IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LUBUVA, J. A., RUTAKANGWA, J. A., And KIMARO, J. A.)

CRIMINAL APPEAL NO. 37 OF 2003

1. ZAKARIA JAPHET @ JUMANNE
2. ELIBARIKI KIFURA MKONYI
3. HEVEN TUMAINIEL.....APPELLANTS

AND

THE REPUBLIC..... .....RESPONDENT

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

(Mkwawa, J.)

dated the 4th day of June, 2002

in

Criminal Session No. 26 of 1998

JUDGEMENT OF THE COURT

18 September 2006 & 4 October 2006

LUBUVA, J. A.:

The appellants were charged with and convicted of the offence of murder contrary to Section 196 of the Penal Code.

The High Court (Mkwawa, J.) sitting at Moshi sentenced them to death.

The facts giving rise to the case as established at the trial were that on or about 26th July, 1997, at Marangu Irisi Village, Moshi Rural District, Kilimanjaro Region, it was alleged by the prosecution that the appellants murdered the deceased, one Gerald s/o Alphonce. The case for the prosecution was that on the fateful night the 1st appellant, Zakaria Japhet alias Jumanne, visited the house of Elvis Michael Kisaro (PW. 5), looking for the deceased. Thereafter, the 1st appellant was seen assaulting the deceased with the flat side of the machete allegedly on the ground that the deceased had shop lifted maize flour and rice from the shop-cum residence of Beda Shirima (PW. 3). Apparently, the 1st appellant raised an alarm that the deceased had stolen from the shop-cum residence of PW. 3. In response to the alarm, a large crowd of people from around the area gathered at the scene. It is also apparent that the deceased was a reputed suspect for theft incidents in the area. Consequently, it was further alleged, the deceased was

indiscriminately assaulted to death by the mob of people present at the scene of crime. Among the assailants of the deceased, it was alleged, were the first, second and third appellants.

In their defence at the trial, the appellants denied any involvement in the alleged crime. It was their defence that even though they heard the noise from the crowd of people from a beer drinking place nearby, they did not join in the mob. Instead, the appellants maintained, they retired to their respective homes. They claimed that the case against them was framed up.

The learned trial judge as already shown convicted the appellants of murder. He was satisfied that the witnesses PW.1, PW.2, PW.3, PW.4, PW.5 and PW. 6, for the prosecution were credible. Invoking the doctrine of common intention, the learned trial judge held that the mob which set upon the deceased including the appellants shared a common intention to kill or do bodily harm in which case malice aforethought

had been established. Consequently, the appellants were convicted as charged. Aggrieved, this appeal has been preferred against the conviction and sentence.

In this appeal, the first appellant was represented by Mr. T. Marealle, learned Counsel and Mr. Munuo Ng'uni, learned counsel represent the second and third appellant. For the respondent Republic, Mr. Kaduri, learned Principal State Attorney, appeared.

The second and third appellants had jointly filed a four-point memorandum of appeal. Mr. Munuo opted to adopt these grounds at the hearing of the appeal indicating that he would argue the grounds together. The gravamen of Mr. Munuo's submission was to the following effect. First, that as found by the learned trial judge, the deceased died as a result of mob beating. However, there was no reliable evidence upon which the appellants were conclusively identified as participants in the beating of the deceased. The position is made even worse by the fact that the incident took place at

night when it was dark and the intensity or illumination of the electrical light at the shop-cum-residence of PW.3 was not established. In such circumstances, it is unsafe to rely on the evidence of visual identification of the witnesses to sustain the conviction of the appellants.

Furthermore, the post mortem examination report (Exh. P.1) does not support the allegation that the action of the first appellant in assaulting the deceased caused his death. While it is alleged that the first appellant assaulted the deceased in the stomach and on the legs, the post mortem examination report shows that the deceased died as result of haemorrhage resulting from severe head injury.

In summary, Mr. Munuo urged that in view of the fact that none of the witnesses positively testified to have seen either the second or the third appellant beating the deceased, the poor condition of light at the time and the conflicting evidence of the witnesses, the case against the appellants still

left doubts which should be resolved infavour of the appellants.

On his part, Mr. Marealle, learned Counsel for the first appellant, Zakaria Japhet alias Jumanne, strongly resisted the appeal. According to him, the evidence against the appellant does not show who among the people in the mob administered the fatal blow to the deceased. At most, he said what is gleaned from the evidence of Esther Alphonce Shirima (PW.2), if at all, it is to be believed, is that she saw the first appellant assaulting the deceased with the flat side of the machete. Furthermore, Mr. Marealle submitted that the conduct of the first appellant was consistent with innocence rather guilt. This, he went on in his submission, was supported by the prosecution witnesses PW.4 and PW.6. For this reason, Mr. Marealle submitted that it was erroneous on the part of the learned judge to hold that malice aforethought had been established against the first appellant. Finally, Mr. Marealle said the learned judge also fell into the error in finding that common intention had been established in this case. He was

firmly of the view that there was no common intention shown in the circumstances of the case.

It is common ground that the death of the deceased was a result of mob beating at the shop-cum residence of Beda Shirima (PW.3). The mob comprised mostly people from the neighbourhood who had responded to the alarm raised. In this situation, the central issue is who was responsible for the fatal blows that caused the death of the deceased.

This issue has exercised our minds considerably. Both the learned counsel Mr. Munuo and Mr. Marealle, are emphatically of the view that the condition at the time of the incident was not favourable for a proper identification of the appellants among the members of the crowd who assaulted the deceased. In this regard it is to be observed that it is also common ground that the incident took place at night when there was no moonlight. Under such circumstances, the next question falling for consideration is whether all possibilities of mistaken identity were eliminated. The learned trial judge was

positively of the view that all possibility of mistaken identity had been eliminated.

Apparently, the learned judge was of this view because according to the evidence of PW.2, "the spot was bathed with the electricity light" from PW.3's shop-cum residence. The intensity of the light was not indicated.

Dealing with this issue, the learned trial judge referred to the scene at the shop-cum-residence of PW.3 as the third and final stage in the series of events that led to the death of the deceased. This is the place where the deceased suffered mob beating. From the record, this stage, according to the learned trial judge, involved all the appellants and was witnessed by PW.2, PW.5 and PW.6. These witnesses, the learned judge found to be credible. Because the evidence of these witnesses provides the crux of the identification of the appellants at the scene where the deceased was assaulted, it is instructive to examine closely the relevant evidence of each of them.

In his evidence in court at the trial PW.2, Esther Alphonce Shirima, inter alia stated:

> Jumanne had a machete. He was assaulting him with the flat side of his machete. He was asking the deceased to show where he has hidden the rice and maize floor (sic)...

She further stated:

> I also saw the other accused persons. They were also assisting Jumanne in assaulting the deceased. The second and third accused persons pertains (sic) in kicking the deceased. They beat him indiscriminately on the stomach and legs.
>
> ... Then the deceased was assaults (sic) by those accused persons and others

> when they were leading him to the police post.

From the record, PW.5, Elvis Kisaro, among other things said:

> Upon arrival at Maeda's shop the first accused forced the deceased to squat. ... It must have been during our brief absence from the scene when the deceased was assaulted. **I did not see any one assaulting deceased** *(emphasis supplied).*

On cross examination, again he stated:

> I did not witness the deceased's beating. ... I cannot testify against the second and the third accused persons.

When questioned by Assessor No. 1, PW.5 replied in part:

> ... I was not present when the deceased was lynched to death.

As for PW. 6, Christopher Emmanuel Makyao, he is recorded to have said inter alia:

> The accused persons at the dock were among the assaillants ... A large crowd had participated in the beatings. They kicked and punched him in discriminately: ... It was and the first accused who eventually managed to get the deceased away from the angry mob.

From these extracts, it is apparent that only PW.2 was positive in his evidence that the appellants were among the crowd beating the deceased. However, PW.5 is categoric that he did not see the deceased being beaten. This is so, because

according to him he was not present when the deceased was beaten.

With regard to PW.6, his evidence is that a large crowd of people was involved in beating the deceased. The appellants were among those in the crowd. This, to say the least, is not satisfactory, all the more so in a criminal charge. Generalised statements such as "they were among the crowd or assailants" should be acted upon with great caution. Specific reference in evidence to individual accused persons is more reliable than global generalized mention of accused person involved in a criminal charge. In this case inspite of these unsatisfactory aspects of the evidence, we think with respect, it was erroneous on the part of the learned trial judge to make a finding that participation of all the appellants was born out from the evidence of PW.2, PW.5 and PW.6.

As just shown, it is only PW.2 who in the nature of evidence extracted above attempted to implicate them to the extent explained. In the light of such evidence, the vexing

question is whether the learned trial judge would have come to the same conclusion had he properly addressed and analysed the evidence of PW.2, PW.5 and PW.6. It remains an open question either way. It is possible that he might not have come to the same conclusion if the finding on the evidence of these witnesses was different. Consequently, the end result pertaining to the verdict would also possibly, be affected.

On the other hand, with regard to the evidence of PW.2 he saw both the appellants among the crowd beating the deceased. The question arises whether the evidence was such that it left no doubt whatsoever as to the correct identification of the appellants. As the incident at the shop-cum-residence of PW.3 took place during the night where, with moonlight and the electric light, was PW.2 able to identify the appellants properly.

The learned trial judge was satisfied that the appellants were properly identified. It has not been shown from the evidence how bright the illumination and intensity of the

electric light was so as to enable PW.2 to identify the appellants among the crowd beyond all doubts. With the crowd milling around at the time of the night each trying to take his chance to beat the alleged thief, the deceased, we are unable to accept that the condition was favourable for a proper identification of the appellants.

