REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 184 OF 2018

(From original conviction and sentence by Hon. MI Shimenga, Resident Magistrate (RM), in Butere PMCCRC No. 43 of 2017 of 27th November 2018)

JOSEPH AMAKANJI ONACHO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. MI Shimenga, Resident Magistrate, of vandalism of electrical apparatus, contrary to section 64(4)(b) of the Energy Act No. 12 of 2012, and was accordingly sentenced to pay a fine of Kshs. 500, 000.00, or serve four (4) years in prison in default. The particulars of the vandalism charge were that on the 3rd day of October 2016, at Munjiti area of Khwisero Sub-County, within Kakamega County, jointly with others not before court, he willfully vandalized a high voltage line valued at Kshs. 350, 000.00 under the control of the said Kenya Power, the licensee.

2. The appellant pleaded not guilty to the charge before the trial court, and the primary court conducted a full trial. The prosecution called five (5) witnesses.

3. Beneta Naman Ondego, testified as PW1. She explained that on 3rd July 2016, she saw the appellant doing wiring for her neighbours. She approached him to do wiring for her because her children had wanted to connect power to her house. She bought the items needed for the work. He started the works and completed the same, and she paid him for his services. He informed her that he had someone who could help connect her to the grid. He brought forms from Kenya Power, which he helped her fill. She paid him Kshs. 6, 000.00 for connection. After three days an officer came, Eric Aseka, who asked for and she paid him Kshs. 2, 000.00. He promised to connect him to power. The appellant later came and asked her for Kshs. 50, 000.00 for connection, and she paid him Kshs. 4, 000.00. The other person, Eric Aseka, came, and asked for Kshs. 13, 000.00, and she gave him Kshs. 5, 000.00. They said the delay in connecting was because of lack of poles, and that they were looking for them. When nothing was done for a long time, she reported the matter to the local Chief. He summoned them, and later arrested them. She informed the chief that all she wanted was her money. The appellant committed to connect power by 1st October 2016. On that day, the two brought one pole, which was placed in her compound. When he confronted the appellant in March 2017, about the pole in her compound, he referred her to the Kenya Power office at Kakamega. She sent her husband to that office, and he came with officers, who took pictures of the pole, and asked her where it had come from. She referred them to the appellant and another. They were arrested and charged in court. She complained that they had neither connected him to the grid, nor refunded her money.

4. Naman Ondego Amakachi testified as PW2. He was the husband of PW1. He stated that on 3rd July 2016 PW1 wanted to connect the house to power, and she called the appellant to do the wiring in the house. He came and did the wiring. After that she informed him that he had a Kenya Power form, and he would bring Kenya Power officers to come and do the connection. He took PW1's KRA PIN and her identity card. He later brought in persons that he claimed were from Kenya Power. They committed to connecting power. He stated that it was PW1 who made the relevant payments to PW1 and the alleged officers. A year later, a pole was delivered at their home. The appellant was later arrested. He asked for forgiveness and committed to connect them to the grid. He decided to follow up with Kenya Power, where he was given two officers who came to his home, took photographs of the pole and of the hole where it had been removed. He directed the Kenya Power personnel to the home of the appellant, who was their neighbour, and they went and arrested him.

5. Simon Mugambi testified as PW3. He stated that he was called on 3rd October 2016 and informed of power outage at Munjiti area. He visited the area with two other officers. They noted that one pole was leaning to one side, while the other had been removed. They later received a report from a customer to the effect that he had received a pole at his home after he had paid Kshs. 30, 000.00. They visited the home, and saw the pole, called a strat, for support, that had been removed in the area and which was at his home. They took photographs of it. They were later escorted to the home of the appellant. He was arrested, and the person who drove the vehicle that delivered the pole was also arrested. He stated that the vandalism was repaired at a cost of Kshs. 350, 000.00. He explained that the line was switched off and the

entire section was shut down. He said there was a cost of labour and materials.

6. Number 64266 Police Corporal Anthony Egesa testified as PW4. He received a memory card from a police officer attached to Kenya Power, Kisumu, to process and prepare the graphics. He did so, and generated four print outs. He prepared a certificate on them.

