IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MJASIRI, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 293 OF 2015

ELIZABETH ELIAS @ BELLA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Mwingwa, J.)

Dated 12th day of June, 2015
In
Criminal Appeal No. 33 of 2013

JUDGMENT OF THE COURT

27th Nov. & 7th Dec. 2017

MJASIRI, J.A.:

An armed robbery incident occurred at Mwanga National Micro Finance Bank, in Mwanga District, Kilimanjaro Region. In the course of the armed robbery one policeman was killed and the other one seriously injured. The sum of Two Hundred and thirty Nine Million Four Hundred and Ninety Thousand (shs 239,490,000/=) was taken from the Bank's strong room. The appellant, Elizabeth Elias Msanze @ Bella together with eleven (11) others were charged with three counts namely, conspiracy to commit an offence contrary to section 384 of the Penal Code, and two

counts of armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E. 2002], the Penal Code. The second count involved stealing Shs 239,490,000/= and the third count involved stealing a sub machine gun, with serial No 02870.

It was the prosecution case that between April and July, 2007, the accused persons conspired to commit an offence of armed robbery at the National Micro-Finance Bank (NMB), Mwanga Branch, and that on the 11th day of July 2007, the appellant together with the other accused persons raided NMB, stole cash and a sub-machine gun, the property of the Tanzania Police Force. The appellant denied the charges and her defence was that she was not at the scene of crime. She was arrested at her home area in Baraa Arusha Municipality.

According to various prosecution witnesses, such as SSP Linus Vincent Sinzumwa, (PW1) SP Duan Nyanda (PW18) Corporal Ally (PW16), the appellant was found at the container place in Njiro where the other culprits had hidden themselves after the robbery incident.

Upon receiving information that the people involved in the NMB robbery, were hiding at Njiro, the police went to Njiro and before those

people were apprehended there was an exchange of fire between them and the police. The battle lasted for about three and a half hours. During the said battle the appellant came out of the house, surrendered to the police and warned them that the duo inside the house were heavily armed. According to PW15, Lilian Pantaleo Mushi the appellant was the one who leased the house at Njiro which ended up being occupied by the alleged robbers. This fact was also confirmed by PW6, Steven Nelson, that the appellant rented a house from Mr. Zebedayo. She pretended to be Mrs. Francis Urassa. The appellant informed PW15 that her husband was a car dealer and the house was to be used as an office.

The appellant together with Samwel Gitau Saitoti and Michael Kim who were the first and second accused in the trial court, were convicted as charged on all the three counts and were sentenced to seven (7) years imprisonment on the first count, and thirty years (30) imprisonment for the remaining two counts. The sentences were to run concurrently.

The appellant being dissatisfied with the decision of the trial court, appealed to the High Court. Her appeal was partially successful. The High Court did not uphold the trial court's conviction and sentence on the first

and third counts, however her appeal was not successful on the second count, hence her second appeal to this court. The appellant presented a five point memorandum of appeal to this Court which can be summarized as follows:-

1. *The charge against the appellant was not proved beyond reasonable doubt.*
2. *The first appellate Judge wrongly relied on speculations, to reach his decision.*
3. *The High Court Judge relied on weak, incoherent, unreliable and uncorroborated evidence.*
4. *High Court Judge erred in law in not taking into account that the rights of the appellants were violated.*
5. *The High Court Judge erred in fact and law in rejecting the defence of the appellant.*

At the hearing of the appeal the appellant appeared in person and was unrepresented and without any benefit of the services of an attorney. The respondent Republic was represented by Mr. Martenus Marandu

learned Senior State Attorney, who was assisted by Mr. Felix Kweitukya, learned State Attorney.

On her part, the appellant asked the Court to adopt her memorandum of appeal as part of her submissions. She also opted to let the learned Senior State Attorney submit first.

In relation to the first ground of appeal, Mr. Marandu submitted that the case against the appellant was proved beyond reasonable doubt. According to him the appellant was involved in committing the crime. The appellant was present at the Njiro house where there was an exchange of fire between the police and the first and second accused. The appellant was found in the house and came out of the house after one and a half hours of exchange of fire between the police and the first and second accused persons. The incident was witnessed by PW1, PW16 and PW18 who were present at the scene. The appellant even volunteered information to the police that the two accused persons were heavily armed and even had bullet proof jackets. After the police succeeded in over powering the first and second accused who were inside the house, a lot of fire arms were found including the submachine gun which was taken

during the bank robbery at Mwanga. Mr. Marandu argued that as the appellant was found in the house with the other accused persons, it can be presumed that she took part in the crime. He relied on the case of **Abubakar Hamis and Two Others v Republic,** Criminal Appeal No. 87 of 2004 (unreported). He stated that no explanation was given by the appellant as to how she came to be found at the Njiro house. He submitted that common intention was established relying on sections 22 and 23 of the Penal Code.

Mr. Marandu also submitted that in his Extra Judicial statement, which was admitted by the Court as Exhibit P19, the first accused named the appellant as the person who procured the lease of the Njiro house on their behalf. The Extra Judicial statement was made before a Justice of the Peace whose evidence was relied upon by the trial Court. Even though the appellant insisted that she was not present at the scene, she never filed a notice to the trial court to present a defence of alibi.

The learned Senior State Attorney relied on the case of **Charles Samson v. Republic** (1990) TLR 39. Mr. Marando reiterated that PW1, PW14, PW16, and PW18 all testified that the appellant knew about the

incident. Her conduct clearly indicated that there was common intention. The appellant was the one who looked for the house in Njiro. This is also established in the testimony of PW15 who knew the appellant well. The appellant was also responsible for leasing another house in another area, through PW6. All the witnesses, that is PW1, PW11, PW14, PW15, PW16, PW18, were all considered by the trial court to be credible witnesses. He cited the cases of **Omari Ahmed v. Republic** [1983] TLR 52 and **Goodluck Kyando v. Republic**, Criminal Appeal No. 118 of 2003 (unreported). He submitted that the trial court's finding on credibility was not discredited by the High Court.

On ground No. 2, Mr. Marandu vehemently argued that the issue of speculation did not arise at all. The evidence relied upon by the two courts below was direct, and was backed up by Exhibits. For instance Exhibit P.19 and the testimonies of PW16, PW18, PW15, PW6, PW11 and PW1.

In relation to ground No. 3, Mr. Marandu submitted that the ground of appeal has no basis. The evidence was very coherent. This is in line with what has been submitted in respect of grounds No. 1 & 2. Mr.

Marandu made reference to **Hamidu Mussa Timotheo and Another v. Republic** (1983) TLR 125.

On ground No. 4, Mr. Marandu strongly argued that the appellant's rights were not violated. Sections 32 (1) 24 and 33 of the Criminal Procedure Act Cap. 20 (the CPA) relates to bail, which was denied because the appellant had a pending charge of murder which was not bailable.

Now, coming to the appellant's last ground of appeal, the learned State Attorney submitted that the appellant's defence was considered and rejected in view of the strength of the prosecution evidence. According to Mr. Marandu, there is overwhelming evidence on record that the appellant was not arrested at Baraa but at Njiro. This is supported by the evidence of PW1, PW16 and PW18. The appellant did not furnish to the Court any notice of alibi as required under section 194(4) (5) & (6) of the CPA. He referred to the case of **Tongeni Naata v. Republic** [1991] TLR 54. He asked the Court to dismiss the appeal.

On grounds No. 1 & 2, the appellant stated that the case against her was not proved beyond reasonable doubt. There was no evidence to prove that she was found at the Njiro home. She also argued that PW1, PW11

and PW18 did not see her at the scene of crime. She was not involved in stealing money or firearm. PW11, PC Naftal who was present at the crime scene at Mwanga only named the first and second accused person. The first accused person's move to mention her in his Extra Judicial statement, that she was the one who leased the house at Njiro for them was not voluntary, he must have been lured to do so.

