REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 25 OF 2014

JAMES MWANGI MUKUMBU.....……..…….APPELLANT

VERSUS

REPUBLIC…….……..……...…RESPONDENT

(Appeal against Judgement, sentence and conviction in Criminal case number 1126 of 2012, R vs James Mwangi Mukumbu & Another at Karatina, delivered by D. N. Mukumbu, Ag P.M. delivered on 21.3.2014).

JUDGEMENT

James Mwangi Mukumbu (hereinafter referred to as the appellant) was arraigned before the Magistrates court at Karatina charged jointly with a one **Antony Hinga Maina** with the offence of wilfully damaging a transformer contrary to Section **64 (4) (b)** of the Energy Act.

The particulars of the offence were that on the nights of 8th and 9th day of October 2012, at Gathui-ni area of Mathira West District, Within Nyeri County, jointly with others not before the court, with intent to steal, you wilfully damaged a transformer serial no. 1150491, valued at Ksh. 500,000, the property of Kenya Power.

This appeal was filed by the appellant only. The first accused in the lower court has not appealed.

The duty of a first appellate court was authoritatively stated by the Supreme Court of India in the recent decision in the case of *K. Anbazhagan v. State of Karnataka and Others*, where a three-Judge Bench addressing the manner of exercise of jurisdiction by the appellate court while deciding an appeal ruled that:-

"The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,.....The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – ***sans passion and sans prejudice****. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."*

PW1 Julius Mathenge Nderitu testified that on 9th October 2012, he was asleep at around 1 a.m. when he heard some noise of something being broken into, he called the watchman of a nearby primary school and asked him to go to the school gate and find out what was happening, he also called the area assistant chief and alerted him, then he heard siren from the watchman say they have gone. The assistant chief came and they had already arrested one of them. He was in the company of the AP's. The suspect showed them where they had hidden the motor cycle. The transformer was on the ground.

PW2 Michael Ngare Kinyua the watchman at the primary school where the transformer was located received a call from PW1 who notified him of the unusual noise, he proceeded to the gate where the transformer was, flashed a torch and about 6 people ran. He raised the alarm. He had called the police also. Thereafter, he saw the first accused who had already been arrested.

PW3 John Gachoki, the assistant chief, confirmed that he received a call from **PW1** at around 1 a.m. on the material day who notified him that he had heard some sound like the transformer had fallen, He called two APs and proceeded to the scene. While on the way they found one person about 100 metres from the transformer. He was running. They arrested him and upon interrogation he said he was in the company of others and they were stealing the transformer. He is the first accused person in the lower court.

PW4 CPL Joseph Mathenge confirmed that on the material day and time he received a call from **PW3** who informed him that the transformer had been stolen, In the company of two other officers, among them **PW 10**, they proceeded to the scene, parked the vehicle and started walking and after about 50 metres they found a person running, they stopped him, he was the first accused in the lower court, he said he had been hijacked by unknown people, but upon further interrogation, he said he was in the company of others stealing a transformer. They proceeded to the scene and found the transformer on the ground. He also told them they came in two motor cycles, each carrying 3 people and around the scene they found two motor cycles**. PW1O, Stephen Musongi Atswanje's** testimony was similar to **PW4**.

PW5 Bernard Muchega Ambaka, chief security officer, Kenya Power & Lighting Co Ltd. Mt. Kenya region, testified that he was called to the police station, identified the transformer and gave its serial number. He confirmed that it was damaged. He identified that transformer in court. He also learnt later that another person had been arrested and charged in Kerugoya Court.

PW6 Alex Mwangi Ndegwa, a employee of Kenya Power who repairs transformers gave details of the damage to the transformer in question and stated that the same was damaged beyond repair and gave the estimate of the damage at **Ksh. 500,000/=.**

The next witness is **P.C Francis Ekwang**. In the record he is shown as **PW4,** though I think he should be **PW7.** His evidence was that on 21.11.2012, he met a person being chased by flying squad at around 6.30 am at Karatina town, he did not know why they were chasing him, but a **Sgt. Muthui** informed him that the person had stolen a transformer. That evening while on patrol he saw him at a bar and arrested him.

PW8 Moses Muthee Kariuki confirmed that he owned motor cycle **KMC 710 L,** that at the request of his wife he agreed to give their daughter the motor cycle to do business with it. He agreed on condition that it would be returned every day, but on 11th October 2012 his wife called to say it had not been returned. Later her driver told her that the motor cycle had been leased to someone else. The motor cycle was found at the police station, but the driver was nowhere to be found. He was not able to find the driver.

PW9 Patricia Waruguru Muthee daughter to **PW8** confirmed that her father had given her the motor cycle to do business with it, she had hired a driver called **"Robert"** with strict instructions that he would return the motor cycle daily at 7pm, that on 8th October 2012 he informed her that he was to give some people the motor cycle to use in a function, but they would return it at 8pm, but they did not return. She called the person who introduced her to the driver and she assured her not to worry, On 9th October 2012 the motor cycle had not been brought, prompting her to report to the police. Later they were informed that the motor cycle had been arrested in connection with this case.

