



REPUBLIC OF KENYA



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**Obura v Republic (Criminal Appeal E022 of 2023)
[2024] KEHC 7558 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7558 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E022 OF 2023
RE ABURILI, J
JUNE 19, 2024**

BETWEEN

COLLINS EMMANUEL OBURA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the conviction and sentence by the Hon. R.M. Oanda on the 4th April 2023
in the Senior Principal Magistrate's Court at Winam in Criminal Case No. E327 of 2021)*

JUDGMENT

Introduction

1. The appellant herein Collins Emmanuel Obura was jointly charged, tried and convicted together with others not before this court of the offence of vandalism of energy installations and infrastructure contrary to section 169 (1) (b) of the *Energy Act* No.1 of 2019. The particulars of the offence were that on the night of 6th December 2020 at Kadiju Primary School in Kisumu East sub-county within Kisumu County, they jointly vandalized one 100KVA/11KV transformer sub-station No. 41962 valued at Kshs. 392,668.64 under the control and property of Kenya Power and Lighting Company Limited, the licensee.
2. The trial court after considering the serious nature of the economic crimes committed by the appellant and his co-accused as well as the fact that the appellant had spent two years in custody prior to the conclusion of his case, proceeded to sentence him and his co-accused to serve eight (8) years imprisonment.
3. Aggrieved by the trial court's conviction and sentence, the appellant filed his petition of appeal dated 3rd May 2023 setting out the following 9 grounds:



- i. That the honourable magistrate erred in law and fact by convicting the appellant on insufficient evidence.
 - ii. That the honourable magistrate erred in law and fact by convicting the appellant without properly analysing the ingredients of the offence of theft.
 - iii. That the honourable magistrate erred in fact and in law in finding that the prosecution's evidence which was littered with contradictions outright lies and half-truths created a lot of doubt which should have been resolved in favour of the appellant.
 - iv. That the honourable magistrate erred in not considering the provisions of evidence act and penal code thus culminating in wrong finding against the appellant.
 - v. That the honourable learned magistrate erred in convicting the appellant on a defence charge thus prejudicing the appellant.
 - vi. That the honourable magistrate erred in not holding that the appellant had no burden of proof while the prosecution had failed to discharge the burden as expected in law.
 - vii. That the honourable magistrate was biased in his decision making.
 - viii. That the decision was against the weight of evidence.
 - ix. That the learned magistrate did not consider the contradictions in the prosecutions case and thus arrived at an unjust decision.
4. The appeal was canvassed by way of submissions with the appellant filing written submissions as the respondent's prosecution counsel made oral submissions.

The Appellant's Submissions

5. It was submitted on behalf of the appellant that the evidence brought against him was merely circumstantial as no eye witnesses testified and that none of the prosecution witnesses were able to identify the appellant as the one who committed the offence as the appellant was charged merely based on suspicion.
6. It was submitted that suspicion no matter how strong cannot be the basis of inferring guilt on an accused person as was held in the case of *Sawe v R* [2003] KLR 364.
7. The appellant's counsel further submitted that the individual who gave the investigating officer a tip off was not a witness in this case and it would have been prudent to call him to testify as was held in the case of *Republic v Kelvin Kamau Gatora & 2 Others* [2018] eKLR.
8. It was further submitted that the prosecution equally failed to call the arresting officer as a witness to explain his basis of arresting the appellant. Reliance was placed on the case of *Bukenya v Uganda* [1972] EA 549 where the court stated inter alia that where a crucial witness is not called to testify and the prosecution's evidence is not sufficiently strong, the court can infer that the evidence of the witness would not be in favour of the prosecution.
9. It was thus submitted that the prosecution failed to prove their case against the appellant beyond reasonable doubt and thus his conviction and sentence should be set aside.



The Respondent's Submissions

10. Mr. Marete Principal Prosecution Counsel submitted on behalf of the respondent supporting the appellant's conviction. He submitted that the conviction was sound and the evidence sufficient as PW3 testified on how they arrested the appellant and recovered from him in his house five (5) litres of transformer oil.
11. It was further submitted that the trial court rightfully considered the defence raised by the appellant and rightfully dismissed it as an afterthought.
12. On sentence, it was submitted that the 8 years imprisonment meted out on the appellant was within the law and thus the court ought not to interfere with the same.

Analysis and Determination

13. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bear in mind that it neither saw nor heard the witnesses testify. In the often cited case of *Okeno v Republic* [1972] EA 32 at 36, the East Africa Court of Appeal stated as follows on the duty of the Court on a first appeal:

“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.”

14. It is therefore necessary to re-evaluate the evidence and reach a conclusion bearing in mind that this court has not had the benefit of hearing or seeing the witnesses, an advantage only the trial court has.
15. PW1, Fredrick Osendo testified that on the night between 5th and 6th December 2020, a transformer at Kadichu was vandalised and also on the 9th and 10th February at Rabuor, and 21st and 22nd February at Buoye, all incidents that were reported to the KPLC security and that on the 7th March 2021, he was informed by the Security Officer at KPLC, Major Musenga that two people had been arrested in connection with the vandalism incidents. It was his testimony that during the incidences of vandalism, copper bindings and oil had been siphoned out of the transformers and that subsequently some people had been arrested at the scene though he did not know them.
16. PW2 Major (Rtd) Murunga, head of security at KPLC Western region testified that following the incidents of vandalism narrated by PW1, they held barazas and instituted night patrols to reduce the said incidences and while in Bwanda area, they noticed the area was in blackout so they proceeded to the nearest transformer where they found 6 men vandalising it, four of whom managed to escape but two of them were arrested. This witness mentioned the appellant as one of those who ran away from the scene on that night.
17. PW2's testimony was corroborated by that of PW3, No. 56682, Senior Sergeant Henry Momanyi Momasi. He stated that the appellant was arrested in Ahero and that five litres of transformer oil



following were recovered from his house. (see handwritten proceedings).The witness further stated that the appellant led them to his house. The witness also stated that he was present when the appellant was arrested.

18. In his submissions on no case to answer, the appellant submitted that he was arrested on 12/4/2021.
19. In his defence given on oath, the appellant testified that he was arrested while on his way from work together with other people that he did not know and that he did not know why he was arrested and was surprised to be charged in court with the offence herein. He denied destroying KPLC property.
20. I have considered the evidence as adduced before the trial court both for the prosecution and the defence proffered by the appellant herein. The issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt.
21. Section 169 (1) (c) of the Energy Act provides that a person who willfully 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.
22. According to PW2, the appellant herein was one of the suspects who fled the scene where four of his colleagues were arrested vandalizing a transformer. However, as the witness did not know the appellant before that night, I am not satisfied that the appellant was sufficiently recognized on that, material night as one of the culprits. However, the appellant was arrested at Ahero on 12/4/2021 and he readily admits that he was arrested together with others and taken to the police and that is how he was charged before Court with the offence that he denied any knowledge or participation. It is noteworthy that upon search of the appellant's house some items related to the vandalism and being property of KPLC were recovered therein, being five litres of transformer oil. The Energy Act makes it an offence to be found with or to handle such material.
23. The appellant's defence was that he knew nothing about the offence. In my view, this defence did not displace the evidence adduced to the effect that upon being arrested, he led the arresters who included the investigating officer to his house and that is where the five litres of transformer oil was found. In my humble view, this defence was an afterthought.
24. The prosecution's case was in my view corroborative of each other contrary to the appellant's allegation that it contained contradictions that ought to have been resolved in his favour.
25. As regards the issue of the prosecution's failure to produce crucial witnesses, there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of Evidence Act (Cap 80) Laws of Kenya provides that:
 - " 143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."
26. In the case of *Bukenya v R* [UGC 1952], (supra), the Court addressed itself thus:
 - "(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.



- (ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.
- (iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

27. In the case of Donald Majiwa Achilwa and 2 other v R [2009] eKLR the Court stated as follows:

“The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses’ evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See *Bukenya & Others v. Uganda* [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference.”

