

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

(CORAM: MWARIJA, J.A., LILA, J.A., And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 553 OF 2016

**DEOGRATIUS DEEMAY GURTU.....
APPELLANT**

VERSUS

THE REPUBLIC.....

.....RESPONDENT

**(Appeal from the decision of the High Court of
Tanzania at Babati)**

(Massengi, J.)

dated the 29th day of April, 2015

in

Criminal Sessions Case No. 53 of 2014

JUDGMENT OF THE COURT

29th November & 7th December, 2018

KWARIKO , J.A.:

The appellant herein was arraigned before the High Court sitting at Babati charged with the offence of attempted murder contrary to sections 211 (b) and 380 (1) of the Penal Code [CAP 16 R.E. 2002] (the Code). It was alleged by the prosecution that on the 9th day of March, 2012 at Utwari Village within Babati District in Manyara Region, the appellant attempted to murder one JOSEPH S/O LAURENCE (PW4). The appellant denied the

charge where after the trial; he was found guilty and sentenced to fifteen (15) years imprisonment. On being aggrieved by that decision, the appellant filed his appeal before this Court.

In order to appreciate the material facts of the case, we find it incumbent to summarize the evidence adduced at the trial from both sides as follows: It was not disputed during the trial that the appellant and PW4 had land dispute before the material day. This dispute led to institution of a criminal case against the appellant in which PW4 was the complainant. On 9/3/2012 both parties appeared before Bashnet Primary Court for that case. The appellant who was in custody was ultimately bailed out at about 02:30 pm hours and left the court premises. This evidence was supported by a court clerk one YASINTA SAGWARE, PW2 and a Magistrate one JULIUS DAGHARO, PW3. PW3 testified further that, soon after the appellant had left the court premises, he received a text message on his phone from PW4, asking him to deny the appellant bail because the former had been informed that, the appellant had promised to kill him upon being released on bail.

According to PW4, after the court session, he left for home at Utwari village; a distance of about an hour's walking. When he got at his home village that evening with his bicycle, he met the appellant where upon a fight ensued. He said that in the fight, the appellant assaulted him with a stick and a club (rungu) on the ribs, back, legs and right arm as a result of which he fell down and lost consciousness. He later found himself in hospital where he remained admitted for three months. PW4 said that during the assault the appellant was telling him to be "a fool who had nothing, not even lands" (mjinga sana wewe, huna kitu na maeneo). He also said during the fight he used fist against the appellant. He said that certain children including Michael, Angelina, Antony, Juma and Ally witnessed the incident. These children raised alarms causing PW4's brother to arrive at the scene.

ALOYCE LAURENCE (PW5), one of PW4's brothers arrived at the scene. He said when he responded to the alarm he saw the appellant, his village mate, using a machete and a club to attack someone who was on the ground whom he could not identify

immediately. When he was about five paces away, the appellant left and found the victim to be PW4, his younger brother. At the scene, he found four children including Francis Marcel. PW4 had wounds on the legs, head, right arm and back caused by a sharp object and was unconscious. He took him to hospital where he was admitted for three months; that, the assault affected his mental capability and cannot work for gain properly.

One of the children who witnessed the incident was a boy aged 13 years, FRANCIS MARCEL (PW6) who testified without oath because the trial court found, during voire dire examination, that he did not understand the nature of an oath. PW6 said PW4 was his uncle who lived in the same village together with the appellant. He said at about 05:00 pm on the material day while in their village together with one Dominic, he saw the appellant with a machete and a club. He PW4 riding on a bicycle. That the appellant hit PW4's bicycle and caused it to fall down. He proceeded to assault PW4 with a machete until he fell down and went on to hit him with stones on the stomach. On seeing that, he raised alarms where upon his uncle (PW5) went to the scene.

Dr. FANUEL MICHAEL (PW7) testified that PW4 was taken to Haydom Hospital while unconscious, having wounds on the legs and head. An x-ray picture showed that he had a broken chin and right leg. He was treated for three months because his condition was critical, almost dying. He said the injuries were likely to have been caused by sharp and blunt objects.

No. E 8080 CPL JIMMY (PW1) was the police investigator who said that he was assigned to investigate this case on 15/3/2012. He visited PW4 at the hospital on 17/3/2012 but he found him unconscious. He had wounds on the head, hands and legs. On 18/3/2012 he visited the scene of crime and drew a sketch map on the instruction of PW6. The appellant who was at large was arrested on 20/3/2012, but upon interrogation he denied the allegations. That, he had to interview court staff as the appellant had raised an alibi. During the trial, the prosecution tendered in court the complainant's PF 3, admission and discharge form and sketch map of the scene of crime as exhibits P1, P2 and P3, respectively.

In his defence, the appellant who testified as DW1, denied the allegations and said that, on the material day he was bailed out at about 04:30 pm. He left the court premises at 05:00 pm and arrived at home at about 07:30 pm. He had supper and went to bed. On that day, he did not have any weapon. It was his defence that this case had been fabricated against him because of the land disputes. He complained that, he had been implicated by PW4 with various cases for the same reason. However, the appellant's statement at the police was tendered in court in terms of section 164 (1) (a) of the Evidence Act [CAP 6 R.E. 2002] to impeach the credibility of his evidence to the effect that he got court bail at about 03:00 pm.

Further, IBRAHIM BIFA (DW2) and SIMON WILBROAD (DW3) being appellant's sureties on the said case, supported his evidence that he was bailed out at about 05:00 pm. However, they said that they parted ways soon after the court business.

In his memorandum of appeal, the appellant preferred five grounds of appeal:

1. *That, the learned trial Judge erred in law and in fact for failure to afford the appellant a fair trial.*
2. *That, the learned trial Judge erred in law and in fact in that she did not take into account the evidence of the defence side i.e DW1, DW2 and DW3.*
3. *That, the learned trial Judge erred in law and in fact when she failed to notice the discrepancy between the charge sheet and the evidence on record.*
4. *That, the trial Court did not properly assess the credibility of the witnesses and so arrived at a wrong conclusion leading to a miscarriage of justice.*
5. *That, the prosecution case was not proved beyond reasonable doubt as there were a lot of inconsistencies between PW4 and PW7 which the learned trial Judge ought to have scrutinized and analysed such inconsistencies.*

When the appeal was called on for hearing, the appellant was represented by Mr. Ruwaichi John Kenneth, learned advocate. The respondent Republic was represented by Ms Eliainenyi Amani Njiro, learned Senior State Attorney.

Mr. Ruwaichi prefaced his submission by abandoning the 2nd and 4th grounds of appeal. He argued the 1st and 3rd grounds of appeal together. He submitted that, initially, the appellant was arraigned in court with the offence of attempted murder contrary to section 211 of the Code. However, when the case was called on for trial, the prosecution substituted the charge which added sub-section (2) of section 211. The trial judge noted however that it was sub-section (b) that was added and therefore, there was no need to go back to preliminary stages of the case, and thus proceeded with the trial.

It was Mr. Ruwaichi's further contention that the charge that was read over to the appellant after substitution was preferred under sections 211 (b) and 380 (1) of the Code. He argued that section 380 (1) was added without an order of the court and thus the charge remained in the court contrary to the law, rendering the same defective thus vitiating the whole trial. He prayed to the Court to nullify the whole proceedings.

Arguing the 5th ground of appeal, Mr. Ruwaichi submitted that, the prosecution evidence was tainted with contradictions as follows: That, PW4 said in evidence that during the fight, he used fist while the appellant used a club and a stick; and he sustained wounds in the head. Whereas, PW1 said PW4 had wounds on the head, legs and hands. Further, PW5 said he found PW4 unconscious with wounds caused by a sharp object. And PW6 said he saw the appellant assaulting PW4 with a club, machete and stones, and heard the appellant “swearing to kill PW4”. To the contrary, PW4 did not say the appellant used any sharp object during the fight, and did not utter that “he was going to kill him”. It was Mr. Ruwaichi’s argument that the contradictions show that the offence of attempted murder was not proved beyond reasonable doubt.

Besides, Mr. Ruwaichi contended that, although the incident was said to have occurred at 05:00 pm but the identification of the appellant was not proved. And PW4 might have only mentioned the appellant because of the land dispute.

In response to the foregoing, Ms Njiro conceded that section 380 (1) was cited in the charge contrary to the court order. However, she argued that even if that provision is removed from the charge, section 211 is sufficient to create the offence of attempted murder. She thus submitted that the 1st and 3rd grounds of appeal have no merit.

As regards the 5th ground of appeal, Ms Njiro argued that, the appellant was sufficiently identified at the scene because the incident occurred at 05:00 pm. That, the appellant and PW4 knew each other and PW6 clearly witnessed the incident; whereas PW5 identified the appellant when he was five paces away from the scene. In relation to the alleged contradictions, she was of the contention that, because PW4 lost consciousness, he might have not grasped some of the incidents at the scene. Hence, the fact that he did not mention the machete is immaterial because PW5 and PW6 said they saw the appellant using the same to attack PW4. And the differences on the appellant's utterances at the scene did not weaken the case. She argued that the discrepancies were normal in the circumstances. She referred us to the decision

of this Court in **EMMANUEL JOSEPHAT v. R**, Criminal Appeal No. 323 of 2016 (unreported) to support her contention.

Finally, Ms Njiro contended that the prosecution case was proved beyond reasonable doubt. That, PW2 and PW3 said that the appellant left the court premises earlier and the time of the incident placed him at the scene of crime. Further, that, even if the two fought, the appellant inflicted serious blows and the types of weapons used onto PW4 who was not armed show that he intended to harm him. Mr. Ruwaichi had nothing to add in rejoinder.

At this point we are required to decide whether this appeal has merit. We will start with the 1st and 3rd grounds of appeal which challenge the charge laid down at the appellant's door. The court record shows that, initially the appellant was arraigned in court on the offence of attempted murder contrary to section 211 (a) (b) of the Code. However, on 15/4/2015 when the case was called on for trial the court granted leave to the prosecution to substitute the charge to add sub-section (b). Though, the new charge read, attempted murder contrary to section 211 (b) and

380 (1) of the Code. Mr. Ruwaichi was emphatic that, the substituted charge added section 380 (1) of the Code, without an order of the court. He said the act rendered the charge defective thus vitiating the whole trial.

It is our considered view that section 380 (1) of the Code did not create any offence so as to be said to have occasioned an injustice to the appellant. That provision merely defines the term “attempt”. It states;

“When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such extent as to commit the offence, he is deemed to attempt to commit the offence”.

Reading from that provision, we agree with Ms Njiro that, even if section 380 (1) of the Code was not cited, section 211 (b) was sufficient to create the offence of attempted murder. It provides that;

“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”,

We get support in the foregoing from the decision of this Court in the case of **ISIDORY PATRICE v. R**, Criminal Appeal No. 224 of 2007 (unreported). The 1st and 3rd grounds of appeal have no merit.

In relation to the 5th ground of appeal, firstly, Mr. Ruwaichi argued that, even though the incident was said to have occurred at 05:00 pm but the appellant was not identified to be PW4's attacker. He did not explain further. This Court is in agreement with the learned State Attorney that, the conditions for positive visual identification at the scene left no doubt that the appellant was identified as PW4's attacker. This is so because, PW5 and PW6 testified that the incident occurred at 05:00 pm in the daylight. These witnesses knew the appellant before as their village mate. Also, PW5 said he identified the appellant five paces away before he ran away. And PW6 testified that he witnessed the incident at the scene. Although PW4 did not mention the time of the incident, but the fact that he knew the appellant as his

village mate, his identification left no doubt. Therefore, in this case the conditions such as source of light at the scene, distance between the witnesses and the appellant, their familiarity and the duration of the incident all have been proved to have been established. The appellant's denial that he did not meet the complainant did not shake the strong evidence of PW4, PW5 and PW6.

