



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HCCRA NO. 33 OF 2019

CONSOLIDATED WITH NYERI HCCRA NO. 37 OF 2019

FREDRICK MAINA WAGURA.....1ST APPELLANT

PAUL MUREBU KIRUNGUMI.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate Hon. R. Kefa

dated 21/05/2019 in Nyeri CMC Criminal Case No. 442 of 2017.)

JUDGMENT

1. **Fredrick Maina Wagura** and **Paul Murebu Kirugumi** referred to as the 1st and 2nd Appellants respectively were charged with the following offences:

Count I: Stealing contrary to section 268(1) as read with section 275 of the Penal Code. Particulars being that the 1st and 2nd Appellants on the 22nd day of January 2017 at Gitaru village within Nyeri county within the Republic of Kenya jointly with others not before court stole two hundred meters of Aluminum conductor valued at Kshs.300,000/= the property of Kenya power.

Count II: Improper use of electrical energy contrary to section 64(4) (d) of the Energy Act No. 12 of 2012. The particulars being that the 1st Appellant on the 26th day of February 2017 at Gatumbiro village within Nyeri county in the Republic of Kenya jointly with others not before court with intent to interfere illegally connected a conductor to the main supply line without the consent of Kenya power the licensee.

Alternative count: Handling stolen goods contrary to section 322(2) of the Penal Code. The particulars were that the 1st and 2nd Appellants on the 2nd day of May 2015 at Karugumi village in Nyeri county within the Republic of Kenya jointly retained a stay wire knowing or having reasons to believe it to be stolen goods.

2. The Appellants denied the charges and the matter proceeded to full hearing with the prosecution calling four(4) witnesses. The Appellants did give sworn testimony each. Later they were both found guilty and convicted on the 2nd count and were sentenced to a fine of Kshs.5,000,000/= in default ten (10) years imprisonment. The learned trial Magistrate did not clearly state that the said sentence was for each Appellant but I want to believe that's what she meant.

3. Being aggrieved by the judgment, they filed separate appeals HCCRA No. 33 and 39/2019 which were later consolidated with HCCRA 33 of 2019 as the lead file.

4. The 1st Appellant filed his appeal through the firm of Karweru & co. advocates on 4th July 2019 raising the following grounds:

a) **That**, the learned trial Magistrate erred in law and in fact in convicting him against the weight of evidence.

b) **That**, the learned trial Magistrate fell into error in convicting him where no evidence of his involvement in installation of and or repair of the electric line thereof was tendered.

c) **That**, the learned trial Magistrate erred in law and in fact in convicting him on contradictory evidence and or no evidence at all.

5. The 2nd Appellant filed his appeal in person raising the following grounds:

a) **That**, the learned Magistrate erred in both law and facts by affirming conviction and sentence considering the testimony of Pw1 which was unsatisfactory, insufficient and unsafe to impose a sentence.

b) **That**, the learned Magistrate erred in both law and facts by relying on the contradictory inconsistent evidence of the prosecution witnesses with no cogent reasons to support a conviction.

c) **That**, the learned Magistrate erred in both law and facts on confirming both conviction and sentence without taking

into account that the prosecution assertions were full of fraught with discrepancies.

d) **That**, the learned Magistrate further lost direction while becoming influenced by the adduced evidence of prosecution side and proceeded to reject his *alibi* defence that was not shaken by prosecution as they were dully bound to as per the law required under section 212 of the Criminal Procedure Code Cap 75 laws of Kenya.

6. **Pw1 John Wilson Kibiru Wahome** who hailed from Gatubero sub-location in Tetu was desirous of installing electricity at his home, in February 2017. He happened to have carried a passenger called Wandeto on his motorbike. Wandeto told him of a person who could install electricity for him. He gave him the contact. He called the number and the person proposed they meet at Diana, where Kenya Power & Lightning Company offices are located.

7. The person he called is Wachira the 1st Appellant. They met and he told him they go to his house for assessment of the installation requirements. He talked of a quotation of Kshs.100,000/= which he would reduce to Kshs25,000/=. He sent him on whatsapp copies of his identity card and those of his parents.

