



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO 11 OF 2012**

**Republic.....Appellant**

**Vs**

**Patrick Muriithi.....Respondent**

*(Appeal against Judgement in CR Case No. 662 of 2011, R. vs Patrick Muriithi at Karatina, delivered H. Onkwani, R.M. delivered on 13.1.2012).*

**JUDGEMENT**

This is an appeal by the state being dissatisfied by the judgement rendered in CR Case No. 662 of 2011 whereby the learned magistrate acquitted the Respondent of two counts of stealing contrary to section 275 of the Penal Code.[\[1\]](#)

The particulars of the first count were that on the 26<sup>th</sup> day of July 2011, at Karatina Township in Mathira East District of Nyeri County within central province, he stole a Co-operative Bank Visa Card No. 4407830028053370 valued at Ksh. 500/= the property of Peter Mwangi Macharia.

The particulars of the second count were that on diverse dates between 26<sup>th</sup> July and 31<sup>st</sup> July 2011, at Co-operative Bank Karatina Branch in Mathira East District of Nyeri County, stole Ksh. 80,000/= the property of Peter Mwangi Macharia.

The complainants evidence was that he discovered his ATM card was missing on 27.7.2011, he reported to the Bank and upon being given a statement he noted Ksh. 80,000/= had been withdrawn from the account. He was shown a CCTV footage and there was a girl withdrawing and the appellant was keeping the money and that it was the appellant who was entering the pin number but the girl was taking the money. He claimed he called the appellant who had the ATM hidden in the ceiling. Upon cross-examination he admitted he had previously sent another person to withdraw salaries. Also on cross-examination he gave the date as 26<sup>th</sup> as opposed to 27<sup>th</sup> mentioned earlier. PW1 was recalled again to produce a mini statement reflecting the withdrawals of Ksh. 20,000/= each made on 26.7. 11, 27.7.11, 30.11.11 and 31.7.11.

PW2 a bar maid at Karatina stated that 26.7.2011, the Respondent asked to sleep with her, she asked to be paid and the respondent asked her if she knew how to withdraw money from an ATM, that they went together to the ATM, that he gave her the PIN and she entered and he took the cash. He also called her on 28<sup>th</sup> in the evening and they went to the ATM and they withdrew Ksh. 20,000/=.

PW3 produced the CCTV footage in court showing the image of a lady in white and a man in a grey suit. PW4 the police officer testified that the appellant was positively identified by the complainant from the

CCTV footage and he himself was also able to identify him since he knew him. He also stated that he recovered the ATM card from the appellant.

The Respondent gave unsworn evidence and stated that on 21.7.2011 he had a case in court and was committed to community service. On 26.7.2011 he reported to the probation office. That on 26.7.2011 he was at the probation office. He also stated that on 27.7.2011 he reported to work at 2pm

After evaluating the evidence the learned Magistrate pointed several inconsistencies in the prosecution evidence. He correctly noted that PW3 and PW4 stated that the complainant reported the loss of the ATM on 3.8.2011 yet the complainant testified that he reported on 26.7.2011. The learned magistrate who had the benefit of seeing and hearing the witness testify observed in his judgement that the CCTV footage showed a lady and a man withdrawing the money but their faces could not be properly identified.

The magistrate noted that the Respondent produced records from the community service officer showing that he was serving probation on the days in question and further noted that the mini statement relied upon by PW1 did not show the time the alleged withdrawals were made and only showed dates. The court also noted that none of the complainant's employees was called to confirm that the ATM was recovered from the Respondent. In any event the complainant stated that the ATM was recovered from the ceiling while the police stated he recovered it from the Respondent.

I reiterate that the trial magistrate had the benefit of seeing the witnesses testify and examining their demeanour and as stated above he saw the CCTV footage and he clearly stated that the images were not clear and that it was not possible to identify the faces of the persons in the footage. I find no reason at all to fault his analysis of the CCTV footage.

Regarding the contradictions and or inconsistencies on the dates and where the ATM card was recovered guidance can be obtained from the decision by the Uganda Court of Appeal in *Twehangane Alfred vs Uganda*<sup>[2]</sup> where it was held that it is not every contradiction that warrants rejection of evidence. As the court put it:-

*“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”*

Thus, it is settled law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.<sup>[3]</sup> The question to be addressed is whether the above contradictions are grave and point to deliberate untruthfulness or whether they affect the substance of the charge.

The complainant stated that he lost the ATM card on 26.7.2011 and reported to the bank the same day. The Bank official and the police stated that he reported on 3.8.2011. By implication the ATM withdrawal of 26<sup>th</sup> July 2011 was made before the card was lost! Interestingly the police stated that the Respondent was arrested on 26.7.2011. The charge sheet shows that the Respondent was arrested on 5<sup>th</sup> August 2011. Evidently, there are key contradictions on the dates. The complainant stated that the ATM card was recovered in the ceiling. The police officer stated he recovered it from the Respondent.

In view of the above contradictions and inconsistencies in the prosecution evidence, the magistrate was persuaded that the prosecution did not prove its case to the required standard and found it unsafe to form the basis of a conviction. I reiterate that unlike the appellate court, the trial magistrate had the benefit of seeing and hearing all these witnesses testify and was in my view better placed to make conclusions as to the credibility of their evidence or lack of it.

Contradiction has judicially been defined to mean lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has

stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.[4]

Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial.[5]It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. Its only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from.[6]

In my view, the above contradictions are substantial and create serious doubts in the mind of the court. The court is obliged to consciously remind itself to be careful while considering evidence with such glaring contradictions. In addition the court should seek to safeguard or reduce the risk of a wrong finding based on suspect evidence.[7]

The trial court should weigh all the evidence and consider the merits and demerits, having done so, should decide whether it is satisfied that the truth has been told despite shortcomings or defects or contradictions in the evidence. The principle in criminal proceedings is that the prosecution must prove its case beyond a reasonable doubt and that a mere preponderance of probabilities is not enough.[8] It follows that the onus rests on the state to prove every element of the crime alleged, including the fact the Respondent is the perpetrator.[9]

The learned magistrate considered and accepted the version tendered by the Respondent, that is, he was arrested and committed to community service and records were produced to support this. The magistrate correctly observed that the mini statements did not show the time the alleged withdrawals were made, possibly to coincide with the times the Respondent was not serving the probation. This left a gap in the prosecution case and it was not for the Respondent to fill in this gap.

The learned magistrate believed the version tendered by the Respondent in his defence. I find no reason to doubt it either. In order to be acquitted, the version of the Respondent has to be reasonably possibly true. [10] Nugent J in ***S v Van der Mevden***[11] said that:-

*"... In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true....."*

It is also trite law that an accused person should only be convicted on the strength of the prosecution case and not on the weakness of his defence.[12] Having casted doubts on the evidence of the complainant, the police and the bank official on account of the inconsistencies and or contradictions cited here above, what remains on record is the evidence of PW2 the bar maid. This is a lady who allegedly met the Respondent for the first time, he allegedly requested for sex and she agreed at a fee, they allegedly went to withdraw the money together and spend the night together. The first such encounter was 26.7.2011 and a second such encounter on 27.7.2011. Admittedly, the witness exposed her character and a court of law cannot ignore it as it assess the value and reliability of her testimony. The character, credibility and truthfulness of this witness comes into sharp focus and for the court to appreciate it, it must be assessed with the background of her character in mind together with the rest of the evidence tendered by the other witnesses. As pointed out above, the magistrate viewed the CCTV clips and was clear that the images were unclear and the contradictions cited above. In my view, the evidence of PW3 cannot be viewed in isolation and on account of the credibility issues raised herein, it is totally unsafe for such evidence to form the basis of a conviction.

In my view, whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt. The existence

of the principle of proof beyond reasonable doubt is unchallenged in the common law world. In the English common law, it was elegantly affirmed by the House of Lords in the celebrated judgement of **Viscount Sankay** in *D.P.P vs Woolmington*.

In *Uganda vs. Sebyala & Others*,<sup>[13]</sup> the learned Judge citing relevant precedents had this to say:-

*“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts”*

The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt.<sup>[14]</sup>

Having considered the circumstances of this case, the prosecution evidence and the defence offered by the Respondent, I am persuaded that the acquittal was justifiable and that this was a case where the Respondent was properly given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right.

Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.<sup>[15]</sup> A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.<sup>[16]</sup>

A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

In the present case and after carefully considering the defence and prosecution evidence, I find that there were reasonable basis for creating reasonable doubts as to the guilty of the Respondent. The upshot is that this appeal fails. I hereby dismiss the appeal by the state and uphold the decision of the learned magistrate.

Right of appeal 14 days

Signed, Delivered and Dated at Nyeri this 12<sup>th</sup> day of October 2016

**John M. Mativo**

**Judge**

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<sup>[1]</sup> Cap 63, Laws of Kenya

<sup>[2]</sup> *Crim. App. No 139 of 2001, [2003] UGCA, 6*

<sup>[3]</sup> See *Uganda vs Rutaro* {1976} HCB; *Uganda vs George W. Yiga* {1979} HCB 217 & *UGANDA VS*

[4] See the Court of Appeal of Nigeria in the case of David Ojeabuo vs Federal Republic of Nigeria, {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA.

[5] See Osetola vs State {2012} 17 NWLR (Pt1329) 251

[6] See Theophilus vs State {1996} 1 nwlr (Pt.423) 139

[7] Schwikkard and Van der Merwe, **Principles of Evidence**. 3<sup>rd</sup> ed 2005.

[8] See S v Shackell [2001 \(4\) SA 1](#) (SCA)

[9] See Schwikkard and Van der Merwe: Principles of Evidence (3<sup>rd</sup> ed) at paragraph 31.3.1.

[10] S v Van der Mevden [1999 \(1\) SACR 447](#) W)

[11] Ibid

[12] **Sekitoleko vs. Uganda {1967} EA 531**

[13]{1969} EA 204

[14]Ricky Gandavs The State, {2012}ZAFSHC 59, Free State High Court, Bloemfontein

[15]Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary

[16] The Supreme Court of Cananda in R vsLifchus {1997}3 SCR 320