

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**AT DODOMA**

**SITTING AT KONDOA**

**CRIMINAL SESSIONS NO. 82 OF 2017**

**THE REPUBLIC**

**VERSUS**

**RAMADHANI POSA ..... 1<sup>ST</sup> ACCUSED PERSON**

**OMARY RAMADHANI ..... 2<sup>ND</sup> ACCUSED PERSON**

**JUDGMENT**

*15<sup>th</sup> October, 2020 & 22<sup>nd</sup> October, 2020*

**M.M. SIYANI, J.**

Ramadhani Posa, and Omary Ramadhani are facing a charge of Attempted Murder contrary to section 211 (a) of the Penal Code, Cap 16 R.E. 2002. They are accused to have attempted to murder one Hussein Ally on 25<sup>th</sup> May, 2011 while at Mtiryangwi village, within Kondoa District in Dodoma Region by stabbing him with an arrow on the posterior left side of the chest. They both denied the charge.

Evidence led by the prosecution which in this case was marshaled by Ms Chivanenga Luwongo and Beatrice Nsana, the learned Senior State Attorneys, indicates that around 20hrs on the fateful day, Hussein Ally (PW1) and his young brother on Shabu Ally (PW2) were returning to their residence from Kijiweni area in Swagaswaga where they went to purchase a torch and batteries. According to their testimonies, they used a bicycle rode by PW2 to get back to their house. As it was already dark, PW2 used a torch which they had purchased at Kijiweni to assist him to see the road.

While approaching their residence, they met the accused persons. According to them, the accused persons were armed with a machete, a bow and an arrow. Their evidence shows while Omary Ramadhani had bow and an arrow, Ramadhani Posa had a machete. They stopped, greeted the accused persons and proceeded with their journey. Approximately five paces after leaving the accused persons, Hussein Ally who was a passenger in a bicycle rode by his young brother was hit at the back with an arrow. He raised an alarm which alerted PW2 as he fell down. PW2 stopped the bicycle and through the light of the torch he had, he saw both the accused persons running. The second accused person who shortly had a bow and

arrow, was at that moment running with a bow only while saying "*Nendeni mkafie mbele*".

An alarm raised by PW2 brought many people at the scene. They were told what happened but neither PW1 nor PW2 revealed to them that it was the accused persons here who were responsible for stabbing Hussein Ally with an arrow. According to PW2, Hussein Ally was carried by the villagers to his house where he was given first aid by his wife before being taken to the hospital. It was PW1 testimonies that he prior to the incident of this case, he had a conflict with the accused persons over their farms boundary and that the same had already been reported to the village authority.

Among the villagers who managed to see Hussein Ally after being stabbed with an arrow that night, was Ramadhan Athuman (PW3). This witness was a suburb chairperson of the area where the incidence of this case took place. He therefore knew both; Hussein Ally and his young brother, together with the accused persons. PW3 was at his house around 20hrs on 25<sup>th</sup> May, 2011 when he heard a lot of noises outside his premise. He heard them saying someone had been stabbed with an arrow. Curiosity

made PW3 to get out of his house where he saw a group of people. It was upon reaching them, PW3 saw Hussein Ally who had blood flowing at his back and it was at that moment, he became aware of the victim of the incident although none of those around, told him about the culprits. PW3 returned to his house after the victim has been taken to Kondoa hospital.

At Kondoa hospital, Hussein Ally was attended by Dr. Briton Rugayana (PW4). His testimony indicates that when reached the hospital, Hussein was unable to move and he had penetrating wound of about 5cms deep at the posterior left side of his chest. His findings were documented in a PF3 (exhibit P1) which was tendered and admitted without objection from the defense. Admittedly, there was no indication in the PF3 regarding PW4's comments on whether or not the injuries sustained by PW1 were dangerous.

Around 15hrs on 26<sup>th</sup> May, 2011, PW3 was approached by police officers. Among them was No. D. 7511 D/Sgnt Jeremiah (PW5). They requested him to escort them to the house of the second accused person who was accordingly arrested in connection to the stabbing of Hussein Ally.



