



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 40 OF 2015

PATRICK MUCHOKI MWITHIKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Appeal from original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 1045 of 2012 (Hon. V.O. Nyakundi, Resident Magistrate)

JUDGMENT

The appellant was charged with the offence of stealing contrary to **section 64(A) of the Energy Act No. 12 of 2006** and the particulars were that on the night of 8th and 9th December, 2012 at Gachika location within Nyeri County, the appellant jointly with others not before court, stole a binding wire in a transformer valued at Kshs 183,237.36/= the property of Kenya Power company. In the alternative, he was charged with the offence of neglect to prevent a felony contrary to **section 392 of the Penal Code, cap 63** and here the particulars were that on the night of 8th and 9th December 2012 at Gachika power station at Kiganjo location within Nyeri County, knowing that he was designated to guard the property of Kenya Power, the appellant failed to use all reasonable means to prevent the theft of copper binding wire valued at Kshs 183, 237.36/= the property of Kenya Power and Lighting Company.

The appellant was convicted of the main count and fined Kshs 5,000,000/= and in default to serve 10 years' imprisonment. Being dissatisfied with the conviction and sentence he appealed to this court on the following grounds:

1. That the learned magistrate erred in law and in fact in convicting the appellant when the case against him had not been proved beyond reasonable doubt;
2. That the learned trial magistrate erred in law and in fact when he convicted the appellant yet his conduct exonerated him from blame;
3. The learned magistrate erred in law and in fact in convicting the appellant when there was no conclusive evidence in proof of his guilt; and,
4. The learned trial magistrate erred in law and in fact when he rejected the appellant's defence that in his view was strong enough to displace the prosecution case.

As the first appellate court, it is the duty of this court to evaluate the evidence afresh and come to its own conclusions notwithstanding that they may be inconsistent with those of the trial court; however, as much as this court may deviate from the findings of the trial court, it has to give an allowance to the fact that the

latter had the advantage of seeing and hearing the witnesses. (See **Okeno versus Republic 1972 EA 32**).

The prosecution evidence was that the appellant was an employee of Brinks Security Services Ltd, a company contracted by Kenya Power company to guard its premises at its Kiganjo Control centre. He was deployed at this centre as one of the night guards together with **Joram Kariuki Njau (PW1)**, Martin Wamathai and Paul Rentuli. Njau (PW1) testified that on 8th December, 2012 they reported to work as usual although the appellant arrived a little bit later, at about 7 PM. They agreed to station themselves at separate places within the premises with the appellant, and one Martin Wamathai guarding the stores while Njau was assigned the task of guarding the main entrance to the control room. Paul Renturi was tasked with patrolling the control room. Although the night duty ended at 6 AM when they were usually relieved by the guards on day shift, the appellant left slightly earlier, at about 5.30 AM.

As they inspected the premises with one of the day guards before they handed them, they noted that a transformer had been tampered with in the sense that some copper wire or wires had been removed from it. They reported this incident which they thought to be vandalism to their manager, **Mr Stephen Muema Siengo (PW2)**. This latter officer then asked **Njau (PW1)** and Paul Renturi to record statements concerning this “vandalism”. Martin Wamathai is said to have disappeared never to return but the appellant resurfaced three days after the incident. He was arrested and charged with the offence of which, as noted, he was subsequently convicted.

The witness admitted that although the compound had only one gate, the fence was porous enough for anyone to access it without necessarily going through the gate.

Mr Siengo (PW2) testified that indeed the appellant was one of the employees of Brinks Security Services Limited and that he was engaged as a security guard and a dog handler. On 9th of December, 2012 he received information from **Florence Muthoni (PW3)**, also an employee of the security of the firm and who was engaged as a day guard, that one of the transformers in the premises they were employed to guard had been vandalised. According to him, Florence noticed this vandalism while inspecting the premises as she prepared to take over from the night guards; she was in the company of **John Kariuki (PW1)** and **Paul Rentuli** at the time. He was also informed that the appellant and Martin Wamathai had left earlier.

When he went to the scene, this witness noticed that there was an opening in the fence; there was also a gunny bag with a grey trouser near it. As for the transformer, he established that a “chain lock” had been cut from the transformer. He also noticed that the appellant’s uniform and that of Martin Wamathai were tainted with what he thought was oil from the transformer. He testified that the appellant did not report to work on 9th December, 2012 but that he instead reported to the firm’s branch offices in Nyeri on the following day, the 10th December, 2012.

On her part, **Florence Muthoni (PW3)** testified that when she reported work at 6:30 AM on 9th of December, 2012 she found three night guards whom she was to relieve; ordinarily they were supposed to be four but one of them was missing. Those she found at work were Martin Wamathai, Paul Rentuli and **Joseph Kariuki(PW1)**. The appellant who was missing. It was her evidence that when she inspected the premises, she noticed three of the transformers had been opened. She informed her manager, **Mr Siengo (PW2)** who directed that nobody should leave the premises. Martin Wamathai left apparently in defiance of the manager’s directive. Later, **Mr Siengo (PW2)** came together with an officer from Kenya Power. They established that part of the fence had been destroyed and that “copper binding wires” had been stolen from the transformers.

Kenya Power’s representative who visited the scene together with **Mr Siengo (PW2)** was **Charles Muchiri Maina (PW5)**; he testified that he was a security officer at the company. It was his evidence that on 9th December, 2012, he received a call from an employee of Brinks Security Services company to the effect that Kenya Power’s transformers at its Kiganjo station had been vandalised. He visited the station and noted that “covers” for three transformers had been interfered with. He therefore informed the energy transmission department of the company to come and establish whether anything had been stolen from the

transformers. A technician from the department established that indeed “copper bindings” in one of the transformers had been stolen. He assessed the value of the stolen material to be Kshs 183, 237.36.

The investigations officer **Police Constable Peter Ogola (PW4)** confirmed that the complaint about the vandalised transformer was lodged at Kiganjo police station by **Maina (PW5)**. He went to the scene and saw the transformer in the course of his investigations. He also established that part of the fence to the company’s compound had been destroyed and in his view, it was to provide access to or exit from the compound by thieves. He concluded that the appellant should be charged because he absconded from duty immediately after the incident and only resurfaced three days later and also that his uniform which was recovered at the scene was tainted with oil thought have been from the vandalised transformer.

With this evidence, the trial court put the appellant on his defence. The appellant opted to give unsworn statement and stated that indeed he was an employee of Brinks security company but that he had been dismissed. He admitted that on the night of 8th and the early hours of 9th December, 2012 he was on duty together with his colleagues whom he named as Lentuli, Kariuki and Martin Wamathai. He also admitted that he left work a little earlier than his colleagues and went to Karatina. On 9th of December, 2012 he met his colleague, Lentuli, around Kiganjo area. Lentuli told him that his manager wanted to see him before reporting to work; however, since it was late, he decided to go back to Karatina and see him the following day. When he went to the company’s offices as he had been directed, he found them closed. He called his supervisor who told him that they could meet at the offices of Kenya Power. When he went there he was arrested and taken to Kiganjo police station. He denied owning the clothes which were presented in court as his; as matter of fact, he showed the investigations officer his uniform. He also denied that the transformer was either vandalised or copper wires stolen from it as alleged by the prosecution witnesses.

The appropriate place to begin from in evaluating the evidence on record is this last point that the appellant made-that neither the transformer was vandalised nor copper wires stolen. With this denial, the burden was on the prosecution to prove beyond reasonable doubt that indeed the transformer was damaged and the copper wires stolen as alleged.

It is understandable that if the copper wires were stolen as alleged and were never recovered, it would be irrational to have demanded of the prosecution to present them as exhibits as part of the proof of the fact of theft. But the damaged transformer from which they are alleged to have been extracted was never stolen; it remained at Kenya Power’s stores. In my very humble view, it would have been worthwhile to the prosecution case and, more importantly, in order for the prosecution to dispel any doubt as to whether the transformer was vandalised or not, to present the transformer in court. Of course, the bare exhibition of the transformer by itself would not be sufficient but I suppose that the Kenya Power technician who examined the transformer and came to the conclusion that the copper wires had been stolen from it would have been at hand to demonstrate, to the satisfaction of the court, the nature and extent of the alleged vandalism and the subsequent theft. This evidence was obviously crucial and in its absence, I cannot see any basis upon which the trial court came to the conclusion that the transformer was vandalised and some cables stolen in the process.

Section 64A of the Energy Act itself, which is the provision under which the appellant was charged, is suggestive that certain facts need to be proved before a conviction of an offence under this section can be sustained. It sates as follows:

64A. *Serving with intent to steal*

A person who, with intent to steal, severs any conductor, transformer or part thereof, insulator, tower, jumper or other installations 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 prosecution must prove that the accused person “severed” certain specified implements or devices; of interest to the appellant’s trial was a transformer. The word “sever” is not defined in the Act and so it

must be assumed that it is used in its ordinary parlance which, according to Oxford Advanced Learner's Dictionary (7th Edition), means "to cut something into two pieces" or "to cut something off something else." The only way the prosecution could prove that the transformer in question was "severed", as contemplated in this provision, was to produce it in court and lead evidence on how the severance was executed. In the absence of the transformer and without any explanation as to why it was not brought to court when it ought to have been exhibited, and in view of the appellant's denial that the transformer was damaged or anything stolen from it as alleged, the trial court ought to have found that there was a reasonable doubt of whether the transformer was vandalised or copper wires stolen. Conversely, the court would have been justified to draw an inference adverse to the prosecution that if the transformer had been exhibited in court it would have been unfavourable to its case.

The other angle to **section 64A** of the **Energy Act** which I think both the prosecution and the trial court missed is that this particular provision does not create the offence of stealing per se. The offence defined in this provision of the law is that of severing "*any conductor, transformer or part thereof, insulator, tower, jumper or other installations under the control of a licensee with intent to steal*". In my humble view, this offence is distinct and separate from the offence of stealing as understood under **section 275** of the **Penal Code**. If at all the prosecution was convinced that the outcome of the investigations revealed that an offence of theft had been committed, the appropriate section to invoke ought to have been this particular section and not **section 64A** of the **Energy Act**. For purposes of this appeal, all I can say that a conviction for an offence of theft under this particular section instead of section 275 of the Penal Code cannot be sustained.

I would have been prepared to substitute the appellant's conviction with that of neglect to prevent a felony under **section 392** of the Penal Code but having come to the conclusion that the alleged felony, irrespective of whether it is an offence of severing under **section 64A** of the **Energy Act** or theft under **section 275** of the **Penal Code**, was not proved beyond reasonable doubt, I am hesitant to take that alternative. The only alternative I have is to allow the appeal, quash the conviction and set aside the sentence. Accordingly, the appellant is set free unless he is lawfully held. Orders accordingly.

Signed, dated and delivered this 12th day of May, 2017

Ngaah Jairus

JUDGE