



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL 147 OF 2004

**(From original conviction (s) and Sentence(s) in Criminal case No. 380 of 2004 of the
Chief Magistrate's Court at Nairobi (Mrs. Matheka – P.M.)**

DANIEL MAINA KAGOTHO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 148 OF 2004

**(From original conviction (s) and Sentence(s) in Criminal case No. 380 of 2004 of the
Chief Magistrate's Court at Nairobi (Mrs. Matheka – P.M.)**

STEPHEN NDICHU CHEGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH CRIMINAL

APPEAL NO. 149 OF 2004

**(From original conviction (s) and Sentence(s) in Criminal case No. 380 of 2004 of the
Chief Magistrate's Court at Nairobi (Mrs. Matheka – P.M.)**

FRANCIS MUNYIRI GWADARO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellants **DANIEL MAINA KAGOTHO, STEPHEN NDICHU CHEGE** and **FRANCIS**

MUNYIRI GWADARO (hereinafter referred to as the 1st, 2nd and 3rd Appellants respectively) were charged and convicted of the offence of **ROBBERY** contrary to **Section 296 (1)** of the **Penal Code** in count 1. In count 2 the 3rd Appellant was convicted of **RESISTING ARREST** contrary to Section 254 (b) of the Penal Code. In count 3 the 3rd Appellant was convicted of **BEHAVING IN A DISORDERLY CONDUCT IN A POLICE BUILDING** contrary to **Section 60(1)** of the **Police Act**. In count 4, the 3rd Appellant was convicted of **REFUSING TO PERMIT FINGER PRINTS TO BE TAKEN** contrary to **Section 21(3)** of the **Police Act**. Each Appellant was jailed for 3 years for the first count while the 3rd Appellant was not given any sentences for the second to fourth counts.

The facts of the case were that the Complainant went to buy milk at 10.00 p.m. on the evening in question. On his way home, he met a group of 8 people. That the 1st Appellant held him by the head with a knife and asked him for his house keys. He surrendered the keys. That while two guarded him six went to his house and stole his property. The Complainant said he saw and recognized the 1st Appellant who he knew before. He led to his arrest. After the 1st Appellant was arrested, he led to the arrest of the 2nd and 3rd Appellants. All Appellants denied committing this offence.

The Appellants have all raised the same grounds of appeal. The appeal was unopposed. In their first ground of appeal, the Appellants contend that the trial magistrate erred in law and fact by convicting on the evidence of a single witness. Their second ground was that the learned trial magistrate erred in law and fact in holding that the Appellants were positively identified. In the third ground all Appellants contended that the evidence adduced by the prosecution was contradicting and inconsistent.

MRS. TOIGAT learned Counsel for the State submitted that the learned trial magistrate did not comply with the provisions of **Section 169** of the **Criminal Procedure Code** while writing the judgment. **MRS. TOIGAT** submitted that in convicting the Appellants, the learned trial magistrate relied on accomplice evidence as adduced by PW1, PW2 and PW3. She also submitted that in passing sentence against the 3rd Appellant, the learned trial magistrate did not specify for which of the four counts the 3rd Appellant faced that the sentence passed related to.

I have analyzed and re-evaluated the evidence of the prosecution and the defence as expected of me as a first appellate court. On the issue of identification, the Complainant's evidence is that he was attacked by 8 people. He was able to see and recognize one of them and he led to his arrest. That was the 1st Appellant. The Complainant said he knew the 2nd Appellant before but he did not identify him as having been present during the attack. The Complainant was categorical that he neither knew the 3rd Appellant before nor did he see him at the scene of the offence.

From the evidence of PW1, PW2 and PW3, the 2nd and 3rd Appellants were arrested afterwards but not as a result of any identification by the Complainant. The Complainant was not present at their arrest either. Consequently, it was necessary to conduct identification parades for purposes of identification of the two appellants by the Complainant. The lack of such identification parades means that the evidence of identification adduced by the Complainant against them was dock identification. Not to mention that the Complainant did not implicate them with this offence. That identification was worthless and ought not to have been regarded. Consequently I quash the conviction of the 2nd and 3rd Appellants in count 1 and set aside the sentence.

As for the 1st Appellant, the Complainant claims he knew him before. The Complainant identified him as the one who held him by the head with a knife in hand and demanded his house keys from him. The Complainant also described the place as being near his house with electricity lights which were lighting at the time. The Complainant also led to the 1st Appellant's arrest. In his defence, the 1st Appellant denied having participated in the offence. He claimed to have been very sick. In respect of the 1st Appellant, I am satisfied that there was sufficient evidence adduced against him. I have warned myself of the danger of relying on the evidence of a single witness to convict. However, having warned myself, I find that the identification was positive and safe. I uphold the conviction against the 1st Appellant.

For the 3rd Appellant in respect of the 2nd, 3rd, and 4th counts, no evidence was adduced in their support, the conviction entered in those counts had no basis and I quash them and set aside the sentences.

As for the 1st Appellant's sentence of three years imprisonment, I find this quite lenient. The evidence adduced shows clearly that the 1st Appellant was armed with a knife. The offence was not only aggravated but serious. In that regard I will not interfere with the sentence.

The upshot of these appeals is that the appeals by the 2nd and 3rd Appellants are allowed, convictions quashed and sentences set aside. The second and third Appellants should be set at liberty unless otherwise unlawfully held.

The appeal by the 1st Appellant fails. The conviction is upheld and the sentence confirmed.

Those are the orders of this court.

Dated at Nairobi this 17th day of June 2005.

LESIT, J.

JUDGE