IN THE HIIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 342 OF 2017

1. TWAHIL S/ O SEIF ALLY@ SPANGALA...

2. ROBERT S/O DEUS ..... APPELLANTS

VERSUS

REPUBLIC ..... RESPONDENT

29/3/2018 & 27/4/2018

JUDGMENT

I.P.KITUSI, J.

Before Temeke District Court in Dar es Salaam where Twahili s/o Seif Ally@ Spangala and Robert s/o Deus the first and second appellant respectively, were charged with Armed Robbery Contrary to Section 287"A" of the Penal Code, it was alleged that on 6th July 2016 at Temeke Maganga area within Temeke District the appellants stole one mobile phone, make Huwawei valued at 150, 000 one moderm of 3G valued at Shs 40,000/= and one computer valued at Shs 590,000the property of Sultan Hamis Matela whom they threatened with bush knife in order to obtain the properties.

After hearing four witnesses for the prosecution and the appellant's two witnesses the trial court was satisfied that the offence had been proved beyond reasonable doubts. It convicted the appellants

and sentenced each to a custodial sentences of thirty(30) years imprisonment. By this appeal both appellants seek to challenge the convictions and sentences praying that this court quashes the said conviction and sets aside the sentence.

The first appellant has presented seven numerical grounds whereas the second appellant presented six numerical grounds. I am intentionally using the word numerical because most of them are a repetition and may easily be combined. So for the first appellant after combining the grounds of appeal I think they fall into the following groups;

1. Grounds No 1, 4 and 6 challenge the trial court for basing a conviction of the first appellant on un firm evidence of visual identification.
2. Grounds No. 2 and 3 attack the decision of the trial court for being based on a cautioned statement of the first appellant that not only was retracted and repudiated but it was illegally taken outside the time limit and was uncredible.
3. Ground No. 5 challenges the trial court for relying on the evidence of Pw1, Pw2 and Pw3 who did not describe the culprits they alleged to have identified at the scene.
4. Lastly and may be generally it is alleged that the offence was not proved beyond d reasonable doubt.

The same grounds invariably match with those of the second appellant except for his allegation contained on ground No. 4 that Pw1, Pw2 and Pw3 did not know him before but they did not give a description of him.

During the trial, Sultan Hamir (Pw1) Jasmin Baruani (Pw2) and Tuhuma Sultani (PW3) stated under oath that they knew the first appellant before the date of the alleged robbery, that is, 6th July 2016. On this date Pw1 was in his office outside the residence of Pw3 who happens to be his father. Pw2 who is Pw1's wife had visited her in laws, so she was with Pw3 and other family members in the sitting room at about 9.00 P.M when Pw1's office was invaded by a group of armed bandits.

Pw1 who is the star witness testified that on the fateful night a group of about 20 people armed with sticks and machetes stormed into his office at about 9.00 P.M. As the bandits went about taking items from the office Pw1 unsuccessfully tried to stop them but surrendered when one of them placed a knife on his neck in threat. Pw1 stated that he could identify two of the assailants, and those are the appellants. He testified that he could identify the two culprits because of the light supplied by a source from outside his office and because he knew the first appellant well before. Pw1's testimony was that the bandits made away with a mobile phone and a computer both belonging to him.

When this was happening to Pw1, Pw2 and Pw3 were in the main house watching but could do nothing about it. They explained the reason for their inaction as being threats made by the bandits although they (Pw2 and Pw3) also managed to identify the two appellants.

Pw1 reported the robbery at police on the same night and two days later he was summoned to police station to identify his assailants who had been arrested in connection to other offences. Pw1 identified the two appellants. According to DC Hamisi (Pw4) he recorded the first appellant's cautioned statement in which he confessed to have committed the robbery, implicating the second appellant in the process.

The first appellant objected to the admissibility of the cautioned statement alleging torture and repudiating it. He stated that he was arrested on 9/7/2016 but the statement was recorded on 8/7/2016 a day earlier. After an inquiry however the statement was cleared for admission and it was marked Exhibit P1.

In defence the appellants gave sworn statements in which they denied taking part in the alleged robbery and attributed the case to fabrication aimed at getting even with them for previous misunderstandings. I take the view that I need not refer in detail to the alleged previous conflicts as the appellants did in their testimonies for reasons that will be clear in due course.

In his judgment the learned Resident Magistrate correctly identified the main issue for determination as being whether the

evidence of visual identification was sufficient to convict the accused persons (appellants).

Thereafter he concluded that the evidence of Pw1, Pw2 and Pw3 was impecable and made him find the identification to have been watertight.

I may as well begin by weeding out grounds of appeal which are outright misplaced and/ or devoid of merits. In that regard and considering the ground of the trial court's decision, all complaints related to inadequacies in the cautioned statements are mere moot because they have nothing to do with the decision of this appeal one way or the other. Thus grounds No.2 and 3 of the appeal related to the cautioned statement are dismissed for being irrelevant and without merits.

At the hearing of the appeal Ms. Veronica Mtafya, learned State Attorney representing the respondent Republic declined to support the conviction on the ground that the evidence of visual identification which the trial court found to be watertight was, to the learned State Attorney, insufficient.

The learned State Attorney submitted that according to Pw1 the light that facilitated his identification of the culprits came from outside the office where he was, but Pw1's testimony did not establish the intensity of that light nor the duration during which he had the said culprits under observation. She had similar criticism of Pw2's evidence of visual identification referring to her testimony that she could see the culprits from the window.

On their part, the appellants who had earlier expressed no intention to submit on the appeal were all the more contended and had nothing to say seeing the respondent's Attorney play into their hands.

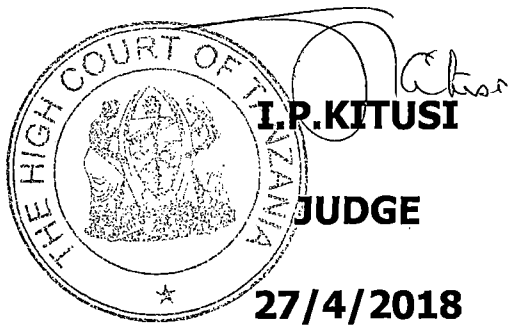
As I said earlier, I respectfully agree with the learned trial magistrate that the appeal turns on the issue of visual identification. I feel that the appeal calls me to determine whether the learned Resident Magistrate arrived at the correct destination in concluding that the evidence of visual identification was watertight

My deliberations will be brief, I think, because the law is settled and easy to apply. If I may restate the principles before testing them against the facts, it is said that evidence of visual identification in unfavorable circumstances is of the weakest type. As early as 1980 **Waziri Amani V. Republic** [1980] TLR 250 and many subsequent decisions it has been held that it is not enough for a witness to say he identified a culprit at night without stating the source of light its intensity, the distance between him and the culprit, the duration during which he observed the culprit and whether or not he knew the culprit before.

In this case the only aspect the prosecution witnesses testified on was their familiarity with the appellants but nothing has been said by them regarding the intensity of the light, the distances and the duration they had the culprits under observation. I am also mindful of the fact that there were about twenty (20) bandits, a factor that renders identification of only two of them less probable. In my

conclusion I respectfully agree with Ms. Mtafya learned State Attorney that the learned trial Resident Magistrate erred in holding that there was sufficient evidence of visual identification. Having taken that position there is no need for me to discuss the defence case because the prosecution totally failed to discharged its burden of proof.

This appeal is, for those reasons allowed. The judgment of the trial court is quashed and the sentences of thirty years imprisonment is set aside. If not held for some other offence the two appellants should immediately be set free.



I.P.KITUSI

JUDGE

27/4/2018

27/4/2018

Coram : HON. MAGUTU –DR

For the 1ST Appellant : Present

For the 2nd Appellant : Present

For the Respondent : Ms Heleni Mashuhuli SA

Cc: MWANGOKA

Ms. Helen Masuhuli State Attorney: The case is coming up today for judgment. We are ready to receive it.

Court: The judgment delivered on 27/4/2018 in presence of Helleni Masuhuli for the respondent and appellants

A.A.MAGUTU

DR

27/4/2018