Owadi v Republic (Criminal Appeal E068 of 2024)
[2025] KEHC 9735 (KLR) (7 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9735 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E068 OF 2024

A MABEYA, J

JULY 7, 2025

BETWEEN

AUGUSTINE AMUNGO OWADI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment & conviction of Hon. M. Shimenga SRM delivered on 6/3/2024 and sentence passed on the 13/3/2024 in Ksm CMCC No. E021 of 2022, Republic v Augustine Amungo Owadi)

JUDGMENT

1. The appellant was charged on Count 1 with the offence of unauthorised disconnection of electrical apparatus contrary to section 168 (1) of the *Energy Act* No. 1 of 2019.

2. The particulars of the charge were that on 6/12/2021 at Sinyolo area in Kisumu West sub-county within Kisumu, jointly with others not before court without lawful right, the applicant disconnected electrical apparatus namely two pre-paid meters serial Nos. 37175362237 and 37170468005 from electric supply line through which electrical energy is supplied without consent of the Kenya Power and Lighting Company Limited, the Licensee.

3. On Count 2, the appellant was charged with stealing of energy equipment or appliances contrary to section 169 (1) (c) of the *Energy Act* No. 1 of 2019.

4. The particulars of the charge were that on the 6/12/2021 at Sinyolo area in Kisumu West sub-county within Kisumu jointly with others not before court the applicant stole two prepaid meters serial No. 37175362237 and 37170468005 the property of Kenya Power and Lighting Company Limited, the Licensee.

5. The appellant pleaded not guilty and a full trial was conducted. The prosecution case was founded on the evidence of four (4) witnesses. The defence evidence was based on the appellant's sworn testimony.

6. In its judgement, the trial court found that the prosecution failed to prove the charges brought against the appellant on Count 1 but that it had proved the charges on Count 2. The trial court went ahead to convict the appellant and sentenced him to a fine of Kshs. 200,000/- in default of which he should serve 2 years' imprisonment.

7. Dissatisfied by the trial court's decision, the appellant filed his undated petition of appeal. There are five grounds of appeal presented by the appellant as follows: -

    a. The learned trial magistrate erred in fact and in law by finding the appellant to have been in recent possession of the stolen meter number 3175362237 when no evidence to such effect was ever led in the course of the case for the prosecution.

    b. The learned trial magistrate erred in law and in fact by assuming that the Techno phone and either any or both of the sim cards that were allegedly found in the possession of the appellant at the time of his arrest had any connection to the phone number +254 711967790.

    c. The learned trial magistrate erred in law in shifting the burden of proof to the appellant.

    d. The learned magistrate erred in law and in fact by convicting the appellant on the basis of the transaction involving phone number +254 711967790 and the stolen meter number 3175362237 on the 8th December 2021 without cogent evidence establishing the connection between the said phone number and the appellant.

    e. The conviction was in all circumstances against the weight of the evidence.

8. In support of his appeal, the appellant filed written submissions in which he stated that there was no evidence linking phone number 0711 967790 to any of the two SIM cards presented as PExh 6 (b) and (c) and in assuming the contrary the trial court fell into error and shifted the burden of proof to the appellant.

9. That the trial court fell into error by assuming that it was the appellant who made the payment of Kshs. 50/- to the stolen meter account without any evidence of the same and further that the trial court erroneously relied on the doctrine of recent possession whereas the prosecution's case was that none of the stolen meters were found.

10. Conversely, it was submitted for the respondent that based on the evidence presented, the appellant knew that the meter he was paying tokens for was stolen despite the fact that he clandestinely paid for using his wife's phone and further that in his defence the appellant failed to explain how he came into possession of the stolen meters. The respondent thus sought to have the appeal dismissed.

11. This being the first appellate Court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion but at all times considering that I did not see the witnesses testify. (See Okeno v Republic [1972] EA 32.)

12. The Court has considered the record. The prosecution case was supported by the evidence of four (4) witnesses. PW1 was the complainant. He told the court that on the 6/12/2022, he woke up and noticed that two of his meters were stolen and subsequently reported to KPLC. That on looking at the KPLC system, they noticed that one of the meters, No. 37175362237 had been loaded with tokens

worth Kshs. 50 by phone number 0711967790. That on calling that number, the appellant picked it up so he organized for them to meet whereby the appellant was arrested.

13. PW2, Samuel Arunga Agoro, the complainant's brother testified that both meters that were stolen were registered under his name. PW3, No. 93128 PC Bonface Gwanta, testified that he was one of the arresting officers and that he arrested the appellant upon being identified by the complainant who had been in communication with him. He testified that at the time of the arrest, they did not recover any meter from the appellant.

14. PW4 No. 57156 Sgt. Joseph Mugenya, the Investigations Officer testified that following the report of the stolen meters by the complainant, he commenced investigations and established that tokens worth Kshs. 50 had been bought on token no. 3717532237 through phone number 0711967790. He told the complainant to call the number seeking installation services to which the owner of the number agreed which led to the arrest of the appellant when he met the complainant.

15. That the line used to buy the tokens was not registered in the appellant's name and on inquiry, the appellant revealed that it was registered in the name of his wife, Jane Fedha. It was his testimony that they did not recover the meters and that the appellant refused to help with investigations.

16. When placed on his defence, the appellant testified that he was arrested on the 22/12/2021 as he was returning from dropping a patient.

17. It is on the foregoing evidence that the trial court found the appellant guilty, convicted and sentenced him to 2 years imprisonment.

18. The Court has considered the record. The grounds of appeal can be collapsed into 1 that, whether the trial court erred in convicting the appellant against the weight of evidence presented by the prosecution.

19. The appellant was convicted and sentenced of the offence of stealing of energy equipment or appliances contrary to section 169 (1) (c) of the *Energy Act* No. 1 of 2019.

20. The fundamental components of the crime of stealing energy equipment as outlined in the aforementioned section include the act of stealing, attempting to steal, or dealing with stolen energy equipment and appliances. Additionally, it is necessary to know or have reasonable grounds to suspect that the equipment or appliance may be stolen, or to dishonestly receive or keep the equipment or appliance, or to dishonestly engage in or aid in its retention, removal, disposal, or realization for the benefit of oneself or another individual.

21. The appellant largely impugned the trial court's conviction and sentence on the grounds that there was no direct evidence linking him to the stolen meter. The evidence as presented before the trial court was that the appellant was not caught with the meters alleged to have been stolen and neither were the said meters recovered.

22. Admittedly, the prosecution case against the appellant primarily rested on circumstantial evidence. In Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR, the Court of Appeal had this to say on this point:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence.

Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -

"It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

23. The Court then proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated: -

" Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; 9iii) the circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.

(see also Sawe v Republic [2003] e KLR and GMI v R Cr. App. No. 38 of 2011).

In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken on destroy the inference of guilt.

(see Teper v R [1952] ALLER 480 and Musoke V R [1958] E.A 715). In Dhalay Singh v Republic, Cr. App. No. 10 of 1997, this court reiterated this principle as follows:

"For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an Accused is entitled to an acquittal."

24. In this case, PW1 testified that after reporting the theft of the meters, he was asked to call the number which had bought tokens for one of the meters. On doing so, the appellant picked the phone and they planned to meet on the premises that the appellant was coming to do some installations for the complainant.

25. PW4, the investigating officer testified that the act of buying tokens worth Kshs. 50 is often used to confirm whether the meter is still active and that after he was arrested, the appellant confirmed that the phone used to buy the tokens belonged to his wife.

26. Juxtaposed against this evidence was that put forth by the appellant who testified that he was arrested as he was coming back from dropping a customer and later charged with the offence herein.

27. The appellant submitted that in convicting him, the trial court shifted the burden of proof from the prosecution to him.

28. In page 4 of the judgment, at the second last paragraph, the trial court observed: -

> " In his defence, the accused just gave a narration of how he was arrested but did not deny any claims that were raised against him by the prosecution witness. He ought to have explained to this court how he ended up dealing with a meter two days after it was stolen."

29. In my view, the appellant having been arrested with the phone that paid for the tokens bought on the stolen meter, two days after the meter was stolen, he was expected to provide some explanation as to how that came to be. This does no shift the burden of proving his guilt by the prosecution beyond reasonable doubt.

30. Sections 111(1) and 119 of the *Evidence Act* provides: -

> " 111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:
>
> Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:
>
> Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."
>
> "119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

31. The appellant was under no duty to adduce evidence and challenge the prosecution's case but having been arrested with the phone that bought the tokens on the complainant's meter and further having admitted that the phone was registered in his wife's name, he failed to offer any explanation as to how and why the said phone was used to buy tokens for the complainant's stolen meter.

32. From the record, it is clear that the trial court did not at any time shift the burden of proof from the prosecution to the appellant. The evidence presented by the prosecution all point to the guilt of the appellant and none other.

33. The appellant impugned the trial court's conviction and sentence on account of the wrong application of the doctrine of recent possession. I have considered the judgment carefully. I have not seen where the trial court raised this issue.

34. In the end, I find that the conviction and the sentence of the appellant was safe and sound. I therefore uphold the judgment of the trial court and hereby dismiss the appeal.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JULY, 2025.

A. MABEYA, FCI Arb.

JUDGE.