

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO.94 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. P.M. Mugure (Mrs.) - RM delivered on 29th June 2016 in Nairobi CM. CR. Case No.366 of 2012)

ISAAC MUSAU MUTUKU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The Appellant, Isaac Musau Mutuku was charged with the **offence of attempted stealing** contrary to **Section 275** as read with **Section 389** of the **Penal Code**. The particulars of the offence were that on diverse dates between 3rd and 13th March 2012, at Equity Bank Limited in Nairobi, the Appellant jointly with others not before court attempted to steal Kshs.120,000/- the property of Equity Bank Limited. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve ten (10) months imprisonment. He was aggrieved by his conviction and sentence. He has appealed to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of insufficient and uncorroborated evidence. He faulted the trial magistrate for failing to properly weigh the evidence adduced by the prosecution witnesses, which, in his view, did not establish all the crucial ingredients of the offence. He was of the view that the trial magistrate erred in law by relying on her own conjectures to convict him. He faulted the trial magistrate for failing to take into consideration the fact that the prosecution had failed to call crucial prosecution witnesses who would have exonerated the Appellant from the crime. He was aggrieved that he was sentenced to serve a custodial sentence that was manifestly harsh and excessive.

During the hearing of the appeal, Mr. Kang'ahi for the Appellant amplified these grounds of appeal. He told the court that the case against the Appellant depended on ATM deposit slips which Equity Bank (the Bank) denied. He stated that the Appellant, being a customer of the Bank, deposited two sums of Kshs.60,000/- on 3rd March 2012 through the ATM. He was issued with two deposit slips which the Bank did not challenge its authenticity. The deposit slips were produced into evidence. The witnesses who were called by the prosecution established that indeed some deposits had been made through the particular ATM. This discounted the Bank's contention that the ATM had malfunctioned on the material day. Mr. Kang'ahi submitted that all the evidence adduced by the prosecution witnesses established that indeed the ATM depository worked on the material day and therefore the decision by the Bank to charge the Appellant for allegedly attempting to steal from it had no basis in law.

Learned counsel urged that the prosecution had failed to establish to the required standard of proof that indeed the Appellant had made an attempt to steal the money. He accused the prosecution for failing to call crucial witnesses, particularly the two ATM officers who were mentioned by the witnesses who testified in the court. He submitted that this failure should be construed in favour of the Appellant because, clearly, these two witnesses would have adduced evidence which would have favoured the Appellant. He explained that there were material discrepancies in the evidence that was adduced by the prosecution witnesses which materially affected the veracity of the prosecution's case against the

Appellant. He urged the court to allow the appeal.

Ms. Sigei for the State opposed the appeal. She submitted that the prosecution had established that indeed the Appellant had attempted to steal the said sum of Kshs.120,000/- by purporting to and making a presentation to the Bank that he had deposited the said sum through the ATM depository. She explained that the two ATM receipts that the Appellant relied on to support his case were not reflected in the journal of ATM transactions of the particular day. She submitted that on the day the Appellant claims he made the deposit, there was a systems failure and therefore the ATM could not accept any deposit. She stated that the said sum of Kshs.120,000/- which the Appellant alleged to have deposited in his account was not reflected in his Bank statement. This was clearly a case where the Appellant had made an attempt to steal the said sum from the Bank in collusion with the others. The prosecution had established its case on the charge brought against the Appellant to the required standard of proof beyond any reasonable doubt.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced by the prosecution witnesses so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court must bear in mind the fact that it neither saw nor heard the witnesses as they testified and therefore will defer to the trial court in regard to the question of the demeanour of witnesses (see **Njoroge –Vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case against the Appellant to the required standard of proof beyond any reasonable doubt.

The basis of the prosecution's case was that the Appellant used two ATM deposit slips to claim money from the Bank yet in actual fact, he never made such deposit. It was the prosecution's case that on 3rd March 2012, when the ATM had malfunctioned, the Appellant obtained two deposit slips from the particular ATM claiming that he had deposited two equal sums of Kshs.60,000/-. Although the Appellant had the ATM deposit slips, because of the malfunction, the transaction were not reflected in his account. In any event, the Appellant had never made transactions involved in such sums through his account. PW1 Francis Wanyoike Njuguna, the Operations Manager of the Bank at its Harambee Avenue Branch testified that on 13th March 2012, the Appellant went to the Bank and complained that he could not access the sum of Kshs.120,000/- which he had deposited in his account via the ATM depository. PW1 investigated the complaint. He became suspicious. He informed PW2 Joy Gitonga, a Security Officer employed by the Bank. She called in PW3 Cpl Nehemiah Ndirangu, a police officer attached to the Banking Fraud Investigation Unit (BFIU). The investigations revealed that the Appellant had obtained the particular ATM deposit receipts from a malfunctioned ATM. PW4 Rachel Macharia, the custodian of the ATM testified that on the particular day the Appellant alleged that he made the deposit through the ATM, there were other transactions which were successful and were reflected in the accounts. The particular transactions that the Appellant claimed he made were not reflected in the account.

When the Appellant was put to his defence, he reiterated that he had made the deposits in the particular ATM. He was emphatic that the ATM worked at the time and that the transactions were genuine. He denied the allegation that he had attempted to withdraw money which he had not deposited.

Upon re-evaluation of the evidence adduced and the submission made on this appeal, it was clear to the court that the prosecution had indeed established, to the required standard of proof beyond any reasonable doubt, that the Appellant attempted to steal the said sum of Kshs.120,000/- from the Bank. It was evident from the testimony of PW1 that the ATM depository had malfunctioned on the material day that the Appellant claims that he made the particular deposits. It was clear that the Appellant obtained the two ATM deposit slips from the malfunctioned ATM and later claimed that he had made the actual deposits. If indeed the Appellant made such deposits, the same were not reflected in his account. PW1's explanation that when the ATM malfunctions the slot that money is deposited automatically shuts. This court was satisfied that it would not be possible for money to be deposited when there was a system failure. In any event, if such money was deposited, then PW4, as the officer in-charge of the ATM, would have retrieved the money from the ATM and later updated the Appellant's account.

As such, this court is persuaded beyond any reasonable doubt that the Appellant made no such deposits through the particular ATM. If indeed the Appellant made such deposits, nothing would have been easier

than for the Appellant to produce his previous bank statements to show that he had the capacity to make deposits of such sums of money. As it were, it was clear to the court that the Appellant, in collusion with others, learnt of the malfunction of the particular ATM, purported to get deposit slips which reflected that he had deposited the said sums of money (when in actual fact he had not) and then later purport to withdraw the same from the Bank.

The upshot of the above reasons is that the Appellant's appeal against conviction lacks merit. It is hereby dismissed. Although the Appellant abandoned his appeal on sentence, on this court's re-evaluation of the sentence, it is of the view that the sentence was harsh and excessive in the circumstances. The Appellant is a first offender. He did not steal the money i.e. the attempt to steal the money failed. He has been in prison for a period of three (3) months. This court is of the view that taking into consideration the value of that which he attempted to steal, the period that he has been in prison is sufficient punishment. His sentence is commuted to the period served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2016

L. KIMARU

JUDGE