

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT TARIME
CRIMINAL SESSIONS No. 59 OF 2019
REPUBLIC
VERSUS
IKONGO S/O CHACHA @ IKONGO

JUDGMENT

23rd October & 2nd November, 2020

Kahyoza, J.

On the 12th September, 2017 at 08.00hrs Tatu W/o Iddy lost her left thumb and sustained a cut wound on her right hand. The prosecution arraigned Ikongo Chacha Ikongo with the offence of acts intended to cause grievous harm under section 222(a) of the Penal Code [Cap. 16 R.E. 2002] now [Cap. 16 R.E. 2019]. Ikongo Chacha Ikongo, the accused person denied the charge and the prosecution summoned three witnesses to prove its case.

The prosecution alleged that on the 12th day of September, 2017 at Kibuyi village within Rora district with intent to disfigure unlawful caused grievous harm to one **Tatu w/o Iddy**.

It is not dispute that the victim, Tatu Iddy sustained injuries on the 12th day of September, 2017 at Kibuyi village within Rora District in Mara

Region at 08:00hrs. According to Exhibit PE.1, (the PF.3) which was admitted during the preliminary hearing, Tatu Iddy Pw1, the victim, sustained a deep cut wound at the palm 2cm and at the humours about 2.5cm length. She had one of her fingers, (the thumb) amputated. The assailant maimed the victim by cutting her thumb.

It is not disputed that on the 11/9/2017 the accused went to the victim's bar and had arguments with her. This fact was admitted during the preliminary hearing. However, the accused denied to have gone to the victim's bar in his defence. The accused's denial was an afterthought. The law provides in no uncertain terms that, facts admitted during the preliminary hearing are considered proved and that there is no need to prove them. See section 192(4) of the CPA [Cap 20 R.E 2019) (the CPA).

The prosecution summoned three witnesses to establish the accused's guilt beyond reasonable doubt. Pw1 Tatu Iddy deposed that on the 11/9/2017 at night hours the accused entered the victim's bar. He ordered drinks for himself and for his friend Charles Kalani. After the accused had sipped enough beer, he refused to settle the bill on demand. Pw1 Tatu Iddy applied force to compel the accused to settle the biil. She held the accused on the neck. People present beseeched victim to release him. She complied.

On the following day, that is on 12/9/2017, the victim took a bucket to fetch water from the lake. She passed at Ikongo Chacha's home. Ikongo Chacha stopped her and conversation began. The accused queried the victim why did she squeeze him in the bar the previous night. Pw1 Tatu

Iddy deposed that the accused told her that he was going to kill her. He pulled a machete, lifted it pointing it to her head. Pw1 Tatu Iddy protected her head by raising up the hand. The machete fell heavily on Pw1 Tatu Iddy's palm maiming her. The accused cut the thumb of Pw1 Tatu Iddy. Pw1 Tatu Iddy ran away to rescue herself. The accused pursued her and managed to cut her on her left hand near the elbow. Pw1 Tatu Iddy cried for help and at that time she had approached Pw3 Kichele Mtanki's house.

Pw3 deposed that he heard Pw1 Tatu Iddy calling for help. He stopped what he was doing to render assistance. Before he could extend help to Pw1 Tatu Iddy, she approached his house and jumped the fence entering his house. Pw1 Tatu went up to her house. Pw3 Kichele deposed that he saw the accused inflicting a cut wound on Pw1 Tatu's left elbow.

Pw2 Wegesa Iddy, the victim's daughter while going to fetch water from the lake, heard Pw1 Tatu Iddy crying for help. Pw2 Wegesa saw Pw1 Tatu running to rescue herself and she witnessed the accused inflicting a cut wound on Pw1 Tatu Iddy's left elbow. Pw2 Wegesa's evidence was like Pw3 Kichele's evidence.

Pw2 Wegesa deposed that she saw the accused picking the victim's cellular handset phone and a bucket going to his house. People came at that place and sent a boy to call the victim's brother in law who was at the lake. The victim's brother in law came to the victim's home. Pw2 Wegesa told him what happened. The victim's brother led people to arrest the accused. The accused escaped. People pursued him. Pw2 Wegesa and Pw3

Kichele deposed that the accused entered the house of Massawe and locked himself inside that house. People requested Massawe to open his house, Massawe refused. Pw2 Wegesa deposed that the village chairman went at that place and reported the incident to police. The police went to Massawe's house and arrested the accused and took him to police station.

