



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 12 OF 2016

STANLEY MAINA GATITUAPPELLANT

Versus

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Nanyuki Chief Magistrate's Court Criminal Case No. 927 of 2014 by Hon. E. BETT Senior Resident Magistrate on 16th October 2015).

JUDGMENT

1. The appellant **STANLEY MAINA GATITU** was charged before Nanyuki Chief Magistrate's Court with **two offences of stealing contrary to section 275 of the Penal Code**. Those two offences related to the theft of the automated teller machine (ATM) card and the withdraw of money totaling to Kshs.383,000 both belonging to Stanley Mwangi Mugethi, the complainant. The appellant was convicted before the Nanyuki Chief Magistrate's Court and sentenced to serve imprisonment for 2 ½ years for each count, those sentences running concurrently. The appellant has filed this appeal against both conviction and sentence.

2. This is the first appellate court. The duty of the first appellate court was discussed in the case **David Njuguna V Republic (2010) eKLR** where the court, relying on the holding of the Court in **Okeno v Republic (supra)** held that:-

“[The duty of the first appellate court] is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

3. The prosecution's evidence was to the effect that the complainant's ATM card was taken by the appellant, without the complainant's authority; which the appellant used to withdraw Kshs.384,792 from the complainant's Equity Bank Account No. (withheld). Prosecution adduced evidence of the Bank Manager of Equity Bank who confirmed that various amounts at different dates were withdrawn by means of ATM from complainant's bank account. The said Bank Manager produced in evidence photographs of the person who withdrew the said amount from the complainant's account. The said photographs were retrieved from the computer printout and stored in a flash disk. The witness provided

the requisite certificate as required under **Section 106(2)** of the Evidence Act. The investigating officer gave evidence of the arrest of the appellant and further stated that he was unable to recover the complainant's ATM card after his search of the appellant's home.

4. The appellant raised two main issues in his written and oral submissions. I shall proceed to deal with them individually.

5. The appellant submitted that there was no proof that the complainant gave him his ATM and Personal Identification Number (PIN). Although in his oral submissions the appellant denied being in possession of the complainant's pin and ATM card, he later in oral submissions contradicted himself. He contradicted himself by saying that the complainant requested him to assist him purchase cattle to carry out zero grazing farming. He further stated:-

"I (appellant) told him (complainant) the cows were expensive; Shs.100,000 for one. He (complainant) said he wanted 3 cows. I told him that the Shs.100,000 could be used to build (cow) pen. That is when he (complainant) gave me (appellant) his ATM card and pin no."

It follows that nothing turns on those submissions that prosecution had failed to prove appellant had complainant's ATM and Pin because appellant admitted possessing of both.

6. Further the complainant in evidence in chief; which evidence was not shaken by cross examination by the appellant; stated that the appellant was his pastor whom he had known for three years. That the appellant was also a land broker. It seemed from complainant's evidence that he had undertaken some transaction with the appellant which necessitated some funds being deposited into complainant's bank account. As a consequence that the complainant at the appellant's request gave the appellant his ATM and National Identity Card. He gave him these for the sole reason of getting the account number of the complainant for the purpose of the deposit of those funds. Complainant was later, according to his clear evidence, to find out that the appellant had swapped and gone away with his ATM card. In that swapping appellant left his own ATM card with complainant. The complainant found this out when he presented that ATM card at the counter of his bank. He discovered that what he presented to the teller at the bank counter was the appellant's ATM card. He further found out that Kshs.384,792 had been withdrawn from his account through the ATM Machine using his ATM card.

7. The appellant in his sworn testimony in his defence confirmed that he withdrew the said funds from the complainant's account using the complainant's ATM card after the complainant requested him to buy for him three cows. He stated in his defence.

"He (complainant) then told me he wanted me (appellant) to withdraw the cash for him. He gave me his ATM and Pin number. He told me to withdraw the money in bits. I would be withdrawing the money and keeping it in bits of Kshs.100,000. I took Kshs.100,000 for the second time and Kshs.183,000 as the last bit."

8. In the first instance that defence is not supported by the complainant's bank statement produced at the trial as an exhibit. The bank statement showed daily withdrawals of Kshs.20,000 for a period, which totaled the amount of Kshs.383,800. But what is important to note is that the appellant admitted having the complainant's ATM and Pin and also admitted withdrawing money from the complainant's account.

9. The trial magistrate considered appellant's stated defence that he withdrew the amount from the complainant's account to assist complainant to purchase cows and stated thus in his considered judgment:-

"Secondly, the court fails to believe or find logic in having the complainants (sic) instruct the accused (appellant) to withdraw the money through ATM withdrawals which would inconvenience him (complainant) in terms of time and costs. The complainant was capable of presenting himself at the bank counter and easily withdraw the entire Kshs.383,000 which would have less inconvenience to him in terms of bank charges as well as time spent. This was well

demonstrated by the fact on the 17th of July 2014 he (complainant) had presented himself at the Equity Bank Nanyuki branch intent on withdrawing Kshs.90,000/=. The court thus rejects the accused allegations of acting on instructions.”

I wholly support that assessment of the appellant’s defence by the trial magistrate.

10. It follows that the first issue raised by the appellant is rejected.

11. The other issue raised by the appellant was that the close-circuit television (CCTV) footage was not primary evidence and that it failed to show a time when he and the complainant went to withdraw money previously together.

12. It is not clear what the appellant meant by submitting that the CCTV footage was not primary evidence. The Bank Manager produced at the trial a flash disk, as an exhibit, which flash disk contained the down-load of the appellant’s photographs of the instances he withdrew cash from the complainant’s account at the ATM. The flash disk in this court’s view is primary evidence of the footage.

13. The fact that there was no footage showing the appellant in the company of the complainant at the ATM on previous time is not material in this case because the appellant acknowledged he had the complainant’s Pin. The trial magistrate in considering that line of defence of the appellant stated:

“I also noted that the accused (appellant) takes issue as to how he could have withdrawn the money using the complainant(s) ATM and yet he did not have his Pin.” On this the court takes the view that the accused had on past occasions accompanied the complainant to the ATM and assisted him effect transaction and had thus every opportunity to view and take note of the complainant’s pin.”

14. The second issue raised by the appellant, in view of the above discussion is also rejected.

15. Before concluding this judgment it is important to consider the defence raised by the appellant that the purpose for which he withdrew money from the complainant’s account was to assist the complainant purchase three cows. The appellant on cross examining the complainant received the following response, on the allegation of the purchase of those cows:-

“The issue he (appellant is saying about the deal to buy the cow(s) is false. If at all it is true you (appellant) withdrew my money to buy the cow for me; where is the cow to the money (sic).”

16. Indeed that response of the complainant to the allegation of purchase of the cows is pertinent. The appellant should have shown where were, if at all, the cows he purchased with the withdrawn money. This he did not.

17. In this court’s view the trial court’s finding that the prosecution’s evidence sufficiently met the criminal standard of proof is correct. The appellant’s appeal against sentencing is also rejected. The sentence well met the crime. The trial court’s conviction is confirmed and its sentence is upheld. The appellant’s appeal is dismissed.

DATED AND DELIVERED THIS 25TH DAY OF JANUARY 2017.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant

Appellants: Stanley Maina Gatitu

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE