



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**  
**CRIMINAL APPEAL 8 OF 84**

**CHARLES LAMAMBIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Nakuru (Nyarangi, J) dated June 5, 1978  
In Criminal Appeal No 133 of 1978)**

**JUDGMENT OF THE COURT**

The appellant was convicted by a Nakuru Resident Magistrate, of stealing eight head of cattle contrary to Section 278 of the Penal Code and sentenced to 7 years' imprisonment with hard labour and one stroke. His appeal to the High Court, which was summarily rejected under Section 352(2) of the Criminal Procedure Code, was on the grounds that he pleaded not guilty; was arrested in town upon identification by another man who had originally been jointly charged with him; he was not at the scene of the crime on the material night (alibi) and the man who pointed him out when he was arrested had a grudge against him.

Since his appeal to the High Court was not only on the grounds that the conviction was against the weight of the evidence or the sentence was excessive, but on other grounds, which included a defence of alibi not having been considered and disputing the weight of the evidence of his identification, his appeal should not have been summarily rejected: *Mulakh Raj v Regina* (1954) 21 EACA 383 and *John Nderitu & Anor v Republic Criminal Appeals Nos 117 & 118 of 1983* (unreported).

The appellant was convicted and sentenced on May 8, 1978. His appeal was summarily dismissed by the High Court on June 5, 1978 and on August 4, 1978, he lodged his appeal to this court in the Nakuru sub-registry. For reasons which we do not know, the appeal was not fixed for hearing until now, that is after a period of five years. In these circumstances, it would not be in the interest of justice to direct the High Court to admit the appeal to hearing as this will undoubtedly cause a further delay. Being mindful of the fact that a delayed justice runs the substantial risk of becoming injustice for one side or another as said by May, LJ in *Dwyer v Rodrick LG* November 23, 1983 and in *Mzee Wanjie & 93 Others v AK Ssikwa & 3 Others Civil Appeal No 72 of 1982* (unreported by Hancox, JA, we decided to hear the appeal.

The case against the appellant was that on the night of January 30 and 31, 1977 eight head of cattle were stolen from Darabeta Co-operative Farm. All the cattle had the mark T8 branded on the left buttock. The theft was reported by Githii Muroki (PW 1) to the Stock Theft Unit. Attempts to track the cattle by

following tracks failed. Waibo Koriso (PW 2) said that on February 5, 1977 Zakau called him and they went to a valley where they saw two persons herding seven bulls. One of the two persons, later said to be the appellant, ran away, but the other was arrested. The one arrested was Loshoro Ole Kasale, who was the 1st accused in the original charge sheet in which four persons, including the appellant were jointly charged. Waibo said he knew the man who escaped and he was the appellant. Sigoma Ole Lamayani (PW 3) said that he was with Waibo when the cattle were found in a valley. He saw the appellant run away. Although Sigoma had a rifle he did not say whether he used it, if it was working and loaded, to deter or even frighten the appellant from escaping. Mr Gatonye argued that there was proper identification of the appellant by a person who knew him before. However, it will be recalled that Cpl John Keri (PW 4) arrested the appellant at a beer hall at Gilgil.

This was after the appellant had been pointed out by a co-accused who was himself under arrest and who subsequently jumped bail. This co-accused did not give evidence so as to give the appellant an opportunity to cross-examine him on the identification.

Waibo's and Sigoma's identification was after the appellant had already been arrested as a result of the identification by the co-accused. The risk was that, their evidence was coloured by the assumption that the police had arrested the right person who ran away from the scene. None of the witnesses said why no one went after the appellant immediately. We do not know the time these events took place and whether the circumstances for identification or recognition, whichever it was, were favourable for positive identification. Sigoma said that his group surrounded the people with the cattle but the appellant was on the other side of the cattle, so it is not even clear whether the appellant was found with the cattle or he was merely found within the vicinity of the place where the stolen cattle were.

The trial magistrate did not explain of recently stolen goats or otherwise. The doctrine of possession of recently stolen property could not apply until possession of what ground he found the appellant guilty of the theft i.e whether on the basis of being in possession by the appellant was satisfactorily proved. The appellant's alibi was not considered despite the fact that he was indeed arrested at Gilgil where he said he was. Although Mr Gatonye submitted that even if it were considered it would have been rejected, but the court should have made a finding on it, and in view of the doubtful identification of the appellant at the scene, it was necessary for the prosecution to displace the alibi which was not done. On the evidence on record, it could not be said that the appellant's guilt was established beyond reasonable doubt, as required in criminal law. There was inadequate evidence connecting him with the offence charged.

For the reasons given, we allow the appeal, quash the conviction, set aside the sentence and order that the appellant be set at liberty immediately, unless he is otherwise lawfully held.

**Dated and delivered at Nairobi this 5th day of March, 1984.**

**A A KNELLER**

**JUDGE OF APPEAL**

**A R W HANCOX**

**JUDGE OF APPEAL**

**Z R CHESONI**

**AG JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**