IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LUBUVA, J.A., NSEKELA, J.A., And NSEKELA, J.A.)

CRIMINAL APPEAL NO. 57 OF 1998

BETWEEN

1. RAJABU JUMA
2. AMANIEL MSHANA
3. MAHAMUDI SHABANI ..... **APPELLANTS**

AND

THE REPUBLIC..... RESPONDENT

(Appeal from the conviction of the RM's Court of Arusha at Arusha)

(Kapaya, PRM/Extended Jurisdiction)

dated the 23rd day of March, 1998
in
Criminal Appeal No. 41 of 1997

JUDGMENT OF THE COURT

KAJI, J.A.:

This is a second appeal. In the District Court of Kiteto at Kibaya, RAJABU JUMA, AMANIEL MSHANA and MAHAMUDI SHABANI who are hereinafter referred to as the 1st, 2nd and 3rd appellants respectively were jointly charged with and convicted of robbery with violence contrary to sections 285 and 286 of the Penal Code, Cap 16. They were each sentenced to 15 yeas imprisonment and 12 strokes

of the cane. They were also ordered to pay LOSERIAN MOLLEL (PW!) Shs. 150,000/= being money they were alleged to have robbed him. On appeal to the High Court where their appeal was transferred to the Resident Magistrate Court of Arusha with Extended Jurisdiction, the appeal was unsuccessful. Hence this appeal.

Briefly the facts giving rise to the case were as follows:-

LOSERIAN MOLLEL (PW1) used to guard the shop of his brother Lemom Mollel. In so doing he used to sleep in a room which was in that shop.

On 5.2.97 at about 10.30 p.m., while PW1 was in the room, he heard a knock at the rear door of the shop. He asked as who was knocking. Mahamud (3rd appellant) identified himself to be the knocker. PW1 asked him what he was looking for at that odd hours of the night to what he replied he had come to deliver a "mzigo" he had been requested by Lemom Mollel to deliver. Since Lemom Mollel used to send the 3rd appellant to deliver "mizigo" at the shop at night

PW1 was convinced. He opened the door. He found the 3rd appellant standing near the door. Suddenly the 3rd appellant pushed him in but he resisted and struggled with him. The 1st and 2nd appellants swarmed in. The 2nd and 3rd appellants got hold of PW1 by his neck and pressed him on the bed while the 1st appellant searched the room by throwing the mattress on the floor. The 1st appellant stole Shs. 150,000/= which was hidden under the mattress. PW1 raised an alarm which was responded to by MUSA ALLY (PW2) and MOLLO JOHN (PW3). It was PW2 who arrived first.

Just when PW2 arrived at the door the appellants got out and ran away. PW3 who had also arrived near the door said he saw the appellants running away from the shop. PW1 was so much injured by the appellants that he lost consciousness. He was taken to hospital for treatment (PF3 Exh. P1). The appellants who were residing in one room were arrested in the same night although at different times. They were taken to Kibaya Police Station and later to court where they were charged with and conviction as above and later their first appeal dismissed.

In this appeal the appellants who were not represented raised a total of 27 grounds of appeal in their separate memoranda of appeal and 11 grounds of appeal in their joint memorandum of appeal. But basically they all revolve on identification and credibility. The appellants argued that the conditions at the material time were not favourable for a proper identification, and that they were not properly identified. The appellants further argued that since PW1 was pressed on the bed and later lost consciousness he could not see what happened thereafter, and that whatever he said happened thereafter before recovery should not be believed. The appellants further argued that since PW3 found the bandits on the run he could not identify them, and that his allegation that he identified them to be the appellants should not be believed.

In reply Mrs. Ntilatwa learned Senior State Attorney, who appeared for the respondent Republic, replied that the appellants were properly identified through solar power light and moonlight, and that the prosecution witnesses were credible. The learned Senior State Attorney further replied that the prosecution evidence was

straightforward, and that what the appellants alleged to be discrepancies were not discrepancies at all but that the appellants had not understood well the judgments or proceedings of the courts below.

On sentence, the learned Senior State Attorney was of the view that the sentence of 15 years imprisonment was improper because the offence charged was committed by more than one person, and therefore was gang robbery whose minimum sentence is 30 years imprisonment as provided for by the Minimum Sentences Act, 1972, as amended by Act No. 6 of 1994.

The crucial issue in this case is identification, that is, whether in the circumstances of the case, the appellants were properly identified. It is in the record that at the scene of crime there was light generated by solar power, and that the appellants and PW1 were village mates who knew each other prior to the event. Further that the event from when PW1 opened the door and found the 3rd appellant standing, got pushed in, pressed on the bed and the room

searched up to when the appellants fled, took a considerable time. We are satisfied that under the circumstances, PW1 properly identified the appellants. We have noted from the evidence of PW1 that the 3rd appellant used to deliver goods at the shop at night from Lemom Mollel. That is why on the material day PW1 did not hesitate to open the door when the 3rd appellant said he had a "mzigo" from Lemom. Just when PW2 arrived at the door where there was full light from the solar power the appellants got out and ran away. They were his village mates whom he knew before. Under the circumstances we are satisfied there was nothing which could have prevented PW2 from making a proper identification of the appellants. We are satisfied PW2 properly identified the appellants.

PW3 arrived when the bandits were on the run. He said he identified them to be the appellants through the solar power light and moonlight. Since he did not elaborate how far he was, there are some doubts in our mind whether he properly identified them. We award the appellants the benefit of doubt. But even if this evidence is discarded, the evidence of PW1 and PW2 proved satisfactorily the

identification of the appellants. Their evidence satisfied the requirements laid down by the Court in WAZIRI AMANI V R (1980) TLR 250 in respect of identification.

The appellants complained that PW1 could not have known what happened when he was unconscious, and that there were some contradictions on the time PW1 was taken to hospital and when he returned from hospital. We have carefully considered this. What happened while PW1 was unconscious was well explained by PW2 and PW3. The discrepancy in time factor is minor as it did not go to the root of the case. It did not vitiate the merit of the case.

As far as sentence of 15 years imprisonment and 12 strokes is concerned, we agree with the learned Senior State Attorney that it was improper. As properly stated by the learned Senior State Attorney, where the offender is in company with one or more persons, the minimum sentence is 30 years imprisonment, as provided for under Section 5 (b) (ii) of the Minimum Sentences Act, 1972, as amended by Act No. 6 of 1994. In that respect we set aside

the sentence of 15 years imprisonment and 12 strokes of the cane and substitute with a sentence of 30 years imprisonment each.

In the event, and for the reasons stated, we dismiss the appeal in its entirety.

DATED at ARUSHA this day of 2004.

JUSTICE OF APPEAL

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