CRIMINAL APPEAL NO. 227 OF 2005- COURT OF APPEAL OF TANZANIA AT ARUSHA- MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.	**JOAKIM ANTHONY MASSAWE Vs. REPUBLIC (Appeal from the Judgment of the High Court of Tanzania at Arusha)- High Court Criminal Appeal No. 68 of 2003-Sheikh, J.**	Offence of armed robbery contrary to sections 285 and 286 of the Penal Code Cap. 16. Difficult whom to believe between main witness and accused person- trial magistrate opted to believe the main witness rather than the accused person- the record is not clear why he believed the witness and not the the accused- In such a situation the magistrate must to give clear reasons why he believed the main witness rather than the accused person. **Hasty or Poor Investigations-** motor vehicle involved was identified even by its registration number which was TZ 41514. But the record is silent as to what steps were taken to trace it and what transpired thereafter. It would

		appear the whole case was either hastily investigated or poorly investigated.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 227 OF 2005

JOAKIM ANTHONY MASSAWE.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Sheikh, J.)

dated the 18th day of August, 2005
in
High Court Criminal Appeal No. 68 of 2003

JUDGMENT OF THE COURT:

8 & 25 October, 2007

KAJI, J.A.:

The appellant Joachim Anthony Massawe, together with six others, were jointly charged with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code Cap. 16. Five of them were found with no case to answer and were acquitted. The case proceeded against the appellant and another accused who was ultimately acquitted. However the appellant was found guilty as charged and was convicted accordingly. He was sentenced to 30 years imprisonment and 12 strokes. He was aggrieved. He unsuccessfully appealed to the High Court.

At the trial the prosecution had adduced evidence to the effect that, on 10.8.2001, at about 6.30 pm, a group of five bandits invaded Njake Petrol Station at Mianzini area, within Arusha City. They were in a Peugeot 504 with Registration No. TZ 41514. One of them who was armed with a pistol, fired on the wall of the office of the said Njake Petrol Station ordering Leonard Munisi (PW1), the pump attendant, to give them money. PW1 gave them Shs. 670,000/=. It

would appear the sound of the shots scared those who were around that area and ran randomly for their lives. The bandits quickly got into their motor vehicle and drove off. But PW1 claimed he apprehended one of them at the scene. This was none other than the appellant. The appellant was later handed over to the police.

In his defence, the appellant admitted to have been at the scene. But he said he went there to buy some petrol for their motor cycle, and that, while there, he heard a sound which he thought was from a tyre burst. Those who were around ran away randomly. He also ran away. But suddenly he was hit with a stone on the head and lost consciousness. When he gained consciousness he realized that he was in Mount Meru Hospital.

In convicting the appellant, the learned trial Senior District Magistrate relied on the evidence of PW1. On first appeal the learned judge joined hands with the learned trial magistrate. Still

undaunted the appellant lodged this appeal. In his petition of appeal the appellant preferred five grounds of appeal which basically hinge on the burden of proof, that the prosecution evidence was not strong enough to secure conviction. At the hearing of the appeal the appellant gave a brief elaboration which basically was a repetition of the petition of his grounds of appeal.

On his part, Mr. Kitambwa, learned State Attorney, who represented the respondent Republic, resisted the appeal mainly on the ground that the appellant was apprehended at the scene of crime by PW1, and that PW1's evidence was corroborated by the evidence of Shabani Jumanne (PW2). The learned State Attorney held the view that, even if the evidence of PW2 is excluded, the evidence of Pw1 was sufficient because he was an eye witness and the event occurred when there was sunlight.

In our view, we think, this was a borderline case. We say so for the following reasons: -

There was only one material witness on each side, that is, PW1 for the prosecution, and the appellant for defence. PW2 said in clear terms that he did not know the one who was arrested at the scene, and did not know the appellant. He said when he heard gun shots he ran away. That is why we are saying there was only one material witness (PW1) for the prosecution.

Thus the learned trial magistrate was faced with a difficult issue of whom to believe between PW1 and the appellant. He opted to believe PW1 rather than the appellant. But unfortunately the record is not clear why he believed PW1 and not the appellant. In such a situation we would expect the magistrate to give clear reasons why he believed Pw1 rather than the appellant. In our view, the explanation given by the appellant that he was mistakenly apprehended cannot be said to be unreasonable. There was ample evidence that the gunshots sent those who were around running randomly, apparently each trying to save his life. The appellant said he also ran for his life. But in the process he was probably mistaken for being among the robbers and was hit with a stone on his head

and lost consciousness. We are quite aware that it is not unusual under such circumstances for an innocent person to be mistaken for the real culprit.

Another point of interest is PW1's assertion that he arrested the appellant at the scene. He said that the appellant was the one who demanded the money from him. He did not clarify as to who had the firearm. According to the sequence of events as described by him (PW1) it would appear he handed over the money to the appellant who was demanding furiously. If that was the case we fail to understand why the appellant was not found with any money if he was really apprehended by PW1 there and then. We say he was not found with money because neither PW1 nor PW2 said the appellant was found with any money. Another thing is that, the investigating officer or any policeman for that matter did not give evidence to clarify as to where the appellant was arrested, that is, at the petrol station as claimed by PW1 or somewhere else where the appellant had run for his life as claimed by the appellant. The doubt must be resolved in favour of the appellant.

Another thing which has taxed our minds is why Said Hussein Shekuu, who was the 6th accused, was acquitted for having no case to answer in view of the evidence by Pw2 that he was the one armed with a pistol. It would appear the learned trial magistrate used a double standard approach in dealing with the merit or otherwise of the case amounting to an unfair trial of the appellant.

As indicated earlier on, seven suspects were charged. Five of them were acquitted for having no case to answer. One was acquitted at the conclusion of the trial. It would appear the police had simply charged whoever they suspected to have been involved and left the court gambling in sorting out as to who was involved. We think this was an unfortunate approach.

Lastly, the motor vehicle involved was identified even by its registration number which was TZ 41514. But the record is silent as to what steps were taken to trace it and what transpired thereafter.

It would appear the whole case was either hastily investigated or poorly investigated.

According to all that we have stated above, we are of the view that, had the learned judge on first appeal taken the approach we have adopted, she would have found that the prosecution evidence was not strong enough to found conviction of the appellant and would have allowed the appeal.

For the reasons we have stated above, we allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released forthwith unless lawfully held.

DATED at ARUSHA this 23rd day of October, 2007.

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

I certify that this is a true copy of the original

(I. P. Kitusi)
DEPUTY REGISTRAR