



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 27 OF 2012

GEORGE GITHUKU KAMAU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 680 of 2007 in the Principal Magistrate's Court at Nairobi – F. Munyi (RM) on 12/10/2011)

JUDGMENT

1. The appellant, **George Githuku Kamau**, was convicted for the offence of stealing by clerk contrary to **Section 281** of the **Penal Code**. It had been alleged that on 29th day of January 2007 at Equity Bank Thika Branch in Thika District being a Credit Clerk to Equity Bank Thika Branch stole from the said bank Kshs.962,127/= which came into his possession by virtue of his employment.
2. The summary of the case is that Thika Institute of Technology had a development loan account No. **[Particulars withheld]** with Equity Branch. One Festus Kang'ethe, **PW2** who was working with the Institute as the Finance and Administration Manager while verifying their bank statements realized that an amount of Kshs.962,127/= had been debited from their account while there were no such instructions to the bank. He notified the bank who took action and thereafter a reversed entry was done on the 19th March 2007. Upon the report being made **PW3** one Lydia Wanja, the Operations Manager checked and confirmed that the erroneous transaction had been made by a member of staff. She checked the account ledger inquiry dated 29th January 2007 and confirmed that the user ID used was GK00925 and was keyed in at 11.07 a.m. The transaction showed that account No. **[Particulars withheld]** had been debited with an amount of Kshs.962,127/= which was transferred to savings account No. **[Particulars withheld]** in the names of Yvone Muthoni Ngamini. The money was thereafter withdrawn from two different branches if Equity Bank in Nairobi. The said Yvone Muthoni Ngamini had an account with Equity Bank opened on the 18th April 2006.

3. In his defence the appellant tendered sworn evidence in which he denied having effected the debit transfer of 29th January 2007. It was his testimony that the bank made an error which it was reversing on 19th March 2007. He also stated that he did not effect the reversal, and that according to the letter from the Thika Institute of Technology, they had not lost any money. He denied any knowledge of one Yvone Muthoni Ngamini, and produced his bank statement in court which showed that he did not receive any money of such amount in his account.
4. He also stated that the log in ID used was not a secret in the bank and it would appear every time one did a transaction. He however admitted that a password was required to get the login ID. He testified that no such password was produced in court. He maintained that he did not serve Yvone Muthoni Ngamini at any time when she made the withdrawals and said that there was an authorizing signature on the withdrawal slip which was not his. He further stated that he was not in any of the branches where the withdrawals were made being at Kimathi Branch and Four Ways Towers.
5. Upon conviction he was sentenced to serve four years imprisonment. He has now filed an appeal in which he essentially attacks the weight of the evidence upon which he was convicted. Mr. Kuloba learned counsel for the appellant compressed the grounds of appeal and urged them together. He argued that the ingredients of stealing by servant were not proved beyond reasonable doubt. That while it is admitted that the appellant was a servant of Equity Bank Ltd, it had not been proved that the thing allegedly stolen was the property of the employer or that the thing which was the sum of Kshs.962,127/= ever came into his possession.
6. Mr. Kuloba submitted that **Section 268** of the **Penal Code** on stealing requires that intent to permanently deprive the owner be proved and that this was not done. That the prosecution failed to show convincingly that the appellant had intent to use the money allegedly stolen. He also contended that the witnesses confirmed that the money which is the subject matter of the case did not belong to the bank. That they were custodians and the money belonged to their customers.
7. In response Miss Nyauncho opposed the appeal on grounds that the prosecution proved all the ingredients of stealing by clerk contrary to **Section 281** of the **Penal Code**. She urged that it had been proved that the appellant was an employee of Equity Bank and that the amount of money stolen belonged to Equity Bank.
8. Miss Nyauncho argued that **PW2** an employee of Thika Institute of Technology testified they had a loan account with Equity Bank and that there was an erroneous transaction on their account, which debited the said account with Kshs.962,127/= and credited it to a third party. That the bank therefore lost money, and the second ingredient was proved. Miss Nyauncho submitted that the bank was the proper complainant and not Thika Institute of Technology.
9. I have scrutinized and reassessed the evidence afresh as is my duty as the first appellate court. The undisputed facts of this case are that the appellant was an employee of Equity bank Thika branch. He was a Credit clerk at the material time. The appellant was also the holder of user ID No. GK 00925. It is also not in dispute that Kshs.962,427/= was transferred from Account No. **[Particulars withheld]** held by Thika Institute of Technology to savings Account No. 260190183462 belonging to Yvonne Muthoni Ngamini. User ID No. GK 00925 was used to effect the said transfer.
10. The appellant was therefore a Credit Clerk in the complainant bank and had authority to transact on clients' loan accounts. The bank was the custodian of the funds in the said accounts. Hence the bank was the special owner of the money and the appellant dealt with those funds on behalf of his employer the bank and not on his own behalf. The submissions of Mr. Kuloba that the prosecution did not show that the transferred money was the property of Equity bank cannot therefore stand.
11. Kshs.962,427/= was transferred from the account belonging to Thika Institute of Technology into

the savings account of one Yvone Muthoni Ngamini without any instructions from Thika Institute of Technology, without any justification and without any colour of right. The bank lost the money when it corrected the erroneous credit to restore the account of Thika Institute of Technology to its rightful position.

12. From the evidence on record the client into whose account the money was erroneously credited withdrew most of the money and could not be traced for purposes of arrest. The evidence of **PW4** the Cash Officer in charge of the cashiers and customer inquiries was that the statements of account showed that the debit error reversed on 19th March 2007 to correct the erroneous debit on account No. **[Particulars withheld]** of Thika Institute of Technology was not done from savings account No. **[Particulars withheld]** of Yvone Muthoni Ngamini which was erroneously credited. The appellant's defence that the error was reversed and therefore no money was lost cannot therefore hold water.

13. The appellant maintained in his defence that he did not transact with Yvone Muthoni Ngamini neither did he know her. From the record the offence was committed when the money was moved from the account of Thika Institute of Technology to that of Yvone Muthoni Ngamini. M/s. Ngamini withdrew the money from different branch outlets and it was not necessary that she makes her withdrawals at the appellant's till to connect him to the offence.

14. The key factor is that the appellant's user ID was used in the transaction that moved the money into Yvone Muthoni Ngamini's account in the first place. The prosecution brought evidence that no one could use that user ID without a password which only the appellant knew. Having so far established it does not avail the appellant to state that his password was breached without evidence to that effect. He alone could have brought such evidence.

15. For the foregoing reasons the appeal is found to be unmeritorious and is therefore dismissed.

SIGNED DATED and DELIVERED in open court this 4th day of **June 2014**.

L. A. ACHODE

JUDGE