



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NOS. 16 & 17 OF 2015

(An Appeal arising out of the conviction and sentence of Hon.S. Mokuu – (SPM)

delivered on 20th January 2015 in Eldoret CM CR. Case No.5900 of 2013)

JULIUS KIPTANUI MISOI.....1ST APPELLANT

JOSEPH KARIUKI THUITA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants, Julius Kiptanui Misoi (1st Appellant) and Joseph Kariuki Thuita (2nd Appellant) were charged with another with the offence of **vandalism of electrical apparatus** contrary to **Section 64(4)(b)** of the **Energy Act 2012**. The particulars of the offence were that on the night of 22nd and 23rd December 2013 at Sango Sub-location in Likuyani District, Kakamega County, the Appellants vandalized two transformers Serial Nos.21725 and 23992 respectively all valued at Kshs.3 million the property of Kenya Power & Lighting Company Ltd (Kenya Power). The Appellants were further charged with **sabotage** contrary to **Section 343** of the **Penal Code**. The particulars of the offence were that on 26th December 2013 at Sango Sub-location, Likuyani District in Kakamega County, the Appellants willfully and unlawfully damaged Kenya Power electric expansion fuses with the intention to impair its efficiency in transmitting electrical power. In the alternative, the Appellants were charged with **handling stolen goods** contrary to **Section 322(1) and (2)** of the **Penal Code**. The particulars of the offence were that on 26th December 2013, in the same place, otherwise than in the course of stealing, the Appellants dishonestly retained 10 kilograms of copper wire, an expansion fuse and three BG conductors knowing or having reason to believe them to be stolen goods. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, the Appellants were found guilty of the first two counts of the charge. They were sentenced to serve ten (10) years imprisonment in respect of the 1st Count and two (2) years imprisonment in respect of the 2nd Count. Both sentences were ordered to run concurrently. The Appellants were aggrieved by their conviction and sentence. They each filed a separate appeal challenging their conviction and sentence.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the basis of uncorroborated and contradictory evidence. They were of the view that the evidence relied on by the prosecution was insufficient to sustain their conviction. They contended that they had been convicted on the basis of facts that did not support the charge. They faulted the trial magistrate for failing to properly evaluate the evidence and thereby reached the erroneous decision that the prosecution had proved its case to the required standard of proof beyond any reasonable doubt. They were aggrieved that their respective defences were not taken into consideration before the trial court reached the impugned decision. They faulted the trial magistrate for sentencing them to serve a custodial sentence that was harsh and excessive in the circumstances. In the premises therefore, they urged the court to allow their respective appeals, quash their conviction and set aside the sentences that were imposed upon them.

During the hearing of the appeal, the two separate appeals were consolidated and heard together as one. The Appellants presented to court written submission in support of their appeals. They further made oral submission urging the court to allow their respective appeals. Ms. Oduor for the State opposed the appeal. She submitted that the prosecution did adduce sufficient culpatory evidence to secure the conviction of the Appellants on the charges that were brought against them. She urged the court to disallow the appeal.

Before giving reasons for its decision, it is imperative that the facts of this case be set out, albeit briefly. On 24th December 2013, PW4 Berita Tapratich was at her home at Sango. She recalled that three men who introduced themselves as Kenya Power employees wanted to inspect the transformer which was near her house. They requested her to give them a stick so that they could use it to undertake the inspection. She

gave them the stick. She saw the Appellants climb onto the electric pole and later descend down. They then left. Later that night, there was a blackout in the area. She suspected that the blackout had something to do with the work that the three men had done during the day. On the following day, genuine Kenya Power employees came to her house and inquired from her if she had seen people tampering with the electric line. She answered in the affirmative. She was told to make a report should she see the people again.

On 26th December 2013, PW4 saw the Appellants again. She contacted the Area Chief, PW2 Paul Nabangi Maketi who arrived at the scene and found the Appellants. At the time, members of the public had arrived at the scene and detained the Appellants. PW2 informed PW3 Sergeant Anthony Martin then based at Kogo Patrol Base. PW3 accompanied PW2 to the scene of crime. PW3 was with two other police officers. They found the Appellants with several items which were suspected to have been vandalized from the transformers. They included copper wires, expansion fuses, climbing irons, safety belts, transformer windings, a modified luk stick, a transformer laminator and a broken piece of pipe. All these items were later produced into evidence by the prosecution. The Appellants were arrested and taken to Kogo Police Patrol Base.

On the following day (27th December 2013), PW1 Martin Kiprop Chebii, a foreman of Kenya Power and PW6 PC Jacob Cheserek attached to Kenya Power Security Office visited Kogo Police Patrol Base. They inspected the items that were found in the Appellants' possession. They confirmed the said items had indeed been vandalized from the Kenya Power transformers. For the avoidance of doubt, PW1 testified that the items could not be purchased from an ordinary electrical shop. The items were supplied directly to Kenya Power. He pointed out a serial number which identified the vandalized items as the property of Kenya Power.

