



REPUBLIC OF KENYA



**Yegon v Republic (Criminal Appeal E048 of 2021)
[2024] KEHC 3128 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3128 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E048 OF 2021
RL KORIR, J
MARCH 13, 2024**

BETWEEN

CHARLES YEGON APPELLANT

AND

REPUBLIC RESPONDENT

(From the Conviction and Sentence in Criminal Case Number 882 of 2017 by Hon. Kiniale L. in the Principal Magistrate's Court at Bomet)

JUDGMENT

1. The Appellant was the 1st Accused in Bomet PMCC No. 882 of 2017. He was charged alongside one Jethro Kiprono Cheruiyot (2nd Accused). They faced five Counts as follows:-
 - i. Count one. Accessing a computer system with intent to commit an offence contrary to Section 83V of the Kenya Information and Communication Act Cap 411 of the Laws of Kenya. The particulars of the offence were that on diverse dates between 20th July 2017 and 19th September 2017 at Imarisha Sacco Society Limited, Bomet branch within Bomet County, he accessed the bank account of Mary Chirchir account number 504xxxxx01 of Imarisha Sacco Limited and stole the sum of Kshs 2,766,100/= the property of the said Mary Chirchir.
 - ii. Count two. Accessing a computer system with intent to commit an offence contrary to Section 83V of the Kenya Information and Communication Act Cap 411 of the Laws of Kenya. The particulars of the offence were that on diverse dates between 8th July 2017 and 11th September 2017 at Imarisha Sacco Society Limited, Bomet branch within Bomet County, he accessed the bank account of Daniel Cheruiyot Korir account number 504xxxxx01 of Imarisha Sacco Limited and stole the sum of Kshs 120,000/= the property of the said Daniel Cheruiyot Korir.
 - iii. Count three. Conspiracy to commit a felony contrary to section 393 of the Penal Code. The particulars of the offence were that on diverse dates between 20th July 2017 and 19th



September 2017 at Imarisha Sacco Society Limited, Bomet branch within Bomet County, he conspired together to steal the sum of Kshs 2,766,100/= the property of Mary Chirchir.

- iv. Count four. Conspiracy to commit a felony contrary to section 393 of the Penal Code. The particulars of the offence were that on diverse dates between 8th July 2017 and 11th September 2017 at Imarisha Sacco Society Limited, Bomet branch within Bomet County, he conspired together to steal the sum of Kshs 120,000/= the property of Daniel Cheruiyot Korir.
 - v. Count five. Abuse of office contrary to section 10 (1) as read with section 36 of the Penal Code. The particulars of the offence were that on diverse dates between 8th July 2017 and 19th September 2017 at Imarisha Sacco Society Limited, Bomet branch within Bomet County, being a person employed in the said Sacco as the Operations Manager fraudulently activated ATM cards serial numbers 4299xxxxxxx7080 and 4299xxxxxxx7080 and accessed account numbers 504xxxxx01 belonging to Mary Chirchir and 504xxxxx01 belonging to Daniel Cheruiyot Korir in abuse of the authority of his office.
2. Both Accused pleaded not guilty to the charges before the trial court, and a full hearing was conducted. The prosecution called seven (7) witnesses in support of its case.
 3. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against both Accused and they were put on their defences.
 4. At the conclusion of the trial, both Accused were convicted on all the first four counts and were sentenced to serve one year each for counts one and two and two years each for counts three and four. The 1st Accused (now Appellant) was convicted on count five and sentenced to serve one year. The Sentences were to run concurrently.
 5. Being dissatisfied with the Judgment dated 9th December 2021, Charles Yegon (Appellant) through his Petition of Appeal dated 22nd December 2021 appealed to this court on the following grounds:-
 - i. That the learned trial Magistrate erred in law and fact in convicting the Appellant on evidence which did not meet the required standard in law
 - ii. That the learned trial Magistrate erred in law and facts by relying on extrinsic evidence that was not adduced during the trial.
 - iii. That the learned trial Magistrate erred in law and facts by introducing extraneous matters in dismissing the Appellant's defence.
 6. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh. This duty was succinctly stated by the Court of Appeal in *Njoroge vs. Republic* (1987) KLR 19 where it held: -

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of the first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect (see *Pandya V. R* [1957] E.A 336, *Ruwala vs. R.* [1957] E.A 570).”

