IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CORAM: KILEO, J. A, ORIYO, J.A., And MMILLA, J.A.

CRIMINAL APPEAL NO. 292 OF 2013

1. **JOHN STEPHEN**
2. **OBED JOHN .....APPELLANTS**

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Moshi)

(Makuru, J.)

dated 13th March, 2012

in

Criminal Session No. 48 of 2006

.....

JUDGMENT OF THE COURT

8th & 24th September, 2014

MMILLA, J.A.:

The appellant, Obed John and one John Stephen were convicted as charged of the murder of Richard Abdi **(the deceased)** by the High Court sitting at Moshi. They were sentenced to death. Aggrieved by conviction and sentence, each one instituted his own appeal in this Court. Unfortunately, John Stephen (**whom we will be referring to as the late John Stephen)** died on 22.6.2014 at Bombo Hospital in Tanga Region as a result of which his appeal abated.

The facts of the case as were found by the trial High Court were briefly that, the late John Stephen and the appellant were father and son. They were related to the deceased who was the latter's uncle and

were neighbours in their village of Masama Roo in Hai District in Kilimanjaro Region where all of them lived.

On 13.4.2003 at around 8.00 pm, the deceased was at his home in that village in the company of, among other persons, his sons including PW1 Alfa Richard and the latter's friend one Israel Michael. Around that time, the appellant went to the deceased's home and inquired why they were making noise. The deceased's reply that he was at his home talking to his children seems to have infuriated the appellant who produced a panga he had hidden under his shirt and attacked the deceased with it twice; firstly on the back using the blunt side, and the second blow landed on the deceased's face using the sharp side after which, he ran away before PW1 and his brothers could organize themselves to retaliate.

The deceased asked PW1 and his friend, Israel Michael to escort him to the ten cell leader. They proceeded to the home of Santiel Manyase to whom the deceased explained what befell him. Santiel Manyase told them that he was not the ten cell leader of the appellant and directed them to report the incident to one Charles. They heeded.

On their way to the home of Charles, they found the late John Stephen on the way after covering a distance of about ten steps who emerged from the hedge of Lenison John, another of the latter's sons. He was said to have exclaimed: ***"Obed hajakumaliza?"*** In other words, he wondered why Obed (the appellant) had not finished him. It was then that the late John Stephen produced a machete which he was

hiding and launched two sudden attacks. The first attack was aimed on the head but the deceased raised a hand to protect himself as a result of which he chopped off his right arm. The deceased staggered and fell down. The second blow landed in the deceased's neck. The attacker turned on PW1 and his colleague but they ran away. He attempted to chase them but could not catch them. They raised alarm and went to report the incident to the ten cell leader. People responded to the alarm, subsequent to which they converged at the scene of crime. On arrival there, they found the deceased had passed away. Among the persons who were there were the village chairman and the secretary who resolved to report the incident at Bomang'ombe Police Station. A couple of them boarded a min bus (Hiace) and left for Bomang'ombe.

On the way to Bomang'ombe Police Station, they found the late John Stephen at a bus stand waiting for transport. The driver of that bus was asked to stop and he boarded therein. On being asked by the village secretary where he was going, the late John Stephen told them that he was going to Bomang'ombe Police Station to report that someone was killed near his home. The villagers wisely remained calm until they arrived at Bomang'ombe Police Station at which they reported the incident and named the late John Stephen as suspect number one. The police arrested him after which the village secretary and his team left for their home village.

On arrival at Masama Roo village, the group went straight to the scene of crime at which some of the villagers had remained guarding the dead body of Richard Abdi. The people who were there told them

that the appellant was throwing stones at them. They traced and arrested him. He was allegedly found hiding behind a toilet at the home of the late John Stephen at which he had kept a heap of stones. They took him to Bomang'ombe Police Station, after which they returned to their village.

The deceased's body remained at the scene of crime until at about 02.00 pm the next day when it was taken away by the police. Investigation was carried out resulting into charging the appellant and his late father, the said John Stephen of the murder of Richard Abdi as aforesaid.

The prosecution side called five (5) witnesses of whom PW1 Alfa Richard was the only eye witness who witnessed both attacks; the first attack which was carried out by the appellant and the second attack that was perpetrated by the late John Stephen. The other witnesses, whose evidence will be considered in the course, were PW2 Adresi Fundi Swai, PW3 Manase Ndesario Swai, PW4 Entinisimbo Richard and PW5 No. C 6364 D/Sgt (Rtd) Godwin Mweya.

