

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CRIMINAL SESSION CASE NO 114 OF 2014
REPUBLIC
VERSUS

JOSEPH JERUSALEM MWAMAKULA ACCUSED

Date of last order: 16/03/2018
Date of Judgment: 04/04/2018

JUDGMENT

I. ARUFANI, J

The accused, Joseph Jerusalem Mwamakula is charged in this court with the offence of **attempt to murder** contrary to section 211 (a) of the **Penal Code**, [Cap. 16 R.E 2002]. It was stated in the particulars of the offence that, on 29th day of June, 2011 at Gezaulole Kigamboni area within Temeke District in Dar es Salaam the accused attempted to murder one Marwa Gasu. The accused pleaded not guilty to the information.

During the hearing of the case the court was assisted by two ladies and one gentleman assessors namely, (1) Ms. Tatu Shamte, (2) Ms. Mwajuma Mfaika and (3) Mr. Athumani Kawambwa. On the side of the parties while the Republic was represented by Miss Jenifar Masue, learned State Attorney and assisted by Miss, Imelda Mushi, learned State Attorney, the accused was represented by Dr. Masumbuko Roman Lamwai and assisted by Mr. Roman Selasini

Lamwai and Miss Mary Lamwai, learned advocates. To prove the information laid against the accused the prosecution called five witnesses and tendered two documentary evidence and on the other hand the accused defended himself.

The victim **Marwa Gasu, PW4** who the court was compelled to go to receive his evidence at his home at Gezaulole within Kigamboni District as we were told is bedridden he told the court that, on 29th day of June, 2011 he wake up early in the morning and took his calves to the football ground to pasture them as he used to do every day. After reaching to the football ground he was followed by the accused who was living neighbour to the football ground and asked him his two bicycles. PW4 said that, when he asked the accused when he gave him the bicycles the accused told him to wait and said he would have come back. PW4 said the accused went to his house and returned with a knife and stabbed him on his neck by the said knife.

PW4 said that, he know the accused by the name of Wakyela and said the accused was his customer as he used to sell milk to him. He said he had never quarreled with the accused. He testified that, after being stabbed he don't know what followed and he don't know if he shouted for help or not as he fell down and became unconscious up to the following day when he find himself at Muhimbili National Hospital. He said he was given the PF3 for

treatment which he tendered to the court and admitted in the case without objection from the defence side and marked exhibit P2.

He testified further that, before being stabbed he was very fine and he was doing his activities without any problem and said that was his first time to use hospital medicine. When he was cross examined by Dr. Lamwai he said he don't know the exactly time of occurrence of the event. He said that, though he was injured on his spinal cord which is causing him to lose his memory but he is still remembering all what happened before the event. He said he don't remember if the accused asked him "*umekuja tena*" (literally means "have you come again"). He said that, where he was tying his calves is not close to the house where the accused was living as there is a distance of about 70 meters. He also said the distance from his house up to the house of the accused is about two hundred meters.

PW4 said that, before being stabbed by the accused he had met **Kurwa Maulid @ Nkuba, PW1** at the football ground. PW1 said that, on the date of event in the morning hours while going to the shop he saw PW4 tying his calves at the football ground. He said while still passing at the football ground he saw the accused following PW4 and told him "*we mzee utaniona, subiri hapo.*" (Literally means "you old man you will see me, just wait"). PW1 said that, after the accused said those word he went to his house and came with a knife which he used to stab PW4 on his neck on the left hand side.

PW1 said after PW4 being stabbed he fell down and as it was morning hours the people who saw that event went to assist PW4. PW1 said he know the accused by the name of Wakyela and said he came to hear his name is Joseph Jerusalem later on. He identified the accused before the court as the person is saying he saw stabbing PW4. He said that, he know the accused even before the date of event as he used to do business of selling milk at their area of Gezaulole. He said he has no any conflict with the accused and said the event occurred between 06:30 up to 07:30 hours. He also said PW4 is his neighbour.

