IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MSOFFE, J.A., KILEO, J. A., And ORIYO, J. A.)

CRIMINAL APPEAL NO.277 OF 2007

SAMSON EDWARD ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Mwaikugile, J.)

dated the 9th day of June 2006
in
Criminal Appeal No 72 of 2002

JUDGMENT OF THE COURT

2nd & 3rd September, 2010

KILEO, J. A.

In Criminal Case No. 237 of 2000 of the District Court of Moshi, the appellant Samson Edward was charged with and convicted of two charges namely; robbery with violence contrary to sections 285 and 286 of the Penal Code and causing grievous harm contrary to section 225 of the Penal Code. He was sentenced to 30 years imprisonment on the robbery charge and 2 years imprisonment on the grievous harm charge. He lost his appeal to the High Court hence this second appeal.

The facts before the trial court were briefly to the following effect:

On 9th March 2000 Thadeo Mamkwe (PW1) a businessman operating a wholesale business of selling beer was joined at his business premises by Peter Msaky (PW2) at around 6 pm for a drink. The duo left the business premises at about 9.15 pm. On their way home PW1 was assailed by a gang of four bandits who attacked him using a sword and made away with his shs. 2,500/=. The two witnesses claimed to have identified the appellant as being among the bandits through bright electric light shining from a coffins shop nearby. They claimed that there was also moonlight on that night. The appellant was arrested a day after the incident at the Urban Primary Court where he had gone in connection with another matter. The appellant disassociated himself from the crime. If anything, he said that there was a fight between him and one Japhet Mkubwa who was drunk. He claimed that it was this fight which eventually led to his arrest.

The appellant who appeared before us in person had listed two grounds of appeal:- **One**, that that his defence was not considered and **Two,** that the

conditions pertaining at the scene of crime were not favourable for positive identification.

Mr. Zakaria Elisaria, learned State Attorney who appeared on behalf of the respondent Republic did not support conviction. Referring to a number of authorities including **Waziri Amani vs. Republic**, (1980) TLR. 250 and **Harod Sekache @ Salehe Kombo vs. Republic** – Criminal Appeal No. 13 of 2007 he submitted that the appellant was not sufficiently identified at the scene and should have been set free.

We agree with both the appellant and the learned State Attorney that bearing in mind the various authorities on identification and looking at the conditions of identification pertaining at the scene of crime, the appellant was not identified to the standard required in criminal law. This Court in **Waziri Aman**i, *supra*, held:

> *"(i) evidence of visual identification is of the weakest kind and most unreliable;*
>
> *(ii) no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."*

In resolving the question whether identification is watertight the Court listed a number of circumstances that must be examined. These include: the time the witness had the accused under observation, the distance at which he observed him, the conditions in which the observation occurred, for instance, whether it was day or night- time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before.

In the present case the two prosecution witnesses who were the eye witnesses to the crime claimed that they were able to recognize the appellants from the light which was shining at a shop selling coffins and also through moonlight. However, as rightly pointed out by the learned State Attorney, the distance between the coffins shop and the spot where the witnesses were when they were attacked was not given. The witnesses were attacked as they were walking along the road. There was no evidence that the light from the coffins shop sufficiently illuminated the road for the witnesses to have a watertight identification of their assailants. The learned State Attorney argued, and rightly so, that since a bullet was fired at the scene of crime, and considering the short time that the whole incident took

the witnesses might have been in a state of panic for them to positively identify the assailants.

Mr. Zakaria was also of the view that there were inconsistencies in the testimonies of the prosecution witnesses such that the lower courts should not have found them credible.

On the question of credibility of witnesses we appreciate that this is a second appeal, in which ordinarily the Court would not interfere with the finding of facts by the lower courts, however, we are satisfied that the circumstances in this case are such that call for an intervention. This Court in a number of cases including **Salum Mhando Vs Republic** [1993] TLR 170, **Shihobe Seni and Another Vs Republic** [1992] TLR 330, **Michael Haishi Vs Rep** [1992] TLR 92 and **Abdallah Mussa Mollel @Banjoo Vs DPP** – Criminal Appeal No 31 of 2008 (CAT) –unreported, has stated that where there are misdirections and non-directions on the evidence, a court of second appeal is entitled to look at the relevant evidence and make its own findings of fact. In **Salum Muhando Vs Republic** –*supra*, the Court stated:

findings of fact are based on a correct appreciation of the evidence. If as in this case both courts completely misapprehend the substance, nature and quality of the evidence, resulting in an unfair conviction, this Court must in the interests of justice intervene."

We are settled in our minds that in the present case both the trial court and the learned judge who sat on first appeal misapprehended the substance and quality of the evidence. For example, PW2 who claimed to know the appellant by name gave his name as Godson while he is Samson. This clearly shows that the witness was not truthful when he said that he knew the appellant by name. Had the courts below correctly analysed the evidence they would no doubt have given the appellant the benefit of doubt on account lack of creditworthiness of the prosecution witnesses.

In the light of the above considerations we find that there is substance in the appeal filed by Samson Edward. We in the event allow it. Conviction entered against him is quashed and sentence passed is set aside. The appellant should to be released from custody forthwith unless he is otherwise lawfully held.

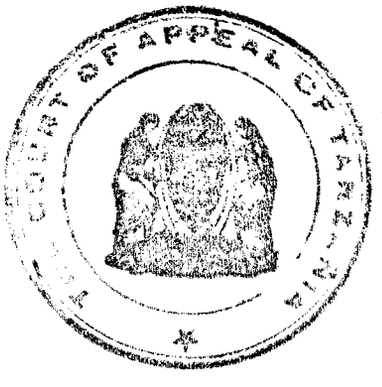
DATED at **ARUSHA** this 2nd day of September, 2010.

J.H. MSOFFE
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL