



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NUMBER 79 OF 2018**

**Alice Mwangi Wakonyo .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence awarded by the Hon. R. Amwayi (Resident Magistrate) in Molo Chief Magistrate's Criminal Case Number 1408 of 2017)*

**J U D G M E N T**

1. This appeal is conceded.
2. The applicant Alice Wakonyo Mwangi was charged with two counts; Count 1:

***UNLAWFULLY INSTALLING APPARATUS CONTRARY TO SECTION 64 (1)(C) OF THE ENERGY ACT CAP 314 LAWS OF KENYA.***

*The particulars were that on the 14<sup>th</sup> day of July 2017 at Kimangu High School within Rongai Sub-County of Nakuru County without lawful right she installed or connected conductor or apparatus with supply line through which electrical energy is supplied without the consent of the KENYA POWER AND LIGHTING COMPANY Limited.*

***COUNT II***

***FRAUDULENT CONSUMPTION OF ELECTRICAL ENERGY CONTRARY TO SECTION 64(1) OF THE ENERGY ACT CAP 314 LAWS OF KENYA.***

*The particulars were that on the 14<sup>th</sup> day of July 2017 at Kimangu High School within Rongai Sub-County of Nakuru County without lawful right fraudulently consumed electrical energy which was not ascertained by meter or any other apparatus or device not contracted by the KENYA POWER AND LIGHTING COMPANY Limited.*

3. She pleaded not guilty to the charges.
4. The prosecution called four (4) witnesses. The case for the prosecution was that on 14<sup>th</sup> July 2017 personnel from Kenya Power and Lighting visited Kimangu Secondary School within Rongai Sub-County. They found the Principal and asked to speak to the proprietor. They were directed to a home next to the school where they found the appellant whom they claimed introduced herself as the proprietor of the school. They then proceeded to the meter installation in the presence of the school principal and the appellant. They found no meter in place yet there was electricity in the school. The appellant could not explain this phenomena and she was arrested and charged with these offences.
5. According to the KENYA POWER AND LIGHTING COMPANY personnel, the school had an account number 2932619 which had incurred a debt of Kshs. 95,045/= by November 2015. KENYA POWER AND LIGHTING COMPANY has installed a postpaid meter. However at some point it had been removed and replaced by a pre-paid meter number 37181469265 without KENYA POWER AND LIGHTING COMPANY's consent and KENYA POWER AND LIGHTING COMPANY had removed it. At the time of the arrest the school had outstanding arrears of Kshs. 27,865.30/=. When questioned, PW1 the KENYA POWER AND LIGHTING COMPANY personnel testified that the meter was in the name of Mwangi Muraya whom he did not know. That the appellant was charged because she is the one who introduced herself as the proprietor.

6. PW2 another KENYA POWER AND LIGHTING COMPANY personnel testified that the school's power connection had been disconnected due to unpaid arrears, however when they went to the school they found that there was power yet, KENYA POWER AND LIGHTING COMPANY had not reconnected the same.

7. PW3 another KENYA POWER AND LIGHTING COMPANY personnel also testified that it was the appellant who presented herself as the proprietor. He said she was not in the school but the school principal rang her and she came and introduced herself as the proprietor of the school.

8. PW4 was the investigating officer, and his testimony was no different from that of PW1, PW2 and PW3. The appellant was put on her defence at the close of the case for prosecution.

9. In her unsworn statement of defence the appellant testified that she was the school bursar. On the material date she was in her house when the school principal called her and told that KENYA POWER AND LIGHTING COMPANY personnel were in the school and wanted the key to the meter box. She rang the proprietor who lives in Naivasha, who told her to go and meet the KENYA POWER AND LIGHTING COMPANY personnel, which she did. She told them she was standing in for him. She gave them the key to the meter box. They told her there was no meter and power was being 'used directly'. It is then they went for a police officer from Rongai Police Station who came and arrested her.

10. In her judgment the trial magistrate stated,

***“The only issue that the accused is contesting that she was or is not the proprietor of the school. However, from the evidence on record, when the prosecution witnesses arrived at the school and asked for the proprietor of the school, it is the accused person herein who was called by the school principal as the proprietor of the school. She presented herself as the proprietor of the school and even during the hearing she never brought up the issue. She did not deny that she was the proprietor of the school, she only brought up the issue during the defence hearing. Be that as it may she did not call any other person as her witness to confirm that indeed she was not the proprietor of the school and neither did anyone come out and state that he/she was the proprietor of the school. The accused presented herself as the proprietor of the school before the concerned authorities and even the school principal who called her as the proprietor of the school. It is my finding that the prosecution proved its case against the accused to the required standard of beyond any reasonable doubt.”***

She found the appellant guilty, convicted her and sentenced to pay Kshs. 100,000/= on each count in default to serve six (6) months. The default sentences would run consecutively. The appellant was aggrieved. She filed this appeal on the grounds:-

1. *The learned magistrate erred in law and in fact by failing to ascertain that the appellant is not and has never been the proprietor of Kimangu Secondary School in Rongai Sub-County.*
2. *The judgment was bad in law and never considered the appellant's unsworn evidence that she is not the proprietor of the school. It was biased and never analysed evidence before court.*
3. *The learned magistrate erred in law in shifting the burden of proof to the accused to prove her innocence.*
4. *The learned magistrate erred in law in her treatment of the case as the circumstances surrounding the entire case did not point at the appellant as the offender at all. There were so many other hypotheses that were never considered.*
5. *The learned magistrate erred in law and in fact in failing to consider adequately the mitigating circumstances of the case.*

