



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CRIMINAL APPEAL NO.51 OF 2016

BETWEEN

GIHOBSON OGETO OSERO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence of Chief

Magistrate's Court Homa Bay in criminal case no.1278 of 2012

dated 30/09/2016 – P. Mayova, SRM)

JUDGMENT

1. GIHOBSON OGETO OSERO was convicted on two counts of stealing contrary to **Section 275 Penal Code** and sentenced to serve a total of three years imprisonment.

He faced two counts, the 1st one being that on 13th August 2012 at **SOPHIA** estate in **HOMA BAY** town within **HOMA BAY** County he stole one **EQUITY** bank **ATM** card in the names of **EDWIN MAKORI NYAKUNDI** valued at Kshs.600/= the property of **EQUITY BANK LIMITED**.

2. The second count stated that on diverse dates between 22nd October 2012 and 1st November 2012 at **EQUITY BANK, HIOMA BAY BRANCH**, in **HOMA BAY TOWN** within **HOMA BAY** County he stole cash Kshs.410,630/= the property of **EDWIN MAKORI NYAKUNDI**.

The appellant denied the charges.

3. EDWIN MAKORI NYAKUNDI (PW1), a matatu driver, had an account NO.[Particulars withheld] at **EQUITY** bank, Homa Bay branch. As at 13/08/2012, he had deposited Kshs.16,000/=, and when he checked the balance it showed Kshs.411,265/75cts. These were earnings from his work.

4. PW1 explained to the trial court that he lived in **SOFIA** estate, alone, in a house which had been found for him by the appellant who was his cousin. The appellant was his neighbor, living just about 20 metres away. On 13/08/2012 after depositing the money in his account, and confirming the balance, PW1 went back to his house and kept his **ATM** card in his suitcase which also contained his academic certificates and other letters.

5. PW1 then had dinner and went to sleep. He had saved his PIN number in his phone.
6. On 19/11/2012, PW1 went to the bank and deposited Kshs.2000/= but when he checked his balance he realized it read Kshs.500/75 cts.
7. When he inquired from the bank manager, he was informed that several withdrawals had been made using his ATM card. The manager asked him to present his ATM card. When PW1 went to his house to collect the card, he did not find it. His house had never been broken into, and he always locked his door with a padlock. The only person who visited his house daily was the appellant.
8. On 20/11/2012, the bank allowed him to view the CCTV images and he recognized the appellant who was withdrawing money. The bank manager advised him to report the matter to police. He was also given his bank statement which showed various withdrawals. On 22/10/2012, twice on 24/10/2012, 25/10/2012 to 31/10/2012 – each time a withdrawal of Kshs.20,000/= was made.
9. On 01/12/12 there was a withdrawal of Kshs.10,000/= making total withdrawal of Kshs.411,000/=.
10. A watchman by name **TOM OSCAR ONYONYA** with G4S informed PW1 that he had seen a person wearing a helmet making frequent withdrawals. The appellant was the prime suspect as he used to go to PW1's house duly and in the month of October PW1 had travelled to his rural home and left the house keys with the appellant because the latter used to keep his clothes in his house.
11. PW1 noticed that the appellant had bought 3 cows and built a semi permanent house – the alarm bells begun to ring, more so because the appellant also had a helmet.
12. PW1 confirmed that there was another cousin (**JOHN ONDIEK**) a primary school student who used to go to his house to wash his clothes, but never lived there as he stayed with his parents. PW1 explained that the money in the bank account were proceeds from sale of his three cows and also savings from his salary.
13. On cross examination PW1 confirmed that one **LILLIAN** who was a neighbor used to visit his house, as well as one **CALVIN ODHIAMBO** (the Landlord's son).
14. PW1's wife **BIRIAH MORIASI** used to visit him over the weekends. What alarmed PW1 most is because he had never made any withdrawals from that account.
15. **TOM OGOTI OGANGA** (PW2) who works for G4S security attached to **EQUITY** bank Homa Bay at the ATM booth confirmed that between August and November 2012, he noticed a customer who would go to the ATM booth frequently while wearing a helmet. He tried to caution him not to enter the booth in a helmet but he ignored him, although there were days he went without the helmet. He noticed the customer whom he knew as **OGETU** would make several withdrawals always between 6.50 a.m. and 6.55 p.m. when he was on duty. PW2 had no suspicions about his conduct.
16. However when he learnt that Pw1's money had been stolen, he mentioned his frequent sightings of the appellant whom he knew as PW1's cousin. He told the trial court:-

“I had known the accused because he is a Kisii and I am a Kisii. The helmet was blue in colour.”

He used to come with motor cycle registration **NO. KMCK 235 J**.

17. **JOHN ALFRED ONDIEKI** (PW3) a cousin to PW1 and the appellant confirmed that he used to go to PW1's house to wash his clothes.

18. He also confirmed that the appellant frequented PW1's house and would sleep in the bedroom.

19. When he learnt about the money ATM card he could not even think what it was as he didn't know what an ATM card looked like.

20. Upon receiving the complaint **COSMAS OTIENO ABALA** (PW5) a bank official with **EQUITY BANK HOMA BAY** checked and confirmed that 21 withdrawals had been made from PW1's account and when PW1 discovered the withdrawals he advised him to report the matter to police.

21. PW6 (**PC PATRICK KIBOWEN**) of **HOMA BAY CID** carried out investigations along with **PC SOITA**. He obtained the CCTV clips from the bank – the images were not clear although they showed someone in a helmet making withdrawals.

22. This corroborated what the guard at the ATM had said and because the guard knew the person as the appellant, he was arrested. Police visited the appellant's rural home and noticed there was a newly built house and some heads of cattle which were reported to have been acquired during the period in question.

23. On being asked the source of his money for the developments, the appellant could not give a satisfactory answer. He also confirmed from witnesses that the appellant used to visit PW1's house, so a decision was made to charge him.

24. **CPL SHEM ONDIEK** (PW4) from scenes of crime support office Homa Bay took photographs of the appellant's newly built house and two cows. He also took photographs of motor cycle Registration KMCK 235 j which the appellant used to ride.

He observed that there was newly growing grass used to thatch the roof of the house, and the walls were newly smeared.

25. In his sworn defence the appellant confirmed he lived about 20 metres from his cousin **EDWIN** (PW1), but insisted that there were other people who had access to PW1's house and who could easily have got the ATM card. He named them as PW1's girlfriend, Alfred (PW5) Lillian (a neighbor) who used to go to the house to watch television frequently, Omar Jared (a water vendor) and PW1's wife.

26. He denied going to PW1's house when the latter was absent and said he too had a salary account with **EQUITY** bank at Homa Bay and he would make withdrawals from his account using the ATM. He confirmed that he owned a motor cycle but stated that his helmet was stolen in SOTIK; so he never wore a helmet in Homa Bay. He denied ever being warned by PW2 against entering the ATM booth while wearing a helmet.

27. Although he had a newly constructed house, he said the construction was done in March 2012, and bought one cow in April 2012 and another on 8th October 2012. He produced receipts to support his position.

28. The trial magistrate in his judgment noted that what was before him was a set of circumstantial evidence. He noted that one of the receipts produced by the appellant showed purchase of one red (nyekundu) cow on 9/4/12, yet the photographs taken of animals found at his home did not show a red cow.

29. The trial magistrate further observed that despite claims that the house was built in March 2012, the photographs taken in December 2012 showed a freshly built house where the rafters on the roof were still green; and it was freshly plastered.

30. The trial magistrate also noted that the images captured in the CCTV clip from the bank showed a person wearing a helmet, but the images were not very clear. However he observed that this confirmed PW2's evidence about the appellant whom he had seen making several withdrawals while wearing a helmet on his head – he noticed that the withdrawals were done on a daily basis and always at odd hours, usually early in the morning.

31. The trial magistrate considered that there was no suggestions that PW2 had a grudge against the appellant to cause him to frame him up.

32. The trial magistrate while acknowledging that the appellant held a bank account with the same bank pointed out that between 22/10/2012 – 1/11/2012 (when the withdrawals were made from PW1's account) – there was no evidence that the appellant was making any withdrawals from his account.

33.33. From this the trial magistrate concluded thus:-

“It is therefore safe to conclude that there is irresistible and compelling circumstantial evidence pointing to the fact that he was withdrawing from the account of the cousin. It was easy to pick the ATM card from the suitcase as he was a regular visitor there.

... I agree with him that the others could pick it but evidence on record points at him only.”

34. The appellant challenged the findings on grounds that there was insufficient evidence to warrant a conviction, and the trial magistrate misdirected himself by shifting the burden of proof onto the appellant.

35. He was also aggrieved by the sentence which he described as manifestly harsh and excessive.

36. The appellant canvassed his appeal by way of written submissions saying the evidence presented before the trial court was fabricated and malicious yet he never committed the offence. He pointed out that no one actually saw him stealing the ATM card or withdrawing the money from PW1's account.

