REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO.98 OF 2012

CONSOLIDATED WITH

CRIMINAL APPEAL NOS. 97, 96, AND 95 OF 2012

WILLIAM KINYANJUI RUMOO…….....1ST APPELLANT

DOUGLAS NDUNGU WARUCHU……..2ND APPELLANT

FESTUS MUTINDA MWANZIA……..3RD APPELLANT

KATUNGA MUTUA…...…….……4TH APPELLANT

VERSUS

REPUBLIC ….....…..... RESPONDENT

(Being an appeal from the original sentence and conviction in Kangundo Senior Principal Magistrate's Court Criminal Case No. 536/2010 by Hon. M.K. N. Nyakundi, PM on 4/7/2012)

JUDGMENT

1. **William Kinyanjui Rumoo, Douglas Ndungu Waruchu, Festus Mutinda Mwanzia** and **Katunga Mutua** hereinafter the 1st, 2nd 3rd and 4th appellants were charged with:-

i. Stealing contrary to **Section 275** of the **Penal Code.** Particulars of the offence being that on the 18th November, 2010 at about 12.35am at K**angundo District** within the **Machakos County**, jointly with others not before the court stole 160 meters of Telecommunication cables valued at Kshs. 379,920/= the property of **Telkom Kenya Limited.**
ii. Tampering with Telecommunication plant with an intent to obstruct or interrupt message or cause mischief contrary to **Section 32** of the **Telecommunication Act.** Particulars of the offence being that on the 18th November, 2010 at about 12.30am at **Kangundo** Township in **Kangundo District** within **Machakos County** jointly with others not before court, willingly and unlawfully tampered with telecommunication which caused interruption of communication.
iii. **William Kinyanjui Rumoo** faced a third charge of unlawful use of a motor-vehicle contrary to **Section 294** of the **Penal Code.** Particulars of the offence being that on the night of the 17th and 18th November, 2010 at **Githurai Estate** within **Nairobi County,** unlawfully and without colour of right, but not so as to be guilty of stealing converted to his use a vehicle namely a lorry

Registration Number KBC 045S.

2. Facts of the case were that PW3, **Daniel Njai Waweru** purportedly owned motor-vehicle Registration Number KBC 045S, Lorry. **PW4, John Mwangi Mungai** a purported Transport Manager entrusted the said motor-vehicle with the 1st appellant. The lorry left the parking yard on the 18th November, 2010 without PW4's knowledge and/or consent. At about 1.00am PW2, **Titus Nzolove Manza** learnt from a colleague that some people were pulling cables. He went to check at the market but found nothing. He encountered a Police Officer whom he reported to. **PW7, No. 71843 P.C. Stephen Kailikia** stopped a motor-vehicle. Its occupants were the 1st and 2nd appellants. The lorry did not have anything but the 1st and 2nd appellants led the police to where cables had been delivered. Being strangers within the area they were not sure of the place. They communicated on being told by PW7. The 3rd appellant went to assist them. He was arrested. He led them to where the cables were being burnt. The 4th appellant was arrested as he was banging doors at the homestead. Many wires were scattered at the homestead. They recovered some cables, a rope, red 'lesso'; two axel blades. When put on their defence the appellants opted to remain silent.
3. The trial court evaluated evidence adduced and convicted them. They were sentenced as follows:-

   Count 1– a fine of Kshs. 400,000/= or two (2) years imprisonment in default.

   Count 2 –three years imprisonment for each appellant.

   Count 3 – A fine of Kshs. 300,000/= or six months imprisonment in default. An order was made for sentences to run consecutively.

4. Being dissatisfied by the conviction and sentence thereof the appellants appealed on grounds that the trial magistrate erred in law and fact:

i. By convicting and sentencing the appellants when the proceedings were conducted in a language that they did not understand;
ii. In convicting and sentencing on insufficient evidence; and
iii. In imposing harsh sentences.

