

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

(CORAM: MSOFFE, J.A., KIMARO, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 463 OF 2008

EMMANUEL S/O JAMES @ JOSEPH.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Mwita, J.)

**dated the 28th day of August, 2007
in
Criminal Appeal No. 96 of 2005**

JUDGMENT OF THE COURT

16 & 20 June, 2011

MSOFFE, J.A.:

It is common ground that on 30/1/2005 at 23.30 hours the residence of PW1 Mashaka Moshi was invaded by three armed bandits. At that time PW1 had not gone to bed and was still talking with his fellow businessmen, PW2 Ibrahim Nungu and PW3 Frank John. The trio were forced by the three bandits to enter into one room. In the meantime, the bandits demanded to be given mobile phones which PW2 had brought from

Mwanza. The bandits were given four mobile phones. PW3 tried to go outside the house after which two bandits followed him. It was at that point in time when PW2 grabbed the appellant and PW1 closed and locked the door. The other bandits were thus locked out. PW1 and PW2 raised an alarm. Some people, including PW4 No. E5201 PC Fisha, responded to the alarm. The people found the appellant unconscious. He was taken to hospital. On the following day he gained consciousness and was able to make a cautioned statement which was eventually produced and admitted in evidence as exhibit P5. It was principally on the basis of the above evidence that the District Court of Nzega (K. M. Rashidi, DM) convicted the appellant of burglary and armed robbery contrary to sections 294(1); and 285 and 286, respectively; of the Penal Code and sentenced him to respective terms of five years and thirty years imprisonment. On appeal to the High Court at Tabora (Mwita, J.) the conviction against burglary was quashed. The High Court went on to discard the evidence on the cautioned statement because *"it was read in court before it was admitted in evidence and the appellant was not given an opportunity to object to its admissibility"*. Having excluded the cautioned statement the High Court sustained the conviction and sentence on the second count of armed

robbery "*because the appellant was apprehended at the scene of crime*". Still aggrieved, the appellant has preferred this second appeal. He appeared in person, unrepresented. On the other hand, the respondent Republic had the services of Ms. Lilian Itemba, learned State Attorney, who declined to support the conviction.

With the cautioned statement excluded from the evidence, it follows that the only other evidence against the appellant was that he was seen at the scene of crime on the fateful day and time. On this, Ms. Lilian Itemba was of the strong view that that alone did not necessarily mean that the appellant was at the scene with a view to executing a criminal act. She urged that, after all, the appellant explained that he was there at that point in time with a view to buying some "*rambo*" (mifuko) bags, an assertion which was supported by his witness, DW2 Abdallah Selemu. In the light of this, Ms. Lilian Itemba, went on to submit, the appellant ought to have been given the benefit of doubt and thereby earn an acquittal because he raised reasonable doubt on the prosecution case against him.

With respect, we are in agreement with Ms. Lilian Itemba. It is true that there was no dispute at the trial that the appellant was seen at the scene of crime. It is also true that he was not contradicted by the prosecution in his assertion that he was at the scene on an innocent purpose of buying the "rambo" bags. In the circumstances, the appellant's mere presence at the scene, without more, did not necessarily make him a criminal.

In a more or less similar situation, in **Jackson Mwakatoka and two others v R** (1990) TLR 17 at page 21 this Court quoted with approval a statement from a decision of the defunct Eastern African Court of Appeal in **R v Komen** that: -

Mere presence of the accused at a killing, he not having any objection thereto, is not enough to justify his conviction for murder.

In similar vein, Ms. Lilian Itemba referred us to this Court's decision in **Damiano Petro and Jackson Abraham v Republic** 1980 TLR 260

where at page 262 the Court quoted a passage by Hawkins, J. in **R v Coney and Others** (1982) 8 Q.B.D. 534 at page 557 that; -

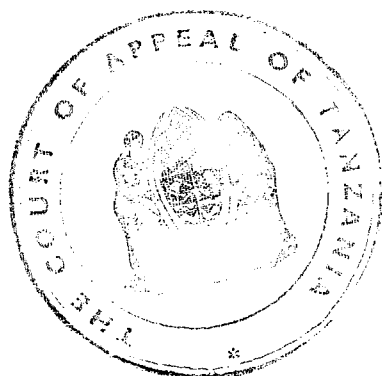
...It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he 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 above passage also appears in **Zuberi Rashid v R** (1957) E.A. 455 at page 458.

From the above authorities we discern one major point for purposes of this case. For a conviction to safely lie against the appellant there ought

to have been evidence that he took some active steps by word or action with intent to instigate the bandits. Apparently no such evidence was forthcoming in the case. In the absence of such evidence it could not be safely said and concluded that the appellant was guilty of the armed robbery in question. For this reason, we hereby allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released from prison unless he is otherwise lawfully held.

DATED at TABORA this 18th day of June, 2011.



J. H. MSOFFE
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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

A handwritten signature in black ink, appearing to read "E. Y. Mkwizu", is written over a horizontal line.

(E. Y. Mkwizu)
DEPUTY REGISTRAR
COURT OF APPEAL