7. Number 66902 Police Corporal Felix Mutai testified as PW5. He was the officer who gave PW4 the memory card to generate prints. He had received a vandalism report from PW3. He visited the scene, and he got information about the vehicle that was used to transport the pole that had been removed from the line. He also got a report from PW2 about how certain persons had extorted money from them promising to connect them to power. He and PW3 went to the home, and they took photographs of the pole. The appellant was identified by PW2 as the person who had brought the pole to his home. The appellant identified himself as an electrician, and he took them to another person, who had ferried the pole on his lorry. He arrested them and took them to Khwisero Police Station where they were rearrested and charged.

8. PW1 and PW2 were recalled for cross-examination by the advocate for the appellant. PW1 identified the appellant as the electrician whose services they had hired to do wiring at his house. She paid for his services. He brought Eric Aseka and she paid them various amounts of money for installation. When they delayed in having the installation done, she reported them to the Chief. She stated that it was the appellant who had brought in the other person, Eric Aseka. She described the appellant as a neighbour. PW2 stated that he knew the lorry that delivered the pole, describing it as a village vehicle. He identified the appellant as a clansman. He was the one who brought the other person. He stated that he was the one who took Kenya Power officers to the homes of the appellant and his accomplice.

9. The court found that the appellant had a case to answer and put him on his defence. He gave a sworn statement. He conceded that he did wiring at the home of PW1 and PW2, and indicated the amounts of money they paid him for his services. He said that the two took him to the Chief, when he pressed them to pay him for his services, and that was where he met Eric Aseka. He said that they entered into an agreement there. He said he did not know where the pole came from. He said Eric Aseka was to connect the power.

10. DW1 was his co-accused. He said that he was approached by two people, who asked him to deliver a pole at Munjiti. They loaded the pole on the lorry and they took it to the home of PW2. They found PW1 and PW2 and their children. He dropped the pole and the two people, and he left them there talking to PW2. It was an old pole they took to PW2's home, he said. He said that he knew the appellant, since they came from the same village.

11. After reviewing the evidence, the trial court convicted appellant of the offence charged and sentenced him as mentioned in paragraph 1 of this judgment.

12. The appellant being dissatisfied with the conviction and sentence appealed to this court. The grounds of appeal are that the conviction was against the weight of the evidence, the case was not proved to the required standard, the evidence of DW1 did not put Eric Aseka at the scene during delivery of the pole, there was no direct nor circumstantial evidence upon which to found the conviction, the explanation given by the appellant was not appreciated by the court, the court relied on conjecture, the trial court delivered the judgement outside the period stipulated in law, the appellants submissions were not considered, the probation officer's report was not considered at sentencing, the conviction was based on extraneous considerations, among others.

13. Being a first appeal, I have re-evaluated all the evidence on record and drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of *Okeno vs. Republic* (1972) EA 32 has consistently been cited on this issue. In its pertinent part, the decision is to the effect that:-

> *"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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 magistrates' findings can 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."*

14. The appeal was canvassed on 12th March 2020. The appellant relied on written submissions that had been placed on record, whilst Ms. Omondi, Prosecution Counsel, indicated that the respondent was relying on the record of the trial court.

15. In his written submissions, the appellant submitted that it was Eric Aseka, and not him who had contracted the transporter to bring the pole to the home of PW1 and PW2, and it was him who committed at the Chief's office to connect power. He further submitted that DW2 did not identify the appellant among the persons who delivered the pole at the home of PW1 and PW2. He further submitted that DW2 had demonstrated that the pole delivered was from Mbale, and was not vandalized. He also submitted that none of the witnesses said they saw him vandalize the pole. He submitted that the only relationship between him and PW1 and PW2 was contractual, and all he did was to introduce them to Eric Aseka. He argued that obtaining money from them was not proof of theft and vandalism, asserting that he was not charged with obtaining money by false pretenses. He submitted that he was not present when the pole was procured, but he was present when it was delivered, questioning whether being present when it was delivered was evidence of his committing vandalism. It is submitted that the judgement was delivered four months after the trial was concluded, which, he submitted, was evidence that the trial court was looking for a bearing to fix the appellant, saying that the tone of the judgment spoke for itself. He submitted that although he had made extensive and well researched written submissions the same were not considered by the court. He submitted that the case was choreographed by PW1 and PW2 to fix him.

16. I understand the appeal to be against both the conviction and sentence. On conviction, all the grounds listed in the petition can be collapsed into only one, that the conviction was against the weight of the evidence; while on sentence the only ground raised is that the trial court did not consider the report filed by the probation office.

