CRIMINAL APPEAL NO. 85 OF 2004- COURT OF APPEAL OF TANZANIA AT ARUSHA- RAMADHANI, C. J.; MROSO, J. A. And KAJI, J. A.	**SALIM PETRO NGALAWA Vs. REPUBLIC- (Appeal from the decision of the High Court of Tanzania at Arusha)- Criminal Appeal No. 60 of 2003- Rutakangwa, J.**	**Verdict and Judgment-**There is technically no judgment but a mere verdict where the Magistrate gives only a summary of the evidence of all the prosecution witnesses and that of the accused persons. **Evaluation by First Appellate Judge-** First appellate judge should discuss the evidence and make his own evaluation when hearing first appeal and hence it is in a way a rehearing: see **D. R. Pandya v. R [1957] EA 336**. **Failure of First**

		Appellate Judge to discuss Evidence- Where the first appellate judge fails discuss the evidence and make his own evaluation when hearing first appeal Court of Appeal can, and should, step into the shoes of the High Court under the provisions of section 4 (2) of the Appellate Jurisdiction Act to do that which the High Court ought to have done. **Period for interviewing a Person-Section 50 of the Criminal Procedure Act Cap 20 [2002 RE]**

		prescribes the basic period available for interviewing a person who is in the custody of police.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA
(CORAM:RAMADHANI, C. J.; MROSO, J. A. And KAJI, J. A.)
CRIMINAL APPEAL NO. 85 OF 2004
BETWEEN
SALIM PETRO NGALAWA ... APPELLANT
AND
THE REPUBLIC ... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Arusha)
(Rutakangwa, J.)
dated the 5th day of March, 2004
in
Criminal Appeal No. 60 of 2003
.....
JUDGMENT OF THE COURT

24 & 30 October 2007

RAMADHANI, C. J.

On 23rd February, 2000, Raphael Baptist, PW 2, and Marcel Schunder, PW 3, were driving in a land cruiser with registration number ARK 403, from Arusha to Babati. At about 22.00 hours at Ndori Village in Babati District, they found big stones laid across the road which

prevented them from continuing with their journey. PW 3, who was driving, tried to engage the reverse gear but did not make it as some bandits were upon them. PW 3 was hit below his right eye and fell unconscious.

PW 2, who was a passenger, was able to identify the appellant who was in front of the vehicle marching towards it while the head lights were on. The appellant then went to the passenger's window of the vehicle and ordered PW 2 to put on the cabin light. After that the appellant boarded the vehicle and with the aid of the cabin light was able to search through the goods in the rear seat of the vehicle.

After the search PWs 2 and 3 were thrown out from the vehicle and the bandits went away with it. When PWs 2 and 3 had properly recovered from the ordeal they went on foot to Babati and reported the incident to the police. On 24 February, 2000, three persons were arrested. D/Cpl Godfrey, PW 6, arrested the appellant, in connection with another case, on 26 February, 2000, at 13.00 hours. PW 6 testified that the appellant confessed to have taken part in the robbery, the subject matter of this case, so, on 28 February, 2000, he was taken to Inspector Wilson, PW 5, to record a cautioned statement, Exh P 4. The appellant was also identified by PW 2 at an identification parade staged by Inspector Rogathe Ndewina, PW 1.

The trial learned District Magistrate, Mr. TUWA, was satisfied with the prosecution evidence and convicted all four accused persons, including the appellant, and sentenced each of them to a term of thirty years imprisonment. The appellant's appeal to the High Court was summarily dismissed by RUTAKANGWA, J., as he then was.

In this second appeal the appellant did not have a counsel but appeared in person while the respondent/Republic was represented by Mr. Henry Kitambwa, learned State Attorney.

The appellant filed a memorandum of appeal containing three grounds:

1. His identification by PWs 2 and 3 was not beyond all reasonable doubt.
2. The identification parade was flawed in that PWs 2 and 3 had not given to the Police a detailed description of the suspect.
3. His conviction was based on a retracted confession.

At the hearing of the appeal the appellant merely adopted the grounds in his memorandum of appeal and was not the first to address the Court.

Mr. Kitambwa replied that the identification of the appellant by PWs 2 and 3 was beyond all reasonable doubt. The State Attorney relied on Waziri Amani v. R [1980] TLR 250 which prescribes the conditions for

a proper identification. In this case, Mr. Kitambwa submitted, there was sufficient light and that PWs 2 and 3 were with their captors for about 20 minutes. The learned State Attorney submitted that the conviction was not solely based on the confession but there were other witnesses who identified the appellant. He pointed out that the retraction of the confession by the appellant was an afterthought but it was otherwise freely given.

Before we consider the grounds of appeal we observe that there is technically no judgment but a mere verdict. The Magistrate gave a summary of the evidence of all the prosecution witnesses and that of the accused persons. After that the Magistrate concluded:

> The segments of evidence adduced before this court by various witnesses on behalf of the prosecution convince (sic) this court to believe that the accused person in the dock were the very ones who committed the offence of armed robbery.
>
> The defence evidence didn't raise any reasonable doubt as far as the quilts (sic) of the accused persons are concerned.

The learned first appellate judge did not discuss the evidence and make his own evaluation as he was entitled to do since it was the first appeal and hence it was by way of rehearing. Instead he summarily dismissed the appeal.

In D. R. Pandya v. R [1957] EA 336 it was held:

> The first appellate court erred in law in that it had not treated the evidence as a whole to that fresh and exhaustive scrutiny which the appellant was entitled to expect, and, as a result of its error, affirmed a conviction resting on evidence which, had it been duly reviewed, must have been seen to be so defective as to render the conviction manifestly unsafe.

So, we can, and should, step into the shoes of the High Court under the provisions of section 4 (2) of the Appellate Jurisdiction Act and we have to do that which the High Court ought to have done.

We start with the identification of the appellant by PWs 2 and 3. It was their evidence that they were able to identify the appellant because of the headlamps of the vehicle. But we ask ourselves how the bandits could have been so foolish as to come out in front of such a glare of the head lights of the vehicle. According to PWs 2 and 3 those people had taken cover and only emerged after the vehicle stopped and tried to reverse. It is highly improbable that they would have done so.

Be that as it may, PW 3 stated that after he was hit close to the right eye he became unconscious. That was reiterated by PW 2 who went further to say that he tried to move PW 3 from the driver's seat so that he could reverse the vehicle but did not manage it. So, PW 2 tried, again in vain, to open the door so that he could flee from danger. We fail to see how he could have made both attempts and at

the same time concentrate on looking at the bandits to be able to identify them.

The appellant in reply to the submissions of the State Attorney pointed out the evidence of Cpl Peter, PW 4, who said:

> On 24/2/2000 from 8.00 a.m. upwards I was at my working station. While I was there, I saw Raphael (PW 2) and Marcel (PW 3) who reported that their M/V and other goods were robbed by unknown person at the area of Mdori village.

The appellant asked how PWs 2 and 3 managed to identify him when on the day after the incident they confessed to the Police that they did not know the people who attacked them? We cannot pretend to know the answer. But that question raises a doubt on the credibility of PWs 2 and 3.

Then there is the issue of the caution statement of the appellant, Exh P 4. Was it recorded within the provided statutory time? The appellant was arrested on 26 February, 2000, at 13.00 hours, and the statement was recorded on 28 February, 2000, that is, after more than twelve hours and that contravened section 50 of the Criminal Procedure Act Cap 20 [2002 RE] which prescribes the basic period available for interviewing a person who is in the custody of police.

Therefore, that cautioned statement was inadmissible as this Court said so in Janta Joseph Komba & 3 Ors v. R Criminal Appeal No. 95 of 2005 (CAT) (unreported) where this Court acquitted the appellants.

We followed that case in this session in Tumaini Molleli @ John Walker & Another v. R., Criminal Appeal No 40 of 1994.

We are, therefore, of the well considered view that there is no evidence against the appellant, we quash the unanimous finding of the two lower Courts and we set aside the order of imprisonment. The appellant is to be set free unless his further incarceration is lawful.

DATED at ARUSHA this 30th day of October, 2007.

A. S. L. RAMADHANI
CHIEF JUSTICE

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

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

(F. L. K. WAMBALI)

SENIOR DEPUTY REGISTRAR