REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.160 OF 2014

JOSEPH KARIUKI.....APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(From the original conviction and sentence in criminal case No. 752 of 2013 of the Chief Magistrate's Court at Isiolo by Hon. J.M. Irura – Senior Resident Magistrate)

JUDGMENT

JOSEPH KARIUKI, the appellant, was convicted for the offence of attempted robbery contrary to section 295 as read with section 297(2) of the Penal Code.

The particulars of the offence were that on 25th October 2013 at Jua Kali area, Isiolo County, jointly with others not before court attempted to rob Stephen Miriti.

The appellant was sentenced to serve seven years imprisonment. He now appeals against both conviction and sentence.

The appellant was in person. He raised several issues that can be summarized into one ground of appeal as follows:

That the learned trial magistrate erred in law and in fact by convicting without sufficient evidence.

The state opposed the appeal through Mr. Namiti, the learned counsel.

The facts of the prosecution case were briefly as follows:

When the complainant was going home from his business premises, he saw three people alight at the door to his bar. They looked suspicious. He therefore went back and asked one of his workers to serve them. One of the two who had entered into the bar fled but they arrested the appellant inside.

The appellant denied any involvement in the offences. He contended that he had gone to the bar to look for a caretaker.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

An attempt to commit a crime is defined in the **Oxford Concise Law Dictionary (2nd Edition)** as;

> ***Any act that is more than merely preparatory to the intended commission of a crime; this act is itself a crime.***

For an offence to be construed to be an attempt, it must pass the **"but for"** test. In the instant case, I will evaluate the evidence on record to find if the offence was proved.

Stephen Miriti (PW1) the complainant said that when he saw some three people alight from a motor cycle and two of them entered his bar, he became suspicious and returned to the bar. He told the caretaker to talk to the people. One of them became uneasy and when fleeing, the caretaker held him and it was noticed he had a gun. At that juncture, the appellant was standing near the door leading to the toilets. None of them said anything to the complainant or anyone else to suggest they were about to perpetrate a robbery. The question is therefore what led the complainant to believe he was about to be robbed. Indeed his evidence was that he was leaving the premises but had to return on seeing the duo enter his bar.

It is trite law that suspicion however strong cannot be a basis for a conviction.

The learned trial magistrate did not have evidence at her disposal that can pass the '**but for test**' and be concluded that the appellant attempted to rob the complainant. The conviction was unsafe.

The conviction is quashed and the sentence set aside.

Consequently, the appellant is set at liberty unless if otherwise lawfully held.

DATED at MERU this 28th day of April, 2017

KIARIE WAWERU KIARIE

JUDGE