IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Gachuhi, Masime JJA & Kwach Ag JA)

CRIMINAL APPEAL NO 78 OF 1988

BETWEEN

KARATON OLE LESARAU...................................... APPELLANT

VERSUS

REPUBLIC... RESPONDENT

JUDGMENT

(Appeal from a Judgment of the High Court at Mombasa, Apaloo J)

July 26, 1988, **Gachuhi, Masime JJA & Kwach Ag JA** delivered the following Judgment,

Karaton Ole Lesarau, the appellant, was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code cap 63. It was alleged that on 13th May, 1985 at about 1 p.m, at Mata village, Kimorigo location in Taita Taveta District, jointly with others not before the court, he robbed Hussein Abdi of 363 heads of cattle valued at shs.363,000 and at or immediately before or after the time of such robbery wounded Hussein Abdi and broke his left arm. At the conclusion of the trial the appellant was convicted by the Senior Resident Magistrate of an offence under section 278 of the Penal Code which relates to stock theft and was sentenced to 10 years' incarceration and 10 strokes of the cane. His appeal to the High Court against both conviction and sentence was dismissed and he now appeals to this Court.

In his memorandum of appeal, the appellant has challenged the decisions of the lower courts on the following among other grounds, that is to say:

1. The trial Magistrate and the judge erred in failing to hold that the evidence of identification or recognition was unsafe to rely on as the same was free from the possibility of an error;

2. The trial Magistrate and the Judge erred in failing to hold that the prosecution had failed to dislodge the appellant's cross-examination by the prosecution.

Hussein Abdi (hereinafter called "the complainant") was employed as a herdsman by a woman called Fatuma Musa (P.W.2). His evidence, which was accepted by both courts as true and reliable, was essentially that on the 15th May, 1985, at 9 am he took the cattle to a grazing field in Njoro area near Tsavo National Park. At about noon, a group of six Masaai *morans*, among them the appellant, came to him and enquired from him if he had seen their cattle and he answered in the negative. According to him this question was specifically put to him by the appellant. The group then left but returned about an hour later at about 1.00 pm. At that point in time, as is common among herdsmen, the complainant had bent

down to dislodge a thorn from his leg when the appellant suddenly, and without any warning or provocation whatsoever threw a club at the complainant hitting him on the arm and simultaneously a second moran hit him on the head and started raining blows on him with a stick. When the beating stopped the complainant saw the group driving away his cattle but as he had been left in a very bad shape, he did not follow them. He went in the opposite direction.

The complainant ran to a nearby house belonging to a man called Mzee Mnyole where he collapsed but after telling this man that:

> "My cattle has been taken away by masaais"

Mzee Mnyole sent a message to the complaint's employer who eventually came and collected the complainant in a vehicle and took him to Taveta Hospital where he was admitted. He told his employer that he had been robbed of cattle by Masaais.

The complainant claimed to have known the appellant for 5 years during which period he had seen him almost daily looking after his father's cattle in the neighbouring village of Salaita, but never got to know his name because they did not talk to each other as they spoke different languages not being members of the same tribe. Although he claimed to have told everyone including the police, that he knew the Masaais who had robbed him of the cattle, when asked to give the name of the appellant he replied:

> "The name of the accused is difficult for me to remember off head. I do not even know the name of my neighbour but we stay together and we have one employer. His name is also difficult for me to remember."

The appellant was arrested at Taveta Hospital while visiting his brother's sick child when the complainant identified him to the police as the person who attacked him.

For reasons which were never explained, Mzee Mnyole, in whose house the complaint ran for help immediately after the attack, was never called to give evidence. We would have thought that this testimony would have been crucial in establishing the identity of the complainant's attackers. Of the 363 heads of cattle only 187 were recovered and returned to the owner.

On the critical issue of identification the learned magistrate directed himself as follows:-

> "I have considered the law relating to identification of an accused by a single witness. I have warned myself as I am bound to do being the trial magistrate of the dangers of convicting an accused person on the testimony of a single witness. It falls on me to be absolutely certain that the identification was perfect and free from any possibility of error or mistake."

The learned Magistrate then proceeded to explain why he thought the appellant's identification by the complainant was reliable but without making any reference at all to the fact although he claimed to have known the appellant for 5 years, the complainant did not even know the appellant's name. We find it somewhat puzzling that the complainant could have had such a lengthy acquaintance with the appellant, during which period he saw the appellant almost daily, without getting to know his name. The excuse he gave that the appellant's name is difficult and that they belong to different tribes does not in our judgement carry any conviction. If anything it should have provided a clear warning to the trial magistrate and the learned judge to treat his evidence with caution before accepting it as true and reliable. From their assessment of this part of the case it is evident that the complainant's failure to identify the appellant by name was omitted from consideration all together and was not weighted on the scales presumably because this omission did not strike either the trial Magistrate or the learned Judge as odd. We regard this factor to be of crucial importance and had the lower courts given it due allowance they may well have reached a different conclusion. There is no other evidence, direct or circumstancial, to corroborate the evidence of the complainant. In a case such as this one which depends solely on identification by a single witness, we cannot over-emphasise the obligation on the part of the trial court to assess and analyse the evidence of

identification with meticulous care.

In the well known case of *Abdallah Bin Wendo v R* 20 EACA 166, the Court of Appeal said at p. 168:

> "The learned judge was impressed by the demeanour of Magondo in the witness box and thought him an honest witness. We accept this assessment unhesitatingly but on an identification issue a witness may be honest yet mistaken, and may make erroneous assumptions particularly if he believes that what he thinks is likely to be true must be true."

We have carefully considered the evidence of the complainant and we think that the warning in the case of *Abdallah Bin Wendo* applies even with greater force to the complainant in this case. When it was suggested to him towards the end of his cross-examination that he could have been mistaken about the identity of the appellant he retorted:

> "I cannot mistake the accused for any other person. I would not accept anyone who says that the accused did not rob me. He was with others and they took our cattle."

In view of the reservations we have expressed concerning the quality of the evidence of the complainant on the issue of identification, we do not share the conviction of the trial Magistrate and the learned Judge that this evidence can be safely accepted as true and free from the possibility of error. In our judgment the complainant's evidence did not come within a mile of the test laid down in the case *R v Turnbull* [1976] 3 All ER 551, where Lord Widgery, CJ, after enumerating the factors to be taken into account in a case of identification by a single witness stated at p 552 letter d;

> "All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger."

In our judgment the identification evidence in this case was of a very poor quality thus making the danger of mistaken identity even greater. If the lower Courts had taken into account the fact that between the date of his attack on 13th May 1983 and the appellant's arrest at Taveta Hospital 3 days later the complainant had not mentioned to anyone that the appellant was a member of the gang that had attacked him and the further fact that the group consisted entirely of Masaai *morans* thus making the circumstances of recognition even more difficult, it would have become plain to them that this evidence was of little if any probative value and should have been rejected outright.

We now consider the defence of alibi raised by the appellant. In his judgment the learned Magistrate said:

"I have given careful consideration to the whole evidence adduced before me by the prosecution and the defence. I am not inclined to believe the *alibi* defence of the accused that he was not at the scene of the incident where the complainant was beaten and his cattle taken away. I prefer the evidence of the complainant than that of the accused and his witness. I reject the alibi defence of the accused. I hold that the accused was at the scene where the complainant was attacked and his cattle taken away and that he had actually participated in attacking the complainant."

The appellant had given sworn evidence in his own defence and told the Court *inter alia*:

> "I have heard all the evidence adduced in this case by the prosecution witnesses. It is alleged that 1 and 5 other Masaai morans had robbed the complainant of 363 heads of cattle. On the material day, I was at Roimbo in Loitokitok. I had gone there on the previous Sunday (12.V.1985). I had taken my father's two heads of cattle to sell for him. On the 13th May 1985, Monday, I was still at Roimbo. I later came back home from Roimbo at 5 pm. I had left Roimbo at 2 p.m. My father and brothers are living at Soloita village, Kimoriga Location, Taveta area (sic)."

On the appellant's alibi defence, the learned judge thought it was of poor account and susceptible to

fabrication as it did not account for the appellant's whereabouts at the time the complainant said he saw him at the scene of the crime. We think that in treating the appellant's alibi defence the way they did both the trial magistrate and the learned judge fell into serious error and made erroneous findings of fact which would entitle this Court to interfere.

On the 4th October 1985, shortly before the prosecution put its show on the road, Mr Sereje who appeared for the defence before the trial Magistrate and before us gave the prosecution notice that the appellant's case was based on alibi so as not to take the prosecution by surprise. Notwithstandig this indication the prosecution went ahead with its case and made no application for an adjournment to enable them to seek and obtain particulars of the alleged alibi from the defence and to conduct the necessary investigations before the trial. The alibi warning was given at that point in time as it would appear that no statement under inquiry or caution was ever taken from the appellant before being taken to court.

There is no mention of these statements in the evidence of PC David Macharia (PW3) the constable who arrested and charged the appellant. Had a statement been taken from the appellant immediately after his arrest his line of defence would almost certainly have become apparent to the police well before the commencement of the trial. The prosecution therefore had only itself to blame for not putting itself in such a position as would have enabled it to read the early warning signals from the appellant. In their haste to prosecute the appellant, the police missed out a material witness (Mzee Mnyole) and also failed to investigate the alibi defence raised by the appellant. In the event the appellant's alibi defence went unchallenged and remained undisplaced with no evidence at all the other way. In these circumstances we are utterly at a loss to understand the basis for the rejection of the alibi defence by the trial Magistrate and the learned Judge.

Although the learned Magistrate warned himself about the need for caution in terms of the direction in *Turnbull*'s case, his silence on the complainant's failure to name the appellant led to an erroneous assessment of the complaint's evidence. As a court of last resort, we feel somewhat uneasy that a citizen should be deprived of his liberty on evidence of doubtful quality. Where, as here, identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name. We would require evidence of a much higher quality than there is on the record before we can be persuaded to say, as we are required to do, with any degree of certainty, that the testimony of Hussein Abdi, the complainant, is free from the possibility of error. In view of this doubt in our minds, we consider the appellant's conviction to be unsafe.

Consequently, we allow the appeal, set aside the conviction, quash the sentence and order that the appellant be released forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 26th day of July , 1988

J.M. GACHUHI

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JUDGE OF APPEAL

J.R.O MASIME

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JUDGE OF APPEAL

R.O. KWACH

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR