



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT GARISSA**  
**CRIMINAL APPEAL NO. 17 OF 2015**  
**MUNYASIA MUTISYA.....APPLICANT**  
**V E R S U S**  
**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence in Criminal Case No. 481 of 2013*

*of the Principal Magistrate's court at Mwingi).*

**JUDGMENT**

The appellant was charged with another in the subordinate court, one Joseph Karanja. They were charged with 3 counts. Count 1 was for vandalism of apparatus contrary to Section 64 (4) (b) of the Energy Act of 2012. The particulars of the offence were that on the night of 29th August 2013 at Kivou Location Mwingi Central District within Kitui County jointly with others not before court willfully vandalized a 100 KVA transformer valued at Kshs 300,000/= the property of Kenya Power. Count 2 was for sabotage contrary to section 303 of the Penal Code. The particulars of the offence were that on 29th August 2013 at Kivou Location in Mwingi Central District within Kitui County jointly with others not before court unlawfully destroyed a 100 KVA transformer knowing that such acts will impair the supply of electricity to the community at Kivou Location. Count 3 was for stealing contrary to Section 268(1) as read with Section 275 of the Penal Code. The particulars of the offence were that on the night of 29th August 2013 at Kivou Location in Mwingi Central District jointly with others not before court jointly stole one KVA transformer valued at Kshs 300,000/= the property of Kenya Power.

Both of them denied the charges. During the trial the other person Joseph Karanja absconded. Judgment was therefore delivered only against Munyasia Mutisya, the appellant herein. He was convicted of count 1 and 2 and discharged of count 3. He was sentenced to serve 10 years imprisonment in respect of count 1 and 3 years imprisonment in respect of count 2, and sentences were ordered to run concurrently.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed initial grounds of appeal on 30th June 2013. He however later filed amended grounds of appeal. He relied on the amended grounds of appeal. The amended grounds of appeal are as follows:-

1. The trial magistrate was unfair and it was not clear whether the trial was conducted by Otieno Ag SRM or Murage Ag.SRM.
2. The learned trial magistrate erred in law in failing to record the language used by various prosecution witnesses.

3. The learned trial magistrate erred in law and fact when he convicted him without considering the date in which the alleged offence was committed and the evidence adduced as a whole was inconsistent with the charge sheet.
4. The learned trial magistrate erred in law and fact to convict him without considering that PW2 was open that he fixed him because he was the only stranger in the area.
5. That the mode of arrest was uncertain.
6. That the alleged exhibits were not proved to be in his possession.
7. That the learned trial magistrate erred in law to convict him without considering that the government chemist report was not produced in court whereas the expert was not brought to avail his evidence.
8. The learned trial magistrate failed in law by not explaining to the accused person purpose of section 211 of the Criminal Procedure Code.
9. The sentence was harsh and excessive.
10. That the prosecution case was not proved as per Section 109 and 100 of the Evidence Act.

The appellant also filed written submissions which he relied upon. I have considered the said written submissions of the appellant.

The learned prosecuting counsel Mr. Orwa opposed the appeal. Counsel submitted that the offence occurred at 5.00 am and the appellant was arrested at 6.00 am and as such there was no possibility of mistaken identity. Counsel submitted that PW2 gave a detailed account of what was found in possession of the appellant. Counsel submitted that the appellant was not able explain how he came to possess those items. With regard to Section 200 of the Criminal Procedure Code, counsel submitted that the trial magistrate was Hon. Otieno and that Hon. Murage only read the judgment. There was thus no need of invoking section 200 of Criminal Procedure Code.

With regard to contradiction and discrepancies, counsel argued that the appellant had not demonstrated the contradiction and discrepancies which he was complaining about. Counsel submitted that the mode of arrest was proper and no law was violated.

On language, counsel submitted that the appellant actually cross examined witness which shows that he understood both the charges and the proceedings. Counsel emphasized that there was no evidence on record that the appellant was fixed by PW2. On the date of the offence which was in some instances said to be 26th of August, counsel submitted that such was a mistake of form not of substance. Counsel emphasized that the appellant stated in his defence that the date was 29th of August therefore he knew the date in question. Counsel submitted further that an inventory of the items recovered was actually taken and that the appellant admitted that he signed the inventory. Counsel added that the Government Analyst report was produced as exhibit 22 and 23 and that there thus was no prejudice visited upon the appellant. Counsel added that Section 211 of the Criminal Procedure Code was verbally read to the appellant and he elected to tender sworn defence, and there was no miscarriage of justice. On sentence, counsel submitted that the sentence was lawful, and It neither harsh nor excessive.

In response to the prosecuting counsel's submissions, the appellant stated that the allegations against him were not true and that the case was a frame up.

