

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 30 OF 2014

OKOTH EMMANUEL AWUONDAH.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

J U D G M E N T

The appellant was charged with the count of conspiracy to defraud contrary to section 317 of the Penal Code. The particulars were that on or before the 8th day of November 2012 at unknown place within the Republic of Kenya jointly with others not before court conspired to defraud Commercial Bank of Africa Limited Kshs. 1,400,400/= the property of the said Commercial Bank of Africa Limited.

The second count was stealing contrary to section 275 of the Penal Code. The particulars were that on the 8th day of November 2012 at Commercial Bank of Africa Limited, Kisumu Branch in Kisumu Town, Kisumu District within Nyanza province jointly with others not before court stole Kshs. 1,400, 400/= the property of Commercial Bank of Africa Limited.

The applicant was acquitted in the first count and convicted on the 2nd and sentenced to 8 months imprisonment. He has filed this appeal citing six ground as per the amended petition of appeal dated 17-7-2014.

The brief facts are that on the material day, the appellant went to Commercial Bank of Africa at Kisumu to undertake some transaction. He decided to withdraw the sum of Kshs. 1,200,000/= from Account Number 6781990019. The bank employee PW1 became suspicious as the sum was large and she sought authority from PW2 and PW5 and further she was only allowed to transact a figure upto Kshs. 500,000/=.

PW2 and PW5 being equally suspicious inquired internally and were convinced that the transaction was fraudulent. Safari Park where the alleged amount was transferred from denied having paid any amount into that account. The said witness called PW6 who came with other police officers and arrested the appellant. After investigations he was charged with the said offence. During his defence however he denied that he had defrauded anybody.

At the hearing of the appeal the state conceded to the same on one ground only, namely that the charge of conspiracy was not proved by the prosecution and that had the trial court been keen it would have noticed this. The said ground is premised under ground 2 of the petition.

I have carefully perused the proceedings as well as the judgment. There is no doubt that the alleged co-conspirators were not brought to testify or charged with the appellant. In a charge of conspiracy there ought to be another person or more. The accused alone cannot conspire.

Equally, from the evidence on record, I do not find anybody complaining about the sum of Kshs. 1,400, 400/= in the appellant's account. Safari Park for example never complained that the money belonged to it. Neither did the bank establish whether there was any customer who complained.

For the above reasons alone and without going into the merits of the other grounds raised, this appeal ought to succeed. The same is allowed. The appellant is freed unless lawfully held.

Dated, signed and delivered at Kisumu this 31st day of July, 2014.

**H.K.
JUDGE**

CHEMITEI