



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**

**Criminal Appeal 43 of 2007**

**DUNCAN KAGWI AMOS.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellants herein were charged the with offence of attempted stealing contrary to Section 275 as read with section 389 of the penal code.

Particulars of the charge are as in the charge sheet. They both denied the charge.

The prosecution called a total of 5 witnesses in support of its case while the appellants made unsworn statements of defence and called no witnesses.

In brief, the evidence adduced before the trial court was to the effect that the complainant (PW1) had parked his motorcycle outside his office within Mbeere District Hospital and went for lunch. As PW2, Anne Selimina Lwamba Nyaga was passing by. She saw 2 people near the motorcycle. One of them was bending over it and appeared to be repairing it. When he looked up and saw her, he took off and ran away. She went to the Public Health Office and reported what she had seen to PW3 and PW1. She described to them the manner in which the 2 people were dressed. The 2 witnesses went into town and started looking for such people. They spotted them enter a matatu. They followed them and boarded the matatu. They asked the driver to drive to Siakago Police Station which he did. PW2 was called to the police station and she identified Accused 2 as the person she had seen tampering with PW1's motorcycle. PW3 said that when he went back to the scene after his lunch break, he found that the motorcycle had been moved slightly. PW5 the police officer carried out a search on the 2 suspect. From 1<sup>st</sup> appellant, only a driving licence and some sim cards were recovered. From 2<sup>nd</sup> appellant, a bunch of keys which included some muster keys were recovered. The muster keys are the ones used to open any locks. The 2 were therefore locked up and charged with this offence. They both denied having committed the offence. They were convicted and each sentenced to 3 years imprisonment. Being dissatisfied with the conviction and sentence, they preferred this appeal. I have considered their separate petitions of appeal and the grounds raised therein. The learned counsel for the state supports both the conviction and sentences imposed on both appellants. I have considered his submission along with the written submissions by both appellants.

As far as the 1<sup>st</sup> appellant is concerned, I find that he was lend of found guilty by association with the 2<sup>nd</sup> Appellant. According to PW2 who was the principal witness, the person he saw bending over the motorcycle and the one who ran away was the 2<sup>nd</sup> Appellant. He was the one she described to the witnesses who followed them and caught up with them.

The evidence against 1<sup>st</sup> appellant was said to be circumstantial but in my considered view, the same was not congenit or watertight enough to form the basis of a conviction. The conviction against the 1<sup>st</sup> appellant was in my view unsafe and the same is not sustainable. I therefore allow his appeal and order that the conviction against him be and is hereby quashed and the sentence set aside. He shall be set at liberty unless he is otherwise lawfully held.

On the 2<sup>nd</sup> Appellant however, I am satisfied that PW2 saw him clearly as he tried to tamper with the complainant's motorbike. When the complainant went to check on the motorbike after lunch he found the cover and the belt having been removed. He was described by PW2 and it was following the said description that he was arrested a few minutes later. I also note that he was found with must keys which could have been used to start the motorcycle in question. The evidence against him was sufficient to support the conviction against him. I find and hold that his appeal lacks merit. I therefore dismiss the same and confirm the conviction and sentence of 3 years imprisonment.

**W. KARANJA**

**JUDGE**

Delivered, signed and dated at Embu this 10<sup>th</sup> day of June 2009.

**In presence of:-**