IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KILEO, J.A., JUMA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 301 OF 2014

BONIFAS FIDELIS @ ABEL ..... APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Arusha)
(Nyerere, J.)

Dated on the 30th day of March, 2012
in
Criminal Sessions Case No. 63 of 2005

JUDGMENT OF THE COURT

Date 1st & 8th October, 2015

JUMA, J.A.:

This is an appeal by BONIFASI FIDELIS @ ABEL against the decision of the High Court of Tanzania which convicted him on a charge of attempted murder and imposed a sentence of twenty years imprisonment. He now appeals to this Court against his conviction and sentence. The particulars of the charge against him were that around 09:30 hours on the 26th day of April 2005, at Ngarasero Village in Arumeru District in Arusha Region, he attempted to murder Mwajuma d/o Samora.

The background to this appeal illustrates how the wheels of justice can on occasions move at their slowest pace. The offence for which the appellant was convicted took place on the 26/4/2005. It took almost seven years later on 15/2/2012, for the first prosecution witness, Hamisi Samora (PW1) to testify on what he had witnessed so many years back.

It was an ordinary day like any other in the village. Tatu d/o Juma (PW3) was away from her house. She had gone to visit a nearby local market she referred to as *Kibandani*. She left behind her two grand-children, a six year old Hamisi Samora (PW1) and a three-year old Mwajuma Samora (PW2). According to Hamisi Samora, he and his sibling PW2 were playing outside their grandmother's house when the appellant appeared. He was naked, and carrying a saucepan containing hot porridge. To PW1's surprise, he began chasing after them. They in turn made their escape to the backside of their grandmother's house. In his evidence which he gave after a *voire dire* examination had been conducted to determine his ability to testify truthfully, PW1 narrated how the appellant poured hot porridge onto Mwajuma's head, cheek and her backside, then followed them right into their grand-mother's room. As he hid underneath a bed he

was able to see how the appellant caught up with Mwajuma in the same bedroom felling her down and used a stool to strangle the girl holding her onto the ground.

Emmanuel Vincent (PW5) was at his house in neigbourhood having his breakfast. He heard voices of children crying for help. He went out to check the source of the commotion which came from the house of his neighbour, Tatu Juma (PW3). PW5 arrived only to see the appellant struggling with, and using a stool to choke up PW2. PW5 had to push the appellant aside to rescue the child. PW5 and one Abubakar, who had by then rushed to the scene, took the injured PW2 to Bakai Hospital.

In her evidence she gave after a *voire dire* examination, PW2 admitted that she was an infant child of three years old when the incident took place and it was her brother (PW1), who later told her about what had happened to her.

When their grandmother (PW3) returned back home, she was surprised to see so many people gathered at her house. After learning what had befallen her grand-daughter, she rushed to the hospital. Her grand-daughter (PW2) was unconscious having sustained burns on her

head, cheek, ear and backside. According to PW3, her grand-daughter was later referred to Mount Meru Hospital where she was hospitalized for a month.

In his defence, the appellant gave his own version of events. He stoutly denied the accusation that he had committed the attempted murder. He explained that before his arrest, he worked as a casual labourer. On the day of the incident, he was outside his house cooking his porridge over an open kitchen. He explained that he was dressed in pieces of short trousers because he was to proceed to his manual work soon after his breakfast. And, he was about to drink his porridge when the two children (PW1 and PW2) came over to the open kitchen where he was. As a kind hearted person, he asked them to bring their cups so that they too could have a share of his porridge.

What happened to PW2 was an unfortunate accident, he explained. The appellant testified, that Mwajuma (PW2) ran into his feet and tripped down resulting in the hot porridge pouring over her from the sauce pan. This, according to the appellant, explains the loud cry which PW2 made as

she ran to follow her brother (PW1) who had earlier gone to collect their cups.

The appellant further testified that immediately after the accident, some of the people who had gathered at the scene allowed him to change into more decent pair of trousers. But, while he was inside his house changing clothes, rumour circulated amongst those gathered outside his house that PW2 had died. The people who were waiting for him to dress up properly became agitated, with some asking why he was taking long inside his house. It was while he was changing his underwear and before he could dress, some people in the crowd pulled him outside, hence his being found naked.

The appellant had earlier on 23/9/2015 filed his memorandum of appeal containing four grounds of appeal. The first ground faults the trial Judge for taking the evidence of a thirteen year old Hamisi Samora (PW1) and a nine-year old Mwajuma Samora (PW2) on oath. As his second ground, the appellant faults the trial Judge for failure to evaluate the evidence of PW1, PW2, PW3, PW4 and PW5. His third ground of appeal has two components, contending that the prosecution case was not proved

beyond reasonable doubt, and failure to bring the author of medical examination report. In his fourth ground of appeal, the appellant complains that he was convicted because of the weaknesses of his defence instead of proof beyond reasonable doubt.

At the hearing of the appeal on 1/10/2015, the appellant was represented by Mr. John Materu, learned Advocate. Mr. Khalili Nuda, Senior State Attorney represented the respondent/Republic.

On behalf of the appellant, Mr. John Materu, abandoned ground 1, and argued grounds number 2, 3 and 4 together. In addition, he argued an alternative ground of appeal which he contended that the learned trial Judge erred in law and fact when she sentenced the appellant to serve the sentence of twenty years, which the learned Advocate described to be severe

Mr. Materu started off by highlighting pieces of evidence which in his reckoning, shows that the appellant did not intend to kill but that he accidentally poured porridge over the complainant. He referred us to page 3 of the record which shows that when the charge of attempted murder was read over to him, he said- *"It is true **but I never intended it**."*

Moving next to the medical examination report (PF3), which was admitted as exhibit P1, Mr. Materu urged us to expunge this piece of evidence from the record because it was unlawfully tendered by Ms. Swai, the learned State Attorney who was prosecuting the case. It should have been tendered by a witness on oath, he insisted. In addition, he contended that the learned trial Judge denied the appellant of his right to cross examine the medical officer who had prepared the medical report. Mr. Materu invited us to expunge exhibit P1 from the record.

With expunging of the medical report from the record, Mr. Materu argued, the entire case for the prosecution will be left short of any evidence to proving the extent of injuries the complainant suffered from. In his estimation, the medical report would have shown the extent of injuries sustained by the victim and hence infer that the appellant had the intention to kill the complainant. At best, Mr. Materu added, the trial Judge should have found against the appellant the offence of causing grievous harm, but not attempted murder.

The learned Advocate took exception to the evidence of Emanuel Vincent (PW5), who claimed to have found the appellant naked, and

throttling down the complaint with a stool. This line of evidence is not sufficient to manifest an intention to kill, he submitted. According to Mr. Materu, the evidence of PW5 is not only overly exaggerated; it was also not weighed by the trial Judge against the appellant's defence who had maintained that the whole episode was but an unfortunate accident.

Moving on to the alternative ground of appeal that contending the sentence of twenty years was severe, Mr. Materu directed his blame at the failure by the learned trial Judge to consider the appellant's mitigation that he was a first offender. In addition, the learned advocate contends that because the appellant had readily admitted that he accidentally injured the complainant, the trial court should not have imposed such an excessive sentence as that of twenty years in prison.

Mr. Khalili Nuda and Ms. Stella Majaliwa learned Senior State Attorneys who appeared for the respondent/Republic, opposed the appeal. Mr. Nuda first addressed the question whether the medical examination report was properly exhibited as evidence. Mr. Nuda readily agreed with Mr. Materu that the learned trial Judge should not have received and acted

upon exhibit P1 without affording the appellant of his right to cross examine the medical officer who had prepared it.

On our part, we are in full agreement with the two learned counsel that it was wrong for the trial court to accept the medical examination report (PF-3) without informing the appellant on his right to cross summoning the medical officer who examined the victim. The exhibit P1 is hereby expunged from the record.

Despite the expunging of the medical examination report, Mr. Nuda was quick to submit that there are still other pieces of evidence on record sufficient to prove the offence of attempted murder beyond reasonable doubt. He submitted on the evidence that proves the extent of injuries sustained by the victim, from which to infer the intention to kill. He referred us to the evidence of the victim's grandmother, Tatu Juma (PW3) who was away when her grand-daughter was injured. Upon her return, PW3 visited the victim in hospital and was able to testify on the extent of her injuries to prove the intention to kill. Mr. Nuda also submitted that the intention can be inferred from the evidence of PW5 who witnessed how the appellant chased down the complainant before strangling her using a stool

and had to be pulled off the girl. This, according to Mr. Nuda is a clear manifestation of the appellant's intention to kill.

Responding to the ground of appeal contending that the sentence was excessive, Mr. Nuda pointed out that since the maximum sentence for attempted murder is life imprisonment, a sentence of twenty years cannot be regarded as excessive, he submitted.

Having read the record of evidence, grounds of appeal and the submissions thereon, the main question of law calling for our determination is whether the appellant's acts manifested an intention to kill the then three years old Mwajuma Samora (PW2). Intention to kill is one of the main ingredients constituting the offence of attempted murder which the prosecution had to prove beyond reasonable doubt against the appellant.

Our duty in this first appeal is to re-evaluate the evidence relating to the ingredients constituting the offence of attempted murder in order to arrive at our own answer to the question whether these ingredients were proved beyond reasonable doubt as against the appellant. In **Siza Patrice vs. R.,** Criminal Appeal No. 19 of 2010 (unreported) we reiterated the duty of first appellate courts:

"We understand that a first appeal is in the form of a rehearing. The first appellate court has a duty to re-valuate the entire evidence in an objective manner and arrive at its own findings of fact if necessary."

The appellant was charged with an offence of attempted murder created under section 211 (a) of the Penal Code. Inevitably, this is the provision from which we must discern the ingredients of attempted murder. We must hasten to point out that section 211 (a) is not a stand-alone provision in so far as all the ingredients of attempted murder are concerned. The word **"attempt"** which is mentioned under section 211 (a) is defined under section 380 of the Penal Code. This means, to appreciate the scope of the ingredients of the offence of attempted murder, sections 211 (a) and 380 must be read together. At this juncture, it is appropriate to deviate somewhat to observe that there are now some **"attempt offences"** that have since gained their independence from section 380 and they now stand alone in so far as their constitutive ingredients are concerned.

This Court in **Isidori Patrice vs. R.**, Criminal Appeal No. 224 of 2007 (unreported) recognized that the offence of **"attempted rape"** now stands alone free of section 380 under section 132 of the Penal Code:

> *"...With the coming into force of the SOSPA, the offence of attempted rape has assumed a new dimension. It has been statutorily defined and its essential ingredients spelt out, outside which there can be no offence of attempted rape. The same is found in section 132 of the Penal Code."*

Back to the instant appeal before us, section 211 (a) read together with section 380 state:

> ***211.*** *- Any person who–*
>
> *(a)* ***attempts*** *unlawfully to cause the death of another; or*
>
> *(b) with intent unlawfully to cause the death of another, does any act or omits to do any act which it is his duty to do, the act or omission being of such a nature as to be likely to endanger human life,*
>
> *commits an offence and is liable to imprisonment for life.*

> ***380.-(1)*** *When a person,* ***intending to commit an offence, begins to put his intention into execution*** *by means adapted to its fulfillment, and* ***manifests his intention by some overt act,*** *but does not fulfill his intention to such extent as to commit the offence, he is deemed to attempt to commit the offence.*
>
> *(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.* [Emphasis added]

It seems to us that four essential ingredients of attempted murder can be discerned from section 211 (a) read together with section 380. **Firstly,** proof of intention to commit the main offence of murder. **Secondly,** evidence to prove how the appellant begun to employ the means to execute his intention. **Thirdly**, evidence that proves overt acts which manifests the appellant's intention. **Fourthly**, evidence proving an intervening event, which interrupted the appellant from fulfilling his main

offence, to such extent if there was no such interruption, the main offence of murder would surely have been committed.

From the perspectives of the provisions of sections 211 (a) and 380 (1), the intention to commit the offence is essential, and we may dare say the most important ingredient of an offence of attempted murder. We say so because, if this ingredient is not proved, we will not bother our judicial time to the remaining ingredients.

From the record of this appeal, there are two versions of evidence. The first version is the evidence of prosecution witnesses (PW1, PW3 and PW5) whose evidence proved that the appellant had intended to kill the complainant and had manifested that intention by overt acts. The second version of evidence is propagated by the appellant who in his defence, insisted that it was anything but an accident. The learned trial Judge gave credence to the first version of evidence and did not believe the second version of evidence which was testified to by the appellant.

This Court has always stated that generally, the credibility of a witness is the monopoly of the trial court, unless there is a good cause for appellate courts to interfere with trial court's assessment. In **Ally Chande**

@ Ally and Another vs. R., Criminal Appeal No. 16 of 2006 (unreported) this Court restated as much:

> *"...We are aware that credibility of a witness is the monopoly of the trial court, but this is only in so far as demeanor is concerned. The credibility of a witness can also be determined in two other ways:* ***One****, when assessing the coherence of the testimony of that witness.* ***Two****, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person, as was held by the Court in the case of* ***Shabani Daudi versus Republic –*** *Criminal Appeal No. 28 of 2000 (unreported)."*

There is nothing on record that can justify our interference with the way the learned trial Judge accorded credence and believed the evidence of prosecution witnesses. The evidence of PW1 that it was the appellant who poured hot porridge onto her sister's head, cheek and her backside was corroborated by the evidence of PW5 who was attracted to the scene by sounds of children crying for help. As if the pouring of hot porridge was not enough, PW5 witnessed how the appellant chased the children

catching up with the victim and strangling her down using a stool. The graphic account of what PW5 witnessed put paid to any suggestion by the appellant that it was an accident. If the pouring of hot porridge was an accident, it did not make any sense for the appellant to follow up by giving a chase and strangle the girl using a stool. PW5 stated:

> *"...I left home following the direction where shouts came from. I met Bonifasi naked... The children came behind the house and Bonifasi was running towards them when I reached there I entered inside and found Bonifasi strangling the child with a stool I could not know where the other ran to. Bonifasi pressed down the child, I thought maybe he wanted to rape the child because he was naked. So I got hold of Bonifasi and pushed him aside in order to pull out the child. By then I was alone then I saw Abubakar standing at the door. So I asked him to assist me to rush the child to Hospital... I have no grudges with him, we have no dispute. I am stating what I saw..."*

Even when he was being cross examined by Mrs. Kimale, learned advocate who represented the appellant during his trial, PW5 maintained

the same stand that the appellant was strangling PW2 using his own hands and a stool. During his re-examination by Ms. Swai, learned State Attorney, PW5 stated:

> *"The shouts from those children were not ordinary crying. It indicated some emergency state. What I am stating to court is what I witnessed and something which I will never forget in my life..."*

Despite expunging the medical examination report from the record, we agree with Mr. Nuda that the extent of the injuries PW2 suffered from the hands of the appellant is evident. The victim's grandmother, PW3 stated:

> *"...I made a follow up at the hospital and found they had been given first aid... I found Mwajuma* ***very unconscious burnt half of her chick and ear, her back, and one side of her head to the cheek plus ear and the back.*** *I went to police station in order to be given PF so that I take her to West Meru Hospital. Usa River Police Station issued us with PF3 and we went to West Meru Hospital where* ***Mwajuma was admitted for almost one month****..."* [Emphasis added].

In so far as the imposed sentence of twenty years out of the maximum of life imprisonment, we do not find the sentence to be excessive when compared to his crime against a three year old girl.

For the above reasons, this appeal against conviction and sentence is devoid of merit and is dismissed in its entirety.

Dated at **Arusha** this 6th day of October, 2015.

E. A. KILEO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL