IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA

APPELLATE JURISDICTION

HC. CR. APPEAL NO. 131 OF 2006

(Original Criminal Case No.368/02 of the District Court of Nyamagana District at Mwanza, before S. A. Kasonso, DM)

SOLI RAJABU MRISHO .....APPELLANT
(Original Accused)

Versus

THE REPUBLIC ..... RESPONDENT
(Original Prosecutor)

JUDGMENT

30.08.2008 – 29.10.2008

G. K. RWAKIBARILA. J

Soli Rajabu Mrisho and **James s/o Samweli** who are the first and second appellants respectively were convicted in Mwanza District Court Criminal Case No. 368/2006 of armed robbery c/ss 285 and 286 of the **Penal Code, Cap. 16** as amended by Acts No. 10 of 1989 and No. 27 of 1998. They were each sentenced to serve thirty (30) years imprisonment. They have lodged this appeal challenging their conviction and sentences.

It was established during trial of appellants that PW^1 Thomas s/o Masatu and PW^2 Mashaka Murundi were by 06.04.2002 staying together in one room in a certain house at Mahina area in Mwanza City within Mwanza Region. PW^4 Sospeter Murundi also stayed in that house but in another room alone.

At around 02.00 a.m. on the same 06.04.2002 day the door for the room where PW^1 and PW^2 stayed was smashed and two men whom they identified as the first and second appellants entered there. They had bush knives which they used to inflict injuries on several parts of PW^1 and PW^2's bodies. They also ordered PW^1 and PW^2 to keep quiet. But PW^4 heard the commotion in the neighbouring room. He kept silent at least for some time in order to spare his life.

PW^1 and PW^2 put it that both appellants proceeded to seize various household items from their room and walked away with them. But before leaving that house, appellants locked the door of that room by using an external bolt and therefore PW^1 and PW^2 remained confined inside.

When the commotion faded PW^4 opened the door of his room and walked to the room where PW^1 and PW^2 used to stay. He opened the door of that room by pushing the bolt which was locked from outside. Several neighbours assembled at the **locus in quo** and assisted to escort PW^1 and PW^2 to Igogo Police Station where complaints for this matter were reported. Later on 06.04.2002, PW^1 and PW^2 were assisted to travel to Bugando Medical Centre **(BMC)** where they received proper treatment of the injuries on their bodies.

From 07.04.2002, PW^3 C. 9461 D/CPL Chacha was assigned to investigate on this case. In course of his duties, he interviewed and recorded statements of PW^1 and PW^2. He also took part in facilitating the arrest of appellants before this charge was preferred against them.

During their defence both appellants contended that they were arrested at separate places for other grounds but later implicated in allegations of this offence. They denied their presence at the **locus in quo** and argued that they were not identified there. In fact they reiterated how they were not identified by PW^1 and Pw^2.

In their defence of **alibi**, appellants were supposed to raise doubt on whether they were at the **locus in quo** or not during the material time. But it transpired from what PW^1 and Pw^2 testified how both appellants used to frequent their home in the neighbourhood or friendly missions before 06.04.2002. According to PW^4, both PW^1 and PW^2 narrated that they spotted both appellants immediately after their invasion. Even PW^3 who investigated on this case explained how Pw^1 and PW^2 mentioned appellants immediately in course of his investigations. So that PW^1 and PW^2 were clear and specific when they clarified how light from the lamp in their room was enough for them to identify appellants whom they knew well before the invasion.

Mr. Matuma, learned state attorney who represented the Republic correctly based on the aforesaid circumstances to support the conviction. He explained that so long as appellants were not strangers to PW^1 and PW^2, their identification in a room by light from the lamp was proper. What Mr. Matuma was relying upon is similar with what Hon Lubuva, JA stated in **Evasolingo, MT 6222421 PTE Peter Magoti and MT 62218 Paschal Magawe Vs R (1995) TLR 220** where his lordship held that conditions are favourable for unmistaken identity when there is plausible evidence to show that appellants were not strangers.

The trial magistrate therefore correctly rejected what were raised by appellants in their **alibi**. He was acting properly when he believed evidence of PW^1 and PW^3 who identified appellants at the **locus in quo**. This appeal therefore has no merit and it is dismissed. The conviction of both appellants was proper.

The sentence of thirty years imprisonment for the second appellant James Samwel is not disturbed. But in case of the charge sheet, the first accused Soli s/o Rajabu Mrisho was aged sixteen (16) years in 2002 when an offence was committed. Under Section 22 (2) of the **Children and Young Persons Act, Cap. 13 (R.E 2002),** it is peovided that:-

> *"No young person shall be sentenced to imprisonment unless the court considers that none of the other methods in which the case may be legally dealt with by the provisions of this Act or any other law is suitable"*

And under section 2 of that Act, a young person means a person who is twelve years of age or more but under the age of sixteen years. In this matter, the trial court didn't record anywhere whether an investigation on the proper age of the second appellant was made or another suitable law to deal with him. In the omission of the same, it is fit to revise the sentence of the first appellant (Solo s/o Rajab) to an extent that he shall suffer a sentence of twelve strokes of corporal punishment.

G. K. Rwakibarila
JUDGE
29.10.2008

Date: 31/10/2008

Coram: Hon. G. K. Rwakibarila. J

1st Appellant: Present

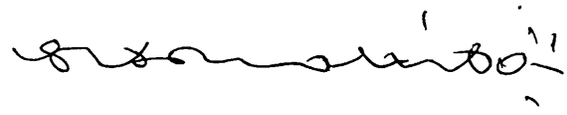
2nd Appellant: present too

For Republic: Mr. Kalunde for Republic

B/S: A. Kaserero

Court:

Judgment delivered at Mwanza this 31st day of October, 2008 and right to appeal in time has been explained thoroughly.



G. K. Rwakibarila
JUDGE

At Mwanza
31.10.2008