



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Criminal Appeal 262 of 2010**

**HENRY OSIEMA OBAIGWA.....APPELLANT  
VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 1331 of 2007 in the Chief Magistrate's Court at Nairobi – Mr.C.W Githua (SPM) on 20/04/2010)*

**JUDGMENT**

**Henry Osiema Obaigwa**, was tried and convicted of stealing contrary to **Section 275** of the **Penal Code**. The brief facts in the first count are that, on or before the 27<sup>th</sup> April 2007 at Kahawa Barracks in Nairobi within Nairobi Area, he stole a Barclay card number 48740805044782 the property of m/s Barclays Bank of Kenya Ltd. In counts two to twelve it was alleged that on diverse dates between 27<sup>th</sup> April 2007 and 28<sup>th</sup> May 2007, at various branches of Barclays Bank of Kenya he stole a total sum of Kshs.830,000/= the property of Barclays Bank Ltd.

Upon conviction the appellant was sentenced to serve 2 years imprisonment on each of the twelve counts to run concurrently.

The appellant being dissatisfied with the conviction and sentence filed an appeal in which he advanced several grounds. I have compressed the grounds as hereunder:

- 1) *That the appellant was convicted purely on the basis of circumstantial evidence which evidence was not only insufficient but also could not sustain the conviction.*
- 2) *That the trial magistrate casually dismissed the appellant's defence to count II and the other counts.*
- 3) *That the conviction was against the weight of evidence and based on presumptions.*

The appellant filed written submissions to fortify his grounds. In the submissions he stated that the evidence of the complainant was at variance with the charge sheet. I have examined the court record and noted some material inconsistencies. The dates of ATM withdrawals indicated on the charge sheet for counts II, IV, XI are different from the dates on the court record given by PW1 in evidence and in the premise agree with the appellant that PW1's evidence in this instance is at variance with the charge sheet.

He also submitted that there was no indication that the charge sheet referred to ATM withdrawals from Barclays branches in Nakuru, Nkurumah and Westlands though PW1 adduced evidence in respect to the

same. The court record bears this out and I concur with the appellant on this. PW1 also testified that the appellant withdrew Kshs. 30,000 from the Machakos Barclays branch. The charge specifies that the appellant withdrew Kshs. 60,000. This is clearly a manifest inconsistency on the court record sufficient to create doubt on the courts mind that the prosecution ought to have taken notice of.

I observe that the result of this is that though the total amount of money alleged to have been withdrawn from PW1's account as per count II to Count XI was Kshs. 830, 000/=, the evidence on the court record indicates that the amount alleged to have been unlawfully withdrawn totals to Kshs. 770,000/=.

Further on evidence, the appellant submits that he was convicted purely on the basis of circumstantial evidence which evidence was not only insufficient but also could not sustain the conviction.

Learned state counsel Miss Maina responding on behalf of the respondent opposed the appeal. She submitted that the prosecution evidence was cogent and that the trial magistrate was right in finding that the prosecution had proved its case against the appellant beyond reasonable doubt. The trial magistrate made the following observation:-

***“For circumstantial evidence to sustain a conviction, it must point directly to the guilt of the accused person as charged leaving no room for any other possible explanation. It must be incompatible with accused's innocence. In this case the accused used to share the house with PW1 at the time. From PW1's and PW2's evidence the said house was not broken into during that period.”***

PW1 on discovering that his ATM card was missing on 26<sup>th</sup> May 2007 asked the appellant who reacted by leaving the house and not returning that evening. He reported the loss to Barclays Bank, Haileselassie Avenue, on 28<sup>th</sup> May 2007 and not 29<sup>th</sup> May 2007 as submitted by the appellant, whereupon he obtained a statement showing transactions done in his account between 19<sup>th</sup> April 2007 and 18<sup>th</sup> June 2007. However, having obtained these statements on 28<sup>th</sup> May 2007, I am unable to reconcile this date with the period for which they were obtained as it is clear from the record that, the bank could not have given him statements that were way beyond the period sought, that is up to 18<sup>th</sup> June 2007.

PW1 accompanied by PW2 on 5<sup>th</sup> June 2007 saw the appellant's image as captured by CCTV cameras at the Eastleigh branch as he withdrew money from the ATM on 18<sup>th</sup> May 2007 way before he had discovered the anomaly on 26<sup>th</sup> May 2007. He positively identified the appellant. PW1 and PW2 recognized the the appellant's image, his facial image and clothes he had worn as being familiar. The appellant testified of having been given the ATM card and PIN number by PW1 on 18<sup>th</sup> May 2007 to withdraw Kshs.20, 000 which he had requested. He admitted having made the said withdrawal. However, PW1 denied having authorized this transaction or any other on his account. The trial magistrate found PW1 truthful, straight forward and reliable on this score. The appellant submitted that;

***“For circumstantial evidence to sustain a conviction, it must point directly to the guilt of the accused person as charged leaving no room for any other possible explanation”***

In the absence of any other plausible explanation, I find no reason to disagree with the trial magistrate's finding on this as the circumstances directly point to the improper conduct of the appellant. However, PW3 who produced the CCTV images in court as exhibits testified that, after copies of the CCTV footages are printed and identification of the suspect by the complainant has taken place, the system is programmed to delete the footages after a month. He however identified the apparel worn by the appellant and the bag he carried on the material day in court as those that he saw on the footage. PW4 who investigated the case contradicted himself when being cross examined. When giving evidence in chief he states as follows:-

***“He gave me copies of footages from CCTV installed at their Easteigh branch showing and making withdrawal from the bank's ATM”***

However, in cross examination he states as follows:-

***“I was not able to view the footage of CCTV myself”***

This is indeed a material contradiction on the part of PW4 who was expected to conduct a thorough investigation that would aid the trial court in arriving at water tight conclusion in determining this case. The character of this investigation was wanting and way below expectation for an offence of such magnitude leaving significant loose ends.

Finally, that the trial magistrate casually dismissed the appellant’s defence to count II and the other counts is not entirely true. The court record indicates that the appellant did admit to withdrawing Kshs. 20,000 on 18<sup>th</sup> May 2007 from the Barclay’s bank ATM at Eastleigh Branch. The trial magistrate however took cognisance of PW1’s demeanour and his testimony to the effect that he had not authorized any withdrawal from his account. I however agree with the appellant on the total sum of money that can be withdrawn in a day PW1 testified that the limit that can be withdrawn in a day is Kshs. 30,000. The trial magistrate indeed convicted the appellant for an offence that was committed on diverse dates for Kshs. 60,000 and not a single day or transaction as submitted by the appellant.

I have analysed this evidence afresh as the court of first appeal, to draw my own conclusions. I am also aware that I did not have the advantage of seeing or hearing the witnesses as they testified.

My conclusion is that, indeed the prosecution did not prove it’s case beyond the threshold of reasonable doubt. There are material inconsistencies in the evidence adduced in the trial court and significant loose ends that needed to be tied.

I find that the appeal has merit and therefore quash the conviction and set aside the sentence on each count. The appellant, I am told is out on bail pending the outcome of this appeal. Following the success of this appeal, the terms of his release are hereby vacated.

Orders accordingly.

**Dated and delivered at Nairobi this 27th day of November, 2012.**

**A. MBOGHOLI MSAGHA  
JUDGE**