IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: Nyalali, C.J., Mwakasendo, J.A. and Kisanga, J.A.)

CRIMINAL APPEAL NO. 57 OF 1979

B E T W E E N

1. DAMIANO PETRO)
2. JACKSON ABRAHAM) : : : : : : : : : : : : : : : : APPELLANTS

A N D

THE REPUBLIC : RESPONDENT

(Appeal from the Conviction and Sentence of the High Court of Tanzania at Arusha (Mnzavas, J.) dated the 3rd day of October, 1979,

in

CRIMINAL SESSIONS CASE NO. 48 OF 1979

JUDGMENT OF THE COURT

MWAKASENDO, J.A.:

The two appellants, DAMIANO PETRO and JACKSON ABRAHAM, were convicted for the murder of SHABANI MIYOMBO on 11th day of September, 1975, and sentenced to death by the High Court of Tanzania sitting at Moshi. Mr. Mlawa, counsel for the Republic, supported the finding of the trial High Court. The two appellants however, are aggrieved by this finding of the trial High Court on the following grounds:

(a) That the learned trial Judge erred in accepting the testimony of P.W.3 as being sufficient in establishing the identity of the appellants as the assailants of the deceased;

(b) That the learned trial Judge erred in holding that the case for the prosecution had been proved beyond reasonable doubt on the purely circumstantial testimony of P.W.3, whose testimony was not corroborated, an issue the learned trial Judge failed to address himself to or put to the assessors; and

(c) That the learned trial Judge erred in convicting the second appellant of the offence charged, on the mistaken finding that the second appellant by telling DAMIANO "throw away the knife" amounted to aiding and abetting the commission of the offence under section 22(c) of the Penal Code.

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The facts in this case are quite simple. SHABANI MIYOMBO at the time he met his death lived and worked at Kiriri mine situated in the Landanai area of Kiteto District. He was a miner. And so were the two appellants. On 11th September, 1975, the deceased left his homestead at the mine camp intending to visit his wife who was living in Landanai town. On his way he passed the camp at which JOSEPHAT ANTONY, P.W.3, was working as a Guard. JOSEPHAT in his testimony before the trial High Court described the incident leading to the deceased's death thus:

> "Sometime in 1975 I was at the camp working as a guard. On this day the deceased passed at my camp from their camp looking for a person to accompany him to Landanai town. I told him that there was no one from my camp going to the town as all people were still at work. Deceased's wife lived in the town. After failing to get someone to accompany him to the town he decided to return to his camp. He started returning back to his camp. As he finished the boundaries of our camp I heard an alarm saying "I am dying I have been stabbed". It was only a few minutes after he had left me that I heard the alarm. I ran towards where the alarm was coming from and I saw two people standing beside the deceased. One of them was holding a knife and looking at the deceased. The two people were Damian and Jackson. Damian was the person who was holding a knife. The knife was blood-stained. Jackson was standing by. He was unarmed. The deceased was lying on the ground already stabbed. He was not armed. I knew Damian and Jackson before the incident. They were working at Landanai mine. .....It was about 3 p.m. when I saw them beside the deceased. I raised an alarm and they started running away. Villagers came and we started chasing them. As we were chasing them Jackson said to Damian 'throw away the knife'. Damian threw the knife on the ground."
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> (The underlining has been made by the trial court)

JOSEPHAT then tells of the chase, the apprehension of the two appellants and their interrogation. The other two witnesses JUMA HASSAN (P.W.1) and IBRAHIM SHABAN (P.W.2) who gave evidence at the trial add only a little colour to JOSEPHAT's evidence.

At the trial the first appellant, DAMIAN PETRO in an unsworn statement denied killing the deceased but gave his own version of what took place on the day the deceased met his death.

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> "I remember on 11.9.75 I was working at the Landanai Mine owned by one, Ali Juuyawatu. On that day I had gone to one Yusufu's mine to get some flour. I remained at the mine for a while waiting for the man responsible for distributing flour. Then we decided to look for the man in nearby house. We went to a house where there was 'pombe' and we started drinking. I was accompanied with one person who later left. I continued drinking. As I was there two people started quarreling over money. Then they started quarreling over a gallon full of pombe. The gallon of pombe fell and the pombe poured on me. Other people also got their clothes soiled by the pombe. These people thought that it was I who had started the fracas and they started attacking me. As they were attacking me I heard one of the man saying 'I am dying I have been stabbed'. Then people arrested me. They searched me and took my knife and shs. 300/-. One Joseph is the one who searched me. Joseph said that it was I who stabbed the deceased. They tied my arms and attacked me. I was then sent to the police station. ....."

The learned trial judge considered the defence put up by the first appellant DAMIAN PETRO but rejected it. We think the learned trial judge was perfectly justified in rejecting first appellant's story and convicting him as charged. Mr. Kiritta, appearing for both appellants, has attacked this finding of the trial judge presumably on the ground that the circumstantial evidence in the case was, according to him, insufficient to ground a conviction of the first appellant. We do not agree. Again, Mr. Kiritta complained about the quality of identification evidence by JOSEPHAT but we think his complaint in this connection groundless. As the learned trial judge correctly observed after a detailed consideration of the circumstances surrounding the stabbing of the deceased, there could not be in this case any doubt whatsoever as to the identity of DAMIAN PETRO as the man JOSEPHAT saw standing at the scene of crime holding a blood-stained knife. In the result, we uphold the conviction of DAMIAN PETRO for the murder of SHABANI MIYOMBO and dismiss his appeal.

The case against the second appellant, JACKSON ABRAHAM, is, in our view, slightly different. As rightly pointed out by Mr. Kiritta, the conviction of the second appellant was based on two crucial factors.

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First, that the second appellant was seen by JOSEPHAT in the company of the first appellant and although the second appellant was unarmed, it was argued on behalf of the prosecution and accepted by the trial court that the fact of his mere presence at the scene of crime in circumstances which indicated that he did not dissociate himself from the actions of the first appellant coupled with his running away from the scene of crime when the alarm was raised, justified the conclusion that he was an aider and abettor in terms of section 22(c) of the Penal Code. And secondly, that the telling advice to Damian to throw away the knife, supported the view that JACKSON was not a mere indifferent observer to the crime. We agree with Mr. Kiritta, learned counsel for the second appellant, that these factors cannot by themselves ground a conviction of murder. To take the first factor first. For a person to be adjudged an aider and abettor it is not necessary that he should be actually present or be an eye-witness or ear-witness of the crime. He is in construction of the law, present, aiding and abetting, if, with the intention of giving assistance, he is near enough to afford it, should occasion arise. Thus, if he is outside the house, watching, to prevent surprise, or the like, whilst his companions are in the house committing an offence, such constructive presence, the law says, is sufficient to make him an aider and abettor to the person who commits the offence and therefore a principal in the second degree. (See Archibold's Criminal Pleading, Evidence and Practice - 37th Edition - paragraph 4124 and section 22 of the Penal Code, Cap. 16). However, to constitute a person an aider and abettor mere presence is not enough (Archibold, supra - para 4126). The person must also participate in the act to some extent and it follows that a person present at the scene of crime who takes no part in it and does not act in concert with the one who commits the crime cannot become a principal in the second degree merely because

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he does not endeavour to prevent the offence or fails to apprehend the offender. The Court of Appeal for East Africa had occasion to deal with the provisions of paragraphs (b) and (c) of section 22 of our Penal Code in the case of ZUBERI s/o RASHID (1957) E.A. 455 at pp. 458 - 459 when the Court said:

> "The learned judge, however, correctly directed himself that it is not sufficient to constitute a person a principal in the second degree that he should tacitly acquiesce in the crime, or that he should fail to endeavour to prevent the crime or to apprehend the offenders, but that it is essential that there should be some participation in the act, either by actual assistance or by countenance or encouragement.
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> The question whether or not the appellant's conduct amounted to "countenancing" the offence is a question of fact. In R. v. Coney and Others (1882) 8 Q.B.D. 534 at page 557 HAWKINS, J., stated the position as follows:
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> > 'In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intenationally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not.'"

The Court of Appeal approving the trial judge's direction on the law applicable to cases of principals in the second degree said at page 459:

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> "There may be cases where mere passivity will amount to abetment because special circumstances impose a duty which the law recognises actively to dissociate oneself from what is about to be done. We think this duty would arise if there had been any antecedent factor which might fairly lead the intending principals to believe that the motive for non-interference was a desire to afford encouragement.
> Wilcox v. Jeffrey (1951) 1 All E.R. 464."

In the instant case we cannot see anything in the circumstances of the case to establish that the conduct of the second appellant, JACKSON ABRAHAM, was such as would have induced a reasonable belief in DAMIAN PETRO that his (JACKSON's) non-interference in what DAMIAN was doing was a desire to afford encouragement.

Consequently, we are unable to accept the view of the learned trial judge that JACKSON ABRAHAM was, in terms of the provisions of paragraph (c) of section 22 of the Penal Code, an aider and abettor of the crime committed by DAMIAN PETRO. Having reached this conclusion we have considered whether in view of the second appellant's subsequent advice to DAMIAN to throw away the knife we would be entitled to substitute a conviction of being an accessory after the fact (sections 387 and 388 of the Penal Code) to murder for that of murder, but we have finally rejected such a course because the law does not permit it - See judgment of the Court of Appeal for East Africa in Muriu s/o Wamai and Others (1955) 22 E.A.C.A. 417 at page 418 and Velezi Kashizha v. Reg. 21 E.A.C.A. 389.

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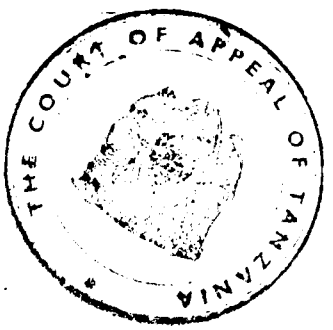
For the foregoing reasons, we allow the appeal by the second appellant, JACKSON ABRAHAM, quash his conviction for murder and set aside the sentence. He should be released from prison forthwith unless he is detained therein on some other matter.

We order accordingly.

DATED at ARUSHA this 6th day of May, 1980.

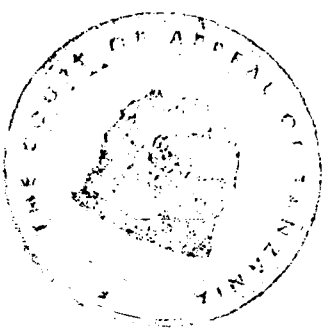


F. L. NYALALI

CHIEF JUSTICE

Y. M. M. MWAKASENDO

JUSTICE OF APPEAL



R. H. KISANGA

JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(L. A. A. KYANDO)
DEPUTY REGISTRAR