REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 275 OF 2011

MILAN MIREMBO NYOTA…….....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 1298 of 2009 in the Chief Magistrate's Court at Nairobi – E. Nduva (RM) on 11/10/2011)

JUDGMENT

The appellant, Milan Mirembo Nyota, was convicted of the offence of Improper Use of Licensed Telecommunications System contrary to **Section 29(a)** of the **Kenya Communication Act 2008** by Hon. E. Nduwa (Mrs.) Resident Magistrate in a judgment delivered on 11th October, 2011 in Nairobi Cr. Case No. 1298 of 2009. Consequently, he was sentenced to pay a fine of Ksh. 50,000/= and in default to serve 2 years imprisonment. Being aggrieved by the said decision the appellant lodged the appeal herein based on three grounds.

In the three grounds set out in the petition of appeal, the gist of the appellant's appeal was that the learned trial magistrate did not evaluate the evidence adduced properly and convicted him against the weight of the evidence.

Learned counsel Mr. Anthony H Khamati appeared for the appellant. It was his submission that the trial magistrate misapplied the standard of proof required in a criminal trial, by failing to require the prosecution to tender tangible proof beyond reasonable doubt that would have proved the charge. He argued that the prosecution failed to produce the phone that was used to send the offensive text messages.

Further, they did not provide the IMEI number of the phone used and also failed to link it to the appellant. From the record, he submitted that the investigating officer in his findings did not link the appellant to the mobile phone numbers from which the abusive text messages originated, as none of the numbers used belonged to him.

The prosecution indeed manifestly failed to prove that the offensive messages were sent from the appellant's mobile phone. As if to suggest that there might have been a rift, quite on the contrary, no rift was established between the complainant PW1 and the appellant who happened to be colleagues at work. If anything, PWI in her testimony stated that there was no bad blood between them as would warrant such provocative messages.

The appellant similarly testified of a good working relationship with PWI. It would therefore be

misplaced to suggest there was animosity between these two parties.

The circumstances of this case in my view are such that one would expect an expert on mobile phone technology from the said providers who are seized of the information to come and testify in order to assist the court arrive at a conclusive determination. However, no effort was made to call expert witnesses from the mobile service provider to shed light on the unidentified mobile serial numbers or even the registered owner.

The appellant denied the offence in his defense and told the court he had no reason to send the complaiannt the offensive messages. He also argued that the complainant did not produce a printout that would track previous communication thread to and from her phone, but only produced her phone. His mobile phone numbers were ***[particulars withheld]*** and ***[particulars withheld]*** respectively both of which were registered in his names.

Learned state counsel Mr. V.I Kabaka conceded the appeal for reasons that the learned trial magistrate misapplied the standard of proof required in a criminal trial. He urged that the prosecution did not discharge its burden of proof to the required threshold of beyond reasonable doubt. In a case such as the one at hand, clear and unequivocal proof is required before a case is made out.

Having carefully evaluated the evidence on record afresh to reach an independent my own conclusion, and having considered the grounds of appeal and the submissions before me, I find that proof of a direct link of the specified communication between the appellants' mobile phones to PW1's mobile phone was crucial. If it was conclusively shown that the appellant was the primary source of the offensive messages to the appellant, then a case would be made out. In the absence of that link, which would have comprised of the numbers and printouts of the messages from the service providers, the court was left with only suspicion. Suspicion, however strong cannot be the basis of any conviction.

With respect therefore, I agree with the learned state counsel. This appeal is therefore allowed, conviction quashed and sentence set aside.

The appellant paid a fine of Kshs. 50,000/=. His appeal having succeeded the said sum shall be refunded to him.

Orders accordingly.

SIGNED DATED and **DELIVERED** in court this **29th** day of July, **2014**.

A. **MBOGHOLI MSAGHA**

JUDGE