

IN THE MAGISTRATE COURT: DELTA STATE OF NIGERIA
IN THE EFFURUN MAGISTERIAL DISTRICT
HOLDEN AT EFFURUN

BEFORE HIS WORSHIP E.A. ODJUGO ESQ., CHIEF MAGISTRATE
(SPECIAL GRADE)
ON THURSDAY THE 20TH DAY OF APRIL, 2023.

CHARGE NO: ME/23C/2022

BETWEEN:-

COMMISSIONER OF POLICE COMPLAINANT

AND

AKPO-OGHENE DUKUYE DEFENDANT

JUDGMENT

The Defendant was charged before this Court on a two-Count charge, viz;

- (1) That himself and one other unnamed person, now at large between the 18th day of February, 2022 and 21st day of February 2022, while on duty in charge of ATM machines at First Bank Plc, Airport Road Branch, Effurun, did conspire with themselves, and, then committed a felony, to wit stealing the sum of Eleven Million, Four Hundred Thousand Naira Only (N11,400,000=) being property of the said Bank, and thereby committed an offence punishable under Section 516 A of the Criminal Code, Cap. C21, Vol. I, Laws of Delta State, 2006, and
- (2) That himself and one other unnamed person, now at large, while on duty in charge of the said ATM machines at First Bank Plc, Airport Road Branch, Effurun, between the 18th day of February, 2022 and 21st day of February 2022, did steal the said aforementioned amount of Eleven Million, Four Hundred Thousand Naira Only (N11,400,000=) from the ATM machine, property of the said Bank, and thereby committed an offence punishable under Section 390 (6) of the Criminal Code, Cap. C21, Vol. I, Laws of Delta State, 2006, supra.

The Defendant pleaded NOT GUILTY to the said two-Count charge, and, thereafter, the prosecution called two witnesses, PW1, one Otedo Cyril and PW2, the IPO, W/Insp. Eguonor Ukura with AP No. 269806, attached to the Nigeria Police Force, Ugborikoko Police Division, Delta State.

The lone Exhibit tendered in this case is the statement of the Defendant which is Exhibit A.

PW1 stated that he is a Banker with First Bank of Nigeria Plc and that he is the ATM custodian with the said Bank at its Airport Road, Effurun Branch. He stated that he knows the Defendant. Also, that his duty as ATM custodian is to load the ATM machine with cash and then ensure that it pays money, cash to customers. Furthermore, that Fridays of every week, he would then hand over his duties as custodian to another staff who would then be on duty for the weekend, and, then hand over back to him on Monday.

PW1 then stated that on the 18th of February, 2022, he handed over duty to one Osunbor Vitalis. He further stated that himself and another staff work together, and, then hand over to two other staff. He stated that he has a combination, a set of codes that gives a person access to the ATM, while his other colleague has the key. He stated that on the 18th of February, 2022, himself and his unnamed colleague, who had the key then handed over duties on the 18th of February, 2022, to Osunbor Vitalis with the expectation to resume on the 21st of February, 2022.

PW1 then narrated to this Court that on the 21st of February, 2022 as at 7.30am the resumption time, the said Vitalis Osunbor had not resumed, and, did not resume ever again. PW1 stated that he made a report to the Head of the Branch of the Bank at 8.00am, who then went into the Bank's vault, brought the spare keys to the ATM vault, to enable them gain access to the ATM, and upon ascertainment of the quantity or amount of cash available, noted that over the sum of Eleven Million Naira was missing. PW1 stated further that he made a statement to the police, and that after the Bank's internal investigation and audit, the amount of money missing was purport at Eleven Million, Four Hundred Thousand Naira. PW1 stated that he handed over his duties to Vitalis, while one Joy handed over her duties to the Defendant alongside eight keys for the eight ATMs

Under cross examination, PW1 stated that he did not give the combination to the Defendant, and that only the keys were handed over to him. He stated that without the combination, the vault cannot be opened. He stated that himself and another person loaded cash into the said ATM machine. He stated further that on that very day, he loaded some cassettes along with the cash in the ATM , which according to him on the day of the incident was more than eleven Million, four Hundred Thousand Naira was missing. PW1 stated that he is not the CSO of that Branch of the Bank. He stated that it is not his duty to fix a faulty ATM machine,

but, certain staff who are familiar with how the ATM machine works can carry out first level maintenance, which he could also carry out.

He stated that he does not need approval to carry out such first level maintenance. He stated that he does not have the written consent of the said First Bank of Nigeria, Plc to come and testify in Court, since it is in the office. PW1 stated that since his manager was not around on the day of incident, a staff of the Bank went to report to the police. He said the incident happened on the 19th and 20th days of February, 2022. He stated that it was when he resumed for work on Monday that he noticed that some money was missing. He stated that he was not the person who reported this matter to the police. He stated that they got access to the ATM machine on Monday morning after 8.00am.

PW1 stated that Vitalis absconded with the ATM door key, that is where the vault is kept, and, that it was the spare key with which they used to open the vault. PW1 stated that as at the time the ATM door where the vault is was opened, they were not aware of missing money. PW1 stated that he could not recall how much was assigned to him to load in cash on the day of the incident, and that not all the cash given to him was loaded in the ATM cassette. He stated further that he could not recall how much he loaded and how much was left on the day of the incident, since the figures were not readily available to him

He stated that he does not have access to the spare key to the ATM vault, and, that the ATM vault key is with the Defendant. He stated that the spare key of the key which Vitalis absconded with is in the main Bank vault, and, that he has no access to it. He said that there are records of withdrawals between 19th of February, 2022 and 20th of February, 2022. He stated that he does not know how much is the amount of the "reject" bills. He stated that Vitalis is a core staff of the Bank, while the Defendant is a contract staff of the said Bank. He stated that the Defendant can receive instructions from Vitalis, but not in all cases. He stated that he does not know how much was recovered from the ATM vault.

