IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

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

CRIMINAL APPEAL NO. 213 OF 2005

MIRAJI SEIF ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Mkwawa, J.)

dated the 18th day of March, 2005
in
Criminal Appeal No. 78 of 2002

JUDGMENT OF THE COURT

29 June & 9 July 2007

MSOFFE, J.A.:

The appellant was convicted of armed robbery contrary to sections 285 and 286 of the Penal Code by the District Court of Handeni (Mfuko, SDM) on 3/10/2001. He was sentenced to a term of imprisonment for 30 years. His appeal to the High Court at Tanga (Mkwawa, J.) was dismissed on 18/3/2005 hence this second appeal against the concurrent findings of fact by the courts below.

The memorandum of appeal to this Court contains five grounds of appeal. However, the grounds crystallize on one major point: That it was wrong for both the trial District Court and the High Court in its appellate jurisdiction to believe the testimonies of the prosecution witnesses, notably PW1 Coridoni Parisino, PW2 Kisairo Mwalimu and PW5 C.8072 Cpl. Amiri.

The evidence on which the trial court convicted the appellant was given by five witnesses, that is to say PW1, PW2, PW3 Omari Nyange, PW4 Alli Athumani and PW5.

PW1 gave evidence and stated that on 1/5/2001 he, and PW2, went to Kibirashi Mnadani to sell his five cows. After the sale they boarded a landrover to Mafisa village. On arrival at Mafisa they disembarked whereupon at about 6.40 p.m. they were attacked by several youths who were armed with sticks and bricks. According to these two witnesses, the appellant was among the youths who despoiled PW1 of his money, bed sheet, umbrella and an assortment of other items he had bought from the proceeds of the sale of the five cows. PW1 and PW2 were supported by PW3 who gave an eye

witness account of the incident. Indeed, according to PW3, he rescued PW1 and PW2 from the attack by the youths. At about 7.00 p.m. on the same day the incident was reported to PW4, the Village Chairman. On 2/5/2001 the appellant was arrested by the Chairman and taken to the police. PW5 received the appellant who denied attacking PW1 and PW2.

At the trial, following the close of the evidence in support of the charge, the appellant was addressed in terms of Section 231 of the Criminal Procedure Act, 1985, after which he elected to remain silent.

Both the trial magistrate and the judge on first appeal were satisfied that the evidence was cogent and irresistible that on the material day the appellant was among the youths who assaulted and robbed PW1 of his money and the other items. That PW1, PW2 and PW3 were all familiar to the appellant. That the incident took place in broad daylight. And finally, that the witnesses had ample opportunity of seeing who the assailants were. In the light of all these factors, there was no possibility of mistaken identity, the magistrate and the judge concluded.

Mr. Biswalo Eutropius Kachele Mganga, learned State Attorney for the respondent Republic, argued in opposition to the appeal. In his submission, there was no possibility of mistaken identity as correctly held by the courts below.

We have given careful consideration to the appeal. In the end, and without hesitation, we are in agreement with Mr. Mganga that there is no basis for us to interfere with the concurrent findings of fact by the courts below. We are satisfied that there was no possibility of mistaken identity as correctly reasoned out by both the magistrate and the judge. Having said so, we need not belabour the point any further. However, there is one other point which we think we should take up here.

In his oral submission before us, the appellant took quite sometime to say that the prosecution witnesses were not credible. In the process he urged, *inter alia*, that PW1 and PW2, being brothers, were likely to lie against him. Our answer to this submission is three-fold: **One,** there is no law forbidding members of the same family from testifying on an incident they believe to have witnessed. **Two,**

as is evident from the evidence, the appellant was not convicted on the basis of the evidence of PW1 and PW2 only. There was also the evidence of PW3, an eye witness to the incident. **Three,** as already observed, the appellant elected to remain silent after he was addressed under Section 231 of the Criminal Procedure Act, 1985. Surely, in the absence of a defence under sub-section (1) thereof, under sub-section (3) the trial court was entitled to draw an adverse inference against him and the court as well as the prosecution could have been permitted to comment on the failure by the accused to give evidence, although the said court did not say so in so many words.

The sentence meted is the statutory minimum. We say so because the evidence is clear that the appellant was armed. Indeed, he was also in company with one or more persons. In terms of **Section 5(b)(ii)** of **The Minimum Sentences Act,** 1972 as amended by the relevant provisions of **Section 2** of **The Written Laws (Miscellaneous Amendments) Act** No. 6 of 1994, the sentence of thirty years imprisonment meted on him was quite in order. Sub-paragraph (ii) of paragraph (b) above reads:-

> (ii) if the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more persons, or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to imprisonment for a term of not less than thirty years.

This Court's decisions in **Ifunda Kisite v. Republic**, Criminal Appeal No. 47 of 2003 (unreported) and **Mwita Sibora v. Republic**, Criminal Appeal No. 49 of 1996 (unreported) are also relevant on the point. Indeed, in **Sibora's** case, in relation to the amendment brought about by Act No. 6 of 1994, this Court stated:-

> This amendment came into effect on 18 March, 1994. As can be seen, the sentence of 30 years is no longer confined to armed robbery but applies to all robberies in which the offender is armed with a dangerous weapon or instrument, or is in company with one or more persons or where in the course of committing the robbery, the offender wounds, beats, strikes or uses any other

personal violence to any person. In other words, all the ingredients of robbery with violence as set out in the second paragraph of section 286 of the Penal Code are now punishable with a minimum of 30 years. The term of 15 years remains reserved for what one might call simple robbery.

As stated above, the offence in this case was committed on 1st May 2001. It was, therefore, within the ambit of the amendment brought about by Act No. 6 of 1994.

In the event, for the reasons stated, we dismiss the appeal.

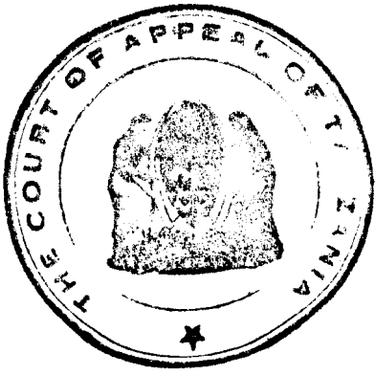
DATED at TANGA this 2nd day of July, 2007.

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