



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL 99 OF 2008

GEORGE ADAMS OKONGO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellant George Adams Okong'o, was convicted on charges of criminal negligence contrary to section 243(g) of the Penal Code and fined Kshs. 20,000/-.

He was alleged to have acted without proper precautions against any probable danger from the electricity power wires for which he was in charge, and caused the death and injuries of nine people who were electrocuted on 26th November 2006 at Matsangoni area.

Appellant had denied the charges and after due trial in which thirteen witnesses testified on behalf of the prosecution while defence had the appellant as the only witness. On 26-11-06, Kenya Power and Lighting Company (KPLC) workers were installing power lines at Matsangoni – the line was to go from Matsangoni to Malindi. There were supervisors being Okumu and appellant. The team of workers comprised among others the nine people who died. As the workers were installing the wire it got trapped by a tree – that wire had no power and so was not live. One of the supervisors, i.e Adams, ordered a person by the name Doroi to climb up and pull the wire. One wire came off and was trapped by a live wire resulting in the workers getting burnt and some died on the spot.

On cross-examination PW1 told the trial court that the wires they were handling were not live and that although the main lines were on, they were not using them – what was required was to switch off the main line by the supervisors at Kilifi, but according to him, they had no gadgets to switch.

PW2 Alex Ngonyo Kajembe, who was in the team of workers clarified that there were many trees at the site where they were working. Once the wire got held by a tree branch, they were ordered by the appellant to pull it – the wire they pulled was of low voltage but it came into contact with a high voltage wire which was above it and it resulted in the workers getting electrocuted. His evidence was that the duties were planned out by the appellant who was their supervisor/instructor.

This was the same evidence repeated over and over by prosecution witnesses who had been members of the whole team at Matsangoni. Medical evidence was tendered by Dr. Mutunda and Dr. Hussein to support both the deaths and injuries of the unfortunate team of workers.

Pc Derrick Mutua who received a report about the incident told the trial court that if proper precaution to stop the wire from touching the live one had been taken no deaths would have occurred.

In his sworn defence, appellant confirmed he was the team leader for the KPLC team at Matsangoni who were running wire for power. His evidence was that the wire was new but the poles were old, with wires on top. The top wires were live. They had to pull the wire to straighten it and in the process it came in contact with the live one which was of high voltage thereby transferring power onto the wire which was

being pulled. His evidence was that the team comprised of persons who had done the same kind of work over a long period with the shortest period being one (1) year and so they knew the work well. He explained that it was not within his power to switch off the upper wire as he had no such authority saying only the Mombasa engineer can switch off such power because if switched off it would affect Kilifi and Malindi areas.

In his judgment, the trial magistrate noted that each worker confirmed they did the work under the instructions of the appellant who was present at the scene and that appellant admitted as much.

He further noted that appellant had undergone a course on overhead conductor, which is about high tension wires, while the workers who were instructed to pull the wires had no training.

The trial magistrate stated:-

“It is not difficult to see that if the tree and the branches had been cut before work commenced the lower wire would not have been entangled when it was pulled. Hence it would not have come into contact with the high tension wire above. The accused as a trained leader of the team, had a duty to ensure that the tree was cut before work commenced. This he failed to do. Further, the workers present are all of the opinion that had the power been switched off the said incident would have been prevented. It was the work of the accused to make such a decision, which he failed to do”.

Appellant’s defence was considered and the trial magistrate held that appellant did not have to take instructions from Mombasa and he ought to have taken precautionary measures as the team leader. He found this failure to comprise:

- 1) Appellant’s failure to ensure the tree or the branches near the power lines were cut before the work started.
- 2) Failure to properly guide the workers on how to pull the said wire to ensure they did not use too much force.
- 3) Failure to ensure the main power line was switched off before the work commenced.

The findings by the trial court were challenged on grounds that:-

- 1) The trial magistrate erred in finding that appellant was in charge of the electricity power lines.
- 2) The trial magistrate erred as the appellant was not properly charged before court
- 3) The trial magistrate erred in finding that appellant was trained in the dangers with regard to high voltage lines, which danger became reality and
- 4) The trial magistrate erred in failing to find that the charge was defective as the electricity wires could not be defined as machinery for which appellant was in charge.
- 5) The trial magistrate erred in holding that appellant did not switch off or attempt to switch off the electric current in the high voltage line or that he did not cut and clear the bushes in the area.
- 6) The trial magistrate erred in finding that appellant did not control the force and strength of the worker pulling the wires that were laid.

At the hearing of the appeal, Mr. Kiarie urged the court to be guided by the decided case of **Kinyanjui v R KLR 1980 pg 119** regarding the defective charge

He further submitted even where person is accused of criminal negligence, the accused’s state of mind i.e the mens rea should still come into play and in this instance the trial magistrate did not consider that – he made reference to the case of **R v Lamb Vol.2 (967) All ER at pg 142** saying that the particulars of the charge did not disclose the machinery which accused was contradicting and there was no basis for the conviction. Mr. Kiarie argued that it could not be said that appellant was in charge or had control of the high voltage wires and he could not switch it off, as this could only be done in Mombasa with the risk of plunging the entire Watamu area into darkness and so appellant was not the person who should have been

charged. Mr. Kiarie's contention is that appellant was merely an employee of KPLC just like the victims at the site and had no control of the power lines – the persons who ought to have been charged should have been the engineers of KPLC or the Managing Director and to the conviction should be quashed and the fine which appellant had paid be refunded.

The State conceded to the appeal and Mr. Ogoti submitted that the charge was not proper as the evidence did not support the particulars of the charge. Mr. Ogoti pointed out that the entire evidence makes no reference to any machine being involved and the team was in its normal duties of fixing cables to supply power and in the process, so much force was used to pull at the wire which had got caught by a tree branch that it came into contact with the main line and several workers got electrocuted. Mr. Ogoti explained that the problem is that section 234(g) specifically mentions machinery yet there was no machinery involved.

Perhaps I should start with the basics – what is machinery? According to Oxford Advanced Learner's Dictionary new Special Edition – the 6th Edition by A. S. Hornby, edited by Sally Wehmeir, machinery means “machines as a group, especially large ones, the parts of a machine that make it work. Does this description fit in with the particulars preferred here. Section 243(g) Penal Code reads.

“Any person who, in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person does any act with respect to, or omits to take proper precautions against any probable danger from any MACHINERY of which he is solely or partly in charge, is guilty of a misdemeanor.”

That definition certainly deals a blow to the prosecution case – as indeed the evidence does not disclose use of any machinery as understood in the ordinary meaning of the word.

Then there is the issue as to whether appellant was supposed to ensure that the tree was cut before embarking on the task. No evidence was led to confirm this, but the learned trial magistrate for some reason decided that it was the duty of the appellant to have the tree cut before embarking on the task.

Also for consideration is who was responsible for switching off the power so as to make it safe for the KPLC workers to do their work with no danger. Not a single engineer or technical personnel testified before the trial court to explain the steps or procedures one should observe when undertaking a task such as the one that was at Matsangoni. Instead the trial magistrate relied on conjecture and opinions of personnel who had no technical training to make a conclusion as to what steps or procedure appellant should have adopted – I concur that was an error in fact and in law.

Consequently, the conviction was unsafe and this appeal is properly conceded to. The conviction is quashed and sentence set aside.

Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 10th day of **February 2010** at Malindi.

H. A. Omondi
JUDGE