Thuku v Republic (Criminal Appeal E38 of 2023)
[2024] KEHC 3531 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3531 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E38 OF 2023

DKN MAGARE, J

MARCH 20, 2024

BETWEEN

PAUL RITHO THUKU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal form the Judgment and Decree of the Honourable P.M. Bosibori, RM. The Appellant filed a petition of Appeal on 14/6/2023 from Mukurweini Criminal No. E145 of 2020. The Appellant was charged with the offence of attempt to vandalize Energy installations and infrastructure contrary to Section 169(1) (b) of the *Energy Act* No. 1 of 2019.

2. The particulars were that on 18/3/2021, at around 10:00 pm at Thunguri village, Gakindu Location and Mukurwe-ini Sub County within Nyeri County attempted to Vandalise Energy Installation and infrastructure valued at 27,000/= under the control of the licence.

3. The surprising element was that there was no licensee named. The said post was in the land belonging to the Appellant. He had not known, the post was there. The licensee was not named.

4. The said Sections provides as follows:

> " A person who willfully: -
>
> a. .....
>
> b. Vandalizes or attempts to vandalize energy installation and infrastructure commits an offence which is deemed to be economic sabotage and shall on conviction be liable to a fine of not less than five million shillings or to a term of imprisonment of ten years or both such fine and imprisonment."

5. In a marked departure from the norm, the complaint was not any of the service providers. The power high voltage transmissions infrastructure is now under the control of KETRACO- Kenya Electricity Transmission Company Ltd. Kenya Power and Lighting co ltd deals with supply of powers to consumers on low voltage.

Evidence

6. The Appellant took plea on 21/12/2020. He was released on 100,000/=. The Appellant reported that a sum of 3000 and his phone were lost at night. It appeared that the court was extremely generous in granting a copious amount of adjournments to the prosecution.

7. The first witness, PC Jeremiah Ndirangu testified that on 18/12/2020 he reached Nyeri under assigned. The contractor was still installing power which had not gone live. The post is 3 – 4 metres from the Accused's home on his family land. The project was ongoing according to the witnesses. He could not get a contract. He conceded that the post is on the Appellant's land and the Appellant or family members have not involved before the posts were erected thereon.

8. His evidence was that the impugned post was placed 3 – 4 Metres from the. Appellant's house. This appears to be reckless endangerment to the family of the Appellant. How can a national power provider be such reckless as to endanger occupants of the Appellant's house.

9. The second witness Paul Ngumi is said to be attached to KPLC. He received a report and did some briefing He then proceeded to hearsay which I do not find useful to state herein. On cross-examination he stated the post did not fall and was not a danger to the public. He stated that the reporting was done by the brother. He did not have documents showing how the report was made.

10. On reexamination he stated that the KPLC owned the post. He contradicted PW1 who stated that the contractor was still in site.

11. PC Jared Saisi was the third witness. He was both the arresting and Investigating officer. He produced some documents. He admitted that the post was on the Appellant's land. He stated that witnesses saw the accused cutting a post. The 4th witness was the Appellant's brother. He stated that on 8/12/2010. I will omit the bulk of the evidence that consists of inadmissible evidence.

12. On cross examination the witness stated that the Appellant went to his house and he chased the Appellant away. The entire evidence was hearsay. He only called the Chief when he had the mother scream. I don't know which magic he used to kind that the Appellant was cutting down the post.

13. PW5 was Martin Thuku Mugambi. He stated that the Appellant is her uncle. This witness set the cut out. The Appellant was residing on what they thought was their family land. He stated that the offence occurred on 18/12/2020. This is contrasted with his father who stated that this was on 8/12/2022. He stated that the Appellant was cutting a post and the witnesses stopped him with other cousins. He stated that the Appellant was drunk.

14. He allegedly had a torch and a hand saw. He did not know where the torch went. This is the same person who said that he saw in darkness, arrested the Appellant *in situ*. How come he could not recover a torch, from a person who had it?

15. This was the point the Appellant should have been acquitted. There was nothing to put him on his defence. However, the court placed him on his defence despite being no evidence justifying him being put on his defence.

16. The Appellant testified that he left Embu in the morning and arrived at 10 pm. His brother called him. He stepped out. The brother alerted him that he, PW4 had felled the Appellants' trees without permission.

17. The Appellant stated that a scuffle ensued. The brother and Nephews stole money and phone from him. He was taken to Mukurweini. He remained in custody. He stated that he got home and was drunk. He was informed of the trees. He never knew of the post. The second witness was Stephen Mwangi Ngunjiri testified but his evidence is not useful.

18. The court convicted the Appellant and fined him 5,000,000 in default 10 years imprisonment.

Analysis

19. The first aspect of the case that was ignored was that the post was said to have been placed by contractors. It had not been handed over to KPLC. The post was thus not an electrical installation. Section 2 of the *Energy Act* provides as doth: -

> " electric supply line" means a wire, conductor or other means used for the purpose of conveying, transmitting, transforming or distributing electricity, together with casing, coating, covering, tube, pipe, pillar, pole or tower, post, frame, bracket or insulator enclosing, surrounding or supporting it or part of it, or an apparatus connected therewith for the purpose of conveying, transmitting, transforming or distributing electricity; "
>
> electrical installation" means an electric supply line or electrical apparatus placed in, on or over land or a building and used or intended to be used for or for purposes incidental to the conveyance, control or use of electricity supplied or intended to be supplied by a licensee, and includes additions and alterations to an electrical installation;

20. Section 178 provides for energy installations. The same provides as doth: -

> " Installation of energy infrastructure along roads, railways, etc
>
> (1) For the purpose of the production, conveyance and supply of energy, a licensee may erect, fix, install or lay any electric supply lines, oil or gas pipelines, other infrastructure or apparatus in, through, upon, under, over or across any public street, road, railway, tramway, river, canal, harbour or Government property, including forests, National parks, reserves and heritage sites, in the manner and on the conditions as provided in this Act and any other relevant law.
>
> (2) Subject to the provisions of this section, a licensee may break up any street within his area of operation, and may erect energy infrastructure along, under or over any such street, and may, from time to time, operate, repair, alter or remove any such infrastructure so erected, laid or constructed: Provided that the person having the control of such street road, railway, tramway, river, canal, harbour or Government property shall have a prior right to break up and repair such street with reasonable despatch upon payment to him of a reasonable charge by the licensee.
>
> (3) A licensee shall, not less than thirty days before exercising any power conferred upon him by this section, give notice in writing to the person concerned of the intention to do so, except in a case of emergency and in such case the licensee

shall notify the person concerned as soon as possible after the emergency has arisen.

(4) The powers conferred upon a licensee by this section shall, except in a case of emergency, be exercised only under the superintendence of the person concerned and according to a plan showing the location or route and in terms of specifications approved by the person concerned, or, if any dispute arises in respect of such plan, route or specifications, as may be approved by the licensing authority. Provided that if the said person concerned fails to exercise the powers of superintendence conferred by this section the licensee may, after giving notice, exercise those powers without such superintendence.

(5) Whenever a licensee carries out any work authorized by this section, he shall comply with the legislation, if any, of the County Government concerned and shall complete that work with reasonable despatch and reinstate the street broken up and remove any debris or rubbish occasioned thereby and shall, while the street is broken up or obstructed, cause the works to be, at all times, fenced and guarded and during the night, adequately lit.

(6) If the licensee fails or unreasonably delays in carrying out the work referred to in subsection (5), the County Government concerned may cause the work to be executed at the expense of the said licensee.

(7) A licensee shall pay to the said County Government the costs reasonably and necessarily incurred by it in executing such work. (8) Nothing in this section shall be construed as relieving a licensee of any liability in respect of any loss or damage caused by his negligence in carrying out such work or by his failure to comply with the provisions of this section.

21. It follows that for an installation to be an installation within the meaning of the *Act*, there has to be installation within the meaning of Section 178 of the *Energy Act*. If the installation was to be on private land, then the same ought to be notified and land compulsorily acquired for purposes of installation. In this matter, it was admitted that there were no discussions over the installation. The same must have thus been an illegal post placed on the Appellant's land without notice. The same was placed 3-4 metres to his house.

22. Section 179 of the *Energy Act* provides as follows: -

"Compulsory acquisition of land If the Cabinet Secretary is satisfied that the holder of a licence under this *Act*—

(a) reasonably requires land for purposes of constructing, modifying or operating any energy infrastructure or for incidental purposes; and

(b) has failed to acquire the land by agreement after making reasonable attempts to do so, the Cabinet Secretary may apply to the government agency responsible for the management of the subject land to acquire it compulsorily under the relevant written law.

23. KPLC did not produce any evidence that there were electrical installation on the Appellants land. There was no evidence that the post belongs to KPLC and it was an installation within the meaning of Section 179.

24. If the same were there, surely there must be wayleaves. It is surprising that the court did not note 2 conclusions: -

    i. The post was on the Appellants land.

    ii. It was 3-4 Metres to his house.

25. This definitely cannot be a KPLC post. They always have specific relating to wayleaves and notices to owners with prompt compensation. Given in any case, the post belonged to the contractor, its way the contractor to testify on the status of the post. If it was just trespass, this court cannot aid illegality.

26. There are no number of witnesses to prove a case. However, failing to provide handover of the post to KPLC and installation as a power supply line, hence energy installation was fatal to the case.

27. Thirdly, it is clear below peradventure that all parties agree that the Appellant was drunk. The witnesses stated that he was standing by the post. It is not possible for a drunkard to have climbed up the poll to cut parts. Why couldn't he cut the same at the base. The court is required to take judicial notice under order 60(1) of the *Evidence Act*.

28. All parties were agreed, even where they were lying that the Appellant stood on the ground. What I am seeing on the photo cannot be a cut from a person on the ground and drunk. Further, we do not know who took the photo. The purported certificate by D. Chege was not signed. The exhibit photo review MFI 2 was never produced. It does not comply with Section 106 (4) of the *Evidence Act*.

29. Finally, we do not know who cut the poll. This is because nature of the post could have been made by the contractors. These are ones with the contract for the post.

30. The evidence did not rise to the arise to vandalism or attempted vandalism. I find that the claim was brought by PW4 and 5 to hide the fact that he had stolen the trees belong to the Appellant. There was no vandalism.

31. In the circumstances, I find that the charges were trumped up maliciously by Gerald Mugambii Thuku. He calls himself the complainant and a licencee when he is neither the licencee and the post is within the Appellants home.

32. I also note sadly that the Robbery that was perpetrated in the Appellants was not followed up. In spite of the court ordering on 21/12/2020 at the Appellant be escorted to Mukurweini police station to report. The Appellant shall be at liberty more for his case to be proceed with.

33. It is not necessary to deal with sentence since the case was not proved. The Appellant should never have been placed on his defence. The remedy however, is not in this court but a civil court for malicious prosecution and land court to remove the offending post.

34. In any case a sentence for a fine of Kshs. 5,000,000 was excessive. The appropriate sum for an offence should be 6 months' imprisonment. In the case of *Andrew Abong'o Otieno v Director of Public Prosecution* [2021] eKLR, justice E K Ogola stated as doth: -

    "

    "7. Courts have always frowned on mandatory sentences that place a limitation on judicial discretion. In S vs. Toms 1990 (2) SA 802 (A) at 806(h)-807(b), the South African Court of Appeal (Corbett, CJ) held that:

    "the infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court's normal sentencing function to the level of a rubberstamp.

> The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant."

35. Sentencing is the discretion of the court. By meting out a mandatory sentence without looking at the subject matter, the background, the circumstances of the Appellant, the court fettered its discretion. I agree with the decision of my brother, Justice Rayola Olel in the case of *Katiku v Republic* (Criminal Petition E020 of 2022) [2023] KEHC 21014 (KLR) (31 July 2023) (Ruling),where he stated as doth -

> " Sentencing is a discretion of the trial court. But the court should look at the facts and the circumstances of the case in its entirely so as to arrive at appropriate sentence. The Court of Appeal in Thomas Mwambu Wenyi Vs Republic (2017) eKLR cited the decision of the Supreme Court of India in Alister Anthony Pereira Vs State of Mahareshtra at paragraph 70-71 where the court held the following on sentencing: "Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence...
>
> There has been change in jurisprudence, which was not available to the trial court and high court especial as regards mandatory minimum sentence and the applicant has the right to benefit from the same given provisions of Article 23, 27 and 50(1) of *the constitution* of Kenya"

36. In the circumstances I find that the prosecution fell far short of the required standards, having taken in hearsay evidence from the brother who was clearly malicious and wanted his brother to be locked away to continue his thieving way.

37. I will not be surprised that the Appellant will reach home and find his land sold. The court should never have believed a thief who stole from his own brother in cahoots with his sons, while framing him for nonexistent charges.

38. I am aware under Section 143 *Civil Procedure Rules* no amount of witnesses are necessary. However, the mother was said to have seen and screamed. Neighbors must have seen. None came. Only the perpetrators and the Appellant.

39. Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) provides as follows:-

> " No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact."

40. Similarly, I am equally persuaded by the reasoning of Odunga, J as he then was in *Bernard Philip Mutiso v Tabitha Mutiso* [2022] eKLR where the learned judge stated as follows:

53. In this case the only people who could have explained the circumstances under which the accident occurred were Musyoka Mutiso who was ahead of the deceased, PW2 and the Appellant. PW2 gave evidence that tended to show that the accident was caused by the negligence of the Appellant while Musyoka Mutiso was not called to testify. In those circumstances one would have expected the Appellant to testify in order to controvert the evidence of PW2 but he chose not to do so. Accordingly, I find that not only was the evidence of PW2 uncontroverted but the conduct of the Appellant invited the inference that his evidence, had he testified, would have been adverse to his case as pleaded.

41. The result is that I find that the appeal is merited and allow the same.

Determination

42. In the upshot, I make the following Orders:

a. The Appeal is allowed.

b. The Judgement of the Trial Court is set aside in its entirety.

c. The Appellant is hereby set free unless otherwise lawfully held.

d. The prosecution to follow upon the offences committed against the Appellant which were reported and are apparent from the proceedings

e. This file is closed.

DELIVERED, DATED AND SIGNED AT NYERI, VIRTUALLY ON THIS 20TH DAY OF MARCH, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Appellant present

Mr Mwakio for the state

Court Assistant - Brian