THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISRTY
AT MBEYA
CRIMINAL APPEAL NO. 40 OF 2017
(Arising from Original Criminal Case No 6/2016 from Mbeya District Court at Mbeya)

THE REPUBLIC.....APPELLANT
VERSUS
AYOUB s/o SIKAGONAMO.....1ST RESPONDENT
MATHEUS s/o MWAFONGO.....2ND RESPONDENT
ODEN s/o DAUDI.....3RD RESPONDENT

JUDGMENT

Date of last order: *08/06/2020*
Date of Judgment: *09/07/2020*

NDUNGURU, J.

This is judgment on appeal from the decision of the Resident Magistrate Court of Mbeya at Mbeya in **Criminal Case No. 61 of 2016** dated 07th day of November, 2016 before Hon Chaungu *Esq* SRM. Briefly, on 12th day of April, 2016, the Respondents Ayubu s/o Nkagonamo, Mathew Mwafongo and Oden s/o Daud were charged with the offence of causing Grievous Harm. The charge against the respondents has been laid under Section 225 of the Penal [Code Cap 16 R.E 2002]. The particulars of the charge are to the effect that the three

mentioned subjects on 13th day of December, 2014, near High Class Hotel -Tunduma area within Momba District in Mbeya Region jointly together unlawful did grievous harm to one Jumanne s/o Peter Mapesa by beating him in different parts of his body using iron bar chain, fits and legs.

The trial court upon hearing the case, convicted and sentence the first and the second respondents to serve the term of two years each while acquitting the first respondent with the reason that the prosecution evidence does not establish that he committed the alleged offence.

The appellant being dissatisfied with the decision of the trial court, appealed to this Court with the following grounds:

1. *That the trial magistrate erred in law and in fact by acquitting the 1st accused person (Ayoub s/o Sikagomano by holding that the evidence against him based on suspicion.*
2. *The trial magistrate erred in law and in fact by imposing unappropriated sentence to the accused persons who were convicted with the offence of grievous harm.*

The appellant prayed that, this appeal be allowed, the acquittal order be quashed and appropriate sentence be imposed against the

respondents. In prosecuting the appeal, Mr. Baraka Mgaya and Mr. Kihaka, the learned State Attorneys appeared for the Appellant/Republic while Ms. Rose Kayumbo, the learned counsel appeared for both Respondents. With the leave of the court, the appeal was disposed by way of written submissions in support and against the appeal.

Before going through the nitty-gritty of the appeal filed, I find it prudent to recap the rival submissions from both sides. The appellant in his 12-page submissions appeared to be long, will be preface it as follows. Mr. Baraka alleged that according to the testimony of the complainant, on the fateful date, he met the 1st Respondent and started to talk to each other since they know each other. But suddenly a black tax appeared, where the 2nd and the 3rd Respondents disembarked from inside. Mr. Baraka went further to submit that the 1st Respondent pointed at the Complainant Jumanne s/o Peter Mapesa to the 2nd and the 3rd Respondents saying that he is the one. According to Mr. Baraka, the learned state attorney, what follows there after was that the two respondents went back to the black tax, emerging out with iron bars, panga, belt and started to bit the complainant leaving him injured heavily in his eyes. It was the appellants submissions that the complainant was rescued by civilians and was taken to the police and

letter to the hospital where he was subjected to two eye operations and was hospitalized for about two months.

The learned state attorney strongly criticized the trial court judgment at page 24 of the typed judgment when the trial magistrate stated that suspicion cannot be the basis of finding on guilty. The trial magistrate held that mere presence at the scene is not enough, he was to say the actual role payed so as to make him party to the injuring. The learned state attorney submitted that the trial magistrate missed the point by failing to invoke the Doctrine of Common Intention Section 23 of the Penal Code, He invited the court to find an inspiration in the case of **Mhina Mndolwa vs. Republic,** Criminal Appeal No. 40 of 2007 and in the case of **Chalamanda Kauteme vs. Republic**, Criminal Appeal No. 295 of 2009.

The learned state attorney could not stop there. He went on to persuade this court as the first appellate court to re-evaluate evidence and reconsider the proper sentence. He invited the court to refer the case of **Prince Charles Junior vs. Republic**, Criminal Appeal No. 250 of 2014, Court of Appeal of Tanzania at Mbeya where the court stated that on first appeal the evidence must be treated as a whole to a fresh and exhaustive scrutiny and that failure to do so is an error in law.

To end up his submission, the learned state attorney invited the court to step into the shoes of the trial court and re-evaluate and reconsider the entire evidence as to the extent of injuries sustained to the complainant and revise the sentence entered to be higher so as to be the lesson to the 2nd and the 3rd respondents and the community in general.

On her part, Ms. Kayumbo the learned counsel for the respondents was very brief and focused. She supported the trial court decisions and prayed for this court to uphold such decision, and dismiss this appeal. Submitting, the learned state attorney was of the view that suspicion however grave cannot be the basis of conviction. She prayed for the court to find an inspiration at page **1447 of the Blacks Law Dictionary, 6th edition** and in the case of **Christian s/o Kale and Rwekaza s/o Bernars vs. The Republic (1992) T.L.R 302** where it was stated that a suspicion cannot sustain a conviction, it entitles an accused person to an acquittal on benefit of doubt.

Ms. Rose went on further to state that the contention that the 1st accused was present when the offence was committed is based upon facts or circumstances which do not amount to proof. Ms. Rose referred to this court the case of **Mohamed Said Matula vs. Republic (1995)**

TLR 3. Ms. Rose went on further to submit that there was no intention established by the prosecution. She invited the court to refer the case of **Damiano Petro and Jackson Abraham vs. The Republic (1980) T.L.R 260** where the court stated that a person should not have been convicted as an aider or abettor as a mere presence at the scene of a crime is not enough to constitute a person an aider or abettor, the person must also participate in the crime to some extent.

Ms. Rose further resisted that the doctrine of common intention cannot be invoked by this court citing the case of **Mhina S/o M Ndolwa vs. The Republic** (supra). For her there must be ana evidence if linked will amount to common intention failure of which the doctrine of common intention cannot stand.

With regard to the second ground of appeal, Ms Rose supported the sentence with the view that the trial court had considers the mitigation factors that the 2nd respondents was the first offender, elderly man and has a family that depend on him. She argued that the court has the mandate to reduce sentence depending on the mitigation factors. She invited the court to refer the case of **Rweyemamu Thomas @ Kaningili Muzahur vs. The Republic**, Criminal Appeal No 370 of 2008 (unreported). She went on state that the appellate court

can only interfere with the sentence of the trial court if it has passed an illegal sentence or had acted in a wrong principle or which manifestly excessive or inadequate citing the case of **Mohamed Ratibu @ Said vs. Republic** (supra).

In his rejoinder, the learned state attorney reiterated his earlier submissions. He joined hands with the submission made by the learned counsel for the respondent that a mere presence of an accused person at the crime scene and also suspicion cannot ground the conviction to any accused person. He however added that, the 1st Respondent did not merely stood there but he pointed the complainant to the two other respondents and said to them that he was the one, thereafter the crime was committed that left the complainant injured.

After having summarized the rival submissions from both sides, I find it prudent to dwell first with the first ground of appeal. The pertinent issue is on whether the prosecution side has proved that there was common intention among the three respondents. I would like to state that the appellants submission is plausibly attractive but not legally and accurately tenable. I have carefully considered page 6 of the proceedings where the appellant has insisted that complainant mentioned the act of the 1st Respondent at the scene of the crime. The

appellant maintained that 1st Respondent pointed the complainant to the 2nd and the 3rd Respondents that he is the one. The appellants maintained further such action necessitated the 2nd and the 3rd Respondent in committing such offence against the complainant. The appellant insisted that the doctrine of common intention has to be applied since the 1st Respondent was presence at the scene of a crime and he played a role by having pointed the complainant to the 2nd and the 3rd Respondents.

I think and it is my view that there is no sufficient evidence to show that the 1st Respondent was privy to preparation to enable the 2nd and the 3rd Respondent to commit such an unlawful act, which was to point the complainant to the 2nd and the 3rd Respondents. There is no such evidence to suggest that the 1st respondent actively took part in aiding the 2nd and the 3rd Respondents to commit such offence.

Ms. Rose is undoubtedly precise in her reference to the decision of **Damiano Petro and Jackson Abraham vs. Republic (1980) T.L.R 260** where it was stated that mere presence at the scene of a crime does not, constitute one a party to an offence, or establish common intention; More inspiration can be found in the case of **Godfrey James Ihuya vs. Republic (1980) TLR 197** where the Court held that:

"To constitute a common intention to prosecute an unlawful purpose. 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. There common intention may be inferred from their presence, their actions and omission of any of them to dissociate himself from the assault."

What can be gleaned from the records of the trial court is that, there is no objection the 1st Respondent was with the complainant before, and during when the offence was committed against him by the 2nd and the 3rd Respondent. There is no gain saying and it has been held so by the Court of Appeal of Tanzania, that mere presence at the scene of a crime is not enough to constitute the 1st Respondent as an aider or abettor. There must be adequate evidence to show that the 1st Respondent actively participated the crime to some extent. The 1st Respondent being present the scene of a crime cannot suffice to say that he become principal offender in the second degree merely because he does not prevent the offence to happen or apprehend the offender. I would like to by an inspiration in the case of **Mhina s/o Mndolwa vs. Republic** (supra) where the Court of Appeal of Tanzania stated that:

"in order for the court to invoke the doctrine of common intention, the prosecution has to establish evidence which if linked will amount to common intention failure of which the doctrine cannot stand."

