IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: OTHMAN, C.J., LUANDA, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 206 OF 2012

JUMANNE JUMA BOSCO
MOHAMED JUMANNE ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania atArusha)

(Mwarija, J.)

dated the 24th day of August, 2012

in

Criminal Appeal No. 31 of 2008

JUDGMENT OF THE COURT

22nd November, 2013 &25th April, 2016.

OTHMAN, C.J.:

The Appellants were arraigned with and convicted of the offence of attempted murder c/s 211(a) of the Penal Code, Cap 16 R.E. 2002 by the High Court (Mwarija, J.) at Arusha on 24/8/2012. They were each sentenced to a term of fifteen years imprisonment and ordered to pay

Tz. Shs 400,000/= as compensation to PW1 (Hando Nina@Peter). Aggrieved by the conviction and sentence they have lodged this appeal.

Briefly stated, the prosecution case was that on 27/9/2007 at 6 pm, while PW1 was on his way to buy cigarettes with PW3 (Emmanuel Lucas) he was attacked and stabbed with a knife by the 1st Appellant. PW1 suffered a penetrating wound on his abdomen (Exh. P.1). An earlier attempt by the 1st Appellant to hit PW1 on the head with a club had failed as he had grabbed it in time. The 2nd Appellant however forcefully took it away from him. The Appellants fled on a bicycle when PW1 raised an alarm. The Appellants were known to PW1 and PW2. They all came from the same Village (i.e Qash).

Responding to PW1's call for aid, PW2 (Petro Daniel) the Hamlet Chairman met the Appellants on the way, riding a bicycle. PW2 gave PW1 first aid by returning his intestines which were out, back into his stomach.

PW1 named the Appellants to the police on the same day of the incident (PW4, DC Donald). The 1st Appellant was arrested at his house, 7 kms. away from the scene of the crime. The 2nd Appellant was arrested at Babati Bus stand, 40 kms. away from Qash Village, on 29/9/2007.

The 1st and 2nd Appellants, who are father and son, denied involvement. Raising an *alibi*, they both claimed to have been at the 1st Appellant's house at the time of the incident. This was supported by DW3 (Mwanaisha Juma), the 1st Appellant's daughter.

The 1st Appellant further alleged that he had grudges with Lucas Bunge, PW1's brother over a boundary between their farms. The Appellants also testified that the 2nd Appellant had previously been charged with the offence of rape against Lucas Bunge's daughter, Basilisus Lucas. The prosecution witnesses, they urged, had been couched by Lucas Bunge.

The 1st Assessor opined that there was sufficient light for the Appellants to have been identified beyond reasonable doubt by PW1, PW2 and PW3. The 2nd Assessor reasoned that the Appellants had not complained anywhere that they had been framed up in this case. The 3rd Assessor opined that the Appellants had intended to kill PW1. All the three Assessors found the Appellants guilty as charged.

The High Court held that the Appellants were properly identified by PW1 and PW1 who were credible. That they collaborated in attacking PW1 and had acted with a common intention of murdering him. It was satisfied that the Appellants had intended to unlawfully kill PW1. There was no

merit, it found, that the case was a frame-up. It held that the charge against them had been proved beyond reasonable doubt by the prosecution.

At the hearing of the Appeal, the Appellants were represented by Mr. Edmund Ngemela, learned counsel. The Respondent Republic, which opposed the appeal was represented by Ms. Elizabeth Swai, learned State Attorney.

Ground one of the Appeal faults the learned trial Judge for proceeding on a defective information.

Mr. Ngemela vehemently submitted that the information for the offence of attempted murder c/s 211(a) of the Penal Code was incurably defective as it did not specify in the PARTICULARS OF OFFENCE, the word "unlawful", an essential ingredient of the offence of attempted murder. As the Appellants did not know what charge they were facing, the omission occasioned a failure of justice, which could not be cured under section 388 of the Criminal Procedure Act, Cap 20 R.E. 2002. He relied on **Terrah Mukinda VR (1966)** E.A. 425.

Furthermore, Mr. Ngemela faulted the information as it did not contain the Appellants' descriptions such as their age, address and places

of abode as was required under Section 135 (d) of the Criminal Procedure Act.