According to PW5, while he was only involved in the arrest of Omary Ramadhan who as noted, is the second accused person in this case, he was unaware on how the first accused person one Ramadhani Posa was arraigned in connection to this case.

Through their defense the accused persons denied to have committed the offense. While the Ramadhani Posa raised the defense of alibi, by contending that he was not at the scene when the crime was committed, Omary Ramadhan also claimed not to be at the scene of crime despite admitting to have been in the same village. It was Ramadhani Posa's defense testimony that he was in Kondoa town on the night when PW1 was allegedly attacked and that he returned to Swagaswaga on 26<sup>th</sup> May 2011 only to be told of the news of PW1's assault. Regarding the existence of land conflict between him and PW1, Ramadhani Posa admitted that indeed such a conflict exists but it was his son and not him who trespassed the alleged boundary.

On the party of Omary Ramadhani, his defense testimony's indicates that, he was asleep in his house at the time of the alleged PW1's assault and he

merely raised from his bed to respond to a call for help which came from the victim's house. According to him, he participated in the efforts to take the victim to a suburb chairperson so that he could be taken to the hospital.

Having revisited the tendered evidence as above, it is a cardinal principle in criminal charges, that the prosecution side has the duty to prove the charges against an accused person and the standard, is always beyond reasonable doubt. Since the accused persons were charged for attempting to cause the death of Hussein Ally, the prosecution was therefore bound to prove that it was no one else but the accused persons who attempted to kill the said Hussein Ally by purposely stabbing him with an arrow, an act which was likely to cause death or endanger his life. It must be proved that the assault was done in a manner which could have substantially cause the death of a

Hussein Ally.

As shown above, evidence tendered by the prosecution in the instant case, is that Hussein Ally was assaulted by the accused persons. These two

witnesses claimed to have recognized the accused person at the scene. This is therefore a case that hinges on evidence of visual recognition. An established principle of law is that such kind of evidence must be carefully examined before being relied so as to remove all possibilities of mistaken identity. Emphasizing the duty of the courts to have identification evidence seriously examined before relying on the same, the Court of Appeal of Tanzania stated the following in **Philipo Rukaiza @ Kitchwechembogo Vs Republic**, Criminal Appeal No. 215 of 1994 CAT (unreported):

*The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if, in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and every reasonable possibility of error has been dispelled. There could be a mistake in the identification notwithstanding the honest belief of an otherwise truthful identifying witness.*

In the case of **Anthony Kigodi Vs Republic** Criminal Appeal No. 94 of 2005, the Court of Appeal of Tanzania reemphasized the same when the following was observed:

*We are aware of the cardinal principle laid down by the erstwhile Court of Appeal of East Africa in **Abdalah bin Wendo and Another Vs Rex** (1953) EACA 116 and followed by this Court in the celebrated case of **Waziri Amani Vs Republic** [1980] TLR 250 regarding evidence of visual identification. The principle laid down in these cases is that in a case involving evidence of visual identification, no court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is absolutely watertight.*

Similarly, in **Shamir John Vs Republic**, Criminal Appeal No. 166 of 2004 the Court of Appeal of Tanzania observed that:

*Whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the*



*defense alleges to be mistaken, the Courts should warn themselves of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications.*

Borrowing a leaf from the above authorities, I would say the need to have all possibilities of mistaken identity cleared before evidence on identification or recognition is acted upon, arises from the common experience that mistakes on identification are normally made even by witnesses who claims to be familiar with the suspects. In **Issa s/o Mgava @ Shuka Vs. Republic**, Criminal Appeal No. 37 of 2005 the Court of Appeal of Tanzania observed the following in similar terms:

*..... as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made.*

In order to eliminate the possibility of mistaken identity, courts of law have developed a list of factors or guidelines to be considered when examining such evidence. The list is however, not conclusive, depending on the circumstances of each case. In **Mathew Stephen @ Lawrence Vs.**

**Republic**, Criminal Appeal No. 16 of 2007, the Court of Appeal of Tanzania listed the following factors for consideration in identification cases: **First;** the period under which the accused persons were under observation by these witnesses. **Second;** the distance separating the two during the said observation. **Third;** as the incident occurred during the night, whether there was sufficient light. **Fourth;** whether the identifying witnesses have seen the accused before and if so, when and how often. **Fifth;** in the course of examining the accused, whether the witnesses faced any obstruction which might interrupt their concentration and **Sixth;** ability of the witnesses to name a suspect at the earliest possible opportunity.

Having stated the position of the law and factors to be considered in cases of identification, I will now test PW1 and PW2's testimony in an attempt to answer the question whether or not they properly recognized the accused persons. But before I do so, I find it prudent, for easy of reference, to reproduce some extracts from their testimony on how they encountered the culprits:

***PW1:***

*On the way we met the accused persons. We stopped and saluted them. Omary Ramadhani had a bow and arrow and Ramadhan Posa had a machete. It was night but we had a torch which I bought at Kijiweni. My young brother had that torch. There were also moon light. I therefore managed to see them when we stopped to greet them. We used at least two minutes to greet them.*

**PW2:**

*I had a torch which had new batteries. It was the light from the said torch which enabled me to see and recognize the accused persons.... It was dark. I had to use the torch to see the road while riding a bicycle. The torch light could enable me to see up to 20 paces.... After leaving them, I heard my brother crying. I stopped the bicycle and directed the torch back. I saw Omary who had a bow, running... I was the one who together with one Thabit who informed the police that Omary Ramadhani stabbed my brother with an arrow.*

Through cross examination, both PW1 and PW2 tendered their statements which they made before the police officers after the incidence of this case.

While PW1's statement was admitted as exhibit D1, PW2's statement was admitted as exhibit D2. Through the said statement, PW1 stated the following:

*Baada ya kutembea kama hatua tano ndipo nilipopigwa na mshale sehemu ya mgongo kwa kishindo. Kwa sababu nilikuwa na tochi niligeuka nyuma kwa haraka na kumulika nyuma nakuangalia ndipo nilipomuona Omary Ramadhani akiwa na upinde na huku akikimbia.*

The above was PW1's statement made on 27<sup>th</sup> May, 2011. On 21<sup>st</sup> March 2017, almost six years later, PW1 made additional statements in relation to the same incident where he stated:

*Nilihisi alinipiga mshale kwa sababu tulikuwa na ugomvi wa mpaka. Niligundua aliyenipiga mshale ni Omary Ramadhani kwa sababu yeye alikuwa na ameshika upinde na mshale na nilimuona pale tulipokuwa tunasalimiana naye na niliona hivyo vitu kwani kulikuwa na mbalamwezi na nilikuwa na tochi ilikuwa na betri mpya ndiyo nilitoka kununua*



kijiweni na wakati tunasalimiana mimi niliwasha  
tochi na ilikuwa na mwanga mkali.

Briefly, through his statement given 29<sup>th</sup> May, 2011 almost four days after the incident, PW2 stated the following:

*Ndipo niliposimamisha baiskeli na kumuangalia kaka yangu amechomwa na mshale. Kwa sababu nilikuwa na tochi ndipo nilipomulika nyuma na kumuona Omary Ramadhani akiwa na upinde na akikimbia kuelekea nyumbani kwake kwa sababu sio mbali na nyumbani kwetu. Baada ya tendo hilo ndipo nilipopiga wangi uwiii uwiii ndipo watu walipokusanyika eneo la tukio. .... ndipo walipomnyanyua mgonjwa na kumpeleka nyumbani.*

In his first additional statement which was recorded on the same day, PW2 stated the following:

*Baada ya kutembea kama hatua tano hivi mbele sisi tulikuwa kwenye baiskeli, nikasikia kaka yangu Hussein Ally anapiga kelele huku akisema nakufa nakufa. Tulikimbia hadi nyumbani lakini wakati tunakimbia tuligeuka nyuma tukamuona Omary*

*anakimbia huku akisema "nenda kafe mbele".  
Tulivyofika nyumbani nilimwalia nikakuta  
amepigwa mshale mgongoni, Nilimchukua na kuja  
hospitali ya wilaya Kondo.*

Through his second additional statements given on 16<sup>th</sup> March, 2017, PW2 stated the following:

