



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 68 OF 2018

GEORGE OCHIENG OLIMAAPPELLANT

VERSUS

REPUBLICRESPONDENT

[Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court

at Winam (Hon. P.K. J. Mitey RM) dated the 8th June 2018 in Winam SPMCRC No. 330 of 2017]

JUDGMENT

The Appellant, **GEORGE OCHIENG OLIMA**, was convicted for the offence of **Severing with intent to Steal**, Contrary to **Section 64 (A)** of the **ENERGY ACT**.

1. He was then sentenced to a fine of Kshs 5,000,000/=; in default 10 years Imprisonment.
2. In his Petition of Appeal, he made the following assertions;
 - i. ***The prosecution evidence was not well corroborated, to support a conviction.***
 - ii. ***The Charge Sheet was fatally defective.***
 - iii. ***His constitutional rights to a fair trial were violated, as Article 50(2)(j) was not complied with.***
 - iv. ***The Defence was not considered by the trial court, yet the said defence was unchallenged.***
 - v. ***Rules of Enforcement of Criminal Law were not complied with.***
3. When canvassing the appeal, the Appellant submitted that the officers who carry out investigations ought to produce their records in court, so that the trial court can ascertain whether or not the investigations were carried out in accordance with the law.
4. The Appellant also submitted that there was need for an expert to testify, if he were to be properly convicted.
5. Furthermore, it was his view that the evidence tendered by the prosecution was in adequate.
6. In any event, the said evidence was said to have been wrongfully admitted in evidence.
7. The evidence was also said to have been inconsistent. In particular, the Appellant pointed out that one prosecution witness said that the offence was committed within somebody's compound, whilst another witness said that the offence was committed on the road.
8. The Appellant also complained that the prosecution had two sets of Witness Statements, which were completely different.
9. In answer to the appeal, Miss Barasa, learned State Counsel submitted that the Appellant was arrested whilst he was in the act of committing the offence. Therefore, the Respondent said that there was no room for any confusion in the identification of the person who committed the offence.
10. It is common ground that **PW1** was re-called during the trial, and he was then cross-examined further.

11. During the said further cross-examination, **PW2** was seated in court, and the prosecution drew the court's attention to that fact, as soon as it became aware of it.
12. The Appellant submitted the presence of **PW2** in court, when **PW1** was testifying constituted a serious violation of the Appellant's rights.
13. The Respondent admitted that it was a mistake for **PW2** to have sat in court when **PW1** was undergoing further cross-examination.
14. However, in the circumstances prevailing in this case, the Respondent submitted that that mistake did not prejudice the Appellant.
15. There is no doubt about the fact that when one witness was giving evidence, the other witnesses who had not yet given their evidence should not be inside the courtroom.
16. The reason why witnesses who were yet to give evidence are required to stay away from the court room when a witness was giving evidence is that it is important to be able to verify whether or not the evidence given would be consistent and corroborative.
17. If witnesses gave evidence after listening to other witnesses testifying, chances are that they would simply repeat what they had heard. In such circumstances, it would be almost impossible for the court to ascertain whether or not they were either telling the truth or if they were just parroting the same untruth.
18. If a witness sat in court through either the whole or the bulk of the testimony of a person who testified before he had given his evidence, the court would need to decide whether or not to allow the witness to give evidence.
19. And if it is after the said person had given evidence that the court became aware that the witness had earlier sat in court during the testimony of an earlier witness, the court may decide to expunge the evidence from the record, if justice so demanded.
20. However, each case must be determined on the circumstances prevailing. The presence of a witness in court, before he had testified would not automatically render the trial fatally defective.
21. But the longer the witness sat through the testimony of another witness, the greater the chances are that his testimony may need to be excluded.
22. In this case, **PW2** sat in court during the brief session when **PW1** was being further cross-examined.
23. The said cross-examination was in relation to the failure by the witness to take a photo of the Appellant during his arrest.
24. The witness also produced his Work Identity Card, which showed that he was an employee of Kenya Power & Lighting Company Limited.
25. In effect, the second prosecution witness sat in court for a very limited period of time. The trial court had the discretion of expunging from the record, the evidence which was tendered by **PW1** during the time when **PW2** sat in court.
26. Both witnesses testified that they found the Appellant on top of an electricity pole.
27. When they inquired from him why he was on the said pole, the Appellant failed to produce any Identification documents which would have proved that he was an employee of Kenya Power or an employee of Kenya Power's licensee.
28. Nonetheless, the Appellant was in possession of Climbers; Aluminium Conductor and a Safety Climbing Belt.
29. The Aluminium Conductor Wire had been cut from the electricity pole.
30. Although the said items were in the Appellant's possession, yet they were the property of Kenya Power, the Appellant failed to offer any explanation to justify his said possession.
31. The said possession was described by the Appellant as being "*recent possession.*"
32. The doctrine of recent possession is applicable when goods were recovered from an accused person a short period of time after the said goods were stolen from the Complainant.
33. In this case, the Appellant was found in actual possession, at the scene of crime.
34. He had not yet carted them from the scene.
35. The items had been severed from the electricity pole where they normally were connected to.
36. It was for that reason that the offence of theft was not yet completed. If the items had been carted away, with an intention of

permanently depriving the Complainant of their ownership, that would have the offence of theft.

37. The Appellant had no lawful reason for being in possession of the items which he had severed from the electricity pole. Therefore, the only logical conclusion that can be drawn by the court is that the Appellant had severed the various items, with the intention of stealing them.

38. During cross-examination of the prosecution witnesses, the Appellant never hinted at the suggestion that he was allegedly heading to Mamboleo to collect some stuff for his shop.

39. Therefore, when he later introduced that line of defence, after the trial court had held that he had a case to answer, it does appear that the said defence was an afterthought.

40. Even the contention that he was first taken to the offices of Kenya Power, where he stayed for 4 hours before being taken to the Kondele Police Station, appears to be a concocted story, whose veracity was shielded from being tested, as the Appellant never questioned the prosecution witnesses about the same.

41. It is important to point out that evidence which is not tested through cross-examination is deemed as having been conceded by the accused or by the party against whom such evidence is tendered.

42. That is exactly what happened in this case, when the Appellant did not cross-examine the prosecution witnesses on the aspects of their evidence, which could, (if the witnesses were shaken), have been the foundation of his defence.

43. It is also significant that when the Appellant was asked about the exhibits which were recovered from his possession, he kept quiet.

44. In the circumstances, I find that the trial court was right to have reached the conclusion that the Appellant's defence was not plausible and was unconvincing.

45. Accordingly, the conviction was founded upon solid evidence, which proved the case against the Appellant beyond any reasonable doubt.

46. As regards the sentence, **Section 64A** of the **Energy Act** prescribes;

“..... a fine of not less than five million shillings or to imprisonment for a term of not less than ten years, or both.”

47. In the event, when the learned trial magistrate imposed a fine of

Kshs 5,000,000/= or in default 10 years imprisonment, he handed down the lowest sentence prescribed by law.

48. Therefore, the sentence is lawful, and the same is upheld.

DATED, SIGNED and DELIVERED at KISUMU

This 13th day of **February** 2019

FRED A. OCHIENG

JUDGE