During the trial the prosecution called 9 witnesses. PW1 was Musembi Kiwamba a watchman at a shop at Mwingi. He stated that on 26th August 2013 at 1.00 am, power went off at his place of work. However at 5.00 am he noted that there was power within Mwingi town and became concerned. He proceeded to where he knew the transformer was to investigate and found 3 men near the transformer. When he

switched on his torch the 3 men ran away. He noticed that one was wearing a jacket which he dropped as they pursued them. Villagers arrested the appellants and handed them over to the police. In cross examination he stated that he saw the 3 suspects at 5.00 am and that the appellant was arrested at 6.00 am.

PW2 was Alice Kasyoka Mutahi the Area Chief. It was her evidence that on the 29th August 2013 at 5.00 am she was called by Peter Mwendwa Kalanu a businessman who said he spotted 3 men near the transformer. She rushed to the scene after informing the OCPD and met a watchman who informed her that the suspects had fled on foot. They searched around and the appellant was arrested by the public. The appellants pockets and his jungle bag had a pair of shoes, 2 caps, a sisal rope, a hacksaw, black cowboys cap, green paper bag, metal rods, adjustable spanner, pliers, transformer tabs, assorted spanners and a bolt. He also had a second bag and brown sport shoes, stripped shirts, and transformer components. She also learned that another person had been arrested a short distance away. In cross examination she stated that the appellant was caught with a spanner which was suspected to have been used in the theft. She stated that the appellant was not a resident of that area.

PW3 was Senior Sergeant Mutemi Karanja. It was his evidence that on 26th August 2013 at about 5.45 am he was at home when he received a call from his brother Peter Mwendwa that he had seen people suspiciously interfering with a nearby transformer. He rushed towards the scene and saw a man in a black suit carrying a bag. He enquired where he was heading to because he was a stranger in the neighborhood. The man claimed to be going to Ruiru and that he was a charcoal trader. He asked him to accompany him to the scene of the transformer and handed him over to the Area Chief. When the man's bag was opened sports shoes, a cap, and spanners were found. He learnt later that another person was also arrested. In cross examination he stated that the spanners and other implements appeared to have had transformer oil.

PW4 Paul Njiri Ngumi was a Kenya Power Security Officer who was initially stood down because the other accused wanted to be supplied with witness statements.

PW5 was Titus Gachau Maina an employee of Kenya Power at Mwingi. He was a supervisor. He stated that on 29th August 2013 at 5.00 am, he was called by a watchman who told him that a transformer was being stolen. He reported the matter to the police. He proceeded to the scene and found the appellant under arrest. The other accused was arrested moments later by the public. In cross examination he stated that he found the appellant having been already arrested.

PW6 was William Munyoki a watchman. It was his evidence that on 29th August 2013 at around midnight the lights went off. That at 6.00 am they heard noise from the transformer. They proceeded to the scene and saw 3 men. Those men fled from the scene. They followed them and arrested two. When they wanted to take them to the police they stated that they would pay them money Kshs 10,000/= so that they do not to take them to the police. The bribe was rejected. The appellant did not cross examine this witness.

PW7 was Paul Njiri Ngumi who had been stood down as PW4. He stated that he was a Security Assistant with Kenya Power. That on 29th August 2013 at 5.30 am he was called by Maina his foreman at Mwingi and informed that a transformer had been stolen at Kivou Area. He called the police who proceeded to the scene. He also went to the scene. They saw the KVA transformer which had been vandalized. They took pictures of the same. They found 2 people who had already been arrested by the public.

PW8 was Corporal Ndambutu Matiti based of Kenya Power Mt. Kenya South Region. It was his evidence that in the morning of 29th August 2013, he received a call that some people had been arrested at Mwingi on suspicion of stealing a transformer. He proceeded to the scene and found that the transformer had been felled down and vandalized. They took photos of the transformer. They recovered copper windings and lamination sheets. He found that 2 suspects had already been arrested. He found pliers and a pair of shoes and made an exhibit memo. The items were all littered with transformer oil. He took the transformer oil sample and submitted the same and related items to the Government Analyst. He received report which indicated that the transformer oil was detected on the items marked B1-B10. In cross examination by the appellant he stated that he found him already arrested and at the station.

PW9 was Corporal Tanui Katumba of CID Mwingi. It was his evidence that on 29th August 2013 at 6.00 pm while at home it was reported to him that a transformer had been stolen and one suspect arrested. They proceeded to the area and saw Alice Kasyoka the Chief and the appellant already in custody. He stated that the appellant had been found with a jungle bag and inside it 10 spanners, a bolt, one pliers, adjustable spanner, hacksaw, coiled wire were wrapped in a green polythene bag together with a sisal rope. Also a pair of shoes, a Marvin hat and one hat insisted as "cowboy hat were" found in his possession. He stated that the appellant claimed to be heading to Ruiru. It was his evidence that Kenya Power Official from Thika arrived shortly thereafter and the appellant and his co-accused were taken to the police station. He stated also that the appellant admitted possession of the bag, shoes, hats and related items found on him. He stated that some exhibits were taken to the Government Analyst for analysis. He produced a black jacket recovered from a thicket when civilians arrested the appellants. He also produced the items recovered from the appellant and his co-accused as well as the photographs, inventory, exhibit memo and Government Analyst's report. He stated that he was the one who carried out the investigations.

