REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 114 OF 1983

(From Original Conviction and Sentence in Criminal Case No 1014 of 1983 of the District Magistrate's Court at Karatina J G Gichuru Esq – D M II

PETER MAGERIA …….. APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

JUDGMENT

The appellant was convicted on the 1st count of assault causing actual bodily harm, c/s 25 pc (cap 63), on the 2nd count for obtaining credit by false pretences, c/s 316(1), PC (cap 63) and on the 3rd one for creating disturbance in a manner likely to cause a breach of the peace, c/s 95(1)(b), PC (cap 63). He was sentenced to serve 9 months, 6 months and 5 months imprisonment on each count respectively. The learned District Magistrate ordered that the sentences run consecutively.

It has been said many times that where different offences form part of one transaction and are committed at the same time – as was the case here – then the sentences should be made to run concurrently unless there are exceptional circumstances for not doing so. In the instant case there was nothing to justify the order for consecutive prison terms.

Mr Waweru for the appellant argued this appeal only against the sentence. He pleaded with this court to reduce it. The appellant no doubt made himself a nuisance on 2nd April, 1983 when he committed the three offences. He refused to pay for the beer he gulped and when asked to pay he hit the owner of the bar with a wire-rope and yet again a little later he chased the complainant throwing stones at him.

"The danger (i.e. of possible wrong identification) is of course greater when the only evidence against an accused person is an identification by one witness and although n one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification." In Abdalla bin Wendo v Shah Bin Mwambere [1953], 20 EACA 166 this court reversed the finding of the trial judge on the question of identification and said this, "Subject to certain well known exceptions a fact may be proved by the testimony of a single witness this does not lessen the need for testing with the greatest care the evidence of such witness respecting identification, especially where it is known that the conditions favouring a correct identification are difficult. In such circumstances, other evidence, circumstantial or direct, pointing to guilt, is needed from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error."

Also in the case of Thairu s/o Muhoro and others v R [1954] 21 EACA 137 (it was held that to convict an accused person relying on the identification of a single witness is dangerous, but a conviction so based cannot in law be regarded as invalid.

In our case at hand, though identification of appellant was of a single witness, I find that it was proper because the circumstances under which complainant had seen appellant on 27th October, 1982, favoured positive identification. The time was 6 pm. The two talked for sometime, complainant therefore had ample opportunity to see the appellant's face well enough to be able to identify him later as he did the following day 28th October 1982. I am therefore satisfied that the appellant was properly identified by the

complainant.

However, I do not find that the evidence from the lower court revealed the offence of robbery, and I substitute a conviction of simple theft, contrary to section 275 of the Penal Code, otherwise, appeal against conviction is dismissed.

As for sentence, I find that a custodial sentence of 2 years imprisonment, plus 5 strokes of the cane, was “harsh” under the circumstances, and I reduce it to 9 months imprisonment, and dismiss appeal against sentence also.

Dated, signed and delivered at Nairobi this 30th day of June, 1983.

J ALUOCH (MRS)

AG JUDGE