Secondly, it was argued for the appellant that, the prosecution did not prove the offence of attempted murder because the witnesses contradicted themselves in their evidence. Mr. Ruwaichi argued that, while PW4 testified that he was assaulted with a stick and a club and sustained head injuries, PW1 said that he found him with wounds on the head, legs and hands. The learned counsel went on to argue that, whereas PW5 said the wounds were caused by sharp object, PW6 said the appellant used machete and stones. And that, while PW4 quoted the appellant as telling him to be "a fool who had nothing not even lands", PW6 testified that, the appellant said "he would kill PW4". This Court agrees with the learned State Attorney that, these

contradictions are not material so as to weaken the prosecution case. We are of the view that minor contradictions are bound to occur among witnesses. For instance in the case of **EMMANUEL JOSEPHAT v. R** (supra), this Court said thus;

“We would like to begin by expressing the general view that contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case”.

In that case the Court went on to refer to the cases of **DIKSON ELIA NSAMBA SHAPWATA & ANOTHER v. R**, Criminal Appeal No. 92 of 2007 and **LUSUNGU DUWE v. R**, Criminal Appeal No. 76 of 2013 CAT (both unreported) where it was commonly held that;

“In all trials, normal contradictions and discrepancies are bound to occur in the testimonies of the witnesses due to normal errors of observation, or errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence”.

We are also of the considered view, as rightly argued by the learned State Attorney, that because PW4 lost consciousness

soon after the assault, he could not have grasped some of the incidents that happened at the scene, leading to minor differences between his account of events and other witnesses. After all the medical personnel (PW7) was better placed to explain injuries in the victim's body. PW7 explained the nature of PW4's injuries and his evidence to that effect was not controverted.

Having found that it was the appellant who assaulted and wounded PW4, the question which follows is; did he attempt to murder him? In order to prove this offence, there should be established both the *mens rea* and *actus reus*. We have already seen that *actus reus* was proved, that is, the act of wounding. Now, did the appellant intend to murder the complainant?

The issue is whether the prosecution evidence has sufficiently proved that the appellant had the intent of unlawfully causing the death of PW4. In the instant case PW4 testified that, when he met the appellant, they fought but he ended up being seriously injured. If that is the case, the appellant would not be held to have the intent (*mens rea*) to kill or cause grievous harm because he was fighting with PW4 and in the cause injured him. In

the circumstances, had the appellant been charged with the offence of murder, he would have been held responsible for the offence of manslaughter. Manslaughter is distinguishable from murder by a lack of intention to kill or cause bodily harm. For these reasons therefore, we find that the offence of attempted murder was not proved. The appellant is therefore found not guilty of the offence charged.

Although *mens rea* was not proved, PW4 was seriously injured by the appellant. What then is the lesser offence of attempted murder is the issue which exercised our minds to a great deal. There is however, sufficient evidence that the appellant seriously injured PW4. The appellant's act of attacking PW4 with a stick, a club and a machete thereby causing him serious injuries was an unlawful act. We find, therefore, that in so doing the appellant committed the offence of causing grievous harm contrary to section 225 of the Code. That section provides as follows;

“Any person who unlawfully, does grievous harm to another is guilty of an offence and is liable to imprisonment for seven years”.

In a persuasive decision of the High Court of Kenya in the case of **JANE KOITEE JACKSON v. R** [2014] eKLR, which had similar facts, the same approach was taken.

Therefore, in terms of Rule 38 of the Tanzania Court of Appeal Rules, 2009, we substitute the conviction of grievous harm contrary to section 225 of the Code and hereby sentence the appellant to seven (7) years imprisonment running from 29/4/2015 the date of conviction by the High Court.

In fine, we allow the appeal to the extent herein above shown.

DATED at **ARUSHA** this 6th day of December, 2018

A. G. MWARIJA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL