IN THE HIGH COURT OF TANZANIA
(MWANZA DISTRICT REGISTRY)
AT TARIME

CRIMINAL JURISDICITON

CRIMINAL SESSIONS CASE NO. 128 OF 2010

THE REPUBLIC
VERSUS
MWITA PAULO @ MWIKWABE

9th & 15th April, 2014

JUDGMENT

MWAMBEGELE, J.:

The accused person Mwita Paulo @ Mwikwabe is charged with attempted murder c/s 211 (a) of the Penal Code, Cap. 16 of the Revised Edition, 2002. He is alleged to have attempted to kill Penina w/o Magabe on or about 08.09.2008 at Nyichoka Village within the Serengeti District of Mara Region. He pleaded not guilty to the information and a full trial ensued.

When this matter was called for hearing on 03.04.2014 it was realised that no preliminary hearing was conducted in its respect. This was not by default, but rather it was by design, for it was directed by the Court of Appeal in the case of ***Israel Misezero @ Minani Vs R***, Criminal

Appeal No. 170 of 2006 in its judgment which was handed down on 18.10.2010 that preliminary hearing intended by section 192 of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002, was not meant for trials in the High Court. However, following that decision, the legislature amended the law vide the Written Laws (Miscellaneous Amendments Act), 2011 – Act No. 3 of 2011 to accommodate the *ratio decidendi* of that case in the section. For ease of reference, this provision, as the law stands now, subsection (1) thereof reads:

> "Notwithstanding the provisions of sections 229 **and 283** if an accused person pleads not guilty the court shall as soon as is convenient, hold a preliminary hearing in open court in the presence of the accused **and** his advocate (if he is represented by an advocate) and the public prosecutor to consider such matters as are not in dispute between the parties and which will promote a fair and expeditious trial." [Bold added by the Written Laws (Miscellaneous Amendments Act), 2011 – Act No. 3 of 2011].

Because this court felt that in view of the foregoing amendment to section 192 of the CPA, Preliminary Hearing is also meant for trials in the High Court. And in further view of the fact Preliminary Hearing

reduces cost and expedites the determination of the case, this court felt it apposite to, and it conducted Preliminary Hearing on 03.04.2014 before commencing full trial of this case. At the Preliminary Hearing, four matters were agreed to be not in dispute; namely:

1) That the names of the accused person are Mwita Paulo @ Mwikwabe;

2) The accused person Mwita Paulo @ Mwikwabe and the victim Penina w/o Magabe were neighbours until 08.09.2008;

3) The accused person Mwita Paulo @ Mwikwabe left Nyichoka Village, Serengeti District on 08.09.2008 relocating to Nyamongo Village in Tarime District; and

4) That the accused person was arrested and charged with the present offence.

After the Preliminary Hearing, a full trial ensued. The Prosecution fielded three witnesses in support of this charge of information for attempted murder. The defence fielded three as well, including the accused person himself.

The material facts of this case are mostly not disputed and not difficult to comprehend. They go thus: the accused person and victim Penina Magabe PW1 were neighbnours at Nyichoka village in Serengeti District in Mara Region. The victim; PW1, was married to one Magabe Turuka who had another residence in the neighbourhood. Theirs was a polygamous marriage. PW1 was a business person trading in food products buying the same from Nyichoka village and selling the same at Sirari, a town in Tarime District in the border of United Republic of Tanzania and the Republic of Kenya. At her residence, PW1 was living with her son Mwita, her daughter-in-law Maria Mwita PW2 and one Anastazia.

On the morning of 08.09.2008, PW1 left her residence going to the Uhuru Torch Celebrations at which their Village Community Bank (VICOBA) was to be inaugurated. The celebrations took place at the village Dispensary. She spent the day there and left for home at about 1800 hrs when the celebrations were over. She arrived home at about about1900 hrs and called PW2 to open the gate for her. PW2 who was then in the kitchen cooking, after hearing PW1 call her, she went thither so that she could open the gate for her. Before PW2 could open the gate for her, PW1 saw two persons running towards her direction. She allegedly identified them to be Mwita Paulo Mwikwabe; the accused person herein and one Turuka Magabe; son of her co-wife.

