

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.154 OF 2017

KENNEDY MWANGI KIRONGOHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. S. Muchangi - RM delivered on 3rd November 2017 in Nairobi CMC CR. Case No.1316 of 2014)

JUDGMENT

The Appellant, Kennedy Mwangi Kirongothi was charged with four counts under the **Penal Code**. He was charged with **stealing** contrary to **Section 268(1)** as read with **Section 275**. The particulars of the offence were that on diverse dates between 13th and 15th February 2014 at various I&M ATM lobby machines within Nairobi County, the Appellant, jointly with others not before court, stole the sum of Kshs.268,150/- from ATM using cards Nos.4173615000061638, 4173615000061612, 4173605000023662 and 4173605000023647 the property of the said I&M Bank (herein referred to as the bank). He was further charged with four counts of **attempted stealing** contrary to **Section 268(1)** as read with **Section 389**. The particulars of the offence were that on 13th February 2014 at I&M Bank Riverside Branch in Nairobi County, the Appellant, jointly with others not before court, used the above cited cards in an attempt to steal cash from the said ATM. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the 1st, 2nd and 4th Counts. In respect of the 1st Count, he was sentenced to serve one (1) year imprisonment. In respect of 2nd and 4th Counts, he was ordered to pay a fine of Kshs.20,000/- each or in default he was to serve three (3) months imprisonment on each count. The Appellant paid the fine for the part that he was fined. He was aggrieved by his conviction and sentence. He filed an appeal to this court challenging the conviction and sentence.

In his petition of appeal, the Appellant raised several grounds of appeal. He was aggrieved that he had been convicted in the absence of sufficient evidence to prove the charge to the required standard of proof. He was of the view that he had been erroneously convicted against the weight of evidence. He faulted the trial magistrate for failing to appreciate the fact that the actual account holders were not called to testify in court as witnesses. He was of the view that the trial court came up with a wrong theory and conjecture and thereby arrived at the wrong decision. He faulted the trial magistrate for convicting him yet a crucial witness by the name Dorah was not called to testify in the case. He was aggrieved that he was convicted on the basis of the evidence of identification that did not stand up to legal scrutiny. He was finally aggrieved that he had been sentenced to serve a custodial sentence that was manifestly excessive and inconsiderate despite the weight of his mitigation. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentences that were imposed upon him by the trial court.

Prior to the hearing of the appeal, the parties to the appeal filed written submission in support of their respective cases. During the hearing of the appeal, this court heard rival oral submission made by Mr. Kang'ahi for the Appellant and by Ms. Sigei for the State. Mr. Kang'ahi submitted that the Appellant was wrongly convicted on the basis of insufficient evidence. He explained that money was stolen using various ATM cards. The Appellant was convicted of the charge of stealing in Count 1 yet no evidence was adduced to support the finding reached by the trial court. Learned counsel submitted that the entire prosecution case hinged on the account holders being produced as witnesses. It was the prosecution's case that certain account holders had lost money when their ATM cards were used to withdraw cash from the ATM machines. These account holders were not called to testify in the case. It was the Appellant's case that the prosecution therefore failed to establish that indeed the same sums of money were stolen. In the absence of their evidence, the trial court could not have reached the conclusion that the money was stolen.

On the issue of identification, Mr. Kang'ahi submitted that a crucial witness by the name Jane Dorah Nyambeya was not called to testify in the case. It was this witness that implicated the Appellant. Failure to call this witness meant that the evidence connecting the Appellant to the crime was tenuous. It was clear from the evidence of the security manager of the bank that the Appellant was convicted on the basis of hearsay evidence that the said security officer received from persons who were not called as witnesses. Learned counsel pointed out that there were gaps in the prosecution's case that clearly raised reasonable doubts as to prosecution's case against the Appellant. He urged the court to resolve these doubts in the Appellant's favour. As regard sentence, learned counsel explained that the same was manifestly excessive taking into account the alleged crime that the Appellant committed. He urged the court, in the event that the appeal was unsuccessful, to consider meting out a non-custodial sentence on the Appellant.

