

the ICC, raises questions about regional leaders' genuine commitment to fighting impunity and ensuring justice for the victims of international crimes. A mass walk-out by African countries would not only see African countries lose the moral ground on international justice discourses but would be a betrayal to its people. These withdrawals are a massive blow to the many victims of especially state-sponsored violence in the continent.

It is indeed a tough time for the court. And even though a good number of African countries have expressed confidence in it, the official position by the African Union calling for alternative dispute resolution mechanisms and African mechanisms of dealing with African problems puts the future of the court in a precarious situation, and this is a huge loss for victims of the many African conflicts especially those that are state-sponsored.

The Principle of Common Intention under the Tanzanian Penal Code: A Review of Practice through Judicial Interpretation



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Abstract

This article analyses the principle of common intention under section 23 of the Tanzanian Penal Code. According to the principle, when a number of persons engage in a criminal act with a common intention, each person is made liable as if he alone did the act. However, decided cases have shown that there are uncertainties and inconsistencies in interpretation of the principle. This article therefore, examines the uncertainties and inconsistencies regarding the application of the principle. In addition, it provides the ingredients and circumstances to aid courts when interpreting and applying the principle.

Keywords : Penal Code, Common Intention, Practice, Judicial Interpretation.

1. Introduction

In Criminal law, intention is generally taken to mean the accused's purpose² to commit the forbidden act. The Penal Code,³ (Cap. 16) is silent on criminal intention, yet section 23 of the law deals with *common intention*.⁴ Again, common intention itself has not been defined

in Cap. 16. Judicial practice has nonetheless, interpreted it to mean that intention made among several persons in pursuance of criminal offence.⁵ The offence so committed is done in a manner that it comes under the sanction of section 23 of Cap. 16.⁶ Section 23 deals with a situation, where an offence requires a specific criminal intention or knowledge and is committed by several persons. Each of them who join the act with such knowledge or intention is liable as if it were done by him alone with that intention or knowledge. The liability of individuals under this circumstance is called *Joint Liability*. The principle of Joint Liability is defined in section 23 in the following words:

...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.

The leading feature of common intention is participation in the action. Therefore, if two or more persons intentionally commit an

1 (*LL B (Dar Es Salaam), LL M (Oslo); Lecturer, Institute of Judicial Administration Lushoto)

2 Card, Cross and Jones: *Criminal Law*, Thirteenth Edition, Butterworth, London, 1995, at p. 62

3 The Penal Code, [Cap. 16 R.E. 2002].

4 The term common intention used in section 23 is also not defined anywhere in Cap. 16. It is also argued that the term is contentious one among different principles in criminal law studies.

5 *R v. Alex and Seven Others* (1971) HCD 197, *R v. Sangi Manyenyi* (1968) HCD 47 and *Shene Kimboka v. R* (1968) 52. Still, there are inconsistencies and uncertainty in judicial opinion with regard to the degree of involvement and intention sharing in common intention.

6 Section 23 does not create any specific offence but only lays down the principle of Joint Criminal Liability.

offence jointly it is just the same as if each of them had done it individually. Everyone must be taken to have intended the *probable and natural results* of the combination of acts in which he joined.⁷ All become guilty of the principal offence. The fundamental factor in common intention is a pre-arranged plan to execute the plan for the desired result.⁸ Common Intention does not mean the similar intention of several persons. To constitute common intention, it is necessary that the intention of each one of them must be *known and shared* to all of the offenders.⁹ It has been further stated that common intention may develop in course of the commission or omission of the criminal act.¹⁰ The essence of liability to be found in existence of common intention is that the criminal act complained against was done by one of the accused persons in furtherance of common intention of all, if this is shown, then the liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone.¹¹ Therefore, section 23 of Cap. 16 is intended to meet cases in which it may be difficult to distinguish between the acts of the individual members of a party or to prove exactly what part was taken by each of them in furtherance of the common intention of all. In essence, section 23 of Cap. 16 lays down only a rule of evidence and does not create a substantive offence.

⁷ *R v. Usumau Mpangani* (1967) HCD 390, Cross, J., (as he then was) held that since death or grievous bodily harm was a probable consequence of the attack upon deceased and the attackers acted with a common purpose, accused is liable for the death even though he may not himself have struck the fatal blow.

⁸ Common intention implies acting in concert and existence of pre-arranged plan.

⁹ *Salehe Selemani v R* (1972) HCD 23, Mzavas, J., (as he then was) held that for the offence of common intention to apply, it must be shown that accused persons shared with actual perpetrators of the crime a specific unlawful purpose that led to the commission of an offence charged.

¹⁰ *R v. Tabulayenka Kirya and Others* (1943) 10 EACA 51- The Court held that...to constitute common intention... it is not necessary that there should have been any concerted agreement between the accused prior to the attack. Their common intention may be inferred from their presence, their actions and the omission of any of them

¹¹ *R v. Rukondo Kamano* (1968) HCD 48 - Mustafa, J., (as he then was) held that the accused person and his company were all acting in concert and with common intention, and accused is therefore responsible for the injury even if he did not himself shoot the arrow.

