REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL NO.63 OF 2011

(Appeal from Resident Magistrate honourable B. Ombewa in Webuye Court in Criminal no.197 of 2010)

GEOFFREY WAFULA MAKOKHA::APPELLANT

~VRS~

REPUBLIC::RESPONDENT

JUDGMENT

The prosecution evidence on which the Appellant was convicted was that on 2/2/2010 PW1 Martin Ogutu Aguku who is an assistant security officer with the Kenya Power & Lighting Company at Kisumu was informed that their transformer at Mukhe area in Webuye of Western Province had been stolen. He travelled to the scene on 6/2/2010 in the company of P.C Edwin Mahera (PW2) and Corporal Jackson Langat (PW3) and they found their transformer had been vandalized and only the outer shell was left. Acting on information received, they went to the Appellant's house that night at about 1.30 a.m. The Appellant is a farmer at Sirisia. The witness woke up the Appellant in whose house they recovered 4 containers each having 5 litres of transformer oil. He was arrested and taken to Webuye Police Station where he was charged. In count 1 he was charged with stealing contrary to section 275 of the Penal code that on 3/2/10 at Mukhe market he jointly with others not before the court stole 100 litres of transformer oil and transformer laminations from a transformer serial number 83125 all valued at Ksh,500,000/= the property of Kenya Power & Lighting Co. Ltd. In count 2 he was charged with sabotage contrary to section 343 (b) of the Penal Code that on the same day and at the same place, and while with others not before the court, he willfully and unlawfully destroyed the transformer knowing that such an act would impede the supply of electronic power to the community of Mukhe area. The Appellant faced the alternative charge of handling suspected stolen property contrary to section 322 (2) of the Penal Code, that on 7/2/2010 at Sirisia area in the same Bungoma East District of the Western Province, otherwise than in the course of stealing dishonestly retained 20 litres of transformer oil knowing or having reason to believe it to be stolen goods.

The Appellant made an unsworn statement in defence denying the charges. He stated that he was found asleep in his house by people who told him they were looking for one Geoffrey Wafula. He was arrested and taken to his father's house and them to the police station. He denied he was found with the oil and said he first saw the oil in court. His father DW2 Isaac Makokha Masinde testified that he was asleep when the Appellant knocked his door. He opened to find the Appellant handcuffed and with people who entered the house and made a search. Nothing was recovered. They took away the Appellant. He denied that anything was found in the Appellant's house.

The trial court considered the prosecution and the defence evidence and found that the main charges had not been proved. It found that the Appellant had the 20 litres of oil in his house that night. He was

convicted on the alternative charge and sentenced to serve 5 years in jail. It is the conviction and sentence that the Appellant is challenging in this appeal. The appeal was opposed by Mrs. Leting for the State.

In the grounds of appeal, the Appellant complained that trial court did not impartially analyse both the prosecution and the defence cases, the burden of proof was shifted on him, and that he was convicted on the alternative charge only because there was no evidence to support the main charges.

It is the duty of this court to subject the entire evidence adduced before the trial court to fresh consideration and evaluation to see if it could form the basis of the conviction. **(Okeno v. R [1972] EA 32)**. In doing this, the court will bear in mind that it did not have the benefit of seeing and hearing the witness.

PW1 received report about the vandalisation of their transformer on 2/2/1010. It is not clear when the crime had been perpetrated. They went to the scene 4 days later. At the scene only the shell of the transformer was in place. It was not known who had committed the crime. The evidence of PW1, PW2 and PW3 was that they went to the Appellant's house at Sirisia that night and found 20 litres of transformer oil therein. He denied the recovery. The trial court considered the evidence of the three witnesses and that of the Appellant and his father and accepted the version of the former. It found that the three witnesses did not know the appellant and his home before and had no reason to frame him. I accept that finding.

The result is that the Appellant was found with 20 litres of transformer oil and has offered no explanation regarding how he came by it. The prosecution witnesses did not testify that there was oil in the transformer that was vandalized. They did not say what was in the transformer. There was no evidence that the vandalized transformer was supporting electric supply, or that the vandalization had interfered with electric supply. These are the reasons why the trial court correctly found that the charges in counts 1 and 2 had not been proved.

Nonetheless, the Appellant was found with 20 litres of transformer oil and had no explanation for the possession. Transformer oil is peculiar kind of oil and not used for domestic purposes. I accept that the oil was feloniously obtained and therefore the conviction of handling stolen goods under 322 (2) of the Penal Code was properly arrived at.

Regarding sentence, the Appellant was asked to serve 5 years in jail. The maximum penalty for the offence is 14 years. He was a first offender who takes care of his old and sick father. In passing sentence, the trial court observed as follows:

"Transformer vandalism and sabotage are on the rise if media reports are anything to go by a deterrent sentence that would deter others is necessary."

It is good practice that an accused should be sentenced only for the offence with which he has been charged, and the facts to be considered in sentencing should be the ones relating to that charge. **(Gibson Kimani v. Republic [1989] 293).** The magistrate was clearly influenced by other matters on which he had not received evidence. Media stories, however believable, were extraneous to the case and were prejudicial to the Appellant. This is the reason why I find the sentence was manifestly harsh and excessive. The sentence is reduced to 2 years.

To that extend, therefore, the appeal is allowed.

Dated, signed and delivered at Bungoma this 19th day of March, 2012.

A. O. MUCHELULE
JUDGE