



**Gatura v Republic (Criminal Appeal E018 of 2021)  
[2024] KEHC 12814 (KLR) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12814 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E018 OF 2021  
CJ KENDAGOR, J  
OCTOBER 4, 2024**

**BETWEEN**

**MICHAEL KAGUME GATURA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence in Othaya Principal Magistrate's Court Criminal Case No. 722 of 2015 delivered by Hon. Ekhubi B. M. on 28th April, 2021)*

**JUDGMENT**

1. The Appellant was charged alongside five others with two counts. In count 1, they faced the charge of conspiracy to commit a felony contrary to Section 393 of the Penal Code. In count 2, they faced a charge of stealing contrary to Section 268 (1) as read with Section 275 of the *Penal Code*. He entered a plea of not guilty, and the case proceeded to full trial. The Appellant was convicted in both counts and sentenced to serve 2 years' imprisonment in Count 1 and to serve 6 months' imprisonment in Count 2. Both sentences were said to run concurrently.
2. The Appellant was dissatisfied with the trial Court's verdict and filed the instant appeal against the conviction and sentence.
3. In the Petition of Appeal dated 5<sup>th</sup> July 2021, the Appellant enumerated 19 grounds of appeal;
  - I. The Learned Magistrate erred in law in convicting the 1<sup>st</sup> Accused when the elements on a charge of conspiracy to commit a felony contrary to Section 393 of the penal code had not been proved.
  - II. The Learned Magistrate erred in law and in fact in holding that there was evidence of agreement between the 1<sup>st</sup> accused person and the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused persons on the charge of conspiracy to commit a felony.



- III. The Learned Magistrate erred in law and in fact in holding that there was a "meeting of minds" between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons to allow ingress of the "auditors" into the vault, yet proceeded to acquit the 3<sup>rd</sup> accused person and convict the 1<sup>st</sup> accused person.
- IV. The Learned Magistrate erred in law and in fact in holding that there was communication between the 1<sup>st</sup> accused and either the 4<sup>th</sup>, 5<sup>th</sup>, or 6<sup>th</sup> accused persons.
- V. The Learned Magistrate erred in law and in fact in convicting the 1<sup>st</sup> accused person on a charge of stealing contrary to Section 268 (1) as read with Section 275 of the Penal Code when the necessary ingredients on a charge of stealing had not been approved.
- VI. The Learned Magistrate erred in law and in fact in convicting the 1<sup>st</sup> accused person on a charge of stealing when no evidence had been laid before court that he stole the sum of Kenya Shillings Thirty Million Nine Hundred and Twenty Eight Thousand (Ksh.30,928,000/=) only.
- VII. The Learned Magistrate erred in law and in fact in placing undue reliance on the evidence of PW1 whilst ignoring material contradictions between his evidence and the other prosecution witnesses.
- VIII. The Learned Magistrate erred in law and in fact in convicting the 1<sup>st</sup> accused whilst relying on the Equity Banks "Policy and Procedure Manual" which was not produced before the Honourable Court.
- IX. The Honourable Court erred in law and in fact in convicting the 1<sup>st</sup> accused based on the alleged flouting of "Policy and Procedure Manual" when the evidence of the procedures was contradictory and inconsistent.
- X. The Learned Magistrate erred in law and in fact in convicting the 1<sup>st</sup> accused on mere suspicion of PW1.
- XI. The Learned Magistrate erred in law and in fact in convicting the 1<sup>st</sup> accused person by placing undue reliance on the evidence of PW10 who brought no cogent evidence against the 1<sup>st</sup> accused.
- XII. The Learned Magistrate erred in law and in fact in placing undue reliance to the evidence of PW10 who declined to tender the "Policy and Procedure Manual" which would have been exculpatory to the 1<sup>st</sup> accused person.
- XIII. The Learned Magistrate erred in law and in fact in failing to consider all the evidence that favoured the 1<sup>st</sup> accused person whilst highlighting elements of the evidence that was inculpatory to the 1<sup>st</sup> accused.
- XIV. The Learned Magistrate erred in law and in fact by assisting the prosecution in extracting evidence from unknown websites and using extracts thereof to convict the 1<sup>st</sup> accused.
- XV. The Learned Magistrate erred in law and in fact in descending into the prosecutions arena and failing to remain a neutral arbiter by basing his conviction on evidence that was not produced by the prosecution.
- XVI. The Learned Magistrate erred in law and in fact in failing to consider the evidence and defence of the 1<sup>st</sup> accused person.
- XVII. The Learned Magistrate erred in law and in fact in failing to appreciate that the 1<sup>st</sup> accused was a complainant and victim of the crime and not perpetrator or conspirator.



- XVIII. The Learned Magistrate erred in law and in fact in failing to consider the conduct of the 1<sup>st</sup> accused person which would have led him to the inescapable conclusion that it was inconsistent with the conduct of a person who had conspired to commit a felony and steal.
- XIX. The Learned Magistrate erred in law and in fact in convicting the 1<sup>st</sup> accused on a balance of probabilities rather than guilty beyond reasonable doubt.
4. The appeal was canvassed through written submissions. The Appellant argued that the prosecution failed to meet the standard of proof beyond reasonable doubt. The Respondent conceded to the entire appeal.
  5. As the first appellate court, this Court is mandated to look afresh at the evidence presented before the trial Court to determine whether the Appellant was properly convicted. I am guided by the decisions in *Njoroge v Republic* (1987) KLR, 19 and *Okeno v Republic* (1972) E.A, 32 and *Kiilu & Another v Republic* (2005)1 KLR 174.
  6. The prosecution called ten witnesses in support of its case. The facts and evidence presented before the trial Court confirmed that Kshs.30,928,000/= was stolen on the morning of 2<sup>nd</sup> October, 2015 at Equity Bank Limited, Othaya Branch.
  7. The Appellant, the 1<sup>st</sup> accused during the trial, acknowledged that the heist occurred and that funds were stolen. It is not disputed that the Appellant was employed by the complainant bank when the offence transpired. He told the Court that he was serving as the Branch's Operations Manager and was the Acting Branch Manager on the morning the heist happened. He testified that he received a call, and the caller informed him that he was an auditor from the bank's headquarters and that they would be conducting a snap audit at the Othaya Branch. According to the Appellant, the individuals who posed as 'auditors' were given access to the bank and they subsequently drew weapons while at the bank's safe. He testified that the robbers tied him up before stealing the money. After they left and he managed to untie himself, he reported the incident to the police.
  8. The main issue for determination is whether the Appellant's involvement in the crime was proved beyond reasonable doubt. The prosecution was required to show proof of conspiracy on the part of the Appellant.
  9. Section 393 of the *Penal Code* provides as follows on the 1<sup>st</sup> count the Appellant was charged with;
 

“ 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.”
  10. In Archibold: *Writing on Criminal Pleadings, Evidence and Practice* 1999 3<sup>rd</sup> Edition. The learned writers observe on pages 2589 and 2590 that: -
 

“ The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons..... so long as a design rests in intention only, it is not indictable; there must be agreement..... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”



11. As the Operations Manager, the Appellant managed and controlled the safe where the money was stolen. He held the combination to the vault door with other authorized employees - their roles were intertwined.
12. PW2, a security officer, testified in Court that he verified the credentials of the individuals posing as 'auditors.' They had name tags indicating they were bank employees, and the security team permitted them entry once they were satisfied with these credentials. There is no evidence to suggest that the Appellant interfered with the verification process or violated any associated protocols. The appellant's arrival and conduct at the bank that morning did not raise any suspicions. Contrary to the Appellant's assertion, though, I found no fault with the trial Court's research of the engineering design of the time lock referenced by the prosecution witnesses in order to comprehend the mechanism and form a well-informed opinion regarding its performance.
13. The CCTV footage does not also suggest that he was acting in collaboration with the robbers to stage manage the theft. None of his actions were outside his scope of duty and furthermore, the policy and procedures manual was not submitted as evidence in court.
14. The records retrieved by the investigation officer revealed no call data indicating that the Appellant had previously been in contact with the mobile number that reached out to him that morning to inform him about the 'audit.' Additionally, there was no evidence of communication between him and the suspects who were later arrested.
15. Based on the evidence presented to the trial Court, there were no circumstances or incidents that could suggest a conspiracy between the Appellant and the robbers who stole the money. A detailed search was executed at the Appellant's residence and additional verification processes were undertaken, confirming that he did not possess the stolen money. He should not face punishment solely based on his role as the acting bank manager when the heist occurred, especially in the absence of evidence demonstrating his involvement in the planning or execution of the theft.
16. The two counts were not substantiated by the evidence presented. In criminal cases, the standard of proof requires that all elements of the offence be established beyond a reasonable doubt. This high threshold means the evidence presented must be compelling enough to leave no room for reasonable uncertainty regarding the accused person's guilt. Furthermore, Courts cannot make inferences on issues that do not have sufficient supporting evidence. This ensures that any conclusions the court draws are grounded in factual evidence. The prosecution's case against the Appellant fails to meet the standard of proof required. Therefore, the conviction, as conceded by the Respondent, was unsafe.
17. I allow the appeal, quash the conviction, and set aside the sentences.

It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 04<sup>TH</sup> DAY OF OCTOBER, 2024.**

**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Hellen

Appellant: Michael K. Gatura

Wanyonyi Advocate holding brief for Macharia Advocate for the Appellant



ODPP: Mr. Mwakio