In relation to ground No. 3, she repeated what she stated on grounds 1 and 2 that no witness gave evidence that she was at the scene of crime. She stated further that PW15 has not provided any proof that she was the one who leased the Njiro house. She also submitted that her relatives did not lead the police to the Njiro house, as they had already been arrested and taken to Kilimanjaro Region.

On ground No. 4, she submitted that she was denied her rights, beaten up and kept in police custody for twenty one (21) days. She stated that she was neither involved in a conspiracy nor stealing arms. She could never be involved in armed robbery.

On common intention, she submitted that she had no common intent with the first and second accused persons. There is no evidence that she

was arrested at the Njiro house, and there is no evidence that she rented the Njiro house or any other house in another area.

On ground No. 5 she submitted that neither the High Court Judge nor the prosecutor considered that her defence was not proper. The conspiracy charge was initially dropped and then brought again, when the charge was substituted. She was set free on the charge of murder. None of the witnesses saw a woman at the crime scene at Mwanga. PW1, PW16 and PW18 were not free witnesses. They had fabricated evidence against her. The prosecution never called any Ten Cell Leader or Chairman of the area. She asked the Court to quash the conviction, drop all charges against her and set her free.

We on our part after carefully reviewing the evidence on record and the submissions made by the learned Senior State Attorney and the appellant, we are of the considered view that the main issues for consideration and decision are as follows:-

1. *Whether or not the appellant took part in the armed robbery.*
2. *Whether or not common intention was established.*

It is evident from the record that there is no direct evidence linking the appellant with the offence. There is no evidence that the appellant was present and directly participated in the act of robbery at the NMB Mwanga. What then was the role of the appellant in the whole saga?

According to the evidence on record, what implicated the appellant and consequently linked her with the armed robbery are the actions of the appellant vis a vis the main players in the crime. The major link between the appellant and the major players is the conduct of the appellant. There is evidence linking the appellant with the crime in the following acts. First of all according to PW6, Steven Nelson, it was the appellant who rented the house from one Zebedayo for Shillings Nine Hundred Thousand (900,000/=) for a period of six (6) months. It was PW6 who linked the appellant with the landlord.

The appellant was also responsible for renting another house at Njiro Container area. It was a two storey building. PW15 coordinated the process. Shillings Two Million four hundred Thousand (shs 2,400,000/=) was paid in advance.

Even though the relationship between the appellant and the two accused persons was not laid bare, her conduct indicated that she had a connection with them. However this link is strengthened given the fact that the appellant was seen at the Njiro house by several witnesses. PW1, PW16 and PW18 all gave a similar account of her dramatic appearance and subsequent surrender at the Njiro house, and her knowledge of how heavily armed the two accused persons were. Whereas the appellant could have claimed that she looked for a house for them not knowing what they were up to, the fact that she was found at the Njiro house after the robbery leads to a conclusion that the appellant was involved. The law is settled. Under section 23 of the Penal Code where there is common intention each of the person who formed such intention in effecting an unlawful purpose is deemed to have committed that offence.

From the evidence of the prosecution witnesses we have highlighted earlier, and the appellant's actions and conduct there is sufficient evidence of common intention under section 23 of the Penal Code. It is immaterial whether the appellant was at the scene of crime or not.

Section 23 of the Penal Code provides as under:-

"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."

In **Daimon s/o Malekela @ Maunganga v. Republic**, Criminal Appeal No. 205 of 2005 (unreported) the Court stated thus:-

"Suffice it to say here that the doctrine of common intention, as distinguished from similar intention, can only be successfully invoked where two or more persons form a common intention to prosecute an unlawful purpose and they commit an offence and are eventually jointly charged and tried together."

The Court made reference to the case of **Wanjiro Wamiero & Others v. Republic** [1955] 22 EACA at page 523. The East African Court of Appeal made reference to section 21 of the Kenya Penal Code which was identical to our section 23. The Court stated thus:-

"In order to make the section applicable, it must be shown that the accused had shared with the actual perpetrators of crime, a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged."

The doctrine of common intention was applied in **Solomon Mungai & Others v. Republic** [1965] EA. 782. The Court stated:-

"In the opinion of the Court, where the case against two accused persons proceeds on the basis of their acting in concert then both can be found guilty, if the evidence establishes that they were acting jointly."

In the **Daimon Malekela** case (supra), the Court stated further:-

"On the basis of these authorities, we take it as settled law that in order to successfully invoke section 23, there must be cogent evidence to establish that one or more persons had shared with the accused a common intention to pursue an unlawful act and that in the execution of the said pre-conceived plans an offence was committed by both or some or all of them. Furthermore, to

secure a conviction under this section two persons or more must be jointly charged and tried."

We fully associate ourselves with the above authorities which have consistently been cited in our jurisdiction in support of the doctrine. Notable among those authorities are this Court's decisions in **Mathias Mhyeni and Another v. Republic** [1980] TLR 290, **Alex Kapinga and Three Others v. Republic,** Criminal Appeal No. 252 of 2005 and **Ami Omary @ Senga and Three Others v. Republic,** Criminal Appeal No. 233 of 2013 (all unreported), to mention only a few.

In **Awino Samwel Otieno v. Republic,** Criminal Appeal No. 124 of 2012 [2014] & eKLR, the Court of Appeal of Kenya defined common intention under section 21 of Kenya Penal Code which is similar to section 23 as follows:-

"Common intention under section 21 connotes a situation where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although common intention can develop in the course of commission of the offence, it normally precedes the commission

of the crime showing a pre-meditated plan to act in concert. It comes into being in point of time prior to the commencement of the act."

The application of this doctrine has also been considered in **Dickson Mwangi Munene & Another v. Republic,** Criminal Appeal No. 314 of 2011 where the Court of Appeal of Kenya stated as follows:-

"This provision has been interpreted and the doctrine of common intention dealt with by our Courts in several cases. In ***Solomon Mungai v. Republic*** *[1965] EA 363, the predecessor of this Court held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged."*

On the basis of these authorities, it is trite law that for the doctrine to apply under section 23 there must be cogent positive evidence to establish that one or more persons had shared with the accused a common intention to pursue an unlawful act and that in the execution of the said pre-conceived plan an, offence was committed by both or some or all of them.

The question to be determined here is whether or not there was such evidence in the instant case. As we have demonstrated hereinabove our answer will be positive.

This is a second appeal. We are mindful that it is an established principle that the Court rarely interferes with concurrent findings of facts by the lower courts except where there are mis-directions and non-directions. See **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149.

The trial court found the prosecution witnesses to be credible, and believed their testimonies. We have no reason to fault the trial Court in the absence of any plausible evidence that the appellant was arrested at Njiro, leased the Njiro apartment and another one in a different area.

In **Goodluck Kyando v. Republic,** (supra), it was stated that:-

> *"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing."*

In **Omari Ahmed v. Republic** [1983] TLR 52, it was held that the trial court's finding as to credibility of witnesses is usually binding on an

Appeal Court unless there are circumstances on the record which calls for a re-assessment of the credibility. We have found no such circumstances in the instance case.

We are fully aware of the fact that the burden of proof is always on the prosecution which is required to prove the case against the accused person beyond reasonable doubt and that the burden never shifts. See- **Mohamed Said Matula v. Republic** [1995] TLR 3.

The basis of the conviction of the appellant is the finding by the two courts below that there was common intention to commit the offence, given the appellant's conduct and the actions taken by her. The appellant's grounds of appeal have no leg to stand on, given the nature of the evidence on record.

We would like to address the appellant's last ground of appeal that her defence was wrongly rejected by the trial Court. The basis of her defence was that she was arrested at Baraa in Arusha Municipality but not Njiro. However this defence was rejected after the trial Court decided to believe the testimonies of PW1, PW16 and PW18 who were considered to be credible witnesses. The first appellate court reached the conclusion that there was overwhelming evidence that the appellant was arrested at Njiro.

On the whole we find no basis in faulting the decision of the first appellate Court.

In the result we find the appellant's appeal without merit and we accordingly dismiss it.

DATED at **ARUSHA** this 4th day of December, 2017.

S. MJASIRI
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL