



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO: 15 OF 2015

SAMWEL MBUGUA MWANGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 5900 of 2013 Republic v Samuel Mbugua Mwangi in the Principal Magistrates' Court at Eldoret by S. Mokuu, Principal Magistrate dated 30th January 2015)

JUDGMENT

(1) SAMWEL MBUGUA MWANGI (the appellant) was convicted alongside two others for the offences of:

(i) Vandalism of electrical apparatus Contrary to Section 64(4) of the Energy Act that on the night of 22nd and 23rd December 2013 at SANGO Sub-Location in **LIKUYANI** District within **KAKAMEGA** County, they vandalized two transformers SN 21725 AND 23992 respectively total value being Ksh.3million, the property of Kenya Power.

(ii) Sabotage Contrary to Section 343 of the Penal Code that on 26th December 2013 at the same place, they willfully and, unlawfully damaged Kenya Powers Electric expansion fuses with intent to impair its efficiency in transporting electronic power.

They all denied the charges, and after trial, were convicted and each sentenced to serve 10 years imprisonment on the first count and 2 years on the second count –the sentences were to run concurrently.

(2) BERTHA TAMBARATICH (PW4) was at her home in **SANGO** on 24.12.2013 at 7.30 pm when she saw three men who claimed to be working for Kenya Power and Lighting Company – among them was the appellant who was the motor cycle rider, near the road, which was 20 meters away from her house. One man climbed up the power pole, and sent the 2nd to request PW4 for a stick to use, promising to return it later. She obliged and gave out the stick, but the three left without returning it.

(3) That night at 7.30pm, the area experienced a power outage. Meanwhile PW2 (**PAUL NABANGA MAKET**) the area chief approached PW4 and enquired what may have happened to the power line, and she described to him the people she had seen.

On 26th December 2013, the same people returned, so she alerted the area chief (PW2) who instructed **SGT MUTHUI** to proceed to the scene and also contacted Kenya Power Company in Eldoret.

(4) SGT. ANTHONY MUTHUI (PW3) of **TURBO** Police Station confirmed receiving a call from PW2 that some suspects had been found by members of the public at the Junction of Kenya Ordinance Facility. He proceeded to the scene accompanied by other officers and found three men, including the appellant. He stated that the other 2 were interfering with the power appliances and also had several gadgets and

“...One of them was in overall the 3rd accused was apartAccused 3 had his motorcycle he had pliers PMFI-9 and PMFI-10. (clamb (?))...they had earlier vandalized the line on 24th December 2013.....

(5) On cross examination he stated that the appellant was by the road, and that the appellant explained he was in boda boda business.

He thus arrested the three and took them to **KOGO PATROL BASE**.

(6) P.C JACOB CHESEREK (PW6) who is attached to Kenya Power security office told the trial court that on 26.12.2013 at about 4.00pm while at the **Eldoret Office**, he was informed that suspects who had been found interfering with the **Nzoia Power** line were arrested and were held at **KOGO** Police Patrol Base. He carried out investigations, and made recoveries from the 1st accused.

He stated:

“... the suspects had used a motor cycle to get to the scene. The motor cycle belonged to the 3rd accused Vandalized transformers were photographed The apron and copper wire were taken to the government chemist for analysis...”

MARTIN KIPROP CHEBII (PW1) a foreman at Kenya Power’s **MATUNDA** branch was informed by security personnel that suspects had been arrested with Kenya Power implements including expansion fuses, climbing irons, safety belt pieces (the last two are used for scaling electricity posts, transformer windings and transformer laminations, modified link stick, and a broken piece of pipe, pieces of brown copper wire – all these belonged to Kenya Power Company except for the pliers, overall and broken pipe.

He observed that the expansion fuses were removed from **LUGULU BRIGADIER NZOIA** line and that such are only supplied to Kenya Power Company and cannot be found in shops.

The cross bar accessory (Ex.4) had been removed from the same line and PW1 was able to recognize it by its serial number on the transformer lamination. He also identified the clamps which were stolen on 23rd December 2013.

(7) In his unworn defence, the appellant explained that he was a boda boda operator who had been hired by the 2nd accused on 21st December 2013 at a charge of Ksh.300/- to take him to a place near the forest where he was to operate a power saw – he obliged. His passengers alighted, and while he waited for them, a vigilante group appeared and an elderly lady began pointing at him.

He did not know the intention of his co – accused when they boarded his motor cycle.

(8) The trial magistrate noted that the 2nd accused had alluded to having used the motor cycle belonging to the appellant, but rejected this line saying the appellant did not explain his whereabouts on 22nd – 24th December 2013 and the inference to be drawn is that he did not challenge the prosecution’s evidence in any way, further, that the three did not also challenge the prosecution evidence that they were at a point where **LUGULU – BRIGADIER NZOIA** power line had been affected due to vandalism.

(9) This decision has been challenged on grounds that the trial magistrate adopted a lower standard of proof than expected in criminal trial and shifted the burden onto the appellant instead of requiring the prosecution to discharge the same. The sentence was also challenged as being harsh and excessive under the circumstances.

(10) At the hearing of the appeal, **MR NGIGI**, on behalf of the appellant submitted that from the proceedings, clearly the appellant was hired by his co-accuseds to provide transport to the scene, the two having presented themselves as sub-contractors of **KPLC**, it was argued that given the fact that the period in question was during the December festivities then it was nothing out of the ordinary for people to hire boda boda services to ferry them.

(11) He also pointed out that PW4 who alerted the area chief about the presence of the three men confirmed that the appellant was at the roadside after off-loading his passengers and all the “mischievous” activities were done by the 1st and 2nd accused, meaning there was no unity of purpose between them and the appellant.

(12) Further that all the items related to Kenya Power’s transmission equipment were recovered from the 1st accused and the only item found on the appellant was a pair of pliers (which is a common tool for anyone operating a basic machine like a motor cycle)

On account of this, accused argued that to achieve vandalism of the kind complained of, one needs more sophisticated gadgets and not just a pair of pliers.

(13) He also urged the court to interfere with the sentence as the record does not show that the appellant was given an opportunity to state his plea in mitigation, unlike his two co-accuseds, and the 10 year sentence was too severe.

(14) In conceding the appeal, Mrs Oduor on behalf of the State submitted that indeed Accused 1 and Accused 2 were the ones linked to the offence as they were found in possession of gadgets belonging to Kenya Power Company. The appellant was linked to the offence because he was found by the roadside with a motor cycle and he had a pair of pliers and clamps but these were not ascertained to belong to **Kenya Power Company**.

(15) Further more Accused 2 confirmed they had hired the appellant’s services to ferry them to the scene and no evidence was tendered to demonstrate that the appellant was part of the power interruption. Also that evidence showed it was the 1st and 2nd accuseds who were handling the power line and not the appellant, so these gaps ought to have been resolved in his favour.

(16) I concur with the observation made by the DPP and add that on the two occasions referred to by PW4, his role remained consistently passive – he would ferry his passengers, then stand at a distance by his motor cycle to watch them. He played no active role. The pliers found with the appellant were not linked to Kenya Power Company. If the clamps were on the motor cycle, then the probability that they belonged to his passengers whom he was waiting to ferry was not denied by prosecution witnesses and I find the appeal is merited and is properly conceded.

(17) Consequently the conviction was unsafe and is quashed, the sentence be and is hereby set aside.

(18) The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DELIVERED and **DATED** this 5th day of September 2018 at Eldoret.

H. A. OMONDI

JUDGE