When he was cross examined by Dr. Lamwai he said he know the accused from 2006 as he used to do business of selling milk at their area. He said that, when he was passing at the football ground at that time of event there was nobody else apart from himself, the accused and PW4. He also said that, after seeing the accused had stabbed PW4 he was shocked to the extent of failing to do anything to assist PW4. He said that, thereafter the people came to the place of event and took PW4 to the police station. PW1 said that, after the accused stabbed PW4 he ran to his house.

When PW1 was shown his statement he identified the same after seeing his signature thereon. He said PW4 was stabbed and fell at the goal which was at the football ground. He said that, when the policemen arrived to the place of event he was present and said he told them PW4 was stabbed by the accused. The defence counsel

prayed to tender the statement of PW1 to the court to impeach his evidence and it was admitted in the case as an exhibit D1. He said the name of PW4 is written in his statement as Malagalasa Malwa. He also told the court that, although he didn't write his statement himself as it was written by policeman but he signed the same. He said that, the place where the event occurred was close to the house of the accused and said there is a distance of about thirty Kilometers. He said the act of the accused going to take knife from his house and come to stab PW4 did not take long time.

Mary Alfred @ Chipeta, PW2 told the court that, she is the wife of PW4 and said on the date of event at morning hours PW4 took their calves to the football ground for pastures. While at their home she was followed by Hamisi Haji who told her to go to the football ground to see her husband. PW2 said that, after going to the football ground she found PW4 laying down on the ground and he was bleeding on his neck and there were many people who had gathered at that area. She said to have heard people saying PW4 was stabbed by Wakyela who is well known to her as he was their milk customer.

PW2 said that, she didn't find the accused at the place of event and after seeing that situation she returned home and prepared herself and went to take PW4 to the hospital. She said from that date PW4 has not managed to wake up to date. She said to have come to know the house of the accused after the event. She also said she has never heard her husband quarreling with the accused. When she was

cross examined by Mr. Roman Lamwai she said to have been told by people who were at the place of event that, the accused ran after stabbing PW4.

She said to have recorded her statement at the police station which was admitted in the case as an exhibit D2. She stated further that, she had never heard the accused claiming his bicycles from PW4 but she heard PW4 saying he had said he would have done something bad to PW4. She said her husband had never told her he was supposed to pay two bicycle for one bicycle he stole from the accused. She also said that, she didn't see the accused stabbing PW4 and she didn't hear PW4 shouting for help.

Leonard Marwa, PW3 told the court to have been informed about the event of PW4 being stabbed with knife at the football ground of Gezaulole by his wife. After going to the place of event he found PW4 had been stabbed by a sharp object on his neck and he was bleeding. He said to have found other people at that area but were worried and they had stood far from PW4. PW3 said that, after seeing that situation he found a motor vehicle and took PW4 to the police station so that he can be taken to the hospital. PW3 said that, he know PW4 as is his best friend and he also know the accused as he was his tenant. PW3 said the name of the accused is Joseph Jerusalem Mwamakula @ Wakyela. He said he didn't find the accused at the place of event.

When PW3 was cross examined by Dr. Lamwai he said from where PW4 was stabbed and fell down up to the house of the accused there is a distance of about twenty to twenty five meters and the distance up to the home of PW4 is about 110 meters. He said he don't know if there was conflict between the accused and PW4 and he don't know if PW4 was stabbed by the accused. He said he didn't go to see his house as he was trying to save the life of PW4. He also said he was not present when the sketch map of the place of event was drawn.

WP 6343 PC Sharifa, PW5 told the court that, on 2nd day of July, 2011 she was assigned a case file to investigate a case relating to causing grievous harm. She said to have been assigned to do the said work with Cpl James who is now a deceased. She said the complainant in the case was Marwa Gasu and the suspect was Joseph Jerusalem. She said that, when she was assigned the file the suspect had already being arrested and was in the police custody. She said that, when the suspect was interviewed by Cpl. Obey and Sgt. Mugabe he confessed to have stabbed PW4 with a knife on his shoulder. PW5 said that, after getting the statement of the accused they issued a PF3 to PW4 whose condition was not good and by that time he was admitted at Muhimbili Hospital.

PW5 said to have gone to the place of event to draw the sketch map of the place of event and they were assisted by the neighbours of that area in drawing the same. She said after drawing the sketch

map they prepared the charge of causing grievous harm and took the suspect to Temeke District Court. PW5 said that, the case proceeded in the District Court where they presented their evidence but after seeing the condition of the victim was continuing to deteriorate they changed the charge from that of causing grievous harm to the charge of attempt to murder.

When she was cross examined by Dr. Lamwai she said the sketch map admitted in this case during the preliminary hearing and marked exhibit P1 is not the original sketch map drawn by her as she tendered the original sketch map in the District Court of Temeke. She said that, when she went to draw the sketch map of the place of event she was with Cpl. Obey and Cpl. Omari and said when they were drawing the sketch map PW2 was present. She said that, after the case being withdrawn from the court they didn't request for the exhibits tendered in that court to be returned to them. She also said that, exhibit P1 has neither her signature nor the signature of the victim and the accused.

She said she don't know who arrested the knife suspected to have been used to stab the victim as she found the accused in the police custody and the exhibits had already been collected. She said is the one tendered the knife before the District Court and said she obtained the same from their exhibits room. She said in her investigation she discovered it is only one person saw the accused stabbing the victim. She also said to be the one went to take the PF3

admitted in this case as an exhibit P2 from Muhimbili Hospital and said she tendered the same in the case filed in the District Court of Temeke as an exhibit.

On his side the accused testified alone as DW1 and while being led by Dr. Lamwai he told the court that, he was living at Gezaule area which is within Kigamboni District. He said from the house he was living up to the house of PW4 you would be required to cross the football ground and pass some few houses. He said that, he know PW4 from 1999 and said he used to buy milk from him and sell it to the people. He said that, there was a time electricity power was being cut off and caused the milk he was buying from PW4 for sell to curdle. He said as he had no customer of buying curdle milk he failed to pay PW4 on time. He said that, thereafter he decided to pay PW4 his money and decided to stop buying milk from PW4.

The accused said that, on the date of event he wake up early in the morning and started washing his clothes and while he was about to finish PW4 went to his place of residence and told him he is pretending to be rude. The accused said that, after seeing the way PW4 went to his place of residence he suspected there was a problem and asked him "*umekuja tena*" (meaning, have you come again) as he had told him he don't want to continue to do business with him. The accused said that, after seeing the way PW4 had followed him and as he was with other three people who one of them was Kurwa Maulid

(PW1) and as he had wear only a short trouser he entered into his house.

The accused said that, while inside his house PW4 took the piece of brick which was out of his house and use the same to break the door of his house. The accused said that, after seeing the door of his house had been broken he realized there is no more peace at his place of residence and started finding the way of getting out. He said to have decided to run from his room and when he stormed out of his room and passed close to PW4 who was at the door of his house, PW4 fell down on his back on the shrubs which were planted to surround his house and hit his nape down on the said shrubs.

The accused said further that, after getting the chance of escaping he ran up to the place where he found people and after seeing that place was safe for him he stopped. He said that, when the people from his area arrived to that place they were told they should not beat him and advised go to the police station. He said the people phoned to the police station and the policemen who were in patrol went to that area. He said after the policemen being told they were fighting they recorded his statement and took him to Kigamboni Police station.

He denied to know who is called Malagalasa Malwa and who is called Wakyela. He also denied to have gone inside his house to take a knife and said he entered in his house to hide himself. He also said

he don't know how PW4 was injured and prayed the court to find the information preferred against him is false. When the accused was cross examined by Miss Jenifar Masue he said he has lived at Gezaulole for long time and said he was the tenant in the house of Leonard Marwa (PW3) for about one year before being arrested. He said he was living with the family of PW3 at the same compound as PW3 has another house where he was living with his another wife.

He said to have entered into his house after seeing PW4 had come with a long stick of about six feet. He said the brick used by PW4 to break the door of his room was nearby to his room. He said he had no conflict with PW4 and he don't know who is called Wakyela. When he was re-examined by Dr. Lamwai he said the name of Wakyela is not indicated in his information. He also said to have stopped doing business with PW4 after seeing the possibility of entering into conflict with him.

