



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. E094 OF 2021**

**MARTIN MWENDA MUREGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the conviction and sentence by Hon. L.N Juma SRM**

**in Meru Cr. Case No.1568 of 2019 on 17/05/2021)**

**JUDGMENT**

1. **Martin Mwenda Murega ('the appellant')** was jointly charged with another with the offence of attempted robbery with violence contrary to Section 297 of the Penal Code. It was alleged that on 26/08/2019 at Cooperative Bank Meru town branch in Imenti North Sub-county within Meru County, he attempted to rob one Mercy Mwendua of cash Ksh.489,200 and immediately after the time of such robbery threatened to use violence on the said Mercy Mwendua.
2. He denied the charges faced his accusers in the trial which followed in which he was convicted and sentenced to an imprisonment term of 5 years.
3. Aggrieved by the said conviction and sentence, the appellant lodged this appeal raising 7 grounds which I fault the trial court to have erred in law and fact by convicting him the charge and its particulars were not proved beyond reasonable doubt, by meting out to the appellant a harsh and excessive sentence and lastly in rejecting the appellant's defence which displaced the prosecution's contradictory and hearsay evidence without a valid reason.
4. In order to appreciate the merits or lack thereof of the appellant's appeal, it is important to set in summary out the evidence at the trial. **PW1, Mercy Mwendua**, was on the material day on her way to the bank to deposit Ksh.489,200/=, when two people with helmets aboard a motor cycle grabbed her handbag. She ran after them and held one of them and the motor cycle fell. The rider then stood up to assist the one she was holding on and they pushed her down and grabbed the bag again. A passerby then came to the scene and grabbed the bag from the people and she took it and went inside the bank very fast to confirm whether the money was intact. The bank police officers guarding the bank came out and unsuccessfully tried to arrest the suspects who escaped and left the motor cycle. The police retained the motor cycle so left behind while she deposited the money and went to the police station to report. During cross examination, she affirmed that she did not see the suspects' faces and could not identify them.
5. **PW2 Kelvin Mureithi**, recalled being asked by the appellant, who was known to him whether his shop and that of the complainant had security, one week before the incident and that he told him that both shops had security as that complainant's shop was next to Equity Bank. He then learnt in the evening of the material day that there was an attempted robbery. He knew the appellant prior to the incident for more than 10 years, as he was his schoolmate. On 16/9/2019, he boarded a motor cycle at Gitimbine, together with the appellant when the appellant told him to tell his boss that the owner of the motor cycle who had attempted to steal from the woman had been arrested. He subsequently went to the police station to record his statement. He denied the existence of a grudge between him and the appellant. During cross examination, he stated that the appellant told him that he was the owner of the motor cycle involved in the robbery.
6. **PW3, PC Ismael Kittany**, was on guard duties at Cooperative Bank on the material day when he heard a woman screaming, came out of the bank to see what was going on and saw the complainant holding onto a passenger on KMER 592 V. On seeing him, the rider and the passenger fled leaving behind the motor cycle, which was taken to the police station. They recovered a panga from the side of the said motor cycle. He did not identify the people on the motor cycle.
7. **PW4 Linus Mugia Mukira**, a boda boda rider and also the chairman of Maathai boda boda operators, in which the 1<sup>st</sup> accused is a member, was informed of the detainer of a motor cycle by the said 1<sup>st</sup> accused Phinius Gikundi with a request that he goes to the police

station to find out why the motor cycle had been taken. He did visit the police station and was asked to tell the owner of the motor cycle to visit the police station. When he called Phinius to inform him that he was required to appear at the station, the said Phinius disclosed to him that he was the one who had the motor cycle and was afraid of being arrested. The said Phinius then went into hiding but was later tracked and arrested in Moyale. The witness stated that he did not know the appellant well, but only as a friend to Phinius.

8. During cross examination, he stated that Phinius had initially denied that he had the motor cycle, but later admitted that he was the one who had the motor cycle on the material day and that he had carried a pillion passenger, whom he did not know.

9. **PW5 PC Stanley Kipkoeh** of Meru police station testified as the investigating officer who took over from a colleague, PC Ambrose Korir, the investigating officer, who was on leave, and who had established that the motor cycle belonged to phinius who had been accused of stealing another motor cycle allegedly owned by the appellant. It was the said Phinius who led the police to arrest the appellant. The witness then produced the bank deposit slips, the motor cycle and the machete as exhibits. During cross examination, he confirmed that the appellant was arrested after Phinius implicated him as having been present at the scene.

10. In his defence, the appellant told the court that on 1/9/2019, he was with Dennis Mugambi whom he took on a motorcycle to Chaaria and back to Meru by 12.20 p.m. before proceeding to Kianjai without going anywhere in town. He denied meeting the 1<sup>st</sup> accused.