8. Later the 1st Appellant brought two meters of power line to his house at a cost of Kshs.12,500/= (*transport included*). He was paid the money. He again called him having found electric poles at Kshs.13,000/=. He showed him a lorry with four rotten electric poles. He was unable to get new poles. Pw1 still paid the Kshs.13,000/=. In March 2017 he promised to bring poles which he never did, but came later with two poles and asked for Kshs.15,000/= more, which he was paid.

9. Later the 1st Appellant came with another person and they installed the electricity. However when he later tried to do a top up the electricity paybill denied him access. This was on meter No. 37180823264. He continued communicating with the 1st Appellant before he finally reported the matter to Kenya power and lighting company after one of the poles bent after it rained. It was discovered that Kenya power and lighting company did not have Pw1's identity details. When the 1st Appellant came to work on the bent pole he was with the 2nd Appellant and both were arrested by members of the public.

10. In cross examination he said he was not given the quotation by the 1st Appellant but he gave him a total of Kshs.40,000/=. Those who installed the electricity were the 1st Appellant and Miano. He dealt with the 1st Appellant all the time.

11. **Pw2 James Nderitu** is the owner of the motorbike KMDT 466Z which had been used to ferry both Appellants to the scene. He identified documents of ownership and two certificates. His driver was Joseph Waithaka.

12. **Pw3 Paul Ngiri Ngugi** is a security officer with Kenya Power and Lighting Company in charge of Mt. Kenya region. He testified that on 2nd May 2017 he received of two persons arrested for construction of illegal lines. The next day he and others proceeded to the scene at Gatumbiro where an illegal power line was erected. The line was constructed by two rotten poles and substandard wire. Two meters had been connected to Pw1 – meter No. 37180823249 and another Justus Metu No. 37180823264. The meters belonged to Muranga county Jumbi area.

13. In cross examination upon being recalled, Pw3 said he did not know for how long the power line had been there but they were illegal connections. The poles were rotten while the conductor wire was substandard.

14. **Pw4 No. 89098 PC Jeremiah Ndirangu** is seconded to Kenya power and lighting company Mt. Kenya region doing general investigations. On 2nd May 2017 at 11:30 hours he was at Manyatta Embu when he was called by Pw1 who had an illegal construction at his home. The Appellants were at Pw1's home repairing the line. He advised Pw1 to mobilize people to arrest them.

15. He passed through Ndugamano police station where he found the three arrested people who had a conductor wire (EXB1) used to support the electric pole, safety belt (EXB2), climbing irons (EXB3), hacksaw (EXB4), pipe ridge (EXB5) and pliers (EXB6). He found that Pw1 had been introduced to the 1st Appellant by Ann Wandeto who too had an illegal connection. At the scene they found that Pw1 was consuming power. The recovered meters EXB7a and (b) belonged to customers in Muranga county.

16. In cross examination he said there were no reports of stolen meters and no one from Muranga had complained of theft. The scene was visited in the absence of the Appellants. He was not aware whether the 2nd Appellant had any connection with KPLC though he used to see him there.

