CRIMINAL APPEAL NO. 222 OF 2007- COURT OF APPEAL OF TANZANIA AT ARUSHA RAMADHANI, C.J., MROSO, J.A. And RUTAKANGWA, J.A.	**JAMES DAWSON MEENA Vs. REPUBLIC- Appeal from the Conviction and Sentence of the High Court of Tanzania at Moshi- Criminal Sessions Case No. 15 of 1997 -Mchome, J.**	Murder that was committed during a robbery- The Doctor who performed the Post mortem Examination did so on 31st December, 1996 which was 55 days after death had occurred.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RAMADHANI, C.J., MROSO, J.A. And RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 222 OF 2007

JAMES DAWSON MEENA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction and Sentence of the High Court of Tanzania at Moshi)

(Mchome, J.)

dated the 9th day of May, 2001
in
Criminal Sessions Case No. 15 of 1997

REASONS FOR JUDGMENT

MROSO, J.A.:

The appellant was convicted by the High Court at Moshi (Mchome, J.) for a murder that was committed during a robbery from a shop at Lang'ata-Kagongo in Mwanga District at about 8:00 p.m. on 6th November, 1996. He was sentenced to death. He maintains that he was wrongly convicted. The advocate who appeared for him during the trial, one J. M. Itemba, lodged a memorandum of appeal for him, raising a sole ground of appeal. It reads:-

> "That the learned Judge erred when he held that the appellant was properly identified as the person who killed the deceased person".

At the hearing of the appeal however, Mr. Kinabo, learned advocate, appeared for him and adopted the memorandum of appeal which was filed by advocate Itemba. The respondent Republic was represented by Mr. Juma Ramadhani, learned State Attorney, who did not oppose the appeal.

After hearing both Mr. Kinabo and Mr. Ramadhani we allowed the appeal by quashing the conviction for murder and setting aside the death sentence. We ordered that the appellant be set free forthwith unless he was held for some other lawful cause. We reserved our reasons which we now attempt to give below.

The conviction of the appellant was substantially based on the evidence of one Mary Peter (PW5) who claimed to have been at the shop of the deceased when a group of at least four people came to the shop in a motor vehicle. Three of those people donned police uniforms. The appellant who put on ordinary civilian clothes was the driver of the motor vehicle. The appellant was said by Mary Peter (PW5) to have grabbed a fanta bottle from her and used it to hit the deceased on the head and strangled him. The deceased died on the spot.

The appellant told a different story. He said that on 6th November, 1996 while in Arusha, his brother in law, James Paschal Meena @ Syril, brought to him a motor vehicle, Land Rover Station Wagon, for repair because he was a mechanic. Two people in suits

who later he realized were armed, came to him and pretended they needed him to repair their motor vehicle which had broken down. These people kidnapped him. They covered his face with jeans clothing and took over the driving of the Land Rover to an unknown destination. On the way more people got into the motor vehicle and, he believed, they were five. They reached a place where the motor vehicle stopped and he heard gunshots and the sound of broken bottles. Thereafter, they drove to Nyumba ya Mungu and he escaped to the police station. His captors escaped. He told the police that the escaping people were bandits. The police from Mwanga came. They arrested him because his clothes had blood stains.

On 9th November, 1996 a Detective Corporal Bazili, PW1, of Mwanga Police Station took a statement from the appellant. It was tendered in evidence as Exhibit P2. The witness believed that statement was false.

Mr. Kinabo argued that the critical issue in this appeal is whether there was correct identification of the person who murdered

the shop owner at Lang'ata-Kagongo. Mary (PW5) said the person who did the killing was the driver of the motor vehicle and was dressed in civilian clothes while the rest of the bandits put on police uniform.

The appellant was indeed in civilian clothes and there was evidence from PW3 – Corporal Ernest, that one of the persons who came in a motor vehicle to Nyumba ya Mungu and had wanted to have a gate opened so that they could cross to the other side had doned a police uniform. Another policeman at Nyumba ya Mungu, P.C. Christopher, PW4, also said one of the bandits was in police uniform. It was not true as claimed by Mary (PW5) that the rest of the bandits had police uniform and that it was only the person who fatally assaulted the deceased who was in civilian clothes.

According to PW5, there were two "lantern lamps" at the shop which enabled him to observe what was happening at the time the bandits were at the shop. But although she claimed that the deceased was also strangled the postmortem report on the deceased

says the deceased died due to intracranial haemorrhage and said nothing about having been strangled.

The evidence of PW5 shows that the deceased died at the scene of the robbery. But Detective Corporal Bazili (PW1) said the deceased was admitted at KCMC hospital. In fact Bazili (PW1) said he went to KCMC hospital to take a statement from the deceased but found he had died. Again, if the deceased died at his shop the police officer would not consider taking a statement from him at the KCMC. He must have been taken to KCMC hospital and was admitted because he did not die at his shop.

All these discrepancies point at one thing regarding the witness Mary Peter, (PW5). She might not have seen things at the shop of the deceased as clearly as she claimed. Some of the things she testified about may have been surmise. Which means her evidence of identification regarding what the appellant was alleged to have done might be significantly incorrect and therefore, not reliable.

At the trial of the case it was the prosecution case that the appellant's statement to the police – Exhibit P2 – differed

substantially from his evidence in court. That is true although both the statement and his defence in court are self-exculpatory. The appellant explained when under cross-examination that the police wrote what they wanted. In other words he retracted or even repudiated the contents of Exhibit P2.

There is indeed something curious about the statement imputed to the appellant which was read in court at the trial. Detective Corporal Bazili said that on the 7th of November, 1996 which was the day after the fatal attack on the shop owner, he said he took a statement from the appellant, a statement he said was a false one. However, the statement which was tendered in evidence was dated 26th January, 1997. That was more than two and a half months after the occurrence of the murder. It is not apparent why Bazili had to take another statement from the appellant after the statement he claimed to have taken non 7/11/1996. A cloud of doubt is cast on the authenticity of the so called caution statements the appellant is alleged to have made. That being the case, little importance, if any, can be placed on the difference in content between these statements and the appellant's evidence in court. It

cannot therefore be said fairly that the difference between the contents of the statement – Exhibit P2 – and the appellant's defence in court suggests that the defence should be rejected out of hand. In fact, in the circumstances obtaining, there is no basis at all for rejecting the appellant's defence in court. It is quite possible, therefore, that the appellant may have been kidnapped by murderous bandits as he claimed.

The trial court did not allude to these disquieting aspects of the evidence and consequently drew wrong inferences adverse to the appellant. We are of the firm opinion that had the trial Judge subjected the evidence to critical consideration in the manner we have tried to do, he would not have found that the guilt of the appellant had been demonstrated beyond a reasonable doubt.

There are other unsatisfactory aspects of the case. It is not even certain if the Postmortem Examination report which was tendered in evidence as Exhibit P1 related to the person who was fatally assaulted on 11th November 1996. The Doctor who performed the Postmortem Examination said he did so on 31st December, 1996!

Why would a postmortem examination be conducted 55 days after death had occurred unless the body had to be disinterred to investigate on a matter which could not be ascertained before it was buried. But here there is no explanation at all, leaving an unanswered question whether, in fact, it was the dead body of late Willison Makengo which was examined by the Doctor on 31st December, 1996. Had the prosecution called one Elisa A. Msangi who is shown in the report as the person who identified the body to the Doctor, he would probably have cast some light on this puzzle.

With all those unsatisfactory features relating to the prosecution case it would be naivé to say that the case had been proved against the appellant beyond a reasonable doubt. That was why the learned State Attorney who at first said he opposed the appeal had second thoughts and, rightly in our view, informed the Court that he no longer supported the conviction. It was for all these reasons that we allowed the appeal.

GIVEN AT ARUSHA this 30th day of October, 2007.

A.S.L. RAMADHANI

CHIEF JUSTICE

J. A. MROSO
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

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

(F. L. K. WAMBALI)
SENIOR DEPUTY REGISTRAR