11. Her counsel Kairu Maina & Associates filed submissions on 4<sup>th</sup> February 2019. It was submitted on her behalf that the appellant produced to KENYA POWER AND LIGHTING COMPANY personnel and to court a certificate of registration showing that she was not the proprietor of the school. That the trial court placed the complete burden of proving her innocence on her contrary to the settled principle that the burden of proof lies with the prosecution. Citing the Latin maxim *“ei incumbit probatio qui dicit, non qui negat”*, Counsel submitted that the judgment was contrary to the principle that a person is presumed innocent until proved guilty. Counsel also relied on **Article 50 (2) (a) of the Constitution of Kenya (2010), Article 14(2) of the ICCPR, International Convention on Civil and Political Rights and Benson Mbugua Kariuki vs Republic [1979] eKLR.**

12. In response Ms. Mwangi for the prosecution submitted that the state was conceding the appeal because the prosecution did not prove before the trial court that the appellant was the proprietor of the school. That Kimangu High School was a private school and there ought to have been investigations as to who the proprietor was, and not having done so their case failed.

13. Is this conceding in order?

14. Guided by **Okeno vs Republic** I carefully considered all the evidence and submissions. The charge states that on 14<sup>th</sup> July 2017 the appellant, *“unlawfully installed or connected conductor apparatus”* through which the school accessed electricity supply without the consent of KENYA POWER AND LIGHTING COMPANY.

15. It is the evidence of each of the four prosecution witnesses that on 14<sup>th</sup> July 2017 the appellant was not in the school when they arrived, and that the principal directed them to her house. None of them testified how the appellant did on that 14<sup>th</sup>, install or connect the alleged apparatus. They produced no evidence that she had the capability to do so, and they produced no evidence that the school's power had been disconnected, nothing, except the two (2) exhibits. **P. Exhibit 1 power cable, P. Exhibit 2 cut out.**

16. There was no evidence of the connection records and the arrears records, hence nothing was placed before the trial court to prove that indeed the school had electricity bill arrears, that power had been disconnected. There must be documentary evidence of connection, the application forms, the processes and the documentation of the consumer, hence KENYA POWER AND LIGHTING COMPANY themselves failed to lay a basis from the charge.

17. The 2<sup>nd</sup> count alleged that the appellant was on 14<sup>th</sup> July 2017 at Kimangu High School found to be fraudulently consuming electrical energy without any device contracted by KENYA POWER AND LIGHTING COMPANY.

18. These officers did not testify that they entered her house and found that she did not have a meter for her house or she was consuming electricity without a meter for her house. No evidence was produced that she was connected to KENYA POWER AND LIGHTING COMPANY power and was not getting billed for the same.

19. If this charge was related to the issue of the school meter, then the manner in which it was framed was personal to her as the appellant, that she is the one who was consuming the electrical energy fraudulently. Not a single iota of evidence was produced to support that charge.

20. From the tone of the prosecution witnesses, PW1 and PW4 testimony, the person they wanted so that they could charge him or her was the school proprietor. They claim that the appellant introduced herself as such, they took that as a form of admission or confession. They charged her, the trial court took it that way as well, saying that she never denied being the proprietor. The trial court completely misdirected itself on this one. It is not correct to state that the only thing the appellant was contesting was that she was not the proprietor of the school. The appellant DENIED the charges preferred against her in their entirety. The court entered a plea of not guilty. The onus fell on the prosecution to prove every single element of those charge “**the onus is on the prosecution to prove its case beyond reasonable doubt...** **BHATT -VS- REPUBLIC (1957) E.A. 332** . The appellant had no obligation to say anything. She had the right to remain silent. This is what **Article 49 of the Constitution** says:

*Rights of arrested persons (1) An arrested person has the right (a) to be informed promptly, in language that the person understands, of —*

*(i) the reason for the arrest;*

*(ii) (ii) the right to remain silent; and*

*(iii) (iii) the consequences of not remaining silent*

21. There is no evidence that she was warned that anything she said at her arrest could be used against her and the trial court failed her in not upholding her right to be the presumption of innocence as provided for under **Article 50:**

*(2) Every accused person has the right to a fair trial, which includes the right— (a) to be presumed innocent until the contrary is proved;*

22. This is clearly demonstrated by the trial court’s judgment where the trial court stated the reasons for finding that the prosecution had proved its case beyond a reasonable doubt: that the appellant did not deny she was the proprietor of the school, that she did not call any evidence to disprove this, that she only brought it up in her defence. It was not upon the appellant to prove anything. The trial court seemed to take it that the appellant had admitted or confessed to being the offender. The court lost sight of the requirements of the Constitution on self-incrimination and the **Evidence Act** on confessions.

23. The onus is on the prosecution to prove their case and in this case, they failed, and the state was able to see this and conceded.

24. I find that the appeal is merited. The appeal is allowed, the conviction is quashed and the sentence is set aside.

**Delivered, Dated and Signed at Nakuru this 7<sup>th</sup> day of May, 2020.**

**Mumbua T. Matheka**

**Judge**

In the presence of:- VIA ZOOM

Edna Court Assistant

Kairu Maina & Associates Advocates N/A

ODPP Ms Odero

Appellant N/A