



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.123 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. W. Ngumi - SRM delivered on 15th October 2012 in Githunguri PM. CR. Case No.1082 of 2012)

GEORGE MUKIEBE NGANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, George Mukiebe Nganga, was charged with the offence of **vandalism of power apparatus** contrary to **Section 64 (4) (c)** of the **Energy Act**. The particulars of the offence were that on the nights of 27th and 28th September 2012 at an unknown time at Mungu village in Githunguri District within Kiambu County, jointly with others not before court, the Appellant vandalized and stole one transformer 25KVA Serial Number G30927 valued at Kshs.1,500,000/-, the property of the licensee. He was alternatively charged with the offence of **handling stolen goods** contrary to **Section 322 (1) & (2)** of the **Penal Code**. The particulars of the offence were that on the 28th day of September 2012 at about 5.39 a.m at Mungu village in Githunguri District within Kiambu County, other than in the course of stealing, the Appellant dishonestly received or retained one transformer 25KVA knowing or having reason to believe it to be stolen goods. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted of the main charge of **vandalism of power apparatus**. He was sentenced to pay a fine of Kshs. 5,000,000/- or in default serve ten (10) years imprisonment. The Appellant was aggrieved by the decision of the trial magistrate on both conviction and sentence and has duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. The Appellant faulted the trial magistrate for convicting him on the basis of circumstantial evidence which in his view did not establish his guilt to the required standard of proof. He was aggrieved that he had been convicted on a charge that was defective. He was aggrieved that the trial magistrate did not take into consideration his defence before arriving at the decision that he had indeed committed the offence. He was finally aggrieved that the sentence was excessive in the circumstances. On the strength of the above grounds, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him. During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. On her part, Ms. Kimiri for the State submitted that the prosecution had established to the required standard of proof beyond reasonable doubt that the Appellant committed the offence as charged. She stated that the Appellant was literally found at the scene of crime with a bag of tools. She further submitted that the Appellant had an injury in his hand caused by the

transformer. She urged the court to disallow the appeal and confirm the conviction and sentence of the trial court.

What was the prosecution's case before the trial court? A transformer located at Mungu village in Githunguri District within Kiambu County was vandalized and stolen on the night of 27/28th September 2012 at around 2.00 a.m. PW1 Samuel Kamau Gathogo, a resident of Matuguta Village testified at trial that on the material night at around 2.00 a.m, while at his house, he got a phone call informing him that some people had been seen tampering with a transformer located along the Mungu-Gituamba road. PW1 then phoned other residents of Gituamba and Mungu to pass on the information before leaving for the scene. He was the first person to arrive at the scene. PW1 testified that he found that the transformer was missing. At the scene, he also found a ladder and long sticks with wires. PW3 Joshua Njoroge Waithaka also a resident of Matuguta Sub-Location gave evidence that on the night in question, he also received a phone call from one Samuel Kiarie, a village elder informing him of the incident. He also proceeded to the scene where he also found other area residents. He testified that they found that the transformer had been removed.

PW3 testified that while at the scene, they saw the Appellant being pursued by members of the public who were shouting **"thief! thief!"**. He testified that the Appellant was running towards their direction. They apprehended the Appellant who was carrying a bag. In the bag, they found assorted tools which included seven (7) pliers, a hacksaw and a pair of sheers. PW3 further testified that they found that he had an injury on his hand. PW3 gave evidence that on interrogating the Appellant on what he was doing at that time of the night, the Appellant told them that he had been kidnapped and dumped in the area by unknown people. PW3 testified that members of the public were dissatisfied with the Appellant's explanation. They threatened to lynch him on suspicion of vandalizing the transformer. PW6 Peter Gachagwi Rikana the Area Assistant Chief, Matuguta Sub-location was called and informed of the Appellant's arrest. He thereafter made arrangements to have the Appellant taken to the Police Station. Meanwhile, a search for the lost transformer was carried out. PW2 Waweru Maina was also at the scene, testified that he found the transformer hidden under tree leaves besides a post. The Appellant was later taken to Githunguri Police Station. At the trial, PW1, PW2 and PW3 identified the items recovered from the Appellant. PW2 also identified the vandalized transformer recovered at the scene.

PW4 PC John Ouma was the investigating officer in this case. He testified that while at the scene, a green bag found with the Appellant containing spanners, sheers and a hacksaw was handed to him. The transformer recovered was also handed over to him. He testified further that a wooden ladder and a plastic pole were also recovered at the scene. These items were produced and admitted in evidence as part of the prosecution's case. PW5 Protus Rutumia Muyembo, a Senior Security Officer at Kenya Power and Lighting Company testified that he received a call from the company's Branch Business Head informing him that a person had been arrested in Mungu village having vandalized a transformer. He visited the police station and was shown a transformer which he described as being Serial Number 3029 and which was registered as 25KVA. He gave its value at Kshs. 1,500,000/-.

When the Appellant was put on his defence, he denied committing the offence. He told the court that on the night in question he had left the club at around 11.00 p.m. and had taken a motorcycle ride to go to Matuguta where his girlfriend lived. The Appellant testified that the motorcycle developed a mechanical problem on the way and he decided to walk to Matuguta. The Appellant testified that before he got to Matuguta, he was ambushed and attacked by four men who robbed him and left him uncounscious at a nappier grass plantation. He testified that he woke up to find people touching him. He was told that there had been a robbery incident in the area. Since he was already bleeding from the attack, they suspected that he was amongst the thieves. Members of the public wanted to lynch him but the police were called to arrest him. He denied that he was involved in the vandalism of the transformer.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced by prosecution witnesses and by the defence before the trial court so as to arrive at its independent determination on whether or not to uphold the conviction of the Appellant. In doing so, this court is mindful that it never saw nor heard the witnesses as they testified and therefore cannot give an opinion on as regards the demeanor of the said witnesses, (**See Okeno -vs- Republic [1972] EA 32**). In the present

appeal, the issue for determination by the court is whether the prosecution established a case for this court to convict the Appellant on the charge of **vandalism of power apparatus** contrary to **Section 64 (4) (c)** of the **Energy Act** to the required standard of proof beyond reasonable doubt.

I have re-evaluated the evidence adduced before the trial court. I have also considered the grounds of appeal put forward by the Appellant in support of his appeal. I have also taken into consideration the submission by both the Appellant and the Respondent. The Appellant was convicted on the basis of circumstantial evidence. As was held by the Court of Appeal in the case of **Sawe -Vs- Republic (2003) KLR 364** at page 372:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of his inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

In the present appeal, it was the prosecution's case that on the night of 27/28th September 2012 at around 2.00 a.m a transformer located at Mungu Village in Githunguri District within Kiambu County was vandalized and stolen. In his testimony, PW1 Samuel Kamau Gathogo testified that on 28th September 2012 at around 2.00 a.m., he received a phone call informing him that some people had been seen tampering with the transformer. PW1 therefore phoned some of the area residents of Mungu to pass on the information before leaving to the scene. PW1's testimony was that he was the first person to arrive at the scene. He testified that he found that the said transformer had been removed. His evidence was that he found a ladder and two long sticks with wires at the scene. PW3 Joshua Njoroge Waithaka also received information in regard to the people vandalizing the transformer. His evidence was that he also headed to the scene. The evidence of PW3 was that while at the scene, he heard members of the public shouting **“thief! thief!”** while pursuing the Appellant. He testified that the Appellant was running towards him. It was his evidence that he together with other members of the public at the scene apprehended the accused. PW3 testified that the Appellant was carrying a green bag at the time. In the bag, they found seven (7) spanners, a hacksaw and a pair of sheers. It was the evidence of the Appellant's hand injuries on his hand. For this reason, members of the public who were at the scene suspected that he was involved in stealing the transformer. PW6 Peter Gachagwi Rikana, the Area Assistant Chief was called. He arrested the Appellant and escorted him to the police station.

Meanwhile, members of the public at the scene began searching for the stolen transformer. PW2 Waweru Maina was amongst those searching for the transformer. His evidence was that he was the one who found the transformer hidden under a pile of leaves. The Appellant was later taken to the police station. PW4 PC John Ouma, the investigating officer gave evidence that while at the scene, a green bag said to have been found with the Appellant containing spanners, sheers and a hacksaw was handed to him. It was his evidence also that a wooden ladder, a plastic pole and a transformer recovered at the scene were also handed over to him. These items were produced and admitted in evidence as part of the prosecution's case. PW5 Protus Rutumia Muyembo, a Senior Security Officer at Kenya Power and Lighting Company testified that he was shown the recovered transformer at the police station. He described the same as being Serial Number 3029 and which was registered as 25KVA. He gave its value at Kshs. 1,500,000/-. The Appellant's explanation on how he came to be at the scene at the time was that he had left the club at around 11.00 a.m on the night in question but was attacked on his way to his girlfriend's house and left unconscious in the area. He denied knowledge of the crime.

Having carefully evaluated the above evidence, it is clear that to establish the charge of **vandalism of power apparatus** contrary to **Section 64(4)(c)** of the **Energy Act** by circumstantial evidence, the prosecution was required to adduce inculpatory evidence which is connected with the Appellant to the crime and which evidence was incompatible with his innocence.

In my considered opinion, I cannot fault the trial court for applying doctrine of circumstantial evidence to convict the Appellant for vandalism of the transformer. The circumstances under which he was arrested at the scene and found with a bag containing various tools and with an injured hand raised a presumption that the Appellant was involved in the vandalism of the transformer. The Appellant failed to explain how he came about to be in possession of the bag said to have contained the assorted tools. These items were obviously used for the purpose of vandalizing the transformer. In view of the foregoing, the prosecution proved its case to the required standard of proof beyond any reasonable doubt. The Appellant did not adduce sufficient evidence to displace this presumption. I hold that the circumstances under which the accused was arrested and found in possession of the tools and with an injured hand pointed to his guilt. The Appellant was involved in the vandalism of the transformer. That is why he was found in possession of spanners, sheers and a hacksaw. I find no merit with the appeal against conviction lodged by the Appellant.

On sentence, the Appellant was sentenced under **Section 64(4)** of the **Energy Act** which imposed a mandatory minimum sentence. **Section 64(4)** provides thus:

“A person who willfully or with intent to interfere with the management of operation of the apparatus of a licensee;

(a)...

(b)...

(c)...

(d)...

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 both”.

The Appellant was sentenced to a fine of five (5) million shillings or in default to serve ten (10) years imprisonment. Accordingly, the sentence imposed by the trial magistrate is legal.

On sentence, I find no merit with the appeal lodged by the Appellant. I uphold his conviction and sentence on the charge of vandalism **of power apparatus** contrary to **Section 64 (4) (c)** of the **Energy Act**. The appeal is dismissed. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF MAY 2015

L. KIMARU

JUDG