*(Appeal from original conviction and sentence in Criminal Case No. 1798 of 2004 of the Senior Resident Magistrate's Court at Nanyuki {R. N. Muriuki- SRM} dated 13th May, 2005)*

ANNE MUMBI MACHARIA……..…….APPELLANT

**VERSUS**

REPUBLIC……..……RESPONDENT

**JUDGMENT**

The appellant, **Anne Mumbi Macharia**, was charged jointly with one **Martin Ndegwa Maingi** with the offence of **attempted robbery with violence** contrary to **section 297(2) of the Penal Code.** The particulars of the offence, as stated in the charge sheet, were that; on the night of 15th December 2004 at 9.30 p.m. at Daiga Millers area in Nanyuki, Laikipia District, they, jointly with others not before court, attempted to rob APC Willy K. Cheruiyot and at, or immediately after such attempted robbery threatened to use actual violence to the said APC Willy K. Cheruiyot. The appellant and her co-accused were tried at the Senior Resident Magistrate's Court, Nanyuki and were convicted of the charge. They were sentenced to suffer death.

Being aggrieved by both the conviction and sentence the appellants appealed. The appellant's petition of appeal was filed in this court while her co-accused's appeal was filed at the Nyeri High Court under file reference H.C.CR.A. No. 124 of 2005. The same was heard and determined in the appellant's favour on 22nd May 2008. Owing to the confusion brought about by the filing of the appeals in two different courts, with the trial court's proceedings being sent to the Nyeri High Court *(where ideally both appeals ought to have been filed)* the present appeal was delayed. The main grounds of the appellant's petition are that the charge was not proved to the required legal standard, that the charge was a mere fabrication and that she was an innocent victim of circumstances.

The State has conceded the appeal for reasons that the evidence adduced by the prosecution at the trial is at variance with the charge and that the circumstances surrounding the appellant's arrest did not disclose an attempt or intention on the part of the appellant to rob. The learned State Counsel **Mr. Mugambi** submitted further that even the complainant himself did not state what item, if anything, capable of being stolen was targeted. Neither did the charge indicate this.

We have read the judgment of the Nyeri High Court in H.CR. A. No. 124 of 2005, which we consider to be compellingly persuasive. We have also examined the record of the lower court and re-evaluated the evidence tendered before it. The prosecution called only two witnesses, the complainant (PW1) and a police officer by the name **P.C. Salim Ali (PW2),** who came to assist PW1 after he had ordered the appellant and her companion to lie down in surrender.

PW1 testified that on 15th December 2004, at 9.30 p.m. he was accosted by five people as he was going to his place of work at the District Officer's residence. He was armed. The five assailants, one of whom was armed with a knife, ordered PW1 to lie down but being duly armed with a gun the complainant did not comply but instead ordered the assailants to lie down. On seeing the gun all but two of the assailants fled. A pen knife was recovered from the appellant's co-accused while she was arrested on suspicion that

she was one of the thugs. The only reason PW1 gave for believing that the appellant was among the assailants was that she was at the scene. Under cross-examination by the appellant, PW1 testified that he did not know whether the appellant was one of the suspects he arrested. PW2's evidence was limited only to the arrest. Any knowledge of the attempted robbery itself was limited to what PW1 told him and was therefore hear say.

The appellant and her co-accused made unsworn statements in their defence. They testified that they were wife and husband. Their evidence, which corroborated each other, was that they were arrested as they walked home after visiting the appellants' friend who was bereaved. They had stumbled across a stationary vehicle and after some questioning by people who "*emerged from the road"* they were ordered into the vehicle and driven to the police station. There they were charged with the offence of attempted robbery which they knew nothing about. The appellant categorically denied any knowledge of or involvement in the alleged robbery.

In convicting the appellant and her co-accused, the learned trial magistrate held that the evidence of PW1, though being one of a single identifying witness was sufficient to prove that the appellant and her co-accused were among the five robbers who attempted to rob the complainant. The findings of the learned trial magistrate appear in the judgment as follows:

"***The accused jointly and with other (sic) not before court no doubt attempted to rob the complainant otherwise they would not have stopped the complainant and even flashed (sic) a pen knife and when he ordered them to stop the accused with others attempted to run away but the two accused were apprehended."***

We have found nothing in the prosecutions evidence to support the above findings. Whereas the complainant stated that one of his assailants produced something which *(he)* later noticed was a knife, there is no clear connection between the knife produced by the attackers as they ordered the complainant to stop and the pen knife found on the appellant's co-accused after his arrest. The appellant never attempted to run away and the reason for her arrest, as stated in PW1's testimony is that she was at the scene, which leads us to find that she may well have been a victim of circumstances. Be that as it may, and being, as we have already stated, of the same persuasion as the Nyeri High Court in **H.CR.A No. 124 of 2005 MARTIN NDEGWA MAINGI –vs- REP,** we agree with the learned State Counsel that the charge as framed was not supported by the evidence adduced at the trial. The would be assailants never demanded for anything, capable of being stolen, from the complainant. They merely ordered him to stop. Neither the complainant, nor the charge sheet gave any indication as to what the assailants intended to steal from the complainant, if at all. Although the appellant made an unsworn statement in her defence, the same was corroborated by the testimony of her co-accused and we are at a loss as to why her defence was dismissed so casually by the learned trial magistrate.

Given the above, we are of the considered view that the conviction was improperly arrived at and cannot stand. We allow the appeal, quash the conviction and set aside the sentence. Accordingly, the appellant is hereby set at liberty and shall be released from jail forthwith unless she is otherwise lawfully held.

**Dated signed and delivered at Nakuru this 23rd day of October, 2009**

**M. G. MUGO**

**JUDGE**

**W. OUKO**

**JUDGE**