



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.428 OF 1998

(From Original Conviction and Sentence in Criminal Case No.1341 of 1998 of the Chief Magistrate's Court at Mombasa – B. Maloba, Ms. – S.R.M.)

ABDALLA BREK.....FIRST APPELLANT

(Original 1st Accused)

=V E R S U S=

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.95 OF 1998

ALI MATRANI.....SECOND APPELLANT

(Original 2nd Accused)

=V E R S U S=

**REPUBLIC.....
RESPONDENT**

J U D G M E N T

Appeal Nos. 84/98 and 95/98 were consolidated and heard together as they arose from the same trial in the Lower Court. The Appellant, Abdalla Brek (Brek) in CR.A. 84/98 was the First Accused while the Appellant Ali Matrani (Matrani) in CR.A. 95/98 was the Second Accused. They both faced one count of Robbery with Violence contrary to Section 296(2) of the Penal Code for which they were convicted upon trial and were sentenced to death by Mombasa Senior Resident Magistrate.

The facts of the case are fairly straightforward.

On the early evening of 20.1.98 Juliana Mrunde (Juliana) had just arrived in Mombasa from her

Taita home to visit a sick person in hospital. She was accompanied by her sister-in-law Gladys Saidi (Gladys). They alighted at Mwembe Tayari and decided to walk towards Bondeni to Juliana's daughter's residence to spend the night there. As they started walking away from the Bus Stop along the shop verandahs they were confronted by three people one of whom went ahead of them while the other two followed behind. The one who stood in front of them was brown and wore a red T-Shirt. They both identified him as Brek. He spoke to the others in a strange language and one of the other two grabbed Juliana's hand. He wrested away her watch and injured her in the process. Gladys hit him with an umbrella but did not stop him. They screamed for help. A knife was produced by Brek and the two women were told to shut up or be harmed. Members of the public rushed to the scene and the robbers ran away.

Among those who heard the screams was Pc. Maurice Ngiwa (Pc. Ngiwa) who was at the time on foot patrol in plain clothes in Mwembe Tayari area about 50 yards away from the scene. He was accompanied by another Police Officer also in civilian clothes and they followed an alley to reach the scene, across the road. That is when they met three people running towards them and on asking them to stop they continued running. They chased them. Pc. Ngiwa caught Brek while the other officer caught Matrani. The third one escaped. Brek was searched and a knife was found beneath his red T-Shirt. The two were marched to the scene where Juliana and Gladys identified them as the assailants. The watch was not recovered. The two were arrested and charged.

Brek in his defence denied that he was at the scene and contended that he was arrested two days earlier by Policemen who wanted a bribe. The Police Occurrence Book however, which he applied to be produced, showed the arrest was on 20.1.98. Matrani for his part said Police in a Land-Rover found him at a Matatu stage where he was working on 18.1.98 and arrested him for nothing.

The Learned Trial Magistrate found as a fact that the robbery was committed by three persons armed with a knife and were violent. What vexed her mind was the identification of the robbers.

On this she found that there were conditions favourable to positive identification in that the shop verandahs were brightly lit and one of the robbers, Brek stood in front of the two women threatening them with a knife. Soon after the robbery they were surprised by two Policemen who caught two of them. They were identified by both complainants although Matrani was only identified by Juliana. He was however apprehended as he fled from the scene.

Before this court the two submitted and argued their own Petitions of Appeal to challenge those findings.

Brek submitted that he was a victim of mistaken identity as the conditions for positive identification did not exist. It was at night and the two women were too frightened to identify the robbers. The verandah lights were not described properly nor the time taken to observe the assailants. Further the knife exhibited in court as having been found on him was not confirmed by Juliana to be the one she saw him wielding. It was not dusted for finger-prints. There was also a failure to produce as an exhibit the red T-shirt allegedly worn by him that evening. He still insisted that his defence that he was arrested on 18.1.98 was not shaken since the O.B. entry for that date was not read out.

On his part Matrani submitted that there were reasonable doubts on his identification since the state of lighting was not explained. None of the two ladies said they saw him at the scene. Only after he was brought there by the Policeman. He pointed out the apparent contradiction on possession of the knife, with Juliana saying Brek had it while Gladys said it was Matrani. In passing, we have cross-checked that version of the typed record with the handwritten one and confirmed that there was a typing error in the evidence of Gladys. She referred to Accused 1 (Brek) as having had the knife and not Accused 2 (Matrani). There was therefore no contradiction. As for his arrest Matrani submitted that the person who arrested him was not called as a witness to explain where and how he was arrested. The omission was therefore fatal as his defence that he was arrested elsewhere two days earlier than referred to in the Charge-Sheet was not challenged.

Learned State Counsel Mr. Ogoti supported the findings of the Trial Magistrate. There could not be any doubt that Brek was positively identified by both ladies through bright shop lights as he stood in front and ahead of them. They both said he was brown and wore a red T-shirt. He was the same person who was soon after brought back to the scene by a Police Officer. It could not have been pure coincidence that the Police would hear ladies screaming and on their way to check out the screams they meet three people running away from the scene who refuse to stop when challenged to do so. There were no credible defences to displace the prosecution case since both Appellants referred to arrests having been made on 18.1.98 while the Occurrence Book on the arrests showed otherwise.

We have carefully re-evaluated the evidence as we are bound to do as the first Appellate Court. We agree with the Learned Trial Magistrate that the two ladies were violently assailed by a group of three men and the watch of one of them was stolen. The elements of the offence charged were clearly established. The issue is whether the robbery was perpetrated by the two Appellants among the three persons involved.

The timing in evidence is early evening between 7 – 7.30p.m. The conditions prevailing for positive identification were lights described as bright by the two ladies emanating from shop verandahs on a main street. The time taken in the robbery is not in evidence but it was long enough for the Appellant Brek to move ahead of the ladies, stop, talk to his colleagues, struggle to wrest the watch from one of the ladies, and wield a knife to stop their screaming. Both ladies say they clearly saw the Appellant Brek in those circumstances as he was a brown person wearing a red T-shirt. If any doubts were lingering in their minds they were cleared when Brek was returned to the scene soon after having been intercepted in his escape by plainclothes police. The Occurrence Book produced in evidence at his instance showed that he was arrested on 20.1.98 and wore a red T-shirt although a black T-shirt was also worn underneath it. There may be some doubt, owing to contradictory evidence from the two ladies, as to whether the knife recovered from Brek was the same one seen by the two ladies and the one exhibited in court, but even if such evidence is discounted, it still remains proved that the Appellant was in company with one or more other person or persons which is sufficient on its own under s.296(2) of the Penal Code to constitute the offence charged.

We believe as the Learned Trial Magistrate did that the offence against the Appellant Brek was proved beyond reasonable doubt and we dismiss his appeal on conviction.

As for the Appellant Matrani, the finding made was correct that the two ladies did not identify him at the scene. His only connection with the offence is that he was arrested soon after as one of the three persons seen running away from the scene not far away. But whoever arrested him did not testify and there was no opportunity for the Appellant to cross-examine him on the arrest. Nothing incriminating was found on him. We think it was fatal for the prosecution to leave out the arresting officer. In the event we give the benefit of doubt to the Appellant Matrani and allow his appeal. We quash the conviction and set aside the sentence. He shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated this 25th day of April, 2001.

P.N. WAKI

J U D G E

P.M. TUTUI

COMMISSIONER OF ASSIZE