| Citation | Parties | Legal Principles Discussed |
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| **CRIMINAL APPEAL NO.49 OF 2007** – COURT OF APPEAL OF TANZANIA AT TANGA.<br>Coram: MROSSO, J.A, KIMARO, J.A AND LUANDA J.A | **MHINA MNDOLWA@MHINA VS THE REPUBLIC** (Appeal from the decision of the High Court of Tanzania at Tanga – **Criminal Sessions case No.31 of 2003**. (Mkwawa, J) | The doctrine of common intention is invoked where two or more people set out or are intent to commit an offence and in the process of prosecuting the intent one or some of them one or some of them commit the "actus reus" constituting the Criminal offence.<br>See also S.23 of the Penal Code, Cap 16 R.E 2002 |

**IN THE COURT OF APPEAL OF TANZANIA**
**AT TANGA**

**(CORAM: MROSO, J.A., KIMARO, J.A. And LUANDA, J.A.)**

**CRIMINAL APPEAL NO. 49 OF 2007**

**MHINA MNDOLWA @ MHINA ..... APPELLANT**
**VERSUS**

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

**(Appeal from the Decision of the High Court of Tanzania at Tanga)**

**(Mkwawa, J.)**

**dated the 5th day of April, 2006**
**in**
**Criminal Sessions Case No. 31 of 2003**

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**JUDGMENT OF THE COURT**

**19 & 27 June 2008**

**MROSO, J.A.:**

Two men, Mhina Mndolwa @ Mhina and Thomas Ruben, were prosecuted for the offence of murder contrary to section 196 of the Penal Code in the High Court at Tanga. They were convicted of manslaughter after a full trial and each was sentenced to imprisonment for six years. Both believed they were wrongly found

guilty of the offence with which they were convicted and appealed to this Court by a memorandum of appeal which was lodged by their advocate, Mr. Sangawe. However, just a day before the hearing date of the appeal, Thomas Ruben, who was the second appellant, wrote a letter to the Registrar of the Court withdrawing his appeal. The letter was written from prison, apparently without consulting his advocate. He did not cite the legal provision under which he sought to withdraw his appeal, but we assume he did so under Rule 70 (1) of the Court of Appeal Rules, 1979.

Mr. Tangoh, learned State Attorney, who represented the Director of Public Prosecutions in this appeal, did not raise objection and the Court had no reason to refuse his application. His appeal to this Court was marked withdrawn. Mr. Sangawe, therefore, argued the appeal in respect of the first appellant only, Mhina Mndolwa @ Mhina.

We think it is helpful to start off with a brief narration of the facts on which the appellant was convicted for manslaughter.

The appellant was a security guard who was employed by a security firm known as Group 4 Night Watch. During the night of 20th March, 2002 he was guarding the premises of one Geofrey Simbo (PW2), an employee of the Tanga Cement Company. While on duty, according to a finding of the trial High Court, an irate mob attacked the deceased with clubs, sticks and *panga* resulting in his death on that same night. The incident occurred in the area which the appellant was guarding. The appellant together with Thomas Ruben (who withdrew his appeal) were prosecuted for the murder of the deceased, one Saidi Ramadhani. It is obvious the two were prosecuted on the basis of evidence which was given by one Philemon Charles (PW3).

Philemon Charles (PW3) worked for a missionary in the neighbourhood of the house which was being guarded by the appellant. He told the trial court that on the night in issue he was awokened by the sound of a whistle which was blown as alarm. He took his torch and went to the scene of the alarm. With light from his torch he saw three people. Those were one Ibrahim, the appellant and Thomas Ruben. According to him, the appellant had

pinned a man to the ground. Thomas Ruben had a *panga*. From 18 paces away he could see that the man who was pinned down was bleeding from the head. The man was allowed to leave but then two motor vehicles from the Group 4 Night Watch Company arrived at the scene and took away the injured man. According to PW3, he was the only person who answered the alarm – *"I can say that I was the only person who answered the alarm"*, he claimed, and that the appellant and the two others were all watchmen, guarding different houses. They told him the deceased was a thief.

The appellant had a different story. According to him, while he was on duty at the house he was guarding, someone suddenly struck him on his shoulder with a heavy object causing him to drop down. That person was with three or more other people. The appellant raised alarm by blowing a whistle and several people responded to the alarm. Although he had a baton with him, he did not use it. However, the people who responded to the alarm heavily assaulted the person who subsequently died.

The learned trial judge said –

> *"... In the light of the available evidence, there is no dispute that the deceased on the fateful night was descended upon by an irate mob who believed that he (the deceased) was a nocturnal thief."*

The learned judge having believed that the appellant was party to the killing sought to invoke the doctrine of common intention and said –

> *"This doctrine is applicable in the present case both from their presence and actions. There is no way one can say that they (the appellant and Thomas Ruben who did not wish to pursue his appeal) can be dissociated from the acts of the irate mob that had descended upon the deceased and beat him as a result of which he died."*

But the judge thought that there was no intention to kill the deceased (however, since they had acted unlawfully), he convicted the appellant for manslaughter.

Mr. Sangawe argued three out of four grounds of appeal.

In the first ground it is averred that there was no direct evidence from the prosecution side showing that the appellant attacked the deceased. In the second ground, the complaint is that PW3 – Philemon Charles – was not a credible witness, that he gave contradictory evidence and, therefore, that the trial court should not have believed him. The third ground of complaint is that since the trial court found as a fact that the deceased was killed by an irate mob, the appellant was implicated as a participant only because he was carrying out his watchman duties.

Mr. Sangawe contended that even going by PW2's evidence, nowhere did he say the appellant struck the deceased. He said he saw the appellant pinning down the deceased. If the deceased was an intending thief or even merely an intruder into the premises the appellant was guarding and was accompanied by others, there was nothing unlawful about the appellant restraining the deceased by pinning him down while awaiting assistance from his employers.

But the appellant explained that it was the deceased and at least three other people who assaulted him (the appellant) and he

raised alarm. Indeed, two motor vehicles from his employer arrived at the scene in response to the alarm and took away the deceased. We, therefore, agree with the appellant that there was no direct, and we may add, not even indirect, evidence that the appellant inflicted any harm on the deceased.

As mentioned earlier in this judgment, the trial court found as a fact that the deceased died from an assault by what it termed *"an irate mob"*. By invoking the doctrine of common intention, the trial court associated the appellant with the act of the mob and found the appellant guilty of manslaughter. But, when is the doctrine of common intention invoked against an accused person? Is mere presence at the scene of crime enough to implicate an accused person under the doctrine?

If it is accepted that the appellant as a security guard was entitled to arrest and keep under restraint an intruder who is suspected to be a thief and all that PW3 told the trial court was that he saw the appellant *"pin down"* the deceased, then if an irate mob came to the scene and without instigation from the appellant fatally

assaulted the deceased, was the appellant responsible for the resulting death? It should also be kept in mind that there was no evidence that the mob assaulted the deceased at the time when he was being restrained by the appellant.

The doctrine of common intention is invoked where two or more people set out or are intent to commit an offence and in the process of prosecuting the intent one or some of them commit the ***actus reus*** constituting the criminal offence. The commission of the offence is imputed to them all. A member of the group would escape being implicated only if there is evidence that he dissociated himself, before the offence was committed, from the act constituting the offence. We may say that the above is a paraphrasing of section 23 of the Penal Code, Cap. 16 of the Laws which reads:-

> *"23. 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 nature that its commission was a probable consequence of the prosecution of such purpose each of*

*them is deemed to have committed the offence.*

On the facts of this case there is not an iota of evidence that the appellant and the irate mob had formed a common intention to kill the deceased or even to assault him. The court below erred, therefore, in importing the doctrine of common intention into the case to implicate the appellant.

PW3 said nothing about an irate mob descending on the deceased. Yet, the trial court found as a fact that there was such a mob and that it was the mob who caused the death of the deceased. The court must have obtained that evidence from the appellant. That implies that PW3 did not see everything that occurred at the scene although he claimed to be the only person who answered to the alarm. If he had been the only person who responded to the alarm there would not have been an angry mob who must also have answered to the alarm and who lynched the deceased. It means, obviously, that PW3 was not a wholly truthful witness and his evidence was to be taken with great caution. Unfortunately, the trial

judge took everything that PW3 said as gospel truth. The learned judge said of PW3 –

> *"I must also point out that I had found PW3 a credible witness and that he had left me with lasting impression of sincerity and truthfulness".*

With respect, had the learned judge considered the evidence as a whole, including the evidence of the appellant, he would not have found PW3 as credible as he thought him to be. Therefore, he would not have relied on his evidence to find the appellant guilty of manslaughter.

At the end of the day in this appeal Mr. Tangoh, learned State Attorney for the respondent, very candidly and properly conceded to the appeal. We allow this appeal by quashing the conviction of the appellant for manslaughter and set aside the sentence of six years imprisonment. The appellant is to be set free forthwith unless he is held for some other lawful cause.

DATED at TANGA this 24th day of June, 2008.

J. A. MROSO
**JUSTICE OF APPEAL**

N. P. KIMARO
**JUSTICE OF APPEAL**

B. M. LUANDA
**JUSTICE OF APPEAL**

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

(W. E. LEMA)
**DEPUTY REGISTRAR**