



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 56 OF 2019

1. JOSEPH OMUSE OMARACHI

2. FAIZ KOMBO MITSANZE.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. M.O Rabera, SRM delivered on 27TH June 2019

in Chief Magistrate' Court at Mombasa Criminal Case No. 1405 of 2018)

JUDGMENT

1. Joseph Omuse Omarachi and Faiz Kombo Mitsanze were jointly charged with 2 others in Mombasa Chief Magistrates Court Cr. C. No. 1405 of 2018 with the offence of vandalism of electrical apparatus contrary to section 64(4)(b) of the Energy Act in count 1 and in the alternative handling stolen property contrary to section 322(1) and (2) of the Penal Code

2. Particulars to the 1st count was that the appellant's on the 17th day of August 2018 at around 0400 hours at Makande area in Makupa within Mombasa County jointly and unlawfully vandalized electrical apparatus namely underground aluminum conductors valued at Kshs 1,367,000 under the license of Kenya Power the licensee.

3. The appellants pleaded guilty to the charged preferred against them and they were conceited and the trial magistrate in passing sentence said the charges are serious and require deterrent measures. He meted out the sentence In the Act i.e fine of Kshs 5,000,000/= in default 10 years imprisonment for each of the appellants.

4. Although records show that the appellants were discharged under section 35(1) of the Penal Code for the offence I count II I have noted that what is referred to as count II is actually an alternative to a charge of stealing and cannot stand on its own.

5. The appellants were aggrieved by the sentence and they lodged petition of appeal citing the following amended grounds of appeal:-

- 1) That the trial magistrate gave them a harsh and excessive sentence.**
- 2) That the trial magistrate failed to consider their mitigation.**
- 3) That the trial magistrate failed to find that there was no certificate of valuation.**

6. The respondent State Counsel Ms. Karanja had no objection to appellants prayer for the sentencing considering they were sentenced to maximum penalty provided by the Energy Act contrary to the holding of the Supreme Court **in Petition Nos. 15 and 16 of Francis Muruatetu and other vs Republic** that the mandatory death sentence is unconstitutional as it denies the trial magistrate the inherent discretion in sentencing.

7, The appellants in their submissions relied in the holding **in Gaston January Stephen vs Republic HCCR APP. No. 20 of 2016 at Kajiado [2017] eKLR** where it was held:-

“It is appropriate to reiterate that the trial court in sentencing discretion should at all times factor the sentencing guidelines principle, and commentaries developed overtime by counts decisions.”

8. The appellant also relied in the holding in **Rep vs Javani & Austin [2002] eKLR** where it was held,

“Sentencing is a mat that rests in the discretion of the trial court. Similarly sentences must depend on the facts of each case on an appeal, the appellant court will not easily interfere with the sentence unless manifestly excessive in the circumstances of the case on that the trial court overlooked some material factors or took into account some wrong material or acted on a wrong principle.”

9. Appellant argued that the fine of Kshs 5,000,000/= was harsh and excessive compared to alleged stolen property more so considering that there was no certificate of valuation for the same.

10. The appellants relied in the holding in **Joscals Mutua Mutunga & another vs Rup. [2019] e KLR** and **R vs Scott [2005] NSWCCA152** to urge the court that they had served 3 years sentence so far and sine they were a 1st offenders and did not waste court’s time by pleading guilty to the charges, the court should consider the time served as sufficient punishment.

11. Section 64(4)(b) of the Energy Act provides section 64(4) unauthorized, fraudulent on the property supply or use of electrical energy.

12. Any person who unlawfully or with intent to interfere with the management or operation of the apparatus of a licensee vandalizes or damages any works or under the control of a licensee commits an offence and shall be liable on conviction to a fine of not less than 5 million shillings or to imprisonment for a term of not less than 10 years.

13. In sentencing the appellants the trial magistrate said that the offence required a deterrent sentence and meted out maximum sentence provided without making reference to circumstances of the case and fact that appellants had pleaded guilty to the offence before going through the long process of trial. In consideration that prosecution has conceded to the appeals and in consideration of the value of the estimated value of the stolen property as well as in consideration of the sentencing policy guidelines and the holding in **Francis Karioko Muruatetu & Another vs Republic** this court finds that the sentence was too harsh and excessive and not commensurate with the offence. This court finds that the period so far served by the appellants is sufficient punishment for the offence they committed. They shall thus be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 1st DAY OF JULY, 2021.

HON. LADY JUSTICE ADWERA ONG’INJO

JUDGE

In the presence of:-

Ogwel – court assistant

Respondent – Ms. Karanja

Appellant – present in person (From Shimo La Tewa Prison virtually)

HON. LADY JUSTICE ADWERA ONG’INJO

JUDGE