28. In the case of *Keter v Republic* [2007] 1 EA 135 the court held inter alia that:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

29. Similarly, in this case, it is my considered opinion that the prosecution was at liberty to call the witnesses they deemed necessary to establish and prove their case. The trial court was in my opinion not at liberty to determine which witnesses gave sufficiently strong evidence that established the prosecution’s case beyond reasonable doubt. Accordingly, I hold the opinion that this ground of appeal fails.

30. The appellant also lamented that the person who gave a tip off was not called as a witness and that therefore the prosecution failed to prove its case against him beyond reasonable doubt and he called upon this court to hold as was in the *Bukenya v Republic* Case. My humble view is that failure to call the person who tipped the investigators of the stealing and destruction of the property in question is not fatal because the failure to call the informer did not affect the value and weight of the evidence presented at the trial, considering that the appellant was found in possession of 5 litres of transformer oil in his house upon being arrested.

31. Furthermore, in the case of *Joseph Otieno Juma v Republic* [2011] eKLR, the Court of Appeal stated thus regarding informers:

“Finally, whether the informers should have been summoned to testify, we are aware of the fact that their protection springs from public interest considerations, because were they to testify, their future usefulness in the same role could be extinguished or their effectiveness in their work considerably impaired. However, all the same, in the circumstances, we think there was no need for any additional witnesses to testify since the trial court had already found that the evidence of PW1 was credible and sufficient having identified the Appellant at an identification parade.”

32. This court takes cognizance of the fact that it is not the number of witnesses called by the prosecution to testify that counts in a criminal case but the quality of the evidence adduced to support a charge.



In *Julius Kelewe Mutunga v Republic Criminal Appeal No. 31 of 2005*, the Court of Appeal held as follows:

“....As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

33. The appellant further contended that failure to call the arresting officer was fatal to the case against him. However, he submitted before the trial court and testified that he was arrested on 12/4/2021. PW3 too was present when the appellant was arrested. The appellant then led them to his-appellant’s house where they recovered the 5 litres of transformer oil. It follows that failure to call the arresting officer to testify was not prejudicial to the appellant and neither was it fatal to the conviction of the appellant.
34. I am fortified by many decisions of superior courts. Wendoh J in *Orata v Republic (Criminal Appeal 73 of 2021)* [2023] KEHC 21972 (KLR) (23 August 2023) (Judgment) stated as follows:

“ As to failure to call the arresting officer, the law is settled. Courts have over the years held that whereas it is important to call the investigation officer or arresting officers, failure to call them is not fatal to the prosecution case but it depends on the circumstances of each case. In *Kiriungi v Republic* [2009] KLR 638, the Court said:

“..... the effect of failure to call police officers involved a criminal trial including the investigation officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrated. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution case as it was established beyond doubt that the appellant was involved in the crime with which he was charged.”
35. The upshot of all the above is that I find that the prosecution proved their case against the appellant beyond reasonable doubt. I find no reason to interfere with the conviction entered against him.
36. As regards the sentence meted out on the appellant, the law under section 169 (1) (c) provides for 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 upon commission.
37. The appellant herein was sentenced to imprisonment for 8 years, this is after the trial magistrate took into account the time spent in custody during the trial as well as his mitigation wherein he thanked the court and asked for help. I find no reason to interfere with the same.
38. I further observe that the offence committed by the appellant and his co convicts was one of the most dangerous offences. the appellant and his co accused were dare devils. Destroying energy transformers and removing oil therefrom could have cost them their dear lives. They however saw and fathomed no evil. The trial court could have given a more severe punishment which could have included fining the appellant but he only imposed custodial sentence which is very lenient and lawful. Furthermore, the appellant was discharged of all the other counts.
39. The upshot of the above is that I find that this appeal lacks merit both on conviction and sentence. I uphold the conviction of the appellant and the sentence of 8 years imposed and proceed to dismiss the appeal in its entirety.
40. The appellant to serve the sentence imposed.



41. This file is closed.

42. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 19TH DAY OF JUNE, 2024

R.E. ABURILI

JUDGE