Ms. Sigei for the State opposed the appeal. She submitted that the prosecution had established its case against the Appellant on the charges that he was convicted of to the required standard of proof. She explained that the six prosecution witnesses who were called to testify in the case established that the Appellant attempted to steal money from bank accounts domiciled in I&M Bank. The Appellant was identified from images that were recorded at the ATM machine when the Appellant attempted to withdraw the money and later when he withdrew money from other ATM machines. She submitted that the fact that the account holders and Dorah were not called to testify in the case was not material because the evidence the prosecution relied on to secure the conviction of the Appellant was cogent consistent and credible. As regard the Appellant's defence, learned prosecutor was of the view that the same was a mere denial and an afterthought. The Appellant's

captured photograph at the ATM machine could not be explained away by mere denial. On sentence, she submitted that the Appellant was properly sentenced. The sentence fitted the crime. She urged the court not to interfere with it.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the prosecution witnesses and by the defence before the trial court, so as to arrive at its independent determination on whether or not to uphold the conviction of the Appellant. In so doing, the court is mindful of the fact that it never saw nor heard the witnesses as they testified and therefore cannot give an opinion regarding the demeanour of the said witnesses (see **Okeno -vs- Republic [1972] EA 32**). In the present appeal, the issue for determination by the court is whether the prosecution established a case for this court to convict the Appellant on the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submission, both written and oral. It was clear from the evidence adduced by the prosecution witnesses that the prosecution's case hinged on the Appellant's photographs that was retrieved from the ATM machine at I&M Bank Riverside Branch Nairobi. The photographs were extracted from a CCTV footage. According to the prosecution, certain Credit cards were duplicated and stolen from the bank. Some Credit cards were issued to customers while others were still being processed when the theft occurred. In total ten credit cards were stolen. The bank started receiving information on 14th February 2014 from their customers who were inquiring why sms messages were being sent to them yet they had not used their respective cards to withdraw money from their accounts. When these complaints were made, the bank immediately suspended the accounts. Investigations commenced. Unfortunately by the time the reports were made, several sums money had been withdrawn from various ATM machines maintained by the bank within Nairobi County.

When the investigators examined the CCTV footage of the various ATM machines, they observed that the person withdrawing the money had concealed his face by wearing a cap which covered his face. Further investigations revealed that before the cards were used to withdraw the said sums of money, an attempt had been made to use the same cards to withdraw cash from the bank's ATM machine at its Riverside branch. The CCTV footage showed the Appellant. In his defence, the Appellant admitted that the photographs obtained from the CCTV footage were his. However, the Appellant explained away the photographs by asserting that they were improperly produced into evidence. At the time the photographs were extracted from the CCTV footage, the investigators did not know the identity of the person in the photographs. However, further investigations, including the arrest of an I&M Bank employee by the name Dorah Nyambeya revealed that she had a connection with the Appellant. Her arrest led to the Appellant's arrest. It was after the Appellant's arrest that the photographs obtained from the CCTV footage connected him to the crime.

The Appellant complained that the said witness i.e. Dorah Nyambeya and the bank's customers whose cards were used to withdraw the cash from the ATM machines were not called to testify in the case. The prosecution contended that their evidence was not necessary to prove the charges that were brought against the Appellant. On re-evaluation of this ground, this court reached the conclusion that once the prosecution adduced the evidence of the photographs extracted from the CCTV footage, it was not necessary to call the witnesses mentioned above. This was because the prosecution was able to establish to the required standard of proof beyond any reasonable doubt that the Appellant had in his possession the particular credit cards at the time the subject withdrawals were made from the ATM machines. As stated earlier in this judgment, the Appellant did not give a reasonable explanation of how he came to be in possession of the particular credit cards at that particular time when the attempted withdrawals were made and later when the actual withdrawals were made. This is a case where **Section 111(1)** of the **Evidence Act** applies. The fact that the Appellant's image was captured by the CCTV camera at the particular time at the particular ATM machine at the bank's Riverside Branch was a fact that was within the special knowledge of the Appellant. In his defence, he was under legal obligation to at least give an explanation of how his photograph came to be taken by the particular CCTV camera at the particular ATM machine. The Appellant failed to discharge this onus placed on him.

The prosecution was able to establish to the required standard of proof that credit cards which were duplicated from credits cards issued by the I&M Bank to its customers were used to withdraw various sums of money from several ATM machines maintained by the bank in Nairobi. The withdrawals were made by persons other than the authorized credit card holders. Three of the duplicated credit cards were established to the required standard of proof beyond any reasonable doubt to have been in possession of the Appellant at the time the unlawful withdrawals were made. In the premises therefore, this court finds no merit with the appeal lodged by the Appellant. The same lacks merit and is hereby dismissed.

On sentence, the Appellant is on firmer ground. It was clear from the nature of the crime that was committed that a custodial sentence was not called for. This court agrees with the Appellant that the sentence that should have been meted on him is a non-custodial one. In the premises therefore, the sentence of one (1) year imprisonment in respect of Count 1 that was meted on the Appellant is set aside and substituted by a sentence of this court. The Appellant did not serve the sentence since the record show that he was released on bail pending the hearing of his appeal. The Appellant is sentenced to pay a fine of Kshs.200,000/- or in default to serve one (1) year imprisonment. It is so ordered.

DATED AT NAIROBI THIS 2ND DAY OF APRIL 2019

L. KIMARU

JUDGE