In his defence the appellant (DW2) was categorical that he did not kill the deceased. He tenaciously contended that he never ever went to the deceased's home on that day. To the contrary he said, it was the deceased who at around 12.00 pm on that day went to his father's home at which he happened to be, and that the deceased, who was drunk not only abused him but also threatened to beat him. He contended that one Elisante who was among his sons pleaded with him

and they left for their home. He allegedly heard of the deceased's death about half an hour later for which he also joined others at the scene of crime.

On another point, the appellant testified that there was bad blood between him and PW1 as they once quarreled over a furrow. He was clear that PW1's evidence against him was nothing but a spurious or false account.

At the end of trial, the trial High Court was satisfied that PW1 was a credible witness who sufficiently identified the appellant and his father as the persons who attacked and killed the deceased, also that there were pieces of evidence from other prosecution witnesses which landed support to that witness' evidence on some other aspects linking him to the charged crime, therefore sealing the fate of the appellant and his accomplice. While that court rejected the appellant's evidence in defence for being fanciful and unbelievable, the trial High Court was satisfied that the killing was premeditated.

In this Court the appellant who was personally present, was represented by Mr. Moses Mahuna, learned advocate, while the respondent Republic was represented by Ms Eliaineny Njiro, learned State Attorney who declined to support conviction and sentence.

The memorandum of appeal filed by Mr. Mahuna on behalf of the appellant raised three grounds as follows:-

(1) That the learned judge erred in law and on fact by convicting the appellant with murder in the absence of the necessary elements establishing the offence of murder, and failure of the prosecution to prove their case to the standard required by law.

(2) That the learned trial judge erred in law and on fact by convicting the appellant basing on the weak and uncorroborated evidence of PW1.

(3) That the learned trial judge erred in law and on fact by convicting the appellant for murder without considering the weight of the evidence against the appellant under exhibit P1 – the post mortem report.

When he appeared before us, Mr. Mahuna proposed to argue the three grounds he raised generally on account that they were interrelated. He began by laying the foundation that the appellant denied the allegations that he ever attacked the deceased. Even where it was to be believed that he assaulted the deceased, he submitted, the evidence of that witness was that he attacked him with a panga applying the blunt side thereof which did not reflect intention to kill which is a pre – requisite ingredient in the charge of murder. This is especially so, he said, when the evidence of PW1 regarding the areas at which the blows he inflicted allegedly landed is pegged to the contents of the post mortem report constituted in exhibit P1. He referred the Court to the case of **Republic v. Betram Mapunda and Optatus Tembo** (1982) T.L.R. 1. In that case, the court inferred malice aforethought from the nature of the wound which clearly showed that the person who inflicted it intended to kill. Mr. Mahuna submitted that

the circumstances in that case resembled to the circumstances in the present case. In his view, since the fatal wounds which killed the deceased in our present case were inflicted by the late John Stephen, there is no gainsaying that it was he who killed the deceased and not the appellant.

On another point, Mr. Mahuna submitted that the testimony of PW1 that the late John Stephen uttered the words ***"Obed hajakumaliza, then I will finish you,"*** before launching the fatal attack on the deceased were improperly believed and relied upon as evidence connecting the appellant to the murder of the deceased because it was not corroborated as it should have been. He contended that had the Court disbelieved PW1, it could not have invoked the doctrine of common intention. Given that situation, the trial court could have been bound to find the appellant not guilty of that offence. He referred the Court to the case of **Mhina Mdolwa @ Mhina v. Republic**, Criminal Appeal No. 49 of 2007, CAT (unreported), in which it was found that there was no evidence to establish that the appellant inflicted any harm on the deceased, or that he and the irate mob had formed a common intention to kill the deceased. It concluded that the court below erred in importing the doctrine of common intention into the case to implicate the appellant. He persuaded this Court to make a similar finding in the instant case.

Another important point advanced by Mr. Mahuna was that, because the appellant was not in the company of the late John Stephen at the time the latter was alleged to have attacked the deceased, that

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Another important point advanced by Mr. Mahuna was that, because the appellant was not in the company of the late John Stephen at the time the latter was alleged to have attacked the deceased, that

was a clear indication that he disassociated himself, thus ruling out the application of the doctrine of common intention.

On yet another point, Mr. Mahuna submitted that the evidence of the prosecution witnesses that the appellant was the one who was found throwing stones at the crowd at the scene of crime on that night was incorrectly believed on account that no direct evidence was led by any of the prosecution witnesses on the point. He concluded therefore that the appellant was wrongly found guilty of that offence and prayed for his appeal to be allowed.

As already pointed out, Ms Njiro supported the appeal. In the first place, she shared the views of Mr. Mahuna that there was no convincing evidence to establish that the appellant had a hand in the death of the deceased because the injuries which caused the deceased's death were not inflicted by him.

She similarly submitted that the doctrine of common intention was not properly invoked in that no witnesses supported the testimony of PW1 that the late John Stephen uttered the words ***"Obed hajakumaliza, then I will finish you."*** However, she supported the finding of the trial High Court that the appellant had attacked the deceased before the latter was ultimately hacked to death by the late John Stephen sometime later.

We wish to make ourselves clear that aware though of rule that the trial court is best placed to determine the credibility of a witness, especially so where the decision of the case is wholly based on the

credibility of the witnesses, this being a first appeal, we are entitled to re – evaluate afresh the entire evidence and arrive at our own conclusions of fact if need to do so arises – See the cases of **John Balagomwa & 2 others v. Republic**, Criminal Appeal No. 56 of 2013, CAT and **Maramo Slaa Hofu & 3 others v. Republic**, Criminal Appeal No. 246 of 2011, CAT (both unreported). We make it plain that we shall take into consideration this principle when determining the present appeal.

There is no controversy that PW1 was the key witness in this case, and that to a large extent the decision of the trial High Court rested on his evidence. He was the only one who witnessed all what happened from the beginning to the end. He told the trial court about the appellant's arrival at the deceased's home on 13.4.2003 at around 7.00 pm, also about the inquiry he made regarding the alleged noise and the attack he launched against the deceased. As already pointed out, he was clear that the appellant assaulted the deceased twice using a panga, the first blow having landed on the deceased's back for which he applied the blunt side of the said panga and the second blow landed on the face.

Let us point out at this juncture that we agree with Mr. Mahuna that the details in the testimony of PW1 that the second blow landed on the deceased's face and caused a cut wound below his right eye was not covered in the post mortem report (exhibit P1). However, as reflected on page 24 of the court record, PW1 was express that the blow inflicted by the appellant on the deceased's face could not have

caused the death of his father. That presupposes that it was not a serious injury. We wish to point out in this connection that the doctor who medically examined the dead body of Richard Abdi was in essence enjoined to determine the cause of death, therefore that it was possible that he ignored minor injuries which had, in his opinion, no contribution to the determination of the task he had.

Looked from a different angle, even where we were to say that that portion of evidence constituted a contradiction when pegged to the contents of exhibit P1, we would still say that such a contradiction was a minor one which did not go to the root of the matter at stake, thus required to be ignored - See the case of **Dikson Elia Nsamba Shapwata & Another v. Republic,** Criminal Appeal No. 92 of 2007, CAT (unreported). The reason is clear that the fundamental point here was the deceased's cause of death which was what exhibit P1 was all about.

In the circumstances of this case, we are required to explore whether or not the appellant had anything to do with that death, particularly so when it is obvious from the evidence of PW1 that the fatal blows were inflicted by the late John Stephen. This takes us to two fronts; **firstly** the credibility of the evidence of PW1, and **secondly** the application or otherwise of the doctrine of common intention in the circumstances of this case.

The trial court found and held that PW1 was a credible witness. It believed that he unmistakably identified the appellant and the late John

Stephen as the persons who on that day attacked the deceased, the appellant having attacked him at around 7.00 pm and the late John Stephen at around 7.30 pm. It is also important to note that, the trial High Court chose to be guided by the case of **Anangisye Masendo Ng'wang'wa v. Republic** [1993] T.L.R. 202 and warned itself of the danger of relying on the evidence of a single witness in founding a conviction in a serious charge of murder. It did so after it was satisfied that PW1 was a witness of truth whose evidence was believable and reliable while on the other hand it was contented that the appellant's defence was fanciful and unbelievable.

After earnestly considering the evidence of that witness, we are satisfied and we agree with the trial judge that PW1 was a witness of truth, therefore that the trial court properly found that he was a credible witness. Reading from the record, he was a straight forward witness whose evidence was free of contradictions which is attributable to the fact that he had opportunity for proper observation because he very well knew the appellant and the late John Stephen and was very consistent. In view thereof, we have no reason at all to fault the trial court's finding on the point. Thus, his evidence was properly believed and relied upon as representing the truth of what he saw and heard.

As already pointed out, the blows inflicted by the appellant were not the immediate cause of the deceased's death, but that the fatal blows inflicted by the late John Stephen were. According to PW1, the late John Stephen cut the deceased with the machete in the right hand thereby chopping off his arm, a blow which sent the deceased down,

and that he directed the second blow on the neck. No doubt, those were deadly blows. As may be recalled, the doctor's report (exhibit P1) was that death was due to severe ***haemorrhage*** resulting from ***"(1) Cut wound (L) side neck involving the carotid artery and jugular vein; (2) Cut wound left wrist separating completely the joint."*** This indicates how fatal the blows inflicted by the late John Stephen were. However, as pointed out above, the crucial issue is whether or not the appellant had anything to do with the deceased's death, or rather the appellant's connection to deceased's death.

In finding the appellant guilty of murder in the circumstances of this case, the trial High Court invoked the doctrine of common intention. We hasten to say that we agree with that finding and conclusion for reasons we endeavour to give. We intend to begin by restating the basics of that principle.

The doctrine of common intention is founded on the provisions of section 23 of the Penal Code Cap 16 of the Revised Edition, 2002 under which it is stipulated that:-

> *"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."*

It is clear that the section denotes action in concert and necessarily postulates the existence of a pre – arranged plan and that must mean a prior meeting of minds. It must be paraphrased that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case, of course, based on the evidence on record.

The section reproduced above has been tested in a number of cases including those of **Mathias Mhnyeni and another v. Republic** [1980] T.L.R. 290 and **Godfrey James Ihuya v. Republic** [1980] T.L.R. 197, among others.

In the case of **Godfrey James Ihuya v. Republic (supra),** the Court stated that to constitute a common intention to prosecute an unlawful purpose, such as to beat a so called thief as a result of which he dies, it is not necessary that there should have been any concerted agreement between the accused persons prior to the attack of the so called thief. Their common intention may be inferred from their presence, their actions and the omission of any of them to dissociate or distance himself from the assault. In other words, where it is proven that people embarked on committing an offence and murder resulted from their common intention, it is legally irrelevant to determine who inflicted the killer blow.

In the case of **Mathias Mhnyeni and another v. Republic,** the appellants were convicted of murder in the High Court. The first appellant enlisted the second appellant in assaulting the deceased

whom he had suspected of having an affair with his former concubine. On the material date the second appellant held the deceased's hands to prevent the deceased from fleeing and from defending himself against the assault. That court convicted both appellants of murder on the basis of the doctrine of common intention. In upholding the decision of the trial High Court, this Court held that:-

> *"Where a person is killed in the prosecution of a common unlawful purpose and the death was a probable consequence of that common purpose each party to the killing is guilty of murder."*

In our present case, there are factors which persuaded the trial High Court to invoke the doctrine of common intention. In the first place, it considered the evidence of PW1, PW2, PW3 and PW4 concerning the unrelenting conflict between the deceased and the appellant's family over a land dispute. PW2 and PW3 were express that the late John Stephen was regularly requesting them to ask the deceased to stop claiming the land in controversy otherwise he was determined to finish him. In that this was not at all refuted and/or contradicted in their defences, we think that it is safe to say that it was the root cause for the appellant and his late father to kill the deceased.

On the date of the incident, the appellant and the late John Stephen had each played a role leading to the death of Richard Abdi. As already pointed out, PW1 testified that the appellant went to the deceased's home at around 7.00 pm and assaulted him with a panga,

while the late John Stephen did the same thing to that same person at 7.30 pm. Again, as stated above, PW1 was clear that before launching the attack the late John Stephen uttered the words ***"Obed hajakumaliza, then I will finish you,"*** after which he launched the deadly attack.

Surely, that indicated that the appellant and his late father had hatched the plan to kill the deceased, and that seeing the latter alive after the first attack by the appellant was something the late John Stephen was not happy about, hence the attack he launched that resulted into deceased's death. Given such a connection, we are not prepared to accept the contention of Mr. Mahuna and Ms Njiro that the appellant had nothing to do with the deceased's death. To the contrary, we conclude, as we are entitled, that on the basis of the doctrine of common intention, he was squarely involved in the death of Richard Abdi. –See the case of **Richard Ndege v. Republic,** Criminal Appeal No. 11 of 1979, CAT (unreported).