17. In re-examination he said the power was illegally connected by the 1st Appellant who is not an employee of KPLC.

18. The 1st Appellant in his sworn defence denied the charges. He denied ever meeting Pw1 at Diana KPLC nor giving him a quotation of Kshs.100,000/=. He basically denied ALL that Pw1 said about him. It was his evidence that on 2nd May 2017 he was called by an unknown person who told him the bulbs in his house were not working. He promised to connect him with a professional as he did not know anything about electricity.
19. The unknown caller gave them directions to Gatumberu and they went on a motorbike registration No. KMDT 4562. Upon arrival at Gatumberu they found many people and they were arrested on the road and not homestead. He denied meeting Pw1 save here in court.
20. In cross examination he confirmed that he was not an employee of KPLC, neither does he come from Gatumberu. He denied having been introduced to Pw1 by Wandeto. He denied receiving any money sent through M`pesa.
21. The 2nd Appellant in his sworn defence denied the charge, saying he was a technician working within KPLC on contractual basis. He said exhibits were never availed e.g. the steel stay wire. He claimed that while at Ndugamano police station, Pw4 demanded for Kshs.60,000/= from him for his release since he was innocent. He even complained to IPOA over this. On 22nd January 2017 he was at Nairobi Dagoretti stores and no witness stated where the aluminum conductor was stolen from.
22. He testified that on 2nd May 2017 he received a call from the 1st Appellant asking for his services (*electrical work*). A motorbike came for him. He carried a safety belt, pair of climbing irons, hacksaw, pipe ridge, spanner, pliers and his job card. Pw4 was satisfied that he was authorized to carry out electrical work though he never returned his identity card. Upon their arrival in Gatumbero village and at the gate a stranger whistled asking if they were the electricians. The stranger was in the tea bushes. When they answered in the positive many people in the tea bushes emerged.
23. The chief Wamiti was present when they were arrested. He produced his job card and the chief threw it away. He denied performing any work on that date. He produced a certificate (DEXB1) from KPLC; photographs taken while in training (DEXB2) and a letter dated 4th January 2018 from Ambit Energy Company to the Manager supply KPLC (DEXB3).
24. In cross examination he said he was authorized to work for KPLC by the documents produced. His employer is Ambit Energy Company. That he first met Pw1 at Ndugamano police station. He did not have a copy of his letter to IPOA as it was sent by email.
25. The appeal was canvassed by written submissions.
26. Learned counsel Mr. Wabandi for the 1st Appellant argued each of the grounds of appeal separately. On the 1st and 2nd grounds he refers to section 64(4) of the Energy Act and submits that the elements of that offence were not proved by the prosecution. Referring to the particulars in count II of which the Appellant was convicted he submits that the same were limited to the occurrence of 26th February 2017.
27. He refers to the evidence of Pw1 in chief, cross examination and re-examination and submits that there is no occurrence particularized to have arisen or taken place on 26th February 2017 and he was not sure of the exact date. He contends that there was no installation which could yield to improper use of electrical energy whereby the Appellants had intent to interfere illegally by connecting a conductor to the main supply line without the consent of KPLC the licensee as at 26th February 2017. He submits that the evidence of Pw3 and Pw4 narrates the occurrences of 2nd May 2017.
28. Its counsel's further submissions that no rotten poles nor bending poles nor their photos with power lines were produced. The meters were found in possession of Pw1 and Justus and the latter was not a witness or complainant. Further that no report was made to Muranga in regard to the said recovered meters in the names of the alleged allottees.
29. On ground 3, counsel submits that the evidence of Pw1, Pw3 and Pw4 yields to hearsay evidence. He contends that Pw1 said he was told about the 1st Appellant by Wandeto who was not called as a witness. Pw3 referred to the same evidence. He further states that Pw1 talked about 1st Appellant's apprehension, but from the 1st Appellant's defence Pw1 was not at the scene of his arrest. Pw1 himself said he was in church when all this was happening. Pw3 and Pw4 were also not at the scene. He referred the case of **Subramaniam –vs- Public Prosecutor (1956) WLR 965** as cited in **Republic –vs- CIK (2017) eKLR**. It's his submission that Wandeto, assistant chief, a member of the public should have testified to give firsthand information on the happenings.
30. Another person who ought to have been called as a witness was one Miano who Pw1 alleges installed electricity with the 1st Appellant while he was in church. Failure to call Wandeto and Miano should lead to an adverse inference as was held in **Bukenya –vs- Republic** cited in the case of **EOO –vs Republic (2018) eKLR**.
31. Counsel on ground No. 5 argues that no evidence was adduced to confirm common intention between the two Appellants. Further that the 2nd Appellant was never connected to the occurrences prior to 2nd May 2017.
32. The appeal was opposed by the Respondent through learned counsel Mr. Duncan Ondimu. While relying on section 107 (1) Evidence Act and the case of **Woolmington –vs- DPP (1935) AC 462**, Mr. Ondimu reiterated that the prosecution had proved its case beyond reasonable doubt and not beyond any shadow of doubt. In **Miller –vs- Minister of Pensions (1947) ALL E.R 372 at 373 Lord Denning** held as follows:
- “That degree is well settled. It need not reach certainty; but it must carry a high degree of probability. Proof beyond (reasonable) doubt does not mean proof beyond the shadow of doubt.”*
33. While referring to section 64(4)(d) of the Energy Act No. 12 of 2012 counsel outlined the evidence of Pw1, Pw3 and Pw4 and submits

