



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.137, 127, 126 & 128 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. J. Kamau- RM delivered on 8th September 2017 in Kibera CMC. CR. Case No.2456 of 2016)

STANLEY KIIRU GITAU.....1ST APPELLANT

STEPHEN THUMBI KAGAI.....2ND APPELLANT

JULIUS GICHUKI MWANGI.....3RD APPELLANT

JAMES MBURU KABI.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The 1st Appellant, Stanley Kiiru Gitau, the 2nd Appellant Stephen Thumbi Kagai, the 3rd Appellant Julius Gichuki Mwangi and the 4th Appellant James Mburu Kabi were charged with ten (10) counts of **vandalism of electrical apparatus** contrary to **Section 64(4)(b)** of the **Energy Act**. The particulars of the offence were that on various dates between 9th September 2015 and 5th June 2016, in Kajiado West and Kajiado North Sub-Counties of Kajiado County, the Appellants jointly vandalized ten (10) transformers valued at between Kshs.350,000/- and Kshs.520,000/- under the control of Kenya Power & Lighting Company Ltd, the licensee. When the Appellants were arraigned before the trial magistrate's court, they were convicted on one count of vandalism but acquitted on nine (9) other counts.

The count that the Appellants were convicted of stated that on 5th June 2016 at Kibiku in Ngong within Kajiado North Sub-County, the Appellants jointly, willfully vandalized a 200 KVA transformer numberless valued at Kshs.520,000/- under the control of Kenya Power & Lighting Company Ltd., the licensee. The 1st Appellant was sentenced to pay a fine of Kshs.6 million or to serve fifteen (15) years imprisonment. The 2nd, 3rd and 4th Appellants were each sentenced to pay a fine of Kshs.5 million or to serve ten (10) years imprisonment. The Appellants were not able to pay the fines. They are serving the default custodial sentences.

They were aggrieved by their conviction and sentence. They each filed an appeal to this court challenging their conviction and sentence. Their petition of appeal raised more or less similar grounds of appeal. They were aggrieved that they had been convicted in the absence of any evidence that placed them at the scene of crime. They stated that the charge upon which they were convicted was fatally defective. They were of the view that the evidence adduced by the prosecution witnesses against them was inconsistent and contradictory to the extent that it could not form a basis for their conviction. The Appellants took issue with the fact that the trial court failed to appreciate the contradictory nature of the evidence related to their arrest which was highlighted by the evidence adduced by the Appellants in their defence and which clearly established that they could not have committed the offence.

The Appellants were aggrieved that the trial court had relied on the evidence of information allegedly given by an informer who was not called to testify in the case. The Appellants took issue with the manner in which the trial court admitted documentary evidence without following the law thus prejudicing them. They were finally aggrieved that the trial court had wrongly relied on circumstantial evidence to convict them yet the evidence adduced was not watertight as to lead to the irresistible conclusion that they had committed the offence. They faulted the trial magistrate for failing to take into account their respective defences before arriving at the determination to convict them. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the sentences that were imposed upon them.

Prior to the hearing of the appeal, the 1st Appellant presented to court written submission in support of the appeal. During the hearing of the

appeal, the 1st Appellant urged the court to consider the written submission and his further oral submission in which he argued that the prosecution had failed to adduce any evidence to connect him with the commission of the offence. In particular, he stated that the prosecution was not able to establish that he had indeed hired the vehicle from PW1 and therefore he could not be said to have been in possession of the said vehicle in the circumstances described by the prosecution witnesses. He submitted there was evidence that the motor vehicle in question was used by police officers. He further argued that it was alleged that he was arrested with transformer oil on his clothes. No evidence in form of photographic evidence was adduced to support the finding reached by the trial court that indeed he had been arrested with transformer oil soaked in his clothes.

Mr. Mberere for the other Appellants submitted that the charge sheet upon which the Applicant was convicted was defective. He submitted that the trial court reached the finding that the Appellants had vandalized the transformer after the conclusion that since the Appellants' arrest, the vandalism had stopped. He doubted if such conclusion constituted circumstantial evidence upon which the trial court could have relied on to convict the Appellants. Learned counsel further submitted that there was no evidence adduced by the prosecution that placed the Appellants at the scene of crime. He submitted that the evidence adduced clearly showed that the Appellants were apprehended elsewhere and not near where the vandalized transformer was. He explained that the evidence adduced by the prosecution witnesses was contradictory and inconsistent. In particular, he was of the view that the evidence of PW1 in regard to the ownership of the motor vehicle and the alleged hiring out of the same to the Appellants was not established to the required standard of proof. No evidence was adduced to corroborate the testimony of PW2, PW3, PW4 and PW6 to the effect that when the Appellants were apprehended, their clothes were soaked with transformer oil. The clothes were not produced into evidence. Nor were photographs of the said clothes produced into evidence. He took issue with the fact that the trial court convicted the Appellants on the basis of photographs and not the actual transformers which were alleged to have been vandalized.

Learned counsel urged the court to re-evaluate the evidence and reach the conclusion that the circumstances of the Appellants' arrest as narrated by the prosecution witnesses was inconsistent and contradictory and raised reasonable doubt as to whether indeed the Appellants were arrested in the manner so adduced in evidence. He urged the court to take into consideration the Appellants' respective defences and reach the conclusion that they were arrested elsewhere other than in the manner suggested by the prosecution witnesses. Learned counsel took issue with the fact that the trial court improperly applied circumstantial evidence to convict the Appellants. There was no direct evidence connecting the Appellants to the commission of the offence. The evidence adduced by the prosecution witnesses did not irresistibly and conclusively connect the Appellants, and the Appellants alone to the vandalism of the transformer. Learned counsel relied on several authorities in support of his submission that the prosecution failed to prove the charge against the Appellants to the required standard of proof beyond any reasonable doubt. He urged the court to allow the appeals.

Mr. Momanyi for the prosecution opposed the appeal. He submitted that the prosecution adduced sufficient, cogent and consistent evidence which was corroborated in all material respects and which supported the charge that the Appellants were convicted of. He explained that the Appellants were found in possession of materials which were established to have been vandalized from a transformer in Kibiku area of Kajiado North Sub-County. When the Appellants were arrested, their clothes were soaked with transformer oil. They also had tools which they had used to vandalize the transformer. Learned prosecutor urged the court to find that, taken into totality, the evidence adduced by the prosecution witnesses established, to the required standard of proof that it was the Appellants who had vandalized the particular transformer. They were therefore properly convicted by the trial court. He urged the court to dismiss the Appellants' respective appeals.

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, Ruwala 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 Appellant on the charge of **vandalism of electric apparatus** contrary to **Section 64(4)(b)** of the **Energy Act** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the submission made by the parties before this court in light of the grounds of appeal presented to the court by the Appellants. **Section 64(4)(b)** of the **Energy Act** that the Appellants were charged with provided as follows:

“A person who willfully or with intent to interfere with the management or operation of the apparatus of a licensee –

a. ...

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

c. ...

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 (10) years, or both.”

The prosecution was therefore required to establish that the Appellants willfully or intentionally interfered with electrical apparatus managed by the licensee who in this case is Kenya Power & Lighting Company Ltd by vandalizing or damaging the same.

What was the prosecution's evidence in support of the charge?

PW3 James Kariuki Ng'ang'a was at the material time the Area Assistant Chief of Kibiku Location in Kajiado North Sub-County. PW5 Stella Muthui and CPL. Daniel Njoroge were security officers attached to Kenya Power & Lighting Company Ltd Security Department. They testified that in the latter months of 2015 and the 1st half of 2016, there was a spate of vandalism which affected several transformers in Kajiado North and Kajiado West Sub-Counties of Kajiado County. They testified that the vandalism of transformers resulted in power outages to many consumers within the area. The vandalism became rampant between the months of March and May 2016. PW5 testified that among the transformers which were vandalized included a transformer at Kibiku Primary School on 26th May 2016, a transformer at Ngong Town on 3rd April 2016, a transformer at Silanga Matasia on 6th April 2016, a transformer at Ole Suretia in Ngong on 1st April 2016 and another transformer at Mugaa Road in Kiserian. The spate of vandalism caused considerable concern with Kenya Power & Lighting Company Ltd. No one was arrested because it became apparent that the vandalism was being undertaken at night. The Company decided to be proactive and involved the Provincial Administration in terms of sensitization with a view to arresting the culprits. The Company specifically asked Chiefs to involve Nyumba Kumi Initiative in order to arrest the situation.

PW3 testified that on the night of 5th June 2016 at about 3.00 a.m., he was called by a member of the community and told that there was a transformer which had just been vandalized. On receipt of the information, PW3 woke up two members of his family and also called PW2, Administration Police Sergeant Loseer Leshapai then based at Kajiado West Kibiku Administration Police Post. They decided to mount a road block on a junction in a road that they thought anyone transporting goods from Kibiku would pass. At about 4.00 a.m., they saw a motor vehicle Registration No.KAW 670P Toyota Carina. When the motor vehicle reached where they had mounted the roadblock, it stopped.

Inside the motor vehicle were five men who included the four Appellants in this case. PW2 ordered them to get out of the motor vehicle. PW2 and PW3 testified that when they got out of the motor vehicle, they realized that the occupants of the motor vehicle were smelling of transformer oil. PW2 and PW3 testified that they were aware of how the transformer oil smells like because of the rampant vandalism of transformers that they had been experienced in the area. They testified that the Appellants hands and clothes were coated in transformer oil. PW2 ordered the occupants to lie on the ground. He then handcuffed them. He did a search on the boot of the car. He found parts of a transformer. These parts included six (6) rolls of copper windings which are found in transformers. He also found a sack which contained stools including spanners and hacksaws. PW2 arrested the Appellants and took them to Ngong Police Station. One of the suspects later died and was therefore not charged with the Appellants.

PW4 PC Emmanuel Ekai, a Scenes of Crime Officer then based at Ngong Police Station was on 20th July 2016 requested to document the scene of crime and the items that were recovered from the motor vehicle that the Appellants were arrested in. He took several photographs which he produced into evidence. The photographs included a transformer which had been dismantled from the pole and left on the ground. The transformer was at Kibiku area in Ngong. He also took photographs of a sack which contained the tools that were used to dismantle the transformer. He also took a photograph of copper windings which were recovered from the motor vehicle. According to the testimony of PW5 and PW6, the copper windings found in the Appellants' possession could only have been removed from a transformer.

PW1 Jamleck Mwangi testified that he was the owner of the motor vehicle that the Appellants were found in. He explained that he had lent the motor vehicle to the 1st Appellant who had indicated that he required it to attend a funeral. PW1 told the court that he had known the 1st Appellant for about four months prior to their arrest. They had developed a friendship. He gave the motor vehicle to the 1st Appellant on a Friday. He expected the motor vehicle to be returned to him on a Sunday. Unfortunately, the motor vehicle was not returned to him on the agreed Sunday. He tried to contact the 1st Appellant but could not reach him. He was later summoned to Ngong Police Station where he was informed that his motor vehicle had been used to vandalize a transformer in Kibiku area.

When the Appellants were placed on their defence, they denied being found in the motor vehicle or being found in the area where the prosecution witnesses testified that they had arrested them. They also denied that they were found in possession of the items that were produced as exhibits in court.

On re-evaluation of this evidence, this court cannot fault the trial magistrate for reaching the verdict that the prosecution established its case against the Appellants to the required standard of proof beyond any reasonable doubt. Although it is conceded by the prosecution that there was no direct evidence linking the Appellants to the actual vandalism of the transformer, the trial court correctly applied circumstantial evidence to convict the Appellants. The prosecution established that a transformer was vandalized on the material night at Kibiku area. A few hours after the transformer was vandalized, the Appellants were found in possession of six copper windings that had been vandalized from the transformer.

When the scenes of crime officer visited the scene of crime, he found the transformer had been dismantled. It had been dismantled from the pole. On being intercepted, the Appellants were smelling transformer oil. Their clothes were soaked in transformer oil. This court believed the testimony of PW2 and PW3 when they said that they were familiar with the smell of transformer oil in light of the fact that they had visited scenes in the then recent past where transformers had been vandalized. The Appellants did not give a reasonable explanation in regard to what they were doing at Kibiku area at that particular time of the night while in possession of the copper windings and with tools that were established to have been used to vandalize the particular transformer.

As regards the Appellants' defence, this court cannot disagree with the finding reached by the trial court when it held thus:

“From their defence, each of the accused narrated how they were arrested at random at various parts of Ngong area for no apparent reason and how they were bundled up together at Kibiku Police Post and later jointly charged with the current offence. Although they all elected to adduce sworn testimony and the said testimonies were tested by the prosecution, I find that their

narration of events of the 4th and 5th June 2016 was far-fetched and does not rebut the explanation offered by the prosecution witnesses. Notwithstanding, I also note that during the prosecution's case, although accused were given ample opportunity to cross-examine all the witnesses, none protested by stating that the case had been fabricated or they had been arrested at random. Their individual defences of random arrest only came up during defence hearing. I am of the opinion that the circumstances under which all the accused persons were arrested in one car that contained items from a transformer and also contained assorted tools and equipment is very suspicious. Indeed as narrated by PW3 a hacksaw is not part of the tool box found in each car."

The Appellants took issue with the finding made by the trial magistrate to the effect that upon the Appellants' arrest, the vandalism of transformers that had become rampant suddenly stopped. The Appellants were of the view that the trial court prejudiced their case by considering extraneous matters that were not germane to the charge. This court disagrees. It was indeed peculiar that after the arrest of the Appellants, the vandalism of transformers in the area suddenly stopped. The statement may have been made obiter to the main finding, but it did not dent the otherwise strong, cogent, credible, corroborative and consistent evidence that was adduced by the prosecution witnesses to support the charge. The Appellants' appeal against conviction lacks merit and is hereby dismissed.

On sentence, this court notes that **Section 64(4)(b)** of the **Energy Act** provides a minimum sentence for those found guilty of committing the offence. This court notes that the offence that the Appellants were convicted is akin to economic sabotage. The Appellants' criminal act resulted in serious inconvenience to residents of Kibiku area who were deprived of electrical connection to the main grid. Recent cases have however emerged from the Court of Appeal that have declared provisions of the law that provide for minimum sentences not to meet the constitutional threshold of fair trial.

In the premises therefore, this court holds that the default custodial sentence that were imposed on the Appellants were harsh and excessive in the circumstances. The trial court did not take into account the specific mitigation circumstances of each Appellant. That default sentence is set aside and substituted by a sentence of this court. This court sentences the Appellants as follows:

1. The 1st Appellant is a repeat offender. He was previously convicted and served term in prison. He appears to have proclivity to crime. He shall serve seven (7) years imprisonment with effect from the date that he was convicted by the trial court.
2. The 2nd & 4th Appellants are first offenders. This court sentences them to serve five (5) years imprisonment with effect from the date of their conviction by the trial magistrate.
3. The 3rd Appellant is not a first offender. He shall serve seven (7) years imprisonment with effect from the date that he was convicted by the trial magistrate.

It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF OCTOBER 2019

L. KIMARU

JUDGE