PW11 Sgt. Kipsang, the Investigating officer confirmed he went to the scene and interrogated the first accused who said the motor cycle was rode by "**Jimmy**." The said **Jimmy, James Mwangi alias Jimmy** was arrested on 21.11.2012. He said PW9 had employed a driver called "**Robert"** who has never been found, but she said she had rented the motor cycle to a person called **"Jimmy"** and that the said "**Robert"** has never been found.

At the close of the prosecution case the trial magistrate was satisfied that a *prima facie* case had been established and put both accused persons on his defence. The provisions of Section **211** of the Criminal Procedure Code were complied with and the appellant herein opted to give unsworn evidence. He testified that on the material day, he went to Chaka to pick a birth certificate for his child, he took it home and in the evening went to Karatina. That evening he was arrested and charged with the offence.

After evaluating the prosecution and the defence case, the trial magistrate found the appellant and his co-accused guilty as charged and each accused person to pay a fine of **Ksh. 4,000,000/=** in default to serve **four years imprisonment.**

Aggrieved by the said finding, the appellant herein appealed to this court against the conviction and sentence imposed and in his amended grounds of appeal he raised four grounds which in my view can be conveniently reduced to one namely; ***(i)*** *Whether the learned magistrate erred in law in concluding that the prosecution had proved its case against the appellant*.

The appellant filed written submissions which I have considered. Learned State Counsel also filed written submissions and conceded to the appeal on grounds that the evidence adduced was not enough to sustain the conviction.

To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty.

In my view, whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt. Perhaps the most eloquent statement of reason for this is to be found in the opinion of **Brennan J** in the United States Supreme Court decision in *Re Winship* where the court stated:-

"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction……Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. <u>It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned"</u>

The learned Magistrate started on the correct footing when she quoted the case of *Patrick Kabui Maina & Another vs Republic* where the court of appeal stated:-

"If an accused is arrested on the strength of an information given by an informer and he is not put in the witness box to testify in chief and be cross-examined, such evidence should be disregarded."

Then the learned magistrate proceeded to state as follows:-

"In the present case, it is on record that second accused absconded bail at Kerugoya court on a similar offence of damaging a transformer. This is criminal case no. 773/11, 2nd accused in his defence did not deny having a similar case in Kerugoya. This shows that he is not innocent. The nature of offence is serious. It is on record that the police were conducting their investigations under cover. I find that

revealing the informer and placing him on the witness box would have prejudiced the whole investigation of such issues. This issue is paramount in this whole area. It is a syndicate and involves many players. There is no witness protection offered for such witness/informers"

After stating the above the magistrate proceeded to find both accused persons guilty. I find it rather unfortunate that the learned magistrate made the above remarks going against the authority he cited referred to above and secondly arriving at conclusions which were not supported by evidence. **First,** there is no evidence at all linking the accused with the offence. A look at the evidence shows that there is there no evidence to show that he was the accused in the Kerugoya case referred to above. Of the 11 witness who testified, the only witness who mentioned the appellant is **PW11** and I will shortly comment on his evidence.

PW9 testified that she received a motor bike from her father to operate a business and employed a rider called "**Robert"** who was introduced to her by a friend called Mama **Nyawira**. She was categorical that the said "**Robert"** vanished after the incident and has never resurfaced. She never said "**Robert"** was the appellant. Her evidence did not show that the person who had the motor bike at the material time was the appellant. She never mentioned him in court even remotely.

The other relevant evidence is that of **PW4,** a police officer whose testimony was that on 21.11.2012, while guarding a bank at Karatina Town at around 6.30am he saw a person being chased by the flying squad, that the same evening while on patrol he saw the same person and arrested him and called the flying squad who identified him. The flying squad identified him and said he had stolen a transformer. It important to point out that this witness never mentioned that the said person was the appellant nor did he identify him in court. A gap exists in the evidence of this witness in that he omitted to clearly state that the person he arrested was the appellant before court nor was any of the persons who he alleged identified the said called to give evidence. Much as the learned magistrate tried to excuse the failure to call the alleged informer, his decision went against the law and the above authority which he quoted correctly and this occasioned a gross-failure of justice.

The other relevant evidence is that of **PW5** who testified as follows:-

*"while the case was ongoing I was told another suspect had been arrested. I was told another suspect had been arrested. I was given the name and i recognized the name as of the person who has another case. Kerugoya court case 773/11. He had absconded. Police officers from Kerugoya came and identified him and he was arrested. He is **James** (2nd accused). He had a case of the same nature in Kerugoya."*

This evidence was heavily relied upon by the magistrate. However, the key question is, is there direct no circumstantial evidence that links the appellant with the offence?. I will revert to this point shortly.

The next relevant witness is **PW11** who testified that:-

"...when I interrogated Patricia he (sic) told me he (sic) has employed Robert and on 7th October 2012 he (sic) did not return home and said he had lent out the motor cycle to a person known as "jimmy."

***Robert** was never found and has not been found to date. From that investigations I concluded that "jimmy" was part of the thieves that ran away. I charged him."*

Several key issues to note from the above cited piece of evidence is that; **(a)** Patricia never mentioned **Jimmy** in her evidence. The record is clear on this. This name **Jimmy** was introduced for the first time by this particular witness**. (b)** More important also is the fact that **PW11** states "*I concluded that jimmy was part of the thieves that ran away. I charged him."*

The witness does not elaborate the basis of his conclusions. Cases are determined on evidence. Which is this other evidence the witness had that informed his conclusions and why was it not revealed to the court. It was a serious and grave misdirection for the magistrate to base his conviction on such evidence. **(c)** Also important is the fact that no one stated the alleged **Jimmy** is now the **"James Mwangi Mukumbu"**

the appellant before court who was at the scene or participated in the alleged offence.

The existence of the principle of proof beyond reasonable doubt is unchallenged in the common law world. In the English common law, it was elegantly affirmed by the House of Lords in the celebrated judgement of **Viscount Sankay** in **D.P.P vs Woolmington.** The United States Supreme Court in the above cited case of ***Re Winship*** held that the reasonable doubt rule has constitutional force under the due process provisions of the United States Constitution.

Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge. In 1997, the Supreme Court of Cananda in *R vs Lifchus* suggested the following explanation:-

"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty. ……the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.

A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt"

The learned magistrate cited a truly relevant passage from the case of *Republic vs Kipkering & Others* on circumstantial evidence but with tremendous respect the magistrate did not correctly apply the said decision to the facts of the present case and this lead to a miscarriage of justice. Had the magistrate correctly applied the said decision in the facts of the case before the court, I am certain the decision could have been different.

To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. The evidence used to prove guilt is classified as either direct or circumstantial. Direct evidence, testimony presented, is a statement about a fact constituting a disputed material proposition of a rule of law, while circumstantial evidence is testimony about a fact or facts from which the disputed material proposition may be inferred.

Thus, circumstantial evidence can be defined as relying on certain proved or provable circumstances from which a conclusion can be drawn that it was the accused person who committed the offence. It is evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence. It differs from direct evidence, which tends to prove a fact directly, typically when a witness testifies about something which that witness personally saw, or heard. Both direct and circumstantial evidence are to be considered, but to bring a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty. This follows from the requirement that guilt must be established.

Commonly, three special directions are given in substantially circumstantial cases:-

i. *as to drawing inferences;*
ii. *that "guilt should not only be a rational inference but should be the only rational inference that could be drawn from the circumstances"*
iii. *that if there is any reasonable hypothesis consistent with innocence, the court's duty is to acquit.*

The second and third directions stated above are but different ways of conveying, or emphasising the meaning of *"beyond reasonable doubt."* Although a conviction will not be upset merely because the evidence is wholly circumstantial, *a more rigorous test is generally used to determine whether such evidence is sufficient to convict.*

In *Abanga alias Onyango vs. Republic*, the learned judges of the court of appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:-

*"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests **(i)** the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, **(ii)** those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; **(iii)** the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else"*

The principles to be applied before basing a conviction on circumstantial evidence were also ably discussed in the case of **GMI v. Republic** These are:-

i. *The circumstances from which an inference of guilt is sought to be drawn, must be*

cogently and firmly established;

ii. *Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*

iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

The above principles were reiterated in the above cited case of *R. v. Kipkering Arap Koske& Another* cited by the learned magistrate. In order to ascertain whether or not the exculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of *Musoke v. R* citing with approval *Teper v. R,* thus:-

"It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference"

A similar position was held in the case of *Paul vs Republic* where it was held *inter alia* that:-

"Where the prosecution relies upon circumstantial evidence to establish the guilt of the accused, the inculpatory facts must be incompatible with the accused's innocence and incapable of explanation upon any other hypothesis than his guilt."

In *Kariuki Karanja vs Republic* it was held that:-

"In order for circumstantial evidence to sustain a conviction it must point irresistibly to the accused and in order to justify the inference of the guilt on such evidence the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving the facts justifying the drawing of that inference is on the prosecution."

In *Sawe vs Republic* the court followed the above principles and added that *"suspicion however strong*

cannot provide the basis of inferring guilt which must be proved beyond reasonable doubt."

In the present case and after carefully considering the defence and prosecution evidence, I find that the circumstantial evidence relied upon by the magistrate did not meet the above threshold and that it did not irresistibly point towards the guilt of the appellant and that there was no reasonable basis for arriving at the conviction and that the evidence tendered against the appellant was manifestly weak and did not establish his guilt to the required standard. Such a conviction cannot be allowed to stand.

For the reasons stated above, I hereby quash the conviction against the appellant herein and set aside the sentence imposed upon him and order that the appellant *James Mwangi Mukumbu* be released forthwith unless otherwise lawfully held**.**

Right of appeal 14 days

Dated at Nyeri this 23rd day of March 2016

John M. Mativo

Judge