



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

**Criminal Appeal No. 48 of 2010**

**FREDRICK OWUOR AGENGA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**(Being an Appeal from the Original conviction and sentence of the Senior Resident Magistrate's Court at HomaBay,**

**Hon. Ong'ondo J. in Homabay SRMCR Case No. 1206 of 2009 dated 9<sup>th</sup> day of February, 2010)**

The appellant, **Fredrick Owuor Agenga** was charged with stealing contrary to section 275 of the **Penal Code**. He faced three other counts. On the first count he is said to have stolen an ATM card for account number 0760192355978 for Equity Bank belonging to **Philister Ajwang Ouma**. He subsequently used the stolen card to effect three withdrawals for various amounts on diverse dates in the months of July 2009. He was tried for the offence, convicted and sentenced by the Resident Magistrate's Court, Homa Bay to serve two years imprisonment for each of the four counts. The sentences were to run consecutively. He was dissatisfied with the judgment hence the present appeal.

In his undated petition of appeal filed on 1<sup>st</sup> March 2010, the appellant has stated that he was arrested on 13<sup>th</sup> August, 2009 and arraigned in court on 17<sup>th</sup> August 2009, hence being held beyond the mandatory 24 hours. He has faulted the prosecution evidence stating that the prosecution presented CCTV footage which did not conclusively identify him. He states that the pictures showed more than one person.

Briefly the facts of the case were as follows. The appellant visited the complainant on 1<sup>st</sup> July 2009 and stayed in her house for 3 days. It is said that the complainant was sick. She discovered that her ATM card was missing and on rushing to her bank, discovered that some withdrawals had been made from her account. She reported to the police. The police accessed the CCTV recording in the course of the investigation and it was from that footage that the prosecution identified the appellant and prosecuted him successfully. The complainant testified as PW1 and narrated that the appellant who was known to her having met him in church stayed in her house for the three days during which her ATM card went missing. She identified him in the CCTV footage.

The investigating officer one CPL **Joash Wawire** testified as PW2. His testimony was that the description of the appellant as seen in the CCTV footage matched that given by the complainant. The photographs from the footage were produced as exhibits. The trial court put the appellant on his defence.

The appellant gave an unsworn statement in his defence. He denied visiting the complainant's home at all. He stated that on the material dates, he was at the St. John's Seminary at Rakwaro where he participated in the Diocesan Music Festival between 4<sup>th</sup> and 11<sup>th</sup> July 2009. He returned to Mbita on 11<sup>th</sup> July, 2009. He stated that he was a choir master at the Utajo St. Stephen's Catholic Church.

The appeal came up for hearing before me on 31<sup>st</sup> October 2011. In prosecuting his appeal, the appellant introduced a new ground of appeal raising an alibi that on the material dates he was at the St. John Rakwaro minor Seminary from 4<sup>th</sup> July to 10<sup>th</sup> July, 2009 and that he had produced a certificate to that effect although the certificate was erroneously dated 4<sup>th</sup> June to 10<sup>th</sup> June 2009. He also submitted that he was wrongly identified. The appellant further made submissions to the effect that he had been wrongly detained for over 24 hours.

The appeal was opposed by the state through learned counsel, **Mr. Mutai**. He submitted that the appellant was convicted on sound evidence. He submitted that the complainant identified the appellant from the CCTV footage. She was able to recognize him in the picture. On the prolonged detention of the appellant beyond the mandatory period counsel submitted that the issue was dealt with by the trial court which satisfied itself that the appellant was arrested on a Friday and arraigned in court on a Monday.

I have subjected the evidence in the trial court to a fresh evaluation as is required of me. See **Pandya –vs- Republic (1957) E. A 336 and Kariuki Karanja –vs- Republic (1986) KLR 190**.

From the appellant's petition of appeal and submissions, the issues for my determination are whether the prosecution did indeed prove its case beyond reasonable doubt and whether the appellant was held beyond constitutionally mandated period.

The prosecution's case was that the appellant stole from the complainant her ATM card which he used to withdraw money from her account. I have carefully considered the testimony of the complainant who testified as PW1. It is cogent and believable. She was able to recognize the person in the CCTV footage as the one who had spent three days in her house. The appellant's complaint that his was a case of mistaken identity is not convincing at all and I reject it.

In his defence, the appellant gave an unsworn statement in which he attempted to demonstrate that he was away at Rakwaro St. John's Seminary during the time he was accused to have stolen. He produced a certificate to back his claim. On examining the certificate the trial court noted that the dates on the certificate did not match those given by the appellant. I have also examined the certificate. It shows that the event took place between 4<sup>th</sup> and 10<sup>th</sup> June 2009 and not July as stated by the appellant. I therefore find, as the trial court did, that the testimony of the appellant was not truthful. I dismiss the suggestions of an alibi as the same was displaced by the prosecution evidence.

On the issue of mistaken identity, I have examined the record. The appellant was said to have been in the complainant's house for 3 days. The complainant knew him. When she saw the CCTV footage, she recognized him in the picture. It was not therefore a case of identification but rather recognition. I find that the ground of appeal cannot stand.

Finally, the appellant has raised the issue of violation of his rights by being held beyond the stipulated period. The trial court dealt with this issue and found that indeed the appellant was arrested on 14<sup>th</sup> and produced in court on 17<sup>th</sup> August 2009. The court noted that the 14<sup>th</sup> was a Friday and that the 17<sup>th</sup> was a Monday. I therefore find that the mandatory period was not violated.

On sentence, I note that the trial court sentenced the appellant to serve 2 years imprisonment on each count. The sentences were to run consecutively. My perusal of the record shows that in imposing sentence, the trial court relied on the information contained in the probation officer's report which was prejudicial to the appellant. The court in passing sentence stated that the accused "*took advantage of the emotional weakness of a widow recovering from the loss of her husband makes the accused's act dangerous and heinous, which calls for condemnation*".

I find that the trial court in exercising its discretion in sentencing took into account extraneous matters not raised in the trial thereby prejudicing the appellant. I correct this by setting aside the order that the sentences run consecutively and substituting therefor the order that the sentences run concurrently. Considering that the appellant has already served a substantial part of the sentence, I reduce the sentence to the period already served.

The appellant is to be set free forthwith unless otherwise lawfully held.

**Judgment dated, signed and delivered at Kisii this 25<sup>th</sup> day of September, 2012.**

**R. LAGAT-KORIR**  
**JUDGE**

*In the presence of:*

Fredrick Owuor Agenga : Appellant (present/absent)

..... : Counsel for the respondent (present/absent)

..... : Court clerk

**R. LAGAT-KORIR**  
**JUDGE**