

**IN THE HIGH COURT OF TANZANIA**  
**AT TABORA**  
**APPELLATE JURISDICTION**  
**(Tabora Registry)**  
**(DC) CRIMINAL APPEAL NO.150 OF 2005**  
**ORIGINAL CRIMINAL CASE NO.197 OF 2002**  
**OF THE DISTRICT COURT OF TABORA DISTRICT**  
**AT TABORA.**

**BEFORE: J.J. MACHUMU Esq., DISTRICT MAGISTRATE**  
**HAMIS JUMA .....APPELLANT**  
**(Original Accused)**

**Versus**

**THE REPUBLIC .....RESPONDENT**  
**(Original Prosecutor)**

**J U D G M E N T**

***19<sup>TH</sup> NOVEMBER, 2007 & 11<sup>TH</sup> DECEMBER, 2007***

**KIHIO, J.**

The appellant, Hamis s/o Juma was Convicted of Armed robbery contrary sections 285 and 286 of the Penal Code, Cap.16 of the Laws as amended by Written Laws (Miscellaneous amendment, Act No.10 of 1985 and was sentenced to fifteen years imprisonment.

Dissatisfied with both conviction and sentence, he is now appealing to this court in this appeal.

The Prosecution side alleged at the trial court, inter alia, that the appellant, on 6<sup>th</sup> day of October, 2001 at about 2.30hours at Milumba Village within the district, and region of Tabora, did attempt to steal cash 1,000,000/= the property of Tano s/o Hamis and immediately after did use actual violence to the said Tano s/o Hamisi by shooting him with a short gun.

Tano Hamisi (PW1) told the trial court that he had five houses and on 6/10/2001 he slept in his house containing three rooms and one veranda. He (PW1) further told the trial court that in the night at around 2.00 a.m. when he was asleep his house where he slept was invaded by bandits who hit one of the four doors using a big stone and thereafter hit the room door and one of the bandits entered in side where he (PW1) beat him (bandit) using a stick. He (PW1) stated at the trial court that he chased the bandit who entered inside and with the aid of his (PW1's) torch he saw the appellant amongst many people outside his (PW1's) house. He (PW1) further stated at the trial court that he heard a gun fire and after an alarm was raised from outside villagers, one Shaban inclusive, gathered at the scene of

crime. He informed the trial court that he identified the appellant who by then wore a long trouser, a long coat and a hat amongst the other bandits because he (appellant) was known to him for a very long time. He (PW1) further informed the trial court that the 1<sup>st</sup> bullet was fired outside his house and the 2<sup>nd</sup> one was fired inside his house. In cross-examination by the appellant, he informed the trial court that he (PW1) did not tell the gathered people that he (appellant) was the one who assaulted him because he was in great pain and on his return back home from treatment, after three days, he named him (appellant). He further informed the trial court that he (appellant) was arrested, after five days. In cross-examination by the court, he told the trial court that he was hurt by the bullet on his left hand between the ankle and the shoulder and on his left thigh. He further told the trial court that he did not tell his wife on the invader because he was not conscious.

The appellant told the trial court that in 2001 on a date he could not recall he cleared his house as there were grasses and that a gang of Sungusungu surrounded him. He further told the trial court that he was arrested and taken to one of the Village offices. He stated at the trial court that he was taken under a tree where the Sungusungu used as an office and he was smeared with mud and told that he

committed the offence charged. He further stated that after he denied the allegations he was taken back to the Village office where he slept and on the following day he was taken to the W.E.O's office and thereafter escorted to the Police Station. He finally informed the trial court that he was later on taken to court.

The appellant raised eight grounds of appeal in his Petition of appeal. However, basically, his ground of appeal is one, namely, that his guilt had not been proved beyond reasonable doubt.

The appellant is unrepresented while the respondent is represented by Mr. Mokiwa, Learned State Attorney.

The appellant has nothing material to submit.

The Republic does not support the conviction against the appellant. Mr. Mokiwa submitted that in the evidence available it is doubtful if the appellant was identified by PW1 as the robber. He further submitted that the robbery was committed on 6/10/2001 and the appellant was charged on 30/5/2003 and brought to court for the first time. He argued that if the appellant was arrested immediately after the Commission of the alleged Armed robbery what grounds

which led the prosecution to bring the appellant to court after a very long time. He further argued that the case against the appellant is a frame-up.

The appellant's conviction was based on the identification evidence of PW1.

The crucial issue here is whether the appellant's identification was correct or not.

In the case of Walter s/o Dominic @ Omundi and Tumaini s/o Luther V Republic – Criminal Appeal No.15 of 2005 – Arusha registry (unreported) the Court of Appeal of Tanzania held, inter alia that,

***"Where an offence is committed at night the issue of identification is very crucial and that no court should convict an accused person on mere visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely water tight."***

In the case of Hassan J. Kanenyera and others V Republic (1992) T.L.R. 100, The Court of Appeal of Tanzania held that,

***"It is a rule of practice, not of law that corroboration is required of the evidence of a single witness of identification of accused made under unfavourable conditions, but the rule does not preclude a conviction on the evidence of a single witness if the court is fully satisfied that the witness is telling the truth."***

In the present case, the Armed robbery took place in the night and when it was dark. PW1 identified the appellant with the aid of a torch he lighted outside when he was chasing one of the bandits who entered inside his (PW1) house and at the time he identified him (appellant) was in a group of many bandits who were outside his (PW1's) house by then. The evidence adduced by PW1 at the trial court shows that the appellant wore a long coat and a hat when he (PW1) identified him.

The evidence of PW1 at the trial court also shows that he did not tell the gathering at the Scene of Crime that the appellant was one of the bandits because he was in great pain and that he named him (appellant) when he came back from treatment after three days. His evidence also shows that he did not mention the invader to his wife because he

was unconscious. If the appellant was identified at the scene of crime and was arrested five days after the commission of the Armed robbery what grounds which led the prosecution to charge him (appellant) and took him to court after almost seven months.

I am satisfied that the conditions were not favourable for a correct identification of the appellant.

In the circumstances of the case, proof of the identity of the appellant was, in my considered opinion, such that the possibility of mistaken identity could not be eliminated.

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The evidence against him (appellant) was not watertight.

There is no corroborative evidence on the evidence of PW1 who is a single witness of identification of the appellant. There is nowhere in the judgment the Learned trial Magistrate warned himself and was fully satisfied that PW1 was telling the truth.


I entirely agree with Mr. Mokiwa that on the evidence available it is doubtful if the appellant was identified as the robber in the Armed robbery.

For the foregoing reasons, the appeal is allowed. The conviction is quashed and the sentence imposed on the appellant is set aside.

The appellant be released from prison immediately unless he is lawfully held there.

  
**S.S.S. KIHIO**  
**JUDGE**  
**11/12/2007**

**Court:** Judgment delivered in the presence of the appellant and Miss. Wakuru, Learned State Attorney.

  
**S.S.S. KIHIO**  
**JUDGE**  
**11/12/2007**