REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.99 OF 2015

[consolidated with HCRA No.100/2015]

1. HUSSEIN SHUNE GALGALO

2. JOSEPH KAMAU .....APPELLANTS

VERSUS

REPUBLIC ……. RESPONDENT

(From the original conviction and sentence in criminal case No. 90 of 2015 of the Chief Magistrate's Court a Isiolo by Hon. J. M Irura – Senior Resident Magistrate)

JUDGMENT

HUSSEIN SHUNE GALGALO and **JOSEPH KAMAU**, the appellants, were convicted for the offence of severing with intent to steal contrary to section 32A of the Kenya Communication Act(sic) of 2012. **HUSSEIN SHUNE GALGALO** was also convicted for the offence of giving false information to a person employed in the public service contrary to section 129(a) of the Penal Code.

The particulars of the offence were that on 25th February 2015 at Kenya Power area along Isiolo Law Courts route, in Isiolo County jointly with intent to commit mischief, tampered with telecommunication plant namely cable by cutting it, the property of Telkom Kenya Limited. After their arrest, the first appellant falsely informed PC Betwel Ndegwa that his name was **CHRISTOPHER MWANGI** knowing the same to be untrue causing the said officer to enter in the occurrence book.

Each appellant was fined Kshs.5 million in count one and in default to serve 10 years imprisonment. The first appellant was fined Kshs. 10,000/= in default to serve two years imprisonment. The appeal is against both conviction and sentence.

The appellants were in person. They raised similar grounds of appeal that I have summarized as follows:

1. That the learned trial magistrate erred in law and in fact by relying on contradictory evidence.

2. That the learned trial magistrate erred in law and in fact by failing to consider the defence of the appellants.

The state opposed the appeal through Mr. Namiti, the learned counsel.

The facts of the prosecution case were briefly as follows:

At about 11 p.m, the two appellants were spotted cutting some Telkom cables. They were arrested at the scene with a knife and a cable they had already cut. When they were taken to the police station, the first appellant gave his name to the police officer booking them as Christopher Mwangi.

In his defence the first appellant contended that he was arrested while coming from a bar. The second appellant contended that he found the first appellant under arrest. He was also arrested and accused of stealing Telkom cables.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC [1972] EA 32.**

The Act under which the appellants were charged was not correctly cited. It is known as ***the Kenya Information and Communications Act.*** I have perused the record and I am satisfied that the error did not prejudice the appellants in any way. They understood the charge and fully participated in the trial. The error is curable under section 382 of the Criminal Procedure Code.

The evidence of **David Kiriiya** (PW1) is that while on guard duties at the Isiolo Huduma Centre, he saw some two people who were tampering with telecom cables near the Law Courts. He called his supervisor **Erick Muriuki** (PW2). The duo went and arrested the appellants with a knife and a cable they had already cut. This is what PW2 testified to. **PC Bethwel Ndegwa**(PW3) testified that he received the two appellants at the police station with a telecom cable and a knife. When he was booking them, the first appellant informed him that his name was Christopher Mwangi.

Although both appellants contended that the prosecution evidence was contradictory, I found no contradictions. The learned trial considered their defence before dismissing the same and rightly so. The appeal on conviction lacks merit and the same is dismissed.

Section 32A of Kenya Information and Communications Act states:

> **A person who, with intent to steal, severs any telecommunication apparatus or other works under the control of a licensee, commits an offence and is liable, on conviction, to a fine of not less than five million shillings or to imprisonment for a term of not less than ten years or to both.**

In count one the appellants were sentenced to the minimum sentence provided by the law. I cannot therefore interfere with the sentence thereof.

In count two, the learned trial magistrate ought to have been guided by the scale provided in section 28(2) of the Penal Code on default sentence to be meted out. I provides:

> ***In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Cap. 91) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—***

The first appellant default sentence ought to have been 3 months imprisonment. The appeal of the first appellant succeed only to this extent in respect of count two.

In a nutshell the appeal by both appellants is dismissed except that of first appellant on default sentence in

count two as above stated.

DATED at **MERU** this **28th** day of **April, 2017**

KIARIE WAWERU KIARIE

JUDGE