**IN THE COURT OF APPEAL OF TANZANIA**
**AT ARUSHA**

**(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And MANDIA, J.A.)**

**CRIMINAL APPEAL NO. 242 OF 2007**

**ALLY MANONO..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

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

**(Mchome, J.)**

**dated the 12th day of October, 2002**
**in**
**Criminal Appeal No. 99 of 2001**

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# JUDGMENT OF THE COURT

**25th & 26th February 2010**

## MJASIRI, J.A.

The appellant Ally Manono, was sentenced to a jail term of 15 years by the District Court of Hai consequent upon his conviction for the offence of robbery with violence. He was also ordered to pay a sum of Shs. 10,000 as compensation to PW1 Kalebi Aleonasaa Swai, a man he was alleged to rob Shs 18,000.

The appellant was dissatisfied with the trial Court's decision so he appealed to the High Court, Moshi, but his effort there was unrewarded. Mchome, J. dismissed his appeal entirely and the appellant has now come to this Court on a second appeal. He appeared on his own, while Ms Immaculata Banzi, learned State Attorney appeared on behalf of the respondent Republic.

Briefly the facts of this case are as follows. On October 2,1999 at about 10.30 p.m. PW1 was returning home accompanied by PW2, Richard Shikamoo. PW2, went into a coffee plantation to ease himself. PW1 continued to walk and while on the move he was accosted by two people he identified as Ally Manono, the appellant and one Hussein. The appellant stabbed him on his private parts and took from him Shs. 18,000. He called for help and PW2 came to his rescue. According to PW2's testimony, he identified the assailants as Ally Manono and Moses. He saw them pushing down PW1. He raised an alarm and pulled out the knife from the appellant's body.

The appellant filed seven (7) grounds of appeal. The sum total of the said grounds of appeal was that the appellant was not properly identified and there was no sufficient evidence to base his conviction.

The Republic did not support the conviction. Ms Banzi submitted that the main issue in this appeal is identification. She argued that the appellant was not properly identified. She further submitted that the incident took place at night and the source of light relied upon by PW1 and PW2 was moonlight and no details were given on how bright the said light was. She made reference to the case of **Waziri Amani v R 1980** TLR 250. Ms. Banzi further argued that if the circumstances of identification were favourable both PW1 and PW2 would have identified the same people.

The central issue in this appeal is whether or not there is a basis for us to interfere with the concurrent findings of facts by the Courts below that the evidence of PW1 and PW2 established the appellant's guilt beyond reasonable doubt. With respect, our answer

to the issue is in the affirmative for reasons which we will demonstrate hereunder.

In a case such as this one, proper identification of an accused person is crucial in proving a criminal charge. It is important to ensure that any possibility of mistaken identity is eliminated before a conviction can safely lie.

We are inclined to agree with the learned State Attorney that the circumstances were not favourable for adequate identification. The crime which the appellant was convicted of took place around 10.30 p.m. and the light relied upon was moonlight. We are also disturbed by the fact that PW1 on cross examination by the appellant stated that the appellant had a habit of 'knifing people'. This statement makes reference to the character of the appellant. No evidence was led to prove this.

This is a second appeal. We are alive to the legal principle that this Court can only interfere with findings of fact by the courts below

where it is shown that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice. See **Peters v Sunday Post Limited** (1958) E.A. 424, **Ambrose Severin Lekule @ China v Republic**, Criminal Appeal No. 145 of 2007; **Daniel Nguru v Republic**, Criminal Appeal No. 178 of 2004 and **DPP v. Norbert Mbunda,** Criminal Appeal No. 108 of 2004 (all unreported).

In **Antony Kigodi v Republic**, Criminal Appeal No. 94 of 2005 (unreported) this Court stated as follows:

> *" We are aware of the cardinal principle laid down by esterwhile Court of Appeal of Eastern Africa in* ***Abdullah bin Wendo v. R*** *(1953) 20 EACA and followed by this Court in the celebrated case of* ***Waziri Amani v Republic,*** *1980 TRL 250 regarding evidence of visual identification. No Court should act on such evidence unless all possibilities of*

*mistaken identity are eliminated and that the evidence before it is absolutely water tight."*

This principle is reflected in other decisions of this Court. See **Raymond Francis v Republic** (1994) TLR 100; **Musa Abdallah v Republic,** Criminal Appeal No. 36 of 2005 (unreported); **Maselo Mwita and Another v R. Criminal** Appeal No. 63 of 2005 (unreported) and **Shamir John v Republic**, Criminal Appeal No. 166 of 2004 (unreported).

In **Raymond Francis** (supra) it was stated as follows;-

*" It is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance"*

In **Said Chaly Scania v R,** Criminal Appeal No. 69 of 2005 CAT (unreported) it was held as follows:-

> *" We think that where a witness is testifying identifying another person in unfavorable circumstances like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light, its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger.*

In this case it is common ground that PW1 identified the appellant and one Hussein whereas PW2 identified the appellant and one Moses. In our evaluation of the entire evidence, we are satisfied

that the evidence of PW1 and PW2 did not establish beyond reasonable that the appellant committed the offence he was charged with and convicted of. The inconsistencies and contradictions of their evidence were significant and went to the root of the matter. This dented the credibility of their evidence. Therefore the evidence of PW1 and PW2 should not be relied upon. See **Mohamed Said Matula v R 1995 TLR 3.** The appellant is therefore entitled to be given the benefit of the doubt.

We accordingly allow the appeal, quash the conviction and set aside the sentence of 30 years imprisonment and the order for compensation. The appellant is to be released from prison forthwith unless otherwise lawfully held there in.

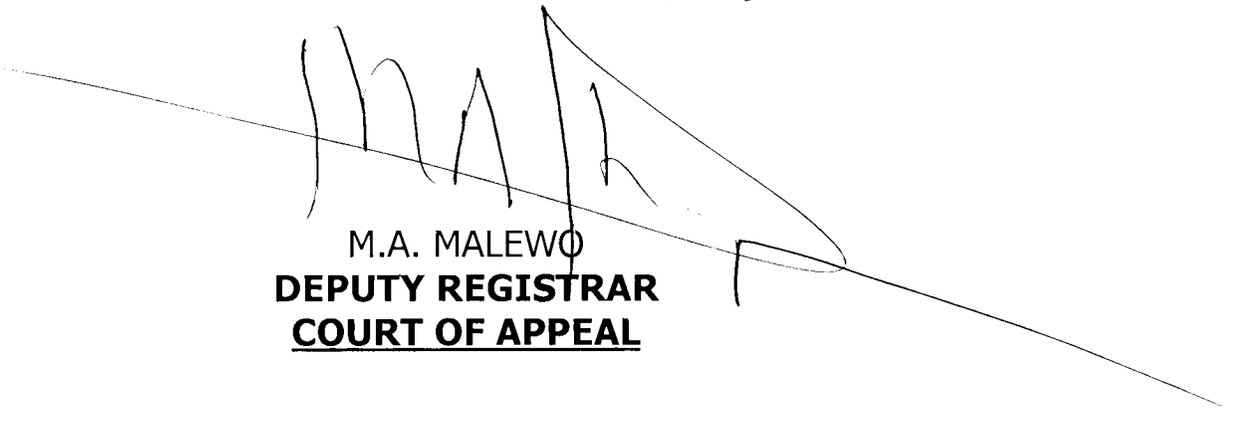
DATED at ARUSHA this 26th day of February, 2010.

E.M.K. RUTAKANGWA
**JUSTICE OF APPEAL**

S. MJASIRI
**JUSTICE OF APPEAL**

W.S. MANDIA
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original



M.A. MALEWO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**