



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 24 OF 2017

HOSTINE OSANJI ONZERE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 34 of 2016 in the Senior Resident Magistrate's Court at Winam delivered by Hon. B. Kasavuli (SRM) on 30th March, 2017)

JUDGMENT

1. On 30th March, 2017; Appellant was convicted for the following two offences.

- i. unlawfully installing a conductor contrary to section 64(1)(c) of the Energy Act and was fined Kshs. 500,000/- in default 2 years imprisonment
- ii. Possession of public stores contrary to section 324(2) as read with section 36 of the Penal Code and was fined Kshs. 100,000/- in default 1year imprisonment

The Appeal

2. Being dissatisfied with the conviction and sentence, Appellant lodged the instant Appeal on 12.4.17and raised 7 grounds of Appeal which I have summarized into 4 grounds **THAT:**

- 1) The prosecution had proved its case beyond any reasonable doubt**
- 2) Appellant was not properly identified**
- 3) Appellant's alibi was not considered**
- 4) The sentences are excessive**

3. When the Appeal came up for mention on 10.4.18, I directed that the appeal be argued by way of written submission which the appellant filed while counsel for the state urged to rely on the evidence on record.

Analysis

4. This being a Court of first Appeal, I am guided by the ruling of the Court of Appeal in the case of **OKENO VS. REPUBLIC (1972) E.A. 32**, where it held that:-

“It is the duty of a first Appellant Court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld”

Evidence at Trial

5. PW1 a KPLC technician testified that on 14.1.16; he received information that some people were constructing a power line on a road reserve. That he visited the scene at Mbale and where he found some people one whom was identified as Onzere. That he recovered a climbing line at the scene and was later informed that Onzere had been arrested. PW2 on the other hand recalled that accused was arrested on 15.1.16 and that climbing iron, metres and KPLC overall and wires were recovered from his shop. PW3 who was in company of PW1 stated

that he did not identify the people that were constructing a power line on 14.1.16 but that accused was identified at his shop the following day from where a climbing iron, metres and KPLC overall and wires were recovered for which appellant signed an inventory. He stated that the exhibits belonged to Kisumu-Lwanda Upgrading Project.

6. In his sworn defence, Appellant denied the offence and stated that he was arrested at his Mpesa shop on 15.1.16 and charged with offences he did not commit.

7. In his judgment, the learned trial magistrate ruled that Appellant had been identified by PW1 and PW3 and fined him Kshs. 500,000/- in default 2 years imprisonment for the 1st count and Kshs. 100,000/- in default 1 year imprisonment in the 2nd count.

Analysis and determination

8. I have considered the evidence on record. As regards Count 1, it is apparent that while PW1 claimed to have identified appellant on 14.1.16, PW3 who was with him stated that he did not identify any of the people that were constructing the power line. The trial Court's finding that Appellant's identification had been corroborated is therefore at variance with evidence on record. Appellant denied that he was at the scene of crime thereby casting doubt on PW1's evidence.

9. Concerning the 2nd count, the fact that appellant signed the inventory showing that the climbing iron and 3 metres wires were recovered from him leaves no doubt in my mind that they were so recovered. The state did not however tender evidence identifying the said exhibits as belonging to KPLC. PW1 and PW2 who are KPLC employees did not identify any unique mark on the wire and climber that showed that they belonged to KPLC. As regards the KPLC overall, it is not uncommon to see institutions' uniform worn by persons who are not employees of those institutions. There is no evidence that the overall was either stolen or unlawfully obtained.

10. The trial Court's finding that no individual has a private right to own such exhibits without permission from KPLC was therefore extraneous since it did not come from any of the prosecution witnesses.

11. In my considered view, the Defence had cast doubt on the prosecution case which ought to have been inferred in favour of the Appellant.

Decision

12. From the preceding analysis, I find that the conviction and sentence entered against the Appellant was not safe and should not be allowed to stand. I allow the Appeal, quash the conviction and set aside the sentence. I order that the Appellant should be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 24th DAY OF May 2018

T. W. CHERERE

JUDGE

IN THE PRESENCE OF

Court Assistant - Felix

Appellant - Mr. Kimanga

For the state - Ms. Wafula