PW1 stated that he neither saw the Defendant steal the said missing money or making arrangements with Vitalis or anyone else to steal it. PW1 then stated that initially, the Bank noted that Eleven Million, Four Hundred Thousand Naira was missing, but after reconciliation, it was discovered to be the sum of Eleven Million. Five Hundred and Thirty Thousand Naira. He stated that the reconciliation was made on the same day that a report was made to the police.

There was no re-examination.

PW2 is the IPO of this case. She stated that she was on duty at the DCB office at the Ugborikoko Police Station on the 21st of February, 2022, when this case was reported by one Frank of First Bank of Nigeria Plc against one Vitalis Osunbor and the Defendant. She said that she recorded statement from the said Frank, and, also recorded a statement from the Defendant. PW2 stated that the Defendant and Vitalis were posted on weekend duty at the ATM gallery at the said First Bank's Airport Road, Effurun Branch, and eight keys to the ATM machine were handed over to the Defendant, while Vitalis had the combination to open the said ATM machines. PW2 stated that Vitalis and the Defendant ought to be together at all times and from her findings, after the close of work, the Defendant left, which Vitalis was still around, whereas, they ought to have left together. She stated that Vitalis stated that he had other things to do, and, opted to trek, rather than enter the Defendant's vehicle, and, so the Defendant left him.

According to PW2, on Monday morning, the Defendant came to resume work, while Vitalis failed to come. Thereafter the management of the Bank took the extra key to the ATM gallery hall, and then operated the ATM machines. PW2 stated that the money stolen is Eleven Million, Four Hundred Thousand Naira only, and that the Defendant hinted that he kept the eight keys in a black cellophane bag in the gallery. She said Vitalis absconded. PW2 stated that she visited the scene of crime which is the ATM gallery accompanied by the DCO and the Inspector (Crime). She stated that the custodian was there, and that they were shown the eight ATM machines and then they were informed of what had happened. PW2 stated that she recorded statement from him, the custodian, and also from PW1. PW2 stated that investigation revealed that the father of Vitalis stood as a guarantor for him, and, that a letter of invitation was sent to him, for which his mother signed for, and spoke with the father on phone, PW2 stated that the father of Vitalis did not come to the police station. It was through PW2 that Exhibit A was tendered in Court.

Under Cross-Examination, she stated that it was one Frank who reported this case, and that he told her that particular sum of money was missing, which was the sum of Eleven Million, Four Hundred Thousand Naira only. PW2 stated that the Defendant and Vitalis were on weekend duty and expected to resume on Monday, but only the Defendant showed up. PW2 stated that she invited the Bank Manager to come and give details of the Bank's operation and about the money, but she refused to come. PW2 stated that a spare key was used to open the ATM door. PW2 stated that in her Investigation Report, she stated that the Defendant was with the key while Vitalis was with the combination, and, that the two of them must be together while working. She stated that the Defendant was

expected to go home with the key daily, before handing over to the next person, but according to the Defendant he hid the key in a cellophane bag. PW2 stated that she is unaware if the said Bank has an operational schedule. She said that she is not aware if it is the practice of First Bank of Nig. Plc to allow staff to take contrary properties home. PW2 stated that she does not know how much was loaded inside the ATM machines before the case was reported to the police, since the said Bank did not furnish the police with details of how much which was loaded or how much remaining.

PW2 stated that the manager of the said Branch of the Bank was invited, but, she did not come. PW2 stated that she is aware that Banks in Nigeria have CCTV footage. She stated that the Police was not given CCTV footage. She stated that she did not recover the missing money from the Defendant. PW2 stated that the Police invited the said Bank's officials to participate in conducting a search of the Defendant's premises, but, they did not come, and, so a search was not conducted in the premises of the Defendant. PW2 stated that the said Bank has security personnel that guard the Bank at all times. PW2 stated that when the Defendant came to work, she would not know if there were security officials on that day. PW2 stated that she did not take statements from the security officials. PW2 also stated that she was told that Vitalis and the Defendant ought to be in charge of the ATM gallery.

PW2 stated that one Mr. Faru is a core staff of First Bank of Nigeria Plc. PW2 stated that she does not know if Vitalis is a core staff of the Bank or if the Defendant is subordinate to Vitalis. PW2 stated that she could not remember if it was Mr. Frank or Mr. Faru who made the report to the Police. She later said it was Mr. Faru, PW2 stated that she was not aware if Mr. Faru transferred his duties to Vitalis. PW2 stated that Mr. Faru represented the Manager of the Bank.