17. The background is that the appellant was engaged by PW1 and PW2 to do wiring at their home. When PW1 indicated that she would go to the Kenya Power offices at Kakamega, the appellant offered to introduce her to someone who could do the connection for her. He introduced Eric Aseka. Various amounts of money were said to have been asked for and paid towards that exercise. There was delay in connection, PW1 and PW2 pressed, whereupon a pole was delivered at their home, at the behest of the appellant. There was more delay, and PW1 and PW2 escalated the matter to Kenya Power, and that was when the appellant was arrested and charged with vandalism, with respect to the pole brought to the home of PW1 and PW2.

18. The appellant denies vandalism. He concedes that he did do wiring work for PW1 and PW2, and introduced Eric Aseka to them to facilitate connection, but he had nothing to do with the delivery of the pole at their home, explaining that he just happened to be at their home when the pole was delivered. He further says that the relationship between him and them was contractual, and makes allegations both against them and the trail magistrate, insinuating a scheme to fix him.

19. The entire matter originates from the hiring of the appellant to do wiring works at the home of the PW1 and PW2. The appellant does not deny that he introduced Eric Aseka to PW1 and PW2 to assist them with the power connection. He concedes that there were money issues between them, which ended up at the Chief's office. Regarding the delivery of the pole, the appellant denies complicity in the whole affair, but curiously he was at the scene at the home of PW1 and PW2 when the same was delivered. He relies heavily on the testimony of his co-accused, DW2, who said he was hired by persons, he did not know, to deliver poles from Mbale to the home of PW1 and PW2, and asserted that the appellant was not among them. That has to be taken against the testimony of PW1 and PW2, who stated that it was the appellant and Eric Aseka, who had informed them that the delay was occasioned by lack of poles and they would work towards getting them. They indicated that the appellant was at the scene when the pole in question was delivered. They were said to have paid the person who delivered the pole.

20. The evidence on record is clear that the appellant was well known to PW1 and PW2, as they were neighbours, and even relatives. They were acquainted with Eric Aseka, as he had been introduced to them by the appellant. Their testimonies were consistent. I have no reason to disbelieve them. The appellant urges that the testimony of DW2 be believed as against that of PW1 and PW2. Yet, DW2 was a co-accused of the appellant. The established legal principle is that accomplice evidence is admissible, but it ought to be corroborated, unless the court finds it believable. See *Kinyua vs. Republic* [2002] 1 KLR 256. A co-accused of an appellant would be his accomplice. The decision in *Karanja & another vs. Republic* [1990] KLR 589, defined what such corroboration would entail, when it said:

> *"... the corroboration which is required of an accomplice's evidence is in the nature of some independent additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it."*

21. So, as between the testimonies of PW1 and PW2, on the one hand, and of the DW1 and DW2, on the other, with respect to the pole, those of PW1 and PW2 would carry more weight. The appellant has not submitted at all on the point that the testimony of DW2 required corroboration. He has not cited any statutory provisions nor case law, and for that reason he has not pointed me to any independent additional evidence tending to render his accomplice evidence truthful and reasonable.

22. The respondent's case is that the pole was removed from a line. There was no direct evidence that the appellant had anything to do with the removal of the said pole from the line. That would then mean that the respondent is relying on circumstantial evidence to connect the appellant with the vandalism.

23. The parameters upon which circumstantial evidence may be considered were set in *Kipkering arap Koske vs. R* [1949] 16 EACA 135, where the court said:

> *"(a) the inculpatory facts must be incompatible with the innocence of the accused.*
>
> *(b) the facts must be capable of no other conclusion or explanation except the guilt of the accused."*

24. There is also *Simon Musoke vs. Republic* [1958] EA 715, where the court cautioned that before drawing the inference of the accused's guilt from circumstantial evidence it would be necessary for the court to be sure that there are no other existing circumstances which would weaken or destroy the inference.

