



IN THE COURT OF APPEAL

AT NYERI

(Coram: Madan, Wambuzi & Law JJA)

CRIMINAL APPEAL NO. 24 OF 1978

BETWEEN

NDIBA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted of the murders of one Mtigiri Ole Lankata by the High Court (Hancox J) and was sentenced to death. He has now appealed to this Court against that conviction.

It is not disputed that the deceased died of stab wounds in the chest inflicted on him during a raid on the manyatta in which he lived in the course of which about 180 head of cattle were stolen by a gang of people. The stolen cattle belonged to three different people.

The evidence against the appellant is two fold. First it was alleged that he was arrested on the night of the raid by Aboto Namili (PW 7) a grazing guard on duty at Chumve some five miles from the manyatta whilst he and another person were driving some twenty five head of cattle. A report was made to Isiolo police station and the cattle and the appellant were taken to that police station where several witnesses identified the cattle as belonging to Malamba (PW 1) and which were some of the cattle stolen during the raid. In his evidence Malamba claimed that when he identified the cattle the appellant was “with the cattle”. The learned trial judge found as a fact, quite rightly in our view, that no police evidence was called to complete the chain of evidence as to the removal of the cattle from Chumve to Isiolo Police station so that it was not established that the cattle with which the appellant and another man were found with Chumve were the same cattle as those seen by various witnesses at Isiolo Police station. There is no evidence that Aboto showed any of these animals to the identifying witnesses.

Secondly there is the extra-judicial statement (Exh 5) in which the appellant admitted he was a member of the gang which raided the manyatta and that he wished to kill one Samburu because Wasamburu killed his brother. He admitted hitting a person with a rungu on the back and that when that person fell down he was stabbed in the abdomen by another member of the gang and had his private parts cut off by yet another member of the gang. He admitted also that the gang drove off some cattle. The medical evidence confirmed his story as to the injuries inflicted on the deceased.

In his defence the appellant denied taking part in the raid and claimed he was awakened during the night and agreed to help drive some cattle when he was arrested. He claimed he was beaten and tortured by the police and was forced to say he had murdered someone.

The extra-judicial statement was admitted in evidence after a trial within a trial. The learned trial judge found as a fact that the statement was voluntarily made and that although it had been retracted, it could not be but true.

Dr. Mwangi (PW 5) examined the appellant about 21/2 years after the alleged statement. His report (Exh 4) reads as follows under "General medical history",

"Accused does not admit he murdered. Alleges that the police at Isiolo pressed his penis anterior left shoulder with pliers. They stepped on fourth left finger and left third toe with police shoes in the process of torture."

Under "General Physical examination" the report reads,

"General condition good. Age thirty years old. Scars anterior left shoulder; anterior penis. Deformity 4th left finger. Mentally nothing obviously."

In his evidence Dr Mwangi said that the scars could have been six months to 5 years old. There was no evidence that the appellant had any injuries when he was arrested and no explanation by the prosecution as to how or when the injuries could have been inflicted on the appellant, otherwise than as he claimed. Indeed, the evidence supports the appellant on this point, because he was examined by Dr Winter two days after his arrest. He was then uninjured. How then did he sustain the injuries later seen by Dr Mwangi? Upon a re-evaluation of the evidence we are unable to rule out that this statement was extracted from the appellant by torture and we doubt that it was a voluntary statement. Accordingly it should not have been admitted in evidence and a conviction based on it cannot in law stand. As we find no other sufficient evidence connecting the appellant with the offence of which he was convicted we allow this appeal, quash the conviction and set aside the sentence of death passed on the appellant. We direct that the appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered at Nyeri this 15th day of November 1978.

C.B.MADAN

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JUDGE OF APPEAL

S.W.W.WAMBUZI

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JUDGE OF APPEAL

E.J.E.LAW

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR