REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 99 of 2004
From original conviction and sentence in Criminal Case No. 462 of 2003 of the Senior Resident Magistrate's Court at NAROK – S. M. GITHINJI, ESQ.)

PAUL KINUTHIA THIGA……...…….APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

JUDGMENT

The appellant and 2 others were charged with house breaking and stealing contrary to Section 304(1) and 279(b) of the Penal Code. The appellant also faced a second count of handling stolen goods contrary to Section 322(2) of the Penal Code. All the offences were said to have been committed on 21st and 22nd July, 2003. He was tried and convicted in the first count of house breaking and stealing. In his judgment, the trial magistrate stated as follows:-

> *"Having found 2nd accused (the appellant) guilty of the main count, I make no finding in regard to the alternative count."*

There was no alternative count and so it is not clear what the learned magistrate was referring to in the above statement. He must have been referring to the second count. He then proceeded to pronounce sentence as follows:-

> *"On each limb of the offence they will serve 10 months imprisonment.*
>
> *Sentences to run consecutively".*

He was referring to the appellant and the first accused in that matter.

The appellant was aggrieved by the said conviction and sentence and preferred this appeal. However, during the hearing of the appeal he abandoned his appeal against conviction and proceeded with appeal against sentence only. He stated in his petition that the learned trial magistrate should not have ordered that the two sentences run consecutively.

The particulars of the offence in the first count of house breaking and stealing showed that the appellant and his accomplices broke into the house of the complainant and stole her goods on 21st July, 2003. These two offences were committed in a single act and our law prohibits an offender from being punished twice for the same offence. The trial magistrate should not have ordered two separate sentences as that was tantamount to punishing the appellant twice for the same offence. In *MUIRURI VS REPUBLIC* [1973] E.A. 86 the appellant was convicted and sentenced on two counts, shop breaking and theft as the first count and robbery as the second count. On appeal, the conviction and sentences on the first count

was quashed because theft was an ingredient of both offences which arose out of a single act.

In this appeal, the appellant should have been sentenced to 10 months imprisonment only and it was not right for the trial court to sentence him to 10 months for each limb of the offence and to order that the two sentences run consecutively.

I therefore allow the appeal and set aside the additional sentence of 10 months imprisonment. As the appellant has been in jail for more than 10 months, I order that he be set at liberty forthwith unless otherwise lawfully held. **DATED,** SIGNED AND DELIVERED at Nakuru this 30th day of September, 2005.

D. MUSINGA

JUDGE

30/9/2005

Judgment delivered in open court in the presence of the appellant and in the absence of the .G.

D. MUSINGA

JUDGE

30/9/2005