



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CRIMINAL APPEAL NO. 15 OF 2012**

BERNARD THUO MAINA ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

**(APPEAL ARISING FROM THE JUDGMENT OF THE PRINCIPAL MAGISTRATE'S COURT  
AT BARICHO (S. JALANG'O – R.M) IN CRIMINAL CASE NO. 560 OF 2012 DELIVERED  
ON 15<sup>TH</sup> JUNE 2012)**

**JUDGMENT**

On 15<sup>th</sup> June 2012, the appellant herein BERNARD THUO MAINA was convicted by the Resident Magistrate Baricho Court (MR. S. JALANG'O) on the following three charges:-

Count 1: Sabotage contrary to **Section 343 of the Penal Code** the particulars being that on the night of 13<sup>th</sup> – 14<sup>th</sup> August 2011 of Baricho market of Kirinyaga County jointly with others not before Court willfully and unlawfully destroyed a 200 Kva transformer Serial number 948562 of Sub-station 11504 valued at Ksh. 750,000 with intent to impair the supply of electricity to the community of Baricho market.

Count 2: Stealing contrary to **Section 275 of the Penal Code** the particulars being that on the same night at the same place jointly with others not before Court stole 300 litres of transformer oil from a 200 Kva transformer Serial number 948562 of Sub-station 11504 all valued at Ksh. 60,000/= the property of Kenya Power and Lighting Company Limited.

Count 3: Failing to report an accident contrary to **Section 73 (3) of the Traffic Act** the particulars being that on 14<sup>th</sup> August 2011 at Huruma Estate along Juja road in Nairobi within Nairobi area being the driver of motor vehicle KBL 643 N Toyota NZE willfully failed to report an accident to any Police Station after causing an accident with the said motor vehicle.

Upon conviction, the trial Court meted out the following sentences:-

Count 1 - 4 years imprisonment

Count 2 - 1 year imprisonment

Count 3 - Fined Ksh. 500 in default one month imprisonment

The sentences on counts 1 and 2 were to run concurrently and that on count 3 consecutively.

He has now filed this appeal against both the conviction and sentence and raised the following grounds:-

1. *That he pleaded not guilty*
2. *That the learned trial magistrate erred in law and in fact by relying on a defective charge indicating he used vehicle KBL 643 N yet the Investigating officer PW6 said the vehicle was KBL 943*
3. *That the learned trial magistrate erred in law and in fact when he relied on the evidence of PW2 and PW3 who are employees of Kenya Power and Lighting Company who only said they had previously testified against him*
4. *That the learned trial magistrate erred in law and in fact when he relied on un-corroborated evidence since PW2 and PW3 said the vehicle was KBL 643 L while PW6 said it was KBL 943 and the charge sheet reads the vehicle was KBL 643 N*
5. *That the learned trial magistrate erred in law and in fact by not considering that no exhibit of the complainant Company was recovered on him and the photographs of the vehicle showed no wreckage*
6. *That the learned trial magistrate erred in law and in fact by convicting him because he had a similar offence and therefore relied on his previous sentence but not on the evidence adduced in Court*
7. *That the trial magistrate erred in law and in fact by failing to consider his defence and mitigation.*

I must point out that although the appellant's appeal lists eight (8) grounds of appeal, they are in fact only seven (7) because ground five (5) was omitted most likely by error.

Being a first appeal, this Court is duty bound to analyze and re-evaluate the evidence which was before the trial Court and come to my own conclusion on that evidence and make a finding on whether or not the conviction and sentence were sound. In doing so, this Court must take cognizance of the fact that unlike the trial Court, it did not have the advantage of seeing or hearing the witnesses – OKENO VS REUBLIC 1972 E.A. 32.

I have accordingly re-evaluated the evidence to draw my own conclusions and also considered the grounds of appeal and the submissions by both the appellant and the State Counsel Mr. Omoria.

MERCY WANJIKU (PW3) is engaged in car hire business and on 8<sup>th</sup> August 2011 he hired out vehicle No. KBL 643 N a Toyota NZE to the appellant who is her neighbour and who paid Ksh. 6,000/= as charges. On the following Sunday morning, she received a call from him saying he had been involved in an accident at Huruma and so she went with him at Pangani Police Station where the vehicle was and inside the boot, she noticed oil.

SGT MWAKA (PW4) said he took photographs of the damaged vehicle at Pangani Police Station being No. KBL 643 N a Toyota NZE which was extensively damaged and also traveled to Baricho Police Station where he was shown a vandalized transformer No. 34599. He produced the photographs as Exhibit 3 and 3B.

DANIEL MWANGI (PW5) an employee of Kenya Power and Lighting Company said on 14<sup>th</sup> August 2011, he came to Baricho following reports that their transformer had been vandalized. It was at Sub-station No. 11504. He reported to the police at Baricho Police Station and was later informed that a suspect had been arrested. He said there was oil at the scene showing that oil had been siphoned from the transformer.

P.C RICHARD SEREM (PW6) of Pangani Police Station said on morning of 14<sup>th</sup> August 2011 at 5 a.m. he and P.C PHYLLIS received a report of a road accident at Huruma flats and on arriving at the scene, found vehicle No. KBL 643 N Toyota Corolla had rolled several times and landed in a ditch. The occupants were not at the scene but the officers noticed some oily substances on the seats and boot.

The vehicle was taken to Pangani Police Station and on 16<sup>th</sup> August 2011, the appellant went and claimed the vehicle was his and since there was information that the vehicle had been involved in theft of transformer oil, the appellant was arrested.

CATHERINE MURAMBI (PW7) is a Government Chemist and gazetted Government Analyst. On 26<sup>th</sup> August 2011, she received several exhibits from the General Crime Unit at Kenya Power Company being a sample transformer oil (Exhibit A), a blackish substance (Exhibit B), a khaki envelope containing oil sample (Exhibit C) and a black cloth soaked in liquid (Exhibit D). Using a process called ultra violet scopie, she concluded that the liquid (B) and Exhibit A were both transformer oil and the same oil was detected in Exhibits C and A.

BERNARD AMBAKA (PW8) of Kenya Power Company said on 14<sup>th</sup> August 2011 he received a call from their Kerugoya office that oil had been stolen from a transformer and there was no electricity in Baricho town. So he went to Baricho Police Station and recorded his statement. On 16<sup>th</sup> August 2012 (must have meant 2011) he received a call from Baricho that a vehicle No. KBL 643 L transferring transformer oil had been involved in an accident near Huruma.

INSPECTOR BARAZA (PW9) is based at CID Headquarter but attached to Kenya Power and Lighting Company and on 15<sup>th</sup> August 2011 he received information that vehicle No. KBL 643 N had been involved in theft of transformer oil and had been involved in an accident but the driver had abandoned it. He went to Pangani Police Station and saw the vehicle and on 16<sup>th</sup> August 2011 he was informed that the appellant and PW3 had gone to claim it and when he interrogated them, PW3 said she had hired out the vehicle to appellant on 8<sup>th</sup> August 2011 for a funeral but appellant could not explain why he kept it for a week and instead informed the officer that the vehicle had been hired by people who went to steal transformer oil. He also said he was carrying elianto oil. However, when the officer took samples of the oil to the Government analyst, it was confirmed that the oil was transformer oil. He later visited the scene and found that the transformer which was vandalized was No. 948562. The appellant was accordingly charged with the offences subject of this appeal.

PW1 (JOHN NJERU) is a watchman in Baricho and on the night of 13<sup>th</sup> August 2011 at about 1 a.m. He spotted a white personal vehicle near a transformer which he thought had developed mechanical problem so he went to investigate but the occupants chased him away with stones. He therefore called his supervisor Mwai. He added that the people he saw were four in number and they were carrying jerrycans which they placed in the vehicle which they drove towards Kagio.

In his un-sworn statement in defence, the appellant said on 14<sup>th</sup> August 2011 he was in a vehicle which was involved in an accident near Huruma and when he went to pick it from Pangani Police Station the following day, he was directed to return on 16<sup>th</sup> August 2011. He said the vehicle was No. KBL 643 N. However, when he went to pick it with the owner, he was arrested on the allegation that it was carrying transformer oil. He was brought to Kerugoya Police Station where he was charged. He admitted that he was the one driving the vehicle when it was involved in an accident but denied that he stole transformer oil.

I have re-evaluated the prosecution evidence and the appellant's defence as is required of me in this first appeal.

The appellant has submitted that the Sabotage charge is defective since it alleges he was using vehicle No. KBL 643 N and PW6 the Investigating officer said it was KBL 943. Neither the charge of Sabotage (Count 1) nor the one of stealing (Count 2) claim that he was using any vehicle. The only charge that mentions a vehicle is Count No. 3 of failing to report an accident and it gives the registration number as KBL 643 N and in his own defence, he has admitted that he was driving that vehicle. That ground fails.

He also states that PW2 and PW3 who were employees of Kenya Power Company only came to testify against him because they had previously done so in a previous case. The witnesses from

Kenya Power Company were infact PW5 (DANIEL MWANGI) and PW8 (BERNARD AMBAKA) and apart from giving evidence of what they saw at the scene of the incident, they both said they were familiar with the appellant because he had previously been convicted for a similar offence at Kerugoya Court in which they were witnesses. They never said they saw the appellant committing the offences subject matter of this case. Their testimonies were basically that a transformer belonging to Kenya Power Company was indeed vandalized and oil stolen. The appellant's complaint that the Court relied on uncorroborated evidence is neither here nor there. This was not a case that requires in law, corroboration of any evidence.

The evidence against the appellant was largely circumstantial. The watchman at Baricho (PW1) never identified with certainty the persons who were stealing from the transformer. Indeed in his testimony in cross-examination he said he saw someone who resembled appellant. Nonetheless, in appellant's own testimony, he admitted that he was driving vehicle No. KBL 643 N which is the vehicle that was involved in an accident at Huruma and in which oil was recovered and confirmed to be transformer oil. This accident happened in the early hours of 14<sup>th</sup> August 2011 as per the evidence of P.C SEREM (PW4). The theft of the transformer oil occurred on the night of 13<sup>th</sup> – 14<sup>th</sup> August 2011 at about 1 a.m. In order to justify a conviction on circumstantial evidence, the inculpatory facts must not only be incompatible with the innocence of the accused and be incapable of explanation upon any other reasonable hypothesis than that of his guilt but also, the said facts must exclude co-existing circumstances which may tend to weaken or destroy that inference – MUSOKE VS REPUBLIC 1958 E.A 715.

In my view, taking all those facts into account including the fact that the appellant first lied that the oil was elianto oil when infact it was transformer oil and his failure to account for the presence of that oil in the boot of the car so soon after a transformer was vandalized at Baricho could only lead to any reasonable Court to conclude that he was one of the four persons that PW1 spotted at the transformer on the day of the theft.

The appellant has also taken issue with the fact that the photographs of the vehicle which were produced as exhibits showed no wreckage. I have looked at the photographs and not only do they show a white vehicle KBL 643 N with a shattered windscreen and dented bonnet but also shows oil in the open boot. An offence is committed under Section 73 of the Traffic Act if “damage” is caused to any vehicle and it is not the law that the vehicle has to be reduced to a wreck.

The appellant also alleges that the trial magistrate only found him guilty because of his previous convictions. It is true that PW5 and PW8 who are both employees of Kenya Power Company testified that they knew the appellant because thy had testified against him previously in a similar case. But there is nothing on the record to show that that influenced the trial magistrate in his decision. The trial magistrate only referred to his previous conviction after he had convicted him for these offences and at the time of sentencing. The record shows that his defence was considered by the trial magistrate who found that his failure to explain the presence of oil in the vehicle showed he was the one who impaired the transformer. His conviction was inevitable in the circumstances and I dismiss the appeal on conviction.

With regard to sentence, the prosecutor informed the Court after conviction that appellant had just a year earlier been fined Ksh. 20,000/= for a similar offence in Kerugoya Case No. 101 of 2011. The appellant confirmed the conviction and infact said the fine was Ksh. 30,000 and not Ksh. 20,000/= . Clearly, he was not deserving of a further non-custodial sentence and taking into account the value of the transformer and oil, the sentences were well merited. I can only add that having imposed a non-custodial sentence on counts 1 and 2, it served no purpose in imposing a fine on count 3. He has already served the sentence on count 3 so that is really academic.

The up-shot of the above is that this appeal lacks merit and is dismissed in it's entirety.

**B.N. OLAO**

**JUDGE**

**5<sup>TH</sup> NOVEMBER, 2013**

5/11/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – present

Mr. Sitati State Counsel – present

Language – English/Kiswahili

COURT: Judgment delivered this 5<sup>th</sup> November 2013 in open Court.

Mr. Sitati State Counsel present

Mr. Muriithi Court clerk present

Appellant present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**5<sup>TH</sup> NOVEMBER, 2013**