11. During cross examination, he maintained that on the material day, he was with Dennis Mugambi and Moses Kirimi. He denied either seeing or talking to Phinius on that day. He further denied attempting to steal from the complainant. He also denied the existence of a grudge between him and PW2. He stated that he was supposed to be arrested with PW3 who was later converted into a witness for the state and that the motor cycle produced in court belonged to Phinius then denied that he was at Cooperative Bank with Phinius, who had stolen his motor cycle, that material day. During re-examination, he confirmed that PW2 was his schoolmate. The cross examination also revealed that the appellant had a complaint against the 1<sup>st</sup> accused which was pending in court on a charge of stealing of a motor cycle.

12. Being a first appellate court, the court is mandated to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. See ***Kiilu & Anor v R (2005) IKLR 174***

13. I have carefully considered the evidence on record and I find no reason to disagree with the trial court that there was no identification of the appellant whatsoever by the two key eye witnesses, that is PW1 and PW3. The only evidence therefore linking the appellant to the offence was purely circumstantial. In its judgement, the trial court observed, in reaching his conviction: -

**“...I note that PW2, Kelvin Mureithi in his evidence before court stated that the 2<sup>nd</sup> accused, whom he knew as a former schoolmate had sought from him information on the availability of security at the scene of crime which was near the witness’ work place. Immediately after, the attempted robbery occurred at the scene.**

**...In my mind, the 2<sup>nd</sup> accused had the *mens rea* for committing the offence by enquiring about the security systems at the scene of crime. He further committed the attempted robbery as he was in possession of the motor cycle recovered from the scene.”**

14. That was the first reason the trial court convicted the appellant. I do find that there were no irresistible facts that unerringly pointed to the guilt of the accused. It was not demonstrated in what context the alleged conversation took place. I find that the inference drawn by the trial court was unwarranted as the appellant even denied having the telephone number to P.W 2. In any event what P.W 2 adverted to would have been in the nature of a confession of self-incrimination which I consider was not admissible.

15. The second reason given to ground the conviction was that the co-accused had implicated the appellant to the effect that the appellant had been given the motor cycle on the material day. PW4 was categorical that Phinius had voluntarily admitted to having been the one riding the motor cycle on the material day. PW5 stated that the reason why the appellant was arrested was because his name had been mentioned by Phinius. The court thus relied on the evidence of a co-accused or rather an accomplice to found the conviction when there had been evidence from both the appellant’s case and prosecution case that there had been a complainant by the appellant against the said Phinius in another case involving theft of a motor cycle. Little regard appears to have been given to that evidence. In fact, no mention is made about it. I do not find the evidence by the co-accused to have been credible and as much as it was uncorroborated, it was not sufficient to support a conviction.

16. Evidence given by a co-accused person against another should only made a basis of conviction if it is found credible and when corroborated in some material particulars by independent evidence pointing to the guilt of the accused and only when it implicates the person giving the evidence of the crime. That was not so in this case here. In this regard amongst other cases I have read, I refer to the case of ***R v Hamisi bin Saidi & Anor (1942) 10 EACA 50*** where the court rendered itself thus;

**“When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as well as against such other person as well as against the person who makes such confession. Such a statement by an accused can only be used as evidence against his co-accused if it is sufficient by itself to justify the conviction of the person making it of the offence for which he is being jointly tried with the other person against whom it is tendered.”**

17. I find that the requirement of using an incriminating evidence by a co accused against the other was not met. The evidence of Phinius was not a confession as such, but a direct inculcation of the appellant. That was the evidence of an accomplice which should never for the basis of a conviction without corroboration by some other independent evidence.

18. It is not in contention that two people attempted to rob PW1, as corroborated by PW3. The only issue is whether the appellant was

connected with that attempted robbery. It must be remembered that Phinius, the 1<sup>st</sup> accused was acquitted by the trial court, despite having confirmed that he was the rider of the motor cycle on the material day. I find that if there was a reasonable doubt to entitle phinius to the benefit of the doubt and an acquittal then the doubt in favour of the appellant was more and wholly militated against the conviction reached.

19. In the end, I find the conviction to have been unsafe, the appeal to be meritorious and I accordingly allow the same. The conviction is thus quashed, sentence set aside and it is ordered that the appellant be set free forthwith unless otherwise lawfully held.

Dated, signed and delivered, **virtually, by MS Teams**, this 24<sup>th</sup> day of September 2021

Patrick J.O. Otieno

Judge

**In presence of**

Mr. Anampiu Gikunda for appellant

Mr. Maina for the respondent

Patrick J.O. Otieno

Judge