



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC.MISC.APPL NO. 213 OF 2017

FORMERLY TAWA SPMCRC NO. 115 OF 2016

JOSEPH MULI SIMON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Appellant was charged with offence **VANDALISM OF ELECTRICAL APPARATUS CONTRARY TO SECTION 64 (4) (B) OF THE ENERGY ACT.**

2. Particulars being that on the night of 14th and 15th August, 2015 at Ntangathini Market, Sakai Sub-location, Wai Location in Mbooni East District within Makueni County, **JOSEPH MULI SIMON** willfully vandalized **50 KVA Transformer S/No 335 make Dausa-Transformer PVT LTD. KPLC No.R101145** valued at Kshs.550,000/= under control of Kenya Power the Licensee.

3. The Appellant pleaded not guilty and the matter went into full trial. The Appellant was found guilty and convicted and sentenced to pay a fine of Kshs.300,000/= and in default to serve three (3) years imprisonment.

4. Being aggrieved by the above decision, the Appellant lodged appeal and set out the following grounds:-

1) **That** the corroboration of evidence as was held by the trial court was not met due to the fact that none of the prosecution witnesses opined as to have witnessed the vandalism of the electric apparatus taking place.

2) **That** the prosecution case was riddled with lots of malice, contradictions and inconsistency which could have looked upon before arising the decision to convict.

3) **That** the particulars of the main charge giving rise to the conviction are defective because it does not tally with the evidence adduced in the support.

4) **That** the trial court erred in law by failing to give his defence adequate consideration.

5) **That** the trial court erred in law and fact by failing to observe that his mode of arrest did not irresistibly point to my guilt.

6) **That** the trial court erred in law by failing to observe, analyse and re-evaluate the entire evidence and find that there was no evidence to convict.

5. The parties agreed to canvass appeal by way of submission.

APPELLANT'S SUBMISSIONS

6. PW2 in his chief evidence testified he got information from the emergency office, that rendering his evidence a hearsay. PW3 did not testify whether there was any vandalism. PW4 got information through the assistant chief of Thanguni through a phone call, a vital witness who was not availed in court.

7. PW5 stated that it was alleged that a transformer was vandalized; he does not tell who alleged that, he never saw the happening take place. PW6 never stated about transformer vandalism. There is no one who saw the person who vandalized the transformer going to where it was installed or out of there.

8. Therefore the circumstances of how the vandalism took place remains unknown. The prosecution case was riddled with lots of malice, contradictions and inconsistencies which should have been scrutinized before a decision was arrived at.

9. When the issue of dates is observed keenly, one will find that something does not add up; PW1 states that the transformer was put up in his presence on 7th of July, 2016, he contradicts himself when he says he found the transformer vandalized on 4th of February 2016, five months before he installed it. That is when he went to the police and booked his report.

10. He also contradicted PW2 who testified that the transformer was vandalized before 15th of August 2015 for it is when he learned that.

11. During the cross-examination of PW2, he stated that Appellant was arrested on 21st of April 2016, while PW3 stated in his chief evidence that the arrest was on 15th of August 2016.

12. The charge sheet states that he was arrested on 27th April, 2016 which is contradictory to PW2 and also PW3 that renders the particulars of the charge sheet defective also. The witnesses were all on oath. The particulars giving rise to the conviction are therefore contradictory to the main charge rendering the charge sheet defective.

13. In the case of **YONGO – REPUBLIC (1983)OKKLR**, it was held that;

“In England it has been said, an indictment is defective not only when it is bad on the face of it, but also when for such reason it does not accord with the evidence given at the trial”

14. Further, PW6 was brought to court under a warrant of arrest, and testified on 18th of October 2016 but was stood down as he testified by the prosecutor.

15. On page 14 line 3 the prosecutor told the court that, quote

“There are serious anomalies. There are discrepancies on the charge sheet and on the statement of PW6 which was occasional at the police station.”

16. Thus the Magistrate should have directed his minds to the evidence of PW6, as the evidence was to be framed afresh. Before PW6 was stood down he had said the following in page 14 line 3 ***“on the 15th of November..... then on 8th November 2016 he stated again and said in line two of page 15. “On 15th August 2015 at 6:00 am I was at work.”***

17. He told the court that Appellant had a luggage in a carton but failed to tell what was in the carton. His evidence is contradictory to the charge sheet that shows he was arrested on 27th of April 2016.

