



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL APPEAL NO. 178 OF 2008**

**KENNEDY IRERI GICHOVI .....1<sup>ST</sup> APPELLANT**  
**WILLY NJOROGE KINYANJUI..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in Criminal Case No. 1659 of 2007 of the Chief Magistrate's Court at Thika by L.W. Gicheha – Senior Resident Magistrate)*

**JUDGMENT**

The appellants, **KENNEDY IRERI GICHOVI** and **WILLY NJOROGE KINYANJUI**, were convicted for the offence of Robbery with violence **contrary to section 296 (2) of the Penal Code**. Thereafter, they were both sentenced to death.

In their appeals to the court they have raised 4 issues, which can be summarized as follows;

- (1) The prosecution witnesses were not credible. They were not worthy of belief.**
- (2) The charge was not proved to the standard required by law.**
- (3) The death sentence was unconstitutional and arbitrary as the trial court did not allow the appellants an opportunity for mitigation.**
- (4) The defences were unjustifiably rejected.**

When canvassing the appeal, the 1<sup>st</sup> Appellant pointed out that the complainant (**PW 1**), and **PW 2** had talked of a person called Njaramba, as one of the persons who robbed **PW 1**. As he was not called Njaramba, the 1<sup>st</sup> Appellant submits that he ought not to have been convicted.

Meanwhile, the 2<sup>nd</sup> appellant pointed out that the name Willy was not descriptive of him alone. As far as he was concerned, that name was available to many other people, including those that were not Africans. Therefore, when **PW 1** identified “Willy” as one of those that robbed him, the 2<sup>nd</sup> appellant believes that that was not specific to him.

In any event, the circumstances prevailing at the time of the robbery were described by the appellants as very harsh. The reason for that is that the robbery happened at about 8.30p.m, and within an area which had no lights.

Furthermore, the complainant was threatened with a knife, resulting in him running-off to save his life. Therefore, the appellants believe that the complainant was too scared to positively identify his assailants.

Had the complainant identified them positively, the appellants contend that he would have given their names and descriptions to **PW 2**.

The appellants also submitted that the particulars of the charge sheet were not proved. They pointed out that whereas the charge sheet specified the loss of 6 dresses, the complainant talked of 3 skirts, 1 petticoat and a pair of trousers.

The charge sheet was also said to be defective, as the knives allegedly used by the robbers were not described as either dangerous or offensive weapons or instruments.

According to both appellants, neither of them played any role in the robbery.

The 1<sup>st</sup> appellant was not found in possession of any of the items allegedly stolen from **PW 1**; whilst the 2<sup>nd</sup> appellant testified that the items had simply been forgotten by the complainant at the spot where he had slept, when he was drunk.

Finally, the appellants faulted the trial court for sentencing them to death without giving them an opportunity for mitigation.

In answer to the appeal, Mr. Muriithi, learned state counsel, submitted that the evidence of robbery was not controverted. According to him, **PW 1** did testify that he was robbed of 6 dresses.

Secondly, the respondent said that **PW 1** did recognize the two robbers, as they were both well known to him.

In order to demonstrate how positively **PW 1** identified the robbers, the respondent reminded the court that the complainant vividly described the role played by each of the appellants during the robbery.

Thereafter, the complainant informed **PW 2** about the identities of the robbers.

On the next morning, **PW 1** reported to the police, also giving names of the appellants.

The respondent also pointed out that it was the 2<sup>nd</sup> appellant who led the police and the complainant to the spot where the stolen items were recovered.

The explanation offered by the 2<sup>nd</sup> appellant, concerning how the items got to that spot, was described, by the respondent, as not plausible.

Being the first appellate court, we have undertaken the task of re-evaluating all the evidence on record. We have drawn our own conclusions whilst making an allowance for the fact that we did not have the benefit of observing the witnesses when they gave evidence.

The complainant does the jobs of an informal laundry and repair shop.

On the material day, he collected from **PW 2**, 3 skirts and a petticoat, which were for repairs. After he had opened up the elastic on the skirts, **PW 1** realized that he did not have the elastic necessary for the repair-work.

At 8.30p.m. **PW 1** informed **PW 2** that he would go home with the clothes.

As he was going home, **PW 1** met 2 men. They asked him what he was carrying. They then grabbed the

paper-bag which **PW 1** had.

Whilst the 1<sup>st</sup> Appellant produced a knife, the 2<sup>nd</sup> Appellant ransacked **PW 1**'s pockets.

According to **PW 1**, he knew the 2 men as Willy and Njaramba.

After abandoning the paper-bag, **PW 1** ran off to the home of **PW 2**. That home was only 50 metres away from where he was robbed. After **PW 1** informed **PW 2** about the robbery, he went home.

On the next morning, **PW 1** met the 1<sup>st</sup> appellant, at about 9.00a.m. **PW 1** asked that appellant for the clothes that the appellants had stolen.

The 1<sup>st</sup> appellant threatened to kill **PW 1**, for spoiling his name. **PW 1** then reported the robbery, to the police. **PW 1** was instructed to go back to the police that evening.

When evening came, **PW 1** went to the police. Some 3 officers accompanied him to the 1<sup>st</sup> appellant's house. A search at that house yielded nothing. The search was conducted in the presence of both appellants, who had been apprehended after **PW 1** pointed them out.

Whilst the team was on their way to the home of the 2<sup>nd</sup> appellant, the said appellant showed the police where the stolen items were. The said items were near a wire.

**PW 2** corroborated the evidence of **PW 1**. She also gave the appellants' names as Njaramba and Willy.

In particular, **PW 2** confirmed that **PW 1** went to her house twice, within a span of 15 minutes.

First, **PW 1** informed her that he was carrying home the clothes which she had given to him for repairs. The second time, **PW 1** told **PW 2** that he had been robbed.

On that second occasion, **PW 1** told **PW 2** that the 2 persons who robbed him were the appellants herein.

**PW 3** was an officer attached to the Juja AP Post. He testified that **PW 1** reported about the robbery, on 29<sup>th</sup> March 2007.

Later that day, **PW 1** pointed out the appellants as the robbers. **PW 3** accompanied **PW 1** and the appellants to the house of the 1<sup>st</sup> appellant.

**PW 3** also corroborated the evidence of **PW 1**, regarding the recovery of the stolen things.

It was the evidence of **PW 3** that **PW 1** gave to the police, the names of the appellants, as the persons who had robbed him.

In particular, the complainant is said to have given the name KENNEDY IRERI.

When the 1<sup>st</sup> appellant was put to his defence, he said that he was arrested on 28<sup>th</sup> April 2008. He said that he was arrested after the police searched his house, although the search yielded nothing.

On his part, the 2<sup>nd</sup> appellant said that he knew nothing about the robbery.

Both appellants alleged that the police officers who arrested them, only charged them because they did not each have KShs.7,000/-.

In our considered opinion, there was a need to critically evaluate the evidence of the alleged identification. We say so because there was only one identifying witness, and also because the robbery took place at night, where there were no lights.

However, we also do consider the fact that the complainant and the appellants knew one another.

The assailants did not simply take the complainant by surprise, from behind; the assailants met the complainant and talked to him. They asked him what he was carrying.

When talking to **PW 1**, they called him “Rambo”. Presumably, that was **PW 1’s** nickname.

The assailants then grabbed the paper-bag. At that stage, **PW 1** asked the assailants why they were stealing from him. The 1<sup>st</sup> appellant told **PW 1** that they would even take what was in his pocket.

The 1<sup>st</sup> appellant removed a knife, presumably to make it clear to **PW 1** that they were serious about their intention to rob him.

As the 1<sup>st</sup> appellant held the knife, the 2<sup>nd</sup> appellant ransacked **PW 1’s** pockets.

We have spelt out these particulars of the incident to show that **PW 1** had no reason to be scared of the 2 men when he first met them. They were people who he knew well; and they too knew him.

The 2 men asked him what he was carrying. In other words, they held a conversation with him.

They then grabbed the paper bag. In order to do so, whilst **PW 1** was still holding the said paper bag, the 2 men were in very close proximity to **PW 1**.

And when the 2<sup>nd</sup> appellant ransacked **PW 1’s** pockets, the two were definitely in close physical proximity.

On the other hand, when the 1<sup>st</sup> appellant threatened **PW 1** with a knife, and **PW 1** then hit the knife (injuring his finger, in the process), that too confirms that **PW 1** was close to the 1<sup>st</sup> appellant.

In those circumstances, we are satisfied that the complainant had ample time to positively identify the assailants.

**PW 1** was so sure of the identities of the appellants that he immediately revealed the same to **PW 2**.

And on the following morning **PW 1** disclosed the appellants’ names to the police.

We are therefore convinced beyond any shadow of doubt that **PW 1** did recognize the appellants as the persons who robbed him.

Therefore, even though the 1<sup>st</sup> appellant did not have possession of the stolen items that did not weaken or nullify the fact that he was recognized.

And the 2<sup>nd</sup> appellant offered an explanation as to how he came to know where the stolen items were. In order to know that, he must have been at the scene of crime. In our considered view, that appellant was simply trying to wriggle out of the tight spot.

We say so because when he was cross-examining **PW 1**, he did not suggest to him that he (**PW 1**) had been so drunk on the material night that he dropped the clothes at the scene.

In any event, **PW 2** testified about **PW 1** reporting to her that he was going home with the clothes she had left with him, for repairs. **PW 2** also said that **PW 1** returned to her house after 15 minutes, saying that he had been robbed.

At no time did the 2<sup>nd</sup> appellant suggest to **PW 2**, during cross-examination, that **PW 1** had simply forgotten the clothes at a place where **PW 1** had fallen down, drunk.

In effect, the 2<sup>nd</sup> appellant's explanation to **PW 3** was nothing more than a smokescreen. The trial court saw through it, and so have we.

We have also verified from the record of the proceedings that both the appellants were duly accorded an opportunity for mitigation. Therefore, their complaint regarding the alleged sentencing, in the absence of mitigation, is without foundation.

In **GODFREY NGOTHO MUTISO Vs. REPUBLIC, CRIMINAL APPEAL NO. 17 OF 2008**, the Court of Appeal made it clear that the courts would be entitled to continue handing down the death sentence in appropriate cases. In effect, they did not declare the death penalty unconstitutional. They only said that courts should first give to a convicted person an opportunity for mitigation before determining whether or not the death penalty was appropriate in any given case.

In this case, the charge did not describe the knives which the robbers allegedly had, as "dangerous or offensive" weapons or instruments"

Whereas that omission could be fatal in a case in which the only ingredient of the offence of Robbery with violence was the fact that the robber was armed with such weapons or instruments, it is clear that in this case, there were more than one robber. Secondly, there was violence visited upon the complainant.

Curiously however, we note that the charge sheet stated that the 2 accused persons were armed with knives, whereas the evidence is that there was only one knife.

The charge sheet also states that the complainant was robbed of six (6) dresses. But **PW 1** was robbed of 3 skirts, a petticoat, waistbands, and a pair of trousers. He was not robbed of even a single dress!

In the result, the evidence adduced did not support the charge. The prosecution ought to have amended the charge sheet, to bring it in line with the evidence adduced. However, no efforts were made to have the charge sheet amended.

For that reason, the evidence on record cannot sustain the conviction. Therefore, we have no option but to allow the appeal. We quash the convictions and set aside the sentences. We order that the appellants be set at liberty forthwith unless they or either of them is otherwise lawfully held.

**Dated, Signed and Delivered at Nairobi this 20<sup>th</sup> day of February, 2012**

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**FRD A. OCHIENG**  
**JUDGE**

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**L.A. ACHODE**  
**JUDGE**