieved by the conviction and sentences the appellants preferred this appeal. The same is premised on the following grounds: -

“1. That the trial magistrate erred in both law and fact by relying on prosecution evidence full of contradictions.

2. That the trial magistrate erred in both law and facts by convicting me on a case which was not water tight since the purported evidence in form of exhibits was not legally and sufficiently proved.

3. That the learned trial magistrate erred in law and fact by making a finding that the main counts of the offences the appellants were charged with were both proved to the required standard whereas evidence on record proved, if at all, a different offence.

4. That the trial magistrate erred in both law and facts by failing to make a finding that the evidence of the prosecution showed that the accused were victims of framing by both the police and the prosecution witnesses.
5. That the trial magistrate erred in both law and facts and law by finding all the appellants guilty of the counts charged with when there was clear evidence that proof of the offences, if beyond reasonable doubt, was not against all.
6. That the trial magistrate erred in both law and facts by not giving a reasoned analysis of how the case was, if at all, proven against each of the appellants separately.
7. That the trial magistrate failed in both law and facts by relying on false evidence adduced and a photograph without the said assailants by only indicating the livestock.
8. That the trial magistrate erred in both law and facts by failing to consider and or treating casually the mitigation of the appellants.
9. The trial magistrate erred in both law and facts by misunderstanding the nature of the offence and evidence before him.”

The appeal was argued by way of written submissions which I have considered fully. As the first appellate court however, I have a duty to reconsider and evaluate the evidence in the lower court so as to arrive at my own independent conclusion. I must do so bearing in mind that unlike the trial court, I did not see or hear the witnesses and make provision for that. (See *Okeno v Republic* [1972] EA 32).

Briefly the facts of the case were that on 21st February 2019, Joel Momanyi (Pw1), a retired civil servant who resides at Nyankoba woke up only to find that there was no electricity in the house. He sent his worker one Jackson to check what had happened and when the worker returned it was to tell him that the electricity conductor connecting them to the grid had been removed. Pw1 called his brother James Mogeni (Pw3) and informed him as he too was affected. Pw3 went home and confirmed the conductor was missing. Thereafter Pw1 received a call from someone asking him if he wanted some conductors. He expressed interest and agreed to meet the man at Keroka. When he went there he discovered the caller was the 1st appellant. Together with the 2nd and 3rd appellants, the 1st appellant took Pw1 to a house at a place which Pw1 described as “Westlands at Central Church SDA” where they showed him some conductors. Pw1 called his brother Pw3 who in turn reported the matter to Keroka Police Station and was accompanied to the house by police officers among them Police Constable Josiah Mokenye (Pw5). The police officers arrested the accused persons and took possession of the conductors which were later positively identified as the property of Kenya Power by Harrison Kimani, a worker with Kenya Power based at Kegati Sub-station which serves Machoge Borabu in terms of maintenance. Pw2 also confirmed that he had received information regarding theft of the conductor wires supplying electricity to Pw1’s house and had gone there and confirmed it was true. He stated that the wires offered to Pw1 by the appellants were 300 metres.

In their defence, the 1st and 3rd appellants admitted that on 26th February 2019 they took Pw1 to the house where they were arrested. They also admitted that some electrical wires were found in that house. They however denied they committed the offences charged and stated that they took Pw1 there because he wanted to rent the house which belonged to the 1st appellant. They stated that they found the house had been broken into and contended they were not aware there were wires inside.

The 2nd appellant confirmed that he saw Pw1 with the 1st appellant and that they all went to the house. He stated that he was asked to join them by the 3rd appellant.

It is my finding that the admission by the appellants that they were arrested in a house to which they had taken Pw1 and that they were found there by Pw3 and police officers and their own admission that electricity conductors were found in that house confirms that the prosecution witnesses were credible witnesses. The admission by the appellants also renders any inconsistencies and contradictions in the evidence of the witnesses minor and I do not agree with their Advocate’s submission that the evidence of the prosecution witnesses was worthless and of no probative value. Indeed, given the defence mounted, it behoves this court to evaluate the evidence so as to determine which of the sides was more believable – the prosecution or the defence. It is my finding that the evidence of the prosecution witnesses bears more weight. Pw1 was not interested in renting a house. It was his evidence that the call he got from the person who identified himself as John was about conductors and that when they met in Keroka it turned out that the caller was the 1st appellant. If indeed Pw1 was only interested in renting a room he would not have made a call to his brother Pw3 who in turn called the police. The defence although it was very well choreographed was not convincing. This court finds it a fact that the appellants knew there were cables in the house and the objective of taking Pw1 there was so that he could purchase the cables. The cables were positively identified by Pw2 as being the property of Kenya Power. Pw2 also confirmed that vandalism had occurred on the line supplying electricity to the homes of Pw1 and Pw3. The appellants were found with the cables (conductors) merely four days after the line was vandalized and the conductors stolen and they having given no explanation at all on how the conductors came into their possession, the doctrine of recent possession aptly applies to their case. Their Advocate’s submission that nobody saw them removing them cannot hold. The prosecution charged the appellants with vandalism which is or was, as the **Energy Act No. 12 of 2006** has since been repealed, a complete cognate offence in **Section 64 (4) (b)** of the **Act** and also with stealing contrary to **Section 275 of the Penal Code** which in my view is also a complete cognate offence. Counsel for the appellants contends that should this court find the offence of vandalism was not proved it cannot substitute it with the one of stealing and has cited the case of **Nicholas Akala Isaac & another v Republic** [2017] eKLR where Ngenye J held that the offence of vandalism was a minor cognate offence to that of stealing, her argument being that the penalty prescribed for vandalism is less severe than that prescribed for stealing. I hold a different view and find that indeed the offence of vandalism whose punishment is a fine of not less than five million shillings or imprisonment for a term of not less than ten years or both is treated more seriously than theft whose maximum punishment is imprisonment for three years. Be that as it may, the prosecution ought to have charged the appellants under **Section 64 A** which stated: -

