IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 245 OF 2007

1. DEO BAZILI OLOMI
2. HAMISI JAMES MALLYA .....APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mchome, J.)

dated the 19th day of October, 2001
in
Criminal Appeal No. 90 of 2000

JUDGMENT OF THE COURT

31st Aug. & 2nd September, 2010

MSOFFE, J.A.:

The District Court of Moshi (Nathan, PDM.) found the appellants, and four others, guilty of armed robbery contrary to **sections 285** and **286** of the **Penal Code** and accordingly sentenced each one of them to a term of thirty years imprisonment. On appeal, the High Court (Mchome, J.) upheld the conviction and the sentence in respect of the present appellants and

allowed the appeal by the three other appellants. The appellants are still aggrieved, hence this second appeal.

In their respective memoranda of appeal the appellants have canvassed a number of points. In a nutshell however, all the points crystallize on one major ground of complaint: - That their conviction was not based on the weight of the evidence on record. In this regard, they are inviting us to fault the courts below in their concurrent and respective findings of fact and accordingly set them free.

Very briefly, the alleged robbery took place on 21/6/1999 at about 22.30 hours at a place called Kibosho Maua Kati within the District of Moshi in Kilimanjaro Region. On that day and time a retail shop belonging to the father of PW1 Oswald John was broken into by bandits and an assortment of articles worth shs. 8,136,140/= stolen. The bandits were wielding a gun and actually fired it in the course of stealing. Apparently the bandits had come to the scene with a motor vehicle which they parked at a short distance away from the shop. With the aid of the vehicle the bandits took away many of the stolen items. According to PW1, the first appellant (Deo

Bazili Olomi) was among the group of bandits who broke into the shop on that day. In the evidence of PW1, he chased the first appellant after which spent a considerable long period of time struggling and grappling with him in the course of the arrest. In the struggle the first appellant injured him with a screw driver.

The second appellant was convicted because he was allegedly found with rice in a nylon bag which had the initials of J.S. (John Shoo) which also stood for the name of PW1 Oswald John.

The crucial and pertinent issue in this appeal is whether or not the evidence on record established the appellants' guilt beyond reasonable doubt. With respect, we are in agreement with Mr. Zakaria Elisaria, learned State Attorney for the respondent Republic, that the evidence as it unfolded at the trial proved the case against the first appellant beyond reasonable doubt. The evidence is clear that the retail shop in question was broken into on the material day and time. In the process, PW1 chased the first appellant who had with him a 50 kilos bag of sugar which he threw away. In the course of the arrest there was a struggle between

PW1 and the first appellant. The struggle took quite sometime. All this time this appellant had a screw driver with which he assaulted PW1. After the arrest this appellant was seen with house-breaking instruments and fake keys. It is clear from the evidence that this appellant was caught red-handed, so to speak. Surely, on the basis of the above evidence, there is nothing to fault the courts below in their findings of fact regarding the first appellant. In this sense, the conviction against the first appellant cannot be faulted.

Notwithstanding what we have stated above, there is one other point which we wish to address here. In the course of his oral submission before us the first appellant seemed to impress upon us that the prosecution witnesses should not be believed because they were near relatives. With respect, this assertion is not borne out by the record. There is nothing to show that the witnesses were relatives. Assuming they were, there is nothing in law forbidding or barring relatives from testifying on an event they witnessed. What matters is the credibility of the witnesses and the weight to be attached to their evidence. In fact, as early as the year 1936 the point was canvassed by the erstwhile Eastern African Court of Appeal

in the case of **R v Lulakombe s/o Mikwalo and Kibege** (1936) EACA 43 at page 44 where Sir Sidney Abraham, C.J. held: -

> *There is no rule of law or practice which permits the evidence of near relatives to be discounted because of their relationship to an accused person.*

In a more recent decision this Court dealt with the same point in the case of **Paulo Tarayi v Republic**, Criminal Appeal No. 216 of 1994 (unreported) where it was stated:

> *We wish to say at the outset that it is, of course, not the law that whenever relatives testify to any event they should not be believed unless there is also evidence of a non-relative corroborating their story. While the possibility that relatives may choose to team up and untruthfully promote a certain version of events must be borne in mind, the evidence of each of them must be considered on merit, as should also the totality of the story told by them. The veracity of their story must be considered and gauged judiciously, just like the evidence of non-relatives. It may be necessary, in given*

> *circumstances, for a trial judge or magistrate to indicate his awareness of the possibility of relatives having a common interest to promote and serve, but that is not to say a conviction based on such evidence cannot hold unless there is supporting evidence by a non-relative.*

As for the second appellant (Hamisi James Mallya), again we are in agreement with Mr. Zakaria Elisaria that the evidence on record did not establish his guilt. As stated earlier, he was convicted allegedly because he was found with rice in a nylon bag with initials J. S. But, as the evidence clearly shows, the seventh accused at the trial, Modesti Stanslaus Mmasi, said in cross-examination that the initials J. S. in the bag were actually inscribed by PW1 and not by the second appellant. In fact, a close look at the evidence will show that there is no causal connection between the bag which had the initials and the event in issue. In other words, there is nothing to show that **the bag with its initials** was seen by any of the witnesses on the date, time and place of incident. If so, it will be obvious that the second appellant had nothing to do with the bag in issue. In the

circumstances, the second appellant ought to have been given the benefit of doubt and thereby earn an acquittal.

For the reasons stated, we hereby dismiss the first appellant's appeal. We allow the appeal by the second appellant. We quash his conviction and set aside the sentence. The second appellant (Hamisi James Mallya) is to be released from custody forthwith unless lawfully held.

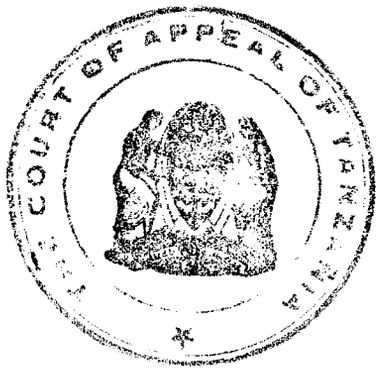
DATED at **ARUSHA** this 1st day of September, 2010.

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