IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MSOFFE, J.A., KILEO, J.A. AND KALEGEYA, J.A.)

CRIMINAL APPEAL NO II4 OF 2004

SHEHE HAMZA.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tanga)

(Longway, J.)

Dated the 5th day of December, 2003
in
Criminal Appeal No. 109 of 2002

JUDGMENT OF THE COURT

26 June & 7 July 2007

KILEO, J.A.

This is a second appeal by the appellant Shehe Hamza. In the District Court of Tanga, the appellant was charged with, and convicted of the offence of robbery contrary to section 285 and 286 of the Penal Code. He was sentenced to fifteen years imprisonment. Being aggrieved by this decision he preferred an appeal to the High Court, which was not successful. He was dissatisfied with the decision of the High Court (Longway, J) hence this appeal. The appellant appeared in person, unrepresented, the respondent Republic had the services of Mr. Oswald Herman.

The appellant listed six grounds of appeal in his memorandum of appeal. His main complaints can briefly be stated as follows:
Firstly, that his conviction was wrongly arrived at by relying on the evidence of a single witness; secondly, that the ingredients of the offence of robbery were not established beyond reasonable doubt; thirdly; that the circumstances of identification were not favourable for a watertight identification; and lastly, that the sentence of 15 years imprisonment was excessive in all circumstances.

At the hearing of the appeal the appellant adopted his six grounds of appeal. He further submitted that the evidence of an earlier misunderstanding between him and the complainant should have been resolved in his favour as negating the charge of robbery.

Mr. Oswald resisted the appeal. He was quick to point out that in terms of section 143 of the Evidence Act, 1967 no particular number of witnesses is required for the proof of any fact and that what matters is the credibility of the witness. He referred to the case between **John Mwalinzi @ Sheyo Shungu and the Republic (Criminal appeal no. 4 of 2000** (unreported) to fortify his contention.

As for the circumstances of identification, the learned State Attorney submitted that they were favourable as there was electric light from a mosque at the scene enabling the complainant to recognize the appellant. In response to the argument that the

complainant was in no state of mind to make a proper judgment of what took place due to his drunkenness, Mr. Oswald submitted that if the intake of alcohol had affected the complainant's judgment he would not have been in a position to inform those at the bar where he had been drinking earlier and also report to the police that it was the appellant who robbed him.

In response to the complaint that the ingredients necessary for the proof of robbery were not established, Mr. Oswald argued that all the ingredients for robbery were present in this case. Referring to section285 of the penal Code, which defines robbery and the case between **Zuberi Bakari and Republic (Cr. Appeal No 109 of 2003** (unreported) he pointed out that the essential elements in a case of robbery are; theft and the use of violence for purposes of taking or retaining the property stolen. These elements, he argued, were proved through the evidence of the complainant who testified as to how he was assailed, kicked at and his property stolen from him.

According to the evidence of the complainant, who testified as PW1 at the trial, on the night of 16/11/1999 he was having a drink at a bar known as Mmasengi. While he was so having his drink, his peaceful enjoyment was interfered with by the appellant who took and drank his half bottle of beer without his consent. The complainant further testified that when he was finally through at the bar, he bought himself some fried chicken and chips and left for his home. However, as he was proceeding home he heard

some voices behind him and as he turned around he came face to face with the appellant who was in the company of another person. The appellant is said to have kicked him at his private parts and chest after which he and his colleague made away with his 80,000/= and an Omax watch worth 80,000/=. Thereafter the complainant went back to the bar and reported to the security guard (PW2) as to what had happened. He also approached the youths who had sold him the chicken and chips to inquire from them if they did not hear his cries for help. The youths are said to have replied in the negative.

Both the trial court and the High Court found that the chain of events as brought out in the evidence irresistibly pointed to the appellant as being the culprit. The fact that the appellant was seen at the bar shortly prior to the incident, the fact that he was observed to have followed the complainant as he left the bar and the fact that there was electricity light from the mosque at the scene of crime were pointed out as being facts sufficient to link the appellant with the commission of the crime.

The question that faces us is whether the charge of robbery against the appellant was proved beyond reasonable doubt in the circumstances of the case.

