



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO. 24 OF 2016

SAMUEL MAMO MATO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in criminal case No. 733 of 2015 of the Principal Magistrate's Court at Marsabit by Boaz Ombewa– Senior Resident Magistrate)

JUDGMENT

The appellant, **SAMUEL MAMO MATO**, was charged with an offence of tampering with telecommunication plant contrary to section 32(c) the Kenya Information and Communications Act cap 411A laws of Kenya.

The particulars of the offence were that on 30th September 2015 at Shauri Yako village Marsabit Central sub County, Marsabit County, with intent to commit mischief, tampered with internet cable sheets by cutting and removing copper conductors valued at Kshs.200,000/= the property of Telkom Kenya limited.

He was tried and convicted of the offence. He was sentenced to serve ten years imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by Mathuva Mwalimu, learned counsel who raised six grounds that can be summarized as follows:

1. That the learned trial magistrate erred in law and in fact by convicting the appellant on a defective charge sheet.
2. That the learned trial magistrate erred in law and in fact by convicting the appellant on a charge that was not proved.
3. That the learned trial magistrate did not consider his defence.
4. That the learned trial magistrate erred in law and in fact by failing to consider the probation report.
5. That the learned trial magistrate erred in law and in fact by meting out a harsh and unreasonable sentence.

The state opposed the appeal through Mr. Chirchir, the learned counsel.

The prosecution facts at the trial court were briefly as follows:

On the 30th September, 2015 at about 9.00 p.m, the OCS Marsabit Police Station received a report of some suspicious characters in Shauri Yako area. He kept the area under observation. At about 2 p.m he received another report. he mobilized his officers and moved to the area with them. They found the appellant and another vandalizing the telecommunication wires. They arrested the duo with some copper wires they had already cut.

The appellant in his defence contended that he was arrested on his way home. He denied any involvement in the offence.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC [1972] EA 32**. where the Court of Appeal set out the duties of a first 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.”

It was contended for the appellant that the charge was defective. He was accused of offending section 32(c) of Kenya Information and Communication Amendment (sic) Act of 2012 Chapter 411A laws of Kenya. The correct title of the Act is:

The **Kenya Information and Communications Act, cap 411A**, laws of Kenya.

Section 32 (c) of the Act reads as follows:

A person who willfully, with intent to—

(a)

(b) ...

(c) unlawfully intercept or acquaint himself or herself with the contents of any message; vandalizes, damages, removes, tampers with, touches or in any other way whatsoever interferes with any telecommunication apparatus or telecommunication line, post, or anything whatsoever, being part of or used in or about any licensed telecommunication system, commits an offence and shall be liable, on conviction to a fine of not less than five million shillings or to imprisonment for a term of not less than ten years or to both.

The section creates several alternative offences and in the instance case the offence ought to have been tampering with telecommunication line.

From the particulars of the offence and from the evidence I have observed that the appellant was adequately informed of the charge and he was not prejudiced in any way. It is desirable however to frame the charge correctly.

What was the evidence against the appellant? According to Chief Inspector Charles Mwangi (PW1), he received information that some two people were pulling telephone cables. When they went to

undeveloped plot in Shauri Yako area, they found the appellant in company of another. The two were removing copper conductors from a cable sheet. The appellant had a rope and a cable. Next to the duo was a yellow paper bag which contained two sacks and a jacket. There was a hack saw blade and some copper wires on the ground. The two had cut about 200 metres of cable. After arresting the duo, they went to the home of the appellant where they conducted a search but did not recover anything. The evidence of PC Kennedy Oduor (PW2) was to the same effect.

In his defence the appellant contended that he went for prayers at PEFA church until 2 a.m on the material night. When he was going home he met with some police officers who arrested and assaulted him. He found his co accused in the police vehicle with the exhibits.

The prosecution evidence on record was overwhelming against the appellant. He was found in the act. His defence was dismissed, and rightly so, after consideration by the learned trial magistrate. On 1st October 2015 when the plea was taken, the appellant informed the court that he found his co accused who had some cutting tools. He (the co accused) asked him to be on the lookout and he (co accused) started to cut the cables. During his defence he gave an entirely different story about the incident. His defence was clearly an afterthought.

The learned trial magistrate was criticized for not considering the probation officer's report. I have looked at the report that was presented to the court. I have noted that the appellant gave another version of events to the officer. The officer did not recommend that he be considered for non custodial sentence. Even if such a recommendation could have been made, this was not binding to the trial court. Sentencing is a discretionally exercise that must be approached judiciously. I find that the learned trial magistrate cannot be faulted on this issue.

The appellant was sentenced to serve 10 years imprisonment. It has been argued that this was harsh and unreasonable. Section 32(c) of the **Kenya Information and Communications Act, cap 411A**, laws of Kenya, provides:

"on conviction to a fine of not less than five million shillings or to imprisonment for a term of not less than ten years or to both."

The appellant was sentenced to the minimum sentence provided by the law.

From the foregoing analysis of the evidence on record, I find that the appellant's appeal lacks merit. I dismiss the same in entirety on both conviction and sentence.

DATED at Marsabit this 16th day of February 2017

KIARIE WAWERU KIARIE

JUDGE