After hearing the evidence from both sides the learned counsel from both side made their final submission to this court. Dr. Masumbuko Lamwai, learned advocate told the court that, the information levelled against the accused is defective as the information provided under the particulars of the offence is not complete as required by section 132 of the Criminal Procedure Act, Cap, 20 R.E 2002. He argued that, the particulars of the information of attempt to murder levelled against the accused was made under section 211 (a) of the Penal Code, Cap 16 R.E/2002 states that, the

accused committed the offence of attempt to murder PW4 without stating the accused had intended to kill the victim and he was prevented by something to fulfill his intention.

He stated that, the intention to kill must show *actus reus* and *mens rea* for the accused to kill the victim. He also stated that, section 211 (a) of the Penal Code is supposed to be read together with section 380 (1) of the same law which requires an intention to commit an offence to be established. He argued that, the information laid against the accused is not stating which act was done by the accused to show his intention to kill PW4. He submitted that, from what he has stated hereinabove it is obvious that, this court has sat and hear the case of an information which is defective and the accused was required to make his defence in a case which is not in existence.

He stated that, what he has stated hereinabove amounted to denying the accused right of fair hearing as he didn't understand the charge is facing. To bolster his submission he referred the court to the case of **Mussa Mwaikunda, V. R** [2006] TLR 387 and stated that, it cannot be said the accused has been fairly tried where he has been charged he has attempted to murder somebody while all the elements of that offence has not been established. He argued in alternative that, if the court will find the information levelled against the accused is proper then it is their submission that, the prosecution side has totally failed to prove the commission of the offence the accused is facing in this court.

He stated that, it is an established principle of the law that, the prosecution is required by the law to prove the information levelled against the accused beyond all reasonable doubt and if there is any doubt the same is supposed to be determined in favour of the accused. He stated that, the above position of the law is provided under section 3 (2) (a) of the Evidence Act, Cap 6 R.E 2002. The learned counsel stated that, in this case it is only one witness said to have seen the accused stabbing the victim with a knife. He argued that, although they agree section 143 of the Evidence Act states it is not the number of witnesses testified in court which proves the offence but the credibility of evidence of a witness testified before the court but the evidence of the witness said to have seen the accused stabbing PW4 who is Kurwa Maulid (PW1) has not managed to establish the accused committed the offence is facing before this court.

He said though PW1 said to have been the only person saw the accused stabbing the victim but he didn't shout for help or assisted the victim and is saying he was shocked by that event. He stated that, the said witness mentioned the victim before the court as Marwa Gasu while in his statement admitted in the case as an exhibit D1 shows he mentioned the victim in the statement as Malagalasa Malwa. He also stated that, PW1 failed to tell the court the exactly time the event occurred as though he said in his evidence the event occurred at 06:30 hours but is recorded to have stated in exhibit D1 the event occurred at 07:30 hours.

The defence counsel stated further that, when he asked PW1 his age at the time of event he failed to do a simple calculation and say what was his age. He said the act of PW1 to mention the victim as Malagalasa and sometimes as Mwita Marwa and saying the name of the accused is Wakyela together with the act of failing to state the time when the event occurred and what was his age at the time of event make him to be not credible witness and his evidence cannot be relied upon to find the accused guilty.

He said another discrepancy is appearing in the evidence of PW4 who though he said he was stabbed by a knife but the alleged knife was not brought to court. He said further that, although PW5 admitted they had such a knife and they tendered the same in the District Court of Temeke but it was not brought to this court. He submitted that, section 110 (1) of the Evidence Act states that, whoever want a court to give judgment depending on existence of any fact must prove that fact exist. He stated that, PW5 failed to prove the existence of the knife alleged to have been used to stab the victim as she failed to produce the same before the court and invited the court to believe the defence of the accused that, PW4 was not stabbed by knife but he felled down on his nape and injured by shrubs.

He also said that, although the court was told PW4 was bedridden but when we went to receive his evidence we found him sitting at his sitting room. He said that, while PW4 said he was given PF3 for his treatment but he told the court that, after being stabbed

by accused he became unconscious and as said by PW2 the victim was unconscious for three months. He contended that, if PW4 was unconscious he would have not been given the PF3. He also said that when PW4 was told to hold the bible to swear he said he cannot hold it but when he was asked to show where he was injured he lifted his hand and show where he was injured. He said further that, although PW4 said to have been given the PF3 but PW5 said it was handed to her.

He argued further that, although PW5 said is the one drew the sketch map tendered in court as an exhibit but it has no signature of anybody being the one who drew it or the witness who showed the place of event and it is not showing where the victim was stabbed and fell down. He said the evidence of PW2 and PW3 is hearsay as what they told the court is what they were told by other people. Finally He prayed the court to base on the above stated reason to find the accused is not guilty of the offence and acquit him.

In response to the submission of the learned counsel for the accused, Miss Imelda Mushi, Learned State Attorney told the court that, the information levelled against the accused has no any defect and it was drawn in accordance with section 135 of the Criminal Procedure Act. She said the particulars of the offence shows what happened is that the accused had intended to kill the victim. He said the argument that the accused failed to understand the offence is

facing has no merit because all factors laid down in the case of **Mussa Mwaikunda V. R** are well covered in the accused's case.

She said the prosecution has managed to prove the information levelled against the accused beyond reasonable doubt. She said further that, the evidence of PW1, PW2, PW3 and PW4 shows clearly the event occurred in the morning of the date of event. The learned State Attorney stated that, to show the accused had intended to kill the victim PW2 and PW4 show there was no conflict between the accused and PW4 and that is supported by the defence of the accused himself. She argued that, as said by PW1, PW4 and shown in the PF3 the accused was stabbed on his neck which is dangerous part of the body.

She said the discrepancies stated to have been observed in respect of time of event has not gone to the root of the matter and added that, PW1 said in his examination in chief that, the event occurred between 06:30 and 07:30 hours. As for the discrepancy in the distance she said each witness estimated the distance from the house of the victim up to house of the accused. She said the PF3 which the defence counsel challenged its authenticity was admitted in the case without any objection from the defence side and were given chance to state if they wish the doctor to be summoned for cross examination but they said they don't wish to cross examine the doctor who filled it.

She said further that, despite the fact that, the knife was not tendered in court as an exhibit but the evidence of PW1 and PW4 which is also supported by PF3 shows the victim was stabbed by knife. She said that, the defence of the accused that PW4 felled on his back and hit his nape and injured on his neck by shrubs which were close to the house of the accused is an afterthought. She said it is not true that the victim felled on his back and injured by shrubs as the PF3 is not showing the victim had injury on his nape. She said further that, the issue of who was given PF3, PW5 said is the one took the victim to the hospital and is the one who was handed the PF3 and took it to the District Court of Temeke.

The learned state Attorney stated in relation to the sketch map that, the same was drawn in accordance with the people who witnessed the event or the circumstances of the place of event. She said that, there is no legal requirement for the victim and the suspect to sign the sketch map. She said further that, even if the sketch map is expunged but the evidence of PW1 and PW4 is enough to convict the accused. She argued that, even if it is true that the evidence of PW2 is hearsay but she said to have found the victim laying down and he had been injured. She said the evidence of PW1 is the one which is supposed to be believed and exhibit D1.

She prayed the court to disbelieve the defence of the accused as the same is an afterthought and it was adduced after the prosecution closed its case. She said the defence of the accused that PW4 felled

down and injured on his neck by shrubs has no any truth as the accused did not state how the said shrubs were looked like. She argued that, she is failing to understand why the accused said to have ran while PW4 had fallen down and prayed the court to find the defence of the accused has not raised any doubt to the prosecution side and disregard the same. Finally she prayed the court to find the prosecution has proved the information levelled against the accused beyond reasonable doubt as required by the law and find the accused guilty of the offence.

After hearing the evidence from both sides and the submission made to the court by the learned counsel from both sides I summed up the evidence of the case to the assessors before requesting them to give the court their opinion as to whether they have been satisfied by the evidence adduced before this court that the accused is guilt or not guilty of the offence is facing before this court. After summing up the evidence to them they came up with a unanimous opinion that, the accused is guilty of the offence is facing before this court.

After considering the submissions made to this court by the counsels for the parties the court has found before start dealing with the merit of the case at hand it is proper to start with the point of law raised by the learned cojunsel for the accused that, the information filed in this court against the accused is defective as is not in compliance with section 132 of the Criminal Procedure Act Cap 20 R.E 2002. The learned counsel stated that, section 211 (a) of the

Penal Code which provides for the offence of attempt to murder levelled against the accused was supposed to be read together with section 380 (1) of the same law which define what is an attempt to commit an offence.

After reading the provisions of the law referred hereinabove the court has found as rightly submitted by the learned counsel for the accused the offence of attempt to murder is not supposed to be made solely under section 211 (a) of the Penal Code as that provision of the law is also supposed to be read together with section 380 (1) of the Penal Code which define the word “**attempt**” which is mentioned under section 211 (a) of the Penal Code. The above finding of this court is fortified by the view taken by the Court of Appeal of Tanzania in the case of **Bonifas Fidelis @ Abel V. The Republic**, Criminal Appeal No. 301 of 2014, CAT at Arusha (Unreported). When the Court of Appeal was determining the criminal appeal originated from the charge of the offence of attempted murder preferred under section 211 (a) of the Penal Code it stated as follows:-

*“We must hasten to point out that section 211 (a) is not a standing 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.”*

In order to be able to appreciate the gist of the two provisions of the law referred in the above decision of the Court of Appeal of Tanzania which were also referred by the learned counsel for the accused person in his submission the court has found proper to quote them in this judgment. The provisions states as follows:-

“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,*

is guilty of 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 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.”*

To the view of this court when the above two provisions of the law reads together established that, the main ingredient of the offence of attempt to murder is the intention of the accused to commit the offence of murder. The learned counsel for the accused submitted that, the particulars provided in the information levelled against the accused is not disclosing the said ingredient of intention to commit

the offence of murder which is also termed as *mens rea*. Now back to the particulars of the offence the accused is facing before this court which the learned counsel for the accused submitted is not disclosing the ingredient of an intention to commit the preferred offence as required by section 132 of the Criminal Procedure Act the court has found the particulars of the offence as provided in the information filed in this court reads as follows:-

“Joseph Jerusalem Mwamakula on 29th day of June, 2011 at Gezaulole Kigamboni area within Temeke District in Dar es Salaam Region did attempt to murder one Marwa Gasu.”

Upon reading the above stated particulars of the offence levelled against the accused and after reading sections 132 and 135 of the Criminal Procedure Act referred by the counsels for the parties in their submissions together with types of the forms of stating offences in information provided in the second schedule to the Criminal Procedure Act the court has come to the finding that, a mere omission to state the ingredient of an intention to commit the offence of murder in the particulars of the offence levelled against the accused cannot be used to find at this stage of the case that the stated omission is fatal to the extent of causing the accused to fail to understand the offence is facing before this court.

The court has arrived to the above finding after seeing the said ingredient of an intention to commit the offence is incorporated in the word “**attempt**” used in the particulars of the offence which is defined under section 380 of the Penal Code. The court has also arrived to the above finding after seeing the important thing to be considered by the court when is faced with situation like the one at hand is to see if the accused understood the nature of the offence is facing and he managed to follow the course of the proceedings. The above view of this court is bolstered by what was stated by the Court of Appeal of Tanzania in the case of **Mussa Mwaikunda V. R** referred by the counsels for the parties in their submissions where it was stated inter alia that:-

“The minimum standards which must be complied with for an accused person to undergo a fair trial are; he must understand the nature of the charge, he must plead to the charge and exercise the right to challenge it, he must understand the nature of the proceeding to be an inquiry into whether or not he committed the alleged offence, he must follow the course of the proceedings, he must understand the substantial effect of any evidence that may be given against him, and he must make a defence or answer to the charge.”

From the above holding of the Court of Appeal which is binding to this court it is the finding of this court that, beside the fact that

the argument by the learned counsel for the accused person that the information levelled against the accused is suffering from the defects of not citing section 380 (1) of the Penal Code so that it can be read together with section 211 (a) of the same law and the ingredient of an intention to commit the offence is not stated in the particulars of the offence but to the view of this court and as rightly submitted by the learned State Attorney the said defects has not established the standards stated by the Court of Appeal in the above referred case were not met in the accused' case. The court has arrived to the above finding after seeing the accused person was represented in this court by the team of three learned advocates and he managed to follow and exercised properly all the rights stated in the above holding of the Court of Appeal.