The Prosecution's Case.

7. It was the Prosecution's case that on diverse dates between 8th July 2017 and 19th September 2017, the Appellant and his co-accused (Jethro Kiprono Cheruiyot) accessed the bank accounts of



Mary Chirchir (Account Number 504xxxxxx1) and Daniel Cheruiyot Korir (deceased) (Account Number 504xxxxxx01) using ATM Card Numbers 4299 xxxx xxxx 8080 and 4299 xxxx xxxx 7080 and fraudulently stole Kshs 2,766,100/= from the bank account Mary Chirchir and Kshs 120,000/= from the bank account of Daniel Cheruiyot Korir (deceased).

8. The Prosecution also stated that the Appellant abused his office as the Operations Manager at Imarisha Sacco Society Limited when he fraudulently linked and activated ATM Card Numbers 4299 xxxx xxxx 8080 and 4299 xxxx xxxx 7080 and accessed the bank accounts of Mary Chirchir (Account Number 504xxxxxx01) and Daniel Cheruiyot Korir (deceased) (Account Number 504xxxxxx01).

The Appellant's Case.

9. The Appellant, Charles Yegon stated that he did not commit the offences and that he discharged his duties to his employer (Imarisha Sacco) honestly. That he did not know Mary Chirchir's account existed until the inception of this case and that his co-accused was not directly under his supervision.
10. The Appellant stated that he was neither in charge of the ATM cards nor did he store them together with their PINS. That once a customer's details had been verified, his work would be to verify that the ATM card and account number were correct and he would link the two together. He further testified that his work was to link the ATM card to the bank account and the branch manager would activate it.
11. It was the Appellant's testimony that his office was in an open space and that any staff member with bad intentions could access his computer. That he only accessed his computer to link the ATM cards handed over to him by the custodian (Irene Koech) and not to steal.
12. The Appellant testified that Jethro (co-accused) was not directly under his supervision and that he was handed duties by the branch manager (PW3). That they did not have a close relationship.
13. On 6th December 2022, this court directed that this appeal be dispensed off by way of written submissions.

The Appellant's Submissions.

14. It was the Appellant's submission that the branch manager (PW3) stated that he and the Appellant had the power to link and activate ATM cards. That when PW4 (Robert Kipngeno Siele) was cross examined, he stated that activation of the ATM cards was the sole job of the bank manager, PW3 (Stanley Kibet Chepkwony). It was his further testimony that PW4 testified that when ATM cards are received from the head office, they are received by the branch manager (PW3) and not the Operations Manager (the Appellant). That there was nothing presented in court to show that he received the ATM cards from the branch manager.
15. The Appellant submitted that the staff in charge of ATM cards and their PINS at Imarisha Sacco, Bomet branch were neither investigated nor was any report presented to the trial court.
16. It was the Appellant's submission that the system generated audit trail report produced was a manufactured excel document which was subject to editing and manipulation. That it was not an original system generated report because the document was made of rows and columns and did not show the computer user who logged into the system, the exact time and date it was produced unlike an original one which would indicate the same.
17. It was his further submission that the investigating officer did not produce the unique identification number called Media Access Control (MAC) address of the computer he allegedly claimed to have been used to link the ATM cards in question. That the trial court ought to have ordered for the computer



- to be produced in court and compare the qualities of a system generated document together with the audit trail report to rule out editing and manipulation of the trail report.
18. The Appellant submitted that the branch manager (PW3) testified that he did not know who reactivated the dormant account and that further upon cross examination, he stated that he did not have anything to show that the Appellant received the ATM cards including one for Henry Sigilai. That this testimony created doubt in the Prosecution's case and that such doubt ought to be in his favour.
 19. It was the Appellant's submission that there was no clear evidence on who activated the ATM cards. That in his testimony, he stated that his only work was to link the ATM cards and the branch manager would activate them. It was his further testimony that his testimony was not controverted by the Prosecution and that in the absence of direct evidence to demonstrate that he linked and activated the said ATM cards, the evidence presented by the Prosecution was circumstantial and it did not meet the threshold to secure a conviction. He relied on *Sawe vs Republic* (2003) KLR 354 and *Solomon Kirimi M'rukaria vs Republic* (2014) eKLR.
 20. It was the Appellant's submission that the Prosecution did not allege or prove that he withdrew money from the said accounts or used the ATM cards. That what was clear was from the Prosecution witnesses was that his co-accused was alleged to have withdrawn money. It was his further submission that the Prosecution failed to provide cogent evidence to sustain the first and second counts.
 21. In regards to the offences of conspiracy to commit a felony, the Appellant submitted that there was no proof that he and his co-accused met and planned to execute the alleged theft. That the investigating officer took his phone and returned it later after he failed to find any link between him and his co-accused in the form of text messages, phone calls or M-pesa. He relied on *Christopher Wafula Makokha vs Republic* (2014) eKLR.
 22. It was the Appellant's submission that the trial court assumed that he supervised his co-accused. That his co-accused testified that he worked under the instructions of the Branch Manager and confirmed the same when he was cross examined. That the Prosecution needed to provide evidence to show that he was supervising his co-accused when the offence was being committed. He argued that mere suspicion of the existence of an agreement to commit the offence was insufficient to support a conviction.
 23. The Appellant submitted that the Prosecution failed to prove its case and that its witnesses gave contradictory testimonies which did not meet the required standard to warrant his conviction. That the Prosecution and his employer did not provide CCTV footage of his work station which was an open area because such footage would not have supported their case.
 24. The Appellant submitted that the ATM card used in the material transactions was in the name of Hillary Sigei and he was never called as a witness by the Prosecution. That he would have helped shed light on this case.
 25. It was the Appellant's submission that the trial Magistrate relied on the ICT Policy document, a document which he had not been served but was introduced during the trial. That this was in contravention to Article 50 (2) (c) and (j) of *the Constitution*. It was his further submission that he did not have adequate time to respond to that document, its use which was prejudicial to his right to a fair hearing. He contended that a conviction founded on evidence which violated *the Constitution* was a nullity and therefore his conviction should be quashed. He relied on *Joseph Ndungu Kagiri vs Republic* (2016) eKLR.
 26. The Prosecution did not file its submissions despite taking directions to do so.



27. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal dated 22nd December 2021 and the Appellant's written submissions dated 15th May 2023. The following issues arise for my determination:-
- i. Whether the Prosecution proved the offences to the required standard.
 - ii. Whether the Defence places doubt on the Prosecution case.
 - iii. Whether the Sentence preferred against the Accused was fair and just.

i. Whether the Prosecution proved the offences to the required standard.

28. In this case, like any other criminal offence, the onerous task of proof falls on the Prosecution. This burden of proof by the Prosecution was aptly explained by Fidelis Nwadialo, 'Modern Nigerian Law of Evidence', University of Lagos Press, Lagos (1999) 379 as follows:-

“The term burden of proof is used in two different senses. In the first sense, it means the burden of obligation to establish a case. This is the obligation which lies on a party to persuade the court either by preponderance of evidence or beyond reasonable doubt, that the material facts which constitute his whole case are true, and consequently to have the case established and judgment given in his favour. The other meaning of the expression burden of proof is the obligation to adduce evidence on a particular fact or issue. This evidence, in some cases must be sufficient to prove the fact or issue to justify a finding on that fact or issue, in favour of the party on whom the burden lies. It is called evidential burden. This is the sense in which the expression is more generally used.”

29. Regarding the standard of proof, the court in *Andrea Obonyo & Others v R* (1962) EA 562, held:-

“As to the standard of proof required in criminal cases Denning L. J. as then was) had this to say in *Bater v Bater* (1950) 2 ALL ER 458 at 459

“It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases, the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges having said that, on proportion as the crime is enormous so ought the proof to be clean in criminal cases the burden rests upon the prosecution to prove that the accused is guilty beyond reasonable doubt.”

