



IN THE HIGH COURT OF KENYA AT KAKAMEGA

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 154 OF 2018

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 156 OF 2018

BETWEEN

MICHAEL KASAMANI.....1ST APPELLANT

HASSAN ANGIRA MBOYA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. M. I. Shimenga, RM dated 16th October 2018 at the Magistrates Court at Butere in Criminal Case No. 343 of 2017)

JUDGMENT

1. The appellants, **MICHAEL KASAMANI** and **HASSAN ANGIRA MBOYA**, were convicted of the vandalism of electrical apparatus contrary to **section 64(4)(b)** of the *Energy Act, 2006*. The particulars of the offence were that on 20th August 2017 at Emukowa area, Imanga Location within Kakamega County, jointly with others not before the court, they willfully vandalized two wooden electric poles and aluminum conductors valued at Kshs. 300,000/- being the property of Kenya Power and Lighting Company Limited (KPLC).
2. The appellants were sentenced to pay a fine of Kshs. 5,000,000/- or to serve 10 years in imprisonment. They now appeal against the conviction and sentence. Before I consider the grounds of appeal it is important to recall the duty of the first appellate court is to review the entire evidence on record and reach an independent decision whether to uphold the conviction bearing in mind that it neither heard or saw what the witnesses testify (see *Njoroge v Republic [1987] KLR 19*). In order to proceed with this duty, I shall set out the evidence emerging before the trial court.
3. Oliver Keya Kachisa (PW 1) recalled that he was outside his house on 20th August 2017, when he heard a power saw outside his house. He went to check and found people cutting KPLC Power posts. One post was on the ground while two people were organizing how to carry the posts. He also saw a power saw and a black pick up carrying one pole. The pick-up sped off but he and other villagers, who had arrived shortly thereafter, arrested the 2nd appellant who was in possession of a KPLC employment identity card. The 1st appellant broke his leg while trying to run away. PW 1 called the area chief Ham Shikuku (PW 2). PW 2 testified that he was called by a village elder to rush to the scene of the incident. He found the appellants had been arrested. He escorted the appellants to Butere Police Station.
4. The Technical Security Officer at KPLC, Simon Mugambi (PW 3) testified that on the material day, he was called by PW 2 and informed of the incident. He proceeded to the scene and found 7 electric poles missing and one pole on the ground. He proceeded to the police station where he positively identified the 2nd appellant as an employee of KPLC. He did not know the 1st appellant. He testified that the 2nd appellant was an employee of KPLC but had not been assigned to work in the area. When cross-examined, he stated the 2nd appellant was part of the office personnel at the emergency desk, was not a field officer and was not on duty on the material date.
5. The investigating officer, Corporal Joseph Oramat (PW 4), confirmed that he was informed of the incident by PW 3. He proceeded to the scene on the next day and found electric poles vandalized and the suspects arrested by members of the public. He took photographs of the scene and forwarded to the Scene of Crimes Officer for processing. The photographs were produced in evidence by PC Chrispinus Abula (PW 5), officer at the Crime Scene Support Services.
6. The 1st appellant (DW 2) denied the offence in his sworn testimony. He told the court that the 2nd appellant (DW 1) had hired him to take

him to the scene and when he arrived there he found a pick up and the accused started running away as members of the public chased him. DW 1 vanished and later emerged from a house. He was told that the DW 1 was suspected of stealing poles. After a while he was arrested by PW 2.

7. The 2nd appellant (DW 1) also denied the offence in his sworn testimony. He admitted that he was employed by KPLC and that on the material day he was on duty at around 5.30pm when he went to Imanga Police Station to report a vandalism incident and recorded a statement. While recording the statement at the police station, he received a phone call and was asked whether he knew Mr Mugambi (PW 3). He told the court that he was stopped from proceeding further until PW 3 arrived. PW 3 did not come so he was arrested and taken to Butere Police Station.

8. Based on the facts I have outlined, the trial magistrate found that prosecution had proved its case. The appellants now appeal based on their respective petitions of appeal and written submissions. They contend that the prosecution failed to prove its case beyond reasonable doubt and that the evidence against them was inconsistent, fabricated and uncorroborated. The appellants also complained that the charge against them was defective and that their respective fundamental rights to a fair trial protected under **Article 50** of the Constitution were violated.

9. The appellants complained that the prosecution did not comply **Article 50(2)(k)** of the Constitution as they were not given statements of witnesses and evidence in advance. This plea is not correct as the record shows that the 4th September 2017, the prosecutor stated that he wished, *“to supply both accused person(s) with copies of the covering report, charge sheet and 5 witness statements.”* The appellants confirmed that they had received them and the matter proceeded without them raising any objection or issue.

10. As regards the issue of the defective charge sheet, the 2nd appellant contended that the charge sheet showed that his place of residence was Kakamega yet it showed that he was a resident of Mumias. That charge sheet was not stamped by the court and that it stated that he had vandalized two poles yet the evidence did not support that fact. The 1st appellant submitted that there was no mention of aluminium conductors in the evidence hence the charge sheet was defective.

11. **Section 134** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* dealing with the framing of charges states that, *“Every charge shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”* [Emphasis mine].

12. I note that the charge referred to **section 64(4)(b)** of the *Energy Act, 2006* which prescribes the following offence:

64(4) A person who willfully or with intent to interfere with the management or operation of the apparatus of a licensee-

(b) vandalizes or damages any works of or under the control of the licensee;

Commits an offence and shall on conviction, be liable to a fine of not less than five million shillings, or to a term of imprisonment of not less than five years, or to both such fine and imprisonment. [Emphasis mine]

13. The charge as framed is lucid, it discloses the offence which the appellants were charged and it one of vandalism contrary to **section 64(4)(b)** of the *Energy Act*. It meets the terms of **section 134** of the *Penal Code*. Any errors, in my view, did not detract from the substance of the charges as the facts or particulars for which the appellants were charged were clearly laid out. Further, I do not think an error concerning the 2nd appellant's residence or failure to stamp the charge sheet is fatal to the charge as he was not thereby prejudiced nor was a failure of justice occasioned.

14. As to whether the facts in the charge were proved is a question of fact to which I now turn. There is no doubt that the electric poles were vandalized as confirmed by PW 1, PW 2, PW 4 and PW 5. PW 1 who arrived at the scene found a post lying on the ground and saw a pick up speed off with another pole while PW 2 told the court that he saw a stump and a fallen pole. Both witnesses confirmed that the stump and pole were the ones photographed by PW 4. The appellants contended that since PW 4 testified that he found 7 poles missing, the charge sheet was defective and evidence inconsistent. The prosecution case was that the appellants were charged with vandalizing two poles. One pole had been cut and this is the one PW 1 saw being spirited away in a pick-up and the other one found at the scene. Since PW 1 did not see who cut the other poles, the appellants were not charged with vandalizing 7 poles.

15. The appellants also complain that the evidence did not disclose vandalism of aluminium conductors. I find that although the witnesses did not talk of aluminium conductors, I do not think that this is fatal to the charge. The term aluminium conductors refers to the electric wire which was vandalized as a result of cutting the poles. I therefore find the prosecution proved that 2 poles and aluminium conductors were vandalized.

16. The next issue is whether the appellants were involved in the vandalism. The key witness, PW 1 placed both appellants at the locus in quo. He saw them organizing how to carry the post. There was a power saw and a pick-up which sped-off with one pole. There was nothing emerging from the testimony of PW 1 to show that he was lying or motivated by spite. The incident took place and daytime hence diminishing the opportunity for mistaken identity and both appellants were arrested at the scene.

17. The appellants defences when considered alongside the positive evidence of identification were an afterthought. The 2nd appellant's case that he was at the scene because he was working was rebutted by PW 3 who stated that field work was not part of his work. Further, his defence that he had gone to record a statement was not true as he did not raise this issue with PW 4. The 1st appellant's defence was also an afterthought as there was no motorcycle at the scene and he did not raise that issue with PW 4 in cross-examination. Further, he did not even mention that he had broken his leg while trying to run away from the scene. The evidence against the appellants was clear and straight

forward and I find the offence was proved. I affirm the conviction.

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*”.

21. As a starting point, the court cannot ignore the fact that the offence of vandalism of the works of licensee is a serious matter as it affects a broad swathe of people and amounts to economic sabotage. The trial court in imposing the sentence had the benefit of Social Inquiry Reports prepared by the Probation Department. As regards the 1st appellant, the report showed that he had been charged with vandalism of electric poles in other cases at the Mumias Magistrates Court and had committed the subsequent act when he was out on bond. While the 2nd appellant was an employee of KPLC and had been hired on contract until he committed acts of vandalism and was charged at the Mumias Magistrates Court.

22. In my view and given the propensity of the appellants to commit the same offences, a non-custodial sentence or a fine is out of the question. I would therefore sentence each of the appellants to 3 years’ imprisonment without the option of a fine.

23. For the reasons I have set out above, I affirm the conviction. I allow the appeal only to the extent that I quash the respective sentences imposed on the appellants and substitute the same with a sentence of 3 years’ imprisonment for each appellant to run from the date of conviction before the trial court.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT KAKAMEGA THIS 26th day of SEPTEMBER 2019.

W. MUSYOKA

JUDGE

Appellant in person.

Ms Ombega, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.