Pw1 Tatu Iddy went to hospital. She was attended and issued with a PF3 (exhibit PE.1). Pw1 Tatu Iddy told this Court that she was maimed and She was incapacitated to great extent.

The accused was the only defence witness. He defended himself on oath denying to cause a grievous harm or maiming Pw1 Tatu Iddy. Dw1 Ikongo denied to have been at crime scene at 08:00hrs on the 12/9/2017. He deposed on the 12/9/2017 he woke up early in the morning and took a ferry to Musoma at 07:00AM. He went to Musoma to sell fish. He remained at Musoma until 02:00PM when he took a ferry prying from Musoma to Kinesi. On reaching at Kinesi police arrested him. He deposed that police arrested him at 03:30PM.

DW1, Ikongo refuted the evidence that he went to victim's bar as Pw1 Tatu Iddy alleged. Dw1 testified that police arrested him for no apparent reason. He denied to enter Pw1 Tatu Iddy's bar. He deposed that he gave money to his friend Kalani to buy beer from Pw1 Tatu Iddy's bar.

The accused person's advocate Mr. Magweyega submitted that the prosecution failed miserably to prove the accused person guilty beyond reasonable doubt.

He submitted that prosecution witnesses were not credible they changed their statements. They gave evidence different from the statement they gave to police. He cited the case of **Lucas Kapinga and 2 others V.R** [2006] TLR 74 in support of his contention. He added that Pw2 Wegesa was incredible witness. She was evasive.

The defence counsel submitted regarding Pw3 that his evidence was different from the statement he gave to police. He submitted that a witness who changes his statement is not a credible witness. He cited the case of **Burago Kabelele and Another V.R** Cr. Appeal No 224/2011 in support of his contention.

The state attorney replied that the accused person's defence of alibi was baseless when compared to the prosecution evidence. He contended that the defence of alibi was raised without following the procedures under S. 294 (4) or (5) of the **Criminal Procedure Act** [Cap. 20 RE 2019] (the **CPA**). He added that the accused had the services of an advocate ought to have complied with the law. He cited the case of **Masaud A. Mulima V. R** [1989] TLR 25 to support his submission that the defence of alibi raised without a requisite notice under S. 294 (4) & (5) of the **CPA** was an afterthought. He prayed this Court give the accused's defence no weight.

He submitted further that the accused person's defence of alibi remains naked or weightless for the accused person's failure to call a witness to prove his defence. He cited the case of **Thom Ngenyi Naatha V. R** [1991] TLR. 54.

The state attorney added that the contradictions in criminal case are

inevitable. Minor contradictions do not affect the case, but contradictions, which go to the root of the matter. He submitted that the central matter was whether the accused inflicted injuries on Pw1 Tatu Iddy. He submitted the contradictions did not go to the root of the matter they were contradictions on minor details caused by passage of time. He referred this Court to the case of **Evarist Kachembeho & Others v. R [1978] LRT No. 70 wherein it was** observed that-

"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story."

He further referred this Court to the case of **Chrizant John V. R Cr. Appeal No. 313/2015** where the Court of Appeal held that

"Contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case. However in considering the nature, number and impact of contradictions, it must always be remembered that witnesses do not always make a blow by blow mental recording of an incidence. As such contradictions should not be evaluated without placing them in their proper context in an endeavor to determine their gravity, meaning whether or not they go to the root of the matter or rather corrode the credibility of a party's case".

The State Attorney submitted further that the prosecution proved its case beyond reasonable doubts. He submitted that there will be some doubts in the case and that those doubt which are not reasonable ought to be disregarded. He cited the case of **Magando Paul and Another V. R**

[1993] TLR 29, where the Court held that remote possibilities in favour of the accused person cannot be allowed to benefit him. If we may add fanciful possibilities are limitless and it would be disastrous if they were permitted to displace solid evidence or dislodge irresistible inference.

It is not in dispute that the Pw1 Tatu Iddy was maimed and she sustained a cut wound near the left elbow. The issue is whether the accused is the person who committed the offence. The offence was committed during the day time. It was at 08.00hrs. Pw1 Tatu Iddy, Pw2 Wegesa and Pw3 Kichele deposed that the accused person is the one who inflicted wounds on the Pw1 Tatu Iddy. The accused raised a defence of alibi during his defence. The defence was of alibi was given without following the procedure.

The law regarding the defence of *alibi* is well settled. First, the law requires a person who intends to rely on the defence of *alibi* to give notice of that intention before the hearing of the case. See section 194(4) of the CPA. If the said notice cannot be given at that early stage, the said person is under obligation, then, to furnish the prosecution with the particulars of the *alibi* at any time before the prosecution closes its case s. 194(5) of CPA. Should the accused person raise the defence of *alibi* much later, later than what is required under subsections (4) and (5) above, as was the case herein, the court may, in its discretion, accord no weight of any kind to the defence (s.194 (6)).

There is no doubt that the accused person is not required to prove the defence of *alibi*. It is also well established that the court will consider

the *alibi* even if the accused has not adduced any evidence in support of the *alibi*. It is enough for the accused to raise the *alibi* and to leave it to the prosecution to prove his guilty. Thus, once an accused person raises the defence of *alibi* as an answer to the charge or information, he does not thereby assume a burden of proving the defence throughout on the prosecution. The Court of Appeal pronounced the position of law in the case of **Jumanne Juma Bosco & Mohammed Jumanne v.R**, Criminal Appeal No. 206/2012 CAT (Unreported).

However, if the accused raises such a defence belatedly it casts doubts on its authenticity. In **Kibale v. U** (1969) Vol. 1 E.A 148, the erstwhile the East African Court held **that a genuine *alibi* is expected to be revealed to the police investigating the case or to the prosecution during trial. When it so given, the prosecution has an opportunity to investigate its genuineness. The defence of *alibi* given for the first time during the defence, there is a likelihood that it is an afterthought.** In **Masoud Amina v. R** [1989] TLR 25 the Court denied the accused's defence of *alibi* on account that the accused did not issue a notice and that he did not call the witness who was with him.

All in all, if one considers the prosecution's evidence a conclusion that the accused person's defence of *alibi* is no weight is inescapable. The offence was committed during the day, all witnesses knew the accused person very well. He was their neighbor. After, the accused had committed the offence, people including Pw2 Wegesa and Pw3 pursued the accused person, surrounded the house where he entered until the time police arrested him. The prosecution's evidence was too tight.

There is no doubt that accused injured Pw1 Tatu Iddy with malice. Pw1 Tatu Iddy deposed that the accused told her that he was to kill her and immediately thereafter lifted the machete with intention to cut her on the head. Pw1 Tatu Iddy raised her hand to protect her head and the machete landed on the Pw1 Tatu Iddy's palm, chopping her left thumb. The accused person made second attempt which inflicted a cut wound on Pw1 Tatu Iddy's hand near the left elbow. The number of blows, the targeted part of the victim's body (the head) and the accused person's utterance established the accused person's malice aforethought. See the case of **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994 (unreported) where the Court of Appeal stated that-

"Usually an attacker will not declare to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following-

- (1) the type and size of the weapon if any used in the attack;*
- (2) the amount of force applied in the assault;*
- (3) the part or parts of the body the blows were directed at or inflicted on;*
- (4) the number of blows, although one blow may, depending upon the facts of the particular case be sufficient for this purpose;*
- (5) The kind of injuries inflicted.*
- (6) The attacker's utterances if any; made before, during or after the killing and the conduct of the attacker before and after the killing.*
- (7) The conduct of the attacker before and after the killing.*

At the end of the summing-up, the Ladies and Gentleman assessors opined unanimously that the accused was guilty of offence of acts intended to cause grievous harm. They accepted and believed the prosecution's account that the prosecution witness recognized accused person as they knew him before. They gave no weight to the accused person's defence of alibi. I concur with the Ladies and Gentleman assessors that the prosecution has established beyond all reasonable doubt that the accused person committed the offence of acts intended to cause grievous harm.