According to PW1, Turuka Magabe moved some steps back and hid in a shrub behind an anthill in the vicinity. The accused person, so PW1 testified, moved closer to the gate where PW1 was standing waiting for PW2 to open the gate for her, and greeted her "habari". PW1 responded "nzuri". Immediately after her response to the greeting, the accused person, allegedly, moved a step back and alas! He started to hack PW1 with the panga he was wielding. He hacked her five times on her right hand which was later amputated. He hacked her on the left arm as well and thereafter three times on her left palm. Thereafter he hacked her on the left cheek and the posterior neck. PW1 fell down and the assailant disappeared.- The ordeal was eye-witnessed by PW2 who was watching through spaces of the wooden gate to the compound. PW2 testified that the assailant, who she identified to be the accused person Mwita Paulo Mwikwabe, ran past the cassava field and boarded a truck which was parked across the field.

After she fell down, PW1 crawled inside the compound through the wooden gate which was by then opened by PW2. She was thereafter unconscious. PW2, after seeing that the assailant was gone, raised an alarm for help. There came first Ghati Magabe; PW1's co-wife and later James Simeon Chacha PW3 and others. PW2 told PW3 and others that the assailant was Mwita Paulo Mwikwabe; the accused person herein.

PW1 gained consciousness two weeks thereafter at Mugumu Designated District Hospital (DDH) at which she was rushed by PW3 after being

asked through a phone call to do so by one Benjamin Mwita; PW1's brother. On gaining consciousness, PW1 realised she had several cut wounds on her body as well as an amputated right forearm. She was treated at Mugumu DDH and later at Musoma Hospital and finally on referral at a Hospital in Moshi.

PW1 testified to have identified the accused person with the aid of moonlight; there was a heavy-shining moonlight at that time, she testified. She also testified that the accused person was wearing a long sleeved white shirt and a black pair of trousers. So did PW2; she testified to have identified the accused person through the moonlight which was heavily shining that night. PW2, as well, described the attire the assailant was in as a white long sleeved shirt. She could not remember the colour of the pair of trousers the assailant was in.

On 11.09.2008, Policemen went at the scene of crime. PW2 told them as well that it was the accused person Mwita Paulo who hacked PW1 with a panga.

In defence, the accused person testified under oath as DW1 and called two witnesses – Godliver Daniel and Chagama Moses - in support of his case; they, respectively, testified as DW2 and DW3. The gist of his evidence is the defence of alibi notice of which was earlier issued under the provisions of subsection (4) of section 194 of the CPA.

The accused person, Mwita Paulo @ Mwikwabe DW1 testified to the effect that he is a resident of Nyamongo Village in Tarime District where he relocated on 08.09.2008. Before that he was was living in Nyichoka Village in Serengeti District since 2002. He sold the Nyichoka residence to one David Rhobi after he decided that he should go settle in Nyamongo after his elder wife and son died through an accident. He relocated there to take care of my kids.

At Nyichoka his residence neighboured, *inter alia*, the residences of PW1 and Magabe Turuka who were wife and husband but lived in different residences. DW1 went on to testify that PW1 lived with his children but did not know if there were other people living there as he was not used to going there. That James Chacha PW3 lived in the village but could not remember PW2, though he heard that she was married and lived there.

The accused person went on to testify that on 08.09.2008 at 09.00 hrs in morning, he went to the hamlet chairperson one Godliver Daniel who testified as DW2 to seek a permit to transport his personal effects from Nyichoka Village in Serengeti District to Nyamongo Village in Tarime District. That he obtained the same in the evening at about 1700 hrs the DW2 could not issue the same without seeing the personal effects in whose respect the permit was being sought for. He had hired the truck from one Hashim (allegedly now deceased) at Tshs. 100,000/= whose turn boy was Chagamba Moses DW3. The permit was tendered and

admitted in evidence as Exh. D1. They started their journey at about 17.30 hrs after getting the permit. Normally, the journey takes about three hours but that they arrived at Nyamongo Village at around 2100 hrs as they had a flat tyre at Rung'abure village which they replaced and had spent some time at Mtomara where there was a police barrier.

Hashim and DW3 left after offloading the luggage and eating. At around midnight, the police came and arrested him and locked him up together with the driver and the turn boy at Nyamongo Police Station claiming that he had hacked someone at Nyichoka village before departure. Hashim and DW3 were released in the morning. He testified further that PW1 and PW2 could not have identified him at the scene of crime through what they referred to a strong moonlight because he was not there at that time.

The testimony of the accused person was supported by the second defence witness GrodliverDanielDW2; the Hamlet Chairperson who issued the permit to DW1 and Chagamba Moses DW3; the turn boy to the truck hired by the accused person. Both testified that the accused person and his family left Nyichoka village aboard a truck which was loaded with his personal effects. DW2 never saw them back after they left. DW3 testified that at 1900 hrs during which the offence is alleged to have been committed, they were together with the accused person at Rung'abure Village replacing a flat tyre.

In this case, I had the assistance of three assessors – a lady and two gentlemen - to try. This is in accordance with the provisions of 265 of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (henceforth the CPA). On 09.04.2014, I summed up the case to them and asked them to give me their opinion having heard the evidence from the beginning the trial. All the three assessors who sat with me to try this case were of the view that the evidence adduced in support of the case against the accused person fell short of proof beyond reasonable doubts. They all thought there were still doubts to be resolved in favour of the accused.

I directed the assessors to the law relating to, *inter alia*, alibi, visual identification and the duty of the prosecution to prove the case beyond reasonable doubt. However, except for the lady assessor, who correctly directed her mind to matters of identification, the gentlemen assessors, mainly, opted to follow a somewhat different direction, and burnt a lot of fuel in opining on matters such as why the PH was conducted in 2014 while the offence was committed in 2008, why Turuka Magabe who was allegedly with the accused person during the commission of the offence was not brought to testify is support of the prosecution case, that it is not humanly possible to greet someone and hack with the panga therefore motive was wanting *et cetera*. However, both gentlemen assessors, generally, felt that the evidence brought on fore by the prosecution felt short of proof of the case beyond reasonable doubt.

The lady assessor was of the opinion that visual identification in the present case was not watertight. She felt that at the time of the incident, the moonlight could not have been shining as to make the identifying witnesses properly identify the assailant. On the attire, she opined it could not be easy for an assailant to wear a white shirt when going to commit the offence of the present nature. She also doubted if PW2 raised an alarm at all, for if she did, male members in the neighbourhood would have showed up at the scene of crime, the lady assessor opined.

The three assessors were of the view that that, in the light of the evidence adduced by the prosecution, the accused person should be acquitted as the evidence shows that he did not commit the offence he is charged with.

I have subjected the evidence presented to me during the trial of this case to serious scrutiny. I have as well considered the opinion given to me by the lady and gentlemen assessors who sat with me in this case. For reasons that I will endeavour to show hereinbelow, with respect, I am not at one with the three assessors and as it is trite law, in the light of the Baland Singh rule of practice propounded by ***Baland Singh Vs R*** (1954) 21 E.A.C.A. 209 and restated by the Court of Appeal in ***Usi Athumani Matu Vs R*** [1988] TLR 78, I will hereby proceed to demonstrate why I am in disagreement with the lady and gentlemen assessors.

Admittedly, the accused person issued notice of alibi under section 194 (4) of the CPA. This subsection reads:

> "Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case".

In the circumstances, the first accused person having issued prior notice as required by the law, it is imperative upon this court to consider the defence of alibi, for, it is the law in this jurisdiction founded upon prudence that, once an accused raises a defence of alibi, it is incumbent upon the court to fully consider it. Failure by a trial court, as this one, to fully consider the defence of alibi is a serious error [see: ***Alfeo Valentino Vs R***, Criminal Appeal No. 92 of 2006 (CAT unreported)]. It is therefore incumbent upon this court to consider whether or not the defence of alibi by the accused holds any water.

The accused person spent all his efforts and brought all his arsenals to prove that by the time he is alleged to have committed the offence, he was around Rung'abure village on his way to Nyamongo village where he was relocating. The accused is supported by DW3 on this assertion.

He is also supported by DW2 who, like DW2, testified to the effect that they departed at 1730 hrs and never came back.

When in a case, like the present one, a defence of alibi is raised and at the same time the case depends on the issue of visual identification, such defence must be subjected to visual identification. That is to say, once it is established beyond reasonable doubt that an accused was properly identified at the scene of crime, his defence of alibi collapses. This position of the law was stated by the Court of Appeal of Tanzania in the case of ***Abdalla Mussa Mollel @ Banjoo Vs the Director of Public Prosecutions***, Criminal Appeal No. 31 of 2008 (unreported) wherein it observed:

> "The appeal stands on the issue of the appellant's identification at the scene of crime by PW 2 and PW 3. **If the appellant was properly identified then his alibi must collapse**"..
> [Emphasis mine].

I shall therefore revert to the defence of alibi after dealing with the question of visual identification.

This case stands or falls on the evidence of visual identification. This offence was committed at 1900 hrs. The identifying witnesses are PW1

and PW2. The identifying witnesses claim to have identified the accused person through what both referred to as a heavily shining moonlight. It is the law in this jurisdiction founded upon prudence that evidence of visual identification is of the weakest kind and most unreliable. And that in order to found a conviction on the evidence of visual identification, the same must be absolutely watertight and all the possibilities of mistaken identity must be eliminated. Therefore, let me, first, expound on this law.

A landmark case in this jurisdiction, cited to me by both counsel, which has uninterruptedly been followed by the courts on this point is the oft-cited ***Waziri Amani Vs R.*** [1980] TLR 250. This case provided guidelines with sufficient clarity on the law relating to visual identification. Guided by the cases of ***R. Vs Eria Sebwato*** [1960] E.A 174, ***Lezjor Teper Vs the Queen*** [1952] A.C 480, ***Abdallah Bin Wendo and Another Vs R.*** (1953) 20 E.A.C.A 166, ***R. Vs Kabogo wa Nagungu*** (1948) 23 K.L.R (1) 50 and ***Mugo Vs R.*** [1966] EA 124 (K), the Court of Appeal provided guidelines on visual identification at pp 151, 152 as follows:

> "Evidence of visual identification is of the weakest kind and most unreliable. No court should act on evidence of visual identification unless all possibilities of mistaken identity are

eliminated and the court is satisfied that the evidence is absolutely watertight."

The Court of Appeal in this landmark case instructively added at p 252:

"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record **a careful and considered analysis of all the surrounding circumstances of the crime being tried**. We would, for example, expect to find on record questions as the following posed and resolved by him; **the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not.** These matters are but a few

of the matters to which the trial judge should direct his mind before coming to any definite conclusion on the issue of identity".
(Emphasis supplied).

The guidelines in the ***Waziri Amani*** case were put in simpler and clearer terms in the case of ***Shamir John Vs R***, Criminal Appeal No. 166 of 2004 in which the Court of Appeal urged to pose the following questions:

"It is now trite law that the Courts should closely examine the circumstances in which the identification by each witness was made. The Court has already prescribed in sufficient details the most salient factors to be considered. These may be summarized as follows; How long did the witness has the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? What interval had elapsed between the original observation and

> the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses when first seen by them and his actual appearance?"

Again, in almost a similar tone, the Court of Appeal of Tanzania reiterated in the case of ***Mathew Stephen @ Lawrence Vs R***, Criminal Appeal No. 16 of 2007 as follows:

> "To exclude all possibilities of mistaken identity, the Court has therefore to consider the following. First, the period under which the accused was under observation by the witness. Second, the distance separating the two during the said observation. Third, if it is at night, whether there was sufficient light. Fourth, whether the witness has seen the accused before and if so, when and how often. Fifth, in the course of examining the accused, did the witness face any obstruction which might interrupt his concentration. Sixth, the whole evidence before the Court considered, were there any material impediments or

discrepancies affecting the correct identification of the accused by the witness".
[See also: ***Raymond Francis Vs R*** [1994] TLR 100].

Now juxtaposing the foregoing guidelines to the instant case, did the circumstances obtaining at the *locus in quo* favour proper identification? This is the question to which I now turn.

The evidence going to incriminate or not to incriminate the accused person is visual identification evidence coming from the testimonies of PW1 and PW2. These two witnesses were positive that they managed to identify the accused person at the scene of crime. PW1 testified that she saw the accused person and one Turuka Magabe running towards her. The accused person moved quite close to where she was. She greeted her and alas! After the response, the accused person moved one step backward and started to hack her mercilessly. This ordeal was witnessed by PW2 hardly a step away. After he was done, so PW2 testified, he disappeared past a cassava field and boarded a truck which was parked beyond the cassava field.

I have warned myself on the dangers of convicting on such evidence. I am satisfied that the circumstances obtaining at the scene of crime favoured correct identification. There was enough moonlight to enable PW1 and PW2 identify the assailant. Both went further as to describe

the attire of the assailant as be a long sleeved white shirt. Though PW2 could not remember the colour of the pair of trousers, PW1 said the pair was black in colour. The accused person was well known to the identifying witnesses. PW1 knew him for about six years back according to the accused (about three years according to PW1) and PW2 for about a year (according to PW2). I have heard and seen the demeanour of the identifying witnesses as they testified in the witness box. Both were very stable in the witness box; except for PW1 who felt a bit dizzy and asked to give evidence while sitting, PW2 rejected an offer to give evidence while sitting. Both identifying witnesses; PW1 and PW2, honestly, left me with an impression that they were speaking but the truth.

Admittedly, there were some minute details which the identifying witnesses could not remember. For instance, PW2 could not remember the colour of the pair of trousers the accused person was wearing. Both identifying witnesses could not exactly tally with Exh. P1 on the number of times and places of the body where the victim was hacked. But these are minute details which do not discredit their testimony. As was observed by this court [Mnzavas, J. (as he then was)] in ***Evarist Kachembeho & Others Vs R*** [1978] LRT n.70, human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story. This incident occurred on 08.09.2008 and the witnesses testified on 03.04.2014; about five years and seven months after the incident. Today, about five years and seven months later, due

to frailty of human memory, it could not be easy for the identifying witnesses to remember every bit of minute details. I am satisfied that the material conditions prevailing at the time of the commission of the offence were favourable to make a fair and correct identification of the assailant possible.

And before I leave this point, let me, also, address on some of the alleged discrepancies raised by Mr. Rugaimukamu, learned counsel for the accused. First, counsel for the accused doubted the credibility of PW1 and PW2 as there was material discrepance on the time the assailant spent in hacking the victim. While PW2 stated that it took about a minute, PW1 stated it took about half an hour. On this one, admittedly, PW1 insisted that the incident spanned for about half an hour. Efforts by Mr. Mayenga, learned State Attorney, to lead her as to what he thought was the correct time span proved futile. PW1 stuck to her guns that the hacking took about half an hour. But I am inclined to agree with the learned State Attorney that PW1 does not know how to estimate time. I say so because, first, PW1 also testified that the accused person did the hacking hurriedly, for fear that neighbours would show up and arrest her. Secondly, the number of times the victim was hacked and if he was doing that in hurry or if that was quickly done, definitely, it could not have taken half an hour. From the evidence and circumstances of the case, he assailant did not pause between hacks. Half an hour is therefore too long a time to be imagined that it was the time span taken in hacking the victim.

And to crown it all, PW1 and PW2 mentioned the accused person Mwita Paulo @ Mwikwabe to be the assailant immediately after the opportunity was available. PW2 mentioned him before PW3 and others who showed up at the scene of crime immediately after the incident. This led to the arrest of the accused person on the same night; some five hours after the incident. She repeated mentioning him some three days later when the police went to the scene of crime on investigation. So did PW1; she mentioned the assailant to be the accused person Mwita Paulo @ Mwkwabe immediately after she gained consciousness at Mugumu DDH two weeks after the incident.

The ability of PW1 and PW2 to mention the assailant at the earliest possible moment is an assurance of their reliability. There is a string of Court of Appeal decisions to support this proposition. One such case is a fairly recent decision of ***Minani Evarist Vs R*** Criminal Appeal No. 124 of 2007 (unreported) whose judgment was handed down on 17.02.2012, in which, referring to its earlier unreported decision of ***Swalehe Kalonga & Another Vs R***, Criminal Appeal No. 45 of 2001, the Court of Appeal of Tanzania observed:

> "... the ability of a witness to name a suspect at the earliest possible opportunity is an all important assurance of his reliability."

The same position had been taken in ealier decisions of the same court of ***Jaribu Abdallah Vs R*** [2003] TLR 271, a case referred to me by the learned State Attorney and ***Marwa Wangiti Mwita & Another Vs R*** [2002] TLR 39. In the ***Marwa Wangiti Mwita*** case (supra), in its judgment dated 12.06.2000, it was observed:

> "The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry".

This position of the law was restated by the same court about fourteen months later (on 10.08.2001) in ***Jaribu Abdallah*** (supra) in which the above passage was quoted with approval in the following terms:

> "In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The conditions for identification might appear ideal but that is not guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is in our view reassuring though not a decisive factor".

[See also: ***Mafuru Manyama & Two Others Vs R*** Criminal Appeal No. 256 of 2007, ***Kenedy Ivan Vs R*** Criminal Appeal No. 178 of 2007, ***John Gilikola Vs R*** Criminal Appeal No. 31 of 1999 and ***Yohana Dionizi & Shija Simon Vs R*** Criminal Appeals No. 114 And 115 Of 2009 (all unreported decisions of the Court of Appeal of Tanzania).

The cumulative effect of the foregoing discussion is a finding that the accused person was properly identified at the *locus in quo*. Reverting to the accused person's alibi, his being properly identified at the *locus in quo* negates his alibi. As observed above, a proper identification of the accused persons at the *locus in quo* diminishes his defence of alibi. Therefore, using the principle in the ***Abdaiia Mussa Mollel*** case (supra), in view of the fact that the accused person Mwita Paulo @ Mwikwabe was amply identified at the *locus in quo* as being the one who hacked the victim Penina Magabe, his alibi is annihilated. I take the accused person's alibi to be futile a attempt to save his otherwise sinking boat. I am satisfied that , for whatever motive known to him which motive is not relevant to me and the law, the victim Penina Magabe was hacked in the manner described in the PF3 (Exh. P1), by none other than the accused person Mwita Paulo @ Mwikwabe.

Lastly, is the issue relating to *mens rea*. As was held in ***Hamis s/o Tambi Vs R*** (1950) 20 EACA 176, it is an essential ingredient to the offence of attempted murder to prove an intention to kill and no lesser intent suffices. In the instant case, that the assailant intended to kill PW1 can be discerned from the wounds inflicted as evident in Exh. P1. Exh. P1, shows that the cut wounds which must have caused by a sharp object, were inflicted as follows: a 10cm x 2cm on the left cheek and ear, a 2cm x 2cm on the on the neck posterior, a 12cm x 3cm on the left forearm, two 2cm x 2cm on the left hand palm, a 20cm x 3cm on the right arm, a 6cm x 3cm on the right arm and 6cm x 3cm on the right forearm. All these were described as dangerous harm. The amputation of the right forearm was described as grievous harm. Dr. Amos Kittoh of Nyerere Designated District Hospital, Serengeti, which I take judicial notice is the Mugumu DDH referred to by the witnesses, also made the following remarks:

> "[The victim] had fracture of a left lower jaw at anterior and posterior. So the injury causes permanent disability".

I have examined Exh. P1 closely and with great care. I have no speck of doubt in my mind that whoever inflicted the wounds had, at least, intention to kill the victim. In view of what I have found and held above that the assailant was none other than the accused person Mwita Paulo @ Mwikwabe, the conclusion to which I come is that, in hacking the

victim in the manner described hereinabove, it is my considered opinion that the accused person Mwita Paulo @ Mwikwabe had no lesser intention than to kill the victim Penina Magabe. I highly regret my inability to join my highly esteemed lady and gentlemen assessors who, in unison, think the case against the accused person has not been made out to the required standard; that is, beyond reasonable doubts. However, I am comforted by the fact that I have, to my understanding, sufficiently demonstrated to the best of my ability why.

In the final analysis, I am of a settled mind that the prosecution has established beyond reasonable doubt that the accused person attempted to murder the victim Penina Magabe and that the act was unlawful. Consequently, I convict the accused person Mwita Paulo@ Mwikwabe as charged.

DATED at TARIME this 15th day of April, 2014.

J. C. M. MWAMBEGELE

JUDGE

Date: 15.04.2014

Coram: Hon. J.C.M. Mwambegele, J.

Mr. Anesius Kainunura State Attorney Assisted by Mr. Harry Mbogoro State Attorney.

Mr. Malongo Advocate holding brief for Mr. Rugaimukamu Advocate for accused.

Accused Name: Mwita s/o Paulo @ Mwikwabe is present and **represented by** Mr. Malongo Advocte holding brief for Mr. Rugaimukamu Advocate.

Interpreter: Mr. Wilbard Tingo from English to Kiswahili and vice versa.

Notice of trial for information for attempt murder c/s 211 (a) of the Penal Code was duly served to accused personal now before the court on 15.04.2014.

Court Assessors:

1. Ayubu Gitinkwi
2. Gweso Gabriel
3. Veronica Chacha

Present.

Court:

Judgment delivered in open court this 15.04.2014 in the presence of Mr. Kainunura and Mr. Mbogoro, learned State Attorneys, Mr. Malongo learned Advocate holding brief for Mr. Rugaimukamu for the accused, the accused person and the assessors.

J.C.M. Mwambegele
Judge
15.04.2014

PREVIOUS RECORD:

Mr. Kainunura State Attorney:

We have no previous record. We pray for a stringent sentence to deter others from committing such offence.

MITIGIATION:

Mr. Malongo Advocate:

The accused person is a first offender. He has eighteen kids to take care of. His wife died and therefore the accused person must take care of the kids. The accused person is aged 56. We therefore pray for a lenient sentence.

ALLOCUTUS:

My Lord, I have a big family to take care of. All eighteen kids depend on me. One of them is a cripple.

I am asthmatic and diabetic therefore pray that I be given a lenient sentence.

SENTENCE:

The accused person Mwita Paulo @ Mwikwabe has been found guilty of the offence of attempted murder. I have taken due consideration of the mitigating factors as raised by Mr. Malongo, learned

counsel and the accused person himself, particularly that the accused person is a first offender and that he has a big family to take care of. I have also considered what has been raised by Mr. Kainunura, learned State Attorney that a deterrent sentence is appropriate to deter others from committing the offence. All considered, the accused person is sentenced to imprisonment for six years.

J.C.M. Mwambegele
Judge
15.04.2014

Court:

Right of appeal explained.

J.C.M. Mwambegele
Judge
15.04.2014

Court:

Assessors thanked and discharged.

J.C.M. MWAMBEGELE

JUDGE

AT TARIME

15TH APRIL, 2014.