IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 240 OF 1995

(Originating from Ilala District Court at Kisutu
Criminal Case No. 215 of 1995)

JACOB MLONGO & 7 OTHERS.....APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

J U D G E M E N T

KALEGEYA, J.

The Appellants, Jacob Mlonga @ Benkichwa, Saidi Mlonga @ Mapesa, Ismail Salum @ Kindonga, Castory Sudi, Saidi Salim @ Kipua, Kipara Mwinyimkuu, Peter Mathew and Halfani Omari @ Daudi (styled 1st - 8th Appellants respectively) having been convicted by the Kisutu Resident Magistrate's Court (Kimaro, PRM) for armed robbery c\s 285 and 286 they are assailing that decision. Each of the Appellants was sentenced to thirty years imprisonment with 12 strokes of corporal punishment save the 6th Appellant, who, owing to his age, estimated to be between 17 and 20 years was sentenced to 4 years imprisonment.

Undisputed facts in this matter are that on 16\2\95, at about 2.00 a.m., PW1's house was stormed by a group of about 15 thieves who, apart from injuring the occupants including PW1, stole various articles whose value is estimated at shs. 2,022,000/=. The robbed premises had two sections - a main house and a rear house. At the time of robbery PW1 lived in the main house while PW2, his son, Tutu Hassan, PW4, Mangapi Hassan, another son, and PW5, Mafuko Ching'ang'a, a tenant, occupied the rear. The premises were lighted. While withdrawing the robbers threw away a video deck and a fan. In the process of stealing, the robbers

injured PW1 on the head; PW2 on his left and right hand and PW5 on his left hand. PW1, 2, 4 and 5 named the Appellants as having been among the group of robbers while PW6, a police officer who was on patrol, maintained to have identified 1st and 2nd Appellant by help of a motor vehicle head lamp lights. He stated further that the 1st accused had a deck while the 2nd accused had a fan both of which were dropped when they (1st and 2nd accused) were flooded with motor vehicle lights.

On appeal to this court the Appellants argued that as the identification was made at night the trial court misdirected itself in convicting on uncorroborated evidence; that the evidence relied upon was of just family members hence not sufficient to found a conviction; that proof of injury allegedly occassioned on PW1, 2, 3 should have been made by the actual testimony of the doctor concerned and not by merely PF3; that under Cap. 13, The Children and Young Persons Ordinance, convicts under 17 years should not be condemned to custodial sentences and finally that being first offenders sentencing them to corporal punishment as well was illegal.

While Appellants argued their appeals in person, Ms Sehe, State Attorney, represented the Republic\Respondent. The latter supported convictions in entirety observing that there was proper identification of the Appellants.

I should outrightly brush aside the complaints regarding the alleged family-members' evidence and the failure to call the doctor for lack of merit. There is no law which prescribes that family members' evidence cannot be relied upon to found a conviction in a charge for robbery committed at night. What is important is the credibility of the witnesses involved and also the circumstances sorrounding a particular case. Jasson Rwembangira case, [1975, LRT No. 26] cited by the Appellants did

not lay down any such principle except saying that in that case, regard being had to its special circumstances independent witnesses were required. Also the question of calling in a doctor to depose physically could not arise for there was no dispute regarding the injuries occasioned nor did the Appellants raise the matter at all during the trial.

I now turn to the question of identification. While appreciating the clear principle of the law which evolved through case law, including those pronounced in Waziri Amani v R (1980) TLR 250 and R v Tinga Kelele (1974) LRT, and which are to the effect that before the evidence of visual identification when conditions of focus are unfavourable, i.e. at night, is relied upon to found a conviction the court should warn itself of its dangers and must be satisfied that it is water-tight, for, a witness may be honest, genuine and yet mistaken (Abdallah bin Wendo and another v R 20 E.A.C.A., 168) in the instant case I am satisfied that the trial court properly directed itself and analysed in details the evidence at hand before convicting. I must emphasise that the legal principles governing the issue do not provide that of necessity there must be corroboration but rather they alert the court that in certain situations it may be necessary while in others it may not. All the same however the court must be satisfied that the evidence is water-tight as regards identification of the accused.

In this case, the trial court went into details to ascertain how each accused (appellant) was identified. First, notwithstanding that it was at night the evidence is clear that the sorroundings had lights both inside and outside. Secondly, the evidence shows that the identifying witnesses (PW1, 2, 4 and 5) had ample time to identify the raiders as they stayed in their vicinity for quite sometime. In fact, PW4, had all the undisturbed chance at his disposal. He had managed to run out of

the house before raiders came to his room. He took cover in the sorrounding banana trees and followed closely what was taking place. Thirdly, the accuseds were not new to these witnesses (PW1, 2, 4 and 5). The Appellants lived in the neighbourhood. They knew each other well. As regards the 1st and 2nd accused there is even corroboration in the evidence of PW6, who was on patrol. He deposed to have been in Vicinity when people were chasing robbers. He deposed, and the trial court believed him, and I find no reason to conclude otherwise, that while running the 1st and 2nd accuseds got caught up in the flood lights of the vehicle he was riding; they dropped the Video Deck and fan they were carrying and run away. PW6 collected the articles which were duly identified by the witnesses as being some of the articles that had been stolen from their house.

From the totality of the above evidence I am satisfied that identification was water-tight and that the trial court was justified in founding a conviction thereon.

Finally, we come to the question of sentence. While the complaint regarding infliction of corporal punishment has no merit as the trial court did not act in excess of its powers, equally the complaint regarding sending to prison a convict aged 17 years is without legs on which to stand.

The trial courts' records shows that the question of age was not taken lightly. The convicts were sent to the doctor to have their age ascertained. These were the 3rd, 4th and 6th accused's (now appellants going by same numbers). After due examination the Doctor concluded that the 3rd and 4th accuseds (Appellants) were each aged between 20 and 22 years while the 6th accused was aged between 17 and 20 years. Treading on this the trial court meted out the required sentence on 3rd and 4th accuseds. Due to uncertainty of the age the 6th accused was sentenced to only 4 years imprisonment. I see nothing wrong with these steps.

In launching the above attack, regarding sentence, the Appellants referred to the (CAT) case of Mohamed Kessy @ Nenga and 3 Others, Cr. Appeal No. 98 of 1992 (Dsm - Registry, unreported). That authority however prescribes nothing different from what the trial court did in this case. In that case, ages of two of the Appellants were uncertain. However, unlike the present case, no attempts were made to ascertain their age. They had been convicted with Robbery with violence and sentenced to 30 years imprisonment each. In reducing their sentences, the court held,

> ".....in view of the uncertainity of the age of the 2nd and 3rd appellant (2nd appellant gave his age as 16 and 3rd appellant in his defence is recorded as 17 years old) these appellants should not have been sentenced under the minimum sentences Act as they were apparently below the age of eighteen years.....In view of their age their sentences of 30 years imprisonment is set aside. They are in substitution thereof each sentenced to 4 years imprisonment".

Treading on this, and The Children and Young Persons Ordinance Cap. 13 there was nothing illegal about sending 6th Appellant to prison because there was certainty regarding his age - he was above 16 years hence not a "young person", for, that term covers only those between 12 and 16 years.

For reasons discussed above the appeals stand dismissed.

(L. B. Kalegeya)

JUDGE

Judgement delivered in the presence of Mr. Mdeme, State Attorney, today the 15th January, 1999.

(L. B. Kalegeya)

JUDGE

15\1\99