



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**Criminal Appeal 100 of 2008, 101 of 2008 & 102 of 2008 (Consolidated)**

**JAMES KINYUA NGINA ..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(Being an appeal from the sentence of L. Mbugua Senior Resident Magistrate in Senior Resident Magistrate's Criminal Case No. 406 of 2006 at KARATINA)*

**CONSOLIDATED WITH**

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO. 101 OF 2008**

**PETER MAINA MWANGI ..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(Being an appeal from the sentence of L. Mbugua Senior Resident Magistrate in Senior Resident Magistrate's Criminal Case No. 406 of 2006 at KARATINA)*

**AND**

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO. 102 OF 2008**

JACKSON KIMARU MAINA ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

*(Being an appeal from the sentence of L. Mbugua Senior Resident Magistrate in Senior Resident Magistrate's Criminal Case No. 406 of 2006 at KARATINA)*

**JUDGMENT**

The above appeals were consolidated whereby James Kinyua Ngina was made the first appellant, Peter Maina Mwangi was the second appellant and Jackson Kimaru Maina was the third appellant. The appellants were charged in the lower court with four counts. In the first count all the three appellants were charged with robbery with violence contrary to section 296(2) of the Penal code. The particulars of that count state that they robbed PW 1. On count II the second appellant was charged with indecent assault of a female, PW 1, contrary to section 144 of the penal code. On count III all the three appellants were charged with robbery with violence contrary to section 296(2) of the Penal code. Count III relates to PW 2. On count IV the third appellant alone was charged with the offence of having or conveying suspected stolen property contrary to section 323 of the Penal code. The particulars of that count are that the third appellant on 23<sup>rd</sup> April 2006 was found in possession of a Motorola phone reasonably suspected to have been stolen or unlawfully obtained. The trial court convicted the appellant on all counts. The appellants being aggrieved of that conviction now bring their appeal against conviction and sentence. This is the first appellate court. As such we need to reconsider the lower court's evidence evaluate the same and draw our own conclusions. In the case of *ACHIRA V REPUBLIC [2003] KLR 707* the court of appeal stated the duty of the first appellate court as follows:-

***“This is a first appeal. This court as the first appellate court is required to reconsider the evidence, re-evaluate the same and draw its own conclusions and in doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Okeno v. Republic [1972] EA 32 and Ngui v Republic [1984] KLR 729.”***

We shall therefore proceed to consider the evidence submitted before the lower court. PW 1 was J W M. She stated that on 23<sup>rd</sup> April 2006 she had gone to visit her husband at Karatina. They both went to Friends bar. Whilst they were there it rained heavily. They left the bar at mid night. As they walked by the Flamingo bar seven people appeared and demanded from them money and cell phones. One of them slapped her. They then threw her to the ground and the 2<sup>nd</sup> appellant began to tear her clothes. Her buttons came off. She grabbed her clothes to cover herself and they pulled off her under garment, biker. In the meanwhile her husband was being beaten by other robbers. They already had taken money from her. The 2<sup>nd</sup> appellant pushed his hands into her private parts. Another one would hit her on the head whenever she would protest. She said that there were security lights at the corridor when the attack took place. She was therefore able to see them clearly. As the attack was going on a vehicle approached and the robbers ran away. It was then that this witness realized that it was a police land Rover. She and her husband shouted to the police that they had been robbed. The police pursued the robbers. She stated that she saw the three robbers well. As the police pursued the robbers she and her husband walked to the police station. The police later came with the persons who she confirmed were the ones who robbed them. She also confirmed that the second appellant was the one who indecently assaulted her. She went to hospital where she was treated and was issued with a P3. When the 2<sup>nd</sup> appellant cross examined her she stated that she recognized him immediately he was brought to the police station. She stated that she had pointed him out at the police station as the one who indecently assaulted her. She reaffirmed that she was positive about her identification of the 2<sup>nd</sup> appellant. On being cross examined by the third appellant she stated that at the point of robbery there were security lights. She denied that she was drunk when being robbed. She only had taken two beers that evening. The whole incident she said took ten minutes. She identified the third appellant as one of the robbers as said that during the robbery he had a beard and side burns. The 1<sup>st</sup> appellant was also confirmed by this witness as being one of the robbers. On being

reexamined this witness stated that the police vehicle when it was chasing the robbers had its lights on. She stated that she however did not see the first appellant clearly. PW 2 was J K A. He said that he was a resident at Karatina town where he was a black smith. He recalled the 23<sup>rd</sup> April 2006 at mid night he had left Friends bar in the company of his wife and they were walking towards mid town hotel. On the way and when they reached Flamingo bar people appeared and they began to demand mobile phones. Some pulled his wife away whilst others were attacking him with clubs. They pushed him to the ground and began to go through his pockets. A police vehicle came along with its lights on which caused the robbers to run away. The robbers stole his mobile phone and Kshs.4000/-. He stated that he clearly saw the robbers by the aid of the security lights outside Flamingo bar. He said that the 1<sup>st</sup> appellant was the one leading the attack on him. When the robbers ran away the police chased them with the vehicle. Later at the police station the police escorted 2<sup>nd</sup> and 3<sup>rd</sup> appellant. He immediately recognized them as being part of the people who robbed them. The following day whilst opening his workshop he spotted the 1<sup>st</sup> appellant as he was walking past. He instructed one of his employees to follow him. The employee returned and told him that the 1<sup>st</sup> appellant had entered into a video show. When however he went to that video show with the police the 1<sup>st</sup> appellant had left. They were informed that the appellant had gone to the stadium. He in the company of police officers went to the stadium and pointed out the first appellant who was arrested. When the second appellant cross examined him this witness denied that he was drunk on the night of the attack. On being cross examined by the third appellant he responded that on the night of the attack it had rained heavily which prevented him and his wife from getting out of the bar earlier. He had taken three bottles of beer that evening. In response to further cross examination by the 3<sup>rd</sup> appellant he responded, *"I knew you before that incident..... You used to go to school with my children. There was no grudge between us."* He also stated that he had described the 3<sup>rd</sup> appellant to the police and had told the police that he was wearing a jacket during the attack. He also described him to the police as black and thin. On reexamination this witness stated, *"There was sufficient light from the security lighting that assisted me identify the accused."* PW 3 was an inspector of police. On 23<sup>rd</sup> April 2006 at about 12.30a.m. while on duty he received an emergency call from a person not related to this case who reported that he had been attacked by robbers at Karatina town. As he was rushing there in the company of another officer and as they reached at Flamingo bar they saw two people being attacked. When the robbers saw the police car they ran in different directions. Two ran towards the railway godown. One of them hid by the corridor of that godown. The other ran past the corridor towards the railway line. He fell down and was arrested. He was identified by this witness as the third appellant. On carrying out a search on him they found a Motorola cell phone. They also found a wallet which had identity card. The 2<sup>nd</sup> appellant was arrested by the police driver. He was found to have hidden by the charcoal bags. They were both escorted to the police station where PW 1 and 2 confirmed that they were amongst the people who attacked them. The witness continued by saying that on the following day at 9a.m. PW 2 reported that he had seen the first appellant at Karatina town. Two police officers went with PW 2 and returned to the station having arrested the first appellant. The 2<sup>nd</sup> appellant on cross examining this witness received a response that the 2<sup>nd</sup> Appellant was not an employee at the charcoal place. The officer confirmed that no item of property was found on the person of the 2<sup>nd</sup> appellant. The witness in response to the cross examination by the 3<sup>rd</sup> appellant stated that they were able to chase him by using the head lights of the vehicle. That one of the officers on shooting in the air the 3<sup>rd</sup> appellant ran into a corridor and on the railway line where he fell down and was arrested. This witness said that although there were no security lights past the corridor from the point where the attack took place they were able to follow the movements of the appellants. He stated, *"I already was on you tracks right from the scene. It was not a dark night. One could see upto 50 metres."* Further the witness confirmed having found a Motorola mobile phone on the 3<sup>rd</sup> appellant and on being questioned by the said appellant the appellant denied that the phone was his. When the first appellant cross examined this witness he stated that a search was carried out at the home of the 1<sup>st</sup> appellant which did not yield anything. PW 4 was the Clinical Officer. He examined PW 1 and found her clothes were muddy. She complained of headache, pain to touch on the neck, left thigh and pain to touch on both sides of the chest. She also had pain on both shoulders. The approximate age of the injury was 8 hours and the probable weapon was blunt. He described the degree of injury to be harm. He also examined PW 2 and found that he was swollen on both eyes which appeared reddish. PW 2 had pain to touch on the neck and on the chest. He had multiple bruises on the left arm. The approximate age of injury was also 8 hours and the probable weapon was

