



No. 64/13

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 81 OF 2012

JOHN MUTISYA KILONZOAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kajiado Principal Magistrate's Court Criminal Case No. 1088 of 2010 by S.O. TEMU, SRM on 20/6/2012)

JUDGMENT

1. The Appellant, **JOHN MUTISYA KILONZO** and three (3) others were jointly charged with two (2) counts.
 - i. Stealing contrary to section 275 of the Penal Code. Particulars thereof being that on the night of 27th and 28th July, 2010 at Kisaju sub- location Oltuloto location in Kajiado North District within Rift Valley Province, jointly with others not before court, stole two (2) 50 KVA transformers valued at Kshs. 1,000,000/= the property of Kenya Power and Lighting Company Ltd.

In the alternative, handling stolen property contrary to section 322 (2) of the Penal Code. Particulars thereof being that on the 29th day of July, 2010 along Athi River – Mlolongo road in a motor vehicle registration number KBC 879C Toyota Caldina, otherwise than in the course of stealing, handled 100 litres of transformer oil, lamination sheets and transformer copper windings, the property of the Kenya Power and Lighting Company Ltd knowing or having reasons to believe them to be stolen property.

ii) Sabotage contrary to section 343(b) of the Penal Code. Particulars thereof being that on the 27th and 28th July, 2010 at Kisaju area in Kajiado North District within Rift Valley Province, jointly with others not before court wilfully and unlawfully damaged and stole two(2) 50 KVA transformers knowing that such act would affect the supply of electricity to the community of Kisaju area.

2. The appellant was tried, found guilty, convicted and sentenced to serve two (2) years imprisonment on each count. Sentences were to run concurrently. Being dissatisfied by the conviction and sentence ,he now appeals on the grounds:-
 - i. **That** the learned magistrate erred both in law and fact by convicting him when there was no evidence connecting him with the scene of the incident and he was not driving motor vehicle

- registration number KBC 879C.
- ii. **That** the learned magistrate erred in both law and fact by disregarding his defence.
 - iii. **That** the learned trial magistrate erred both in law and fact by appreciating evidence of recent possession of property without considering the circumstances in which the items were found.
 - iv. **That** the learned trial magistrate erred both in law and fact by holding that the items found were of a transformer while the alleged Government Examiner did not testify.
3. This being the first appellate court, I have a duty of evaluating and analysing evidence adduced before the lower court and coming up with my own conclusion. I do appreciate the fact that I had no opportunity of seeing or hearing witnesses. (*Okeno versus Republic 1972 E.A. 32* adopted).
 4. To prove its case the prosecution called eight (8) witnesses, PW1, **Samson Netasi Ndunda** was at his place of work at Sina Rose's farm at 2.30 am when he heard a bang. There was power outage. He went to check on the transformer from a distance. He saw a person having climbed the electric pole with a transformer. He notified his colleagues **John Abura Ebironi** and **Francis Tileni**. They notified Kenya Power and Lighting Company Ltd and their neighbour. At 5.00am he saw a motor vehicle leaving the scene of the incident. Administration police officers were called by a neighbour. They now moved to the scene and found the transformer on the ground. It had no oil.
 5. PW2, **John Abura Ebironi** an employee of **Sina Roses** was awake at 3.00am when he was called by PW1. He rang Kenya Power. Later he saw a white vehicle leaving the scene of the incident.
 6. PW3, No. 2008047569 **APC Benard Weboguru** was on patrol when he got information about a motor vehicle that was suspected to be carrying transformer oil. They trailed the motor vehicle registration number KBC 879C and stopped it at Bamburi area. It had four (4) occupants and it carried some parts of a transformer. They arrested the persons and impounded the motor vehicle. Kenya Power officers were summoned. He identified the appellant as one of the persons who were inside the motor vehicle.
 7. PW4, **Zakaria Ombati** a security officer with Kenya Power and Lighting Company Ltd got information that a transformer had been stolen and a suspect had been arrested. He went to the Administration Police Camp, Kitengela where he found motor vehicle registration No. KBC 879C white in colour, some 100 litres of oil from a transformer, three (3) 20 litres empty containers, three (3) copper wires from the transformer and old hosepipe. He also saw a pipe and assorted spanners. He moved to the scene of crime and found the transformer having been damaged and left on the ground. Suspects were charged in court. Two (2) of them absconded.
 8. PW5, No. 81255 P.C. **James Kiprotich ChepKoing** of Scenes of Crime took photographs of exhibits recovered and made a report thereof.
 9. PW6, **Daniel Muchene** a Superintendent with Kenya Power and Lighting Company Ltd provided the police with samples of oil for transformers for comparison in the course of analysis at the Government Chemist. He estimated the value of the damaged property as 1,000,000/=.
 10. PW7, **Tumaka Ole Musala** on receiving a report regarding the incident from a neighbour followed the car that had been driven away. He encountered the police at Kitengela and made a report. They trailed the car and the occupants were arrested.
 11. PW8 No. 53376 P.C **Michael Wahome** investigated the case. He took samples of the oil recovered and took it to the Government Chemist for analysis. He produced the report received pursuant to section 77 of the Evidence Act.
 12. In his defence the appellant stated that on the fateful morning he was on his way to Nairobi where he worked when he stopped a private motor vehicle. The driver agreed to carry him. Along the way the driver of the motor vehicle stopped at the roadblock. A police officer asked the driver of the motor vehicle to assist some persons. He then saw some items being put in the motor vehicle. They proceeded with the journey. Reaching Mlolongo they were stopped by a pick-up motor vehicle. Administration Police Officers who were therein arrested them.
 13. In his written submissions the appellant stated that the witnesses did not identify persons who committed the act of stealing. They saw a white motor vehicle. At the point of arrest he was found inside motor vehicle registration No. KBC 879C, Toyota Caldina having been carried as a passenger but had no knowledge items carried therein were stolen items. This defence was not discredited. Further, he stated that there was no proof that the oil taken to the Government Chemist was from the transformer.
 14. **Mr. Mwangi**, State Counsel in response thereto opposed the appeal. He submitted that the

- appellant was found in recent possession of stolen goods and was identified appropriately. PW1 saw people on top of the transformer. At 4.30am he saw a white car leaving the place. Two (2) transformers had been brought down. His evidence was corroborated by that of PW2. Police officers who received the report intercepted the motor vehicle barely an hour later and recovered exhibits. He prayed for dismissal of the appeal.
15. I have duly read the evidence by witnesses who testified, the appellant inclusive. I have also carefully read and considered the judgment of the trial court.
16. Eyewitnesses to the offence committed of stealing did not identify the person who climbed the pole on which the transformer was mounted and damaged them, eventually removing them from where they were and placing them on the ground. They however saw a white car leaving the scene of the incident. PW7 on being informed of the theft followed the motor vehicle. They caught up with it and at the point of being intercepted by the police they confirmed it was carrying exhibits produced in court. In his defence the appellant denies having had knowledge that items inside the motor vehicle in which he was found were stolen.
17. The doctrine of recent possession of stolen goods was addressed in the case of ***Thati -vs- Republic [1983 KLR 354]*** where it was held:-

“The accused/appellant was found with the stolen goods so soon after the theft and in the circumstances it was right to apply the doctrine of recent possession. According to the evidence before the court, the accused was in possession of the goods within 12 days of their theft and was rightfully convicted.”

18. This is a case where the representative of the complainant identified the items recovered as theirs. He identified the transformers that had been vandalized; the internal components, the copper windings and the oil. According to the report of the Government Analyst the liquid recovered was analysed and found to be transformer oil. This was proof beyond doubt that what was stolen indeed belonged to the complainant.
19. In the case of ***Malingi versus Republic (1989 KLR 225)*** the court of appeal stated thus :-

“By application of the doctrine (of recent possession) the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the items and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole or was a guilty receiver”.

20. In the case of ***Chaama Hassan versus Republic [1976] KLR 6 at pg 10 Trevelyon and Hancox JJ*** also held:-

“Whether the accused should or should not be convicted, depends on all facts since such possession is about one aspect of circumstantial evidence, the sum total of which must be unexplainable upon any reasonable hypothesis other than that of guilt or the reason charged before a conviction is recorded”.

21. The transformers having been vandalized and their components having been stolen were found inside the car the appellant was travelling as a passenger. I did consider the evidence adduced before the lower court in totality. Accused 3 who was driving the motor vehicle told the court that he found the appellant herein along the way, at Kitengela. He carried him as a passenger and charged him Kshs. 100/=.
22. Eye witnesses who saw the motor vehicle leaving the scene of crime did not follow it

immediately. On seeking assistance of PW7 they followed it and later intercepted it. By then it had four (4) passengers. The driver of the motor vehicle argues that he found the appellant along the road. The prosecution did not adduce evidence to challenge that assertion. The explanation offered by the appellant in the circumstances was not rebutted. There was no evidence to prove that he was inside the white motor vehicle when it left the scene of crime.

23. In the circumstances, I find the trial magistrate having misdirected himself when he failed to consider the defence raised by the appellant. The evidence adduced by the appellant in his defence raised some doubt to the prosecution's case. The doubt that was raised should have been resolved in favour of the appellant.

24. In the circumstances, the appeal succeeds. I do quash the conviction and set aside the sentence imposed in respect of the appellant on both counts.

25. The appellant shall be released forthwith unless otherwise lawfully held.

26. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 9TH day of JULY, 2013.

L.N. MUTENDE

JUDGE