2. Necessary Elements in the Principle of Common Intention

To invoke the application of Section 23 of Cap. 16, certain necessary elements must be satisfied. The conditions as discussed below:-

2.1 Existence of Criminal Act:-

The criminal act under section 23 of Cap. 16 does not refer to individual acts where a group of persons commits a crime. Where the crime is committed by several persons in furtherance of common intention of all of them, each of them doing some act, similar or diverse, big or small shall be liable for that act. That act refers to the *criminal act* used in section 23, which means the unity of criminal behaviour that results in something for which an individual would be punishable if it were all done by himself alone in an offence.

In the case of *Juma Mkurasi v. R.*,¹² five people arrived in Bukoba, debarking from the S.S. Victoria, and went to a bus service booking station to buy tickets for Ngara. Being informed that the bus would leave the next day; they were attracted by an offer by a man, later identified as the accused, to take them to a bus which was leaving that night from a place some distance away. He took them in two groups to a dark place in his small car. While they were there, two other men appeared claiming to be police officers looking for Ugandan currency, which they said was prohibited in Tanzania. These other two men took money from the passengers and gave it to the man identified as the accused. The passengers, believing that they were police officers, allowed the search and seizure of the money; they subsequently went to a house with the police officers, who went off. The accused was convicted of robbery.

The Magistrate construed section 285 of Cap. 16 to mean that when more than one person commit the offence, the use of actual force is not necessary. Their being more than one is enough to create the fear of such

¹² (1969) HCD 72.

a nature intended to overpower the party robbed. On appeal Bramble J., (as he then was) held that section 285 of Cap. 16 merely provides for greater punishment where more than one person acting together commits a robbery. The use of actual force, or the threat of immediate actual force, is nonetheless a necessary element of the offence. His Lordship continued and stated that:

The evidence clearly discloses a common intent between the accused and the other men and each is responsible for what was done in furtherance of that intent.

In conclusion, his Lordship distinguishes the *criminal act* actually committed by stating that the evidence supports a case of stealing, not robbery.

2.2 Criminal Act Done by Several Persons:-

Under common intention, the criminal act in question must have been done by several persons. In other words, the number of offenders should be two or more persons. In the case of *R v. ACP Abdallah Zombe*,¹³ Massati J.K (as he then was) stated that common intention is a doctrine formulated in section 23 of Cap. 16 where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another.¹⁴ Most importantly, if the criminal act was fresh and independent act springing wholly from the mind of the offender, the others are not liable merely because when it was done they were intending to assist the offender in a different criminal act.

1.2 Common Intention in Doing the Act:-

The words in conjunction with one another

¹³ *R v. ACP Abdallah Zombe and 12 Others*, Criminal Sessions Case No. 26 of 2006, High Court of Tanzania, at Dar Es Salaam, p. 14.

¹⁴ *Ibid*, p. 13.

in section 23 of Cap. 16 mean that the accused persons must have prior concert to do an offence. In this case, the burden lies on prosecution to prove that actual participation of more than one person for commission of criminal act was done in furtherance of common intention at a prior concert. Case law have shown that where there is no indication of premeditation or of a pre-arranged plan, the mere fact that the two accused persons were seen at the spot or that the accused persons fired an arrow as a result of which a person died could not be held sufficient to infer common intention. In the case of *Salehe Selemani v R.*¹⁵, where the two accused persons followed a fourteen-year schoolboy who had one hundred Tanzanian shillings to buy items in a shop. Along the way, one of the accused persons grabbed the money from the boy and ran away. Both accused persons were arrested and prosecuted for robbery with violence contrary to section 255 and 256 of Cap. 16. The first accused argued that the complainant did not mention him as one of the robbers. The second accused gave his defence on oath and denied committing the offence. In the High Court, Mzavas, J., (as he then was) held that for the offence of common intention to apply, it must be shown that accused persons shared with actual perpetrators of the crime a specific unlawful purpose which led to the commission of an offence charged. His Lordship concluded that:

...in this case, there is no evidence whatsoever showing that the first accused shared with second accused who was the actual perpetrator of the crime, a specific unlawful purpose which led to the commission of the offence of robbery with violence.

Prior to Salehe's case, Mustafa J (as he then was) in the case of *R. v. Sangi Manyenyi*,¹⁶ had held that in the absence of evidence as to

¹⁵ (1972) HCD 23.

¹⁶ (1968) HCD 47.

which accused fired the arrow, they both can be convicted of attempted murder only if the prosecution could show a common intention. To make his statement clear, His Lordship states that:

...the prosecution sought to find the requisite common intention intent in the joint attack on the complainant moments before he was wounded.

The facts of this case were that: complainant was shot with an arrow, whereupon he turned around and saw only the two accused persons. There was no evidence adduced to show which one had shot the arrow. Just before the shot, the accused had attacked complainant and taken the bow and arrow with which he was shot. It is because of this, His Lordship reasoned that:

...the arrow was shot, the assault on complainant had already been terminated, and there was no evidence adduced to show that accused were still acting in concert.¹⁷

1.3 Participation in Doing the Criminal Act:-

The participation in a criminal act of a group is a condition precedent in order to fix joint liability and there must be some overt act indicative of a common intention to commit an offence. Cap. 16 require that an accused must be present on the spot during the occurrence of the crime and take part in its commission. It is also enough if he is present somewhere nearby. Court practice has shown that the essence of section 23 of Cap. 16 is that a person must be physically present at the actual commission of the crime. He must be physically present at the scene of the occurrence and must actually participate in

the commission of the offence in some way or another at the time crime is actually being committed. Again, where two or more persons embark on a joint unlawful enterprise each is equally liable for the *probable consequences* of such acts of the other person as are done in pursuance of the agreement. The abettor is then, liable for unforeseen consequences of the same extent as the principal offender.

The first leading case on the point is *R v. Mughaira and Others*,¹⁸ where nine appellants formed a *common intention* during a period of famine of burgling a house and carried the plan. During the burglary one of the appellants, who was armed with a spear killed the owner of the burgled house. The appellants were arrested and prosecuted for murder. The other eight appellants denied any intention of murder. The court held responsible for murder all nine appellants. On appeal, the Court of Appeal held that even though only the first appellant who had formed the intention of committing burglary was armed, the enterprise of burglary and the resistance by the owner of the premises burgled was a probable consequence. The Court of Appeal reasoned that: the overcoming of such resistance by violence was necessary by the burglars and would probably be resorted to violence and this bring all of the accused persons within the doctrine of common intention, thus making them equally responsible in law for the act of the first accused alone.

However, the existence of common intention does not necessarily mean that there should be a previous agreement. Common intention may be formed at the spot of the event. Case law shows that the very important thing is participation in the commission of criminal offence. In the case of *R v. Tabulayenka Kirya and Others*,¹⁹ a suspected thief one Mikairi, was discovered sitting near the door of a hut at night. An alarm was sounded and several persons came rushing to the spot and at once

proceeded to beat the said Mikairi with all necessary available weapons at hands. The result was death from multiple injuries to Mikairi. In discussing the issue of *common intention*, the court said:

...to constitute common intention... it is not necessary that there should have been any concerted agreement between the accused prior to the attack. Their common intention may be inferred from their presence, their actions and the omission of any of them.

This practice has been shown in other common law legal tradition. For instance, the practice in India and England show similar interpretation. In the known *Shankari Tola Post Office Murder Trial*,²⁰ the High Court of Calcutta and the Privy Council both agreed with the findings of the trial court and held the accused guilty of murder. Giving his judgment Lord Sumner stated that:

...even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things they also serve who only stand and wait..... Section 34 (Section 23 of the Tanzanian Penal Code) deals with doing of separate act, similar or diverse by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all as if he had done them himself. (Emphasis supplied)

In England, in the case of *R v Betts and Ridley*,²¹ it was stated that to be convicted of a crime under the *doctrine of common intention* it was not necessary for an accessory to actually be present when the offence was carried out. The reasoning of Mr Justice Avory in the Court of Criminal Appeal is very clear that:

...where common design to commit robbery with violence and one participant caused death while another present aiding and abetting as principal in second degree, both guilty of murder although latter had not specifically consented to such degree of violence as was used.²²

Court practice, however, has shown that the same or similar intention does not necessarily mean that there is common intention. Sometimes, the circumstances may be such as to show that each person had acted independent of another. A good example is the case of *R v. Okute and Another*,²³ where the deceased died from shock resulting from injuries received in two separate and independent assaults. The first appellant and three others who were convicted of manslaughter made the first assault. The trial court held that in the first assault was intended to cause grievous harm, and the second independent assault upon the deceased was one of the injuries from the cumulative effect of which the deceased died. On appeal, the Court of Appeal stated that the second appellant, having intent to cause grievous bodily harm, inflicted an injury on one who was already in a weak state. The Court of Appeal entered conviction for the second appellant and allowed appeal for the first appellant.

17 Read: *Dracaku Afia and Another v. R* (1963) E. A 363.

18 (1943) 10 EACA 105.

19 (1943) 10 EACA 51.

20 *Barendra Kumar Ghosh v. King Emperor*, AIR 1925 PC 1.

21 (1930) 22 Cr App R. 148.

22 *Ibid*, at p. 155.

23 (1941) 8 EACA 78.

3. Basic Intention and Specific Intention in the Principle of Common Intention

In criminal law, a distinction is always made between an offence of basic intent and an offence of specific intent. Offences requiring basic intent specify a *mens rea* element that is no more than the intentional or reckless commission of the *actus reus*. The criminal offender either knew (intended) or deliberately closed his mind to the risk (recklessness) that his action (*actus reus*) would result in the harm suffered by the victim. A limited number of offences are defined to require a further element in addition to basic intent, and this additional element is termed specific intent.