25. Then in *Erick Odhiambo Okumu vs. Republic* [2015] eKLR, the court set three tests to guide courts on circumstantial evidence. The tests are as follows:

> *"(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*
>
> *(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;*
>
> *(iii) 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."*

26. The circumstances that the respondent relies on to infer the guilt of the appellant with regard to the vandalism is that that he and his accomplice, Eric Aseka, had made promises to PW1 and PW2 that they would deliver connection of electricity to them. They asked for payments to facilitate the same and the payments were made. A dispute was registered with the Chief, who did not testify, with respect to the delay in connection, and specifically to have the money refunded. It was then indicated that delay was caused by lack of a pole, then one pole was delivered, with promises of more to follow. Kenya Power say that there was a blackout, which they connected to the removal of a pole, and they say that the pole removed is that which was found at the home of PW1 and PW2, which they believe was delivered there at the behest of the appellant. Can it reasonably or logically inferred that the pole that was removed from the line is the same one that was traced to

the home of PW1 and PW2? In my view, the only way to infer that the appellant had anything to do with the vandalism is to prove that the pole that was vandalized from the line was the same one that was found at the home of PW1 and PW2. Was it the one? The evidence on record is hazy on that score. There is nothing to show that the said pole was serialized, and could be identified by serial number. PW3, the Kenya Power technician, did not point to any identifying feature on the pole that was found at the home of PW1 and PW2, that would have linked it to the one that was vandalized. He just gave general explanations. PW5 said that PW3 merely identified it as a Kenya Power pole, and not necessarily as the pole that was vandalized. I am not satisfied that there was any connection between the two.

27. The other thing is about the testimonies of PW1, PW2 and PW3. According to PW1 the pole was brought to her compound on 1st October 2016, and it was in March 2017 that she contacted Kenya Power about it. PW2 merely said that later in 2016, a pole was delivered at his home, and it was on his compound until sometime in 2017 when he went to Kenya Power about it. According to PW3 the Munjiti area suffered a power outage on 3rd October 2016. He went to the scene with an emergency team, and found that one of the support poles had been removed. Then in May 2017 he found a report from PW5 about a report from a customer that the stolen pole had been delivered to his home, and he then went to the home. PW5 testified that it was on 15th May 2017 that he got a report from PW2 that some people had dropped a pole at his home. According to him, PW3, when he saw it, identified as a Kenya Power pole. How he was able to identify it is not indicated.

28. The pole could have come from anywhere. It could have been a Kenya Power pole alright, but not necessarily the one that had been vandalized from the line. It could have come from any of the Kenya Power stores. It was said that Kenya Power sells poles to its staff, although it was explained that the ones sold are then cut into smaller pieces. It was not explained who would cut the poles, and how they would be so cut, so as to distinguish them from the ones in use. It could be that the pole in question came from any source. The evidence that is on record is that the appellant, and his accomplice Eric Aseka, might have delivered a pole at the home of PW1 and PW2, but there is no evidence that that pole is the one that had been vandalized.

29. My conclusion, therefore, is that the vandalism charge against the appellant was founded on circumstantial evidence. However, applying the principles governing circumstantial evidence to the facts of the case, I am unable to draw or make an inference that the appellant was guilty of the vandalism, for it was not established that the pole stolen from the line was the same that was recovered at the home of PW1 and PW2.

30. The last thing I would address is with respect to the aspersions cast on the judicial officer who handled the matter, that the judgement was delayed outside the period allowed in law, and the delay was contrived to produce a particular outcome. The submissions in questions were made through an advocate. The said submissions make no legal arguments whatsoever, in terms of citing any known legal principles founded on statutory provisions or case law, for no statutory provisions nor case law is cited. Instead, the party resorts to impeaching the integrity of the PW1 and PW2 and the judicial officer who tried the case. My understanding of the law is that criminal cases are determined on the basis of the evidence on record. Any appeal to an appellate court should also be argued on the basis of the evidence recorded, not on extraneous matters such as the lack of integrity of the other parties to the dispute and even of the judge. It is a pedestrian approach to litigation. It is unfortunate that the judge is accused of determining the matter on extraneous considerations, when the appellant himself is raising what are no doubt extraneous matters. If there were any integrity issues involved, then the appeal would not be the right place to raise them. One can only read malice and ill will in the approach that the appellant has chosen to adopt here; that if you cannot render your argument coherently, then besmirch the characters of the other side and of the judge. Advocates should know better that engage in that kind of litigation. As the Presiding Judge in charge of the region I know for a fact that the judge was on mandatory leave, and the arguments raised herein can only be intended to character assassinate, which should be avoided.

31. Enough said. I believe that there is merit in the appeal herein, and I do hereby allow the same. The conviction of the appellant is quashed, and the sentence imposed set aside.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26th DAY OF June , 2020

W. MUSYOKA

JUDGE