

TANZANIA / JUDGMENT

juma mussa another vs republic

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IN THE HIGH COURT OF TANZANIA AT BUKOBA H/C CONSOLIDATED CRIMINALS APPEALS NO. 35 AND 36 OF 2005 (Arising from Criminal Case No. 91/2004 at Karagwe District Court)(Before: D.D. Komba, Esq. DM) JUMA MUSSA ======1ST APPELLANT EMMANUEL ISAYA ====== 2NDAPPELLANT VERSUS THE REPUBLIC

=====RESPONDENT JUDGMENT 7/12/2006 & 5/3/2007 Mussa. J. In the District Court of Karagwe, the appellants were jointly arraigned with five others for robbery with violence contrary to sections 285 and 286 of the Penal Code. The other accused persons were Zamda Abasi, Lausa Shafii, Elesia Mugenyi, Aurat Rashid and Deus Katabako, respectively, the third to the seventh accused persons. The particulars alleged that on the 26th day of April, 2004 at Skyline Bar situate at Kayanga, within the District of Karagwe, the appellants and their co-accused persons stole a sum of Shs: 100,000/= the property of Adelina Katemana. It was further alleged that immediately before and after such stealing, the accused persons used actual violence to the person of the said Adelina Katemana. From a total of six prosecution witnesses, it was common ground that the above mentioned Adelina Katemana (PW1) was, at all material times, an attendant at Skyline Bar. Her evidence was to the effect that she knew all the accused persons by name except for the appellants and the seventh accused whom she knew only by face. On that fateful day, around 1.30p.m; the accused persons are said to have called at Skyline Bar where they ordered soft drinks. A shortwhile later, whilst at the Bar, the fourth accused allegedly retorted to Adelina thus:- Wewe ulitufukuzisha kazi, lazima upigwe tu hata ufanye nini. Adelina did not utter a word in reply but, thereafter, all the female accused persons, that is, the third, fourth, fifth and sixth accused persons, descended upon her. As a group, I shall, henceforth refer to them simply as "the accused ladies". It was said that whilst the sixth accused got hold of Adelina, the fourth accused poured beer onto her body. That being the situation, one Happiness Magessa (PW2), another of the Skyline's attendants, went up to where the owner of the Bar was, to inform her of the ensuing scuffle. The proprietor, namely, Beatrice Phidelize (PW5) arrived just in time to quell the scuffle. Just then, the accused ladies left but only after the fifth and sixth accused had warned Adelina thus:- Japo umewaleta hawa wakusaidie, lakini lazima leo tutakupiga. Labda ulale unalindwa. According to the proprietor, the accused ladies even retorted that they smelt blood whereupon she advised Adelina to report the incident to the police to which advise the latter declined, obviously, unaware that more was in the offing. As I understood Adelina, the accused

ladies were again seen Back at the Bar around 7.30p.m; but after she refused to serve them drinks, they again, left. Meanwhile, their male colleagues, whom they had come with, that is, the appellants and the seventh accused; had, throughout, remained drinking at the Bar. Almost immediately after the accused ladies had left, for reasons not apparent from the prosecution version, the first appellant struck Adelina with a shoe and then grabbed hold of her neck. Adelina tried to shout an alarm but the first appellant would not let go. Happiness tried to lend a hand to her colleague but had to recoil after the first appellant dealt her with a hefty stroke of a belt on the side of her neck. Happiness, thereafter, rushed again to a shop where the proprietor was, to seek more help. Just as Happiness left, the first appellant, allegedly, locked the door of the Bar from inside. Next, Happiness, now in the company of Jackson Prude (PW3) made it back to the Bar where, upon their entry from the guest house door, the second appellant and the seventh accused opened the Bar door and escaped. For a while, Jackson tried to hold captive the first appellant but; no sooner had he done it than the first appellant overpowered him and he too made a bolt for it. Inside the Bar, Adelina was a total wreck. The grip on her neck had rendered her unconscious but; the worst aspect of it was the fact, as told by the prosecution witnesses, that her body was smeared all over with faeces of her own, apparently, discharged as a result of what appears to have been a gruesome moment she sustained at the hands of the first appellant. Somehow, the accused ladies had reappeared at the scene, apparently, enjoying every second of the episode and chanting with this:- amekoma; amejinyea; wamewashikisha adabu; watalijua jiji... When all dust was clear, Adelina realized that a sum of shs: 100,000/= was missing from the cash box that was situate at the scene of the attack. Somehow, the appellants and their co-accused were arrested and arraigned as already indicated. To this version as told by the prosecution witnesses, the first appellant had a different tale unfolding a predicament of his own. To begin with, as regards the fact that, at all the material times, he was at Skyline Bar, the appellant admitted that much. At the Bar, the first appellant was taking a cocktail of Balimi beer and Tyson whiskey. All went well until Happiness picked a quarrel with some of her customers which was cause to a kind of disharmony at the Bar. The appellant decided to pay his bill, apparently, set upon calling it quits. That he did but had to wait for his change that was somehow held up. Just as the first appellant made a follow up of his change from Adelina at the counter, a man grabbed hold his shirt accusing him that he (first appellant) was seducing the mans' ladies. Next, the first appellant was dealt with a thorough beating and finally advised to fetch his change on the morrow. The first appellant then, apparently, retired home only to be invaded there by a group of persons among whom Adelina was part. The first appellant related to having been subjected to a further rain of beatings; tied with ropes; had his sum of shs: 162,000/= stolen at the groups' hands and; finally, was dragged to the police station. As regards the alleged encounter with Adelina at the Bar, the first appellant denied having attacked her. The second appellant also told a tale of his own predicament. He did not also deny being present, on that fateful day, at Skyline Bar. Like the fist appellant, the second appellant was also, apparently, given to cocktails as he was taking a mixture of beers and Konyagi while talking to Happiness. At some moment in time, Happiness, allegedly, told a certain Dickson that the second appellant was seducing her whereupon, that said Dickson subjected him to untold beatings. The second appellant also claimed that a sum of shs:20,000/= was stolen by Happiness from his person. The second

appellant completely disassociated himself with the alleged encounter with Adelina. There was, in addition, the respective defences of the third to seventh accused persons which are not quite relevant here. In any event, the third, fourth, fifth, sixth and seventh accused were acquitted, the trial Magistrate having not found sufficient material to found a conviction. So, in the final analysis, the accused ladies, who were obviously quite a scene, cheated the hook of the law. It was certainly unbecoming and, perhaps, incongruous of them to rejoice at the molestation of a fellow being but; as to what exactly such conduct is all about in law, I would say, I am not sure. I need not comment any further as that is not the subject of this appeal. Back to the matter presently before me, on the whole of the evidence, the learned trial Magistrate found the prosecution to have established its case against the appellants. The appellants were, accordingly, convicted and dealt with respective terms of 15 years imprisonment. The appellants are at odds with both the conviction and sentence and seek to impugn the decision of the court below through their respective petitions which I had consolidated. Before me, the appellants, unrepresented, adopted their respective grounds of appeal and further urged to be absolved of responsibility. For the respondent Republic, Mr. Vitalis declined to support the conviction on the ground that the factual setting did not yield to the requirements of the offence of robbery with violence, to which submission, I must defer. As correctly formulated by the learned state attorney, for the offence of robbery with violence to be constituted, it is not sufficient to merely establish that there was a threat to or the use of violence; rather, it must be further established that the violence was with intent to obtain or retain the thing stolen. Where the evidence is to the effect that the violence occurred independently of the stealing, such would not be facts constituting robbery with violence. That would suffice to overturn the conviction but; quite apart, the great wealth of commotion that admits to the episode does not exclude the possibility of some other persons, apart from the appellants, sneaking into the counter and stealing the money. This is all the more likely much as Adelina did not relate to seeing any of the appellants taking the money but, rather, only realized that it was amiss when all dust was clear. That said, all what was sufficiently established in this case was the detail about the first appellant subjecting Adelina to physical violence. Mr. Vitalis suggests, in effect, that the first appellant should be found responsible for assault causing actual bodily harm contrary to section 241 of the Penal Code which, counsel urges, is an offence minor and cognate to that of robbery with violence. As regards the sentence that would meet the justice of the case, learned state attorney submitted that the court should take into account that the assault was, as I presume it was, fairly hefty. The invitation by learned state attorney reminds me of a stance shared by some in this court that a court may only substitute a conviction for an offence which is minor and cognate to that charged. An offence is said to be minor and cognate when all the ingredients constituting it are necessary ingredients of the offence charged. Thus, in *John Opio V.R. (1969) HCD n.59* this court quashed a substitution by the court below of a conviction of grievous harm on account of the stance taken that "it is not necessary to do grievous harm to any person unlawfully to commit robbery." In the more recent decision of *Mwita Magore VR [1984] TLR 279; Munyera, 3*; underscored the stance with a holding that a cognate minor offence is the one that forms part of a series of lesser offences that must be committed in order to complete the major one; that when a person is tried for robbery, assault and stealing are necessarily the subject of the trial and it shall not be unlawful to substitute a

conviction of either of them for robbery and; finally, that one does not have to cause grievous harm in order to commit robbery, an offence which the Judge said is not a minor cognate offence which must be specifically charged. The two decision are, indeed, in contemplation of the provisions of section 300(1) of the Criminal Procedure Act. It is in terms with the provision that the minor offence is a cognate one being one arrived at by the subtraction of the particulars that constitute the offence charged. But on the reasoning of the two decisions, while a substituted conviction for common assault contrary to section 240 of the Penal Code is pertinent; a substituted conviction for assault causing actual bodily harm contrary to section 241 of the Penal Code would be unwelcome much as it is not necessary to occasion actual bodily harm in order to commit robbery. With respect, as was held in Joseph Shagembe VR [1982] TLR 147; the foregoing stance has not been fully mindful of subsection 2 of the provision according to which all what is required to found a substituted conviction is proof of facts which reduce the charged offence to a minor offence. To this end, a substituted conviction may be held on a minor cognate offence just as it may also be held on facts constituting and reducing a charged offence to a minor offence. In other words, a substituted conviction may be found on a minor offence even if such offence is not one which is cognate to the charged offence. When all is said and done, in the matter presently before me, if the PF.3 is anything to go by, the victim of the assault was occasioned actual bodily harm. I will, accordingly, accept the invitation of the learned state attorney on the strength of the formulation that the facts proved yield to a minor offence of causing actual bodily harm contrary to section 241 of the Penal Code of which a substituted conviction is welcome. To sum up from the foregoing, I will allow the appeal by the second appellant the result of which his conviction and sentence are, respectively, quashed and set aside. The second appellant should be released from custody forthwith unless otherwise lawfully held there. The appeal by the first appellant only succeeds to the extent that his conviction is substituted to one of assault occasioning actual bodily harm contrary to section 241 of the Penal Code. I am alive to the fact that the offence attracts a sentence of up to five years imprisonment; that the appellant is a first offender and; that he has been in prison even since the 20th day of January

2005. But considering the unusual circumstances in which the assault was carried out, I award the first appellant a sentence of two years imprisonment effective from the date hereof. Order accordingly. 28/02/2007 Date: 5/3/2007 Coram: Mkasimongwa - DR. Appellant: Present Respondent: Present by Mr. Kweka - S/A. C/C: Kasenene CT: Judgment delivered in chambers this 5th day of March, 2007 in the presence of the Appellants in person and of Mr. Kweka, learned State Attorney for the Republic. E.J. Mkasimongwa DISTRICT REGISTRAR 5/3/2007 AT BUKOBA 5/3/2007

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