At common law specific intent has been defined, in the case of Mohan²⁴ to mean that *aim or purpose – a decision to bring about, insofar as it lies within the accused's power, the commission of the offence...no matter whether the accused desired that consequence of his act or not*. In Tanzania the case of ACP Abdallah Zombe and 12 others,²⁵ the High Court stated that *specific unlawful purpose* is a condition necessary in *common intent*. In this case, ACP Abdallah Zombe and 12 others were jointly charged with four counts of murder contrary to section 196 of Cap. 16. It was allegedly by the prosecution that accused persons jointly and together unlawfully killed the four victims with malice aforethought. During the trial, all accused persons pleaded not guilty to the charges. Before deciding the case, Massati JK, (as he then was) had to address his mind to two principles which he thought are of relevance to the case.²⁶ The first one is on criminal participation or principal offender and the second principle is on common intention.²⁷ His Lordship concluded the application of common intention in relation to specific intent by stating that:

*...for section 23 to apply it must be shown that an accused person shared with the actual perpetrators of the crime a specific unlawful purpose which led to the commission of the offence charged.*²⁸

Therefore, for section 23 of Cap. 16 to apply it must be revealed that an accused person shared with the actual offenders of *the crime a specific intention*, which led to the commission of the offence charged. The requirement for specific intent in common intention has been long stated in the case of *Salehe Selemani v R*,²⁹ discussed herein above.

4. Proving Existence of Common Intention in Criminal Offence

The principle of common intention refers to the common design of two or more persons acting together.³⁰ The burden lies on prosecution to prove that actual participation of more than one person for commission of criminal act done in furtherance of common intention at a prior concert.³¹ In *R v. Salehe Selemani and Another*,³² Mzavas, J., (as he then was) held that it is settled law that where two or more persons are charged with an offence, the prosecution has to prove the actual guilt of each accused or alternatively the prosecution must prove that the accused persons were acting in pursuance of a common purpose when one of them committed the alleged offence. For the principle of common intention to be proved the prosecution must show that an accused person shared with the actual perpetrators of the crime a

²⁸ *Ibid*, p. 14.

²⁹ (1972) HCD 23.

³⁰ *Amon v. R* (1970) HCD 251, Bramble, J., (as he then was) held that: *if the prosecution's case is believed he (accused) was seen running away from the scene together with four other men... (then) the evidence should then have been examined to see whether there was anything connecting the appellant with the crime... it must be proved that he took part in the execution of it by some overt act or that by his words or behaviour identified himself with the perpetrators, that he had a common intention with them... there was no evidence to support any of these facts.*

³¹ *Wanjiro Malerio and Another v. R*, *Ibid*.

³² (1972) HCD 23.

specific unlawfully purpose which led to the commission of the offence charged.³³

In the case of *R v. Sangi Manyenyi*,³⁴ Mustafa J., (as he then was) held that both accused persons can only be convicted of attempted murder if the prosecution could show a common intention. In this case, complainant was shot with an arrow, whereupon he turned around and saw only the two accused. No evidence was adduced to show which one had shot the arrow. Just before this, the accused had attacked complainant and taken the bow and arrow with which he was shot. His Lordship reasoned that: the prosecution sought to find the requisite common intention intent in the joint attack on the complainant moments before he was wounded. When the arrow was shot, the assault on complainant had already been terminated, and there was no evidence adduced to show that accused were still acting in concert.

It must be noted that it is the reason for doing the acts forming the criminal act. This is different from the intention to commit the offence, which is the result of the criminal act committed.³⁵ The case of *R. v Alex and Seven Others*³⁶ is very illustrative of this point. In this case, the eight accused persons were originally charged with murder and subsequently called upon to answer a charge of manslaughter. They were alleged to have participated in the beating of a suspected thief. The trial judge convicted seven of them for manslaughter and one for assault. The Judge provides his reasoning:

...I convict Aloys of simple assault which he has been proved to have committed.

³³ *Wanjiro Malerio and Another v. R*, *Op. Cit.*

³⁴ (1968) HCD 47.

³⁵ Read: *Mwakabuku and Another v. R* (1972) HCD 89, where Dufus P; Law and Mustafa, JJ, held that: we cannot find sufficient evidence to show that *the accused acted with a common intention* in accordance with section 23 of Cap. 16. What does appear much more likely is that these three brothers quarrelled and abused each other; the deceased on one side and the two appellants on the other; but that both appellants acted separately in hitting the deceased so that *the second appellant's use of the stone was an individual act* for which he alone should be held responsible.

³⁶ (1971) HCD 197.

*As for the rest of the accused the only reason why they beat the deceased without even stopping others from doing so after his condition had become critical was because they commonly intended punish him. As such, they were particeps criminals and I have no hesitation in finding them guilty of manslaughter as charged.*³⁷

The jurisprudential history and conclusion in the case of *ACP Abdallah Zombe* in respect to section 23 of Cap. 16 is well settled.³⁸ In the earlier days, to infer common intention, one had to prove that the criminal act was done pursuant to a pre-arranged plan.³⁹ As the cases developed, the view was that common intention could also be formed: only a moment before the commission of the offence;⁴⁰

³⁷ *R v. Ngereza Massaga* (1962) EA 766, where Reide, J., (as he then was) acquitted one accused for an offence of murder because she struck a blow and retreated, leaving the others beating the deceased. The Judge went as far as to suggest that common intent can only be inferred where the victim is attacked by *all members of the crowd simultaneously*.