I, therefore, find the accused person, **Ikongo Chacha Ikongo**, guilty and convict him with the offence of acts intended to cause grievous harm under section 222(a) of the Penal Code [Cap. 16 R.E. 2002] now [Cap. 16 R.E. 2019].



J.R. Kahyoza

JUDGE

2/11/2020

Antecedent: Mr. Peter S/A: The accused person is the first offender we pray for stern sentence for the following reasons-

- (a) Offences of assault, grievous harm and acts intended to cause grievous harm are rampant.
- (b) I pray this Court to take into consideration of the punishment provided by law, which life imprisonment.

(c) I pray this Court to take into consideration the fact that the accused has wasted time of this Court by engaging this Court to conduct full trial.

(d) I pray for a sentence that shall be lesson to other people of similar intention or inclination.

Mitigation by Mr Magweyega, advocate for the accused person:

The accused person is the first offender. We pray for a lenient sentence to the accused. We pray for the minimum sentence. The accused person is a younger person, this court is dutiful to consider the age of the accused. the accused is resourceful.

The accused person has a family. He is married with children and parents who all depend on him. I pray the court to take into consideration the fact that the accused was the bread earner of the family. The accused person's children are no longer going to school. The state attorney has prayed for a stiff sentence. The sentence provided is the maximum sentence. The law says that the accused upon conviction is liable for life sentence. We pray that this court should not impose a sentence as a way of revenge. I pray the Court to take into consideration the time the accused has been in custody.

I humbly submit



J.R. Kahyoza

JUDGE

2/11/2020

Accused person: I am suffering from epilepsy. I am on medication.



J.R. Kahyoza

JUDGE

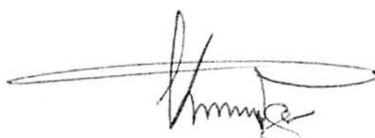
2/11/2020

SENTENCE: The accused person has been convicted of the offence of acts intended to cause grievous harm under section 222(a) of the Penal Code [Cap. 16 R.E. 2002] now [Cap. 16 R.E. 2019], which attracts a maximum sentence of life imprisonment. A just sentence has to consider the mitigation and the aggravating factors. I agree with the defence counsel, that the maximum sentence should be left for habitual offenders. The accused is not an habitual offender is a first offender. One of the aggravating factors is that such offences are rampant, thus, this Court should pass a sentence that will discourage such offences. I was not informed how rampant are the offences of this nature. I do not wish to disregard that fact as many murder cases happened due to such acts of causing grievous harm.

I have also taken into consideration the fact the accused person is very younger. I agree with the defence counsel that this Court is not here to revenge but to pass a justice sentence, by balancing the interest of the accused and his dependents.

I passionately considered the mitigation and the aggravating factors and the circumstances of this case, I sentence the accused person to serve a sentence of 12 years custodial sentence. I do not think the accused is entitled to deduction of the period he was in custody. The accused was granted bail and defaulted the bail conditions, the court cancelled his bail and kept him in prison.

In addition, the accused is sentenced to pay compensation of Tzs. 1,500,000/= to the victim in cash or the same be levied from his property. Right to appeal by lodging a notice of appeal within 30 days of the judgment, explained.

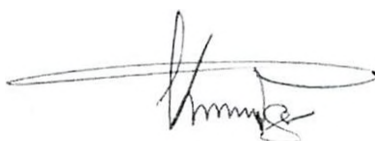


J.R. Kahyoza

JUDGE

2/11/2020

Court: Judgment delivered and sentence passed in the presence of the of Mr. Peter, State Attorney for the Republic and the accused person and his advocate Mr. Magweyega. And in the presence of the Lady and Gentleman Assessors, Mrs. Khadija Haji and Mr. Laurent Ochieko. B/C Ms. C. Tenga.



J.R. Kahyoza

JUDGE

2/11/2020

Court: The Ladies and Gentleman Assessors, thanked and discharged.



J.R. Kahyoza

JUDGE

2/11/2020

