



**REPUBLIC OF KENYA**

**High Court at Nyeri**

**Criminal Appeal 139 of 2010**

**PATRICK MURIUKI KINYUA.....APPELLANT**

**versus**

**REPUBLIC.....RESPONDENT**

*(arising from the judgment of Hon J.Kiarie Senior Principal  
Magistrate at Nyeri in Criminal Case No. 244 of 2008)*

**CONSOLIDATED WITH**

**DAVID MWANGI GATHOGO.....APPELLANT**

**versus**

**REPUBLIC.....RESPONDENT**

*(arising from the judgment of Hon J.Kiarie Senior Principal  
Magistrate at Nyeri in Criminal Case No. 244 of 2008)*

**JUDGMENT**

The appellants were jointly charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code.

The particulars of the offence was that on the night of 23rd January 2008 at Thegu in Nyeri North District robbed ISAAC NGATIA KINYUA a mobile phone make sendo valued at Ksh.4000/- and at or immediately before or immediately after the time of such robbery used personal violence to the said ISAAC NGATIA KINYUA.

They faced a second count of assault causing actual bodily harm contrary to section 251 of the Penal code.

The particulars of the second count was that on the night of 23rd January 2008 at Thegu in Nyeri North District within Central Province jointly with others not before the court unlawfully assaulted MARY MUTHONI JOHN thereby occasioning her actual bodily harm.

They both pleaded not guilty to the said charges and were tried convicted and sentenced to death.

Being aggrieved by his conviction and sentence they both filed appeals to this court which said appeals were consolidated for the purpose of trial and determination.

The appellants who were not represented each presented amended grounds of appeal and written submissions which they relied upon at the time of the proceedings.

The appeal was opposed by Mr. Kaigai on behalf of the DPP and the grounds that:

- a) ***The Prosecution case against the appellants was proved to the standard required beyond reasonable doubt.***
- b) ***The complainant recognized the appellants with the assistance of the light which were on .***
- c) ***P.W.4 gave the names of the attackers to the police.***
- d) ***The appellants were identified and the identification parade.***
- e) ***Their defences were considered and properly rejected.***

He has therefore urged us to dismiss the appeal.

The appellants on the other hand have raised the following grounds:

- a) ***Section 200(3) of the CPC was not complied with.***
- b) ***The evidence adduced did not support the charge.***
- c) ***They were not properly recognized and the court relied on the evidence of one identification by a single witness without excluding the possibility for the existence of error or mistake.***
- d) ***The appellants' constitutional rights were violated in that they were held in custody for 91 days without an explanation.***

This being a first appeal, we are in law required to reevaluate the evidence tendered before the trial court to come to our own conclusion based upon the same but while taking into account the fact that we did not have the advantage of hearing and seeing the witnesses.

Before we look at the evidence tendered the appellants have raised a fundamental issue of law that if true will go to the root of this appeal and that is the fact that section 200(3) of the CPC was not complied with

From the proceedings we note that plea was taken by L.W. Gitari then SPM on 7th March 2008.

On 31st October 2008 the trial commenced by J.K. Ngeno SPM where seven witnesses testified.

On 12th May 2009 the matter was listed before R.A.A. Otieno when the court record reads as follows:

Court: Matter was part heard before Mr. Ngeno SPM who proceeded on transfer. Section 200 CPC complied with.

Accused 1: in Kikuyu language I wish to proceed with the case from where it reached.

Accused 2: in Kikuyu language I wish to proceed from where the case reached.

Court: case to proceed from where it had reached proceedings are legible matter to proceed.

It is therefore clear to our mind that the court complied with the requirement of section 200(3) CPC and find no merit on this ground of appeal. There was no need to start the case denovo as submitted by the appellants since they opted for the case to proceed from where it had reached. There is also no evidence that the appellant were prejudiced in any manner whatsoever.

The appellants have also raised the issue of recognition and identification by the complainant. It was submitted by the appellants that there was a case of mistaken identity and that the circumstances prevailing were not favourable for positive identification. It is further submitted that the court based the conviction on the evidence of a sole identification witness that of P.W.4.

We have looked at the evidence of P.W.4 who stated as follows:

***“We had a lamp on and outside was moonlight... I recognised 3 of the attackers as David Muriuki, David Gathogo and Ewantus Ngatia.... Two of the attackers are before court.. Muriuki is this one here (pointing at accused 1) and he is one who had a case in court earlier with me. When he came to our house that fatal night he had not hooded his face. Accused 1 is a man from Chaka, David is the man here (pointing at accused 2).. he was not hooded and I saw him clearly.”***

P.W.4 was later able to pick the appellant at an identification parade. Of this evidence the trial court found as a fact that there was light and that P.W.4 had known the appellants who also confirmed that P.W.4 knew them and that one had given the names to the police and since P.W.4 had known the appellant the identification could not be said to be difficult or likely to be mistaken.

We therefore find no fault with the trial courts finding on facts and find that the prosecution case against the appellants was proved beyond reasonable doubt and therefore the conviction was safe.

We therefore find no merit on the appellants' appeal herein and dismiss the same.

Dated and delivered at Nyeri this 1st day of November 2012.

**J.K. SERGON  
JUDGE**

**J. WAKIAGA  
JUDGE**

1/11/2012  
Before Hon. Justice J. Wakiaga - judge  
court clerk - Wanjohi  
Patrick Muriuki Kinyua  
David Mwangi Gathogo - appellants  
Miss Maundu for the state.

Court - Judgment read in open court in the presence of the appellants and Miss Maundu for the State.

**J. WAKIAGA  
JUDGE**