**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

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

**CRIMINAL APPEAL NO.287 OF 2007**

**RESPIKI MICHAEL @ PENDO.....APPELLANT**

**AND**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the judgment of the Resident Magistrate's Court at MOSHI)**

**(Mgaya, PRM, Ext. Jur.)**

**dated the 13th day of April, 2007**
**in**
**Criminal Appeal No. 20 of 2007**

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**JUDGMENT OF THE COURT**

**16 & 19 August, 2010**

**KILEO, J. A.:**

This is a second appeal. The appellant Respiki Michael @ Pendo was charged in the District Court of Moshi together with another person who was acquitted, with the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code. The appellant was sentenced to 15 years imprisonment. His appeal which was heard by a Principal Resident Magistrate with Extended Jurisdiction in terms of section 45 (2) of the

Magistrates' Court Act, Cap 11 R.E. 2002 was dismissed. Being aggrieved he has preferred this second appeal.

The appellant appeared in person at the hearing of the appeal. The Respondent Republic was represented by Mr. Juma Ramadhani, learned Senior State Attorney.

The appellant attacks the decisions of the courts below on five grounds but the gist of his complaint may be summarised in three main grounds which are:

a) Insufficiency of evidence
b) Contradictions in the testimonies of the prosecution witnesses
c) Non-consideration of the defence case

The learned Senior State Attorney did not support the conviction entered against the appellant. He submitted that though this is a second appeal, in which ordinarily the Court would not interfere with the finding of facts by the lower courts, however the circumstances in this case are such that call for an intervention. Mr. Ramadhani cited **Salum Mhando Vs Republic** [1993] TLR 170, **Shihobe Seni and Another Vs Republic** [1992] TLR 330, **Michael Haishi Vs Republic** [1992] TLR 92 and **Abdallah Mussa Mollel @Banjoo Vs DPP** – Criminal Appeal No 31 of 2008 (CAT) – unreported, all of which explained the exception to the general rule in cases of second appeals. The common holding in these cases was to the effect that where there are misdirections and non-directions on the evidence, a court of second appeal is entitled to look at the relevant

**Republic** –supra, the Court stated:

> *"On a second appeal to this Court, we are only supposed to deal with questions of law. But this approach rests on the premise that the findings of fact are based on a correct appreciation of the evidence. If as in this case both courts completely misapprehend the substance, nature and quality of the evidence, resulting in an unfair conviction, this Court must in the interests of justice intervene."*

In the present case the case for the prosecution was to the effect that the appellant and another person had invaded the barber shop where PW1 was cutting PW2's hair. It was alleged at the trial that the appellant and his co-accused who were both armed with pangas threatened PW1 and demanded money for Xmas. Thereafter the appellant is said to have taken away a Siemens C. 35 phone, hair-cutting machine and a radio belonging to PW1. Before they left the appellant and his co-accused are said to have locked the door of the barber shop from the outside. The appellant on the other hand claimed that on the material date he and his co- accused had taken the child of one Heaven Michael (DW2) to hospital but as money was needed for treatment they had to look for the father to supply the money. While they were in this process the appellant claims that the complainant and others in his group appeared and attacked them without any cause. He was injured and lost consciousness only to regain it at the police station. The appellant claimed that he spent five days in hospital after which he was sent back to the police station and finally to court. DW2, Heaven

the evidence adduced on behalf of the defence and ought also to have given reasons for preferring the evidence of the prosecution to that of the defence. The appellant did explain that there were some misunderstandings between him and PW1 over a girl friend. The trial magistrate did not say anything about this. The evidence of the complainant appears to us to be quite suspicious. In the course of his evidence he is recorded as having stated:

> *"Upon coming out I lock the door and went to report to police and I was given RB No. 14557/2007 and I returned home. Before reaching I found a lot of people near saloon upon asking me what happens I did not reply rather I went home. On 28/12/2005 one person come and told me that he headed people in Umbwe ground talked about me, I went and with the help of people we arrest the two accused and call police and they come and arrest them"*

Looking at the above statement, and considering that the offence committed against the complainant was a serious one, one wonders why he would not have wanted to talk about it. It is not natural for someone to be robbed and refrain from talking to well wishers about it. It also appears from the above statement that it was only after one person told the complainant that he heard people in Umbwe ground talking about him that he arrested the appellant. The question that comes to mind immediately is what would have the complainant done if he was not told that people were talking about him.

Bearing all the above considerations in mind we agree with both the appellant and the learned Senior State Attorney that the conviction entered against the appellant was not proper. We accordingly allow the appeal. We do hereby quash the conviction and set aside the sentence imposed upon the appellant. The appellant is to be released forthwith from prison unless otherwise lawfully held in custody.

It is accordingly ordered.

**DATED** at **ARUSHA** this 17th Day of August 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**