Owour v Republic (Criminal Appeal E099 of 2022)
[2024] KEHC 17018 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 17018 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E099 OF 2022

RPV WENDOH, J

JUNE 20, 2024

BETWEEN

JACK OMONDI OWOUR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence by Hon. H. Maritim– Resident Magistrate in Migori Chief Magistrate's Court Criminal Case No. E1275 of 2021 delivered on 06/04/2022)

JUDGMENT

1. Jack Omondi Owour has filed this appeal against the judgment of the Resident Magistrate, Migori, in which he was convicted for the offence of stealing of Electrical Energy Equipment contrary to Section 169 (1) (c) of the *Energy Act* No. 1 of 2019.

2. The particulars of the charge are that on 18th December, 2021 at Maasai Mara area, Nyatike Sub County, wilfully stole KPLC meter No. 37163533252 valued at Kshs. 5,000/- the property of Kenya Power.

3. The appellant denied the offence and the case proceeded to full hearing with the prosecution calling a total of four witnesses in support of their case, namely, PW1 Naftali Okal Otieno; PW2 Wycliffe Otieno Oguda; PW3 Sergeant Zablon Ogutu Sang, the Investigating Officer from Karungu Police Station and lastly PW4 CI No. 23374 Simotwo Michael of KPLC South Nyanza Region.

4. When placed on his defence, the appellant gave an unsworn statement and did not call any witness.

5. Upon conviction, the appellant was sentenced to pay a fine of Kshs. 5,000,000/- in default, to serve ten (10) years' imprisonment. He is aggrieved by both the conviction and sentence which has culminated in this appeal. The grounds of appeal filed in court on 11/10/2022 are that: -

1. The trial magistrate erred both in law and fact when she merely based the conviction on the defective charge sheet;

2. That the evidence did not support the charge.

3. The sentence of 10 years' imprisonment imposed upon by the trial court was manifestly harsh and excessive;

4. The trial magistrate erred both in law and fact by failing to consider the appellants' defence.

6. The appellant therefore prays that the Appeal be allowed.

7. The Appeal was canvassed by way of written submissions. The appellant filed written submissions on 12/03/2024 while the Prosecution counsel, Ms. Ikol - Esaba opposed the appeal through their submissions dated 30/04/2024.

8. This being a first appeal, this court is required to re-examine all the evidence tendered in the trial court, evaluate and analyse it, and arrive to its own conclusion. The court has to however make allowance for the fact that this court neither saw nor heard the witnesses testify, an opportunity which the trial court had. This court is guided by the decision of Okeno vs. Republic (1972) EA 32 where the Court of Appeal said: -

9. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

10. PW1, the complainant, told the court that on 24/11/2021 at around 7:35pm they had no power. He bought tokens but they still had no power. He went to check the meter box and found his meter missing. He reported the same to KPLC Sori the following day and he was advised to report the same to Wanda Police Station, his meter No. was 37163533252. On 17/12/2022, he was called by the OCS and informed that a suspect had been found with some meters. He was shown the meters and he was able to confirm that one of the meters was his missing meter. He conceded that he did not see the appellant stealing the meter,

11. PW2 stated that on 19/11/2021, his meter No. 37164533749 got lost. He reported the same to KPLC Sori and later to the Police Station and was given a police abstract; that on the 24/11/2021 he found out that a number 0724292739 has tried to send Kshs. 1 to his meter. He later found out that the said number belonged to the appellant who was someone he had known for about 3 years and used to do electrical wiring. That he was in the company of police officers when they spotted the appellant at around 12 midnight and he had 2 meters in his bag, PW2 however, did not get his meter among the 2 meters found in the appellant's possession and that he has never found his meter. He also clarified that he had not seen the appellant steal his meter but only knew of his involvement through his phone number which had tried to pay Kshs. 1 through his meter.

12. PW3 stated that on 16.11.2021, they received information from a complainant, PW2, that the appellant had been spotted at Masai Mara. He left in the company of 3 other police officers and PW2. PW2 identified the suspect since he knew him and they arrested him. They searched his blue backpack

and found an iron rod, meters belonging to KPLC, pair of pliers and a certificate for KPLC. All these were marked as PMF 1 – 5. They also found his personal effects and his ID card. The appellant was arrested and they informed KPLC of the recovered goods. The certificate was in another person's name. He conceded that they did not dust the recovered items.