At the trial court, there is no an iota of evidence that the 1st, 2nd and the 3rd Respondent formed a common intention to cause grievous harm to the complainant. Hence it was right for the trial court to acquit the 1st respondent by not invoking the doctrine of common intention. It is for this reasons that, the trial court acted properly in determining the case on merits and the reasons for the decision was clearly provided for by the learned trial magistrate in his well-reasoned judgment. This court does not therefore find any valid reason to interfere with such decision. This ground of appeal is therefore bound to fail and cannot be entertained.

Reverting to the second ground of appeal, Mr. Baraka submitted that, this court has power to re-evaluate evidence and reconsider the proper sentence. For them, the sentence of two years is not enough compared to the status of the offence committed. Ms. Rose supported the sentence entered with a view that this court can only interfere with the sentence if the trial court has acted on a wrong principle or has imposed an illegal sentence and or if the sentence is manifestly excessive or clearly adequate.

From the records of the trial court, the 2nd and the 3rd Respondents were both sentenced to serve two years custodial sentence, and each to

pay Tshs. 500,000/= as compensation to the complainant (PW1). The trial court was satisfied that the two respondents have indeed committed the offence and were accordingly convicted. That means there is nothing for me to re-evaluate pertaining the evidence. With regard to the given sentence, I find it prudent to buy an inspiration from the case of **Rweyemamu Thomas @ Kaningili Muzahura vs. The Republic** (supra) where the Court of Appeal of Tanzania stated that on appeal, an appellate court has a limited role in sentencing. The governing principles that must be borne in mind include that:

(i) Sentencing is a function which the legislature entrusts to the trial judge (or a magistrate, as the case may be);

(ii) The sentencing decision is a decision made in the exercise of a discretion.

(iii) ***An appeal court may only intervene where the exercise if the sentencing discretion is vitiated by error, such that there has been no lawful exercise of that discretion;***

(iv) Then an appeal court can decide for itself what the sentence should have been.

These principles are reflected in the case of **Mohamed Ratibu @ Said vs. The Republic**, Criminal Appeal No. 11 of 2004 (unreported) where it was stated that:

> *"It is a principle of sentencing that an appellate court should not interfere with a sentence of a trial court merely because had the appellate court been the trial court it would impose a different sentence. In other words, an appellate court can only interfere with a sentence of a trial court if it is obvious that the trial court has imposed an illegal sentence or had acted on a wrong principle or had imposed a sentence which in the circumstances of the case was manifestly excessive or clearly inadequate."*

As rightly pointed out by the trial magistrate and based on holistic evaluation of evidence on record, I would safely state that, there is evidence to suggest that the act of the 2nd and the 3rd Respondents made the complainant to have his operation in both eyes. There actions forced the complainant to be hospitalized for a month. The trial court was satisfied that the case was proved beyond the shadow of doubt against the 2nd and the 3rd Respondent who were therefore convicted and sentenced.

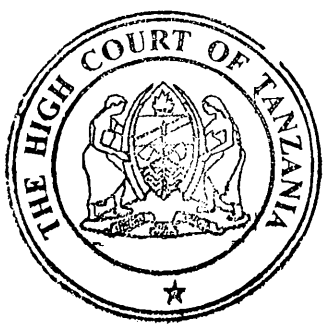
I am alive to the pronouncement made in **Rweyemamu Thomas @ Kaningili Muzahura vs. The Republic** (supra) that an appellate court may only intervene if the sentencing discretion is vitiated by error,

such that there has been no lawful exercise of that discretion; I have not seen any error since the trial court has discretion to impose an appropriate sentence. Section 225 of the Penal Code, Cap 16 provides for a punishment of seven years. The court is therefore empowered to issue any sentence but does not exceed seven years. Now in our case the 2nd Respondent is serving two years but under the community service order issued on 21/11/2016. I think it would not be practicable to re-evaluate the sentence entered. The 3rd Respondent is at large and has never been found so that he can start to serve his sentence.

Considering that trial court is under the obligation to consider the circumstances of each case and make its own findings, I have seen no reason to fault the trial courts finding on the issue conviction and sentence imposed on the Two respondents and the acquittal of the 1st Respondent.

For the reasons stated herein above, I am constrained to dismiss the appeal. The appeal is hereby dismissed in its entirety. Right for further appeal detailed.

It is so ordered.



D. B. NDUNGURU
JUDGE
09/07/2020

Date: 09/07/2020

Coram: D. B. Ndunguru, J

For Republic: Ms. Sarah Anesius – State Attorney

1st Respondent:

2nd Respondent:

3rd Respondent: Absent

For 1st and 2nd Respondent: Ms. Rose Kayumbo – Advocate

B/C: Gaudensia

Ms. Sarah Anesius – State Attorney:

The case is for judgment, we are ready.

Ms. Kayumbo – Advocate:

We are ready.

Court: Judgment delivered in the presence of Ms. Sarah Anesius State Attorney for the Appellant/Republic and Ms. Rose Kayumbo advocate for the 1st and 2nd respondents who are also present.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
09/07/2020

Right of Appeal explained.