Ibrahim v Republic (Criminal Appeal E051 of 2024)
[2025] KEHC 9613 (KLR) (30 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9613 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E051 OF 2024

JN ONYIEGO, J

JUNE 30, 2025

BETWEEN

SULEIMAN MUKTAR IBRAHIM .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the conviction and sentence arising from SPM's Court at Wajir in Criminal Case Number E0190 of 2024 delivered on 29th November 2024 by Hon. Xavier Baraka (R.M)

JUDGMENT

1. Muktar Ibrahim the accused herein was charged with the following offences: Count I: Tampering with telecommunication plants contrary to section 32(c) of the Kenya Information and Communication Act Chapter 411A Laws of Kenya. The particulars of the offence were that on 02.08.2024 at around 0130hrs at Halane Safaricom Mast, Wajir East Sub County, jointly with others not before court intentionally and unlawfully tampered and vandalized engine copper wires valued at Kes. 120,000/-, the property of Safaricom Kenya Limited.

2. Count II: Stealing contrary to section 268(1) as read with section 275 of the *Penal Code*. The particulars being that on 02.08.2024 at around 0130hrs at Halane Safaricom Mast, Wajir East Sub County, jointly with others not before court stole 70 litres of diesel valued at Kes. 14,000/- the property of Safaricom Kenya Limited.

3. He also faced an alternative charge of handling stolen goods contrary to section 322(1) (2) of the *Penal Code*. The particulars were that on 02.08.2024 at around 0130hrs at Halane Safaricom Mast, Wajir East Sub County, jointly with others not before court otherwise than in the course of stealing, dishonestly retained 70 litres of diesel knowing or having a reason to believe them to be stolen goods.

4. Count III: Tampering with telecommunication plants contrary to section 32(C) of the Kenya Information and Communication Act chapter 411 Laws of Kenya. The particulars being that on 02.08.2024 at around 0130hrs at Bulla Waso Safaricom Mast, Wajir East Sub County, jointly with others not before court intentionally and unlawfully tampered and vandalized engine copper wires valued at Kes. 126,000 the property of Safaricom Kenya Limited.

5. Count iv: Stealing contrary to section 268(1) as read with section 275 of the *Penal Code*. The particulars being that 02.08.2024 at around 0130hrs at Halane Safaricom Mast, Wajir East Sub County, jointly with others not before court stole 300 litres of diesel valued at Kes. 54,000/- the property of Safaricom Kenya Limited.

6. He faced an alternative charge of handling stolen goods contrary to section 322(1) (2) of the *Penal Code*. The particulars were that 02.08.2024 at around 0130hrs at Halane Safaricom Mast, Wajir East Sub County, jointly with others not before court otherwise than the course of stealing, dishonestly retained 300 litres of diesel knowing or having a reason to believe them to be stolen goods.

7. The appellant was convicted in regards to Count 1 and 2 and acquitted in reference to the alternative Count to count 2, Counts 3, 4 and the alternative Count to Count 4. He was sentenced to pay a fine of Kes. 5,000,000/- or to serve imprisonment of 10 years in respect to count I while in Count II he was sentenced to serve 1year in prison.

8. Being aggrieved, he filed an undated petition of appeal, challenging his conviction and sentence. In his appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He argued, that the prosecution's evidence was not proved beyond reasonable doubt. In addition, that the trial court failed to consider his defence without giving a cogent reason for the same. He urged the court to quash his conviction and set him at liberty by setting aside the sentence imposed.

9. The appeal was canvassed by way of written submissions.

10. The appellant in his undated submissions submitted that the trial court convicted him notwithstanding the fact that the prosecution's evidence was riddled with inconsistencies. That the credibility of the prosecution's case was brought into question noting that PW1 stated that he only saw the fence cut and destroyed but failed to link him to the said vandalism. He also faulted the trial court for failing to consider his defence in as much as the same was cogent.

11. On sentence, it was his argument that the same was not only excessive but also uncalled for considering the fact that he was a first offender. He thus urged this court to consider his appeal and allow the same.

12. the respondent filed submissions dated 01.04.2025 urging that the prosecution sufficiently proved the elements of the offences charged. That the provision of the section under which the appellant was charged requires the prosecution to prove only one or more of the limbs. From the evidence adduced before the court, the respondent contended that the same was clear in that the electric fence and fuel supply to the mast generator were tampered with. The respondent relied on the case of Chiragu & Another vs Republic [2021] KECA 342 (KLR) where the court held that:

    ...it is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; those circumstances should be of a definite tendency unerringly painting towards guilt of the accused; the circumstances taken cumulatively ,should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

13. That based on the above standard set by the superior courts, the prosecution tendered evidence that sufficiently met the standard set above. It was urged that the evidence by the prosecution reiterated that the appellant was arrested alone at the scene of crime; he was inside the mast compound and jumped out when shots were fired; jerricans full of petrol were recovered the same having been siphoned from the mast; a siphoning pipe was recovered near the mast at the 0130hrs; the appellant was unable to explain his presence at the mast at 0130hrs; the appellant's phone was recovered inside the mast; the electric fence at the mast had been tampered with yet only the appellant was arrested inside the mast compound; the mast had been vandalized and 60 litres of petrol had already been siphoned off the mast.

14. That from the above, there is no doubt that the appellant's activities at the mast amounted to vandalism, damaging, removal and tampering with telecommunication apparatus. He submitted that equally, count II of the offence was proved beyond any reasonable doubt.

15. On sentence, the respondent relied on the case of Benard Kimani Gacheru vs Republic [2002] KECA 94 KLR to urge that the sentence meted out by the trial court was not excessive as the trial court acted within the law. Additionally, that the appellant did not demonstrate that the trial court acted in excess of its powers or acted on evidence that was perverted. To that end, this court was urged to uphold the finding of the trial court by dismissing the appeal herein.

16. This is the first appellate court. As expected, I have to re-analyse and re-evaluate afresh all the evidence adduced before the lower court. I must draw my own conclusions while considering that I neither saw nor heard any of the witnesses. See the often quoted case of Okeno vs Republic [1972] EA 32, where the Court of Appeal set out the duties of a first appellate court.

17. Briefly, PW1, Issack Duale Hassan an NPR Officer No. 06656 based at Halane testified that Mohamed Salah, a watchman at the Safaricom mast informed him of 17 containers of 20 litres each that he had found at the Safaricom mast compound. That he proceeded to the scene and confirmed the same. He stated that he also saw that the fence had been cut and destroyed and therefore, he informed him to remain keen and not to hesitate informing him of any unusual occurrence.

18. That at 1.30 hrs, Salah informed him that he had seen someone inside the safaricom mast compound and so, he went to the said mast where he fired a shot thus prompting that person, the appellant herein to jump out. Further, he testified that he also saw three people armed with pangas outside the mast compound as the appellant was busy inside the mast compound. According to him, the appellant upon being overwhelmed, he stopped and raised up his hands. He was subsequently arrested and taken to Wajir police station.

19. PW2, Mohamed Salah, a security guard at Vickers Security recalled that on the material day, at 6.00 p.m. he was on duty at Halane Safaricom Mast when he came a close 17 jerricans and a pipe. That he called the Safaricom office and informed them of what he had seen. He stated that he took a photo of the same and sent to the safaricom office and his manager at Vickers.

20. It was his evidence that his manager by the name of Muktak informed him that the alleged thieves were likely to be back. On 02.08.2024, he saw 2 people outside the mast compound and therefore alerted PW1 who told him to check if someone could be inside the mast compound. That upon checking, he saw a person and therefore he relayed the same to PW1 who upon reaching the mast fired a shot which prompted the suspect (appellant) to jump off the mast. That when PW1 fired a shot again, the same rendered the appellant immobile. He stated that they arrested the appellant together with three jerricans of petrol oil which according to him had been siphoned from the mast. He stated that the electric fence had also been cut.

21. PW3, No. 77667 Sgt. Bashuna Godana testified that he was on duty when he received a distress call from the OCS at midnight. That together with his fellow officers, they rushed to the scene at Halane area where they found a person who had been arrested and tied up by security officers who were manning the area. He further stated that he was informed that the person, the appellant herein was found siphoning oil from the safaricom mast. He reiterated the other prosecution witness evidence and further stated that the mast at Bula waso was also vandalized together with three other masts. He stated that the tuk tuk found at the scene was also found at the other scenes. According to him, the appellant was found red handed at the said mast.

22. DW1, Suleiman Muktar Ibrahim the accused herein stated that he lived at Makoror and on 08.07.2024 at 1.30 a.m., he was walking past a safaricom mast nearby when he was arrested on allegations that he was a thief. That he confronted the person and after some fight, many people were drawn to the scene and the very people proceeded to beat him up. It was his evidence that the said people took his phone and shoes.

23. He recalled the NPR officer shooting in the area and that for no apparent reason he was arrested and later on arraigned in court. It was his evidence that in the morning, the said people brought 3 jerricans full of diesel with other empty containers. That in as much as his m-kopa phone was found within the safaricom compound his mistake was simply being found walking home at a wrong time. He denied committing the offence herein as he claimed that he was simply framed.

24. I have considered the grounds of appeal, submissions by both parties and the record as a whole. Issues that fall for determination are:

    i. Whether the prosecution proved its case beyond reasonable doubt.

    ii. Whether the sentence meted out was harsh in the circumstances herein.

25. 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.

26. The section creates several alternative offences and in the instant case the offence was tampering with telecommunication line by "vandalizing engine copper". From the particulars of the offence and from the evidence before the court, the appellant contended that the prosecution's evidence did not support the charge. According to the charge sheet, the alleged act of tempering with the telecommunication plant was by vandalizing engine copper wires. None of the three witnesses ever stated that the mast engine wires were vandalized.

27. The mere fact that the electric fence was cut which even the investigating officer did not confirm does not amount to tempering with the telecommunication plant. That would have amounted to malicious damage to property and not tempering with telecommunication plant. Stealing oil does not amount to

tempering. None of the acts of stealing oil or cutting the fence fits in any of the elements of the subject offence. In fact, nobody from safaricom ever gave evidence to confirm that copper connected with the mast engine was interfered or tempered with.

28. It is trite law that the burden of proof in a criminal case always lies with the prosecution. See James Ogunde Onyango V Republic [2012] KEHC 5309 (KLR). In the circumstances, prosecution did not prove the necessary ingredients of the first count to the required standards. To that extent, it is my finding that the appeal in respect of count I is merited and the conviction thereof is quashed and the sentence thereof set a side.

29. Regarding the offence of stealing (count II), it is the prosecution's case that the appellant was found within the mast compound on the material day. He also conceded to the fact that he was at the said scene but claimed that he was simply enroute to his home when he was arrested. He however conceded that his phone was recovered from within the mast compound a fact he could not explain

30. On the other hand, the evidence of PW1 and PW2 is that the appellant was arrested after he had cut and siphoned oil from the mast. It was stated by pw1 and pw2 that the appellant cut the fence wire to gain entry to the compound. PW1 was categorical that he noticed that the fence had been cut and destroyed thus prompting him to inform PW2 to remain keen and not to hesitate to inform him of any unusual occurrence.

31. Additionally, the fact that property in the name of oil was stolen from the safaricom mast was not in doubt. This is so because the appellant was arrested at the scene of the incident. This was buttressed by the fact that he was found to have filled oil in some jerricans while some, were yet to be filled with oil.

32. Clearly, the appellant's reason as to why he was at the said compound during the odd hours cumulatively considered with the presence of jerricans that were partly filled with oil points to one fact that he went there to steal the oil from the mast. Undoubtedly, the prosecution's evidence placed the appellant at the scene of the offence as he was armed with the tools for the commission of the offence and further, had also siphoned some oil from the mast.

33. From the evidence on record, there is sufficient circumstantial evidence to link the appellant with the offence of stealing. In R v. Taylor, Weaver & Donovan [1928] Cr. App. R. 21 lord Heward, CJ, stated as follows on circumstantial evidence;

> " it has been said that the evidence against applicant is circumstantial. so it is, but circumstantial evidence is very often the best. it is evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics. it is no derogation from evidence to say that is circumstantial."
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> (see also Musili Tulo v. Republic Cr. App. no. 30 of 2013).

34. It must be clear however, that, before circumstantial evidence can form the basis of a conviction, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v Republic, Cr. App No. 32 of 1990 the court of Appeal set out the conditions as follows:

> " it is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
>
> (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

see also sawe v. republic (supra) and gmi v. republic, cr. ap. no. 308 of 2011.

35. From the above analysis, I find that the learned trial magistrate was right in dismissing the appellant's defence since the prosecution's evidence was not only well corroborated but also proved that no one else but the appellant who committed the offence of stealing. As such, I find that the appellant's conviction was not only legal but also safe. For the above reasons stated count two for the offence of stealing was well proved to the required degree.

36. On sentence, the appellant was sentenced to pay a fine of Kes. 5,000,000/- or to serve imprisonment of 10 years in count I while in Count II he was sentenced to serve 1year in prison.

37. Under Section 275 of the *Penal Code*, any person convicted for the offence of stealing is liable to imprisonment for 3 years. On the other hand, a conviction under section 32(c) of the *Kenya Information and Communications Act* provides that upon conviction to a fine of not less than five million shillings or imprisonment for a term of not less than ten years or to both. Having quashed the conviction in respect of count I, the issue of harsh sentence does not apply save for count II for the offence of stealing.

38. It is trite law that sentencing is at the discretion of the trial court unless the same is illegal, excessive or arrived at after considering irrelevant factors or wrong principles. See Wanjema v Republic (1971) EA 493. In the instant case, I do not find the sentence of one-year imprisonment excessive. To that extent, the sentence is commensurate to the offence committed.

39. Having held as above, the appeal herein succeeds in respect of count one and the conviction thereof quashed and sentence thereof set a side. The conviction and sentence in respect of count two is hereby upheld.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JUNE 2025

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J. N. ONYIEGO

JUDGE