The appellant attacked the decision of the courts below for reliance on a single witness. However, in terms of section 143 of the Evidence Act, 1967 no particular number of witnesses is required for the proof of any fact. The provision states as follows:

> **"(143) Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for proof of any fact"**

This Court in the case between **Yohanis Msigwa and the Republic (1990) TLR 148** making reference to the above section held:

> **"(i) As provided under section 143 of the Evidence Act 1967, no particular number of witnesses is required for the proof of any fact. What is important is the witness's opportunity to see what he/she claimed to have seen, and his/her credibility"**

The mere fact that a conviction of an accused was based on the evidence of a single witness would not in itself be a ground for faulting the decision of a lower court in so far as such evidence was credible.

The appellant also complained that the elements necessary for the proof of the charge of robbery were not established. The question is, given the circumstances of the case can it be said without a flicker of doubt that robbery against the complainant was proved? Was there sufficient evidence to prove that the appellant stole the complainant's property and that force was used in taking or retaining such property?

We are mindful of the fact that this is a second appeal. It is now settled that an appellate court will interfere with concurrent findings of fact by the courts below in very rare cases. This Court in the case between the **Director of Public Prosecutions and Jaffari Mfaume Kawawa (1981) TLR.149** at page 153 stated as follows:

> **"The next important point for consideration and decision in this case is whether it is proper for this Court to evaluate the evidence afresh and come to its own conclusions on matters of facts. This is a second appeal brought under the provisions of S.5 (7) of the Appellate Jurisdiction Act, 1979. The appeal therefore lies to this Court only on a point or points of law. Obviously this position applies only where there are no misdirections or non- directions on the evidence by the first appellate court. In cases where there are misdirections or non directions on the evidence a court is entitled to look at the relevant evidence and make its own findings of fact."**

We have carefully considered all the circumstances surrounding this case. Having done that we strongly feel that there were important areas which the courts below failed to address themselves to and we respectfully think that had the lower courts seriously considered these areas they may have come to a different conclusion.

There is evidence showing that sometimes prior to the alleged robbery, the appellant and the complainant had had some kind of a quarrel. There is also evidence on record that the complainant had taken a considerable amount of alcohol. According to the complainant himself, the doctor who attended him initially gave him only light medicine "as he was drunk". The evidence also shows that the appellant followed the complainant as he went out of the bar only to return shortly in a joyous mood. He might have been joyous for any reason, not necessarily that he had robbed the complainant. He might also as well have been drunk. The appellant claimed that he shouted for help when he was assailed but no one came to his rescue. He stated however, in his evidence that when he went back to the bar after he was robbed he asked the youths who sold him the chicken and chips whether they had not heard his cries for help and they replied that they had not. The fact that he asked them whether they had not heard his cries for help tends to indicate that the incident occurred not too far from the bar. If it occurred not too far from the bar one may wonder why no one heard his cries for help. The complainant said that when he was assailed the appellant was in the company of another person. There is no other evidence showing that when the appellant left the bar he had company.

We are of the considered view that if at all there was a scuffle between the appellant and the complainant, the possibility that the scuffle was a continuation of the quarrel cannot be ruled out. On the other hand, as already pointed out, the circumstances of the

case show that the complainant was in a drunken state when the incident is said to have occurred. Mr. Oswald argued that he was not so drunk as to be unable to form an intelligent identification of his assailant. He pointed out that the complainant went back to the bar and reported the incident to the security guard and the youths who sold him the chicken after which he was advised to report the matter to the police. We are however of the view that, given the fact that the complainant was drunk, given the fact that there had been a misunderstanding a short while prior to the alleged incident and given the fact that the incident occurred at night, the presence of tube light notwithstanding, the possibility of the complainant's rational judgment being blurred could not be ruled out.

We are of the considered view that if the courts below had addressed themselves to the above circumstances fully they would have found that the case against the appellant was not proved beyond reasonable doubt. They would have given the appellant the benefit of doubt.

In the light of the above considerations we allow the appeal by Shehe Hamza. We quash his conviction and set aside the sentence imposed. He is to be released from custody unless held for some other lawful cause.

DATED AT **TANGA** this 2nd day of July, 2007.

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

L. B. KALEGEYA
JUSTICE OF APPEAL

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

(I. P. KITUSI)
DEPUTY REGISTRAR