



**IN THE COURT OF APPEAL  
AT NAIROBI**

**(CORAM: GICHERU, KWACH & SHAH, J.J.A.)**

**CRIMINAL APPEAL NO. 16 OF 2001**

**BETWEEN**

**HUSSEIN IBRAHIM**

**RASSA )**

**DIDA JIRMA ) ..... APPELLANTS**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a Conviction and Sentence of the High Court of Kenya  
at Nairobi (Aluoch & Githinji, JJ.) dated 29th October, 1998**

**in**

**H.C.CR.A. NO. 681 OF 1997)**

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**JUDGMENT OF THE COURT**

*Dida Jirma (Jirma) and Hussein Ibrahim (Ibrahim)* , the appellants in this appeal, were convicted by the Principal Magistrate at Kibera of robbery with violence contrary to section 296(2) of the Penal Code on an indictment which alleged that on *31st July,1995* at Kabiria Village in Nairobi, with others not before the court, they robbed Sophia Nyakio of Shs.5,200/= using violence. In count two on the same date and place, it was alleged that they robbed George Kariuki of Shs.17,100/= using violence. They were sentenced to death. Their appeals to the High Court against conviction and sentence were dismissed on 29th October 1998 , and they now bring this second appeal to this Court.

The evidence led at the trial was that on 31st July, 1995 at about 8:30 p.m., *Sophi a Nyakio (P.W.1.)* , her cousin *Hezron Kabiru (P.W.2.)* and her brother-in-law *George Kariuki (P.W.7.) (Kariuki)* were returning home in a pick up driven by Kariuki after Sophia had closed her shop. When the vehicle pulled up at the gate they were surprised to find it open but they nevertheless entered. Before they reached the garage, which was brightly lit, six robbers appeared out of the blue wielding whips, clubs and somali swords and demanded money. Four were on the driver's side and two on the passenger side. Kariuki had Shs.17,100/= and when one of the robbers threatened to stab him with a knife he threw the money at them. One of the robbers who was wearing a t-shirt and a jacket made off with Sophia's handbag which contained her documents and Shs.5,000/= in cash. Sophia, Kariuki and Kabiru and Sophia's children who had heard the commotion in the garage raised alarm, and as neighbours came to their rescue, the robbers

started running away. All except Jirma managed to escape into the nearby forest under the cover of darkness. Jirma was not so lucky. As he was fleeing from the scene, he fell down and he was apprehended by members of the public who had come out to chase the robbers.

*Lukas Kingenge (P.W.3.)* was visiting a neighbour when he heard screams of "thief, thief" coming from the direction of his house. As he rushed back to his house he saw a man running in the opposite direction pursued by members of the public. He joined in the chase, caught up with the escaping robber, and apprehended him. This man was Jirma. Police who were on the beat in the area soon arrived and Jirma was handed over to them. They took Jirma back to the scene. He admitted that he had taken part in the robbery and volunteered to take the police to the forest and show them where he had dropped Sophia's handbag. He led the police to the forest and Sophia's handbag was recovered together with her documents but without the money.

Jirma was taken to Kabete Police Station and later charged with the offence.

When Sophia and Kariuki saw Jirma when he was brought back to the scene by the police after his arrest, they were emphatic that they had recognised him because the robbery lasted a little while, and the garage was brightly lit.

Mr. Oduk, for both appellants, submitted that since no harm or injury was caused to the victims the charge under section 296(2) of the Penal Code could not lie. With respect, that submission is unsustainable because the gang consisted of more than two members and they were armed with offensive weapons. Mr. Oduk also challenged the reliability of Jirma's identification arguing that he was an innocent man going about his business and was mistaken for a robber simply because he happened to be in the vicinity when the robbery occurred. But this submission ignores the fact that after he was arrested Jirma escorted the police to the forest and showed them where he had hidden Sophia's handbag. As we have already pointed out, the handbag was found there. His protestations of innocence therefore ring hollow. While Jirma had no burden at all to prove anything he was bound to explain how Sophia's handbag which had been stolen in a violent robbery had come into his possession. He volunteered no explanation. We are satisfied that Jirma was convicted on credible evidence and in the circumstances his appeal must fail and it is dismissed.

We now turn to the appeal by Ibrahim who was the second accused before the trial court. On *7th August, 1995 IP Benjamin Kiptarus (P.W.5.)* conducted an identification parade at Kabete Police Station at which Kariuki identified Ibrahim. He claimed to have seen his face clearly in the reflection of the light on the walls of the garage which were painted white. There was also a third person who was arrested and charged jointly with the appellants. This man was Bonaya Durba, the third accused. He was arrested following a tipoff by Kariuki. On *12th August, 1995* at 10 a.m., Kariuki had gone to Ngando village to look for a friend. He saw Bonaya Durba entering premises in which busaa is sold and consumed. He recognised him as one of the robbers who had robbed them on 31st July 1995. He immediately rang his brother and explained to him what he had seen. His brother got in touch with the police who then came and arrested Bonaya Durba in the bar. He was taken to Kabete Police Station where he was charged with robbery together with these two appellants. But Bonaya Durba was acquitted at the end of the trial because he successfully proved that at the time he was alleged to have been involved in the robbery, he was in fact at his place of work at a building site near the Government Press in Nairobi. Yet Kariuki swore that he was among the robbers and he had seen him clearly. When he saw him again at Ngando village on 12th August, 1995 he was convinced that he was one of the men who had robbed them. But convinced as Kariuki was that Bonaya Durba had taken part in the robbery his identification of him turned out and was shown to have been totally mistaken as Bonaya Durba was not involved in the robbery at all.

The only evidence against Ibrahim was Kariuki's claim to have seen him wielding a knife and demanding money from Sophia and himself. He later picked Ibrahim at an identification parade at Kabete Police Station. It may well be that Kariuki saw Ibrahim as he claimed he did, but what we have to decide is whether that identification was free from the possibility of error. This is important especially in view of the fact that it is in the final analysis evidence of identification by a single witness, and it was incumbent

upon the trial magistrate to appreciate that point and warn herself of the danger of relying solely on it to convict Ibrahim. Once she had warned herself of the danger she was free to rely on it provided she believed it was true. There is no indication in the record that either the trial court or the learned Judges who heard the appeal in the superior court directed their minds to this point.

What has caused us some anxiety is that Kariuki's identification of Bonaya Durba turned out to have been mistaken and nearly caused a miscarriage of justice. In view of this we cannot say with any degree of certainty that his purported identification of Ibrahim could not have been flawed as well. Maybe he saw him, maybe he did not. This creates a doubt in our minds the benefit of which must go to Ibrahim. Ibrahim denied taking part in the robbery and claimed that he was arrested by the police on *4th August, 1995* in the evening on his way home from the mosque when he failed to produce his identity card to the police. We have said enough to demonstrate that Ibrahim's conviction was unsafe. Accordingly we allow his appeal, quash the conviction and set aside the sentence. We order that he be set free forthwith unless he is otherwise lawfully held.

The final order therefore is that Jirma's appeal is dismissed and the appeal by Ibrahim is allowed.

*Dated and delivered at Nairobi this 13 th day of December, 2002.*

***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***

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**