Resisting, Ms. Swai acknowledged that the words "unlawful" were not spelt out in the PARTICULARS OF OFFENCE. However, she succinctly submitted that the words that were used, "attempt to murder" were sufficient to characterize the offence, as the word "murder", defined in section 196 of the Penal Code encompassed an "unlawful" act that causes death. That in any event, the defect was curable under section 388 of the Penal Code as the Appellants were put on notice of the offence that they were charged with by the information and no injustice was occasioned to them. On the non-compliance with section 135(d) of the Criminal Procedure Act, MsSwai submitted that the Appellants' names had provided a proper description of who they actually were. They had not been denied any right as they were physically present at the preliminary hearing and at the trial.

It is trite that a charge or information should be read as a composite whole. Section 132 of the Criminal Procedure Act requires a charge or information to contain a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the

offence charged. A charge is sufficient when it does so. The information preferred against the Appellants on 19/6/2008 was read to them on 20/10/2008 before the commencement of the preliminary hearing and they were reminded of it again, on 10/8/2012, before the prosecution case opened.

For clarity, we think we should reproduce the essential parts of the information at issue:

> *"**STATEMENT OF OFFENCE***
>
> ***ATTEMPT TO MURDER**, contrary to section 211(a) of the Penal Code, Cap 16 of the Laws, Revised Edition, 2002.*
>
> ***PARTICULARS OF OFFENCE***
>
> *JUMANNE JUMA @Bosco and MOHAMED JUMANNE, on or about the 27th day of September, 2007 at Endandoshi Qash Village within Babati District, Manyara Region, jointly and together did **attempt to murder** one HANDO NINA @ Peter.*
>
> *Filed at Arusha this 19th day of June, 2008*
>
> *STATE ATTORNEY" (Emphasis added)*

Having carefully considered the record and in particular the information we are of the settled view that the omission to spell out the

words "unlawful" in the PARTICULARS OF OFFENCE did not render it fatally defective. The STATEMENT OF OFFENCE clearly spelt out that the Appellants were facing a charge of attempted murder c/s 211 (a) of the Penal Code. Therein any person who attempts **unlawfully** to cause the death of another is guilty of the offence of attempted murder.

Attempt is defined in section 380(1) of the Penal Code, thus:

> *380(1) "when a person, intending to commit an offence, begins to put his intention into execution by means adopted to its fulfilment, and his intention by some overt act, but does not fulfil his intention to such extend as to commit the offence, he is deemed to attempt to commit the offence".*

Furthermore, section 135 (a)(iii) of the Penal Code requires the PARTICULARS OF OFFENCE to be set out in ordinary language, in which the use of technical terms shall not always be necessary. The expression used in this case and in plain language, that the Appellants jointly and together did "**attempt to kill**", one HANDO NINA @Peter read in their entire context were adequate to render the information sufficient under section 132 of the Criminal Procedure Act.

In our view, **Mukinda's case** is distinguishable as it dealt with the offence of obtaining money by false pretenses contrary to S.31 of the Penal Code (Kenya) and not the offence of attempted murder c/s 211(a) of our Penal Code, offences that have different ingredients and which are different all together.

Moreover, the Appellants' names referred to who they were, a fact that was not in dispute throughout the trial. In the circumstances, their actual names in the information were a sufficient description of who they were. To say the least, they were described by their actual names.

That apart, we are fortified by the view we take having regard also to the *proforma* for an information for attempted murder, in **ARCHBOLD, Criminal Pleadings, Evidence and Practice**, 34th Ed., 1954 para. 7), whose relevant parts we recite:

"INFORMATION

Attempt to murder, *contrary to.....*

PARTICULARS OF OFFENCE

*AB, on the .....day of....., in the county of. ....., **attempted to murder** JN, by (describe the act in ordinary language)". (Emphasis added)*

In the result, and considering what we have observed earlier, the alleged omissions in the information also did not occasion any failure of justice in terms of section 388 of the Criminal Procedure Act. On the information preferred and well before the trial commenced, the Appellants knew the essence and substance of the offence they were required to face at the trial. We find no merit in ground one of the appeal.

The complaint in ground two of the appeal is that the High Court erred in law in admitting and acting on PW1's PF3 Form (Exh. P.1) contrary to section 291(3) of the Criminal Procedure Act. Mr. Ngemela submitted that notwithstanding the non-objection by the Appellants' learned Advocate at the trial to the tendering of the PF3 Form, the trial court was required to inform the Appellants of their right to have the medical officer who prepared it to be summonced by the Court for cross-examination. He relied on **Sprian Justine Tarimo V.R,** Criminal Appeal No 226 of 2007 (CAT, unreported). In view of that alleged defect, Mr. Ngamela left it to the Court to order a retrial, if the justice of the case warranted.

On her part, Ms. Swai lucidly submitted that the High Court had complied with section 291(3) of the Criminal Procedure Act. The PF3 Form (Exh P.1) was tendered by PW1 without any objection by the Appellants' learned Advocate. As an officer of the court, he was not only required to assist it, but he was also under section 291(3), free to request the Court to summon the medical officer for cross-examination, which he did not opt for. Moreover, as the PF 3 Form (Exh P.1) was in the Appellants' hands from the date of the preliminary hearing, on 20/10/2008, a long time ago, it meant they were satisfied with its contents.

The record is silent whether or not the learned Judge informed the Appellants of their right to require the medical officer who prepared the PF3 Form to be summoned for cross- examination as was required under section 291(3). When the PF3 Form was tendered by PW1, the Appellants' learned counsel told the Court, that the defence had no objection. Indeed, if he had objection, the learned Judge would have made good the probable omission.

Considering that the Appellants had legal representation; the non-objection by the defence to the admission of the PF 3 Form when an opportunity arose at the trial; the fact that they were aware of its content from 20/10/2008 and PW1 only sought to tender it on 10/8/2012, a period

over three years and nine months and the option the Appellants' learned Advocate had under section 291(3) of the Criminal Procedure Act to request the Court to summon or make available the medical officer for cross-examination, which possibly he choose not to seize and applying section 388 of the Criminal Procedure Act, we are of the settled view that no failure of justice was occasioned in any manner in the trial court's admission and reliance on the PF3 Form. (See, **Bahati Makeja V.R**, Criminal Appeal No. 118 of 2006 (CAT, unreported).

That aside, on the proved facts of this case, even if we were inclined to expunge the PF3 Form from the record, the nature and extent of the serious bodily injuries inflicted by a knife and sustained by PW1 on his stomach was abundantly proved by the evidence of PW1, PW2 and PW3, which was held credible by the trial court. As a matter of fact, PW3 was 3 paces away. With respect, ground two of the appeal has no merit.

At its core, ground three of the appeal, submitted in the alternative, aults the learned Judge for not considering the Appellants' *alibi*, notice of vhich was duly given to the prosecution under section 194(4) of the Criminal Procedure Act. Mr. Ngemela acknowledged that the learned Judge iad referred to the *alibi* in his analysis of the evidence. However, he omplained that by not arriving to any conclusion on it, the High Court had

erred. That as it was incumbent on it to make a conclusion, a task it failed to perform, this Court could not step into its shoes as it would be taking over a burden that rested on the former Court, which had original jurisdiction on the matter. He relied on **Hussein Idd and Another V.R (1986) T.L.R. 167** (CAT) were the Court held that it was a serious misdirection on the part of the trial Judge to deal with the prosecution case on its own and arrive at the conclusion that it was true and credible without considering the defence evidence.

Responding, Ms. Swai submitted that the Appellants' *alibi* was fully analysed in the trial Court's Judgment. That it would have been wise for the learned Judge to have made a specific finding on it, but as he had considered the Appellants' defence as a whole, and had concluded that it had no merit, no fault was committed.

Going by the record, on 10/8/2012 the Appellants gave notice to the prosecution and the Court of their intention to rely upon an *alibi* under section 194(4). To this effect, in their defence the Appellants, supported by DW3 gave evidence that they were in DW1's house at Qash Hamlet from 4 pm on 27/9/2007 to 29/09/2007. PW1 was attacked and stabed at 6 pm on 27/9/2007, at Endadosh Hamlet, 7 kms from DW1's house. It was PW1 and PW3's evidence that they had identified the Appellants at the scene of

crime. PW2 said he saw them riding a bicycle when he was responding to PW1's alarm.