There was no re-examination and that was the case for the Prosecution. The Defendant is the lone witness for the Defence. He is DW1. He stated that he worked formerly with Via Lawrence & Associates as a Contract staff to First Bank of Nigeria Plc. He stated that he is not a direct staff of First Bank of Nigeria Plc. He then narrated to this Court how on the 18th of February, 2022 while on duty at the First Bank of Nigeria Plc. Airport Road, Effurun Branch, his Manager informed him that he would be going for weekend ATM duty with one Adamu Faruk Prince, a staff of the said Bank. DW1 stated that on the 19th of February, 2022 when he came to work very early in the morning, he met another staff of the said Bank, one Vitalis Osunbor who was handling the ATM keys. According to DW1, he then inquired from the said Vitalis if he was the person on duty and

Vitalis responded whether he had a problem with that, because he DW1 had expected Faruk Adamu Prince. DW1 stated that he then called one Mrs. Tinwola Adegbite, the Manager to explain to her about this development, and, she then confirmed to him that it was the decision of the management, and, that there was no problem. According to DW1, Vitalis then opened the ATM door, and, then loaded cash into the machine, DW1 stated that Vitalis ordered him outside when he had finished loading cash, because, he had to lock the door. Thereafter, according to DW1, the next day, 20th of February, 2022 being a Sunday, when he DW1 arrived at work, he met Vitalis there.

DW1 stated that Vitalis then told him that he had already loaded cash in the machine, and, that he should stay outside. According to DW1, later on the day, he did not see Vitalis again and, when he asked the securities men, they told him that Vitalis had gone out to get a bag. Thereafter, according to DW1, when he came to work on Monday, the 21st of February, he was ordered to stop working, and, one Mr. Sylvanus Nwadei, his supervisor told him that money was missing from the ATM gallery, and, that Vitalis Osunbor had not come to work. That same day, according to DW1 he was then taken to the police station Ugborikoko. He said that he made a statement to the police. He stated that one Insp. Gabriel then tore the statement, and, told him that Mrs. Tinuola Adegbite, his manager had narrated what had happened, and his statement did not tally with that. He said that Insp. Gabriel gave him another sheet of paper to write and then he started to write. He claimed that Insp. Gabriel then read same, and, then proceeded to give him a slap. According to DW1, the said Insp. Gabriel thereafter took him to his office, then ordered two officers to beat him up, under the pretext that he was hiding the truth. DW1 then narrated to this court how Insp. Gabriel threatened him to write verbatim what he told him to write, otherwise, he would be subjected to further beating. DW1 stated that he was locked up in the cell with other inmates, and, so he then later wrote verbatim what Insp. Gabriel dictated to him.

Then, DW1 stated how that same day, his Manager, his Uncle, one Mr. Iroko and one Mr. Femi came over, and he was instructed there at the Police station to drop his car keys, phones, account details and, he was further informed that he would pay half of the missing money. He stated that when he refused to agree with their terms, the Manager, Mrs. Tinuola got angry and then got angry while Insp. Gabriel told him that he would not be granted bail, unless he agrees.

He stated that his vehicle was withheld at the Airport Road, Effurun Branch of the Bank, and his Account with First Bank No. 3117131714 had a lien placed

on it. He said that his vehicle has been released to him, but he has no access to his account. He said his personal keys have not released to him.

Under cross-examination, he said that one W/Insp. Eguolor Chukwurah is the IPO of this case. He said that she was harsh to him. He stated that he was in Court when the IPO testified as PW2, and no issue relating to beating arose. He stated that it was here in Court that he got to know that his IPO is a female, since, it was Insp. Gabriel who was taking statements from him. He emphasized he was slapped and beaten up by the police Officers. He stated that he wrote his statement twice, after being beaten up, and, then on the third occasion, wrote verbatim whatever was dictated to him. He stated that as a BSC holder, he can write. He stated that he was not there when the money inside the ATM was stolen, because he had already gone home. He stated that the person who made away with the money was on duty with him, and that he did not leave before closing hour. He stated that he was not with the key when the money was stolen, because according to him, the key was with Vitalis who is now at large. He said his term of duty had not lapsed when the key was still with Vitalis.

There was no re-examination, and that was the case for the Defence.

In the Written address filed by the Learned Defendant's Counsel, three issues were presented for determination, viz;

- (1) Whether the prosecution has proved the guilty of the Defendant beyond reasonable doubt?;
- (2) Whether the prosecution has proved the elements of the offences of conspiracy and stealing?, and,
- (3) Whether the confessional statement signed by the Defendant is believable and whether this Honourable Court can rely on it.

On issue No. 1, on proof beyond reasonable doubt, the cases of *Saidu V. The State* (2009) 29 WRN 86 at 97 and *Solola V. State* (2005) 127 LRCN 1091 at 1098 were cited in this respect, and to highlight the fact that the onus is on the prosecution to prove beyond reasonable doubt. On proof of all the essential ingredients of the offences, the case of *State V. Aba Tyoubur* (1999) 2 LRCNCC at 88.

It was canvassed that PW1's evidence is hinged on hearsay evidence, and, furthermore that the police failed to carry out a proper investigation. It was further submitted that the arrest and arraignment of the defendant was done/carried out illegally. The case of *Happy Kingsley Idemudia V. The State*

(2015) 46 WRN at Ratio I was cited in support, as well as Section 36(12) of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

On PW2's evidence, it was stressed that the Police did not carry out investigation relating to documentary evidence to show how much was loaded in the ATM machines or records of the alleged stolen monies. It was also canvassed that the PW2's evidence was anchored on what prospective witness told her during the course of investigation, and, so such evidence from her amounts to hearsay which cannot form the basis of any judgment. The case of Ekpo V. The State (2002) NWLR (Part 712) 292 at 304 was referred to.

It was also stressed that vital witnesses such as the Bank Manager, Securities Personnel attached, the Chief security Officer did not testify in Court, since their evidence may determine the case one way or another, and know something significant. The case of Afoloke V. The state (2010) All FWLR (Pt. 538) 812 at 820 – 821 was cited on who a vital witness, and that failure to call a vital witness is fatal to the case of the Prosecution.

On Issue No. II, it is submitted that the ingredients of the offences as contained in the charge must be proved. The case of Olamolu V. The State (2013) 2 NWLR (Pt. 1339) 580 at 600 was cited with regards to the elements for stealing which are:

- (1) Ownership of the thing stolen
- (2) That the thing is capable of being stolen
- (3) That the thing was fraudulently taken or converted.

It was submitted that the evidence of PW1 who was told by the Manager and also that of PW2 are hearsay evidence, and, so inadmissible. Furthermore, it was highlighted that there is no record of the actual amount stolen, and how much money that was loaded, backed with documentary evidence to that effects, which is sorely lacking in this case. It is further submitted that vital witnesses such as the Bank Manager, security personnel and Chief Security Officer were not taken or brought before this Court. It is submitted that it is only the Bank Manager who can glve evidence as to whether stealing took place in that Bank.

It is submitted that doubt which exist in this case should be resolved in favour of the Defendant. The case of Shehu V. The State (2010) 22 WRN 1 at 11 was cited, and relied upon in this regard.

On the evidence of PW2, it was submitted that PW2 stated that under investigation, it was the sum of Eleven Million, Four Hundred Thousand Naira

that was missing, but turned around to say that it was a staff of the Bank who told her about the missing/stolen amount. It was stressed that PW2 informed this Court that the Bank failed to provide her with the necessary documents to enable her investigate this matter, but yet PW2 could assume that it was the Defendant who was the person who stole the said amount of money. It is submitted that where there are two sets of interpretation, the Court should opt for the interpretation favourable to the Defendant. The case of *Godwin Alao V. The State* (2015) 5 MJSC (Pt. 1) at 52 was cited and relied upon.

It was highlighted that the Defendant was neither found with the alleged stolen/missing money, nor was he arrested at the very point of committing the offence. It was stressed that it was the Bank Manager who was not at the scene of crime nor called as a prosecution witness, who arrested the Defendant. It was canvassed that the failure of the prosecution to establish that the Defendant was indeed the person who committed the offence disentitles the Court from convicting such a defendant. The case of *Tajudeen Fabisi V. The State* (2015) 46 WRN at 45 was referred to. It is submitted that PW1's testimony under examination in chief where he stated that it was Eleven Million, naira that was missing, he later under cross examination stated that it was the sum of Eleven Million, Four Hundred Thousand Naira, amounted to a malicious contradiction, and, so cause doubts in the case of the prosecution. The case of *Eke V. State* (2011) 1 – 2 SC (Pt. 11) 219 was cited in this regard.

On the ingredients of conspiracy, the case of *Shoduya V. The State* (1992) 3 NWLR (Pt. 230) 457 was cited. So too, the case of *Ontario Oil and Gas (Nig.) Limited V. Federal Republic of Nigeria*, no year referred to, but citation given by the Learned Counsel to the Defendant to be 46 WRN at 102.

It is submitted that from the evidence, common agreement at a particular time to carry out an unlawful act as disclosed. Furthermore, it is submitted that it is the prosecution that has the burden to prove the offence of conspiracy, and from the circumstances, provide the materials before the court for which it can infer or presume from, that the offence of conspiracy has indeed been proved. The Case of *David Omotola & Ors. V. The State* (2009) 2 ACLR 29 at 45 – 46 was referred to. It is submitted that the prosecution has not been able to discharge that burden.

On Issue No. III, it is submitted that the confessional statement of the Defendant cannot be believed, since it was involuntarily made. It is stressed that Exhibit A he subjected to the six way tool as enunciated in the case of *Kazeen V. State* (2009) 29 WRN 43 at 53. It is submitted that nothing outside Exhibit A

makes it true, since the Defendant gave evidence as to his whereabouts, manner of arrest and how his statement was obtained, which according to the Learned Counsel to the Defendant were not contradicted. It was emphasized that the information in this case was that the Defendant stole money from First Bank Plc, while the statement of the complainant dated 22nd of February, 2022 stated that it was observed that the expected balance was not as it ought to be, as some monies had been taken away.

It was emphasized that the circumstances surrounding the taking of Exhibit A causes serious doubts on Exhibit 'A. It was stressed that PW2 suggested that the Defendant be lured to pay the missing money. It was also stated that failure of the Bank Manager and the security personnel to make statements to the police smirks of poor investigation by the police. It was also submitted that inconsistencies and doubts are thrown up in this case.

This Court was finally urged to discharge and acquit the Defendant.

On Issues Nos. I and II respectively, it is trite that the prosecution in this case has the burden of proving the guilt of the Defendant, since, the onus rest upon it to prove it's case beyond reasonable doubt. This Court refers to the Cases Saidu V. The State, supra at 97, and Solola V. The State, supra at 1098. This Court also adds the Case of Bala Alhaji Ilyasu V. The State (2021) 1 NWLR (Pt. 1756) 1 at 17.

Indeed in the Case of Wadata Isah V. The State (2019) All FWLR (Pt. 980) 535 at 560, the Supreme Court, per His Lordship, Rhodes-Vivour, JSC, stated"

"Proof beyond reasonable doubt does not mean proof of a mathematical certainty. It also does not mean proof beyond all reasonable doubt. A charge is proved beyond reasonable doubt when the facts and circumstances of the case and the quality of the evidence addressed is compelling and reliable to establish the guilt of the accused person. There must be a high degree of probability that the accused person committed the offence. The doubt must be of a reasonable man. Proof beyond reasonable doubt is not achieved by the prosecution calling several witnesses to testify. The Court is only interested in the testimony of a quality witness, so long as the charge is not one that needs corroboration. See Egwumi V. State (2013) 2 SC (Pt. 111) 119".

Furthermore, statutorily encapsulated is the provision of S. 135(1) of the Evidence Act, 2011, as amended, which mandatorily makes it incumbent upon the prosecution to prove it's case beyond reasonable doubt. It should be noted that the burden on proof never shifts, as in this instant case, and it is crucially

inevitable, that the prosecution must inexorably establish every ingredient of the offences as contained in the charge. Undoubtedly, such proof must be beyond reasonable doubt. See the Case of Obriki Kingsley V. The State (2010) 6 NWLR (Pt. 1191) 593 at 609 – 610, per His Lordship, Augie JCA, as he then was, now JSC.

On burden of proof resting on the prosecution, See the Case of Ismail V. The State (2008) 15 NWLR (Pt. 1111) 593 at 620. On proof of essential ingredients, this Court refers to the Case of Yongo & Anor. V. C.O.P. (1992) 8 NWLR (Pt. 257) 36 at 50. See further the case of Enewoh V. The State (1989) 6 NWLR (PT. 119) 98 at 109).

Where the Prosecution fails to prove onus of the essential ingredients, the resultant effect is that of acquittal of the Defendant. See the Case of Friday Aiguoreghian V. The State (2004) All FWLR (Pt. 195) 716 at 721, Ratio. See further the Case of Sunday & Anor. V. The State (2009) All FWLR (Pt. 482) 1044 at 1048 – 1049, Ratios 5 – 6.

Now, very importantly in the Case of Samson Emeka V. The State (2012) 9 ACLR 401 at 421, His Lordship, Onu, JSC, stated:

“The evidence adduced by the Prosecutor clearly consisted of the confessional and circumstantial evidence. These admittedly constitute two of the three ways or methods of proving the guilt of the Accused person, the third method being the evidence of eye witnesses which in the instant case is conspicuously not available. See Uke V. The State (1975) 9 – 11 SC 17” So much for the Law.

From PW1’s evidence, it is obvious that he was not an eye witness to have commission of any offence. Furthermore, as a core staff of First Bank of Nigeria, Plc, at it’s Airport Road, Effurun Branch, at the material time, his duty as an ATM custodian was to load ATM with cash, and ensure that it pays money to customers daily from Mondays to Fridays. Thereafter, for weekend duty, himself, PW1 and another staff would hand over to two other staff.

From his evidence, he PW1, handed over to one Vitalis Osunbor, another staff, while another staff handed over to the Defendant. Also, from the evidence, he stated that he has the combination of set of codes, a set of codes that gives a person access to the ATM, while his other colleague has the key.

So, from the evidence, PW1 and another colleague handed over weekend duties to Vitalis Osunbor, who has now disappeared into tine air and the

Defendant on Friday the 18th of February, 2022 with the expectation, that they would then resume duty on Monday, the 21st of February, 2022.

From PW1's evidence, it is quite obvious that Vitalis Osunbor did not report for duty on the 21st of February, 2022 at 7.30am, the expected resumption time, and so, he had to make a report to the Head of the Branch of the Bank who then went to the Bank's vault, brought the spare keys to the ATM vault to make them gain access to the ATM machines.

From the evidence, and according to PW1, upon ascertainment of the quantity or amount of cash available, it was noted that over the sum of Eleven Million Naira was missing. It is noteworthy to point out the fact that there was no document produced in this Court to show how much cash was loaded into the said ATM machine on particular dates, how much was dispensed, and how much was remaining. PW1 also informed this Court that after the Bank's internal investigation, the sum of Eleven Million, Four Hundred Thousand Naira was fund missing. The Court takes cognizance of the fact again that the Report of such internal investigation was not placed before this Court. The Court was not told who or which powerless of staff or external Auditors who carried out the Report. The date or dates on which the said internal investigations were carried out. This Court was not informed whether the Defendant was a part of such internal investigation or audit by the Bank staff.

PW1 further stated that one Joy handed over to the Defendant, while he, PW1, handed over his duties to Vitalis Osunbor. This Court also notes that Joy, the Manager of the Bank, the Security staff, Frank and Faru did not testify before this Court. They are vital witnesses, and, their statements were neither taken by the police nor produced before this Court. This Court therefore is of the view that there is withholding of evidence by the prosecution, and, also, that if such evidence be produced, it would be unfavourable to the prosecution. This Court refers to section 167 (d) of the Evidence Act, 2011 as amended.

PW2 the IPO lamented about this fact while testifying before this Court about the unco-operative attitude of the Bank's officials towards a proper investigation of this case. In this modern age of technology and from the evidence in Court the complainant Bank has CCTV. No CCTV footage was tendered before this Court. The CCTV footage would have shown and pointed investably at the person who stole the said sum of money. The security officers on duty on that particular weekend neither made statements nor testified in Court. The said security officers saw who and who entered the branch of the said Bank on that day, and, who and who left, and, with what. There was evidence

before the Court that Vitalis Osunbor during that weekend left his duty post to go and bring plastic bags. Where were the security guards if the court may ask? The diligence of the security guards come to play and it is rather unfortunate that they did not come to Court to testify.

From the evidence before the Court, it is clear as crystal that PW1 did not give the combination to the Defendant, and, that only the keys were handed over to the Defendant. It is clear as crystal that the combination, a set of codes is known only to PW1, the absconding Vitalis Osunbor, and, other staff, but, unknown to the Defendant. This combination which PW1 refers to, is the password, the "open sesame" to the ATM machines. It is thus obvious that, without the said combination, there can be no access to the said ATM machines.

From the evidence before the Court, it is PW1 who loaded cash who loaded same cassettes with the cash. Those cassettes were not tendered before this Court. There is no documentary record to show how much was loaded, and, indeed how much was missing or stolen. The Court is further left in the uncomfortable position of speculating which, this Court is forbidden to do. See the case of Collins Ojo Aibangbee & Anor. V. The State (1998) 1 ACLR 168 at 204, a Supreme Court case decided on Wednesday, the 6th day of July, 1988 per His Lordship, Kayode Eso, JSC, stated:

"A Court can only base it's finding on the evidence before it and not on speculation." Further at Section 212, His Lordship, Eso, JSC stated in the same Collins Ojo Aibangbee case, supra, thus"

"The role of a trial Court is to have an evidence to believe or disbelieve witnesses, to make findings of fact based on the credibility of witnesses who testified and to decide the merits of the case based on the findings. When a trial Court acts on speculation rather than on the evidence then it has abandoned its proper role. No trial Court has a right to draw conclusion of fact outside the available evidence."

So, this Court will not be tempted to speculate. It is clear and obvious that the incident in respect of this matter happened on the 19th and 20th days of February, 2022 which was a weekend, and, PW1 himself was not on duty that particular weekend. It is further obvious that it was not the Manager of the Branch of the Bank who went to report this matter to the Police. Also, obvious is the fact that Vitalis Osunbor absconded with the ATM key, since a spare key was used to open the ATM door by the manager of the branch of the Bank as at 8.00am on the 21st day of February, 2022, when Vitalis Osunbior had not resumed work. It is

also obvious that the ATM key was given to the Defendant upon assumption of duty for that weekend.

PW1 stated also that there were records of withdrawals on the 19th and 20th days of February, 2022, which said records have not been brought to the Court. Also, noted by the Court is that the Defendant could receive instruction from Vitalis. PW2 in turn recorded a statements from one Frank who reported this matter to the police. Frank did not testify before this Court. According to PW2, from her investigation, the Defendant and Vitalis Osunbor ought to be together, and, leave together, but Vitalis Osunbor opted to trek and did not enter the Defendant's car to leave with him. It should be. According to PW2, the eight keys were left by the Defendant at the ATM gallery inside a cellophane bag, and thereafter, according to her, Vitalis absconded.

It should be noted that PW1 who came to give evidence in Court did not emphasis on Vitalis Osunbor and the Defendant being together whilst doing their job on that weekend. It should be noted that without the combination there can be no access to the ATM machine which contains the cash inside the said machine. It should be noted also that the Defendant showed up for duty on the 21st of February, 2022 while Vitalis Osunbor, had absconded with missing cash and ATM keys. PW2 the IPO, stated quite firmly and emphatically that she invited the Bank Manager to give details of the bank operation, and she refused to come to the Police station. PW2 stated that she is not aware if it is the practice of First Bank Plc to allow staff to take home company properties. PW2 also stated that she is not aware of any operational schedule existing in First Bank of Nig. Plc.

It should be noted that PW1 did not tell this Court whether the Defendant and Vitalis Osunbor were to be working together almost like Siamese twins or if staff of the bank were to keep keys within the Bank premises or to carry keys or company properties home. The Bank's branch manager, Mr. Frank, Mr. Faru, Joy or even the security staff if they had testified in Court would have thrown more light on this. They are vital witnesses, and, they failed to testify in Court which could prove fatal.

PW2 re-iterated the fact that she was not given any CCTV footage, and that she was aware of the existence of CCTV in First Bank of Nigeria, Plc. As explained hereinbefore, it is needless to point out the necessity of this Court repeating itself. It is also very unfortunate that PW2 lamented the uncooperative attitude of the said Bank's officials to the extend that she invited the said staff to accompany her to conduct a search of the resident of the Defendant, but they failed to do so.

From the evidence of the Defendant, DW1 he narrated to this Court how his manager informed him that he would be on weekend duty with one Adamu Faruk on the 19th of February, 2022. The Defendant gave uncontradicted evidence of how on the 20th of February, 2022 upon resumption of work for the weekend, he saw that it was Vitalis who resumed for work, rather than Faruk. From the evidence of the Defendant not contradicted is the fact that he, the Defendant complained to his Manager about this development, and even interrogated Vitalis about the fact Adamu had not come and yet the Manager Mrs Tinusa Adegbile gave the go ahead for Vitalis to work with him, rather than Adamu Faruk on that day with no explanations from the Manager.

From the Defendant's evidence, it was Vitalis who loaded the cash into the ATM machine, when the door was opened, and, after that exercise, Vitalis ordered him out, because, the door had to be locked. Now how much was loaded by Vitalis into the machine was not disclosed or shown to the Court by the officials or staff of First Bank of Nigeria Plc. Then from the uncontradicted evidence, the next day being a Sunday, the 20th of February, 2022, he arrived at work and met Vitalis there. The Defendant again told this court that after loading the cash, he, the Defendant was ordered by Vitalis to stay outside. Again, how much Vitalis loaded is not before this Court. This Court is not ready to speculate on that.

Thereafter, according to the Defendant, later in the day, Vitalis went out, and promptly disappeared. He stated that he asked the security men on duty about Vitalis, and, the said security men told him that Vitalis had gone out to get a bag. As noted by this Court, it is only the security men who would know when Vitalis left, whether he came back ever, or came back with a bag. These snippets of evidence can only be given by the vital witnesses, the security staff of the branch of the said Bank. The sum of Eleven Million Naira is not a small sum of money that can easily be carried away by one man. And, that huge sum of money must be carried out through the gate of the branch of the bank. The security men who would have given these vital pieces of information did not make statements to the police nor did they come to Court to testify either. This speaks of the tardiness of the police investigation arising from the uncooperative attitude of the staff of the Bank. The Defendant also narrated to this Court how he refused to pay for half of the missing money and how he was beaten up physically to make his statement which according to him was torn twice, until it rhymed to the dictation of one Inspector Gabriel.

The defendant also importantly stated that he did not leave his duty post until closing hours during the weekend assignment. The only people who would verify that assertion are the security men who did not come to Court to testify or any other staff of the Bank who was also on weekend duty on that day.

The Defendant stated clearly that the key was with Vitalis, when the term of his duty had not lapsed. It is obvious that PW1's testimony is not that of an eye witness account to the commission of any offence. PW2 lamented the uncooperative attitude of the said Bank's officials and with yawning gaps arising from poor investigation into this case, it is difficult for this court to rely confidently on her evidence, or ascribe probative value on same.

On Count I, which deals with stealing, this Court relies and adopts the elements of the offence for which the prosecution has to prove in a case of stealing as enumerated in the case of *Olamolu V. State*, supra, at 600. This Court also refers to the case of *Dr. Olu Onagoruwa V. The State* (1998) 1 ACLR 435 at 469.

It is on record that body saw the Defendant steal this said sum of money. PW1 was not there when this money was stolen. Neither was PW2. Any evidence given by PW1 pointing to complicity of the Defendant based on information he got from his manager would amount to hearsay evidence, and thus inadmissible. It has been stated hereinbefore the fatality of the evidence of vital witnesses not testifying in Court and producing vital, relevant and credible evidence before Court. Also highlighted hereinbefore is the absence of documentary evidence regarding actual amount stolen, how much money was loaded and record of withdrawals during that weekend which are sorely lacking.

Indeed, in the *Dr. Olu Onagoruwa's* case, His Lordship, Tobi, JCA, as then was, and, now of blessed memory stated at P. 475, thus:

"Where specific sums are allegedly stolen on specific dates, the prosecution must prove that the various sums for which the accused was charged actually got into his hands before he could be properly convicted."

Furthermore, still at P. 475, His Lordship, Tobi, JCA, as he then was stated:

"Where an accused person is charged with stealing a specific amount, the prosecution has the burden to prove that the amount alleged was stolen".

In this instant case, the prosecution has not disclosed or established whether the said sum of money allegedly missing actually got into his hands.

They have been unable to establish this crucial fact. A CCTV footage would have revealed the identity of the culprit conclusively. The evidence relating to stealing of the alleged sum of money missing is to Vitalis Osunbor, and not the Defendant. That is my finding and I so hold. The prosecution has not been able to prove with specificity the actual amount of money missing or stolen. The Internal Auditor Report carried out by the said Bank as to how much money is missing or stolen is not before the Court. No record of how much was loaded, withdrawn or stolen is not before this Court.

Indeed, in the case of *Dr. Olu Onagoruwa V. The State* supra at P. 478, His Lordship, Tobi, JCA, as he then was stated:

“Therefore, if an accused is charged with stealing a particular amount or named amount, the prosecution must stand or fall by proving the particular amount or by failing to prove same, respectively. The legal position is as exact as that. A contrary position will not only be oppressive to the accused but will certainly run against the provision of Section 33(5) of the Constitution of the Federal Republic of Nigeria, 1979 where the accused is presumed innocent, until he is proved guilty. How can an accused be proved guilty if evidence is not led on the exact amount of money stolen in an indivisible charge such as the one the appellant faced? That will be tantamount to reversing justice and, we in this Court, cannot be a party to such reversion.”

This Court is properly guided, and states quite unequivocally that the prosecution has not been able to prove this specific amount of money or any sum of money allegedly stolen by the Defendant. That is my finding and I so hold.

It should also be noted that there was a prevarication of how much money was said to have been stolen. From Eleven Million it became Eleven Million, Four Hundred Thousand Naira. The Defendant was not found with the money stolen, nor, was he arrested at the very point of commission of the offence. The Prosecution has been unable to establish that it was the Defendant who was indeed the person who committed the offence, and so, this court is disentitled from convicting him. See the Case of *Tajudeen Fabiyi V. The State* (2015) 46 WRN at 45.

Then on Count II, this Court refers, and adopts the elements of conspiracy as enumerated in the case of *Shodiya V. The State*, supra. The Court also refers to the case of *Patrick Njovens & 3 Ors. V. The State* (1998) ACLR 224, Supreme Court stated that:

“It is the duty of the Court in every case of conspiracy to ascertain as best as it could the evidence of the complicity of any of those charged with that offence.”

The offence of conspiracy is the meeting of mind of the confirmations, and it is hardly capable of direct proof. It is only complete by the agreement to do the act or omission complained about. So, conspiracy is a matter of inference from certain criminal acts of the parties concerned done in pursuance of an apparent crucial purpose in common between them.

The burden is on the prosecution to prove the offence of conspiracy, by providing materials before the court which will assist the Court to infer from the circumstances, if indeed, there was an agreement between the parties to connote an offence common to them. The Case of David Omotola & Ors. V. The state, supra becomes relevant.

This Court states that there is nothing from the facts and circumstances surrounding this case that this Court can infer the complicity of the Defendant with any other person in the commission of any offence whatsoever. The offence of conspiracy crumbles, since there is nothing to so infer. That is my finding and, I so hold.

On Issue No. 3 In respect of Issued No. 3, this Court states that it has read the statement made by the Defendant. In the said statement, the Defendant did not state that he stole the said money or that he conspired with others to steal any sum of money.

From the statement, the Defendant stated that he left the keys at the ATM gallery inside the Bank before he closed for work on the day of the incident. It is obvious that circumstantial evidence comes to play. The case of Mallam Zakari Ahmed V. The State (2001) 2 ACLR 131 at 147 thus:

“Through circumstantial evidence is admissible in criminal cases to prove the guilty of an accused, yet such evidence must be narrowly examined by the court if only because evidence of this kind may be fabricated to cast suspicion on another, It is necessary before drawing the inference of the accused is swift from circumstances to be sore that there are no co-existing circumstances which would weaken or destroy the inference – Okoro Meriagbe V. The State (1977) 2 SC 89”

The fact that the Defendant was not stated that he left the keys at the ATM gallery in his statement, it is not enough. The prosecution is still duty bound to

prove it's case beyond reasonable doubt. So many co-existing circumstances weaken the inference of guilt against the Defendant in this case.

On confessional statements, this Court refers to the case of Kazeen V. State, supra, and emphasis that the six tests which the court are enjoined to employ to test confessional statement must be emphasized in this instant case.

They are:

- (1) Whether there is anything outside the confession to show that it is true.
- (2) Whether the statement is corroborated
- (3) Whether the statement of fact made in the confessional statement so far can be tested as trust.
- (4) Whether the Accused (or Defendant) has the opportunity of committing the offence charged.
- (5) Whether the confession of the Defendant was possible.
- (6) Whether the confession was consistent with other facts which have been ascertained and proved at the trial.

In Exhibit A, the Defendant gave details about where he was on that particular weekend at his duty post in the said branch of First Bank of Nigeria Plc. Then of course, gave details on what transpired on Saturday the 20th of February, 2022, and also on the 21st of February, 2022. On 20th of February, 2022, himself and Vitalis closed at about 6.30p.m, and left. Then on Sunday, 21st of February, 2022 and in Exhibit A stated that himself and Vitalis closed at 4.38pm, leaving his key at the place where he kept it at the gallery. In Exhibit A, it was stated therein that the key to the main door was handed over to Vitalis by the custodian. It is also stated in the Additional Statement dated 22nd of February, 2022, that Vitalis has the combination and password to the machine, which was the key as the supporting staff.

Now, to test whether this confession is possible, the sum of Eleven million, Four Hundred Thousand Naira is quite a huge bulky sum of money, and, it must be carried out of the bank's premises. The security men who would have given vital evidence as to who they saw with a bag did not come to Court to give evidence. That is a gap.

The specific sum of money stolen has not been proved or ascertained by virtue of the fact that no records or Audit Reports have been brought to this Court to confirm that such sum of money was indeed stolen. No staff of First Bank Plc came to Court to testify that it was part of the operational guidelines for staff to go home with keys or to keep keys within the premises.

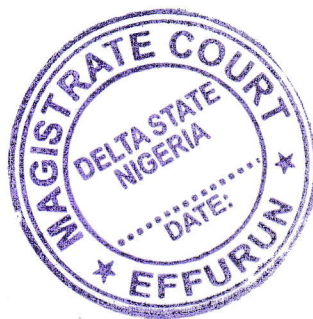
The vital witnesses who failed to come and give evidence in Court created yawning gaps in the case for the Prosecution. Even in Exhibit A, the specific sum of Eleven Million, Four Hundred Thousand Naira was stated by the Defendant to be missing.

The evidence before this Court points invertibly to Vitalis Osunbor, and, not the Defendant. PW2, the IPO gave evidence as to how she traced the homes of the parents of Vitalis, especially, the father who stood as guarantor, and how she merely dropped a letter of invitation with his (Vitalis) mother, and, that was the end of the investigation. There was no follow up on how to get Vitalis. This case was not properly investigated, and, so it is not safe to convict, moreso, when the elements of the offences as contained in the charge have not been satisfactorily proved before this Court.

Again, the Defendant reported for work at his duty post. Vitalis absconded. The Defendant has no knowledge about the password or combination to gain access to the ATM machine, and, he the Defendant was not the person who loaded the ATM machines with cash. So, in short he, the Defendant had no access. The said missing money was not recovered from the Defendant. The attempt to even search his house was scuttled by the uncooperative attitude of the said Bank's officials according to PW2, the IPO. Nobody saw him steal the said money.

So, in sum, this Court is of the view that the Prosecution has not successfully discharged the burden placed on it to prove the case against the Defendant beyond reasonable doubt. Thus the charge is dismissed and the Defendant is discharged and acquitted in respect of Counts I & II of the charge.

Dated at Effurun, this 20th day of April 2023.



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E.A. ODJUGO, ESQ.
CHIEF MAGISTRATE
(SPECIAL GRADE)