



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 46 of 2015

FARID KEYA WANGARA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani Cr. Case 828 of 2010 delivered by Hon. L. Mbugua,CM on 17th March, 2015)

JUDGMENT

Background

The Appellant was charged alongside another with two counts of stealing by servant contrary to Section 281 of the Penal Code. He was the first accused. The particulars of Count I were that on the 29th day of April, 2010 at Equity Bank in Kajiado township within Kajiado District, being servant of Equity Bank as Branch cash officer and Branch Assurance Officer respectively, jointly stole Ksh. 3,630, 000/= the property of Equity Bank which came into their possession by virtue of their employment.

The particulars of Count II were that on 3rd May, 2010 at Equity Bank Kajiado Branch in Kajiado township within Kajiado district, being a servant to Equity Bank as the Branch Cash Officer stole Kshs. 2,235,000/= the property of Equity Bank which came into his possession by virtue of his employment.

At the conclusion of the trial the Appellant was found guilty in respect of Count I and was sentenced to two years imprisonment. His co- accused was acquitted in both counts.

Being dissatisfied with the decision of the trial court he has filed this appeal against both his conviction and sentence. In a Memorandum of Appeal filed by Oyombra & Co. Advocates on 20th March, 2015, he raised the following grounds of appeal;

- 1. The learned Magistrate gravely erred in law and in fact by finding that the Appellant is guilty of stealing by servant contrary to Section 281 of the Penal Code.**
- 2. The learned magistrate erred in law and in fact and totally misdirected herself by holding that only the Appellant had access to the ATM at Equity Bank Kajiado**

branch on 3rd May 2010 contrary to the evidence issued in Court by the Accused persons and Prosecution Witness One (PW1).

3. The learned magistrate completely erred in law and in fact and totally misdirected herself by making contradictory findings that money allegedly stolen was never loaded on the ATM machines contrary to evidence issued in Court by the accused persons and Prosecution Witness.

4. The learned magistrate completely erred in law and in fact and totally misdirected herself by making contradictory findings that only the Appellant had access to the ATM machines on 3rd May 2010 and only the Appellant loaded money to the ATM machines on the particular day.

5. The learned Judge erred gravely in law and in fact and thereby completely misdirected herself by failing to appreciate that the alleged service men from Technology Associates were allowed into the Banking hall without any identification and that their presence was made known to the Appellant by one Miss Susan thereafter the Appellant brought the same to the attention of the 2nd accused person and PW1 who allowed them access to the ATM machines.

6. The learned Magistrate erred in law and in fact and completely misdirected herself by holding that the Appellant was solely responsible for allowing the alleged service men from Technology Associates to gain entry into the ATM machines and thereafter allowing them access out of the said ATM machines contrary to the evidence adduced in Court.

7. The learned magistrate erred in law and in fact and totally misdirected herself by not considering the conflicting evidence of PW1 on which persons gained access to the ATM machines on 3rd May 2010 and which persons participated in the loading of money therein.

8. The learned Magistrate erred in law and fact by concluding that the Appellant was solely responsible for cash management at the Bank and in particular the ATM machines without the benefit of considering any documentary evidence go the effect.

9. The learned magistrate erred in law and in fact and completely misdirected herself by holding that the Appellant knew the alleged service men from Technology Associates and further failed to appreciate the fact that the Appellant on the said date of 3rd May 2010 had been summoned by PW1 to undertake duties of a teller while the said persons were still at the ATM machines a fact that PW1 was well aware of.

10. The learned magistrate erred in law and in fact by conclusively holding without the benefit of any evidence whatsoever adduced by the prosecution that the Appellant stole money from the ATM machines at Equity Bank Kajiado Branch on 3rd May 2010 and has thereafter wrongly convicted the Appellant without any regard to the rules of Evidence.

11. The learned magistrate erred in law and in fact and thereby gravely misdirected herself by failing to appreciate at all material times when the alleged crime was committed the Appellant was working under the supervision and control of the 2nd Accused person and PW1 who are the Appellant's superiors and as such they were privy to the Appellant's dealings which fact has not been controverted by the aforesaid persons.

SUBMISSIONS

The appeal was canvassed by way of written submissions. The Appellant's submissions were filed by Amadi and Amadi advocates. In them they argued that the presence of PW1 when the money was loaded into the ATMs made her culpable in the whole affair. It was argued that suspicion further fell upon PW1 given the fact that the first reconciliation of the money missing from the ATMs as conducted by the Appellant, PW1 and the Stephen Sairo showed that the money that was stolen was around 2.235 million shillings but kept on increasing, consequently with PW2 stating that the amount was around 5 million.

It was submitted that the fact that PW1 had stamped the treasury out slips with regards to the money that was removed from the vault and loaded into the ATM with a stamp dated 13th February, 2012 on 3rd May 2010 means that she was part and parcel of the ploy to rob the company and as such should have been charged. The fact that she testified against him was highly prejudicial.

The Appellant submitted that the fact that him, the operations manager(PW1) and the branch manager(Accused 2) had access to the codes to the ATMs and were authorized to open the same meant that the two, to his exclusion, had motive and opportunity to carry out the theft. As such, doubt arose as to his involvement solely given the fact that at least two people were required to open the machines. On the same issue he takes the Branch manager's denial that they opened the ATMs together as a blatant and outrageous aversion to avoid responsibility which lends credence to his assertion that he was being framed.

He further asserts that he was in no way associated with the masquerading technicians who according to the prosecution were the perpetrators of the crime in question. He agrees that he did indeed open the ATMs for them but he was in the company of the branch manager. He states that the assertion that he allowed the masqueraders into the back rooms was false and that one Miss Susan did the same and he promptly informed PW1 of it. He further submitted that after the ATMs were opened he took a supervisory role at the lobby before being called back to act as a teller by PW1. He submitted that he left the intern in a sentry position at the ATMs. He therefore is of the view that the robbery was carried out by the masqueraders and his nexus to them was never proved as it was never shown that he made a call to the Technology firm or headquarters as testified by PW3 and 4. Furthermore, it was never demonstrated that he was privy to the information that the ATM machine was faulty on 2nd May, 2010. Again, it was never established that he loaded any money into the machine, as a result of which he would have had an opportunity to steal.

He concluded by stating that the prosecution had not discharged its onus of proving the case beyond a reasonable doubt and prayed that the appeal be allowed.

The Respondent in its submissions filed by Learned State Counsel, Ms. Aluda conceded to the appeal. She submitted that PW1 had been privy to the fact that technicians were expected at the branch even though according to PW3 and PW4, no communication requesting them to come was made. PW1 was also part of the team that had loaded the machines and was therefore aware the machines had money. She also called the Appellant from his supervisory role in the ATM lobby when the technicians were working raising further suspicion. She submitted that the Appellant's role in the theft was questionable given the fact that he was at all times answerable to the Branch Manager and the Operations Manager who both appeared to know of the coming 'technicians' who likely disappeared with the money. Further, a crucial witness one Stephen Siro/Sairu had not been called to corroborate and give crucial evidence about the occurrence of the events of the day in question. He was mentioned severally on the occurrences of 3rd May, 2010 and the failure of the prosecution to call him was a fatal mistake to their case.

Miss Aluda questioned why the role of the receptionist in allowing the technicians into the office

without taking down in the visitors' book in which it was supposed to be recorded the purpose of the visit, the time out, their signatures and time out.

Finally, she further submitted that the trial magistrate had failed to consider in his deliberations that the police investigations in the matter had not been completed given the fact that one of the masqueraders identification cards was positively tied to a person known to the National Registration Bureau but the person in question was never arrested or questioned to establish a link to the robbery in question As such doubt persisted as to the Appellant's culpability.

Evidence.

This being the first appellate court, I have to reevaluate the evidence on record and come up with my own independent conclusions. The prosecution's case was that the Appellant on 29th April and 3rd May 2010, with others not before the court, was complacent in the theft of Kshs. 5,865,000 cumulatively being Kshs. 3,630,000 on 29th April 2010 and Kshs. 2,235,000 on 3rd May 2010. The monies in question came into the possession of the Appellant by virtue of his employment by Equity Bank where he worked as a Cash Officer at the Kajjado Branch. The theft in question was well orchestrated with the money stolen in between the bank vault and the Automatic Teller Machines, herein ATMs.

It was contended that the Appellant and his accomplices would withdraw money from the bank vault for the purpose of refilling the ATMs but the money would be subverted before it got to the machines. The period in question was a particularly notorious streak with three robberies taking place; the other theft was allegedly carried out by Edwin Kirui on 30th April, 2010. It was alleged that the Appellant was one of the three people who had the authority to open the ATMs; the others being, the Branch Manager who was the 2nd Accused, and the Operations Manager, who was PW1.

It was said that the ATMs had malfunctioned on 2nd May, 2010. The Appellant in the company of the operations manager, the branch manager and one Stephen Siro checked the machines on 3rd May and found that some notes had caused a blockage that occasioned the malfunction. Once the blockage was cleared and the machines were up and running they discovered that they were running low in funds necessitating a refill. The Appellant and the operations manager went to the vault and withdrew Kshs. 2,650,000/= for ATM 1 and Kshs. 2,750,000/= for ATM 2 which they refilled into the respective machines before returning to their ordinary routines.

Later on two men appeared who said they had been sent by Technology Associates who were the bank's contracted service providers with regards to the servicing and repair of the ATMs. The Appellant and the Branch Manager then led the men to the ATM lobby where they opened the machines and the men started making the necessary repairs to the machines. The branch manager then left for his office and left the Appellant to oversee the work. He was still overseeing the men when the operations manager called him back to the banking halls to help out since there was a shortage of tellers. He went back to the main banking halls and continued to carry out his tasks. About an hour later one of the employees informed the Appellant that the doors to the ATMs were not locked. He went to look and found that they were open. He did not panic since he thought the technicians were still around. After they had searched around to no avail they decided that they had to count the money and make a reconciliation. The Appellant and the Operations Manager then opened the machine and found that the money was less than they had deposited in the morning. ATM 1 was missing Kshs. 800,000/= while ATM 2 was missing 1,000,000/=. They then closed the machine and the branch manager, who was in Isinya, was called and briefed. They later counted the money, they were; the Appellant, Branch manager, Operations manager and Stephen Siro. They found that Kshs. 2,235,000/= was missing in total namely; Kshs. 1,130,000/= from ATM 1 and Kshs. 1,105,000/= for ATM 2.

The branch manager then made a report to the head office regarding the loss and a security

team was sent. The team found that the technicians who had been let into the ATM lobby were not from their service partners but impostors who were masquerading. They also found in the lobby a laptop bag and a courier envelope. They then made a complaint to the Banking Fraud Unit which started investigations into the matter. After concluding their investigation they preferred charges against the Appellant and two others who they found to be culpable for the offences in question.

PW1, CATHERINE WAITHERA NDUNGU, testified that she was the operations manager during the period in question and that her duties involved training staff and being the custodian of the safe areas where the money was kept. She stated that there were two custodians each with a code and key and their access to the money was mutually inclusive, that is, none could access the money without the other.

She stated that on 3rd May, 2010 when she reported to work the manager informed her that the ATM machines were not working. She, in discharging her duty, went and found the Appellant and Stephen Siro. They then checked the machines and found them faulty. The fault in question was due to a stuck note which they removed and an inspection of the machine showed that the cassettes, which hold the money were all in good condition. They also discovered the cassettes that held 1000 denomination notes were empty. They therefore decided to replenish the same. She was escorted by the Appellant to the vault where they withdrew Kshs. 2,650,000/= for ATM 1 and Kshs. 2,750,000/= for ATM 2. She adduced the treasury slips evidencing the same.

After loading the ATMs she returned to her regular duties where after a while the Appellant came and informed her of some visitors from Technology Associates who were there to service the ATMs. She stated that they had not called the head office requesting them and given the fact that schools were reopening she did not see the reason for such servicing during such a hectic time since the machines were functioning properly. She therefore told the Appellant to inform them to wait.

Later as she was sitting in her office, which was adjacent to the Appellant's, she saw Stephen Siro get into the Appellant's office. He enquired as to why the ATM door was open. Having overheard this she went to enquire and found that indeed the door was open and that one ATM was working while the other one was not. The Appellant said that he had left the technicians working on the machines after he and the manager had opened the door. She then asked him to show her the visitors since she had not seen them and the Appellant had been the one who cleared them.

She with the help of the Appellant and in the presence of Stephen then proceeded to open the door to the ATMs. She could already see that the money inside was less than what they had loaded that morning. They found that ATM 1 was missing Kshs. 800,000/= and ATM 2 was missing Kshs. 1,000,000/=. She then called the manager, who was at Isinya, and informed him of the situation. She then proceeded to close the ATMs and it was decided that they should carry out a manual count. The count was done by PW1, the Appellant, Bank Manager and Stephen. On conclusion they found that Kshs. 2,235,000/= was missing, that is, Kshs. 1,130,000/= from ATM 1 and Kshs. 1,105,000/= from ATM 2.

The manager then made a report to the head office. She was then informed by the bank manager that he had assisted the Appellant to open the machines. A security team was sent from the head office to investigate the situation. She checked the visitor register and found that there were 2 visitors who could not be accounted for. They had left their national identification cards. They were James Trevor Sieko ID No. 25226315 and Abraham Ngigi Mungai ID no. 22143858. The purpose of their visit was not indicated in the visitor log as required. The receptionist informed her that she had referred the visitors to the Appellant and that she did not know when they had left. On 4th May 2010 another team was sent to the branch to carry out reconciliation of the accounts. She recalled that they found Kshs. 5,600,000 was missing.

On cross examination, PW 1 stated that the ATMs had been faulty on 2nd May, 2010 and she had been informed of that by the bank manager. She called the head office and informed them of the issue. The head office was going to give a solution the next day. She also stated that the duty to vet any guests to the premises fell on her. She further stated that she had stamped the treasury slips 13th May, 2010 when they were actually made on 3rd May, 2010. She acknowledged that it was an error on her part that occurred after the Appellant refused to stamp them.

PW2, CHARLES NGURE CHEGE, he testified that he works at Equity Bank as a manager in monitoring and evaluation. He stated that on 10th May 2010 he was assigned the duty of investigating loss of cash at the Kajiado branch ATM1 and ATM2. The span of the investigation was supposed to be between 29th April 2010 and 3rd May 2010. He produced the analysis journal of his investigation. His evidence was that a total of Kshs. 5,865,000/= was lost; Kshs. 2,830,000/= and Kshs. 3,035,000/= in the respective ATM machines.

PW3, JULIUS MAINA MWANGI testified that he was an employee at Technology Associates. He stated that he was in charge of receiving and reacting to calls. He assigns engineers to react to the calls and he rarely went for site visits. He learnt of the theft at Equity Bank Kajiado branch on May 2010 when the investigating officer visited him. He informed him that some people went to the branch on 3rd May 2010 stating they were from the firm and they checked the ATMs. He showed him copies of the masqueraders' identification cards which did not match any of their employees.

Their firm had however not sent any engineers to Equity Bank Kajiado Branch on 29th April, 2010 or 3rd May, 2010. He further stated that their employee, one David Mburu went to the branch on 31st May 2010 for routine maintenance.

PW4, FASIL ARTHUR OPIYO OYUGI, was a general manager in charge of IT services who dealt with service providers and equipment. He testified that he co-ordinated support for ATMs when they broke down usually using Technology Associates who were a contracted service provider. He stated that they had ATM custodians in the branches and also field officers. He testified that in case of a problem these custodians could call the headquarters without involving the branch manager.

His further testimony was that on 20th May 2009 he sent an email to all technical field officers copied to all branch managers and all heads of operations amongst others in which he asked them to not call Technology Associates directly in case of ATM breakdown. The calls from the branches were fielded by a group of about 5 people who then made calls to Technology Associates. He did not recall receiving a call from the Kajiado branch during the period from 29th April 2010 to 3rd May 2010.

PW5, ROSE JEPKEMOI BII worked for Equity Bank in the Human Resources department. She confirmed that the Appellant was an employee of the bank having joined the company on 23rd July 2008 as a cash officer. She testified that he was however summarily dismissed on 5th May, 2010 over theft of ATM money. She adduced as evidence certified copies of the Appellant's appointment letter, posting letter and dismissal letter. The dismissal letter stated that the Appellant was 'liable to pay back part of the total loss that the Bank had incurred as a result of the fraud amounting to Kshs. 4,050,000/=.

PW6, NICHOLAS CHAO, also worked at Equity Bank as a security officer based at their head office in Upper Hill Nairobi. His duties included investigating fraud and other assignments. On 3rd May, 2010 while on duty he was assigned to investigate theft of money at the Kajiado branch. He proceeded to the branch to take details. He met the branch manager, operations manager and the Appellant. He learnt that on 2nd May 2010 the ATM was malfunctioning. He also discovered that some people had been to the branch earlier that day to repair the ATMs.

He found that the people in question had signed the visitors register at the branch namely James Trevor Otieno Mboha ID No. 25226315 and Abraham Ngige Mungai ID No. 2243857. They allegedly came from Technology Associates. His evidence in other respects corroborated that of PW1. He discovered that the total loss was Kshs. 5,565,000/=. When he interrogated the Appellant and the bank manager they could not give a clear explanation of how the money was stolen. They instead blamed the theft on the 'technicians'. He also found a laptop bag in the ATM room.

PW7, No. 62155 CPL NEHEMIAH NDIRANGU attached to the Banking Fraud Unit investigated the case. He took over the conduct of the investigations on 4th May, 2010. As at this date, the Appellant had been placed in custody. He thereafter visited the bank where the theft took place. He read self-recorded statements of the staff members. He concluded that the operations manager and bank manager had a 'clear view' of what was going on in the area. He was taken through the loading process so as to understand what may have occurred. He observed that the ATMs were all operating optimally although the operations manager, PW1, did indicate to him that they had issues servicing the two machines and this had been brought to her attention by the Appellant.

He was then given the visitors book together with the two national identification cards of the 'technicians'. He found out that the entry in the book with regard to the two people was incompatible with the bank procedures of entertaining visitors. The purpose for their visit, checking out time, signatures and signatures of the authorizing personnel were not filled in. At the ATM lobby he found a black bag on the floor and upon checking inside found a brown envelope. The envelope was a courier envelope with a sender's (Paul Syaywa, Tel. 0723396211 Eldoret) and receiver's (Vincent Anyula Tel. 0725816392 Kakamega) names. He tried to reach the numbers but they were not going through. He discovered a CD inside the envelope which he tried to run to no avail. Upon returning to Nairobi he had a conversation with PW2 who was part of the bank compliance team and who elaborated on the audit of the money that was loaded on the ATM. He also found out that the Appellant was supposed to monitor the cash and appraise his juniors while also overseeing the migration of cash by requisitioning for money when it was running out to keep the tellers operational.

Determination

Having considered the submissions of the respective parties and the evidence on record, I find that the issue for determination is whether the prosecution proved its case beyond a reasonable doubt.

The case in question involves the events of 29th April - 3rd May 2010 at the Kajjado Branch of Equity Bank. The evidence of PW2 demonstrated how electronic system was used to execute the systematic theft at the branch's ATMs on the two dates mentioned above. There is evidence that only three persons had access to the codes to gain entry into the machine and that two of their numbers had to act in concert every time the machines had to be opened. It follows then that the theft could have only occurred with the knowledge, omission or commission of two of these parties.

The theft took various forms with some money being taken out of the cash cassettes while the rest was never loaded into the machines. This therefore calls into question the role of the masquerading technicians. The evidence of PW2 was clear that the money stolen from the machines on 3rd May, 2010 was not removed from the machines and so may not have been loaded after all. The amount in question is Kshs. 1,130,000 for ATM 1 and Kshs. 1,105,000 from ATM 2. The role of the 'technicians' in this matter therefore appears to be merely that of bag men whose duty was to carry the money out of the place. This is further evidenced by the fact that the cassettes inside the machines had not been affected and there was no evidence of forced entry. Therefore, this case turns on who had the ability, opportunity and motive to carry out the offence.

The Appellant contends that the evidence in question could not support a conviction as it was littered in doubt and material contradictions. He particularly pointed a finger at PW1 and her conduct which he stated caused suspicion as to her role therein and that she should have therefore been interrogated and treated as a suspect. He stated that he did not know of the issues with the ATMs until the morning of 3rd May, 2010 when he was informed by the branch manager.

He further relied on the evidence of DW2, who was the 2nd accused, the bank manager who testified that when he found out that the machines were malfunctioning on 2nd May, 2010 he tried to call him to no avail but he had had discussions on the same with PW1 and Stephen Siro/Sairu. This, he contended, meant that he could not then have been in a position to set up the masquerading technicians as bag men. He further averred that he learnt of the 'technicians' arrival from Miss Susan although PW1 had earlier informed him they would be showing up. This he alluded, meant that the evidence against him did not tie him to these men and that the learned magistrate's finding linking him to them was wrong in law and fact.

This court has looked at the evidence at hand and upon an analysis of the same finds that the assertion that the Appellant worked in cahoots with the 'technicians' was doubtful. As earlier noted the technicians did not carry out the robbery but were mere abettors whose duty was to plausibly carry away the money. PW2 stated that the money that was stolen on 3rd May, 2010 was never loaded onto the machines. The evidence on record shows that the machines had been loaded in the morning by both the Appellant and PW1. They both agreed to that particular fact. However, as at the time the money is said to have disappeared from the machine, the Appellant was not around it (machine). Furthermore, the person in whose company he was when loading the machine was not himself charged but treated as a prosecution witness. That called into question how the investigator arrived at that conclusion

Further, although the Appellant left the technicians unsupervised, it is worthwhile to note that it is PW1, his superior, who called him to go to help out with a shortage of tellers. He may not have known how the money left the machine after he went to do the teller duties. Of course, of importance is the fact that it was a school opening day and so the bank was busy. I cannot therefore doubt that he told the truth; in any case, that fact was not challenged by the prosecution.

There is also the fact that PW1 stamped the treasury out slips that evidenced the money that was supposed to be loaded into the machines. The stamps in question were done on 3rd May, 2010 but the date shown was 13th February, 2010. PW1 agreed to having stamped the documents but stated that the same was by mistake. They were two treasury out slips and given the sensitivity of the said documents and particularly their importance with regard to various daily cash reconciliations in a financial institution, I find it hard to comprehend the fact that PW1 appended the wrongly dated stamp to not one, but two documents without realizing this critical error. This further raises doubt on the involvement of the Appellant in the offence. I am of the view, then that Ms. Aluda for the state, properly conceded to eh appeal in as far as the role of the Appellant in the disappearance of the money was questionable.

I must also comment on the failure to call as a witness one bank employee, Stephen Sairo/Siru. He was mentioned as being there when the blockage in the ATMs was cleared, was there when money was loaded, was there when a reconciliation was done and knew of the conversations about the malfunctioning machines of 2nd May, 2010. Both parties to this appeal have pointed out that his failure to be called as a witness meant that a crucial witness was never called and the court should have taken this to mean that the evidence he would have adduced would have been detrimental to the Prosecution case. See **Bukenya & 5 others vs Uganda[1972] EA 549** and further emphasized by H.A Omondi J. in **Mwalimu Kalama Fondo vs Republic[2009] e KLR** where it was stated that:

“I think the decision in Bukenya and 5 others v Uganda has been misapprehended. The principle advanced in that case is that failure to call as witnesses, persons who have been mentioned in a hearing does not automatically mean it’s because their evidence would have been fatal to prosecution case and therefore call for an automatic acquittal. It is when the evidence called is inadequate as to leave loopholes which could have been filled by the testimony of the person mentioned but not called, that the same becomes fatal and gives room for the court to infer that had such a person been called, he would have given evidence adverse to the prosecution.”

In the present case, I am convinced that the failure to call Stephen was detrimental to the prosecution case as it left so many unanswered questions which he would have answered. This particularly related to the chain of events from the time the machines were loaded, the ‘technicians’ entered the bank and the money disappeared. I concur with the Appellant that the obvious omission of the evidence of Stephen gives the inference that if he had testified, his evidence would have been adverse to the prosecution.

This court therefore, having re-examined and re-evaluated the evidence is satisfied that the appeal must succeed. I find that the prosecution did not prove its case beyond a reasonable doubt. I quash the conviction, set aside the sentence and order that Appellant be and hereby forthwith set free unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED at NAIROBI THIS 12TH DAY OF JULY, 2016.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Mr. Amadi for the Appellant.
2. Miss Akuja for the Respondent.