REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 16 OF 2020

GEORGE WARUI KIIGE.....APPELLANT

LAWRENCE ISABWA MWALE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgement of the Principal Magistrate Karatina Honourable A. Mwangi, in Criminal Case No. 369 of 2017 delivered on 15th July 2020).

JUDGEMENT

Brief Facts

1. The appellants were charged with Severing with Intent to Steal contrary to Section 32A of the Kenya Information Act Cap 411A Laws of Kenya. The particulars of the offence were that on the night of 31st July 2017 and 1st August 2017 at Ndimaini Area in Mathira East sub-county within Nyeri County jointly severed a base transmission station under the control of Safaricom Company Limited with intent to steal and did steal sixteen (16) batteries, one programmable logical module, 2 programmable logical module extension, one energizer, four (4) comparators and one direct current converter all valued at Kenya Shillings Five Hundred and Twenty Four Thousand One Hundred and Eighteen (Kshs. 524,118/-), the property of Safaricom Company Limited. They were convicted and sentenced to ten years imprisonment or pay a fine of Kenya Shillings Five Million (Kshs. 5,000,000/=).

2. Being aggrieved by the decision of the trial court, the appellants lodged this appeal citing 22 grounds summarised herein as follows. The Learned Trial Magistrate erred in fact and in law by:-

a) Misunderstanding the nature of the offence and the evidence placed before her, when she found that PW4's evidence placed the appellants firmly at the scene of the crime, thus part of the team that vandalized the site, while PW4 clearly stated that the evidence he produced before court did not contain location data on the site allegedly vandalized;

b) Finding that circumstantial evidence pointed towards the appellant's guilt without any corroborative evidence;

c) Finding that the prosecution proved its case beyond reasonable doubt;

d) Failing to consider the appellant's defence particularly DW1's testimony despite him producing credentials of his academic expertise on the field of telecommunications engineering;

e) Failing to give her independent opinion on the date evidence presented before her but instead relying on the evidence of PW4 as an expert in the field of telecommunications engineering, who did not demonstrate his expertise in the field of telecommunications engineering but claimed to have been trained in data handling by the complainant and he did not set out his academic or professional qualifications;

f) Admitting inadmissible evidence and irregularly/illegally obtained evidence and proceeding to convict the accused persons based on such evidence;

g) Contravening Article 31 of the Constitution on the right to privacy when she purported to admit the evidence relied on by the prosecution, in light of the apparent conflict of interest of the complainant being the custodian of the private data, and the lack of

proof that the safeguards put in place by the law to protect subscribers such as the appellants from the abuse of their privacy by the service provider were followed;

h) Failing to appreciate that the doctrine of common intention was not established as envisaged in Section 21 of the Penal Code;

i) Failing to comply with Section 169 of the Criminal Procedure Code while writing the judgment and sentence;

j) Sentencing the 2nd appellant without taking into account the number of days he spent in custody/remand before sentencing;

k) Imposing a period of imprisonment in default of payment of a fine exceeding the period permitted by law;

l) Imposing an unlawful default sentence in view of the express provisions of the law.

3. By consent, the parties disposed of the appeal by way of filing written submissions. The appellant then filed his submissions but the respondent did not do so

The Appellants' Submissions

4. The appellants submit that theft is a key ingredient of the offence for which they were charged with. It was argued that the prosecution did not provide the trial court with an inventory of the telecommunications apparatus/equipment that was at the Ndimaini BTS Site, the identification tags such as serial numbers of the said items and a proper identifiable list of the items that were missing after the alleged crime. Moreover, none of the allegedly stolen items were ever recovered from any of the appellants. The items allegedly stolen were sixteen batteries, one programmable logical module, 2 programmable logical module extension, one energizer, four comparators and one direct current convertor. PW1 testified that the items allegedly stolen were 16 pieces of side batteries, 1 PLC, 4 computers and 1 energizer. PW2 did not provide a list of the items allegedly stolen but he confirms that he did not have an inventory of the items allegedly stolen while PW3 states that 16 batteries and other items were stolen. Although PW3 testified that the stolen items had serial numbers, he never gave the said numbers to the police. As such, the appellants submit that his evidence was extremely vague, casual and inadequate despite being the primary witness and the first person on the site of the alleged crime. PW5, the investigating officer, testified that 16 batteries, an energizer and a convertor were stolen. He however stated that he did not receive an inventory of the items and equipment on the site before the alleged crime or the items allegedly stolen. This contradicts the evidence of PW3 who stated that a list of the items that were reported missing were provided to the police.

5. The appellants submit that the only consistent item allegedly stolen is the 16 batteries. The prosecution failed in to prove its case as it did not prove the existence of something capable of being stolen and whose ownership and possession was illegally taken. The appellants rely on the case of **Martha Gacheri vs Republic [2011] eKLR** to buttress this point. Further relying on the same case, the appellants submit that the prosecution did not prove identification of the items stolen despite the complainant having an inventory of the same with the serial numbers. No photos of the items allegedly stolen was produced which left the trial court to rely on its imagination. As such, the appellants contend that to convict them on such vague and inconclusive evidence is a miscarriage and travesty of justice.

6. The appellants further submitted that the trial court ought not to have relied on the call and SMS data records and subscriber data presented by PW4 as evidence as the same was illegally obtained. The phone numbers 0722668294 and 0722365939 registered to the 1st and 2nd appellants respectively were flagged as having been in the general area of coverage of the Ndimaini BTS Site on the night of the alleged crime. Thus PW4 should have sought a court order to allow him breach the privacy and access the personal subscriber data and call records of the appellants. By obtaining the data information without a court order the appellants' right to privacy under **Article 31 of the Constitution** was breached. Further, **Section 27A(3) of the Kenya Information Communications Act (KICA)** obligates the complainant, Safaricom PLC, as a Mobile Network Service Provider to secure and keep in a confidential manner, not to disclose the subscriber's registration details without the written consent of the subscriber except for the reasons outlined under **Section 27A(2), (a), (b) & (c). Regulation 3(1)(d) of the Kenya Information and Communications (Consumer Protection) Regulations, 2010** requires a mobile service provider to protect the personal privacy of a subscriber and protect against unauthorized use of personal information.

7. The appellants further submit that the instant case is unique as the entity tasked with safeguarding the sanctity and privacy of the mobile subscriber is the complainant. PW4 being a Directorate of Criminal Investigations Officer attached to Safaricom as a Liaison Officer ought to have obtained a court order before accessing the call and SMS data records. This is so because PW4 presents a conflict of interest as he is having the complainant investigate and prosecute their case, while having custody of all the evidence, including that which could exonerate the appellants. At the very least, the appellants submit that **Section 27A(3)(b) of KICA**, there should have been a formal request for the personal data and call records from a law enforcement agency.

8. The appellants rely on the doctrine of "Fruits of a Poisonous Tree" used as a bar or exclusion to the use of illegally obtained evidence in a trial, and submit that since the personal data and call records of the appellants were accessed illegally, they ought to be expunged from the trial record as illegally obtained evidence. Relying on the case of **Philomena Mbete Mwilu vs Director of Public Prosecutions & 3 Others, Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR** the appellants submit that their constitutional right to privacy was infringed and thus the evidence ought to be expunged being illegally obtained.

9. Pursuant to **Section 32A of the Kenya Information and Communications Act,** the prosecution ought to have proved that the appellants had an intent to steal and have carried out the act of severing. Since the appellants were jointly charged, the prosecution ought to have proved that they had expressed the mental desire and will to severe and steal. The appellants argue that the call and SMS logs produced by PW4 were taken as conclusive evidence of intent as the calls were made a day prior to the date of the alleged crime and on the date of commission of the alleged crime. However, the prosecution did not provide voice or SMS transcripts of communication between the appellants and therefore the trial court found the appellants guilty based on the fact that they simply communicated with each other. The

appellants further contend that since the call and SMS logs relied on were extracted in isolation and limited only to a day before and after the commission of the alleged crime, the court ought to have considered that the appellants were arrested within the same neighbourhood and as such, communication between them was not conclusive evidence of intent. The appellants state that had the prosecution provided more extensive records of the call and SMS logs outside the immediate period surrounding the alleged crime, the trial court would have found that they regularly communicated with each other.

10. Relying on the case of **Moses Kabue Karuoya vs Republic (2016) eKLR** the appellants submit that communication between them in the absence of conclusive evidence that the same was about the commission of a crime, ought not to have been taken as proof of intent to commit a crime.

11. For the act of severing to be proven beyond reasonable doubt, the accused has to be placed at the scene of crime through production of evidence that proves their presence at the scene during the commission of the crime followed by a demonstration of how the actual severance was carried out. The appellants submit that the complainant, with its sophisticated technological equipment has the capacity to extract data that shows exactly where they were at the time of the commission of the alleged crime however they chose not to either by default or design.

12. The appellants argue that the trial court erred when it relied on the uncorroborated evidence of PW4 putting the appellants at the scene of the crime while the evidence of both PW4 and DW1 stated that it did not contain any geographical coordinates. Since no direct evidence tied the appellants to the commission of the crime, no eyewitnesses claimed to have seen them in the act or any of the stolen items found in their possession, the prosecution ought to have given the exact location co-ordinates of the Ndimaini BTS and then provided the exact location coordinates of the phone numbers registered to the appellants for the time leading to the alleged commission of the crime to prove beyond doubt that they were at the exact scene of the crime at the time of the commission of the crime and thus had the opportunity to commit the crime. Instead the trial court relied on PW4's evidence who testified that there was a code which when inserted in a tool, the i-tool, would give the exact coordinates of the network user at a specific point in time. As such, PW4's evidence is an admission that the data produced was inconclusive and would need to be supported by further data extracted by the i-tool. The appellants contend that this tallies and collaborates the testimony of DW1 who stated that the documentary evidence, Prosecution Exhibits 10 and 11, contained data which was inconclusive as to the exact location of the appellants at the time of the commission of the crime.

13. The appellants submit that the prosecution did not discharge both the legal and evidential burden of proof to the standard required by law. Relying on the case of **Patrick Muchoki Mwaniki vs Republic [2017] eKLR** the appellants submit that the prosecution ought to have provided proof that they severed the batteries from the base transmission station. As such, the prosecution ought to have produced the service rack and battery bank in court during trial and lead evidence on how the severance was executed. Instead, the prosecution did not produce the telecommunications apparatus/equipment in court to demonstrate what was severed and how it was severed leaving the trial court to rely on its imagination. The appellants further reiterate their submissions above on how the prosecution did not prove common intent.

14. The appellants further submit that the trial court on relying on circumstantial evidence ought to judge the total cumulative effect of all the proved circumstances each of which reinforces the conclusion of the guilt of the accused person. If the combined effect of such circumstances is taken to be conclusive in establishing the guilt of the accused then the conviction would be justified. To buttress this point the appellants rely on the cases of **Navaneetha Krishan vs The State by Inspector of Police Supreme Court of India, Criminal Appeal No. 434 of 2013; Republic vs Elizabeth Anyango Ojwang [2018] eKLR; Musili Tulo bs Republic [2014] eKLR & GMI VS Republic [2013] eKLR.** The appellants reiterate their submissions on circumstantial evidence as discussed above and urges this court to find that the evidence produced in the trial court was inconclusive, incomplete and unreliable and does not meet the standard of proof required.

15. The appellants rely on the case of **G.M.I vs Republic [2013] eKLR** and submit that the circumstances of the case did not form a chain so complete that the only conclusion that could be made was that the alleged crime was committed by the appellants. The appellants further submit that they called DW1 as an expert witness pursuant to **Section 48 of the Evidence Act** who established his expertise by stating his qualifications and handing copies of his academic qualifications particularly a degree in Telecommunications Information Engineering. DW1 explained the functioning of the Base Transmission Stations in relation to delivery of mobile networks within their area of coverage and the process by which a mobile phone communicates with and settles on which BTS to use in connection to the mobile network. He testified that although it is possible to pinpoint the location of a transcriber within a BTS coverage area through triangulation, triangulation utilized data from a number of BTS to calculate a location, and the data produced by the prosecution did not have any triangulation data or have any GPS coordinates. Thus the only conclusion that could be drawn from the same was that the subscriber was within the general area covered by the Ndimaini BTS site. He agreed with the testimony of PW4 that the BTS sites can have a radius of up to 35km and that the handover from one BTS area of coverage to another is automatic and the subscriber never knows which BTS their phone is in communication with. The appellants submit that DW1 concluded that from the data produced in court, it was inconclusive and did not place them at the scene of the crime as it lacked location markers/co-ordinates.

16. The appellants rely on the cases of **Mutonyi vs Republic (1982) eKLR** and **Davie vs Edinburgh Magistrates (1933) SC 34,40** and submit that the trial magistrate ought to have considered the opinion of the expert and then analysed the same to form her own opinion with regards to the facts presented as evidence before her. However, the trial magistrate missed the mark on the testimony of DW1 who was there to provide an interpretation of the data contained in prosecution exhibits 6, 7, 8, 9, 10 and 11. His conclusion when led through the evidence was that the data contained in the exhibits did not contain any geographical coordinates, a fact admitted by PW4. Therefore merely placing the appellants at the scene of the alleged crime is not sufficient evidence of the commission of a crime.

17. The appellants further submit that pursuant to **Section 32A of the Kenya Information Communications Act**, gives three choices when sentencing. Instead of choosing an appropriate sentence, the trial court left the choice of either the prescribed fine or term of prison to them. Thus the court did not pronounce itself unequivocally in the sentence but gave a reading of the penalties imposed by the law for the appellants to choose. Further, the 2nd appellant was in remand from 23rd November 2017 and thus the trial court ought to have taken into account the time already served in the computation of the sentence.

18. The appellants rely on the case of **Okeno vs Republic [1973] EA 32** and submit that the honourable court on appeal has a duty to evaluate the evidence recorded by the trial court and come to its own findings and conclusions. The appellants thus urge the court to find that the trial court erred in convicting them and to set aside the conviction and sentence imposed.

19. The respondents conceded to the appeal on grounds that the offence was not proved to the standards required, that the tools used to gain access through the stone wall were not produced, that the evidence was inadmissible in that a court order was not obtained and that there was duplicity of the charge.

Issues for determination

20. The appellant has cited 22 grounds of appeal which can be compressed into three main issues:-

a) Whether the prosecution proved its case beyond reasonable doubt;

b) Whether the trial magistrate disregarded the appellants' defence;

c) Whether the sentence imposed was lawful.

Duty of the first appellate court

21. This being a first appeal, this court is guided by the principles set out in the case of **David Njuguna Wairimu vs Republic [2010] eKLR** where the Court of Appeal stated:-

> **"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.**

22. Similarly in the case of **Okeno vs Republic [1972] EA 32** where the Court of Appeal set out the duties of the appellate court as follows:-

> **"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 vs Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 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 finding and 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 vs Sunday Post [1958]EA 424."** This was also set out in the case of **Kiilu & Another vs Republic [2005] KLR 174.**

23. In line with the foregoing, this court in determining this appeal requires to satisfy itself on whether or not the respondent proved its case beyond a reasonable doubt.

24. In discussing whether the respondent proved its case beyond reasonable doubt, the following issues must be considered:-

a) Whether the circumstantial evidence was sufficient to prove the case.

b) Whether the evidence obtained was irregularly obtained and thus in contravention of Article 31 of the Constitution;

c) Whether the prosecution proved common intention as per Section 21 of the Penal Code;

Whether the trial court erred in admitting the evidence PW4;

25. The appellants contend that the trial court failed to give her independent opinion on the evidence presented before it and instead relied on the evidence of PW4 as an expert in the field of telecommunications engineering. The appellants further submit that PW4 did not demonstrate his expertise of telecommunications engineering and he did not set out his academic or professional qualifications. The appellants were of the view that the trial magistrate ought to have relied on the testimony of DW1 who was an expert in telecommunications engineering and he backed this by producing his academic credentials as evidence.

26. **Section 48 of the Evidence Act** is instructive of opinions of experts and it provides:-

> **When the court has to form an opinion upon a point of foreign law, or science or art or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art or in question as to identity, or genuineness of handwriting or fingerprint or other impressions.**

27. On perusal of the record of appeal, DW1 is a holder of Bachelor of Science in Telecommunications and Information Engineering from Jomo Kenyatta University of Agriculture and Technology. DW1 testified that it is possible to locate a number through the base station transmitter but for one to pin point the phone to a specified location, one has to do a triangulation of 3 base station transmitters. He testified that the prosecution evidence was inconclusive as it did not place the appellants at the scene of the crime but indicated a general area of

coverage.

28. PW4 on the other hand, stated that he was a Liaison Officer with Safaricom and his duties entailed extraction of data records, mpesa statements, investigating cases related to safaricom and data analysis. He stated that he worked for Safaricom since 2015 and had been trained in handling subscriber data. He testified that he conducted a site analysis of all the vandalized sites including the Ndimaini site and found the appellants phone numbers in the sites. He produced site reports for the vandalized sites including an analysis of the Ndimaini site showing the numbers, 0722668294 and 0722365939 that were there at the time of the vandalism. He also produced call data records and subscriber details of both the appellants.

29. It is not denied that PW4 did not produce any documentation of certification to prove that he was a certified data analyst. However, I do note that PW4 said that he had worked in Safaricom since 2015 and that his duties entailed extraction of data records, mpesa statements and investigating all cases related to Safaricom data analysis. DW1 stated that he had never worked in Safaricom or Airtel but he worked for Oxygen & Africa Ltd, a telecommunications company where he was involved in system maintenance. He also added that he has never worked with a transmission booster. I am thus persuaded that PW4 was better placed and qualified in explaining the tracking system based on his practical experience as opposed to DW1. Further, the appellants had a chance to cross-examine the witness, and he testified that he has been trained in handling subscriber data and further that he had undergone numerous trainings by Safaricom. Even if the particulars of the trainings were not given the trial court believed the evidence of PW4 which was not really contradicted by that of DWI. Considering the trainings the witness had undergone and his explanations of the transmitters which showed the location of the phone numbers of the appellants within a radius of 35 kilometres, I am satisfied that the magistrate did not error in believing the evidence of PW4.

Other issues raised

30. The appellant's argued that an inventory of the items stolen was not produced. PW4's evidence was clear on what was stolen from the Ndimaini site. There is no requirement in law that an inventory must be produced in a case of theft. The failure to produce the inventory did not cause miscarriage of justice on the appellants.

31. It was also alleged that the batteries produced in evidence had no markings on them for ease of identification. PW4 explained that Safaricom batteries bore no markings. Being an internal officer in the organisation the witness identified the batteries as belong to the complainant. It is noted that none of the appellants claimed ownership of the stolen items. I am satisfied that the identification by PW4 was sufficient.

32. It was contended that Section 169 of the Criminal Procedure Code was not complied with by the trial court for it did not set out the points for determination. I have carefully perused the judgement of the said court and note that the points of determination though not set out specifically were dealt with and reasoning on the decision satisfactorily given.

33. On allegations by the respondent that there was duplicity of the charge, it is my view that Section 32A of the Kenya Information Act sets out the ingredients of the offence as "severing with intent to steal" and that this is the offence the appellants were convicted of. It was not necessary to charge the appellants with a second offence of stealing as a separate charge. I do not find existence of duplicity of the charge.

34. The respondent also argued that the tools used to drill into the wall were not produced in evidence. If the said tools were not recovered, then the respondent would not have been expected to produce them. It is trite law that failure to produce tools used to gain access to a site or a building does not render the case of this nature short of proof provided there is other evidence to prove the ingredients of the case.

Whether the evidence obtained was inadmissible, irregularly obtained and in contravention of Article 31 of the Constitution;

35. The appellants submit that the evidence tendered by PW4 was obtained contrary to the provisions of **Article 31 of the Constitution, Section 27A(2)(a), (b) & (c), 27A(3) of the Kenya Information and Communications Act and Regulation 3(1)(d) of the Kenya Information and Communications (Consumer Protection) Regulations, 2010.** The appellants argue that PW4 ought to have sought a court order to allow him to breach their privacy and access their personal subscriber data and the call records. The appellants further argue that PW4 being a Liaison Officer for Safaricom who is the complainant in the instant case, presented a conflict of interest as the custodian of the private data was the complainant and therefore PW4 ought to have obtained a court order to access subscriber data.

36. I have looked at the record of Appeal and the case law relied on by the appellants being that of **Philomena Mbete Mwilu vs Director of Public Prosecutions & 3 Others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR** and find **Article 50(4) of the Constitution of Kenya** instructive and it provides:-

> **Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.**

37. Thus to determine if the evidence would be detrimental to the administration of justice it is prudent to look into **Section 27A (2) and (3) of the Kenya Information and Communications Act. Section 27 A(3)** provides:-

> **Notwithstanding the provisions of subsection (2)(c), a telecommunications operator may disclose the registration particulars of a subscriber:-**
>
> **a) For the purposes of facilitating the performance of any statutory functions of the Authority;**
>
> **b) In connection with the investigation of any criminal offence or for the purpose of any criminal proceedings; or**

c) For the purpose of any civil proceedings under the Act.

38. Subsection (b) is clear that a telecommunications operator may disclose details of a subscriber in connection of an investigation of any criminal offence. Pursuant to this, I do find that PW4 by obtaining the appellants subscriber details without a court order, did not act illegally as **subsection (b)** above allows use of such evidence in the course of investigating any criminal offence. In this case the complainant's base transmission site was vandalised and the investigation fell within the duties of PW4 in the organisation.

39. The trial court addressed this issue and came to a conclusion that the evidence of PW4 was not obtained illegally. Section 27(3) (b) allows Safaricom as a communication operator being a custodian of such data to use. In this case, Safaricom was the complainant in a crime where its property had been stolen. PW4 was the liason officer of the complainant and had the authority of his senior manager to extract the data in the course of their internal investigations. Article 31 of the Constitution deals with the right of privacy which is not one of the rights that cannot be limited as provided for under Article 24 of the Constitution. The facts in the cases cited by the appellants are distinguishable from this case.

40. Consequently, I find that Safaricom cannot be said to have obtained the data of the appellants phones illegally. Even if the court was to find that any law was violated, the appellants have a remedy in Civil litigation. It was held in the Court of Appeal case of **James Githui Waithaka & Another –Vs. Republic** that violation does not render criminal proceedings null and void.

Whether the prosecution proved common intention as per Section 21 of the Penal Code;

41. **Section 21 of the Penal Code** provides:-

> **When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.**

42. The appellants argue that the prosecution ought to have demonstrated that they expressed the mental desire and will to severe and steal. The prosecution failed in discharging this burden as it did not produce SMS transcripts of the communication between the appellants which would have provided conclusive proof of the intent to commit the crime.

43. On perusal of the record of appeal, particularly Pexh 10 and 11, indicates that the two appellants vide telephone numbers 0722668294 and 0722365939 were in communication on 31st July and 1st August 2017. As per Pexh 10, 0722668294 belonging to the 1st appellant contacted 0722365939 belonging to the 2nd appellant twice. On 1st August 2017, the two lines were in communication and the location indicates that they were at the Ndimaini site where severing of the transmission took place. The evidence also indicates that the two lines were in communication more than two times. These facts are not disputed or refuted by the appellants.

44. The act of the appellants communicating with one another immediately before, during and after the incident, coupled with their presence at the scene are proof of common intention to commit the crime. I am satisfied that the respondent proved common intention.

Whether the trial magistrate disregarded the appellants' defence

45. The 1st appellant testified that he lives in Nairobi where he works as a driver. He further stated that he often visits his parents at Mukurweini, using the Nyeri Karatina route and he travels after work in the evenings. On cross-examination, he stated that the Ndimaini booster is not on his route to his parent's home.

46. The 2nd appellant stated that he was a taxi driver who also offered wiring and Dstv installation at his area of residence for a fee. On the fateful day, he testified that he picked a customer at Nairobi at 3.00am and drove him to Karatina. They reached Karatina at 5.00am and the customer requested the 2nd appellant to drop him at his house which he did. He further testified that before getting back to Karatina, he got lost and found himself at Mukurweini and was directed by a fellow motorist to go through Muranga road. He stated that he followed the fellow motorist since they were going to Kenol and they parted ways at Kenol.

47. On evaluating the evidence, I find that the appellants failed to give any satisfactory explanation as to why their phones were captured at the scene of the crime at 5 am. Further, they never challenged the prosecution's evidence presented on the ownership of the phones nor on the site location of the phones on the material day. Their defences on where they were at the material time were just but mere defences that were far from cogent.

48. It is trite law that an accused person has no burden to give testimony to prove his innocence but it is incumbent upon him to challenge the evidence presented by the prosecution.

49. I have carefully perused the defences of the appellants and do not in any way shake the prosecution's evidence, I find that the prosecution's case placed the appellants at the scene of the crime on the material date.

50. It is evident in the judgement that the trial court considered the appellants' defence and rejected them for lack of merit. I find no merit in this ground of appeal.

Whether the circumstantial evidence was sufficient to sustain a conviction

51. The prosecution evidence was mostly circumstantial as to what actually transpired immediately before, during and after the incident.

52. Circumstantial evidence must be examined in light of the principles set out by the Court of Appeal in **Sawe vs Republic [2003] KLR 364** where the court held:-

> **"In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. There must be other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."**

53. Similarly in the case of **Sylvester Mwacharo Mwakeduo & Another vs Republic [2019] eKLR:-**

> **"Over the years, courts have set the threshold which has to be met if circumstantial evidence is to be relied on to prove a case to the required standard of beyond reasonable doubt. For circumstantial evidence to form the basis of a conviction several conditions must be satisfied to ensure that it points only to the guilt of the accused to the exclusion of others. This test has previously been applied by this Court in a myriad of cases for instance in the case of Judith Achieng' Ochieng' vs Republic, Criminal Appeal 128 of 2006, this Court stated the law 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 the 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;**
>
> **iii. The circumstances taken cumulatively should form 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;**
>
> **iv. In other words, in order to justify a finding of guilt, the circumstantial evidence, in its totality, ought to be such that the incriminating facts lead to the unimpeded conclusion of guilt and that there are no co-existent facts that are capable of explanation upon any reasonable hypothesis other than that of the accused's guilt."**

54. The issue herein is whether the evidence on record herein link the appellants to the offence. While evaluating the evidence on record, I note that it is not in dispute that the transmission site at Ndimaini was broken into and items stolen as indicated in the charge sheet.

55. PW4 testified that telephone numbers 0722365939 and 0722668294 belonging to the 1st and 2nd appellant were traced to the scene of the crime. He produced subscription details to show ownership of the two numbers to the appellants, a report and data records indicating that the appellant's telephone numbers were at the Ndimaini site on 1st August 2017. To counter this argument, the 1st appellant called a telecommunications engineer as a witness, DW1 who stated that the evidence of PW4 was inconclusive as it did not show the exact location of the appellants' phone numbers. He argued that a person's phone signal is picked by the nearest base station which picks the strongest phone signal within a radius of 30km. Therefore, this means that the person is within the area of coverage but it does not mean that the person is at that particular base transmission station.

56. PW4 testified and produced a report and data records showing the appellants were at the Ndimaini site. He stated that on 30/7/2017, the 1st appellant was in Nairobi and travelled to Ndimaini on 31/7/2017 and on 1/8/2017 he was there and travelled back to Nairobi. The 2nd appellant travelled to Ndimaini on 1/8/2017 and then back to Nairobi. These facts were fortified by the appellants' account of where they were on the respective dates, which both indicate that they were travelling from Nairobi and back. PW4 also indicated that there were four numbers that had appeared initially in the Ndimaini site, but on carrying out his analysis and investigations, he found that only the appellants' numbers were reflected in the other vandalised sites which ruled out two of the four numbers. Furthermore, evidence of DW1 of the site covering 30km is in conformity with that of PW4. Therefore DW1's evidence also placed the appellants at the scene of the crime as far as the radius coverage was concerned.

57. The circumstances that may be gathered from the evidence are as follows:-

a) That the transmission base at Ndimaini site was broken into, severed and items listed in the charge stolen.

b) That mobile phone's data records of the appellants in respect of lines 0722365939 and 0722668294 placed the appellants at the scene between the 31st July and 1st August 2017.

c) That the phone data records proved common intention as the defences of the appellants are not plausible in that regard.

d) The appellant was found in possession of three screw drivers,spanners, pliers and copper wires believed to have been used as tools to dismantle the alarm system and batteries and which were produced in evidence.

e) The defences of the appellants did not shake the prosecution's evidence of their presence at the scene at the material time.

58. It is my finding that foregoing circumstances were firmly established and that taken cumulatively, point guilty in this case to no other person but the appellants. In my considered view there are no other existing circumstances that contradict the fact that the appellants were at

the scene of crime at the material time.

59. It is my finding that the prosecution proved this case against the appellants beyond reasonable doubt.

Whether the sentence imposed was lawful?

60. The appellants argue that the trial magistrate in sentencing, did not pronounce itself unequivocally, but gave a reading of the penalties imposed by the law for the appellants to choose. Further, the appellants contend that the trial court did not take into account the time already served by the 2nd appellant in computation of the sentence. The 2nd appellant states that he was in remand from 23rd November 2017.

61. **Section 32A of the Kenya Information and Communications Act** provides:-

> **A person who, with intent to steal, severs any telecommunication apparatus or other works under the control of a licensee, commits an offence and is liable, on conviction, to a fine of not less than five million shillings or to imprisonment for a term of not less than ten years or both.**

62. A clear reading of Section 32A of the Act imposes a fine of not less than Kshs. 5 million, or a prison term of not less than 10 years or both the fine and the imprisonment term.

63. The appellants contend that the trial court erred by imposing an unlawful default sentence. I wish to point out that the sentence meted out to the appellants does not fall into a category of default sentences. The wording is very clear that the trial court can impose a fine or a prison term or both. The sentence was vague in that the court seem to have imposed two sentences being a fine of Kshs.5,000,000/- or ten years imprisonment. It was incumbent for the trial court to give a definite sentence. In case of a fine the defaulters sentence ought to have been given in compliance with the law. There is need therefore for this court to interfere with the sentence.

64. The 2nd appellant further contends that he was in remand from 23rd November 2017 and the trial court did not take into consideration the time he spent in remand. The charge sheet indicates that the 2nd appellant was arrested on 23/11/2017. The charges were consolidated and the two appellants took plea on 17/4/2018. The 2nd appellant was granted bond of Kshs. 200,000/- but he was unable to raise it and therefore remained in remand for 2 years and 8 months during the pendency of the trial. When rendering the sentence, I am persuaded that the trial court did not accord the 2nd appellant the benefit of Section 333(2) of the Criminal Procedure Code thereby not taking into account the time the 2nd appellant had spent in remand. On this ground of appeal, I find merit in this ground of appeal.

Conclusion

65. It is my finding that this appeal has no merit, save for the issue of the erroneous sentence imposed on the appellants.

66. Consequently, I make the following orders:-

a) That the conviction was based on cogent evidence and it is hereby upheld.

b) That the sentence imposed is hereby set aside.

c) The appellants are hereby sentenced to a fine of Kenya Shillings Five(5) Million(Kshs.5,000,000) and in default twelve(12) months imprisonment.

67. The appeal is therefore only partly successful

68. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 10TH DAY OF FEBRUARY, 2022.

F. MUCHEMI

JUDGE

JUDGEMENT DELIVERED THROUGH VIDEOLINK THIS 10TH DAY OF FEBRUARY, 2022