that the Appellants were arrested at the scene and all this evidence confirmed the 1st Appellant's participation in the offence.

34. He argues further that there were no contradictions or inconsistencies in the prosecution case. However he adds that if there were any contradictions or inconsistencies they were too minor to affect the prosecution case. To the defences he said the same were mere denials.

35. Learned counsel Mr. Karweru for the 2nd Appellant while referring to the particulars in the charge sheet and section 64(4)(d) of the Energy Act No. 12 of 2012 submits that the said section criminalizes the stealing, illegally trading or use of electrical energy. It does not deal with illegal connections of conductors. That the charge leveled was not supported by the particulars as is required by the law.

36. Counsel has further submitted that the 2nd Appellant was not contracted by Pw1 to do any work. Secondly he never received any money and neither was he contracted to install any alleged illegal connection. He refers to the evidence of Pw1 at pages 12 and 36 of the proceedings. He adds that Pw1 only saw the 2nd Appellant on 2nd May 2017 upon arrest and not before. There was nothing mentioned against him in regard to 26th February 2017.

37. This is a first appeal and this court has a duty to re-analyse and re-consider the evidence on record afresh to arrive at its own conclusion. The Court of Appeal in the case of **Okeno –vs- Republic (1972) E.A 32** set out the duties of the 1st 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 conclusion; 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 Vs Sunday Post [1958] E.A 424.”

38. Similarly, in **Kiilu & Another (2005) I KLR 174** the Court of Appeal stated thus:

(1) An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.

(2) 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.

39. Later in the case of **Japheth Gituma Joseph & 2 Others –vs- Republic (2016) eKLR** the Court of Appeal held that:

“The first appellate court is under a duty to reconsider the evidence, evaluate it and draw its own conclusions and it is not enough to merely scrutinize the evidence to see if there is some evidence to support the trial court's findings and submissions”.

40. Upon considering the evidence on record, the grounds of appeal, all submissions and caselaw, I find the main issues falling for determination to be whether the prosecution proved its case against the Appellants beyond reasonable doubt.

41. The learned trial Magistrate upon evaluating the evidence found that:

i. The Appellants did not steal 200 metres of aluminum conductor wire valued at Kshs.300,000/= the property of Kenya power and Lighting Company.

ii. The Appellants did not retain a stay wire knowing or having reasons to believe it to be stolen goods.

She proceeded to acquit them of the 1st and alternative counts.

42. She however found both of them guilty and convicted them of the 2nd count meaning both Appellants were involved in the connection of a conductor wire to the main power supply.

43. On perusal of the charge sheet (*both original and copies*) I have noted that the 2nd Appellant was not an accused in count II. This is how the particulars read:

“Fredrick Maina Wagura

On the 26th day of February 2017 at Gatumbiro village within Nyeri county in Republic (sic) of Kenya jointly with others not before court with intent to interfere illegally connected a conductor to the main supply line without the consent of Kenya Power the licensee.”

44. A further perusal of the record shows that when the Appellants first appeared in court and plea taken, the plea taken on count II was in respect of both accused persons. It is not clear where this notion came from since the charge sheet only refers to one accused person who is the 1st Appellant.

45. It is so surprising that even the prosecution, defence counsel and the learned trial Magistrate in the lower court never picked up this. Counsel for both the 2nd Appellant and the Respondent in this appeal did not pick this up either, which I find to be abit odd. I have perused the proceedings in the trial court and I have confirmed that there was never any amendment of the charge sheet.

