



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAN: GICHERU, KWACH & SHAH, JJ.A.)**

**CRIMINAL APPEAL NO. 8 OF 1993**

**BETWEEN**

**JOHN NJOROGЕ NJENGA**

**JOSEPH GATERE**

**PETER MAINA WACHIRA .....APPELLANTS**

**AND**

**REPUBLIC .....RESPONDENT**

(Appeal from a conviction of the High Court of Kenya at

Nairobi (Mr. Justice Ojuk, S. 0.) dated 15th October,

1991

**in**

H.C.CR.A. NOS. 731, 732 & 791 OF 1991)

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**JUDGMENT OF THE COURT**

This appeal has been brought by three appellants namely John Njoroge Njenga (the first appellant), Joseph Gatere (the second appellant) and Peter Mama Wachira (the third appellant). All these three appellants, and a fourth person, one David Mama Irungu, were convicted by Acting Resident Magistrate, at Kibera, on a charge of robbery contrary to section 296 (1) of the Penal Code.

Each one of them was sentenced to a term of imprisonment of seven years and 10 strokes of the cane to be followed by 5 years police supervision.

The appellants and the said David Mama Irungu appealed to the superior court against their conviction and sentences. The appeals against conviction were dismissed, but as regards sentences, these were allowed, and the Judge reduced the prison terms to 5 years and strokes to 3 but upheld the police supervision order. David Mama Irungu has not appealed and does not therefore feature in this appeal. The second and third appellants have already served their sentences and we were informed that they have been

released from prison. In the circumstances, we order that their appeals do abate under rule 70 (7) of the Rules of this Court. That leaves for consideration only the appeal by the first appellant whom we shall henceforth refer to simply as "the appellant".

Elizabeth Kanuthu (P.W. 1) owned a matatu minibus which she operated on route 28 between Kariobangi and the city centre (Nairobi). She had a conductor called Muma Mutua Kioko (P.W. 2).

There was also a driver whose name was not stated. On 11th January, 1991, when the matatu stopped at the Korogocho terminus in Kariobangi, the appellant and the other 3 accused persons boarded the matatu and demanded Shs.200/=, from Kioko which they claimed was the fee for the use of the terminus. Kioko told them the fee had already been paid by Kanuthu's husband. They would not accept this assurance because as it turned out, the demand for payment was not genuine, but was made merely as a pretext to commit a robbery.

The appellant and other members of the gang beat up Kanuthu, Kioko and the driver and robbed Kioko of Shs.800/=, after tearing his coat before disappearing from the scene. The matter was reported to the police and the appellant was arrested the following day and charged with the offence along with the others.

The appellant was identified by Kamanu as one of the persons who had taken part in the robbery. Kioko also identified the appellant as one of the robbers who assaulted and robbed him of Shs.800/=.

In his unsworn statement which the learned Magistrate rejected, and in our view rightly so, the appellant said he was arrested on 13th January, 1991 while he was on his way to church. The Magistrate as well as the learned Judge were satisfied that the appellant had been positively identified as one of the 4 persons who had robbed the complainant and that there was no possibility of mistaken identity as the robbery had taken place in broad daylight, and the appellant was well known to both Kamanu and Kioko, being a member of a gang who usually loitered at the terminus. Apart from causing personal injury to Kioko, the gangsters also pulled down the driver's door and broke the side mirror.

The appellant appeared in person before us and on a careful consideration of the grounds of appeal he filed, the only issue of law raised, this being a second appeal, was the issue of identification. He disputed his identification by both Kamanu and Kioko contending that the former was at the rear of the minibus from which position she could not have seen him. As for Kioko, the appellant denied that he had identified him to the police. His case was that it was someone else that had pointed him out. The trial Magistrate carefully assessed the evidence and was satisfied that the appellant, along with the others, had been properly and positively identified. On first appeal to the superior court, the learned Judge also independently evaluated the evidence and arrived at the same conclusion as the Magistrate. In view of this concurrent finding by the Magistrate and the learned Judge on the issue of the appellant's identification, which is based on credible evidence, we can see no reason to disagree with it. Accordingly, the appeal against conviction fails and is dismissed. The appeal against sentence does not really lie because it was a lawful sentence.

Dated and delivered at Nairobi this 31st day of July, 1996.

**J. E. GICHERU**

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**JUDGE OF APPEAL**

**R. O. KWACH**

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**JUDGE OF APPEAL**

**A.B. SHAH**

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**JUDGE OF APPEAL**