Back to the merit of the case the accused is facing before this court, the court has found that, as it can be grasped from the evidence adduced before this court by both sides there is no dispute that the victim, PW4 was injured on his neck on the date of event and taken to Kigamboni police station while unconscious and thereafter to Muhimbili National Hospital where he was treated. The issue in dispute is whether the accused is the one injured the victim and he did so while in an attempt to murder him. Upon considering the evidence of PW4 who is the victim of the event and PW1 who was the sole witness said to have seen the accused stabbing the victim the court has found their evidence is to the effect that, the victim was

assaulted by the accused person who stabbed him with a knife on his neck while tying his calves at Gezaulole football ground.

These witness told the court that, when the victim was tying his calves at Gezaulole football ground the accused followed him and asked him *“umekuja tena, nisubiri hapo”* and thereafter the accused went to his house and come back with a knife which he used to stab the victim on his neck. PW1 said that, after the accused stabbed the victim he ran to his house and left the victim and PW1 at the football ground. The above evidence of PW1 and PW4 that the accused person is the one stabbed the victim with a knife is supported by the evidence of PW2 and PW3 who said to have gone to the mentioned football ground and found PW4 laying on the ground unconscious and he was bleeding on his neck and said to have been told the person stabbed the victim was the accused person.

PW2 and PW3 told the court that, they took the victim to Kigamboni police station and thereafter the victim was taken to the hospital for treatment. The court has considered the defence of the accused that, the victim followed him at his home while holding a long stick and that the victim fall on the shrubs and injured when the accused was running from his house and come to the finding that, as rightly stated by the learned State Attorney the defence of the accused person is an afterthought story which has no any grain of reality and it has raised no any doubt to the evidence of the prosecution.

The court has arrived to the above finding after seeing that, despite the fact that the sketch map admitted in this case during the preliminary hearing as an exhibit P1 is not showing where the victim was injured but all the prosecution witnesses save for PW5 said the victim was injured and fall at Gezaulole football ground and not at the home of the accused person. When PW1 was cross examined by the accused's learned counsel he said the victim was stabbed by the accused and fall at the goal post of the Gezaulole football ground. The court has also found there is no any witness said the victim went to the home of the accused or he was injured while at the home of the accused person as stated by the accused person in his defence. The court has also failed to see any reason which can make it to find all the prosecution witnesses would have lied against the accused that the victim was injured at the football ground and not at the home of the accused as stated by accused person.

Another reason caused the court to find the defence of the accused is an afterthought is the fact that, if it is true that the victim fell himself at the home of the accused and injured by the shrubs which are planted to surround the house of the accused what caused the accused to run while as he told the court there was nobody who was chasing him. To the view of this court it is highly probable that the accused person ran after seeing he had done an overt act which might have caused people to arrest or assaulted him. The court has considered the contradictions and discrepancies raised by the learned counsel for the accused that they are featuring in the

evidence of the prosecution witnesses and find the same has not gone to the root of the whole evidence adduced before this court by the prosecution's witnesses.

The court has arrived to the above finding after seeing the Court of Appeal of Tanzania stated clearly in the case of **Said Ally Juma V. R** Criminal Appeal No. 249 of 2008 which was also referred in the case of **Daniel Abdul V. R**, Criminal Appeal No. 42 of 2015, CAT at Arusha (Unreported) that, it is not every discrepancy or contradiction in the prosecution case which will cause prosecution case to flop but only the contradictions affecting the gist of the evidence implicating the accused with the offence. The court has considered the contradictions or discrepancies stated to exist in the evidence of PW1 that he stated in his evidence the event occurred at 06:30 hours and in his statement he wrote at the police station that the event occurred at 07:30 hours and come to the finding that, as he stated before this court he was just making an estimation of the time of event and he told the court the event occurred between 06:30 up to 07:30 hours. Even if there is such a discrepancy but to the view of this court is not a big discrepancy which can cause the court to find it has affected the gist of the prosecution evidence.