13. PW4, an officer attached to KPLC South Nyanza Region and the Investigating Office stated that on 18/12/2021, he received a call from the OCS Karungu Police Station that a suspect had been arrested with a meter that had been reported stolen by a KPLC customer, he confirmed that the meter recovered from the appellant belonged to PW1 as per the information from KPLC. He produced PMFI 1 – 6 as Pexh. 1 – 6 and the Supply Contract between KPLC and Naftali Okul Otieno as Pexh.7.

14. It was the appellant's unsworn testimony that he is a fisherman; that on 17/12/2021, he had come from the lake and was at a place called Calabash when PW3 went and arrested him and took him to the police station.

15. In addition to the grounds of the appeal, the appellant submitted that his Constitutional right to fair hearing was grossly violated by the trial magistrate who heard the case despite having no jurisdiction to entertain the same and only transferred the same for sentencing.

16. It was also his submission that the evidence of PW1 was that his meter was stolen by unknown persons but there was no confirmation that indeed the exhibit which was presented to court was stolen from PW1's house; there was no OB report of a stolen meter, no exhibit where the said exhibit was stolen from, that the exhibits were not subjected to dusting to connect him with the offence, there was no documentary proof to support the allegations by PW2 of trying to pay him off.

17. In her submissions, Ms. Ikol - Esaba for the Prosecution outlined the statutory provisions for the offence, gave an overview of the prosecution's case in the trial court and maintained that the same had been proved to the required standard of beyond reasonable doubt. It was her submission that the appellant was arrested with two meters, and one of those which had been installed in PW1's house but went missing and the other one that belonged to PW2 and which the appellant had tried to pay Kshs. 1, the said meters were in possession at the time of the arrest.

18. On the assertion by the appellant that the sentence was harsh and excessive; she submitted that the said sentence of Kshs. 5,000,000/- payable as fine and in default 10 years imprisonment is actually prescribed in the *Energy Act*; the same was therefore within the law and the same cannot be said to be excessive. She maintained that the conviction and sentence by the trial court was safe and urged the court to dismiss the appeal.

19. I have carefully read and understood the grounds of appeal, record of appeal and the rival submissions. It is the appellant's contention that the charge sheet was defective, the trial magistrate had no jurisdiction to hear the matter, no evidence was adduce to satisfy the ingredients of the offence which was not proved to the required standard and that the sentence was harsh and excessive.

20. The Respondent on the other hand maintained that the prosecution proved all the ingredients of the offence to the required standard of beyond reasonable doubt and the sentence meted was legal and safe as prescribed under the Act.

21. Of jurisdiction; The question is whether the trial magistrate had the requisite jurisdiction to entertain the case' The Respondent did not comment on the issue of jurisdiction.

22. Jurisdiction is everything and it goes to the root of a case. It is what gives a court of law the authority to inquire into a matter before it. As held in the celebrated case of Owners of Motor Vessel 'Lilian S';C. A. 50 of 1989, the court held that must down its tools where it has no jurisdiction. The jurisdiction of

magistrates' courts to entertain criminal matters is outlined under the First Schedule of the *Criminal Procedure Code*. It specifies in details which court should handle which cases. Further, on the issue of sentencing, Magistrates Courts have jurisdiction to impose minimum and maximum sentences provided by the law under Section 28 of the *Penal Code*. However, section 7 of the *Criminal Procedure Code* limits the said jurisdiction depending on the rank of the trial magistrate.

23. Further, section 79 of the CPC provides for the transfer of a criminal case from one subordinate court to another. It provides that a magistrate may direct or empower a magistrate holding a subordinate court of the second class who has taken cognizance of a case and whether evidence has been taken in that case or not, to transfer it for trial to himself or to any other specified magistrate within the local limits of his jurisdiction who is competent to try the accused and that magistrate shall dispose of the case accordingly.

24. In the instant case, I do note that the trial magistrate (Hon. H. Maritim - RM) heard the case to its conclusion and issued her judgement whose effect was to convict the appellant for the offence. She consequently transferred the matter to the Court 4 (Hon. P. Areri - PM), for purposes of sentencing. The penalty prescribed in the Act for the said offence if Kshs. 5,000,000/= and in default, imprisonment for a term of 10 years. I find that the said ground of appeal is not merited.

25. The next issue is whether the charge sheet is defective. It is the appellant's contention that the particulars of the charge sheet are at variance with the evidence on record. Section 134 of the *Criminal Procedure Code* provides what a charge sheet has to contain. It reads:-

26. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".

27. A defective charge sheet was defined in the Court of Appeal case of Court of Appeal in Sigilani –vs- Republic (2004) 2 KLR, 480 where it was held as follows: -

28. The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence".

29. I have carefully looked at the charge sheet and guided by the above caselaw and statutory provisions, it is my considered view that the said charge was not defective. The same outlined the nature of the offence in a clear and concise manner, which offence is known in law. Further, the appellant has not demonstrated the manner in which the said charge is defective and which may have prejudiced him in the preparation of his defence. His allegations are therefore baseless.

30. I will now proceed to consider the ingredients of the offence herein and determine whether the same was proved beyond reasonable doubt. The appellant was charged with the offence of stealing of Electrical Energy Equipment as outlined under section 169 (1) (c) which provides as follows: -

    A person who wilfully-

    a. Encroaches, illegally acquires or deals in public land set aside for energy infrastructure projects;

    b. Vandalise or attempts to vandalise energy installations and infrastructure

    c. steals or attempts to steal any energy equipment or appliance or handles any energy equipment or appliance (otherwise than in the course of stealing) knowing or having reason to believe the equipment or appliance may be stolen, or dishonestly receives or retains the equipment or

appliance, or dishonestly undertakes, or assists in its retention, removal, disposal or realization by or for the benefit of himself or another person or if he arranges to do so ,....

commits an offence which is deemed to be an economic crime and shall on conviction, be liable to a fine of not less than five million shillings or to a term of imprisonment of ten years or to both such fine and imprisonment.

31. My understanding of the above section clearly stipulates the offences among others, handling any energy equipment or appliance otherwise than in the course of stealing, knowing or having reason to believe the equipment or appliance may be stolen.

32. PW1 testified that on 24/11/2021, he found his meter No. 37163533252 missing. He reported the same to Sori KPLC and later to the police station. On 17/12/2022, he was shown the meters found in possession of the appellant and he confirmed that one of the meters was his. PW3, the arresting officer stated that when they arrested the appellant, they searched his blue backpack and found an iron rod, 2 meters belonging to KPLC, pair of pliers and a certificate for KPLC. It is one of the said meters that was later identified by PW1 as belonging to him. PW4, the investigating officer from KPLC South Nyanza branch, confirmed that the said meters belonged to them and produced a Supply Contract between the KPLC and PW1 as Pexh. 7, which proved that the said meter indeed belonged to PW1. I therefore find that the evidence/ testimony of PW1, 3 and 4 was corroborated, cogent and indeed confirmed that the appellant was handling an energy appliance (whether or not in the course of stealing) without any lawful explanation or justification.

33. The appellant in his defence generally denied committing the offence and stated that he was a fisherman. He did not comment or deny the items found in his possession in his blue backpack or provide a plausible explanation or justification of why he had the said appliances, being the property of KPLC. PW2 also confirmed that the appellant was an electrician, a fact the appellant did not challenge. I therefore find that the prosecution's evidence was unrebutted and the charge was proved beyond reasonable doubt that the appellant had committed an offence under the *Energy Act*.

34. Of sentencing; It is the appellant's contention that the sentence meted was harsh and excessive and the trial magistrate did not consider that he was a first offender. The Respondent on the other hand stated that the said sentence was as prescribed in the *Energy Act* and the same cannot therefore be said to have been harsh or excessive.

35. It is not in dispute that Section 169 (1) as stated above, provides for a penalty of a fine of Kshs. 5,000,000/- or in default to serve an imprisonment term of 10 years imprisonment. The question that therefore follows is whether the said prescribed sentence is mandatory and binding or whether a trial court can exercise its discretion depending on the circumstances of each case. My answer to the above is in the negative. The trial court's discretion in sentencing should not be fettered and the court is under a duty to exercise the said discretion judiciously on a case-by-case basis.

36. For the above reasons, I find the conviction to be safe. The court takes into account the fact that offences under the *Energy Act* are prevalent and a deterrent sentence is called for. However, in line with the court's decision to move away from mandatory sentences, I hereby set aside the 10-year imprisonment default sentence and substitute the same with 5 years' imprisonment. The Appeal succeeds to that extent.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 20TH DAY OF JUNE, 2024.

R. WENDOH

JUDGE

In presence of; -

Ms. Ikol for the state

Appellant Present

Ms. Emma/ Phelix –Court Assistants