



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 553 of 2004**

**PATRICK GITONGA GITHINJI.....APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

***(An appeal from the Judgment of Senior Resident Magistrate G.M. Njuguna dated 5<sup>th</sup> November, 2004 in Criminal Case No.154 of 2004 at Kiambu Law Courts)***

**JUDGMENT OF THE COURT**

The appellant herein was jointly charged with two others for the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that they, on 28<sup>th</sup> December, 2003 at Kawaida Village in Kiambu District, Central Province, jointly with others not before the Court and while armed with dangerous weapons, namely an AK-47 rifle, an axe and a spear, robbed **Jackson Irungu Mathenge** of cash in the sum of Kshs.50,000/=, a JVC television, one radio cassette, Aiwa by make, one gas cooker with gas cylinder, one Nokia cellphone, one car radio-cassette, a spare wheel, one full military uniform, one green jacket, a pair of military boots – bearing a total value of Kshs.150,000/= ? and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence against the said **Jackson Irungu Mathenge**.

In a second count of the charge, the appellant, jointly with the same two others, was charged with the offence of robbery with violence. The particulars were that the three, on 20<sup>th</sup> December, 2003 at Kawaida Village in Kiambu District, jointly with others not before the Court, while armed with dangerous weapons namely an AK-47 rifle, an axe and a spear, robbed **George Kweyu Orata** of one radio cassette, Sony by make, one solar battery and one bag, all bearing a total value of Kshs.38,000/=, and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence upon the said **George Kweyu Orata**.

The three accused persons faced a third count of the charge of robbery with violence: that on 28<sup>th</sup> December 2003 at Kawaida Village in Kiambu District, jointly with others not before the Court and while armed with dangerous weapons, namely on AK-47 rifle, an axe and a spear, they robbed **Maurice Owino Tabu** of cash in the sum of Kshs.2,800/=, one television set, Great Wall by make, two pairs of shoes, one hurricane lamp, one wrist watch – all valued at Kshs.10,000/= ? and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence upon the said **Maurice Owino Tabu**.

PW1, **Jackson Irungu Mathenge**, a military officer residing at Kawaida Village, was asleep in his house, with his family at 2.30 a.m. on the night of 27<sup>th</sup>/28<sup>th</sup> December, 2003, when his residence was

invaded by thugs. They began by making noise outside, and then crushed the windows and entered, in full electrical lighting in all the five rooms of the house. A member of the gang wielding an AK-47 rifle found PW1 in the corridor and pushed him into the lounge. The intruder, under full lights, aimed his gun at PW1, and ordered him to sit down. Two more thugs came into the lounge, one wielding an axe. They opened the wall-unit and took a television, JVC by make, a video-deck and a radio cassette, Aiwa by make. The appellant herein who had the gun, ordered PW1 to stand up and go to the bedroom and produce money, lest he be killed. After PW1 had gone and found Kshs.10,000/= in his jacket pocket, and handed it over, the appellant demanded still more. He demanded cellphones too, and PW1 handed over his, a Nokia, to this intruder. The intruders fetched the door keys from PW1's wife who was in the children's room; they opened the main door; they took away the television, the video deck, radio, and clothes. All this time, the lights in the house were not switched off. The appellant herein took PW1's military uniform and boots, and left the house. While the intruders were outside the house, they broke into PW1's car, a Toyota saloon, registration No. KAC 139T. They took the car radio, the spare tyre, and the jack. They left, and this gave PW1 a chance to call Flying Squad Police from Karuri. An unsuccessful chase of the thieves was attempted.

The robbers had come in full light, and had executed their depredations in full light, hanging around for about 20 minutes. The appellant, dressed in black, and with his face unmasked, had guarded PW1 all along. As this robber continuously chatted away, PW1 noted that two teeth were missing from his lower jaw.

On 26<sup>th</sup> February, 2004 PW1 was called to Karuri Police station, to go to an identification parade for the purpose of identifying any member of the gang that had robbed his house on the material date. PW1 went to the parade, and picked out the appellant herein.

On 21<sup>st</sup> January, 2004 PW1 had been asked to go to the Police station, as certain stolen items had been recovered, and were held there. He went, and identified one green jacket which had been stolen from his house, on the material night.

On cross-examination, PW1 said he had seen gaps in the appellant's lower teeth, on the material night. At that point the Court recorded that the appellant herein, when he spoke, showed only the teeth of the lower jaw. PW1 confirmed that the green jacket which he had identified at the Police station was indeed his; it bore an identification hole which PW1 had himself made.