37. In reference to his sudden upward surge of acquisitions, the appellant submitted that PW1 was simply propelled by envy regarding the developments he was making and decided to implicate him in the offence. He described the evidence presented at the trial as unsafe, saying PW1's evidence was marred by a lot of contradictions, inconsistencies and very doubtful; and he was merely trying to settle personal or family scores.

38. He also pointed out that whereas PW1's evidence was that the money got lost between 22/10/12 and 01/11/12, PW2 claimed the person he had seen frequently the ATM in a helmet had been doing so between August and November 2012. It was his contention that PW2 was merely being used to help PW1 settle scores, wondering how he got to know that he was related to PW1. He also questioned why PW2 did not find it prudent to report to the management that he was frequently the ATM booth while wearing a helmet.

39. The appellant suggested that it was PW1 who made the withdrawals from the account, then colluded with the bank officials to implicate him.

40. In opposing the appeal MR. OLUOCH on behalf of the state submitted that PW2's evidence was clear regarding the many instances he saw the appellant entering the booth in a helmet, and sometimes without the helmet – so he was able to see, recognize and identify him.

He pointed out that the appellant was known to PW2 prior to the offence and testified in court saying:-

“I knew him as OGETU.”

He also urged the court to consider the fact that although the CCTV clips were blurred they definitely showed a man in a helmet entering the ATM booth on the dates in question and thus confirmed what PW2 observed.

41. Counsel also submitted that the appellant had opportunity to access the ATM card as he often visited PW1's house and this was confirmed by another cousin (PW3).

He urged the court to find that the sentence was neither harsh nor excessive.

42. As rightly pointed out by the trial magistrate, this matter was purely based on circumstantial evidence.

The case of **KIPKERING arap KOSKEI (1949) 16 EACA page 135** states:-

“Such evidence is sometimes compared to a chain with its links as a rope with several strands, each link or strand must be carefully tested and if in the evidence, it does not lead to the irresistible conclusion of the accused’s guilt, the whole chain or rope must be rejected. If it passes the test proving it is as good as any direct evidence.”

Were the circumstances in this case such that any reasonable person considering the scenario would come to the conclusion that no one else **but** the appellant committed the offence?

43. The appellant named five other persons who had access to PW’1 house and who in his view could easily have accessed the ATM card.

44. PW1 indeed confirmed that the named persons used to visit his house but there is no evidence that:-

a) They visited the house in the absence of the owner (PW1)

b) They went into the bedroom in the absence of PW1

45. On the other hand PW3 confirmed that sometime when PW1 was away, the appellant visited the house and even slept in PW1’s bedroom. PW1 also confirmed that in October when he was away he left his house keys with the appellant so as to collect his laundered clothes and help then in the house.

46. There was no evidence to suggest why PW3 (who is their cousin) would frame up the appellant – infact he stated that the relationship between the appellant and PW1 had been good and he described them as friends.

I am persuaded that the appellant had opportunity to access the card.

47. There was also the question as regards who was making the withdrawals – PW2 said he saw the appellant whom he had known before and he knew was PW1’s cousin. His evidence regarding the helmeted customer who made frequent withdrawals during the period in question was supported by the CCTV clips although the images were not clear so the features of that individual could not be discerned. Indeed this witness even knew his motor cycle registration and the appellant confirmed he used to ride a motor cycle.

48. At the trial there was no suggestion presented to the court why PW2 would fabricate such evidence, and the trial magistrate noted as much.

Then there were the sudden upsurge of new developments all taking place at a hastened pace, within the same period in question. The trial magistrate indeed made detailed observation in this regard and I cannot fault his conclusion.

49. Consequently I hold and find that the inculpatory facts were indeed incompatible with the innocence of the appellant and totally incapable of any other explanation upon any reasonable hypothesis other than his guilt.

The upshot is that the conviction was safe and is upheld.

50. As regards sentence – the offence of stealing carried a maximum sentence of 3 years – appellant was sentenced to serve 6 months on count 1 and 2^{1/2} years on count 2 – the sentences ran consecutively. Indeed the trial magistrate pointed out that the reason for the sentence in count 2 was due to the sum lost. I note that PW1 had explained to the trial court that he had sold his animals, and made savings from his earnings because he wanted to buy land. Instead his trusted cousin whom he used to leave his house help

to get free access stabbed him in the back and used the very money for his own selfish improvements. I hold the view that he deserved the sentence meted out and I decline to interfere with it. The sentences were neither harsh nor excessive and the same are confirmed.

51. The appeal is dismissed.

Delivered and dated this 11th day of December, 2017 at Homa Bay

H.A. OMONDI

JUDGE