



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 53 OF 2017

JUSTUS MUSAU MUSEMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 54 OF 2017

MORRIS KING'ONDU SYENGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL NO. 55 OF 2017

RAPHAEL KYALO KISILU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence of Hon. O. Ooko (P.M.)

delivered on 28th April, 2017 in Mavoko Principal Magistrates' Court

Criminal Case No. 14 of 2016)

JUDGEMENT

1. The Appellants were charged with two counts. The first count was the offence of vandalism of electrical apparatus contrary to section 64 (4) (b) of the Energy Act No. 12 of 2012. The particulars were that the Appellants on 9th January, 2016 at Nairobi National Park within Nairobi County, jointly willfully and unlawfully vandalized electricity transmission cables to wit 950 meters valued at KShs. 5,500,000/- the property of Kalpataru Power Transmission Company Limited. The alternative charge to it was handling stolen goods contrary to section 322 (1) as read with section 322 (2) of the Penal Code and the particulars were that the Appellants on 9th January, 2016 at Nairobi National Park within Nairobi County otherwise than in the cause of stealing dishonestly retained electricity transmission cables to wit 950 meters valued at KShs. 5,500,000/- the property of Kalpataru Power Transmission Company Limited knowingly or having reasons to believe it to be stolen or unlawfully obtained.

2. The Appellants were in the second count charged with the offence of entering into a National Park with a livestock contrary to section 102 (1) (a) of the Wildlife Conservation and Management Act, 2013 particulars being that the Appellants on 9th January, 2016 at Nairobi National Park within Nairobi County were jointly found to have illegally entered Nairobi National Park.

3. The Appellants having denied the charges, were put on trial. The prosecution called five (5) witnesses. Ramasamy Anbarasan (PW1) who is the complainant's site Engineer was on 10th January, 2016 at Kitengela Town when his colleague who goes by the name Arnold called and informed him that there was a theft case of the complainant's power metal near Kitengela and that suspects had been arrested to that effect. PW1 proceeded to Athi River Police Station and got to be shown the suspects and he later went to the scene where he found cables missing. He identified the recovered cables as those stolen from the complainant. He stated that the complainant is the only company which has such cables within Kitengela area. Photographs of the said cables were taken.

4. Samson Somo (PW2), a guard at Nairobi National Park and James Gitonga (PW3), a security officer with Kenya Wildlife Service were on 9th January, 2016 patrolling inside the Park when they saw three men carrying sacks loaded with electrical cables. The three men were ordered to stop and attempted to flee but the two cocked their guns prompting the three men to surrender. PW2 informed his immediate Superior who went to the scene. The three were then arrested and escorted to Athi River Police Station. They were found in possession of a panga and hacksaw. PW1 stated that he identified the three as the Appellants using moonlight while PW.2 did so using torch light.

5. Police Constable Shadrack Mwendu (PW4) who is based at Athi River Police Station was on 9th January, 2016 on patrol together with Sergeant Kerithi and Police Constable Kyalo when they received a call from the Officer in Charge of Athi River Police Station informing them that three suspects had been arrested at Nairobi National Park Cheetah area. They went to the scene where the Appellants were handed over to them. The Appellants were said to be in possession of six sacks loaded with the complainant's electrical cables. He stated that the three were also in possession of a panga and a hack saw. The next day, a representative from the complainant's company accompanied PW4 to the scene where the cables had been vandalized and PW4 witnessed wires on toners No. 1009012 having been vandalized and some thrown by the roadside and inside the power station. He stated that the Appellants had gained entry through a construction site opened by China Road Construction Company and had no permit to enter the National Park. He produced the complainant's certificate of compliance as P. Exhibit No. 1 and wires as P. Exhibit No. 3. He took photographs of the wires and sacks used to carry the same and forwarded to the scene of crime officer. The same were produced as P. Exhibit 6. He stated that in the course of interrogation, he discovered that the Appellants were not the complainant's employees and preferred charges against them. He further produced two pangas and a hack saw as P. Exhibit 4 a and b and P. Exhibit 5.

6. William Ogola Ondieki (PW5) who is a gazetted scene of crimes officer received a CD disk on 20th January, 2016 accompanied by a duly filled exhibit memo. He printed the photographs and prepared a certificate to that effect dated 4th March, 2016 (P. Exhibit 7).

7. The Appellants were put on their defence upon which they testified as follows. The first Appellant (DW1) reported to his place of work at the construction site on the material day and worked until 5.00 pm when he took clothes to his friend by the name Mutua. He parted ways with Mutua at 6.00 pm and headed to his house adjacent to Mlolongo Police Station. While on his way at around 6.30 pm, he met two police officers who stopped him. He was interrogated and arrested and taken to Athi River Police Station and later charged. He denied knowing the 2nd and 3rd Appellants.

8. The second Appellant (DW2) was on the material day heading to Mlolongo town. While walking along the railway line adjacent to Bamburi Cement Company, he met two KWS officers who stopped him and demanded that he tells them where he was from and where he was headed. He explained himself but shortly thereafter, a police vehicle arrived and he was made to board it and was taken to Athi River Police Station and charged. He stated that he only got to know the 1st and 3rd Appellants in court.

9. The third Appellant stated that he was at work in Athi River from 7.00 am to 5.00p.m and while on his way back home, he met two police officers at about 6.30 pm. They stopped him and ordered him to board a police vehicle without being told the offence he had committed. He was taken to Athi River Police Station and charged.

10. The Appellants were convicted of the first count and were each sentenced to a fine of KShs. 5 Million in default to serve ten years imprisonment. Aggrieved, the Appellants filed this appeal on the following grounds that they were convicted on evidence that contained material inconsistency, discrepancy and contradictions and that the prosecution case was not proved beyond reasonable doubt. In considering this appeal, this court bears in mind that it is a first appeal. This court shall therefore reconsider and reanalyze the evidence afresh with a view of arriving at its own independent conclusion bearing in mind also the fact that it did not have the chance to observe the demeanor of the witnesses.

11. It is the Appellants' submission that they were convicted on evidence that had material discrepancies, inconsistencies and contradictions. They contended that the mode of arrest and identification was wanting. It was argued that it is not clear why if truly they were arrested at the scene only photographs of the cables and not theirs were taken. That had they been arrested at the scene then even their photographs would have been taken and submitted that the photographs do not confirm vandalism. **Kennedy Ochieng Arongo & Another v. Republic [2008] eKLR and Abanga Onyango v. Republic CR. Appeal No. 32 of 1990** (Unreported) were cited to support the argument. It was further argued that the conviction should not stand since the complainant never reported the incident to the police and that it cannot be ascertained that the complainant is the owner of the cables. In support thereof, the Appellants cited **Gethema & others v. Republic C.A. No. 182 -186 (1952)** where it was held that the evidence of the first report to a person in authority is important as they often provide good test by which the truth and accuracy is to be established as a safe ground against later established or made up case. They further argued that it was unfair for the trial magistrate to dismiss their defence without putting much consideration to it. It was submitted that the fact that certain assertions went unchallenged by the Appellants does not necessarily imply an inference of guilt.

12. The prosecution on the other hand submitted that the Appellants did not prove the asserted facts as required. It was submitted that PW2 and PW.3's evidence was consistent that the three were found with a sack which contained vandalized cables and were also found in possession of pangas and hack saw. That the evidence was not only consistent but also corroborated each other. On contradictions, the prosecution submitted that the role of a court when confronted with allegations of existence of inconsistencies and contradictions was provided in **Joseph Maina Mwangi v. Republic Criminal Appeal No. 73 of 1992** thus:

“In any trial there are bound to be discrepancies. An Appellate court in considering those discrepancies must be guided by the

wording of section 382 of the Criminal Procedure Code whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.”

It was argued that the inconsistency and contradiction can be reconciled since one can be arrested anywhere and not necessarily at the scene of crime for as long as the evidence links them to the offence. It was argued that the contradictions on the light used to identify the Appellants and point of arrest does not prejudice the Appellants. It was further argued that the issue of ownership is not in dispute as the fact remains that the cables were vandalized and the same was not challenged at all by the Appellants and that PW1 who is an employee of the complainant produced certificate of registration for the company. It was submitted that the trial court considered the Appellant’s mitigation before sentencing them.

13. The Appellants lamented that they were convicted on evidence that was inconsistent and contradictory and had discrepancies. Particularly it was stated that there was contradiction on the mode of identification. While PW2 stated that he identified the Appellants using moonlight, PW 3 stated that he identified them using a torch. Secondly, it was contested that it was not clear where exactly they were arrested. The question that arises is whether or not the alleged inconsistencies, discrepancies and contradiction had an effect to the prosecution case. While I acknowledge the existence of the same, I note that the prosecution was firm on the manner in which the Appellants were arrested and that they were found in possession of the cables. The same did not in my view affect the prosecution evidence that the Appellants were found in possession of the cables and failed to explain how they got possession of cables which were confirmed to be missing by PW1 and PW4. See: **Isaac Ng’ang’a Kahiga alias Peter Ng’ang’a Kahiga v. R NYERI CA Criminal Appeal No. 272 of 2005** where the Court of Appeal held:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words there must be positive proof, first; that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant...”

Secondly, the Appellants were said to have been arrested by PW2 and PW3 at the Nairobi National Park while on the other hand, the Appellants’ evidence amounted to mere denial. I am in this head guided by the Court of Appeal decision in **Erick Onyango Odeng’ v. Republic [2014] eKLR** citing with approval the Uganda Court of Appeal case of **Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6** in which it was held as follows:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.”

It came out clearly that the prosecution’s witnesses PW.2 and PW.3 stumbled upon the three Appellants who were carrying sacks and were ordered to stop. It was discovered that the Appellants were carrying electrical cables which were later established to have been stolen and which belonged to the complainant. The Appellants did not offer an explanation as to how they came to be in possession of the stolen electrical cables belonging to the complainant. I am unable to believe the Appellants defence evidence that they were bundled into a police vehicle while they were heading to their homes. I find the defence evidence did not shake that of the prosecution which was quite overwhelming against them and that the case had been proved against them beyond any reasonable doubt. I find the trial court properly convicted the Appellants

14. In view to the foregoing, I am unable to find that the prosecution case was not proved beyond reasonable doubt. The defence case does not cast doubt to the prosecution case. In the end I find no merit in this appeal and it is hereby dismissed. The conviction and sentence by the trial court is upheld.

It is so ordered.

Dated and delivered in **Machakos** this 17th day of **September 2018**.

D. K. KEMEI

JUDGE

In the presence of:-

Justus Musau, Morris Kingandui, Raphael Kyalo - for the Appellants

Machogu - for the Respondent

Josephine - Court Assistant