



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 63 OF 2018

STEPHEN MUSEMBI MUSILA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(FROM ORIGINAL CRIMINAL CASE NO. 480 OF 2017 AT SRM'S COURT AT KILUNGU)

JUDGMENT

INTRODUCTION

1. The Appellant was charged for **STEALING OF ANY WORKS UNDER THE CONTROL OF A LICENSE CONTRARY TO SECTION 64(4) OF THE ENERGY ACT.**

2. On the 6th day of September, 2017 at Kwa-Kyambu village, Kitaingo Sub-location, Kitaingo Location in Mukaa Sub-county within Makueni County, Stephen Musembi Musila jointly with others not before court, wilfully with intent to steal, fell down two electricity wooden poles, electric materials, two stay wires, assorted shackles and D-irons which are under the control of Kenya Power the license.

3. **COUNT II: CONVEYING PUBLIC STORES CONTRARY TO SECTION 324(2) AS READ WITH SECTION 36 OF THE PENAL CODE**

4. Particulars being that on the 7th day of September, 2017 at Kwa-Kyambu village, Kitaingo Sub-location, Kitaingo location in Mukaa Sub-county within Makueni County, Stephen Musembi Musila jointly with others not before court, were found conveying public stores namely 2 electricity wooden poles, stay wires, assorted shackles and D-iron in a motor vehicle registration number KAP 567A make Mitsubishi pick-up, being the property of Kenya Power, such properties being reasonably suspected having been unlawfully obtained.

5. He pleaded not guilty and the matter went into trial. He was found guilty and sentenced to a fine of Kshs.5 million or serve 10 years' imprisonment, count II one-year imprisonment.

6. Being aggrieved, the Appellant lodged instant appeal and set out five grounds, namely: -

- i. **THAT**, the learned trial magistrate erred in both law and facts by convicting him on insufficient evidence.
- ii. **THAT**, the learned trial magistrate erred in both law and facts by dismissing his sworn defence without reasons.
- iii. **THAT**, he prays to this Hon. Court to re-evaluate and reconsider the evidence adduced before the trial magistrate and reach an independent and variant decision.
- iv. **THAT**, the learned trial magistrate erred in both law and facts by convicting him on uncorroborated and contradictory evidence.
- v. **THAT**, he cannot recall all the evidence adduced in the court and he now begs leave of this Hon. Court to be furnished with the trial court proceedings to enable him to add more grounds.

7. Parties agreed to canvass appeal via written submissions but only Appellant filed prosecution relied on evidence on record.

8. The appellant abandoned his grounds of appeal and instead sought to mitigate and did so in his hereunder submissions.

APPELLANT'S SUBMISSIONS

9. The accused person is the above mentioned in criminal case no. 480 of 2017. The matter was heard and determined at the SRM's court sitting at Kilungu. He was convicted and sentenced to serve ten (10) years and one (1) year imprisonment for offences of **STEALING OF ANY WORKS UNDER THE CONTROL OF A LICENSE CONTRARY TO SECTION 64(4)(C) OF THE ENERGY ACT and CONVEY OF PUBLIC STORES CONTRARY TO SECTION 324(2) AS READ WITH SECTION 36 OF THE PENAL CODE.**

10. Before the SRM's Honourable E. Muiro, the main reasons why the accused sort mitigation for leniency is for the sake of saving his young innocent children, who's lives are at stake due to his arrest.

11. Further, he prays to this Honourable court of justice to grant him a non-custodial sentence or an option of a lesser fine, to help him support his children establish their future life, hence reduce the swelling number of the street children .i.e. help reduce the rate of crime within our nation.

Deeply Remorseful

12. The accused/Appellant prays to this honourable court of justice for leniency for the alleged offence he was accused of, thus submits that he is deeply remorseful and repentant for the act he committed.

13. He submits that it has been so painful experience for both himself and his family. And in as much as he is suffering behind bars, the most affected is his family. This has influenced his life positively the way he thinks spiritual, emotional and mentally.

14. Further he submits that he has been addressing the cause of the crime he committed which is alcoholic, drug influence and bad company. This is through attending Christian fellowship and bible studies within the prison. Hence it has improved his ways of thinking and patience, thus has helped him positively in addressing any issue that comes on his way.

15. Also he submits that this is his first time in life of being arrested and taken to court for a criminal act. He had not committed or involved in any criminal offence before and his records are clean.

16. More so, the Appellant submits that it is unlikely that he will ever commit any crime in his life. For the consequences of committing offence is painful and distressful moment and admits that this occurs due to ignorance about the law.

Potential citizen

17. The accused submits to this Honourable Court that since he is still a youth who is still in need of establishing a family and also the first born in their family of five (5) siblings, who he was catering for their education and their well-being, thus his intent absence until subjected to finish his jail term behind the bars, these several dependents are tend to suffer untold calamities. That he requests for leniency of non-custodial sentence or option of a fine to help continue bringing hope in his family while he is also working to establishing his family too.

18. That he has been addressing the root cause of the crime he committed which was drugs, bad company and hunger. Through guidance and counselling sessions which he has been attending within the prison premises, and also through attending prison rehabilitation sections of welding, he has learnt more from attending church service where he has found new friends in Christ.

19. It is the appellant's submission that he always attended bible study and organizing prayer meetings together with his new found friends in the prison daily. By doing so, it has made him to think positively and act positively towards any issue that crop on his way.

Resourceful Person

20. The appellant submits to this Honourable Court that in general he has improved on his behaviour, since he came to prison, through psychological guidance and counselling process, through joining the prison rehabilitation section of building thus has put him into a better position to understand his potential. He has gained more skills in the field of building, because they used to build some prison structures for both staff and the inmates.

21. During Sundays, he attends church services for spiritual nourishment and also attending bible group's discussion. With the work skill experience, he has gained, he is now capable of handling the drug and alcohol influence.

22. Further, it is his submission that if this Honourable court of justice grants him a second chance, he will be in a better position to make good use of the skills he has gained from the prison, also start the guiding and counselling programs where both young and old people would be helped to manage stress, hence have positive attitudes in life challenging moments.

23. This will be more practical wen this Honourable Court alters the sentence to a lesser term, non-custodial sentence or option of a lesser fine. It will be easier to meet with the youth early to help them start establishing a worthwhile family, hence help building our country's economy

The Judicial Discretion

24. The Appellant prays to this court under its discretion to please issue orders of revising, reducing or substituting the said sentence to a lesser term or to a non-custodial sentence in since he has served part of his sentence in custody right from remand and has learned the value of being patient.

25. He prays to this court to grant him a second chance and promises to make good use of it, hence if a non-custodial sentence is granted, will enable him to help his young innocent family to reach their goals in life, hence restore back hope and confidence in their life again.

26. It is the Appellant's submission to this Honourable court of justice, with its original jurisdiction in both criminal and civil matter that it can order for a non-custodial sentence. The **ENGLISH COURT OF APPEAL** held that: -

“The court were the ultimate custodian of the rights and liberties of people where the status and that there was of law the courts are to abdicate jurisdiction merely because the proceedings under review are of an internal disciplinary character there is no provision in the prison Act which excludes with the rights of inmates however circumscribed by a Penal sentence and observe the principle of fundamental justice.”

27. He (Appellant) makes reference to Article 2(1) (5), 20(1) (3b), 21(1)(4) 22(1), 23(1), 27(1), 28, 29(c, d, e, f) 47(2) 51(1) of the constitution of Kenya 2010.

28. The Appellant abandoned his appeal as set out in his grounds but opted to mitigate vide his grounds above.

29. The court then will adhere to the law in the circumstances.

30. After going through material the court, I find the issue to be ;

31. **ISSUES**

-Whether there is justification to interfere with the sentence meted out herein?

Section 64 (4) Energy Act CAP 314 states;

A person who wilfully or with intent to interfere with the management or operation of the apparatus of a licensee—

(a)

(b)

(c) steals or, with intent to steal, breaks, throws down or damages any works of or under the control of a licensee; or

(d).....

Commits an offence, and shall be 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 both.

29. The appellant vide above provisions was awarded the minimum sentence provided by the law. This court has no mandate to reduce the minimum sentence set out in the statutes.

a. Thus the court finds no merit in the instant matter and dismisses the same.

SIGNED, DATED AND DELIVERED THIS 31ST DAY OF MAY, 2019, IN OPEN COURT.

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C. KARIUKI

JUDGE