Another argument that PW1 failed to do a simple calculation of his age at the time of event and the time of adducing his evidence cannot be a ground for discrediting his evidence because that depends on the ability of a witness to do such a calculation, as not all

people who can do such calculation especially while in a witness box where some of the people used to be not free from fear. As for the point that, PW1 failed to assist the victim while is an adult person and a mason on the ground that he was shocked by the event the court has found that depends on an ability of a person to perceive the event as every person has his own ability of perceiving an event of that nature.

Likewise the contradictions stated to have been raised against the evidence of PW4 has been found by the court are just minor and they cannot go to the root of the rest of the evidence adduced before the court to establish that the victim was stabbed by the accused on the date of event. As for the contradictions directed against the evidence of PW5 the court has found that, a mere fact that the knife alleged to have been used to stab the victim was not produced to the court as evidence and the contradiction as who was handed the PF3 admitted in the case as an exhibit P2 between the victim and PW5 cannot be enough to establish that the victim was not injured on the date of event as there is no dispute that the victim was injured on the date of event.

After the court been satisfied the evidence adduced before this court by the prosecution has managed to establish the victim was stabbed by knife by the accused on the date of event the next question as raised hereinabove is whether the accused injured the victim while in attempt to murder the victim. In order to say the

offence of attempt to murder has been established the essential ingredients of that offence which are supposed to be established were well enumerated by the Court of Appeal of Tanzania in the case of **Boniface Fidelis @ Abel V. R.**, (Supra) to be as follows:-

*“**Firstly**, proof of intention to commit the main offence of murder, **secondly**, evidence to prove how the accused 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 intervention event which interrupted the appellant from fulfilling his main offence, to such extent that, if there was no interruption, the main offence of murder would surely have been committed.”*

After carefully reading the four ingredients of the offence of attempt to murder enumerated in the above case and applied the same in the case at hand the court has found there is no any evidence adduced before this court by the prosecution to establish that, the accused had an intention to murder the victim and his intention was interrupted by anything. As said by PW2 and PW4, though the accused had stopped purchasing milk from the victim after seeing he was failing to pay him within the time but they told the court the accused and the victim were not in quarrel. However, the court has found as stated by PW1 and PW4 it appears there was some sort of exchange of words between the accused and the victim, as PW1 and

PW4 said before the accused stabbed the victim he asked him if he had come again and told him to wait and thereafter the accused followed the knife which he used to stabbed the victim on his neck.

Since after the accused stabbed the victim he was not prevented by anything to accomplish the intention to murder the victim but he ran to his house and thereafter to the place where he was arrested the court has found the element of intention to murder stated in the above case which the learned counsel for the accused termed as mens rea has not been established by the prosecution in this case. In the circumstances though the court is in agreement with the unanimous opinion of the wise assessors that the accused committed the act of stabbing the victim with a knife but is not guilty of the offence of attempt to murder the victim. In lieu thereof the court has found as indicated in the PF3 which was admitted in this case as an exhibit P2 there is sufficient evidence to establish the accused person wounded the victim by stabbing him with a knife on his neck and caused grievous harm to him.

This makes the court to find there is enough evidence to establish the accused person committed the lesser offence of unlawfully wounding or causing grievous harm to the victim contrary to section 222 (a) of the Penal Code, Cap 16 R.E 2002. Although the accused person was not charged with the said lesser offence but the court has found has power under section 300 (3) of the Criminal Procedure Act, Cap 20 R.E 2002 to find the accused person guilty

and convict him in the said lesser offence as an alternative to the offence of attempt to murder he stand charged in this court.

In the premises the court has found that, although the accused is not guilty of the offence of attempt to murder contrary to section 211 (a) of the Penal Code but is guilty of the minor offence of unlawfully wounding or causing grievous harm to the victim contrary to section 222 (a) of the Penal Code and is accordingly convicted in the said minor offence.

Dated at Dar es Salaam this 4th day of April, 2018.



I. Arufani
I. ARUFANI
JUDGE
04/04/2018