“A person who, with intent to steal, severs any conductor, transformer or part thereof, insulator, tower, jumper or other installations under the control of a licensee, commits an offence and is liable, on conviction, to a fine of not less than five million shillings or to imprisonment for a term of not less than ten years, or to both.”

This offence carries a similar penalty to that of vandalism. My finding is that the charge against the appellants was proved beyond reasonable doubt and that they were properly convicted and their appeal against conviction has no merit.

On the sentence, Counsel for the appellants submitted the same was excessive; that although the sentence provided was a mandatory sentence, the trial Magistrate had a discretion to take into account the mitigation offered by the appellants in line with the reasoning of the Supreme Court declaring such sentences unconstitutional. He urged this court to find the sentences unlawful and acquit the appellants.

On his part, Senior Prosecution Counsel Mr. Majale citing the case of **Simon Kipkurui Kimori v Republic [2019] eKLR** urged this court to consider the circumstances of this case and determine whether the mandatory minimum sentence was not appropriate. He submitted that from the evidence adduced and the voluminous cables recovered, the appellants were in the business of vandalizing Kenya Power Cables and selling them back to the victims. He contended that the offence had serious ramifications to the economy and that therefore this court should uphold the sentence.

In the case of **Michael Kasamani & another v Republic - Kakamega HCCRA No. 154 & 156 of 2018 [2019] eKLR**, Majanja J while considering arguments similar to those raised by Counsel for the appellant stated: -

“18. The offence of vandalism under section 64(4)(b) of the Energy Act, 2006 attracts a penalty prescribed of a fine of not less than five million shillings, or a term of imprisonment of not less than five years, or to both such fine and imprisonment. The sentence imposed by the trial court was the mandatory minimum sentence under the Energy Act 2006.

19. Mandatory minimum sentences have been under attack since the decision of the Supreme Court in the case of Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017]eKLR where it held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 50 of the Constitution. Further, that enactment of a mandatory death sentence is a legislative intrusion into the judicial realm. Thereafter the Court of Appeal applied the same principles in several cases where it held that the mandatory minimum sentences under the Sexual Offences Act were unconstitutional (see Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR and in Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014). The inescapable conclusion is that the mandatory minimum sentences under the Energy Act, 2006 must suffer the same fate hence the mandatory minimum sentence prescribed under section 64 thereof is unconstitutional. At this point I wish to observe that the Energy Act, 2006 was repealed by the Energy Act, 2019 which re-enacted the same offence and penalty at section 168 thereof.

20. Having reached the aforesaid conclusion, I am now called upon to reconsider the sentence. Section 354 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) provides for the powers of this court upon hearing an appeal if it considers that there is no sufficient ground for interfering, to dismiss the appeal or it may, under subsection 3(b), “in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence”.

I agree fully with the above reasoning of Majanja J and more so given that the only reason the trial Magistrate meted that punishment was because it was the minimum prescribed under the Law. The appellants have a constitutional right to equal protection and equal benefit of the law as do the other persons charged with offences where mandatory penalties were prescribed. That is not however to mean that because the sentences were declared unconstitutional the appellants should be acquitted. What it means is that it now behoves this court to reconsider the sentence.

No doubt the offence is a serious one and is indeed one considered as economic sabotage. It is however noteworthy that the accused persons were first offenders. The trial Magistrate was prevented from treating them as such by the mandatory nature of the sentence. In my view the sentence was way too excessive for first offenders two of who were young and students. Accordingly, I shall set aside the sentence of a fine of five million or imprisonment for ten years and substitute it with one for a fine of five hundred thousand shillings only (Kshs. 500,000/=) or a term of imprisonment for three (3) years each. It is so ordered.

Signed, dated and delivered in open court this 30th day of January 2020.

E. N. MAINA

JUDGE