



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 471 OF 2003**

(From original conviction (s) and Sentence(s) in Criminal case No. 881 of 2003 of the Chief Magistrate’s Court at Nairobi (W. Juma (Mrs.) –P.M.)

JAMES NDUNGU GITAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 472 OF 2003**

(From original conviction (s) and Sentence(s) in Criminal case No. 881 of 2003 of the Chief Magistrate’s Court at Nairobi (W. Juma (Mrs.) –P.M.)

JOSEPH KUNGU MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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

The two Appellants JAMES NDUNGU GITAU and JOSEPH KUNGU MWANGI, hereinafter referred to as the 1st and 2nd Appellant respectively were charged with one count of DEMANDING PROPERTY BY MENACES contrary to Section 302 of the Penal Code. The particulars of the charge are that on 31st March 2003, along Racecourse Road, in Nairobi, they with others not in court, demanded with menaces Kshs.20/- from Complainant FRANCIS NJUGUNA with intent to steal. After the trial both Appellants were convicted and each sentenced to serve four years imprisonment. They were aggrieved by the conviction and sentence and so lodged their Appeals.

The facts of the case are simply that the Appellants with others who were not arrested, intercepted a public service vehicle Reg. No. KAG 100Q in which PW1 was working as a conductor. This was along Racecourse Road. On the material day the 1st Appellant entered the vehicle while the 2nd Appellant and others stood outside. They started demanding 20/- from the Complainant. When he resisted to give the money, the two Appellants and their accomplices threatened that they would remove the side mirror of the vehicle in lieu of payment. When the 2nd Appellant and accomplices who were outside moved towards the mirror, the vehicle owner PW2 called for help. He was assisted to take the 1st Appellant to Kamukunji Police Station. The rest escaped. On 4th April 2003, the 2nd Appellant with others came along to demand afresh 20/. The 2nd Appellant was also arrested. They were both charged in court with the offence. Both Appellants denied the charges.

The Appellants raised similar grounds of Appeal. Having considered them, I find that the issues raised rotate around only two points.

1. That the learned trial magistrate erred in law and fact in relying on the evidence of PW1, 2 and 3.
2. That the learned trial magistrate erred in law and fact in failing to consider whether or not the Appellants were members of Mungiki.

The Appeal was opposed. MR. MAKURA, learned counsel for the State ably responded to each of the issue raised. I have also considered those submissions together with the Petitions of Appeal by both Appellants and the facts and circumstances of the case.

I find this an open and shut case. The Appellants demanded 20/- from the Complainant, PW1, in the presence of his employer, PW2 and his colleague PW3. Even though 31st March 2003 was the date in issue, it appears from the evidence of the Prosecution that the Appellants had made it a habit to demand the said payments. From the evidence of PW1, 2 and 3, the Appellants demanded the said amount as a right and towards the Mungiki group.

The issue involved in this case was whether the 20/- money was demanded with force by the Appellants. I find that the ingredients of the charge were proved. The said money was demanded for. In addition to threats used, the Appellants were ready to remove the car's mirror if the money was not paid. I find from this evidence that the case was proved. The Appellants seem to suggest that the Prosecution had to prove that they were members of the Mungiki in order to prove their case. It is irrelevant, as far as the conviction is concerned, who the Appellants were or who they were acting for. The only issues the Prosecution needed to prove are that on the day in question, the Appellants demanded 20/- and that force was used. The other point is that of witnesses.

The Appellants seem to suggest that since they were the vehicle owner and crew, then their evidence needed corroboration. Having re-assessed the evidence adduced herein, I am satisfied that the witnesses were credible and reliable. The inconsistency in their evidence as observed by MR. MAKURA, concerned only their arrest. The inconsistency was minor and immaterial.

Having considered this Appeal at length, I find that the conviction was safe. Accordingly I uphold the conviction.

On the sentence, even though the sum involved was little, it is material to bear in mind what the learned trial magistrate observed before passing sentence. It was her view that at the time the offence was committed, people were invoking the name Mungiki in order to extort money from the Matatu business. She also observed that such acts had in some cases led to blood shed. I would not argue with that fact. The only observation I invoke is that the offence was not aggravated in that no weapon was used either to instill fear or to use force. The sentence should be commensurate with the act done. In that regard, I find four year imprisonment was on the higher side. The Appellants have already served over 18 months. I will allow the Appeal against sentence by reducing the sentence to the period already served.

The upshot of this Appeal is that the conviction is confirmed. The Appeal against sentence is allowed and sentence reduced to the period already served. Orders accordingly.

Dated at Nairobi this 15th day of December 2004.

**LESITT**

**JUDGE**

Read, signed and delivered in the presence of;

**LESIIT**

**JUDGE**