blunt and sharp. The degree of injury was harm. PW 5 was a police constable attached to Karatina police station. He was on patrol on 23<sup>rd</sup> April 2004 in the company of PW 3 and other officers. When they were at Makutano area they heard noises and they rushed to the scene. They found people struggling on the ground. Upon noticing their presence some ran away leaving behind a woman and a man on the ground. They gave chase to those that ran and shot in the air. They arrested two of them. When the two were taken to the police station before they could be searched one suspect dropped a Motorola cell phone. That was the 3<sup>rd</sup> appellant. On being asked he denied that the mobile phone was in his possession. He confirmed that it was the 2<sup>nd</sup> and 3<sup>rd</sup> appellants that were arrested that night. On the following morning one of the complainants reported at the police that he had spotted the third suspect. He then stated, *"He gave us his son to accompany us to where he had spotted the suspect."* He went further to say that they arrested the first appellant near the stadium. On carrying out a search on the 1<sup>st</sup> appellant they did not find any suspicious items. On being cross examined by the 3<sup>rd</sup> appellant this witness said that when the robbers ran they, the police officers did not stop to speak to the victims but rather that they gave chase to the appellants. This witness was the one who arrested the 3<sup>rd</sup> appellant who surrendered when they shot in the air. He then stated, *"I never lost sight of you."* The lower court after receiving that evidence of the prosecution found that the appellants had a case to answer. The prosecution's case was heard by PC Tororey Ag. PM. After the ruling that there was case to answer, the case was taken over by BM Kimemia RM. The court after the matter was taken over by BM Kimemia RM recorded the following:- *"The accused persons informed of their rights to elect under section 200(4) CPC on whether the matter should start denovo or proceed from where it stopped, the trial magistrate having left."* All the three appellants responded by saying that the case to continue from where it stopped. By the time the case came up for defence hearing the matter was before L. Mbugua SRM. The record on the court file at that time showed that the three appellants indicated to the court that the case should proceed from where it stopped. The 2<sup>nd</sup> appellant gave a sworn statement. He stated that on 22<sup>nd</sup> April 2006 he went to work at 5.30p.m. as a watchman. At his place of work he met his boss Michael Ndungu. Michael Ndungu left him guarding the place. At mid night of that night a man came to him and asked him to identify himself. The person said that he was an officer from Karatina. He told the appellant that he was wanted by the OCS of Karatina police station. He was placed in a police vehicle. When he was taken to the station he found a woman and a man who said that they had been attacked by thieves. On 23<sup>rd</sup> April whilst at police cells his boss Michael Ndungu came to find out why he had been arrested. It was then that he said that his boss was requested to pay Kshs.5000/- to facilitate his release. The amount was not paid because it would have been deducted from his salary. The 3<sup>rd</sup> appellant also gave a sworn statement. In his defence he said that he works as a loader. On 22<sup>nd</sup> April 2006 he was on his way home from the market where he works as a loader. He had worked upto 10.30p.m. because of a vehicle that arrived late at the market. When they finished off loading that vehicle someone he called Gachagu escorted him upto to mid town. They parted at that point and he used the railway route to go home. On reaching the mitumba place he spotted two people. He stopped and saw seven people coming and passed him. It was then a police officer arrested him and began to search him. The police removed his phone and ID card. That phone he said was his. The second appellant's witness Michael Ndungu Kirito stated that he was a businessman selling charcoal. He said that he had been employed to off load charcoal. The second appellant arrived at 6p.m. just as he normally did and he left him at the place of work. The following morning when he reported at work he did not find the 2<sup>nd</sup> appellant. The 1<sup>st</sup> appellant in his defence under oath stated that he was a hawker at Karatina. That he sold sweets in that town. On 22<sup>nd</sup> April 2006 at the end of the working day he went home. The following day he went to Karatina stadium to play soccer and whilst there three people came and said that they were police men and arrested him. They took him to the police station and later he was charged with the robbery. This witness pointed out to the court that it was the son of PW 2 who pointed him out and yet he did not give evidence. He also said that there was a grudge between him and PW 2. The robbery in this case occurred at mid night on 23<sup>rd</sup> April 2006. PW 1 and 2 were near the Flamingo bar where there was security light. All the appellants in their cross examination did not contradict the evidence relating to that light. PW 1 said that the robbery took 10 minutes. This means that the complainant had 10 minutes in a lit place to observe their attackers. PW 2 was even able to note the appearance of one of the attackers. The 2<sup>nd</sup> and 3<sup>rd</sup> appellants were arrested the same night. The police stated that they gave a continuous chase. That evidence was also not entirely contradicted by the appellants in their cross examination. The

prosecution's evidence was a combination of visual identification by complainants and of continuous chase by the police. In respect of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants we are satisfied that their identification had a degree of certainty because of the availability of the security light and their continuous chase. It also became clear that PW 2 knew the third appellant before that incident. It matters not to us that PW 2 did not know his name. After all it is possible to know somebody physically but not know his name. In respect of the 1<sup>st</sup> appellant the evidence surrounding his identification and the manner of arrest has obvious contradictions. PW 2 said that he pointed him out to the police and he was arrested. PC Kennedy Ondongo PW 5 however stated that PW 2 sent them with his son when they arrested the 1<sup>st</sup> appellant. If what PW 5 says is correct then PW 2 should have been made to identify the 1<sup>st</sup> appellant at an identification parade. This did not happen. If what PW 5 said was correct it then means that the identification of the 1<sup>st</sup> appellant was only a dock identification. Such identification was not satisfactory to lead to the 1<sup>st</sup> appellant's conviction. There were no stolen goods that were recovered from the 1<sup>st</sup> appellant. In his defence the 1<sup>st</sup> appellant said that on the night of the robbery he was at home after a day of selling sweets in Karatina. He said that was his normal occupation. When he was arrested he said that he was playing football at the stadium. That defence in the light of the contradiction in the prosecution's case relating to the 1<sup>st</sup> appellant leads us to find that the case against the 1<sup>st</sup> appellant was not proved beyond reasonable doubt. We entertain doubt whether he was involved in the robbery. We shall therefore proceed to allow the 1<sup>st</sup> appellant's appeal against all counts. The 2<sup>nd</sup> appellant in his defence raised alibi defence. When he raised that defence he assumed no burden to prove it. That burden lay with the prosecution throughout the trial. That indeed was the holding in the court of appeal's case of ***Macharia v Republic [2001] KLR 155*** in which they said:-

***“We would state here that when the appellant put forth an alibi as his defence it was upon the prosecution to disprove it since an accused person is under no obligation to prove his own innocence as the burden of proving a case against an accused remains on the prosecution throughout the trial. In SEKITOLEKO V UGANDA [1967] EA p. 533 Sir Udo Odoma CJ said***

***“In R V. JOHNSON [1961] 3 All ER 969 the general principle of law applicable to defence of an alibi was enunciated. It was laid down as a general rule of law that if an accused puts forward an alibi as an answer to a criminal charge, he does not thereby assume a burden of proving his defence and that the burden of proving his guilt remains throughout on the prosecution.”***

The 2<sup>nd</sup> appellant stated that he was employed as a watchman and he called Michael Ndungu to confirm that he was his employee. When Michael Ndungu however gave evidence he stated that he was himself an employee, employed to off load charcoal. He did not in his evidence confirm that the 2<sup>nd</sup> appellant was his employee. That alibi evidence considered alongside the prosecution's evidence we find that the prosecution has proved the case beyond reasonable doubt against the 2<sup>nd</sup> appellant. PW 1 is very clear in her evidence on how she observed the 2<sup>nd</sup> appellant as he tore her clothes, removed her inner wear and indecently assaulted her. The alibi defence therefore is rejected. The appellants argued in their written submissions that PW 1 and 2 had consumed alcohol that hampered the identification of their assailants. The question that was put to the complainants on the issue received a denial of drunkenness by the complainants. PW 1 had consumed two beers and PW 2 three beers. They said that they had been detained in the bar by the heavy rains. We have reevaluated the lower court's evidence and we are of the view that on conviction we are in agreement with the lower court's judgment and we find no basis of coming to a different conclusion. The learned state counsel had faulted the lower court for conviction of the third appellant on count IV of conveying suspected stolen mobile phone. Learned state counsel argued that that count should have been an alternative count. In our view we find that that count related to possession of stolen goods whereas the other main count related to robbery and indecent assault. The argument of the learned state counsel is not correct because there is no where in evidence where it was proved that the phone was the property of the complainant and neither did any of them identify the phone as belonging to them. The mobile phone from the evidence adduced was not the subject of the robbery suffered by PW 1 and 2. It was therefore not an alternative count to the main counts. Having also reconsidered the lower court's evidence we are satisfied that the 2<sup>nd</sup> count of indecent assault was proved beyond reasonable doubt. We are also satisfied that the subsequent magistrates who handled the trial

complied with section 200 of Criminal Procedure Code. In sentencing the learned trial magistrate sentenced the appellants to hanging on count I and again sentenced them to hanging on count III. In this regard the learned magistrate acted in error. What she ought to have done was to sentence the appellant to hang on count I and the sentence on count III ought to have been held in abeyance. This was the holding in the court of appeal's case of ***Abdul Debanu Boye & another vs Republic Criminal Appeal No. 19 of 2001*** (unreported).

***“We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. The reasons for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term. The case of the 1<sup>st</sup> appellant provides a good illustration of this. If the appeal is heard and finalized before the sentence of seven years imprisonment is served he is required to serve that sentence and complete it first before the sentence of death is carried out? We can find no sense at all in such a proposition and the long practice which we are aware of is that once a sentence of death is imposed the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been imposed, the court dealing with the appeal would consider all the counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed. We hope that sentencing courts will take heed of these simple requirements and act appropriately.”***

In the end our judgment is as follows:-

- 1. The 1<sup>st</sup> appellant's appeal against conviction and sentence succeeds. The 1<sup>st</sup> appellant James Kinyua Ngima conviction in the lower court is hereby quashed. His sentence is hereby set aside. We order that James Kinyua Ngima be set free unless otherwise lawfully held.***
- 2. The appeals against conviction of 2<sup>nd</sup> and 3<sup>rd</sup> appellants that is Peter Maina Mwangi and Jackson Kimaru Maina are hereby dismissed. The sentence on count I and III by the lower court are set aside. We sentence 2<sup>nd</sup> and 3<sup>rd</sup> appellants on count I to hanging as provided under the law. In respect of count No. III the sentence is held in abeyance.***

***Dated and delivered at Nyeri this 11<sup>th</sup> day of May 2009.***

**MARY KASANGO**

**JUDGE**

**M.S.A. MAKHANDIA**

**JUDGE**