In cross examination he stated that at the scene he met the Area Chief and approximately ten other people, together with the appellant.

When put on defence the appellant gave sworn testimony. It was a short testimony. He stated that he was a resident of Ruiru and sold charcoal. That on 29th August 2013 he planned his trip to Mwingi to buy charcoal. He arrived at Kivou and found that a theft had taken place. He was taken to Mwingi and charged with the theft.

In cross examination he stated that he was not caught in the act, and that he had arrived at Mwingi that night. He admitted that he signed an inventory of items prepared by the police confirming the items, implements, and components for the transformer which were found on him.

This is a first appeal. As a first appellate court I am required to re-examine all the evidence on record and come to my own conclusions and inferences see the case of ***Okeno- vs- Republic (1972) EA 32***.

The appellant has raised a number of grounds on appeal. He stated firstly, that the trial was unfair and that it was not clear who of Otieno Ag.SRM and Murage SRM conducted the case. I have perused the record. The whole case was conducted or heard by V.A. Otieno Ag.SRM. The judgment was also written by V.A. Otieno Ag. SRM. It was however delivered by M. W. Murage Ag.SRM. The law allows a succeeding magistrate to deliver a judgment written and signed by another magistrate. Murage Ag. SRM also sentenced the appellant. The law also allows that. I do not see anything on record to suggest that the trial was unfair or that the appellant was prejudiced by the actions of any of the two magistrates.

The appellant has complained that he did not understand the language of the proceedings. My perusal of the record reveals that on 30th of August 2013 the appellant was brought to court. The language used in court was not indicated. However it was indicated that the charges were read in a language which all the two accused's understood and they responded that they were not guilty. The trial was then fixed for another date. The subsequent hearing date do not have any indication of the language used either by the court or by the witnesses.

That was a mistake. The court should have indicated the language used by the court and the witnesses and translation if any. I however note that the appellant participated fully in the trial by cross examining witnesses. He cross examined PW1. He cross examined PW2. He cross examined PW4, 5, 7, 8 and 9. In my view therefore he understood the proceedings and the language used. In my view if the appellant had not understood the language used he would not have cross examined the witnesses. He would also have raised the issue of him not being able to cross examine witnesses. There is no record that he complained. He also does not alleged on appeal that he raised the issue and the court ignored it. The appellant also gave a clear sworn defence and he was cross examined and answered the questions. That in my view in totality shows that the appellant understood the proceedings and the language used in court.

The appellant has complained that Section 211 of the Criminal Procedure Code was not complied with. Indeed the trial court did not put it on record that section 211 of the Criminal Procedure Code was

complied with. However it is clear from the record that the appellant chose to make a sworn defence and the other accused opted to keep quiet. The totality of this shows in my view that the options in their defenses were explained to both the appellant and the co accused and each one of them made their choice. In my view therefore Section 211 of the Criminal Procedure Code was complied with.

The conviction herein is based on the application of the doctrine of recent possession. Though some witnesses said that they went to the scene of the incident and met 3 people who ran away, none of them said they could identify those people. The appellant and his co accused were also not arrested because of any description given by the people who went to the scene and saw 3 people fleeing. The prosecution position is however that the appellant was found with items that connected him to the offence and that he was not able to explain how he came into possession of the items.

I note that the offence was alleged to have occurred at around 5.00 am and the appellant was said to be arrested at about 6.00 am. That was a difference of about 1 hour. In my view the arrest was done shortly after 3 people ran away from the scene of the transformer. The appellant was alleged to have been found in possession or control of a bag which had a number of items . He did not deny the ownership or control of that bag. The items were taken to the Government Analyst. Though the Government Analyst did not come to testify in court, his report was tendered in court and the appellant did not object. Some of the items were said to contain transformer oil which is a specialized oil. The appellant signed an inventory with the police showing the items that were found on him, some of which were found to contain the transformer oil. In his defence he stated that he had come from Thika to buy charcoal. He did not address the issue of possession of those items, while he knew that the evidence against him was related to the possession of those suspected item. He thus failed to shake the prosecution case – see the case of *Mwachanje –vs- Republic (2002) KLR 341.*

In my view the prosecution evidence established beyond reasonable doubt that the appellant was found in recent possession of items related to the vandalizing of the transformer. The burden shifted on him to explain how he came into possession of those items and what they were for. He did not do so either to the police or in court, and as such and under the doctrine of recent possession, the appellant was properly convicted.

The sentence imposed is neither excessive nor harsh. It is within the law.

Consequently, and on the above reasons I find no merits in the appeal. I dismiss the appeal and uphold both the convictions and the sentence of the trial court. Right of appeal explained.

Dated and delivered in Garissa this 27th July 2015.

**GEORGE DULU**

**JUDGE**