5. At the hearing of the appeal **Mrs Rashid** learned counsel for the appellants submitted orally. She stated that the judgment did not comply with **Section 169(1)** and **(2)** of the **Criminal Procedure Code.** It had no points for determination and reasons for the decision which was prejudicial to the appellants and sentences pronounced were punitive. She faulted the trial magistrate for convicting on evidence of a single witness. The 3rd appellant was arrested along the way. Circumstances that made him give direction were not corroborated. The 4th appellant was arrested at the homestead where the wires were being burnt but no evidence was adduced as to who was burning the wires. Arguing that the appellants were not conversant with Kiswahili the language the court used, for that reason they did not have anything to state after **Section 211** of the **Criminal Procedure Code** was complied with.
6. **Mrs Abuga,** learned State Counsel submitted that after the wires were stolen the 1st and 2nd appellant did not have anything but the 3rd appellant led the police to the home of the 4th appellant where recovery was made. The doctrine of recent possession of property was applicable.
7. With regard to count 3 she stated that the owner of the motor-vehicle said it was to be used for only transporting sand. In respect of the language used, she stated that the appellants understood the language as they communicated in Kiswahili when the charge was substituted. With regard to sentence she admitted that it was harsh in the circumstances.
8. This being the first appellate court, its duty is to subject evidence on record to a fresh review and scrutiny and come to its own conclusions bearing in mind, however, that it did not see nor hear witnesses testify.(***See Okeno versus Republic [1972] E.A. 32).***
9. The trial magistrate has been faulted for using Kiswahili a language the appellants did not understand. It is not stated which language they were familiar with. But, prior to the actual trial

commencing the charge was substituted on the 9th March 2011. The substituted charge was read to the appellants in a language they understood which was Kiswahili. Indeed they responded in Kiswahili language. Thereafter they participated in proceedings and cross-examined the witnesses who testified. It cannot be alleged at the appellate stage that the appellants did not understand Kiswahili language.

10. Was evidence adduced sufficient to secure a conviction?

In **Count 1** the appellants are stated to have stolen 160 telecommunication cables valued at Kshs. 379,920/= the property of Telkom. The appellants were not seen taking the cables stated to have been stolen. The prosecution had a duty of proving that cables owned by **Telkom Kenya Limited** had been stolen. PW1, **Ambrose Kiplangat Tanui,** a **Senior Field Intervention Technician** an employee of **Orange Telkom Kenya** stated that:-

> ***"I informed my Team Leader at Athi River with whom we visited our offices and found a cable serving Kangundo town had been taken."***

He also identified some photographs of ***"a motor-vehicle and cables burnt and others not."***

He did not state if what he saw burnt and not burnt belonged to **Orange Telkom Kenya** or **Telkom Kenya Limited.** He was silent on the value of the cables. They found missing and whether it could be what was partly burnt.

11. **PW2,** the guard at **Telkom Kangundo** heard allegations from another guard that people were pulling down cables at the market. He did not divulge the source of his information. He later met a Police Officer who stopped a lorry that emerged. The 1st and 2nd appellants were in the motor-vehicle. It was his evidence that:-

"*The Police then led the men."*

He did not go with them. According to PW7 the Police Officer said he heard watchmen screaming and whistling having seen a lorry carrying cables belonging to **Telkom Company.** This is what prompted him to stop the lorry which did not have anything. The 1st and 2nd appellants denied the allegation but later agreed to lead them to where the cables had been taken. He went on to state that:-

> "***The two (2) were foreigners and they did not know the way."***

12. He then told them to call their colleague and the 3rd appellant went to assist them. It was the witness's evidence that when he encountered the 1st and 2nd appellants he confiscated their cellphones. He did not tell the court the mode of communication they used to call the 2nd appellant.
13. When the 3rd appellant emerged, similarly, he arrested him and confiscated his phone. He went on to state thus – in regard to the 3rd appellant.

> "***He told us he would take (sic) to where they were burning the wires."***

They went to a homestead where wires were being burnt. Some other wires were recovered in a coffee plantation near the homestead while others were scattered within the homestead. The prosecution had a duty of proving that the 3rd appellant was an accomplice of persons who were alleged to have taken cables. The fact that he led the police to where cables were being burnt may not necessarily mean that he stole or was an accomplice.

14. At the said homestead only the 4th appellate was arrested. The reason being that she was heard banging the door, closing it. **PW8, No. 50823 Corporal Suleiman Opondo** the investigating officer did not carry out proper investigations. He did not establish who the owner of the

homestead was. He simply took over the case and charged the appellants.

15. Prior to the cables/wires being found burning, none of the witnesses stated that they were in possession of the appellants. In order for the doctrine of recent possession to be relied on, the prosecution ought to have proved that:-

i. The property was found with the suspect;
ii. The property was positively identified by the complainant;
iii. The property was stolen from the complainant
iv. The property was recently stolen from the complainant; (see ***Arum versus Republic, Court of Appeal at Kisumu Criminal Appeal No. 85 of 2005)***.

16. The property was found at the homestead where the 4th appellant was arrested allegedly closing the door. No evidence was led to establish if she lived at the homestead. No evidence was led of the owner of the homestead. No evidence was led if she had any knowledge that the wires that were littered all over the place had been stolen. It can therefore not be stated that she was in possession of the wires.
17. In his evidence, PW8 the Investigating officer stated that he called **Ambrose Kiplagat** from **Telkom Kenya** who confirmed that the property belonged to **Telkom. Ambrose Kiplagat,** PW1 was very casual in his testimony. He stated:-

> ***"We visited Kangundo Police and saw some suspects and motor-vehicle KBC 045S Mercedes as shown in this photos- motor-vehicle and cables burnt and others not".***

He did not identify what was recovered as the property of Telkom. It is therefore questionable if what was recovered belonged to Telkom Kenya Limited**.**

18. Whether the property was indeed stolen is also questionable. No evidence of ownership of what was alleged to have been stolen was adduced. In the premises the court could not think of relying on the doctrine of recent possession. The charges of stealing were not proved.
19. With regard to the 2nd count of tempering with telecommunication plant, the appellants were stated to have tampered with telecommunication cables which caused interruption of communication. **Section 32** of the **Act** has three paragraphs (a) (b) and (c). It was not stated which paragraph of the section the appellants purportedly contravened. Secondly, no evidence was called of any interruption of communication having occurred within **Kangundo.** There was absolutely no evidence adduced of such tampering having occurred.
20. With regard to the third count, the 1st appellant was stated to have converted to his use a vehicle registration number KBC 045S. **PW3, Daniel Njai Waweru** stated that the 1st appellant was his driver. He claimed ownership of motor-vehicle Registration Number KBC 045S. To prove ownership of a motor-vehicle a person is required to produce a registration certificate (Logbook) or some evidence confirming registration or beneficial ownership. Such evidence was not adduced. No evidence was adduced that the appellant was employed by PW3 and that **PW4, John Mwangi Mungai** was the transport manager. It could therefore not be asserted that the motor-vehicle was within **Kangundo** area as a result of some conversion. In the premises the charge was not proved.
21. This is a case where the court found that a *prima facie* case had been established hence putting the accused persons on their defence. In the case of ***Ramanlal Trambaklal Bhatt versus Republic [1957] E.A. 332*** the Court Stated that:-

> "***A prima facie case is made out if, at the close of the prosecution, the case is merely one -***
>
> ***"which on full consideration might be thought sufficient to sustain a conviction"***
>
> ***This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution's case…"***

This was a case where no *prima facie* case had been established warranting the accused persons being put on their defence. They should have been acquitted at the ruling stage.

22. It is also contended that **Section 169** of the **Criminal Procedure Code** was not complied with. It is advisable for the section to be complied with since it is couched in mandatory terms. It is good practice for the trial court to make an effort of complying with it.
23. From the foregoing it is apparent that the appeal has merit. The conviction entered is quashed and sentences imposed set aside. The appellants if in custody should be released forthwith unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **22ND** day of **JANUARY, 2015.**

L.N. MUTENDE

JUDGE