It is common knowledge that evidence of visual identification is of the weakest kind and most unreliable. For this reason this Court has in numerous cases enjoined the courts not to act on such evidence unless all possibilities of mistaken identity are eliminated and the courts are satisfied that the evidence is absolutely watertight – see for instance, **Waziri Amani v. Republic** (1980) TLR. 250. In the instant case, it is doubtful that the learned trial judge addressed the evidence of PW.2 from this point of view. Had he done so, it is doubtful whether he would come to the conclusion he reached.

Incidentally, it will be recalled that according to the evidence of PW.2 as well as the other witnesses for the

prosecution, most of the people in the crowd at the shop-cum-residence of PW.3 were from the locality, they are familiar with each other. If that was so, it is curious that PW.2 was able to identify only the three appellants out of the crowd. All the more so if, according to the evidence, many people including the appellants partook in the beating of the deceased, Why were the others not identified by PW.2. It raises nagging doubts as well. Such doubts, the learned counsel, Mr. Munuo and Mr. Marealle urged should be resolved infavour of the appellants. With respect, we agree with them on this point.

There is yet another aspect of the case which, as urged by Mr. Munuo and Mr. Marealle, was not properly addressed by the learned trial judge. This relates to the cause of death. Accepting the evidence of PW.2 for what it is worth, the first appellant is alleged to have beaten the deceased with the flat side of the machete. The other appellants among the crowd were seen beating and kicking the deceased on the legs and stomach. The post mortem examination report (Exh. P.1) shows that the cause of death was due to **haemorrhage**

resulting from severe head injury. It is clear therefore that even if it is accepted that the appellants took part in the mob beating of the deceased, such beating did not cause the death of the deceased. The appellants could not therefore be held responsible for the death of the deceased as charged. We are respectfully of the view that the learned trial judge did not consider this aspect in his judgment. Had he done so, it is not certain what would be his conclusion.

At this juncture it is desirable to consider whether the doctrine of common intention was properly applied. On this, Mr. Kaduri, learned Principal State Attorney, for the respondent Republic ardently maintained that the trial judge properly directed himself on the principle. He said so long as the appellants are shown to have participated in assaulting the deceased as a punishment to a suspected thief, common intention had been established, however slight the participation. While the learned trial judge supported by Mr. Kaduri set out correctly the legal position regarding common intention as provided under Section 23 of the Penal Code, with

respect, we do not think that th plicable in the instant case.

First, in order for the principle to come into play, it presupposes that the accused, the appellants, in this case were properly identified. Here, on the evidence, the condition as demonstrated earlier, was not favourable for proper identification of the appellants. Second, the principle is applicable where, on the evidence it is shown that the act of the accused, the appellants in this case, caused the death of the deceased. In this case, again it has been shown that even if it is granted that the appellants took part in the beating of the deceased on the stomach and the legs, the cause of death was not caused by such beating. The medical evidence does not support it.

We may as well mention here in passing that with regard to the first appellant, his conduct according to PW.6 was not consistent with his guilty but rather, with his innocence. He is reported to have actively assisted in desisting the rest of the

crowd from beating the deceased. He also assisted in calling for the police and taking the deceased to the police.

All in all therefore, we are satisfied that the circumstances of the case were such that lingering doubts still remained unresolved. The learned judge, with great respect, does not seem to have addressed these aspects closely. Had he done so, we think he would have come to the conclusion that doubts still remained unresolved. It is a cardinal principle of law that in a criminal charge doubts are resolved infavour of the accused however slight they may be. In similar vein, in this case, it is our view that lingering doubts as indicated herein should have been resolved in favour of the appellants as urged by Mr. Munuo and Mr. Marealle, learned counsel for the appellants.

In the event, for the foregoing reasons, the appeal is allowed, the conviction quashed and sentence set aside. The appellants, Zakaria Japhet alias Jumanne, Elibariki Kifura

Mkonyi and Heven Tumainiel, are to be set free forthwith unless otherwise lawfully held.

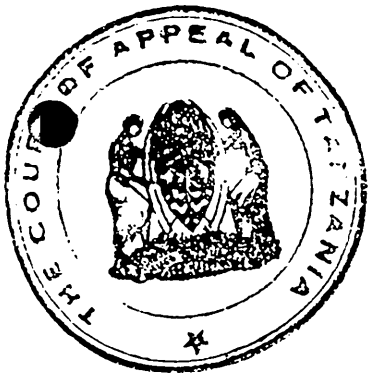
DATED at ARUSHA this 4th day of October, 2006.

D. Z. LUBUVA
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

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



S. M. RUMANYIKA
DEPUTY REGISTRAR