³⁸ *R v. Abdallah Zombe*, *Op cit*, pgs 13 -16, His Lordship Massati, J.K., (as he then was) gives four important principles in application of the common intention, namely: (i) it must be shown that an accused person shared with the actual perpetrator(s) of the crime a specific unlawful purpose which led to the commission of the offence charged (ii) the offence committed must be a probable consequence of the prosecution of the unlawful purpose (iii) it is not necessary that there should have been any concerted agreement between the accused persons prior to the commission of the offence, and (iv) Mere presence at the scene of crime is not enough to infer common intention.

³⁹ Read: *R v. Usumau Mpangani* (1967) HCD 1967 390, *R. v. Sangi Manyenyi*, (1968) HCD 47, *R. v. Rukondo Kamano* (1968) HCD 48, *Shene Kimboka v. R* (1968) HCD 52, *Juma Mkurasi v. R* (1969) HCD 72.

⁴⁰ *R v. Sangi Manyenyi* (1968) HCD 47, where Mustafa J., (as he

on the spot; or during the course of the commission of the offence.⁴¹ The court noted, however, that in most situations, it is virtually impossible to directly prove a pre-arranged plan between the parties. While the usual circumstances that can lead to the inference of common intention are the conduct of the parties, the weapons used and the nature of the wounds inflicted, these circumstances are non-exhaustive.⁴² The totality of the circumstances must be considered in determining whether there was a common intention. At the same time, an inference of common intention should not be made unless it is a necessary inference deducible from the circumstances of the case.⁴³

However, reasonable care must be taken not to confuse same or similar intention with common intention.⁴⁴ The partition, which divides their bounds, is often very thin, nevertheless, the distinction is real and substantial and if overlooked will result in injustice. The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, but there must be pre-arrangement and premeditated concert.⁴⁵

5. Circumstances and Judicial Interpretation of the Principle of Common Intention

The principle of Common Intention as is provided under section 23 of Cap. 16 and through judicial interpretation can have the following ingredients:

5.1 Prior Meeting of Minds of Accused Persons:-

In order to bring a case under section 23 of Cap. 16 it is not necessary that there must be a prior pre-meditation. The common intention can be formed during the course of the

then was) stated that the prosecution sought to find the requisite common intention intent in the joint attack on the complainant moments before he was wounded

41 *R v. Tabulayenka Kirya and Others* (1943).

42 *Ibid.*

43 *R. v. Rukondo Kamano* (1968) HCD 48.

44 *R v. Okute and Another* (1941) 8 EACA 78.

45 Y V Chandrachud et al (eds.) *The Indian Penal Code*, Thirty-first Edition, Wadhwa & Company, 2006, at p. 134.

commission of the offence. It has been stated by the Eastern African Court of Appeal that to constitute common intention to prosecute an unlawful purpose, for instance to beat a so called thief, as a result of which he died, it is not necessary that there should have been any concerted agreement between the accused person prior to the attack of the so called thief. When asked how common intention can be determined in that circumstance, the court replied that: *their common intention may be inferred from their presence, their actions and omission of any of the accused person to dissociate himself from the assault.*⁴⁶ The Eastern Court of Appeal has recognised this opinion prior to the *Tabulayenka decision*. In the case of *Okute Kaliebi and Another v. Rex*, the court stated that:

*...in our opinion the fact that two people have the same intention does not necessarily mean that they have a common intention, for, the circumstances may be such as to show that each has acted independently of the other. Where several persons together beat another, then though each may have a different reason, and though some may join in the beating later than others it is plain that all have what the law calls common intention, which does not necessarily connote any previously concerted agreement between them.*⁴⁷

This line of thinking was adopted by His Lordship Kwikwima J., (as he then was) in the case of *R. v Alex and Seven Others*,⁴⁸ where he stated that:

I convict Aloys of simple assault which he has been proved to commit. As for the rest of the accused the only reason why they beat the deceased without even stopping others from doing so after his condition had become critical was because they commonly intended punish him. As such, they were particeps

46 *R v. Tabulayenka Kirya and Others* (1943), also read the judgment in *R v. Abdallah Zombe*, *Op. cit.*, at pages 14 and 15.

47 *Okute Kaliebi and Another v. Rex* (1941) 8 EACA 78.

48 *R v. Alex and Seven Others* (1971) HCD 197.

criminals and I have no hesitation in finding them guilty of manslaughter as charged.

This holding suggests that common intent can only be inferred where the victim is attacked by all members of the crowd simultaneously. It is therefore established principle that for section 23 of Cap. 16 may apply in circumstances where there is no prior concert of the criminal act.

5.2 Presence of Accused Person at the Scene of the Crime:-

It has been established by the courts that the requirement of section 23 of Cap. 16 is that mere presence at the scene of crime is not enough to infer common intention. Massati JK, in the case of *Zombe*,⁴⁹ stated the following words:

*I agree with the principles stated in numerous authorities cited by the learned counsel and others that mere presence at the scene of crime did not constitute one a party to the offence, or that he had common intention with the actual offenders. I also agree that from the evidence on record, the 12th accused did not have a gun and so he could not have been the one that killed the victims. Prima fade therefore, he could not be a principal offender. He could only be taken in as an aider or abettor counsellor or procurer, either by an act or by omission (encouragement) if there was evidence to that effect.*⁵⁰

His Lordship concluded that:

Mere presence at the scene of crime does not make one a party to an offence. To constitute an aider or abettor, or countanancer, there must be evidence of action or omission from which the court could infer that the person who did so, intended to aid, abet, or encourage the commission of that offence by the

49 *R v. Abdallah Zombe*, *Op. cit.*, p. 15.

50 *Ibid.*, p. 194.

*principal offender. Evidence could be direct or by conduct, and it is a question of fact in each case whether such evidence exists.*⁵¹

This position was clearly stated in 1962 by the Eastern Africa Court of Appeal, Reide J., (as he then was) in the case of *R v. Ngereza Massaga*,⁵² where one of the accused persons was acquitted of murder because she struck a blow and retreated, leaving the others beating the deceased. Reide J, went as far as to suggest that common intent can only be inferred where the victim is attacked by all members of the crowd simultaneously. His Lordship reasoned that:

...it is impossible to say which of the assailants' struck the fatal blow or blows...It could not be said that when Kwigema struck the deceased the first blow or blows. She had a common intention with others, nor that fatal blow or blows was or were struck by any of the assailants when carrying out a common intention with others.

It is therefore settled principle that for application of section 23 of Cap. 16, that mere presence at the scene of crime does not make one a party to an offence. To convict an accused person the evidence should support existence of common intention.⁵³ The court should examine the evidence to see whether there was anything connecting the accused person with the crime.⁵⁴

51 *Ibid.*, pp.194 -195.

52 (1962) EA 766

53 Read: *Tindira Chiru and Another v. R* (1951) EACA 180 where their Lordship stated that: *we do not find in the records any evidence to support common intention in the minds of the two appellants to attack the deceased. There is nothing to suggest that when either of the appellants struck his blow, it was in pursuance of a pre conceived plan.*

54 *Amon v. R* (1970) HCD 251, Bramble, J., (as he then was) stated that: *...presence in the neighbourhood of crime does not necessarily make a person a party. It must be proved that he took part in the execution of it by some overt act or that by his words or behaviour identified himself with the perpetrators, that he had a common intention with them.*

5.3 Suspicion of Existence of Common Intention:-

It is established, in criminal law, that an accused person cannot be convicted of an offence on a mere suspicion alone.⁵⁵ Samatta J., (as he then was) once quoted to have stated that suspicion, however grave it may be, cannot be a substitute for proof in a court of justice.⁵⁶ Courts of law have shown that even in common intention a mere suspicion alone cannot hold a person to have common intention with others. In the case of *Amon v. R*⁵⁷, it was stated that a person cannot be convicted of crime on suspicion alone. In his words, Bramble, J., (as he then was) stated the following words:

If the prosecution's case is believed he was seen running away from the scene together with four other men. At its highest, there was very suspicion but a person cannot be convicted of crime on suspicion alone.

For better understanding of the issue of suspicion in common intention, the facts of the case are provided hereunder. The appellant, Amon, was convicted of shop breaking and stealing contrary to sections 296 and 265 of Cap. 16. At about 3.15 am one morning a watchman heard as though a glass window was being broken and he raised alarm. Another watchman from neighbouring premises hastened to the spot and saw five persons running in different directions, one of whom was running towards where he was. He told him to stop and when he failed to do so he struck him twice on his head with stick, but the

⁵⁵ See: *Hakimu Mfaume v. R* [1984] TLR 102, Maina, J., (as he then was) stated that: *Although there may be strong suspicion against the appellant, suspicion however strong is not sufficient evidence to convict; R v. Ally Said Kiubatyo* [1990] TLR 137, where it was stated that: *the defence of provocation is not open to a mere suspicion by an accused person of existence of adultery; Mathias Mhyen and Another v. R* (1980) TLR 290 – *mere suspicion that one's woman is carrying an affair with another is not sufficient ground for defence of provocation to reduce murder to manslaughter.*

⁵⁶ Samatta, J., in *Ally Fundi v. R* [1983] TLR 210, at ps. 214 -215. Also read the judgment in *Erasimu Daudi v. R* [1993] TLR 102, by Mroso, J., (as he then was) when stated, at p. 109, that: *suspicion, however strong, cannot form the basis for conviction of theft.* His Lordship added that: *The law is that no amount of suspicion, however strong, can found a conviction.*

⁵⁷ (1970) HCD 251.

person escaped. By following the blood stains they found the appellant with fresh injuries on his head. The appellant's story testified by a prosecution witness – appellant's relative, was that on the night of the incident he had attended a dance and as he had to go on safari the following morning he decided to go to his relative. While he was passing in a path where he was stopped by an unidentified man and he refused whereupon the man struck him on he fell down. He managed to escape and went to his relative, who gave him a change of clothes. The latter suggested that they should make a report to the police and while they were on the way they met the police and he was arrested. It was established beyond doubt that the appellant was the person to whom the watchman referred and the only question was whether he was a party to the breaking. On this point the trial magistrate held that:

*...it is clear that none of the prosecution's witnesses testified as to the accused's identity at the time the offence was committed, but the overall evidence particularly the clothes... irresistibly connects the accused with the said crime. The accused in his defence...said that he was attacked by an unknown man for an unknown reason. This **I am unable to accept as truthful.** (Emphasis supplied)*

The High Court on its part stated that the evidence should have connected the appellant with the crime. The defence ought to have been carefully examined. It is not enough for a magistrate to say *I am unable to accept it as truthful*. Some reasons must have been given as to why it was rejected so that an appellate court can say whether the conclusion is justified from the evidence. The appellant's story could possibly be true and as such it should have raised a reasonable doubt. In its conclusion, the High Court warned that:

...at its highest there was very suspicion but a person cannot be convicted of crime on suspicion alone. Presence in

the neighbourhood of crime does not necessarily make a person a party. It must be proved that he took part in the execution of it by some overt act or that by his words or behaviour identified himself with the perpetrators, that he had a common intention with them. There was no evidence to support any of these facts.

It is therefore important for the court to see to it that the evidence connects the accused person with the crime and that he had common intention with other offenders.

5.4 The probable consequence of the offence:

For the principle of common intention to apply, the offence so committed must be a *probable consequence* of the prosecution of the unlawful purpose.⁵⁸ Under section 23 of Cap. 16, each of the accused persons in the application of the principle is convicted of the same offence. In the case of *R v. Usumau Mpangani*,⁵⁹ Cross, J., (as he then was) held that:

....since death or grievous bodily harm was a probable consequence of the attack upon deceased and the attackers acted with a common purpose, accused is liable for the death even though he may not himself have struck the fatal blow...⁶⁰

In this case, the accused person, Usumau Mpangani, was charged with murder of a woman. There was evidence that accused and many others responded to an alarm, found that deceased had assaulted a woman, and possibly harmed her child. The crowd followed deceased to another house where accused and others beat him. Accused was armed with a large stick.

Before Usumau decision, the Eastern Africa

⁵⁸ *R v. Abdallah Zombe, Op. cit.*, p. 14.

⁵⁹ (1967) HCD 290.

⁶⁰ *Ibid.*

Court of Appeal had already in *R v. Mughuira and Others*,⁶¹ started that even though only the first appellant who had formed the intention of committing burglary was armed, the enterprise of burglary and the resistance by the owner of the premises burgled was a *probable consequence*.

The decision in *Mathias Mhyen and Another v. R*⁶² is a good illustration on the subject. In this case, the first appellant enlisted the second appellant in assaulting the deceased with whom he suspected of having an affair with his former concubine. On the material date the second appellant held the deceased's hands to prevent the deceased from fleeing and from defending himself against the assault. The court stated that where a person is killed in prosecution of common unlawful purpose and death was a *probable consequence* of that common purpose, each party to the killing is guilty of the murder. The court gives its reasoning in the following words:

...the second appellant was active participant in the vicious assault of the deceased by holding deceased's hands. He not only made it impossible for the deceased to flee from his assailant but also ensured that the first appellant in carrying out his evil deed would meet no resistance from his victim. In the circumstance, we are satisfied that the second appellant's conduct at the material time brings him within the ambit of provisions of section 23 of Cap. 16...⁶³

However, the courts of law have been very conscious to set a rule of law that always convict each and every individual involved in the prosecution of the offence from probable consequences. The courts always examine

⁶¹ (1943) 10 EACA 105.

⁶² (1980) TLR 290.

⁶³ *Ibid.*, at p. 294.

circumstances of each case. In the case of *R v. Alex and Seven Others*,⁶⁴ where eight accused persons were originally charged with murder and subsequently called upon to answer a charge of manslaughter. They were alleged to have participated in the beating of a suspected thief. The trial judge, Kwikima Ag. J, (as he then was) convicted them of manslaughter, except one accused person.⁶⁵ Therefore, courts are advised to determine each individual case on issues of common intention in probable consequences of the offence.

5.5. To Share Common Intention with Actual Perpetuator:-

In order to bring section 23 of Cap. 16 into play, it must be shown that the accused shared with the actual perpetrators of the crime, a common intention to execute an unlawful purpose.⁶⁶ In the case of *Adam Yusufu v. R*,⁶⁷ Othman J., (as he then was) stated that:

...from the evidence of prosecution witnesses, I have highlighted earlier the agreement and the appellants actions and conduct there is sufficient evidence of common intention under Section 23 of Cap. 16 it is immaterial whether the money was received by one or the other. (Emphasis supplied)

In the case of Zombe, His Lordship Massati,

⁶⁴ *R v. Alex and Seven Others* (1971) HCD 197.

⁶⁵ The reasons provided by His Lordship were that: *...in this case, all the accused stayed long at the scene and their purpose could not have been other than to punish the thieves in the customary way of their tribe. For this reason, I feel bound to acquit Aloys Paulo of the charge as his purpose and intention may have been to take the deceased to justice as he himself alleges. I convict Aloys of simple assault, which he has been proved to have committed. As for the rest of the accused the only reason why they beat the deceased without even stopping others from doing so after his condition had become critical was because they commonly intended punish him. As such, they were particeps criminals and I have no hesitation in finding them quality of manslaughter as charged. See: R v. Alex and Seven Others* (1971) HCD 197.

⁶⁶ *Wanjiro Wanello and Another v. R* (1955) 22 EACA 521; see also: *Zuberi Rashid v. R* (1951) EA 455 and *R v. Cheya and Another* (1973) EA 500.

⁶⁷ *Adam Yusufu v. R*, Criminal Appeal No. 75 of 2014, High Court of Tanzania, at Dar es Salaam, at p. 5.

JK., stated that: *for section 23 to apply it must be shown that an accused person shared with the actual perpetrators of the crime a specific unlawful purpose which led to the commission of the offence charged.*⁶⁸ In absence of the shared specific knowledge of criminal intent, accused persons of murder may be convicted of assault occasioning actual bodily harm. In the case of *Dracaku Afia and Another v. R*⁶⁹ the court reasoned that in the circumstances where the crime of the first accused is complete before the second accused struck, the two incidents must be regarded as separate offences. In this case, Dracaku and another accused person were charged of murder. The evidence produced before the court was that Dracaku struck the deceased one blow on the head with a stick and deceased fell down to the grounds. The second accused person picked up the stick and hit the deceased on the head as he lay on the ground. The medical evidence did not establish which blow caused the fatal injury or that both blows were fatal but the Judge in convicting the two accused persons of murder concluded that they had acted in concert to beat the deceased person and that the case fell within the definition of *common intention*. On appeal, it was held that the case did not support a finding of *common intention* so as to invoke-section 23 of Cap. 16 nor could the second accused be regarded as an aider and abettor of the first.

It is therefore established law that for the doctrine of common intention to apply it must be shown that an accused person shared with actual perpetrators of the crime a specific unlawful purpose which led to the commission of the offence charged the accused person.⁷⁰ Therefore, if there is no evidence showing that one accused person shared with another, who is actual perpetrator of the offence, a specific unlawful purpose that led to the commission of an offence, there is no common intention.⁷¹

⁶⁸ *R v. Abdallah Zombe*, *Ibid*, p. 14.

⁶⁹ *Dracaku Afia and Another v. R* (1963) EA 363.

⁷⁰ *Salehe Selemani v. R* (1972) HCD 23.

⁷¹ *Shene Kimboka v. R* (1968) HCD 52 – Duff, J., (as he then was) held that: *it is not clear that they themselves (accused persons) committed any robbery directly nor is it clear that all of the accused persons shared the intention to steal. In absence of such*

5.5 Hiring a person to commit an offence:-

For the common intention to be established there must be two or more persons who form a common intention to commit an unlawful act together. But when one hires another to commit an unlawful act on his behalf he does not form a common intention with that other person. In the case of *Shija Luyenko v. R*,⁷² the Court of Appeal stated that the appellant, Shija Luyenko did not form a common intention with Lifa Nkinga by hiring him to commit the murder of the deceased.⁷³ In its own words, the Court of Appeal states that:

*As can be seen from the cautioned statement, the appellant's intention was to kill the deceased. So, Lifa Nkinga killed the deceased for payment as agreed. In that situation, we are unable to see any common intention in which case section 23 of Cap. 16 was inapplicable on the facts of the case.*⁷⁴

In this case, Shija was convicted of murder and sentenced to death. The facts disclosed that Shija suspected that the deceased, his mother, had bewitched his son who died while at primary school. So, Shija hired Lifa Nkinga to murder his mother. Lifa Nkinga made a cautioned statement in police station and conviction was entered solely on the strength of the cautioned statement. On appeal the appellant, Shija argued that the conviction was bad because it based on cautioned statement without corroborative evidence. The prosecution replied that there was common intention in killing the deceased. From this decision, it is quietly clear that when one person hires another to commit an unlawful act on his behalf he does not form a common intention with that other person

proof the conviction for robbery must fail.

⁷² [2004] TLR 254.

⁷³ *Ibid*, at p. 264.

⁷⁴ *Ibid*, at p. 263.

6. Conclusion:

This article intended to reveal judicial practice on the interpretation of common intention. It has been shown that the interpretation invites uncertainties and inconsistencies. To reduce or get rid of the uncertainties and inconsistencies, the article has provided ingredients and circumstances to be considered in interpreting and applying the principle. It is intended that courts should use the ingredients and circumstances to address and avoid conflicting interpretations.