



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MARSABIT**  
**CRIMINAL APPEAL NO. 16 OF 2016**  
**JACOB THURANIRA ICHUNGI .... APPELLANT**  
**VERSUS**  
**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in Criminal Case No. 733 of 2015 of the Principal Magistrate's Court at Marsabit by Hon. BOAZ M OMBEWA– Senior Resident Magistrate)*

**JUDGMENT**

The appellant, **JACOB THURANIRA ICHUNGI**, was charged with an offence of tampering with telecommunication plant contrary to section 32(c) of the Kenya Information and Communications Amendment (sic) Act cap 411A laws of Kenya.

He was tried and convicted of the offence. He was sentenced to serve ten years imprisonment. He now appeals against both conviction and sentence.

The particulars of the offence were that on 30<sup>th</sup> September 2015 at Shauri Yako village Marsabit Central sub County, Marsabit County, with intent to commit mischief, tampered with internet cable sheets by cutting and removing copper conductors valued at Kshs.200,000/= the property of Telkom Kenya Limited.

The appellant was in person. He raised six grounds that can be summarized as follows:

1. That he was convicted on insufficient evidence
2. That the learned trial magistrate did not consider his defence
3. That the learned trial magistrate erred in law and in fact by failing to consider the probation report.

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

The prosecution facts at the trial court were briefly as follows:

On the 30<sup>th</sup> September, 2015 at about 9.00 P.M, the OCS Marsabit Police Station received a report of some suspicious characters in Shauri Yako area. He kept the area under observation. At about 2AM he received another report. he mobilized his officers and moved to the area with them. They found the appellant and another vandalizing telecommunication wires. They arrested the duo with some copper

wires they had already cut.

The appellant in his defence contended that he was framed up.

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**, where the Court of Appeal set out the duties of a first appellate court as follows:

**“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) 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) EA. 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 vs. Sunday Post [1958] E.A 424.”**

Before I address my mind to the grounds of appeal raised by the appellant, I wish to comment on the charge. The appellant was accused of offending section 32(c) of Kenya Information and Communication Amendment (sic) Act of 2012 Chapter 411A laws of Kenya. The correct title of the Act is:

The Kenya Information and Communications Act, cap 411A, laws of Kenya.

Section 32 (c) of the Act reads as follows:

**A person who willfully, with intent to—**

**(a) ....**

**(b) ...**

**(c) unlawfully intercept or acquaint himself or herself with the contents of any message; vandalizes, damages, removes, tampers with, touches or in any other way whatsoever interferes with any telecommunication apparatus or telecommunication line, post, or anything whatsoever, being part of or used in or about any licensed telecommunication system, commits an offence and shall be 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.**

The section creates several alternative offences and in the instance case the offence ought to have been tampering with telecommunication line. From the particulars of the offence and from the evidence I have observed that the appellant was adequately informed of the charge and he was not prejudiced in any way. It is desirable however to frame the charge correctly.

The appellant contended that the evidence adduced against him was contradictory. He particularly had an issue with the time the offence was allegedly reported and when he was arrested. Upon my perusal of the evidence on record, it emerges that two reports were made concerning the incident. The first was at 9 PM and the second was at 2 AM. The appellant was arrested after the second report. The evidence is clear and there is no contradiction.

The evidence of PW1 and PW2 is that the appellant was arrested while committing the offence. I do not find the evidence of these two contradictory in any way. It placed the appellant at the scene of the offence and was armed with the tools for the commission of the offence.

In his defence the appellant testified that he was arrested while going home. The police accused him of walking at night and arrested him. This However contradicted his earlier contention during cross examination. He had contended that he was the one who showed police officers the exhibits. This was denied by PW2. PW1 and PW2 also denied the allegation by the appellant that they found him having been arrested by the chief and was in handcuffs. This line of argument also contradicted his defence.

The appellant contended that the trial magistrate disregarded his bus ticket which he produced as an exhibit to bolster his argument that he was travelling to Marsabit on the material night. The bus ticket indicates that Jacob was travelling from **ISL** to **KRR**. When he was cross examined after he had testified on oath, he confirmed that the owner of the ticket was going to Karare from Isiolo. Karare is about 25 KMs before Marsabit from Isiolo. The learned trial magistrate considered this defence before dismissing it. This is what he said:

**" The 1<sup>st</sup> accused produced as exhibit (D exhibit 1) a bus ticket showing that he travelled from Isiolo to Marsabit on 29.9.2015. This is not in issue. He admits that he was arrested in Shauri Yako area."**

I find that the learned trial magistrate was right in dismissing this defence. Since the appellant did not tender an explanation as to why the bus ticket indicated he was to alight at Karare and not Marsabit when cross examined about it, it is highly probable he never travelled as he alleged. That ticket could have been borrowed from somebody else for the purposes of this case.

The probation officer's report indicated that the appellant's mother was alive contrary to what he wanted the court to believe. This coupled with the fact that he had a previous relevant conviction, may have informed the court in not considering to place him on probation. I find no reason to fault the learned trial magistrate for this also militated against the court from considering the first line of sentence which is imposing a fine.

From the foregoing analysis of the evidence on record, I find that the appellant's appeal lacks merit. I dismiss the same in entirety on both conviction and sentence.

**DATED at Marsabit this 25<sup>th</sup> day of October 2016**

**KIARIE WAWERU KIARIE**

**JUDGE**