We would agree with both Mr. Ngemela and Ms. Swai that in the Judgment, the learned Judge analysed the prosecution and the defence evidence fully including the Appellants' *alibi* (page 63). However, with respect, he made no finding or conclusion on it as required by law. Given the available prosecution and defence evidence, respectively, on the Appellants' identification and *alibi*, which were clearly opposed to each other, that evidence had to be resolved by the trial Court. Incompatible, the evidence was to have been settled by a definite finding or conclusion. As stated by the Court in **Kavina Ntakimazi V.R,** Criminal Appeal No. 52 of 1992 (CAT, unreported) in essence the defence of *alibi* means that the accused cannot commit the offence because at that time, he was away in a different place from the scene of the crime.

The law is well established that on first appeal, the Court is entitled to re-evaluate and re-appraise the evidence, to determine whether or not the trial court had erred in its approach to evaluating the evidence or had acted on a wrong principle and to come to its own conclusion (See, **Hassan MzeeMfaume V.R.** (1981) TLR 167; **Laxminarayan and Another v. Returning Officer and Others** (1947) I S.C.R. 822). This is

not a question of the Court taking over the trial Court's original jurisdiction as strenuously argued by Mr. Ngemela, but a duty incumbent on a first appellate Court.

That apart, **Hussein Idd's** case is of no assistance to the Appellants. In this case, the learned Judge had analysed fully the prosecution and defence evidence, while in the former case the trial Court had dealt with the prosecution evidence on its own and had not considered the defence evidence. Moreover, here the learned Judge having considered the whole evidence, arrived at a conclusion that one of the allegations by the defence, that involving misunderstanding and grudges between the Appellants and PW1 had no merit. As we have eluded to earlier, it was the finding on the *alibi* that went amiss in the High Courts' Judgment.

The law is well settled that where an accused person puts forward an *alibi* as an answer to a charge or information, he does not thereby assume a burden of proving the defence and the burden of proving his guilt beyond reasonable doubt remains throughout on the prosecution (See, **Sekitoleko V Uganda** (1967) E.A. 531 at 533; **Leornard Aniseth V.R.** (1963) EA 206; **Saidi s/o Mwakawanga VR** (1963) E.A 6). It is sufficient that an *alibi* raises a reasonable doubt (See, **Ali Salehe Msutu V.R.** (1980) T.L.R.1).

Having re-appraised the entire evidence, we are of the decided view, as was the opinion of the learned Judge and the 1st Assessor that the Appellants were positively identified at the scene of the crime. The incident took place at 6pm. PW1 and PW2 knew the Appellants before. They all lived in Qash Village, although in different Hamlets. The former resided at Endadosh Hamlet and the later at Qash Hamlet. PW2 was 3 paces away when PW1 was stabbed. Both PW1 and PW2 gave concordant descriptive particulars of the colours of what the Appellants wore. The Appellants fled on a bicycle when PW1 called for help. PW2 who responded to PW1's alarm met the Appellants on the way, ridding a bicycle. He also knew them before the event. The trial Court found these witnesses credible, and there is no cause for us to hold otherwise. The factors for identification were favourable and rendered it watertight with no possibility of mistaken identification (See, **Waziri Amani V.R.** (1980) T.L.R. 250); **Igola Iguna and Noni@Dindai Mabina V.R.**, Criminal Appeal No. 34 of 2001 (CAT, unreported)). Having regard to the totality of the evidence, we find that the *alibi* raises no reasonable doubt. The prosecution had proved the case beyond reasonable doubt that the Appellants were at the scene of the crime at the material time and had jointly participated in attempting to

unlawfully murder PW1. All considered, ground three of the appeal has no merit.

In the result and for the foregoing reasons, we uphold the conviction, sentence and order of compensation imposed by the High Court. The appeal having no merit, is hereby dismissed.

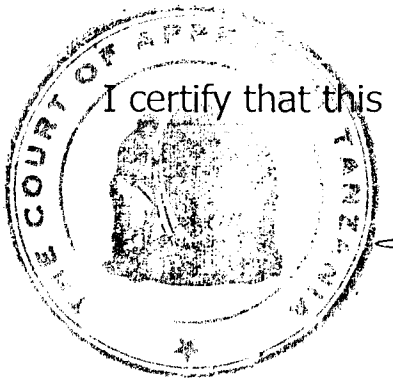
DATED at **ARUSHA** this 11th of February, 2014.

M. C. OTHMAN
CHIEF JUSTICE

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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



J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL