



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 980 & 981 of 2003**

**(From original conviction(s) and Sentence(s) in Criminal Case No. 22 of 2003 of the Senior Resident Magistrate's Court at Kikuyu (M. W. Murage – SRM.)**

**ANTHONY NJOGU WANJIKU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 981 OF 2003**

**(From original conviction(s) and Sentence(s) in Criminal Case No. 22 of 2003 of the Senior Resident Magistrate's Court at Kikuyu (M. W. Murage – SRM.)**

**PETER NJAU NJERI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**ANTHONY NJOGU WANJIKU** and **PETER NJAU NJERI** who were originally charged with five others were both convicted of **VIOLENTLY ROBBING DAVID NGANGA MUNGA** of cash and documents on 8<sup>th</sup> April 2003. They were both sentenced to death as by law prescribed. Being aggrieved by the conviction and the sentence, they lodged their appeals which we have consolidated since they arise out of the same trial.

When the appeal came up for hearing, **MRS. KAGIRI**, learned counsel for the State conceded the appeal citing insufficiency of evidence to support the offence charged. Learned counsel submitted that the evidence adduced supported the lesser offence of assault causing actual bodily harm. Counsel urged us to substitute the conviction entered with one for the lesser offence.

On the 1<sup>st</sup> Appellant's part, he opposed the substitution of the offence and submitted that in fact the evidence on record was insufficient to support a conviction even for the lesser offence of assault. The 2<sup>nd</sup>

Appellant urged court to find that he was convicted for the wrong offence and reconsider in particular the evidence of PW1 and PW5.

Both Appellants relied on their written submissions which we have carefully considered. We have also carefully analyzed and evaluated afresh the evidence adduced before the trial court. The key issue raised by the Appellants was that of identification. The Appellants are alleged to have surrounded the Complainant while in a crowd of touts and to have beaten him and robbed him of some money. The Appellants contented that there were so many persons in the crowd and therefore the Complainant was impeded from identifying the persons who stole from him and those who beat him.

In the Complainant's evidence, he said that after the attack he led PW5 to the scene and identified the 1<sup>st</sup> and 4<sup>th</sup> accused in the lower court as the ones who beat him and stole from him respectively. PW1, the Complainant said he could not identify the others in the group that attacked him. The 1<sup>st</sup> accused is the 2<sup>nd</sup> Appellant while the 4<sup>th</sup> accused is the 1<sup>st</sup> Appellant in this appeal. PW5 on the other hand contradicted the Complainant and stated that when the Complainant took him back to the scene of the incident, he identified the 3<sup>rd</sup> and 5<sup>th</sup> accused as his assailants. PW5 said that eventually he arrested the rest of the persons who were eventually charged in the case after the 3<sup>rd</sup> and 5<sup>th</sup> accused implicated them. When the learned trial magistrate summarized the evidence adduced before her, she considered only the evidence of the Complainant. The learned trial magistrate failed to consider the conflicting evidence of PW5 as to the persons the Complainant identified to him as his attackers. Consequently, the learned trial magistrate failed to resolve the conflict between the evidence of these two key witnesses. On our part, we find the conflicting evidence irreconcilable and irresolvable. The only conclusion we draw from it is that there is a confusion as to whom the Complainant identified as his attackers in the evidence of both the Complainant and the arresting officer PW5. That conflict creates doubt in the prosecution case which in our view ought to have been resolved in favour of the Appellants and their co-accused in the case.

We have not found any reliable and credible witness implicating the Appellants with the attack. We agree with the Appellants that indeed there was a huge crowd at the place where the attack took place and as a result, it was practically difficult for the Complainant to positively identify those who attacked and stole from him. We find that the conviction entered in this case against the Appellants was unsafe and cannot be allowed to stand.

We allow both appeals quash the convictions and set aside the sentences. The Appellants ought to be set at liberty forthwith unless they are lawfully held.

Dated at Nairobi this 9<sup>th</sup> day of May 2006.

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**LESIIT, J.**

**JUDGE**

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**MAKHANDIA, M.**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant present

Mrs. Kagiri for the State

Wambui/Eric - CC

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**LESIT, J.**

**JUDGE**

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**MAKHANDIA, M.**

**JUDGE**