

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: TUNOI, SHAH & KEIWUA, JJ.A.)
CRIMINAL APPEAL NO. 48 OF 2000

BETWEEN

HASSAN MOHAMED KATANAAPPELLANT
AND
REPUBLICRESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Mombasa
(Justice Hayanga & Commissioner Khaminwa) dated the 25th
February, 2000

in
H.C.C.R.A. NO. 495 OF 1996)

JUDGMENT OF THE COURT

This is a second appeal. The appellant had been charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code in that on March 30, 1996 at Kenyatta Flats in Makupa area in Mombasa District jointly with others not before the Court robbed one Erimina Ringoma of a radio cassette valued at K.Shs.10,000/= and at or immediately before or immediately after the time of such robbery used actual violence on the said Erimina Ringoma.

According to the complaint of the victim of the violence, she was in her house at the said estate when at 3 a.m. she heard a loud bang from her sitting room and rushed out of her bedroom to check what was happening and she found the outside door of the sitting room had been broken and was at that moment being pushed open. She enquired as to who was pushing it but got no answer. The complainant switched on the lights and saw two people pushing the door, and a person who was wearing a white cap entered the house, whereupon the complainant shouted and screamed for help.

That person struggled with the complainant and hit her on the head with a rungu. The person struggled and tried to push the complainant backwards. The latter resisted being pushed because she told the attacker that her mother was sleeping in the house. The mother went to the sitting room and on realizing what the matter was, she screamed as well and so did the complainant's 112 years old son, at which point the attacker hit the complainant with the rungu on the left arm and slashed her with a knife on the neck. The attacker hurriedly looked around and picked a radio cassette and ran away with it to join his companions who presumably were outside the house. At that juncture, the complainant had the opportunity and went out of the house and screamed where the neighbours joined her.

The attacker and his companions were chased by the watchman who returned with the complainant's radio cassette that apparently had been dropped by the robber. The matter was reported to Makupa Police Station whose officers visited the complainant's house that night. At about 4 a.m. that same night, the complainant heard shouts of "thief", "thief" and rushed outside. She saw five young men chasing a person with whom they caught up three blocks away from the complainant's house. The complainant approached the young men and recognised that person as the person who had attacked and robbed her of the radio cassette. She was able to recognise the person who had been apprehended because she saw him clearly and recognised the same clothes he was wearing during the attack and the robbery.

The learned Counsel for the appellant submitted that the manner in which the appellant was

identified cannot be relied on inasmuch as there was no evidence giving details on the appearance as well as the clothes the appellant was wearing at the time of the robbery. Of vital importance is the fact that, it was most unlikely that a robber who had just been chased away an hour before, can return to the same neighbourhood without running the risk of being recognised and arrested that time round. He also submitted that there was no link between the robbery and the arrest of the appellant later that night and that the appellant had not been linked to the allegedly stolen radio cassette.

In his turn the counsel for the respondent did concede that the manner in which the appellant was taken to the complainant and her mother to identify was improper as the appellant ought to have been taken to the police station on arrest and a proper identification parade held. We agree that a properly conducted identification parade should have been held in the peculiar circumstances of this case. We are also of the view that there was no link between the arrest of the appellant that night, and the robbery in the complainant's house an hour or so prior to the arrest. There was no evidence before both lower courts, to link the appellant with the radio cassette or to conclusively point to the guilt of the appellant without a doubt, that some other person committed the offence. For these reasons we allow the appeal, quash the conviction and set aside sentence of death. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Mombasa this 19th day of July, 2000.

P.K. TUNOI

.....

JUDGE OF APPEAL

A.B. SHAH

.....

JUDGE OF APPEAL

M. KEIWUA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR