**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Nyarangi, Gachuhi & Masime JJ A)**

**CRIMINAL APPEAL NO 163 OF 1988**

**BETWEEN**

**TORROHA MOHAMED TORROHA.............................APPELLANT**

**AND**

**REPUBLIC..............................................................RESPONDENT**

**JUDGMENT**

*(Appeal from the judgment of the High Court at Nairobi, Mbito & Dugdale JJ, dated 18th October 1988,*

*in*

*High Court Criminal Appeal No 309 of 1988)*

******************************************

January 18, 1989, the following Judgment of the Court was delivered.

This second appeal is from a judgment of the High Court allowing the appeal of the Republic from the decision of the Chief Magistrate whereby he discharged and set free the appellant Torroha Mohamed Torroha, a National of Tanzania who was the other person concerned in proceedings which were brought under Section 14 of the Extradition (Contiguous and Foreign Countries) Act, cap 76 of the Laws of Kenya (The Act).

The appellant was arrested within Nairobi under provisional warrants and produced in the Chief Magistrate's Court on November 18, 1988. The provisional warrants were issued under Section 13 of the Act after Chief Inspector Njue, attached to the Interpol Section of the CID Headquarters in Nairobi swore an affidavit in support of the warrants of arrest.

That was followed by authenticated documents from Dar-Es-Salaam in Tanzania. The documents included a warrant of arrest for the appellant, and another with whom we are not here concerned, issued and signed by the Principal Resident Magistrate, Kisutu, Dar-Es-Salaam whose signatures had been verified by the Attorney-General who is also the Minister of Justice in Tanzania, Mr D.Z. Lubura. A duly certified copy of the original Penal Code of Tanzania and a statement of complaint signed by the Principal Resident Magistrate Kisutu were sent to the Attorney- General Kenya in support of the warrant of arrest. Then the warrant of arrest was endorsed by the Chief Magistrate and served on the appellant who confirmed to the Chief Magistrate that he understood the charges. Also included in the documents were

certified copies of proceedings held before the Principal Resident Magistrate, Kisutu, in Criminal Case Number 557 of 1987, Kisutu, Dar-Es-Salaam wherein the appellant and another were jointly arraigned on five counts, the first count of which related to conspiracy to commit a felony and the remaining four counts alleged offences of stealing travellers' cheques worth U.S. Dollars 390,000 and Sterling £ 20,000. For the sake of completeness we add that by Legal Notice Number 95 of 1966, part three of the Act applies in the case of Tanzania.

The appeal before the Court is based upon two grounds. First, it is said that the Judges misdirected themselves on the onus of proof and that *prima facie* evidence was not necessary. The second ground of attack on the judgment which is really a variant of the first is that there was no evidence to connect the appellant with the offences to be preferred against him in Tanzania. Mr Owino Opiyo who argued this appeal with admirable brevity referred to paragraph 1178 on page 572 and paragraph 1179 on page 573 *Halsbury's Laws of England*, Volume 16, third edition and then submitted that it has to be shown by evidence that the offences the subject matter of the suggested extradition were committed in the relevant jurisdiction and the identity of the subject should be beyond question.

Reference was also made to paragraph 1193 of the same volume of *Halsbury's Laws of England* and it was urged that the High Court erred in reviewing the decision of the Magistrate.

On behalf of the appellant, Mr Owino Opiyo said at the outset that the appellant was not cautioned on being arrested and therefore that no weight should be put on that which the appellant is stated to have said about the whereabouts of Khadija Ali. It was contended that Ngaya (PW 2) spoke from memory and did not testify that he knew the appellant in connection with relevant bank business of the National Bank of Commerce, in Dar- Es-Salaam. It was urged that Ngaya did not say how he obtained the information about the appellant's involvement with the alleged offences. Counsel said the appellant was not an employee of the Bank of Commerce, had no account with that bank in which the travellers' cheques were issued, was not linked to the offence by the seven persons who were arrested during investigations and there was nothing to suggest that the appellant was connected with those who stole the foreign exchange. Mr Owino Opiyo also submitted that the High Court erred in reviewing the evidence and that the Chief Magistrate was justified in his finding that there was no evidence to connect the appellant with the offences.

Quite shortly the contention of Mr Etyang on behalf of the respondent Republic is that the High Court properly reviewed the evidence and correctly made its own order; and that the appellant provided information which led to the arrest of Sarah Khadija who had disappeared from her place of work when the travellers' cheques went missing. Next Mr Etyang said the appellant must have been in Tanzania when the cheques went missing and that after Thomas Cook travellers' cheques in U.S.A Dollars and Sterling Pounds were stolen in Tanzania, the appellant cashed some of those very cheques in London.

The questions which have been canvassed before us on the basis of the two grounds of appeal raise issues of law.

The case has raised the important question as to the test to be applied when assessing the evidence having regard to Section 14 (1) of the Act which provides,

> "14. (1) Subject to section 16 of this Act, where a person arrested under a warrant endorsed in accordance with section 12, or a provisional warrant issued under section
>
> 13, of this Act is brought before a magistrate and, in the case of a person arrested under a provisional warrant, the original warrant has been produced and endorsed, the magistrate may, if he is satisfied –
>
>> (a) that the warrant is duly authenticated as directed by this Act and was issued by a person having lawful authority to issue the same; and
>>
>> (b) by evidence on oath, that the prisoner is the person named or otherwise

described in the warrant,

order the prisoner to be returned to the country in which the original warrant was issued and for that purpose to be delivered into the custody of the persons to whom the warrant is directed or any one or more of them and to be held in custody and conveyed into that country.

(2) A person to whom the warrant is directed and the person so authorized may receive, hold in custody and convey into the jurisdiction of that country the prisoner mentioned in the warrant.

(3) A magistrate shall, so far as is requisite for the exercise of the powers of this section, have the same power, including the power to remand and admit to bail a prisoner, as he has the case of a person arrested under a warrant issued by him.

(4) In proceedings under this section, the magistrate shall receive any evidence which may be tendered to show that the case is one to which the relevant provisions of section 16 of this Act apply."

Section 14 (1) is subject to the severe restrictions contained in Section 16 of the Act which in summary form states that any person accused of an extradition crime committed within the jurisdiction of any other country who is in Kenya shall not be surrendered if the offence for which his surrender is required is one of a political character or the return would result in a punishment for an offence of a political character. No surrender is possible if the suspect would be detained or tried in the country for an offence other than an extradition crime.

It is fundamental that there cannot be extradition where fair trial cannot be guaranteed.

Section 16 was complied with and in the entire circumstances of the case, we entertain no doubt whatsoever that in the neighbouring Republic of Tanzania, the appellant will receive a fair trial. It is convenient at this point to consider the proper task of a Magistrate before whom the return of a prisoner is sought.

The Court shall have regard to Section 14 (1) of the Act. The Magistrate then peruses the documentary and oral evidence and ensures that Sub- Section 1 (a) and (b) of Section 14 of the Act has been complied with. Before exercising his discretion to order the return of the prisoner, the magistrate should peruse the entire evidence and understand it, without taking the position of a trial court. So, the degree to which the Magistrate has to be 'satisfied' is not expected to be as high as if any such satisfaction was derived from an analysis and evaluation of evidence adduced at a trial. The Magistrate is under no duty to enquire into the merits of the charges to be preferred. The Magistrate does not try or attempt to try any issue because there is no hearing . *Kunga vs Republic*, [1975] E.A 155. If there is some evidence which discloses a connecting factor between the prisoner and the alleged offences, the magistrate should order the prisoner to be returned.

The question which arises is whether or not the magistrate had evidence before him upon which to order the return of the prisoner. The High Court was entitled to examine the evidence, to re-hear the case, reconsider the material before it and reach its own decision thereon without disregarding the judgment of the Magistrate but carefully weighing it: *Shantilal Ruwala v Republic*, [1957], E.A 370 and *Answar Kipngetich v Republic*, Criminal Appeal No 141 of 1985.

In this appeal, the other question of law is whether the High Court approached its task on the correct principles. Mr Owino Opiyo submitted that the first appellate Court had no business to reconsider the evidence and that it was bound by the view of the Magistrate that there was no evidence in support of the return of the prisoner. We have no hesitation in rejecting outright that argument. It is important to bear in mind that a first appellate Court acts the same way irrespective of the substance or nature of the appeal before it, unless there is a statutory provision or other authority to the contrary.

The ultimate question is if the High Court was right in upsetting the Magistrate. Before the High Court was evidence that Sarah Khadija then an employee of the Bank of Commerce, Dar-Es-Salaam vanished from work on 29th October, 1987. Immediately thereafter travellers' cheques belonging to Thomas Cook went missing from the section where Sarah Khadija a national of Tanzania was employed. She was next found in the Jacarandah Hotel in Nairobi on November 13, 1987. Upon his arrest, the appellant also a national of Tanzania informed a police officer where Sarah Khadija was. She was found and arrested at the Jacaranda Hotel. The information which the appellant gave to the Police Officer about Sarah Khadija was a relevant fact in terms of section 31 of the Evidence Act, cap 80. There was no obligation on the Police Officer to caution the appellant. There was evidence also that the appellant could have been in Tanzania on October 21, 1987, two days after the travellers' cheques were found missing.

The High Court thought all that was significant.

The second matter is this. There were unchallenged allegations that the appellant cashed some of the Thomas Cook travellers' cheques, which were lost in Dar-Es-Salaam, in London. The High Court was persuaded that as the appellant knew Sarah Khadija, the appellant may not have lawfully obtained the travellers' cheques which he cashed in London.

In its result, the High Court concluded that there was evidence to support the return of prisoner.

The High Court rested its decision on an issue of law.

In our view the evidence went far enough in establishing a link, connecting factor, between the prisoner and the offences he will face at the trial. To our mind, one cogent reason why we think the High Court was right is that there was communication between Sarah Khadija and the appellant and that the appellant was said to have cashed some of the stolen travellers' cheques.

In our Judgment, the High Court directed itself correctly in every respect and so this appeal fails and must be dismissed.

That is the order of this Court.

**Dated and delivered at Nairobi this 18th day of January , 1989**

**J.O NYARANGI**

**.............................**

**JUDGE OF APPEAL**

**J.M GACHUHI**

**.............................**

**JUDGE OF APPEAL**

**J.R.O MASIME**

**.............................**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**