30. It was the Prosecution's case that the Appellant had illegally withdrawn money from the bank accounts of Daniel Cheruiyot Too and Mary Chirchir. The Prosecution called Beatrice Cheptanui Korir who testified that she was the wife of Daniel Cheruiyot Too (then deceased). She testified that her husband died on 29th June 2016 and she produced a birth certificate and it was marked as P.Exh1. She further testified that she did not know who withdrew the money as she did not have the deceased's ATM card.
31. The Prosecution also stated that the illegal transactions on Mary Chirchir's bank account came to light when Jethro Kiprono Cheruiyot (2nd Accused) who had impersonated himself as Henry Sigilai sought to transact further on Mary Chirchir's account using an ATM card that bore the name Henry Sigilai.
32. It was the Prosecution's case that the Appellant accessed the bank account of Mary Chirchir (Account Number 504xxxx01) of Imarisha Sacco Limited and stole Kshs 2,766,100. That the Appellant also accessed the bank account of Daniel Cheruiyot Korir (deceased) (Account Number 504xxxx01) of Imarisha Sacco Limited and stole Kshs 120,000/=. It was the Prosecution's further case that the



Appellant had accessed the said bank accounts after linking them using ATM cards being numbers 4299 xxxx xxxx 8080, 4299 xxxx xxxx4964 and 4299 xxxx xxxx 7080.

33. To prove this assertion, the Prosecution called Caliph Sigei (PW6) the ICT Manager of Imarisha Sacco Limited. It was PW6's testimony that he received a call from the branch Manager in Sotik, Stanley Chepkwony (PW3) requiring him to check on the bank statements of Mary Chirchir (Account Number 504xxxxx01) and confirm if the transactions done were legal. That he confirmed ATM withdrawals of Kshs 2,296,100/= had been made using ATM card number 4299 xxxx xxxx 8080 and a further Kshs 480,000/= had been withdrawn using ATM Card Number 4299 xxxx xxxx 7080. Stanley Kibet Chepkwony (PW3) corroborated this testimony.
34. PW6 testified that he called Mary Chirchir to confirm if she did the transactions as shown in her account and she informed him that she did not transact on her account as she did not have an ATM card. It was his conclusion that the said ATM transactions were fraudulent. He produced the bank statement of Mary Chirchir and the same was marked as P.Exh 14. The bank statement was an electronic record. In regards to its admissibility, Section 106B of the *Evidence Act* provides as follows:-
 1. Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
 2. The conditions mentioned in subsection (1), in respect of a computer output, are the following —
 - a. the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
 - b. during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
 - c. —
 - d. the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
 3. —
 4. In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
 - a. identifying the electronic record containing the statement and describing the manner in which it was produced;
 - b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;



- c. dealing with any matters to which conditions mentioned in subsection (2) relate; and
- d. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.”
35. While discussing the application of the above section, the Court of Appeal in *County Assembly of Kisumu & 2 Others vs. Kisumu County Assembly Service Board and 6 Others* (2015) eKLR observed that:-
- “Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document ‘if the conditions mentioned in this section are satisfied in relation to the information and computer.’
- In our view, this is a mandatory requirement which was enacted for good reason. The Court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in subsection 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced.”
36. With regard to the contents of the requisite certificate, the court in the above case went on state as follows:-
- “The *Evidence Act* does not provide the format the certificate required under subsection 106B (2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.”
37. I have looked and considered Mary Chirchir’s bank statement and the requisite Certificate dated 22nd September 2017 signed by Caliph Sigei (PW6) and I am satisfied that its production had satisfied the requirements of section 106B of the *Evidence Act*. I therefore find the bank statement (P.Exh 14) admissible. I dismiss the Appellant’s arguments that the same fell foul of the law.
38. I have looked at and considered Mary Chirchir’s bank statement and it shows that there were ATM withdrawals using ATM card number 4299 xxxx xxxx 8080 on various dates between 20th July 2017 and 4th September 2017. It also shows ATM withdrawals using ATM card number 4299 xxxx xxxx 7080 on 18th and 19th September 2017.
39. PW6 further produced ATM transactions of the bank accounts of Mary Chirchir (Account Number 504xxxxx01) and Daniel Cheruiyot Too (Account Number 504xxxxx01) and the same was marked as P.Exh 13. The said document was an electronic record which was accompanied by the requisite certificate dated 22nd September 2017 and signed by PW6 and it was therefore admissible.
40. I have looked at the ATM transactions and I have noted that ATM card numbers 4299 xxxx xxxx 8080 and 4299 xxxx xxxx 7080 were used to withdraw money on various dates between 20th July 2017 and 19th September 2017 from the bank account of Mary Chirchir. I have also noted that ATM card number 4299 xxxx xxxx 4964 was used to withdraw money on various dates between 9th and 11th July 2017 from the bank account of Daniel Cheruiyot Korir (deceased).



