



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 28A OF 2016

CONSOLIDATED WITH CRIMINAL APPEAL NO. 28B OF 2016

NICHOLAS AKALA ISAAC.....1ST APPELLANT

NICHOLAS CHAVASAKHA IRARWA.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court the Kibera Cr. Case 1687 of 2015 delivered by Hon. Ondieki, RM on 22nd January, 2016.)

JUDGMENT

Background

Nicholas Akala Isaac and Nicholas Chavasakha Irarwa, the Appellants herein were charged with committing the offence of vandalism of electrical apparatus contrary to Section 64(4)(b) of the Energy Act. The particulars of the offence were that on 24th April 2015 at Gitanga Road in Nairobi within Nairobi County, jointly vandalized 20 meters of AMKA cable valued at Kshs. 40,000/= under the control of Kenya Power, the licensee.

After the trial, the Appellants were found guilty and convicted accordingly. They were each sentenced to pay a fine of Kshs. 5,000,000/= in default serve 10 years imprisonment. They were displeased with that court's decision and have filed the present appeal. They filed similar amended grounds of appeal dated 29th March, 2017. They were that; the learned magistrate erred when he based the Appellants' convictions on evidence that did not prove the offence beyond a reasonable doubt, the charge sheet was defective, the trial magistrate relinquished his role as an arbiter when he started looking for supportive evidence that was never adduced, the trial magistrate erred when he relied on the doctrine of circumstantial evidence and finally the trial magistrate erred when he passed a judgment not supported by the evidence on record.

Submissions.

Both Appellants relied on written submissions filed on 29th March, 2017 which were similar in all respect. They submitted that the charge sheet was defective in that it did not specify the correct statute under which the charge was drafted. Their contention was that the offence having been drafted under the

Energy Act which does not exist calls for their acquittal. They were alive that the offence ought to have been charged under the Energy Act No. 12 of 2006. They submitted that the trial court relied on hearsay evidence in convicting them. This was buttressed by the fact that no eye witness who allegedly saw them stealing the AMKA cables were called as prosecution witnesses. All the prosecution witnesses testified to what they had been told by the members of the public. As such, the court ought not to have relied on hearsay evidence. They also submitted that the photographs comprising the vandalized cables were not produced in accordance with the Evidence Act. They specifically took issue with the non-production of the certificate pursuant to **Section 68 of the Evidence Act** of the maker of the photographs. On the whole, they were of the view that the circumstantial evidence relied upon was not sufficient to found a conviction against them. They urged that the appeal be allowed.

Learned State Counsel Ms. Kimiri opposed the appeal. Her submission was that the charge sheet was not defective as the offence was drafted under the correct provision of the law. She submitted that although the members of the public who arrested the Appellant did not testify, under **Section 143 of the Evidence Act**, the prosecution was enjoined to call the witnesses they knew and were convinced would prove their case. In that regard, the prosecution witnesses who testified proved the case beyond a reasonable doubt. Ms. Kimiri while summarizing the prosecution case conceded that the Appellants were convicted based on circumstantial evidence. This was buttressed by the fact that no eye witness testified. However, she submitted that the evidence on record was sufficient to found a conviction against both Appellants. Furthermore, the Appellants did not give a reason why they would have been framed for the offence. She also emphasized that the sentences imposed were legal and conformed to **Section 64(4)** of the Energy Act. She invited the court to consider that the offence was serious and called for a deterrent sentence. She urged the court to uphold the conviction and sentence.

Evidence.

PW1, Titus Kipkemei Chemey was a supervisor with Kenya Power and Lighting Company(KPLC) at Dagoretti Corner. He recalled that on 24th April, 2015 he was at work with his team in Kawangware and as they passed by Braeburn School found a mob which had caught two people cutting cables. The suspects had pangas and a cable. They the two arrested the suspects whom they escorted to Riruta Police Station. He identified them as the Appellants in court. He also produced photographs of drum of cable and the panga they were using.

PW2, Daniel Muchene an electricity superintendent was on 24th April, 2015 informed of the incident by CPL Daniel Njoroge, a police officer attached to KPLC. He visited the scene where he found a drum roll from which the cable was cut. He confirmed that the roll was from KPLC by way of a label.

PW3, CPL Daniel Njoroge attached to KPLC's security department corroborated the evidence of PW1 and 2. He investigated the case and preferred the charges against the Appellants. He also produced the photographs of the exhibits taken by Joseph K. Gacheche, a scene of crime officer.

After the close of the prosecution case, the court ruled that a prima facie case had been made out against the Appellants. They were both put on their defence and they chose to give unsworn statements. They also called witnesses in support of their defence.

The 1st Appellant who testified as **DW1** worked as a garbage collector. He said that on the material date he was engaged in usual chores. After work he and co-workers went to take some alcohol after which they headed home. On their way home he met with some KPLC employees who were not happy with his drunken state. He said that he insulted the employees who in turn assaulted him. The 2nd Appellant arrived to help him but they also assaulted him before taking both of them to Riruta Police Station where they were charged. He said that they did not cut any cables and were framed for an offence they did not commit.

DW2, the 2nd Appellant corroborated the evidence of DW1. He added that after their drinking spree he went to clean his overalls in a river. That is when he saw the 1st Appellant being assaulted near Rusinga

School. He demanded to know why the 1st Appellant was being assaulted and he too was assaulted before being thrown into a lorry and ferried to Riruta Police Station where they were charged. He stated that he did not commit the offence.

DW3, Tinar Kakai Liveya a sister to DW1 only stated that she knew that DW1 was a garbage collector. **DW4, Roalah Arata Liveya** a brother to DW1 stated that he knew why the 1st Appellant had been charged. **DW5, Oliver Mukhwana Mecha**, a brother to the 2nd Appellant also stated that he knew why his brother had been arrested.

Determination.

This being the 1st appellate court its duty is to reevaluate the evidence and come up with its independent conclusions. The court must however bear in mind that it has neither heard nor seen the demeanor of the witnesses and give regard for that. **See Okeno v Republic (1972) EA 32.**

After summarizing the evidence on record, I have deduced the issues for determination to be whether the charge sheet was defective and where the case was proved beyond a reasonable doubt.

On whether the charge sheet was defective, the Appellants submitted that the charge itself did not conform to **Section 137(a) (ii) Criminal Procedure Code** in that the offence was not properly described as the law provides. They submitted that the charge sheet in this case did not make reference to the specific statute under which they were charged. According to the Appellants, there exists many Energy Acts, thereby obligating the draftsman to state the actual Act the offence was drafted under.

The Appellants were charged with contravening **Section 64(4)(b) of the Energy Act**. The provision of the law ought to have read as **Section 64(4)(b) of the Energy Act No. 12 of 2006**. The mere omission of stating the no. of the Act under which the charge was drafted did not make the charge defective. I say because the Act itself provides for Section 64(4) that specified the offence. Furthermore, the charge was itself drafted in unambiguous manner, thus the Appellants understood the charge they were facing. The Act No. 12 of 2012 which the Appellants referred to was a subsidiary legislation that amended the main Statute. However, the amendments did not affect Section 64(4)(b).

Be that as it may, I have had to interrogate whether the offence as charged was supported by the evidence on record. Both Appellants were jointly charged under **Section 4(4)(b) of the Energy Act** (which should read as Act No. 12 of 2006). The same provides as under:

“A person who willfully—

(b) Carelessly or accidentally breaks, throws down or damages any works of or under the control of a licensee, or”

From the definition, the prosecution must establish the following; that the person willfully, carelessly or accidentally:-

(i) Breaks, or

(ii) Throws down, or

(iii) Damages, any works of or under the control of the licensee.

In this case the licensee is the Kenya Power Company. The elements must be supported by the evidence adduced. The case for the prosecution was that the Appellants cut a portion of some uninstalled AMKA cable that was on the ground for purposes of swapping with old ones. According to PW3, both Appellants at the time of their arrest were being escorted by the members of the public alongside the 20 metre cable that had been cut off from the roll meant for swapping. At the time of cutting off the cable, the roll had

not been installed.

The charge as drafted was one of vandalism. It then behooves this court to define the word ‘**vandalism**’ so as to determine whether it was supported by the evidence. Under the 9th Edition of the Black’s Law Dictionary, the word is defined as follows:

- 1. Willful or ignorant destruction of public or private property, esp. of artistic, architectural, or literary treasures.**
- 2. The actions or attitudes of one who maliciously or ignorantly destroys or disfigures public or private property; active hostility to anything that is venerable or beautiful”**

From the evidence on record, none of the members of public who allegedly saw the Appellants destroying the cable were called as prosecution witnesses. All the witnesses who testified attested to events after the cable had allegedly been ‘vandalized’. Furthermore, it is clear that the cables had not yet been installed; thereby, leading this court to conclude that the evidence disclosed the offence of stealing as opposed to vandalism as defined under **Section 268(1) of the Penal Code**. The question now is whether this court can find both Appellants guilty of the offence of stealing. The same can be applied on invocation of **Section 179 of the Criminal Procedure Code**. The same provides as under:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

It is then safe to conclude that the issue of substituting an offence with the one for which the evidence is established is not an obvious case. The offence substituted must be cognate and minor to the offence that an accused was initially charged with. The reasoning was adopted by the Court of Appeal in the Case of **Kalu vs Republic [2010] 1KLR**. In part, the court observed as follows:

“...all the provisions of Criminal Procedure Code which are under the heading:- ‘convictions for offences other than those charged’ and beginning with Section 179 up to Section 190 deal with substitutions in which a Court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under Section 296(2) of the Penal Code for the offence of simple robbery contrary to Section 296(1) of the Code. It is so permissible to convict a person charged with murder under Section 203 of the Penal Code with manslaughter under Section 202 as read with Section 205 of the Penal Code. That is because the offence of manslaughter, for instance, is minor and cognate to that of murder...”

So then, is the offence of vandalism cognate or minor to the offence of stealing? The answer can simply be deduced from the respective prescribed penalties. Under **Section 64(4) of the Energy Act No. 12 of 2006**, the offence of vandalism is punishable by a fine not exceeding Kshs. 1,000,000/= or a maximum term of imprisonment of one year. The offence of stealing on the other hand is punishment under **Section 275 of the Penal Code**. The said provision provides that a person who steals anything capable of being stolen is guilty of a felony termed theft and is liable unless owing to the circumstances of the theft or the nature of the thing stolen, some other punishment is provided, to imprisonment for three years. Accordingly, the latter offence being a felony is more serious than the offence of vandalism. Accordingly, this court would be more than courageous to substitute the offence charged with one of stealing.

I would in the circumstances find and hold that the charge was not proved beyond a reasonable doubt as it was not supported by the evidence adduced and because the evidence itself did not support the elements

of the offence charged. The court can now only do the needful which is to find that the appeal has merit. I allow the same, quash the conviction, set aside the sentence and order that both Appellants be set free unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi this 23rd May, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *1st Appellant present in person.*
2. *2nd Appellant present in person*
3. *M/s Kimiri for the Respondent.*