



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**CRIMINAL APPEAL NO.64 OF 2017**

**(Appeal Originating from Nyahururu CM’s Court Cr.No.1561 of 2014 by: Hon. D.K. Mikoyan – P.M.)**

**DANIEL NGUTHUKU WAINAINA.....APPELLANT**

**- V E R S U S -**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The appellant herein **DANIEL NGUTHUKU WAINAINA** was charged with the offence of tampering with Telecommunication Plant Contrary to Section 32 of the Kenya Communications Amendment Act No.12 of 2012.

The particulars of the charge are that on 22/6/2014 at Asian Quarters, Nyahururu in Laikipia County, jointly with others not before the court, tampered with Telecommunication Plant, namely, communication cable valued at Kshs.500,000/= by severing it, the property of Telkom Kenya Ltd.

The appellant was arraigned before the Chief Magistrate’s Court Nyahururu, on 24/6/2014 when he pleaded guilty to the charge and was sentenced to serve 10 years imprisonment.

The appellant is aggrieved by the sentence and prays that this court do intervene and reduce the sentence; that he is a family man with children who depend on him and are suffering now that he is in prison.

In reply, Mr. Mong’are, learned counsel for the State submitted that the sentence is not harsh and that it was the minimum sentence under the provisions of law under which the appellant was charged.

The appellant was charged under Section 32 of the Kenya Communication Amendment Act. The section reads as follows: Section 32:

***“A person who willfully, with intent to:***

***(a) Prevent, obstruct or delay transmission of any message;***

***(b) Interfere with the management or operation of a telecommunication apparatus; or***

***(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 charge did not specify under what sub section the appellant was charged. The appellant should have been charged under Section 132(c) which generally covers interference with telecommunication line, post e.t.c. However, having read the particulars of the charge, the most appropriate section that the appellant should have been charged under should have been Section 32A which reads:

***“A person, who, with intent to steal severs any telecommunication apparatus or other works under the control of a licensee, commits an offence and is 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 above notwithstanding a serious offence was committed. Both sections carry the same sentence. I find that the offence committed was under Section 32A of the Act because the cable had been severed with the intention of stealing it and that is what the particulars of the charge indicate. I believe the stiff sentences prescribed in the Act were meant to deter the would be offenders because of the likely inconvenience, setbacks and costs that are involved when any act of vandalism or theft is committed to any communication apparatus in this day and age. In these days of internet, everything comes to a sudden halt and at a great expense to all, if cables are vandalized or stolen. In this case the appellant had severed an underground cable of 300 metres.

The above sections provide for a minimum sentence and the court has no discretion to give a sentence below the prescribed one. Upon conviction, one will be sentenced to fine of less than Kshs.5,000,000/= in default to a term of not less than 10 years imprisonment or to both fine and sentence. In this case, I find that having pleaded guilty the court should have given the appellant the option of fine. There was no reason given by the court as to why there was no option of fine.

Having come to the above conclusion, I hereby vary the sentence to the extent that I will impose on the appellant a fine of Kshs.5,000,000/= in default 10 years imprisonment which is the minimum sentence. The appeal is hereby dismissed. The sentence will run from 24/6/2014 when the appellant was sentenced.

***Dated and Signed at NYAHURURU this 5<sup>th</sup> day of May, 2017.***

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**R.P.V. Wendoh**

**JUDGE**

**Mr. Mong'are for State**

**Mr. Lokwang – Court Assistant**

**Appellant in person**