In that case, while appreciating that the appellant was not the one who fired the killer bullet, the Court went on to hold him equally guilty of the charged offence on the basis of the doctrine of common intention. It said:-

> *"Of course the appellant did not fire the bullet that killed the deceased but under the doctrine of common intention, where 2 or more persons set out armed with lethal weapons with the common intention of stealing, and one of*

them ... kills the custodian of the goods (in order to fulfill the purpose), all are liable to be convicted of murder."

We think this is a requisite proposition to which we associate ourselves.

Mr. Mahuna urged the Court to find that the appellant's absence at the place at which the late John Stephen launched the attack against the deceased, thus killing him connoted disassociation, and that the evidence of the prosecution witnesses that he was found throwing stones at the crowd at the scene of crime should be rejected because it was not rational and at most mere hearsay. With respect, we are once again not prepared to agree with him for reasons we are about to assign.

To begin with, we agree with Mr. Mahuna that the appellant was not at the place where Richard Abdi met his ultimate death at the time the late John Stephen made the said fatal attack. We are also conscious that where a person may have dissociated before the common plan is put into effect, the doctrine of common intention ceases to apply – See **Godfrey James Ihuya v. Republic** (supra).

In the circumstances of this case however, Mr. Mahuna's assertion that at a certain stage the appellant dissociated because he was not with the late John Stephen at the time the latter assaulted the deceased is not supported by evidence. To the contrary, there was sound evidence to establish that it was the appellant who was found throwing stones at the crowd at the scene of crime. That evidence came from PW1, PW2 and PW3.

On page 22 of the court record, PW1 was recorded to have informed the trial court that:-

> *"On my way home, I passed by where the deceased's body was just to find (that) people had dispersed. I was with the secretary and chairman. People told us that Obedi was throwing stones at them.* ***We ambushed Obedi and arrested him. He was hiding behind their toilet with a hip (sic: heap) of stones. We took him to Bomang'ombe . . . ."*** [Emphasis added].

Similar such evidence came from PW2 who said on page 31 of the court record that from Bomang'ombe they went back to the village. He added that:-

> *"We went back home at the scene of crime.* ***At the scene of crime we found stones were thrown. We decided that we search for the person who was throwing the stones. Stones were coming from the 1st accused's house. Villagers went in search of the person who was throwing stones. Obedi John was arrested and brought at the scene. No more stones were thrown.*** *I and other people took Obedi to the police station Bomang'ombe."*[Emphasis provided].

Not least on the point was the evidence of PW3 who, like PW1 and PW2, said on page 35 over to 36 that from Bomang'ombe they returned to Masama Roo village. He went on to say that:-

> *"We went back to the scene of crime. We were informed by Gerald Joseph Swai that someone was throwing stones at them. He told us that it was Obed John Munisi who was throwing the stones. The same Obedi had attacked the deceased with a machete prior to this incident. . . .*
>
> ***We searched for Obedi. We went to the 1st accused's house where Obed used to reside but he was not there. We found Obed hiding in a coffee farm belonging to the 1st accused we arrested him and took him to poiice station."*** [Again emphasis added].

It is clear from the above that the evidence of PW1, PW2 and PW3 as regards the stone throwing incident was not hearsay as submitted by Mr. Mahuna, but for all intents and purposes it was direct evidence. That evidence established that the appellant did not distance himself as is now being purported, but was still in it. For those reasons, the trial High Court properly invoked the doctrine of common intention in the circumstances of this case.

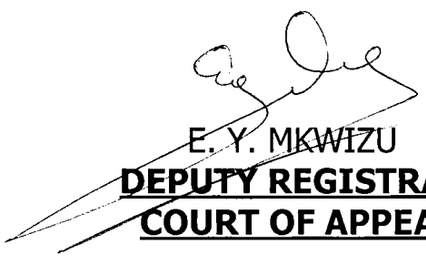
In conclusion, on the basis of the reasons we have assigned, we find and hold that the appeal lacks merit and we dismiss it in its entirety.

DATED at **ARUSHA** this 23rd day of September, 2014.

K. K. ORIYO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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



E. Y. MKWIZU
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