46. This goes a long way to confirm that the 2nd appellant was never charged in count II. The conviction against him is therefore quashed and the sentence set aside.

47. Coming now to the 1st Appellant the particulars are specific that the offence complained of was committed on 26th February 2017: What is alleged to have occurred on 2nd May 2017 was not connection of power.

48. The critical evidence on this issue is that of Pw1 John Wilson Kibiru Wahome. It was his evidence that in February 2017 he carried Wandeto on his motorbike who told him of a person who had installed for him electricity in his house. He further told him that the person worked with KPLC. What was the real conversation between Pw1 and Wandeto? Even after Pw3 and Pw4 learnt that the alleged KPLC person had installed electricity for Wandeto, they never bothered to look for Wandeto to confirm the allegations or find out if Pw1 was just saying that to save his neck.

49. It is nowhere stated in Pw1's evidence that electricity was installed in his house and that of Julius on 26th February 2017. If indeed the 1st Appellant told Pw1 that he worked in the design section of KPLC,

why would he allow him to do the work of an electrician? From Pw1's evidence, it's clear that around March 2017, him and the 1st Appellant were still looking for poles in order to do the installation. He later came on a Sunday on an unknown date and together with another person (*Miano or Maina*) to install the electricity.

50. It is therefore clear that if any connection of electricity was done, it was sometime in March 2017 and not 26th February 2017 as stated in the charge sheet. Pw1 also told the court that the 1st Appellant showed him his identity card which had his photo, and had a blue and yellow colour, with the name of KPLC, and also the 1st Appellant's name. Did Pw3 and Pw4 find it prudent to have the 1st Appellant's home or business premises searched for the recovery of this card if it was true?

51. From his evidence Pw1 was so glad giving out unreceipted money to "a KPLC employee" as long as he got electricity. The actions of Pw1 lead me to the conclusion that he was an accomplice to what was happening herein. How should his evidence be treated.

52. An accomplice is of course a competent witness but corroboration should be found for his evidence before a conviction can be based on it. The corroboration should be some additional evidence rendering it probable that the accomplice's evidence is true and it is reasonably safe to act on it. It must connect the accused person to the crime. See **Republic –vs- Baskerville (1916) 2 KB 658**.

53. This brings me to the allegation by Pw1 that it is one Wandeto who introduced the 1st Appellant to him. Wandeto was a crucial witness and his evidence would have corroborated Pw1's accomplice evidence. The principles to consider in determining the issue of crucial witnesses was dealt with in the leading case of **Bukenya & Others –vs- Uganda (1972) E.A 549 LUTTA A.g Vice President** held:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.”

54. It is not necessary for the prosecution to call all the people who know something about the case as witnesses. The issue is whether those called are sufficient to aid the court establish the truth, whether the evidence is favourable to the prosecution or not. In this I find failure to call Wandeto and Miano as witnesses, failure to confirm that the 1st Appellant had installed for Wandeto electricity at his home and failure to confirm that the 1st Appellant had a KPLC identity card all went to the extent of weakening the prosecution case.

55. It is true the 1st Appellant was arrested somewhere near Pw1's home. This was on 2nd May 2017. The particulars in count II are about 26th February 2017. The fact of this earlier date had to be fully established before the court would consider the happenings of 2nd May 2017.

56. Moreover none of those who arrested the Appellants ever testified to tell the court how they were arrested and what they had done. Pw3 and Pw4 only found them already arrested and at Ndugamano police station with certain items. Had Pw3 and Pw4 done their work diligently all the people behind this racket would have been brought to book, including Anne Wandeto if she exists.

57. The upshot is that there wasn't sufficient evidence to warrant the conviction of the 1st Appellant for this particular installation.

58. I find merit in the appeal which I allow. The conviction of each Appellant is quashed and the sentence against each set aside.

Orders accordingly.

Dated and signed this 10th day of November 2020, in open court at Makueni.

H. I. Ong'udi

Judge