18. PW4 opined that he was told by a fellow officer that he was wanted and came to arrest the Appellant for other reasons. The other thing he did is to go to a scene where a transformer was vandalized.

19. The question that first arises is how did the learned magistrate establish that the copper windings are of a transformer and specifically transformer serial 335? Appellant being a witness testified that he had a carton that contained hair pieces and he gave it out at his salon in Ngulumi the only luggage that he had.

20. However, the Hon. Court failed to give his defence adequate consideration and find that he had no luggage by the time of his arrest.

21. PW5 contradicted PW4 when he testified that he was arrested after it was alleged that he vandalized a transformer therefore contradicting PW4 who testified that he was arrested because he was wanted after he was intercepted at Wote.

22. And to support his argument that PW4 and PW5 were not straight forward people/witnessed. He cites the case law in **NDUNGU KIMANI –VS- REPUBLIC (79) KLR 283, MADAN, MILLER AND POTTER (J.J.A)**, the Hon. Judge held that;

“..... the witnesses in a criminal case upon whose evidence is proposed to be relied upon should not create an impression in mind of the court that he is not a straight forwarded person or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his or her evidence.”

23. Thus, that is the case of most prosecution witnesses in this matter.

24. The magistrate rejected his defense without giving any cogent reason for so doing as is stipulated in Section 169.

i. Of the criminal procedure code, had the Hon. Court really alive to its findings, it would have noticed that the particulars

of the charge did not match the evidence that was adduced in court.

ii. That the allegation that he was involved in the vandalism of a transformer was a mere allegation.

iii. That the entire case was full of malice, exaggerations, contradictions and inconsistencies.

iv. The investigations and the prosecution of the entire case lacked legal foundation hence was never proved beyond all shadows of doubts.

RESPONDENT'S SUBMISSIONS

25. The prosecution submitted that, there was prove of prosecution case beyond reasonable doubt PW3 testified that the Appellant was in his motor vehicle. He had luggage. He was arrested from said motor vehicle. He denied the luggage in motor vehicle. The luggage was copper wire for transformer.

26. PW6 was in said motor vehicle stated Appellant entered motor vehicle with a luggage at 6.00 a.m. The luggage was copper wire. Appellant denied the luggage upon being arrested in same motor vehicle.

27. In defence he said he had luggage but was containing saloon cosmetics. He did not alight with any luggage. He only had luggage of copper wire of a transformer. He was arrested shortly after transformer was vandalized. The exhibits produced were identified by PW1 and PW2 employees of KLPC. The luggage had serial numbers of vandalized transformer.

28. The evidence was corroborated and pointed to the guilty of the Appellant.

29. The charge sheet is not defective as alleged. Thus Respondent prays for the appeal to be dismissed.

DUTY OF FIRST APPELLATE COURT

30. The duty of a first appellate Court was set out in the celebrated case of **Okeno V. Republic (1972) E.A. 32** in the following terms;

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination (Pandya Vs. Republic (1957) EA. (3365) and the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see Peters Vrs. Sunday Post [1958] E.A. 424.”

EVIDENCE

31. The prosecution called 6 witnesses. PW1 Anthony Irungu a construction supervisor with the Rural Electrification programme testified that on the 7th day of July 2015, he was at Ntangathini with his colleague. They wanted to install electricity.

32. On the 4th day of February 2016, when they came for inspection at Ntangathini, they found that the transformer had been removed. He reported the matter at Mbumbuini police station.

33. On cross-examination, PW1 testified that he was not told the person who pulled down the transformer. He further testified that he found the remains of the transformer at the police station.

34. PW2 Simon Mugambi testified that on the 15th day of August 2015, he got information from their Makueni office that a transformer had been vandalized. When he visited the site, he found the transformer 50KUA S/NO.335 had been damaged. The copper linings had been removed. Later on, the police Mbumbuni told him that the suspect had been arrested.

35. On cross-examination, PW2 testified that he discovered that the transformer had been vandalized on the 15th day of August 2015.

36. PW3 John Irungu Ngatia testified that on the 15th day of August 2016, he was driving his vehicle of registration number KBN 269 H. when he got to Kwa Kulomba, he was stopped by a premmio vehicle.

37. The driver of the premmio, identified the accused person and arrested him.

38. When they got to Tawa, he saw a luggage in the boot of which none of the passengers owned up to be theirs. He handed over the luggage to Tawa patrol base. Later on, he was called by police officers from Mbumbuni to record his statement.

39. On cross-examination, PW 3 testified that he realized that the luggage belongs to the accused person when he got to Tawa. He further testified that the luggage was in a carton.

40. PW4 Pc James Mbuvi of Mbumbuni police station testified that on the 15th day of August 2015 at 8.00 a.m. while he was in the office, he was informed by Cpl. Sululu that Karanja's lorry had been intercepted at Wote and the driver was a wanted person.

41. He boarded a vehicle and arrested the accused person at Kwa Kulomba and took him to Mbumbuni police station. At 12.00 p.m., he was called by the area chief of Ithangathini who told him that a transformer had been vandalized.

42. On cross examination PW4 testified that he used a private vehicle of a business man to arrest the accused person.

43. PW5, Pc Stephen Bett of Mbumbuni police station testified that on the 26th day of April 2016, together with inspector Oscar Bhugus and Pc Maina, they visited the scene where the transformer had been vandalized, where he found oil split on the ground.

44. The accused person was arrested. He recorded the statements of the witnesses then charged the accused person with the offence before court. On cross examination, PW5 testified that the copper windings were recovered from the accused person in a vehicle.

45. PW6, Francis Ngovi testified that on the 15th day of the August 2015, the accused person boarded their vehicle with a luggage and put it on the chair. At 6.00 p.m., the luggage was returned to Mbumbuni. At 7.00 p.m., he was called by Cpl. Sululu to go and record his statement at Mbumbuni police station.

46. On cross-examination, PW6 testified that the accused person's luggage was labeled using a marker pen.

47. The accused person was put on his defence. He testified on unsworn testimony without calling any witness. He testified that on the 15th day of August, he was travelling to Nairobi, and he had carried some luggage which were Salon items.

48. When they got to Kwa Kulomba, they were stalked by a private vehicle. The driver of the private vehicle handcuffed him. He was taken to Mbumbuni police station, he was then brought to court where these charges were read over to him.

ISSUES, ANALYSIS, AND DETERMINATION

The only emerging issue herein is whether the prosecution case was proved beyond reasonable doubt?

49. PW1 Anthony Irungu a constructions supervisor with the rural electrification programme testified that on the 4th day of February 2016, when he came for inspection at Ntangathini he found that their transformer had been removed.

50. PW2 Simon Mugambi, testified before court that when he visited the site he found that the transformer had been damaged but later on he was told that the suspect behind it had been arrested.

51. PW3, John Irungu Ngatia the driver of the vehicle of registration number KBN 296 H, confirmed that when he got to Kwa Kulomba, a premium vehicle (salon) car intercepted them and the accused person was arrested. He further testified that when he got to Tawa he realized that the luggage which was in the vehicle belonged to the accused person.

52. PW6 Francis Ngovi corroborated the evidence of PW3. He testified that on that material date, he saw the accused person board their vehicle with a luggage which was then returned to Mbumbuni police station at 7.00 p.m.

53. PW5 Pc Stephen Bett visited the scene and confirmed that indeed the transformer had been vandalized. He produced the copper windings and the transformer as exhibits.

54. It was noted from the evidence of PW6 and PW4 that the copper windings were the luggage that the accused person was travelling with, on the date when he was arrested.

55. The accused person in his unsworn testimony testified that on the 15th day of August 2015, he was arrested at Kwa Kulomba on his way to Nairobi. He further testified that he had carried salon items.

56. It was found by trial court that, his defence to be a mere denial because he testified that he entered m/v on 15/8/2015 carrying a luggage which he put on chair. He gave it out at Nguluni. He never called anybody to confirm he really gave out same and that it had salon items as he alleges.

57. PW6 saw him board same m/v with a luggage same time and date and put it on chair. It turned out that same was the items of the vandalized transformer.

58. The evidence of all the prosecution witnesses was consistent though with minor errors on dates and was well corroborated and thus credible. Thus no reason to doubt them.

59. The court has gone through the evidence on record and found that the evidence against the Appellant was overwhelming and the defence did not shake it.

60. The court thus finds that the appeal has no merit and makes the following order;

The appeal is dismissed, conviction affirmed and sentence confirmed.

SIGNED, DATED AND DELIVERED THIS 24TH DAY OF SEPTEMBER, 2018, IN OPEN COURT.

C. KARIUKI

JUDGE