PW2, **George Kweyu Orata**, a security officer who stays at Kawaida Village, testified that on the material night, at 1.00 a.m. he was alone and asleep, when he was awakened by his door being broken from without. Two people, flashing a torch, then came and stood by his bed. They were armed, one with a gun, another with a machete. The house was not lit, and a third man stood by the door, flashing his torch generously – and this enable PW2 to see the two standing by his bed. They demanded PW2's radio and solar battery. As the man with the gun guarded PW2, another man disconnected the battery from the radio. The person at the door flashed the torch and lit up PW2's bag, which the man wielding the gun now turned to look at; and in the meantime, the torch-light fell on him as he eyed the bag. This was an opportunity, PW2 testified, for him to observe the face of the appellant herein. It was the appellant herein who carried the said bag away. The intruders grabbed the bag, the solar battery, and the radio. They left after ten minutes, in disappointment that PW2 had no money to hand over ? for good measure.

PW2 noticed that when the appellant and his gang left his house, they went to the house of a neighbour, **Maurice Owino** (PW3) where they threatened to kill the neighbour if he delayed in opening the door for them. PW2 heard the members of the gang order PW3 to lie down and to avail to them certain particular items – the television, the battery, the bicycle.

On the following morning, PW2 went and reported the robbery incident at Kawaida Police Post, indicating he had identified one of the robbers. He gave a description of the said robber to the Police officers. Later, somebody was arrested, and PW2 was asked to go to the Police station for the purpose of identification. At an identification parade, he picked out the appellant herein.

On 31<sup>st</sup> January, 2004 at 2.00 pm, PW2 identified his solar battery, Serial No.000107 which was being charged at a place called Laini Supply Centre. He went home and brought his purchase receipt, which showed that this battery being recharged was his property. He called Police officers from Karuri Police Station, who took away the said battery.

On cross-examination, PW2 thus spoke on the question of identification of the appellant herein, at the material time:

“You were standing next to me. I [noted] your facial features. It is your colleague’s torch which lit [up] your face. It [had] a very [powerful] light. I had not known you before. I never sent [the] Police to your place. [The] Police seem to know you. I told [the] Police what you looked like.”

PW3, **M T O** who is a security guard and stays at Kawaida, testified that he was awakened from his sleep, during the night of 27-28<sup>th</sup> December, 2003 at about 1.00 am, by a loud bang on his door. When he asked who it was, a person flashing a torch asked him to shut up. This man had a gun, and now ordered PW3 to open the door. After PW3 opened, he had the gun pointed at his neck as the intruder ordered him to lie down, and stepped on his neck. PW3’s wife, **R W**, was ordered to remove her clothes. One of the intruders had wanted to rape PW3’s wife, but changed his mind, and the intruders instead proceeded with grabbing house-items. They took a television, Great Wall by make, shoes, and a green jacket, in the pocket of which PW3 had kept Kshs.2,800/=. These gangsters hit PW3’s wife on the buttocks, and the one with the gun threatened to shoot if the couple made any noise. They left after carrying out the robbery; and PW3’s wife then raised the alarm, and neighbours came along to help.

PW3 visited a Police station and reported the matter. He was later called to the Police station where he found that his shoes, lamp and watch had been recovered.

PW3, at the Police station, identified the one of the robbers who had been carrying a gun, on the material night. When PW3 had opened the door at the command of the gang, he was able, by means of moonlight, to see the gun-wielding robber. Then a little later, a torch being flashed by another of the robbers lit up the gunman’s face, and this torch-light was “very strong.”

PW6, Police Force No.230863 **Inspector of Police Michael Misati** of Karuri Police Station had been requested to conduct an identification parade for a suspect, the appellant herein. He conducted the parade in an enclosed area. He put in place 8 parade members from the Police cells, and these men had similar features, build, complexion, etc. The suspect expressed no objection to being put on the parade, and he was asked to take a position of his own choice. PW3 came and picked out the appellant herein. The suspect said he was not satisfied with the parade, but gave no reasons.

Next, the suspect took a different position in the parade, and PW2 was called; he viewed the parade members, and touched the appellant herein as the suspect. Again the appellant said he was not satisfied, but gave no reason. The appellant duly signed the parade form, which was then countersigned by PW6.

PW8, Police Force No.60997 **P.C. Daniel Gaiko**, of the CID Flying Squad at Karuri, was on patrol with his colleagues at 2.48 a.m. on 28<sup>th</sup> December, 2003 when they received a call alerting them that a robbery was taking place at Kawaida Village and in the house of PW1. PW8 and his team responded and arrived at the scene, only to find that the robbers had escaped after stealing household electronics, a car radio, mobile phones, television sets and clothes. In the trail of the robbers, PW8 and his colleagues recovered crude weapons left as the thugs took off; these were an axe and a spear.

PW9, Police Force No. 44094 **Sgt. Jupet Mekasa** of Kawaida Police Patrol Base, was in the office on 28<sup>th</sup> December, 2003 when PW1 came to report the robbery incident. PW9 visited the scene, and found that the robbers had cut the window-grille. Acting on information from the village regarding suspicious conduct on the part of the appellant herein, PW9 arrested him and had him detained at Karuri Police Station.

PW10, Police Force No. 42833 **P.C. Titus Mugo** was responsible for general duties at Kawaida Police Post about the material time. He was at the Police Post on 28<sup>th</sup> December, 2003 at 8.00 a.m., when he received a report of a robbery incident from PW1. PW10 booked the report in the Occurrence Book, and began investigations. On 29<sup>th</sup> January, 2004 PW10 received a tip-off which led them to the house of the appellant's wife; and there they recovered a hurricane lamp and a pair of shoes which PW3 identified as his, which had been stolen on the material night. The lamp bore PW3's special mark; and the shoes had a brown colouring inside, which was the mark in PW3's shoes. PW10 also found in the said house a wrist-watch and a cassette, which were some of the items reported to have been stolen during the robbery. PW10 recovered from the same house a jacket, which PW1 identified as his, by means of a hole which had been made on it, for identification purposes. PW10, at the time of recovering these items, arrested the 3<sup>rd</sup> accused who, in PW11's testimony, had said she was the first wife of the appellant herein. PW11 further testified that the appellant's wife had relocated to the house where the stolen items were found, only a few days after the robbery took place.

PW12, Police Force No. 28049 **Cpl. Boyfriend Mutua** of Karuri CID Flying Squad testified that he was entrusted with the conduct of investigations, in this case. He saw to the conduct of an identification parade for the accused persons, and the appellant herein was positively identified by all to the three complainants, and, on that basis, a charge was laid against the appellant. PW12 found that the robberies had been executed while the suspects were armed – with a gun, a spear, an axe and bows and arrows. The 2<sup>nd</sup> and 3<sup>rd</sup> accused were wives of the appellant herein and, in their houses, some of the stolen items were recovered. The 2<sup>nd</sup> accused had been found with the stolen solar battery.

When put to his defence, the appellant herein elected to make an unsworn statement and to call no witness. He said he is a supervisor at Kibubuti Estate and resides in Kawaida Estate. He did not speak about the material date, but said that on 9<sup>th</sup> January, 2004 he was arrested by a Police officer, for reasons unknown to him. He said he was subsequently detained at Karuri Police Station, and then still later, placed on identification parade where, on three separate occasions complainants came along and touched him on the shoulders. Subsequently he was charged with offences of robbery with violence.

The learned Senior Resident Magistrate found the appellant herein to have been safely identified as one of the robbers on the material night. With regard to the first count of robbery, the trial Court remarked.

***“I have warned myself of [the risk of] wrong identification, and I am satisfied that the complainant identified the accused very well in the house, and during the identification parade which both the accused and the complainant has referred to.....The lights in the house were on, and the accused, throughout, guarded the complainant. His defence has no merits at all”.***

In relation to the 2<sup>nd</sup> count of robbery, the Court found as follows:

***“.....PW2, George Kweyu Orata narrated how he was attacked by robbers at about 1.00 a.m. While asleep on the night of 27<sup>th</sup>/28<sup>th</sup> December, 2003 he was alone in the house. Though there was no light in the house, one of the robbers had a very [powerful] torch. According to him the accused was armed with an AK-47 rifle. The robbers were specific about what they wanted – a solar battery and a radio. As one of the robbers disconnected the battery from the music system, he pointed the torch at the accused – which lit him up. He was able to identify [the accused]. He also realized that they were using his bag to carry the stolen items. This witness went to great lengths [to show] how he was able to see the robbers with the help of the torch which they had and which they were [flashing] carelessly. When he reported the matter to the Police he informed them that he could identify all the three robbers if he saw them. When the identification parade was conducted he easily picked out the 1<sup>st</sup> accused [appellant herein].....”***

In relation to the third count of robbery with violence, PW3 had testified that the robbers had used a powerful torch in his house, while robbing him of his household effects; and this enabled him to see the appellant herein, who had a gun. He was later able to identify the appellant at an identification parade. The learned Magistrate attached significance to the fact that PW2's evidence was to the effect that the

robbers when they left his house, had gone *straight into PW3's house*, and that this evidence *corroborated* PW3's evidence of identification of the appellant herein, as the robber who had a gun.

So the trial Court held:

**“.....the prosecution has proved its case beyond reasonable doubt in relation to the third count of robbery with violence.....”**

The trial Court expressed the final result as follows:

**“In the result, therefore, the 1<sup>st</sup> accused [appellant herein] is convicted [on] the three counts of robbery with violence .....**”

On that basis, and as required by law, the appellant herein was sentenced to death, for each of the three counts of the charge.

The appellant's grounds as he comes before this Court may be summarized as follows:

- (i) that he had not been positively identified;
- (ii) that the identification parades were not properly conducted;
- (iii) that proof-beyond-reasonable-doubt had not been achieved;
- (iv) that the trial Court gave judgment not based on reasons;
- (v) that the trial had been irregular, because the record did not show the language used in Court;
- (vi) that the trial was irregular, because the record failed to show the rank of the prosecutor in the Police Force;
- (vii) that the trial Court erred in law and fact, when it rejected his defence.

Several of the foregoing grounds were not in the filed petition of appeal, but were introduced later as part of the written submissions which the appellant brought along, during the hearing of the appeal.

Learned respondent's counsel, **Mr. Makura** contested the appeal, and urged that it be dismissed, and the convictions and sentences upheld.

There was no irregularity in the trial proceedings, counsel submitted, because the original record showed that the trial Magistrate indicated the language in which the hearing took place; and the appellant had cross-examined all the prosecution witnesses. Similarly, the original record shows clearly that all prosecutors were duly qualified to conduct prosecution.

Were the grounds for conviction sufficient? **Mr. Makura** submitted, they indeed, were. PW1 had shown clearly how he took note of the appellant's facial appearance; how he described the appellant to the Police; and how he picked out the appellant at the identification parade. PW2 had similarly identified the appellant as the robber who was wielding a gun, and this testimony interlocked with and corroborated that of PW1. PW3's evidence, counsel urged, was entirely consistent with that of PW1 and PW2. Besides, it was urged, the identification parade had provided each of the three complainants featuring in the separate counts, with an opportunity to pick out *precisely* the appellant, as the robber of the material night.

Learned counsel submitted that the appellant's unsworn evidence had been carefully considered by the trial Court, but found to be lacking in merits.

*Identification* was the main consideration, on which the findings of the trial Court turned. We have carefully considered all the evidence on record, and come to the conclusion that the trial Magistrate was well focussed on the circumstances in which the offence in each robbery-with-violence count was committed.

We have no doubts at all, in the case of the 1<sup>st</sup> count, that PW1 had an abundant opportunity, in full light and for a sustained period, to see and to make visual impressions of the intruder. PW1 more than confirmed his identification of the appellant herein, when he picked him out quite easily at a duly-conducted identification parade.

Although PW2 had a slightly more limited opportunity to view the appellant during the robbery incident, we have no doubts, from the corroborated evidence regarding the powerful torch-light which the intruders were using, that he did see the appellant in action; and, so well did he see the appellant, he went to a duly-conducted identification parade, and picked out the appellant with ease. The same is true as regards PW3; we believe he did see the appellant executing the robbery, and his evidence, indeed, *is* true, insofar as it relates to one single transaction covering robbery in PW2's house creeping progressively into robbery inside PW3's house; it was like one robbery affecting two neighbouring houses as one process.

If it is true the appellant herein robbed PW2's house at the material time – and we hold that it is – then this gives corroborative proof of robbery by the appellant in PW3's house; for it was *one extended transaction*, the veracity of which is ascertained by the doctrine of *res gestae*. The law on this point is clear from *Sir Rupert Cross* and *Nancy Wilkins, An Outline of the Law of Evidence*, 4<sup>th</sup> ed. (London: Butterworths, 1975), and the following passage in that learned work may be quoted (p.159):

***“It is sometimes said that facts may be proved as part of the res gestae when they form part of the same transaction as that under investigation. For example, a man is charged with murder, and it is proved that the culprit stole a car immediately after the incident in order to effect his escape.”***

Now in the instant case, the entirely believable evidence that the appellant committed a robbery in PW2's house shows how that robbery was *immediately extended* to the neighbouring house of PW3.

Besides, PW3 certainly *saw* the appellant as the robber, and was able, easily to pick out the appellant at a duly-conducted identification parade.

All the evidence *interlocks* so completely, focussing upon the appellant as the robber with the gun, who broke the peace of Kawaida Village on the night of 28<sup>th</sup> December, 2003 and robbed the three complainants herein. We find the proof of the prosecution case to have been taken well beyond any reasonable doubts.

Accordingly, we dismiss the appellant's appeal. We uphold the conviction on each of the three counts of the charge. We affirm the sentence of death, as required by s.296(2) of the Penal Code (Cap.63), in respect of each of the three counts. We order, however, that the sentences in respect of the last two counts shall be held in abeyance, pending execution of the sentence on the first count.

***Orders accordingly.***

**DATED** and **DELIVERED** at Nairobi this 6<sup>th</sup> day of March, 2008.

**J.B. OJWANG**

**JUDGE**

**G.A. DULU**

**JUDGE**

**Coram: Ojwang & Dulu, JJ.**

**Court Clerks: Huka & Erick**

**For the Respondent: Mr. Makura**

**Appellant in person**