41. It was therefore clear from the above evidence that ATM card numbers 4299 xxxx 5170, 4299 xxxx xxxx 8080 and 4299 xxxx xxxx 7080 were used to withdraw money from the bank accounts of Mary Chirchir and Daniel Cheruiyot Korir.
42. For the Prosecution to prove their case against the Appellant, they had to link the Appellant to illegal transactions on the two bank accounts using the said ATM cards.
43. PW6 testified that he was the ICT Manager of Imarisha Sacco and that he was in charge of the computer systems. That he maintains the users and issues system codes, access and account privileges. He produced an Audit Trail Report dated 21st September 2017 in which he stated that he was able to establish that the Appellant linked ATM card numbers 4299 xxxx xxxx 4964, 4299 xxxx xxxx 8080 and 4299 xxxx xxxx 7080 which were subsequently used to illegally withdrew sums of money from the bank accounts of Mary Chirchir and Daniel Cheruiyot Korir. The Report was produced as P.Exh 15. The said document was an electronic record which was accompanied by the requisite certificate dated 22nd September 2017 and signed by PW6 and it was therefore admissible.
44. I have keenly considered the Audit Trail Report and I have noted the following:-
 - i. On 8th and 12th July 2017, the Appellant linked Account Number 504xxxxx01 (Daniel Cheruiyot Korir) to ATM card number 4299 xxxx xxxx 8080.
 - ii. On 20th July 2017, 7th August 2017, 11th August 2017, the Appellant linked Account Number 504xxxxx01 (Mary Chirchir) to ATM Card Number 4299 xxxx xxxx 8080.
 - iii. On 18th September 2017, the Appellant linked Account Number 504xxxxx01 (Mary Chirchir) to ATM Card Number 4299 xxxx xxxx 7080.
 - iv. On 12th July 2017, the Appellant linked Account Number 504xxxxx01 (Daniel Cheruiyot Korir) to ATM Card Number 4299 xxxx xxxx 4964.
45. When PW6 was cross examined, he stated that Mary Chirchir never applied for an ATM card and that she used to transact across the counter in their Bureti branch. That the computer he used to get the information belonged to Imarisha Sacco and the same had been assigned to the Appellant, Charles Yegon. PW6 further stated upon cross examination that from the user names in the Audit Trail Report (P.Exh 15), he was able to tell who accessed the system.
46. It was PW6's further testimony upon cross examination that the deceased's (Daniel Cheruiyot Korir) account had been activated by the Appellant, Charles Yegon.
47. Flowing from the above, it is my finding that there was sufficient evidence to link the Appellant to the theft of money from the bank accounts of Mary Chirchir and Daniel Cheruiyot Korir. He executed the heist by using his position as the Operations Manager at Imarisha Sacco to illegally link ATM cards numbers 4299 xxxx xxxx 8080, 4299 xxxx xxxx 7080 to the Mary Chirchir's bank account and ATM card number 4299 xxx xxxx 4964 to the bank account of Daniel Cheruiyot Korir (deceased) thereby facilitating the illegal ATM transactions on the two bank accounts.
48. For the offence of conspiracy to commit a felony, the Prosecution had to prove common intention between the Appellant and his co-accused, Jethro Kiprono Cheruiyot.
49. Section 21 of the Penal Code of Kenya defines common intention as follows:-

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose, an offence



is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

50. I get further guidance from the case of Republic vs. Tabulayenka s/o Kirya (1943) EACA, 5 where the Court of Appeal of East Africa held thus:-

“Common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault.”

51. In the later case of Dickson Mwangi Munene & Another vs. Republic (2014) eKLR, the Court of Appeal held:-

“..... Where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object, by unlawful means and so act or express themselves as to reveal such intention, it implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence.....”

52. In the present case, Stanley Kibet Chepkwony (PW3) testified that he was the branch manager at Imarisha Sacco Limited at the material time. That the co-accused, Jethro Kiprono Cheruiyot joined them as an intern in December 2016 and worked with them until sometime in August 2017.

53. It was PW3's testimony that the co-accused was assigned to the Appellant who would guide him on the operations of the Sacco. He produced letters proving that the co-accused worked for them for the stated period and the same were marked as P.Exh 5, 6, 7 10 and 11.

54. PW3 testified that he received a call from Robert Siele (PW4) who informed him of suspicious ATM card activity by someone called Henry Sigilai. That when the ATM card in the name of Henry Sigilai was brought to him, he conducted investigations and discovered that the ATM card had transacted and withdrawn money from Mary Chirchir's bank account. That Henry Sigilai's bank account had been linked to the bank account of Mary Chirchir for the purpose of withdrawing money from the latter.

55. When PW3 was cross examined, he confirmed that the co-accused had been assigned to the Appellant. He further stated that the co-accused went to Co-operative bank and introduced himself as a staff member of Imarisha Sacco.

56. Robert Kipngeno Siele (PW4) testified that at the material time, he worked for Imarisha Sacco Limited as a teller. That on 19th September 2017 while in the course of his duties, he received a call from Reuben Tanui of Co-operative bank who inquired whether they had a staff member called Henry Sigilai. PW4 further testified that Reuben Tanui had informed him that the said Henry Sigilai wanted to do a further withdrawal after he had already exhausted his daily limit of Kshs 300,000/= and when they tried to question him, the said Henry Sigilai vanished.

57. It was PW4's testimony that the teller who did the transaction at the bank gave him the ATM card which bore the name Henry Sigilai, card number 4299 xxxx xxxx 7080 which was for account number 504xxxxx01. It was PW4's further testimony that they later went with PW6 (Caliph Sigei) to review the footage from Co-operative bank and he was able to confirm that the co-accused was the one who transacted using the said ATM card.

58. Barnabas Namai (PW5) testified that on the material day, he was the teller at Co-operative bank when the Appellant's co-accused sought to withdraw money. That he had earlier transacted Kshs 300,000/= but he wanted to withdraw more. That this raised a red flag as it was expected that he knew the daily



withdrawal limit was Kshs 300,000/=. PW5 further testified that he interrogated the co-accused on where he worked and he vanished.

59. It was PW5's testimony that he became suspicious and retained the ATM card. He produced the ATM card that was marked as P.Exh 12. I have looked at the ATM card and the card number is 4299 xxxx4964 xxxx 7080 in the name of Henry Sigilai.
60. It was PW5's testimony that the person whom he served and who withdrew the Kshs 300,000/= using the said ATM card was the co-accused.
61. The only direct evidence connecting the co-accused to transacting on Mary Chirchir's bank account using ATM card number 4299 xxxx xxxxx 7080 (P.Exh 12) was the testimony of PW5 who was the bank teller who served him at Co-operative bank. PW5 identified him as the person who transacted on the said account. When PW5 was cross examined, he stated that he could recognise the co-accused as he had interacted with him for some time.
62. Additionally, there is sufficient circumstantial evidence to link the Appellant and the co-accused in the commission of the offence. Circumstantial evidence will be construed as sufficient where it enables the court to make reasonable inferences about the ultimate facts in issue. This court must therefore be convinced that such evidence was not mere conjecture or speculative.
63. In the case of Ahamad Abolfathi Mohammed and Another vs. Republic (2018) eKLR, the Court of Appeal held: -

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, C.J. stated as follows on circumstantial evidence in R. v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -

‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”

64. Barnabas Namai (PW5) produced the ATM card (P.Exh 12) which the co-accused used to transact on Mary Chirchir's bank account. As found earlier, this ATM card was linked by the Appellant to Mary Chirchir's bank account and was used to transact on it on 18th and 19th September 2017. Interestingly, the said ATM card bore the name Henry Sigilai and it was for the account number 504xxxxx01. This means that the ATM card (P.Exh 12) apart from being issued for the account number 504xxxxx01, had also been linked to Mary Chirchir's bank account number 504xxxxxX01 which was an irregular occurrence as one ATM card cannot be used to withdraw money from two bank accounts. It is worth noting that when the co-accused was questioned about his withdrawals, he ran away and he did not provide an explanation as to how he came upon the ATM card (P.Exh 12).
65. Based on the evidence above, I am convinced that the co-accused was in possession of the said ATM card on the day he went to transact (19th September 2017) at Co-operative bank, Bomet branch. Since the said ATM card was not his, the co-accused had a burden of explaining how he came into possession of the said ATM card, a burden which he failed to discharge because he ran away. In the article, Regina



V. Graham 'The Doctrine of Recent possession and the Rule against Hearsay Evidence,' (1973) 15 Crim LQ 195, the doctrine of recent possession was described as:-

“Under the doctrine of recent possession, an inference of guilty knowledge may be drawn against the accused in the absence of a reasonable explanation from him of how he came by the (stolen) goods in his possession.”

66. In the case of Paul Mwita Robi vs. Republic (2010) eKLR, the Court of Appeal explained thus:-

“Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden”.

67. Similarly, in the persuasive case of Kelvin Nyongesa & 2 Others vs. Republic (2016) eKLR the Court held that:-

“Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard”.

68. Flowing from the above, I am satisfied and convinced that the Appellant and the co-accused worked in cahoots in the offences they were charged with. The Appellant as the Operations Manager identified the bank accounts (Mary Chirchir's and Daniel Cheruiyot Korir) that they could withdraw money from and linked the said accounts to various ATM cards. He would then enlist the co-accused (who worked under his supervision) to go to the ATM or in the banking hall to do over the counter transactions. The evidence adduced did not reveal any other person who withdrew money using the ATM card (P.Exh 12).

69. Based on the totality of the evidence, I am satisfied that the Prosecution proved the charges of accessing a computer system with intent to commit an offence, conspiracy to commit a felony and abuse of office against the Appellant and had discharged their burden of proof.

ii. Whether the Defence places doubt on the Prosecution case.

70. It was the Appellant's case that at the material time, he was the Operations Manager at Imarisha Sacco. That he did not steal from the bank accounts of Mary Chirchir and Daniel Cheruiyot Korir (deceased). It was his testimony that he was not the custodian of the ATM cards and their PINS. That Robert Siele (PW4) was in charge of the PINS while one Irene Koech was the custodian of PINS.

71. The Appellant in his testimony explained that when ATM cards were sent from the main branch, he would receive and sign for them and Irene Koech would counter sign. He further explained the verification process before an ATM card could be linked to an account. That his duty after a customer had been issued with a PIN was to verify that the details on the ATM card and the account were accurate and then he would link them. That it was the duty of the Branch Manager to activate the card. He further testified that the ICT manager did not assign him rights to activate a linked card.

72. The Appellant testified that Jethro (co-accused) was not directly under his supervision and that he was handed duties by the branch manager (PW3). That they did not have a close relationship.

73. I will consider this evidence against the testimonies of the branch manager, Robert Kipngeno Siele (PW3) and the ICT manager, Caliph Sigei (PW6). PW3 testified that ATM cards were issued to



customers by the Operations Manager (Appellant) and that activation of the said cards would be done by himself as the branch manager or the Operations Manager (Appellant). That their system had an audit trail and every user was allocated a user account and a user password by the ICT manager which would uniquely identify a person accessing the system. That the Audit trail established that the Appellant accessed the system.

74. PW6 testified that as the ICT manager that he would provide linking privileges to the branch manager (PW3) and the Operations Manager (Appellant). PW6 produced the Audit Trail Report (P.Exh 15) which showed that the Appellant linked ATM cards number 4299 xxxx xxxx 4964, 4299 xxxx xxxx 8080 and 4299 xxxx xxxx 7080 the bank accounts of Mary Chirchir (account number 504xxxxx01) and Daniel Cheruiyot Korir (account number 504xxxxx01). PW6 also produced ATM transactions (P.Exh13) which showed ATM withdrawals on the said bank accounts using the said ATM cards.
75. From the above, it was clear that the Branch Manager (PW3) had linking privileges. However, there was no evidence adduced to show that he linked the said ATM cards to the said bank accounts. The evidence contained in the Audit Trail Report, the ATM transactions and Mary Chirchir's bank statements were so damning against the Appellant and he did little to try and disentangle himself from that evidence. Therefore, there is no doubt in my mind that it was the Appellant who linked the ATM cards to facilitate the theft of money from the bank accounts of Mary Chirchir and Daniel Cheruiyot.
76. I also dismiss the Appellant's defence that his office was stationed in an open area where anybody who had ill will could easily access his computer to link the ATM cards. The argument is far-fetched and does not hold water because for one to access his system, one must have his confidential login credentials. No evidence was tendered to back up this claim that somebody else accessed his computer.
77. The co-accused was also found in possession of the ATM card (P.Exh 12) which was linked by the Appellant and was used to transact on Mary Chirchir's account despite the said card being in the name of Henry Sigilai.
78. Based on the totality of the evidence, it is my finding that the Appellant's evidence was a mere denial and did not shake or place doubt on the Prosecution's case which I have already found proven.

iii. Whether the Sentence preferred against the Accused was fair and just.

79. The Appellant was charged with multiple offences as follows; On the first two counts, the Appellant was charged with accessing a computer system with intent to commit an offence contrary to section 83V of the Kenya Information and Communication Act. Section 83V of the Kenya Information and Communication Act was repealed and replaced with Computer Misuse and Cybercrimes Act No. 5 of 2018. The said offence was replicated in Section 14(1) of the Computer Misuse and Cybercrimes Act No. 5 of 2018 which provides that:-

A person who causes, whether temporarily or permanently, a computer system to perform a function, by infringing security measures, with intent to gain access, and knowing such access is unauthorised, commits an offence and is liable on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years, or to both.

80. The maximum sentence as provided above for this offence was three years. The trial court sentenced the Appellant to serve one (1) year in respect of counts 1 and 2. After considering the circumstances of the case, I find the sentence passed by the trial on counts one and two court to be just and fair.
81. In regards to count three and four, the Appellant was charged with conspiracy to commit a felony. Section 393 of the Penal Code provides that:-



Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.

82. The Appellant after being convicted was liable to serve seven (7) years imprisonment. The trial court on these counts sentenced the Appellant to serve two (2) years each on each count. After considering the circumstances of the case, I find the sentence passed by the trial court on count three and four to be just and fair.

83. On count five, the Appellant was charged with abuse of office. Section 101(1) of the Penal Code provides that:-

Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of a felony.

84. Section 36 of the Penal Code provides that:-

When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.

85. Under this offence, the trial court sentenced the Appellant to serve one (1) year imprisonment. After considering the circumstances of the case, I find the sentence passed by the trial court on count five to be just and fair.

86. In the final analysis, it is my finding that the sentences were not excessive and in relation to the circumstances of the case, were justified. I uphold the Appellant's conviction and affirm the sentences. The Appeal dated 22nd December 2021 has no merit and is hereby dismissed.

87. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 13TH DAY OF MARCH, 2024.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the absence of the Appellant and the Respondent. Siele (Court Assistant)