The case was investigated by PW6 who, after concluding investigations, formed the opinion that a case had been made for the Appellants to be charged with the offences that they were convicted. In his defence, the 1st Appellant explained that he was an employee of a contractor engaged by Kenya Power. On 26th December 2013, he had gone to Sango to complete the assignment that he had been tasked. He was arrested while he was performing the task. He denied that he was at the time vandalizing the electric power line. The 2nd Appellant told the court that on the material day of 26th December 2013, while he was riding on a boda boda motorcycle from his home, he was stopped by a group of men, arrested and accused of vandalizing electric power lines. He denied the charges. In essence, the 2nd Appellant was saying that he was innocent. He was a victim of mistaken identity.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellants on the charges brought against them to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence that was adduced before the trial magistrate's court. It has also considered the grounds of appeal put forward by the Appellants and the submission that was made before this court during the hearing of the appeal. There are three main issues for determination that came to the fore during the hearing of the appeal. The first issue is the identification of the Appellants. *Where the Appellants identified at the scene where the transformers were vandalized?* According to PW4, she knew the Appellants prior to the date of their arrest on 26th December 2013. She testified that on 24th December 2013, the Appellants had gone to inspect the transformer which was near her house. The Appellants identified themselves as employees of Kenya Power. Indeed, PW4 even lent them a piece of stick which they used to undertake their work. PW4 saw the Appellants climb the pole where the transformer was situate. They later went away.

Later that night, there was a power blackout. On the following day, genuine Kenya Power employees visited PW4 at her homestead and inquired from her if she had seen any person who was working on the power line and particularly the transformers. She answered in the affirmative. She was told to make a report if she saw the people again. On the following day, she saw the Appellants. She made a report to the Area Chief. The Area Chief informed the police. The Appellants were arrested. They were found in possession of the items which clearly belonged to Kenya Power. The items had indeed been vandalized from the power line and the transformers resulting in a power blackout in the area. The vandalized items were produced into evidence. The Appellants did not claim that they owned the particular items. Indeed, PW1 testified that the items were not ordinarily found in an electrical shop but rather were specifically supplied to Kenya Power.

In their defence, the 1st Appellant told the court that he was an employee of a contractor of Kenya Power who had been engaged to install a power line. If that indeed was the case, *why didn't the 1st Appellant produce an identity card or document establishing his bona fide as an employee of the contractor? Why didn't the 1st Appellant call the contractor to testify on his behalf in court to confirm his identity as an employee of the contractor?* It was clear to this court that the 1st Appellant was masquerading as an employee of Kenya Power so as not to arouse suspicion from members of the public. As regard the 2nd Appellant, his defence to the effect that he was an innocent bystander who was arrested while on his way does not hold since he had been seen on two occasions in the company of the 1st Appellant by PW4 prior to his arrest.

On re-evaluation of the evidence adduced by the prosecution and the defence of the Appellants, it was clear to this court that the verdict reached by the trial court cannot be faulted as regard the identity of the Appellant. The Appellants were arrested with equipment and electrical gear ordinarily used by Kenya Power employees in circumstances that clearly pointed out that they had indeed vandalized the same from the power line and transformers within Sango area.

The second issue for determination was whether the items found in possession of the Appellants were the property of Kenya Power. PW1 testified that the items found in the Appellants' possession could only have been supplied to Kenya Power. The items were not ordinarily found in the open market. They were especially supplied to Kenya Power for its purpose when installing electric power lines. The Appellants did not give a reasonable explanation how they came to be in possession of such items which were clearly established to belong to Kenya Power. The prosecution also established that during the material time that the said items were vandalized from the power lines, there was a blackout in Sango area. The recovery of the vandalized items in the Appellants' possession was proximate to the time the same were vandalized from the power lines.

The third issue for determination is whether the prosecution established to the required standard of proof beyond any reasonable doubt the two charges that the Appellants were charged with. In respect of the first count of vandalism, the prosecution was supposed to establish that the Appellants vandalized the power lines with the intention of interfering with the operation of the apparatus in issue. In the present appeal, it was clear that the prosecution established to the required standard of proof that the Appellants vandalized transformers within Sango area that caused a power blackout. The vandalism interfered therefore with the supply of power to the Kenya Power customers at Sango area. The Appellants were found in possession of the vandalized items in a manner that raised no doubt that they had vandalized the same so that they could sell the same for private gain.

As regard the charge of sabotage, the prosecution was required to establish that the Appellants vandalized the electric power lines with the sole purpose of impairing the efficiency of the supply of electricity to the Sango Community. This court holds that the prosecution indeed established to the required standard of proof that the Appellants vandalized the power lines and caused an extensive power blackout within the Sango area during the material time which happened to be the Christmas holiday period. The Appellants' action not only caused a power blackout, but also interfered with the lives of the people of Sango. In the premises therefore, the Appellants' appeal against conviction lacks merit. It is hereby dismissed.

On sentence, the custodial sentence that was meted by the trial court is legal. This court cannot interfere with the same. Indeed, the Appellants were sentenced to serve the minimum sentence provided by the law. Taking into consideration all the circumstances of the case, this court holds that the verdict reached by the trial court in respect of sentence was justified in the circumstances. The appeal against sentence therefore lacks merit and is hereby dismissed. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF JUNE 2019

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27th DAY OF JUNE 2019

HELLEN OMONDI

JUDGE