



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CRIMINAL APPEAL

NO. 8 OF 2018

BETWEEN:

HAMISI BIMBA MAMBA.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. E. G. Nderitu at SPM's Court Voi. CR. Case No. 276 of 2017 delivered on 1 December 2017)

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(Being an Appeal from the Judgment of Hon. E. G. Nderitu at SPM's Court Voi. CR. Case No. 276 of 2017 delivered on 1 December 2017)

J U D G M E N T

1. The Court has before it two appeals that arise from a single trial before the SPM's Court in Voi and a single Judgment. The Learned Trial Court found both Appellants guilty of two counts on a charge sheet comprising three counts.

2. The Appellants were charged on 12th June 2017 with three counts. The First Count was : "*Sabotage contrary to Section 343(b)*

of the Penal Code. The Particulars of the Offence was set out as :**1. ALI MWAADALU MREMA. 2. HAMISI BIMBA MAMBA:** On the 9th day of June 2017 at around 0100 hrs at Taita Village in Maungu within, Taita Taveta County, willfully and unlawfully you destroyed Kenya power tower bracing (132(kilo volts) (sic) Juja Rabai line knowing that such act will impair the supply of electricity of the residents of Coast Region. The Second Count was "*Severing with intent to steal contrary to Section 64A(b) of the Energy Act Cap 314 Laws of Kenya*". The Particulars of that offence were set out as; **1. ALI MWAADALU MREMA. 2. HAMISI BIMBA MAMBA:** On the 9th day of June 2017 at around 0100 hrs at Taita Village in Maungu within, Taita Taveta County, with intent to steal server Kenya power transmission tower bracings all valued at Ksh 100,00 under the control of Kenya power the licensee. Under the Third Count the Charge was; "*Vandalism of Electrical Apparatus Contrary to Section 64(4)(b) of the Energy Act, Cap 314 Laws of Kenya*". The Particulars of that Charge were set out as; **1. ALI MWAADALU MREMA. 2. HAMISI BIMBA MAMBA:** On the 9th day of June 2017 at around 0100 hrs at Taita Village in Maungu within, Taita Taveta County, willfully vandalised Kenya power transmission bracings which are under the control of Kenya power the licensee.

3. The Record shows that on 12th June 2017 both Accused appeared before Hon M Onkoba and the substance of the charges and every element thereof was read out and explained in a language each one understood. In relation the Count 1, the First Accused said "It is true". The Second Accused said "It is true". In response to Count 2 the First Accused said "It is true" and the Second Accused said; "It is true". In relation to Count 3 the First Accused said; "It is true" and the typed proceedings show no response from the Second Accused, however the handwritten proceedings show that he responded; "It is true". The Prosecutor (Dama Karani) applied for an adjournment on the basis that the statement of facts were not ready and the exhibits were not before Court. On the next occasion (13th June 2017) they changed their pleas to "It is not true" on each Count. The plea of not guilty was entered. Hon M. Onkoba also ordered on that date that the accused be furnished with copies of the charge sheet and witness statements. From 30th June 2017 the trial court was comprised of Hon E.G. Nderitu. On 13th July 2017, there was a further direction for statements to be provided to the Accused. On 19th July 2017 both Accused confirmed that they had "just received" the statements and a new hearing date was taken. On 13th August 2017, both Accused confirmed that they were ready to proceed.

4. This being the first appeal this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions bearing in mind that it neither saw the witness nor heard the evidence when parties were testifying to see their demeanor. See the case of **MARK OIRURI MOSE –VS- REPUBLIC [2013] e KLR Criminal Appeal No.295 of 2012** where the Court of Appeal stated: "It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that." See also the well known case of **Okeno –Vs- Republic [1972] E.A. 32** which sets out the same principle (per Judgment **In The High Court Of Kenya At Kakamega HCCRA No.145 of 2013**).

5. The First Appellant but Second Accused was granted leave to file an appeal out of time by Hon J. Kamau J on 21st February 2018 . The Second Appellant but First Accused was granted leave to appeal out of time by Hon J. Kamau J also on 21st February 2018.

