



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

**Criminal Appeal 162,108,109 &119 of 2009**

**RICHARD MAINA MAKARI.....1<sup>ST</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 108 OF 2009**

**GEORGE NJOGU GATHONI .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 109 OF 2009**

**DOUGLAS MURIUKI GATHATHU .....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 119 OF 2009**

**PETER WACHIRA MAINA.....4<sup>TH</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence of L. Mbugua, Ag. Principal Magistrate in the Senior Resident Magistrate's Criminal Case No.158 of 2009 dated 13<sup>th</sup> May 2009 at Karatina)*

**JUDGMENT**

**RICHARD MAINA MAKARI, GEORGE NJOGU GATHONI, DOUGLAS MURIUKI**

**GATHATHU**, and **PETER WACHIRA MAINA**, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants respectively, were arraigned before the Principal Magistrate's Court sitting at Karatina to face a charge of two counts. In the first count, the quartet were jointly charged for the offence of kidnapping a child under the age of 14 years contrary to *Section 262* of the Penal Code. The record shows that the charge sheet was later amended on 2<sup>nd</sup> March 2009 so that the section the Appellants

faced was deleted and substituted with *Section 255* as read with *Section 257* of the Penal Code in count I. In count II, Peter Wachira Maina, (4<sup>th</sup> appellant) faced a charge of threatening to murder contrary to *Section 223 (1)* of the Penal Code. After undergoing a full trial, the Appellants were convicted in count I and were each sentenced to seven (7) years imprisonment. The 4<sup>th</sup> Appellant was also convicted in count II and sentenced to serve seven (7) years imprisonment. Being aggrieved, the appellants each preferred an appeal i.e.

Richard Maina Makari.....Criminal Appeal 162 of 2009.

George Njogu Gathoni.....Criminal Appeal 120 of 2009.

Douglas Gathathu.....Criminal Appeal 109 of 2009

Peter Wachira Maina.....Criminal Appeal 119 of 2009.

The aforesaid appeals were consolidated by an order of this court made on 11<sup>th</sup> February 2010. When the consolidated appeal came up for hearing, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> accused persons were granted leave to file and rely on written submissions. Mr. Muthigani, learned counsel for Douglas Muriuki Gathathu (3<sup>rd</sup> appellant), made oral submissions. Mr. Makura, learned Senior State Counsel, conceded the appeal for the reasons I will later revisit in this judgment.

The background of this appeal is not complicated. The particulars in count I are that on 13<sup>th</sup> February 2009, at Giakaibei Village in Nyeri North District within Central Province, the accused persons are alleged to have jointly kidnapped or abducted one A. W. K, a child under the age of 14 years with intent to steal her from E. K. W. In count II, the particulars of the offence are that on 14<sup>th</sup> February 2009 at Giakaibei Village in Nyeri North District, Peter Wachira Maina, 4<sup>th</sup> Accused herein, without lawful excuse caused one Peter Munyiri Waweru to receive a message of threat to kill him. **A. W.K** (P.W.1), the complainant herein, a class 3 pupil at W.N Academy, left the aforesaid school for home at 4.45 p.m. on 13<sup>th</sup> February 2009. She left with **A.N.M** (P.W. 2). As they walked a white motor vehicle with tinted windows pulled by. Someone came out of that motor vehicle, called out P.W. 1 by the name 'A'. She was immediately pulled and pushed into the aforesaid motor vehicle and the motor vehicle drove off. The commotion took place under the watchful eye of P.W. 2. P.W. 2 met P.W. 1's mother (P.W. 3) and informed her of what she had witnessed. P.W. 3 made frantic efforts to trace the whereabouts of her daughter (P.W. 1). At Makuyu road block, Richard Maina Makari (1<sup>st</sup> Appellant), and George Njogu Gathoni (2<sup>nd</sup> Appellant) and the complainant (P.W.1) alighted from a matatu and that is where the Police intercepted them. **JOHN MWANGI** (P.W.4), a matatu driver told the trial court that the trio boarded his matatu at Kibirigwi. It is the evidence of P.W. 2 that the 3<sup>rd</sup> Appellant was the one who was asked by the 2<sup>nd</sup> Appellant to inform the complainant to pick up a receipt to take to her mother (P.W.3) from motor vehicle registration No. KAD 387 M. The aforesaid motor vehicle is a taxi operated by the 3<sup>rd</sup> Appellant within Karatina town. The 4<sup>th</sup> Appellant is said to be the person who pulled and pushed the complainant into the white motor vehicle at

Giakaibei. In respect of count II, **PETER MUNYIRI WAWERU** (P.W.6), told the trial court that he received threatening messages and calls from cell phone No. “0737334672”. The message was to the effect that unless the 1<sup>st</sup>-3<sup>rd</sup> Appellants are released, P.W. 6 and his family would be killed. **I. P. JEREMIAH NDUBAI**, (P.W. 10), managed to retrieve the sim card in respect of cell phone No. 0737334672 from the 4<sup>th</sup> Appellant.

The Appellants each denied having committed the offence when placed in their defence.

On appeal, the Appellants each listed various grounds in support of their appeals. The 1<sup>st</sup> appellant stated that he was convicted on contradictory evidence while the 2<sup>nd</sup> Appellant was of the view that the evidence tendered did not prove the offence he was convicted for. Mr. Muthigani for the 3<sup>rd</sup> Appellant, was of the view that the Appellants were convicted under *Section 262* yet the charge sheet had been amended to include *Section 255* as read with *Section 257* in place of *Section 262*. According to Mr. Muthigani, the defence was blurred by the confusion created by the amendment and judgment. It is also stated that there was no evidence proving common intention. Mr. Makura, learned Senior State Counsel, conceded the appeal on various grounds. First, it is his submission that the charge was incurably defective in that the same was duplex. I have considered this ground and with respect, I agree with the submissions of Mr. Makura. A careful perusal of *Section 255* of the Penal Code, will reveal that the particulars of the charge of kidnapping must contain the age and sex of the child. The charge in this appeal talks of a child under the age of 14 years. The second ground which the learned Senior State Counsel relied in conceding this appeal is to the effect that the learned trial magistrate introduced extraneous matters like the doctrine of *res gestae*. With respect, I do not agree with Mr. Makura. The learned Principal Magistrate was perfectly entitled to draw her conclusions from the sequence of events taking place. The third ground Mr. Makura used to concede the appeal is that the learned Principal magistrate shifted the burden of proof. I have carefully considered the judgment and the evidence tendered. It is obvious from the judgment of the learned Principal Magistrate that she shifted the burden of proof to the 3<sup>rd</sup> and 4<sup>th</sup> Appellants. In respect of the 3<sup>rd</sup> Appellant, it is on record that the learned Principal Magistrate clearly stated that the 3<sup>rd</sup> Accused (3<sup>rd</sup> Appellant) did not show he was innocent in the saga. In regard to the 4<sup>th</sup> Appellant, the learned Principal Magistrate stated that the 4<sup>th</sup> Accused (4<sup>th</sup> Appellant) did not give a plausible explanation of his whereabouts. The law requires that an accused is entitled to set up a defence of alibi and that the prosecution was bound to rebut it. With respect, I agree with the submissions of Mr. Makura that the learned trial Principal Magistrate erred by shifting the burden of proof to the accused persons yet the law required the prosecution to discharge the burden. It would appear the learned Principal magistrate misdirected herself when she stated that the 2<sup>nd</sup> Accused (2<sup>nd</sup> Appellant), did not rebut the evidence of P.W. 1 and P.W. 2. Mr. Makura, further pointed out that the second count was defective in that *Section 223* of the Penal Code talks of threatening to kill while the charge sheet talks of threatening to murder. Again, I agree with the submissions of Mr. Makura that the offence set out in count II is not known in law hence the charge is fatally defective.

The overall picture I get from the proceedings taken before the trial court is that, the Appellants' trial was conducted in a manner which prejudiced their right to a fair trial. I contemplated to order for a retrial because I have formed the opinion that on a proper consideration of the admissible evidence, a conviction may result. But, in view of the defects on the charge, pointed out by Mr. Makura, learned Senior State Counsel and Mr. Muthigani, learned advocate for the 3<sup>rd</sup> Appellant, I will not make the order. If I order for a fresh trial, the prosecution may at the opportune time correct the errors hence sealing the gapping loopholes. I will give the Appellants the benefit of doubt. I hereby allow the consolidated appeals. The conviction and sentences are quashed and set aside respectively. The Appellants are hereby set free forthwith unless lawfully held.

***Dated and delivered at Nyeri this 9<sup>th</sup> day of July 2010.***

**J. K. SERGON**

**JUDGE**

In open court in the presence of the Appellants and Mr. Makura for the State.