



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Criminal Appeal 84 of 2009

BONIFACE MAOSA NYARIBARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted of stealing contrary to section 275 of the Penal Code. The particulars of the offence were that on the 23rd day of April 2008 along Kebirigo-Nyamira road in Nyamira District within Nyanza Province jointly with others not before court, he stole 8 kilometre long telephone cable belonging to Telkom Kenya valued at Kshs. 1.6 million. He was sentenced to 2 years' imprisonment. Being aggrieved by the said conviction and sentence, the appellant preferred an appeal to this court.

During the trial the prosecution called only two witnesses. PW1, Joseph Mosinya, is the complainant's officer in charge of security in South Nyanza region. He testified that on 24th November, 2008, he received a call from the OCS Nyamira who informed him that his officers had arrested two suspects along Kebirigo-Nyamira road. The suspects were in possession of telephone cables. When PW1 proceeded to Nyamira police station he found the appellant and one other person.

The other witness was Police Constable Joseph Ndung'u of Nyamira police station. He testified that on 23rd April 2008 he accompanied the OCS to Konate Chief's office where the appellant and one other person were handed over to them as well as the cable which they were alleged to have stolen. They escorted the appellant to the police station and thereafter he was charged.

When the appeal came up for hearing, Mr. Mutai, Senior State Counsel, stated that he was not opposing the appeal, and in my view rightly so. He agreed with Mr. Nyambati for the appellant that several key prosecution witnesses were not called. The OCS Nyamira who told PW1 about the arrest of the appellant did not testify. The Chief of Konate location was also not called. No witness gave any evidence as to the circumstances under which the appellant was arrested.

I agree with Mr. Nyambati and Mr. Mutai that there was no sufficient evidence to warrant a conviction of the appellant. Consequently, I allow this appeal, quash the appellant's conviction and set aside the sentence that was handed down by the trial court. The appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 8TH DAY OF MARCH, 2010.

D. MUSINGA
JUDGE.

9/3/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Mutai for the state

N/A for the Appellant

Court: Judgment delivered on 9th March 2010 in open court.

D. MUSINGA
JUDGE.