6. The Appellants filed Grounds of Appeal and Amended Grounds of Appeal which are set out below:

CRIMINAL CASE NO 9 OF 2018: ALI MWADALU MREMA

GROUND OF APPEAL – 29/1/2018

- 1. I pleaded not guilty charges*
- 2. The investigating officer did a shoddy job as far as he did not visit the scene of crime.*
- 3. The accused was not caught at the scene of crime nor with the stolen exhibits.*
- 4. Your honour I am the sole bread winner of my family after my parents demise.*
- 5. Supplementary grounds of appeal to follow when and if furnished with a certified true copy of the proceeding of this case.*
- 6. In the view of circumstances of this case, the custodial sentence of 15 years is harsh, severe and manifest excessive punishment.*

7. Your honour I beg your honourable court to reduce the conviction, give option of fine slash conviction or order retrial or which ever your honourable may deem fit.

8. That in the event of my humble appeal may find merits. I would wish to be allowed to be present during the hearing of my appeal.

AMMENDED GROUNDS OF APPEAL – 17/7/2018

1. That the learned trial magistrate erred in both law and fact in convicting and sentencing me without considering that, I the appellatant was not informed by the prosecution on the charges they preffered to me as required by the law.

2. That the learned trial magistrate erred in both law and fact in convicting and sentencing me while not considering that, I the appellatant was not assigned an advocate by the state as required by the law since I am a layman in law.

3. That the learned trial magistrate erred in both law and fact in convicting and sentencing me while not considering that the burden of proof was not discharged beyond reasonable doubt.

4. That the learned trial magistrate erred in both law and fact in not considering that, I the appellatant was a first offender and hence deserved an alternative sentence.

5. That the learned trial magistrate erred in both law and fact in not considering that my defence evidence which created a reasonable doubt to the prosecution whereby the benefit ought to have been given to me.

CRIMINAL CASE NO 8 OF 2018 : HAMISI BIMBA MAMBA

GROUND OF APPEAL – 29/1/2018

1. I pleaded not guilty charges

2. The investigating officer did a shoddy job as far as he did not visit the scene of crime.

3. The accused was not caught at the scene of crime nor with the stolen exhibits.

4. Your honour I am the sole bread winner of my family after my parents demise.

5. Supplementary grounds of appeal to follow when and if furnished with a certified true copy of the proceeding of this case.

6. In the view of circumstances of this case, the custodial sentence of 15 years is harsh, severe and manifest excessive punishment.

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5. *That the learned trial magistrate erred in both law and fact in not considering that my defence evidence which created a reasonable doubt to the prosecution whereby the benefit ought to have been given to me.*

9. Both Appellants and the State have filed their respective Written Submissions as directed.

10. The Trial Court heard from 5 prosecution witnesses. PW-1 Jonathan Musinde who was also described as the Complainant. He said he was a security officer with Kenya Power and was then based at the Regional Headquarters in Mombasa. In his evidence he told the Court that there had been previous incidents of vandalism to the towers which carry the high voltage electricity cables carrying 132 kilowatts. He says that on 29th May 2017 they had received a report of stolen bracing which was reported to Maungu Police Station as OB No10/5/2107. Then on 9 June 2017 there was a report from the Patrols in Rabai that some cables were in danger of falling as some metal pillars had been unscrewed, in the Maungu area. PW-1 along with his colleagues Michael Ngure and PC Opando Fedinard joined the transmission team at Maungu to carry out a patrol on the line between Bachuma gate to Maungu. They found that in relation to three towers the metal bracings had been opened. The problem was reported to Maungu Police Patrol Base and a report was recorded. They also came to Voi Police Station CID Office and reported the problem. The transmission team were then left to carry out necessary repairs. About 3 weeks later he was contacted by Voi CID Office who said that they had arrested two suspects in possession of the bracings and they were called to confirm if these belonged to Kenya Power. The bracings that were recovered by the Police were 23 in number. PW-1 said that three towers had been vandalised/bracing opened and/or removed. The Court was shown various photographs of towers for example one at Bachuma Gate. The photo showed a tower with the bracing removed. The second photographed tower showed some bracings removed and others cut and hanging. The Court was also shown a photograph of a tower where the bracings were intact for comparison purposes. The Witness said that he was informed that the suspects were arrested at Bachuma Gate.

11. PW-2, PC Samuel Ngunjiri was attached to DCI Voi investigation duties and in June 2017 he was in Voi, he said. He was also one of the Police Officers were on duty patrol along the Mombasa Voi road. At 0100 hrs when they were in the Taita Village area their attention was caught by some suspicious activity. There was a light shining in an area where there is no habitation. Further investigation revealed that the light was from the headlight of a motorcycle. As they approached the motor cycle drove off and left behind two people who were arrested and now come before the Court as the accused/Appellants. Close by were 23 bracings. The bracings were tied in two bundles. When they were first interrogated the Accused were said to have explained that they had been engaged to remove metal from the mast and take them to Bachuma where a buyer was waiting. The bracings were to be sold for scrap. PW-3 was an engineer with the transmission department and his job was repair and maintenance. He said vandalising of towers was a problem rampant around Maungu and he had reported that four towers around Maungu had been vandalised. On 11th June 2017 he visited the area and identified the towers that had been vandalised. He explained that if tower is vandalised it becomes so unstable that it can come down and cause a national blackout and loss of life. The Photographs used were taken and introduced into evidence by PS Shem Asha. He told the Court that the photographs were taken on 9 June 2017 near Miasenyi Taita village between Bachuma Gate and Maungu along the Juja-Rabai power transmission line. That witness also identified the bracings found by the Police from their markings and further identified the towers from which they had been removed from the photographs.

12. The Defence run by both Defendants was denial. Each one said that he did not know the other. He did not know why he was arrested. He had never seen the bracings before and it was just coincidence that they were found in that area. They insisted they had been arrested at or close to their homes. The Accused persons did not call any witnesses to corroborate their version of events, more specifically their parents given their young age.

13. Trial Court found that there was absolutely no doubt that the 23 bracings in P. Exhibit 4 had been severed from the towers shown in P.Exhibit 2b, d & f and that those bracings were found in the possession of the Accused. The Learned Trial Magistrate found the Accused guilty of Count 1 and 3 but not Count 2, in other words they were found guilty of "sabotage" but not "vandalism". Equally they were found guilty of "destroying" the bracings but not vandalism. On page 11 the Judgment reads; *"Accused clearly severed Pexb 4 from the towers, having been found in possession, ready to transport them hence steal the only explanation that can be drawn is that they personally severed then or were party to their being severed. I do find count III duly proved. Having so noted, I am unable to find that the fact set out above established the offence of vandalism as charged in count II.*

The learned trial magistrate drew a distinction between severing and vandalism describing vandalism denote malice, being "*wanton acts of destruction for no useful purposes or with no intention of benefiting from the remains of the destruction.*" The Learned Trial Magistrate did not elucidate on whether in this case, the severing rendered that which was left "vandalised".

14. In his Written Submissions the First Appellant (No 8) states that the Prosecution failed to inform him of the Charges. The Record shows that the Charges were read on two separate occasions and he changed his plea from Guilty to Not Guilty. Similarly the record shows witness statements were provided. The Appellant also complains no Advocate was provided. That is the case however the Appellant was not charged with a capital offence and the provision of Advocates is at present, only mandatory in that class of cases. The First Appellant also argues that the sentence is too harsh.

15. The Respondent's Submissions filed on behalf of the State reiterate that the Charges were read on two separate occasions and that the statements were provided. On the question of sentencing, the Respondent concedes that applying the maximum sentence to a first offender is erroneous. That is in relation to the charge of sabotage. However, in relation to Count 3, the Energy Act sets out the minimum sentence (*Section 64(4)(b)*). That is 10 years. The Act does not allow for the exercise of discretion to a lower term. In relation to the maximum term of 5 years, as the two sentences are to run concurrently, the consequence of that sentence is subsumed in the longer sentence. The Learned Trial Magistrate thus contradicts herself. She first finds there is no vandalism because that is a senseless act with no benefit to the perpetrator. She then goes on to punish for exactly the offence that incorporates vandalism.

16. In the circumstances, the Appellant's have failed to demonstrate sufficient or adequate grounds to say their conviction was reached through a process that was unfair. Further, they have failed to demonstrate that the findings reached by the Trial Court could not have been reached on the evidence before it. Therefore the Appeal against conviction is dismissed.

17. The Appellants have been found guilty of sabotage. There have also been findings that amount to criminal damage within the Penal Code. The Appellants have failed to demonstrate how their sentence is excessive or harsh. However, it is manifestly unfair because it is illogical the reasoning does not accord with the decision on vandalism. In deciding an appropriate sentence, this Court also takes account of the prevalence and persistence of late night theft of metal structures in the area including the road bridge at Kariakor Voi near Shell Petrol Station. In the circumstances the maximum sentence is justified for sabotage. The sentence for Count III does not follow the reasoning of the findings. In the circumstances, the sentence of the Lower Court is therefore replaced with a single sentence of 5 years each for both counts to run concurrently.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 13th day of February 2019.

In The Presence of :

Court Assistant: Josephat Mavu

Appellant: In Person

Respondent: Ms Anyumba



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