*Nilipokuwa naandika maelezo yangu ya nyongeza  
nilisema kuwa baada ya ndugu yangu kuchomwa  
mshale tulikimbia kila mmoja kwa kadri ya uwezo  
wake hadi nyumbani ndipo nikakuta ndugu yangu  
amaeshatolewa mshale na mke wake. Nikamchukua  
na kwenda naye hospitali sikuwa na maana kuwa  
mimi ndiye niliyemchomoa huo mshale.*

As it can be seen, there are serious contradictions between the above statements given by PW1 and PW2 in different occasions but regarding the same incidence. For example, as it was the case when giving his testimony in this court, in the first statement PW2 said he was the one who had the torch and that following his brother's assault, PW1 was carried by villagers back to his house; in his additional statements he changed the story and

said having been stabbed with an arrow, each of them ran away to their house where PW1 was given first aid by his wife. Moreover, in his additional statements, PW2 said having ran from the scene, it was only after reaching their house, that he looked at his brother and saw an arrow which stabbed him. Yet the second additional statements appear to suggest that PW1 was the first to reach his house after the incident because according to PW2, by the time he reached there, he found the arrow has already been removed from PW1's back by his wife.

One of the key elements in PW2's statements above, is that he was the one who had a torch which was purchased in the same evening and which enabled him to see that night. This fact appears to contradict PW1's position who in his statements (exhibit D1) he repeatedly stated that he was the one who had a torch. There was also another thing which caught my attention, PW1 stated that the night was clear because there was some moon light, while PW2 maintained that the night was dark and it was only through the assist of the torch light, that he managed to see and ride the bicycle.

In both PW1 and PW2's testimonies in this court, they maintained that, after being stabbed, PW2 stopped the bicycle and that from there PW1 was un able to walk. He had to be carried by other people to his house. However according to PW2's additional statement, as soon as PW1 was hit by an arrow, each of them ran to serve his life. That means, despite being injured, PW1 was able not only to walk but also to ran and yet reach their premise even before PW2 who stated through his additional statements that by the time he got home, he found the arrow had already been removed by his in law.

I am keenly aware that the law allows witness to clarify their statements in court, but the serious change of story on what happened that night by these two witnesses touches their credibility not only because of the noted contradictions, but more so by their failure to name the culprits to those who responded their call for help. As it was testified by PW3, there was no disclosure of the names of the culprits that night. According to him, despite hearing people saying that Hussein Ally has been stabbed with an arrow, no one told him who did that. In cases which depends on identification or recognition evidence, ability of the witness to name and describe the



culprits is very important. It is not enough to merely state that the accused person was identified.

In **Raymond Francis Vs Republic** [1994] TLR 100, the Court of Appeal of Tanzania cited with approval the decision of the defunct Court of Appeal for Eastern Africa in **Mohamed Alhui Vs Rex** (1942) 9 EACA 72, which observed the following:

*In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description given are matters of the highest importance of which evidence ought always to be given; first of all, of course, by the persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.*

The principle set in the above decision, is that evidence on identification of a witness, must be given first; by a witness who gave the description and purport to identify the accused, and then by the person or persons to

whom the description was given. Admittedly, in this case the prosecution side did not procure any witness who claimed to have been given the descriptions of the identification of the accused persons by either PW1 or PW2. Even PW5 who was not even an investigator of this case, did not record either of these witnesses' statements. His only involvement in this case was to arrest the second accused person. According to him, he was directed by one DC Nyandai to go to Swagaswaga and arrest the said second accused person. Since DC Nyandai was not procured in court, it is unknown whether her directives to PW5 was a result of her own investigations or that she was given the descriptions by PW1 and or PW2.

Ability of a witness to name a suspect at the earliest opportunity is an all but important assurance of his reliability. Failure to name a suspect for long time may as well shake the credibility of a witness. [See **Marwa Wangiti Mwita and Another Vs Republic**, Criminal Appeal No. 6 of 1995 CAT (unreported). In the case of **Jaribu Abdallah Vs Republic**, Criminal Appeal No. 220 of 1994, the Court of Appeal of Tanzania had the following to say on credibility of witnesses;

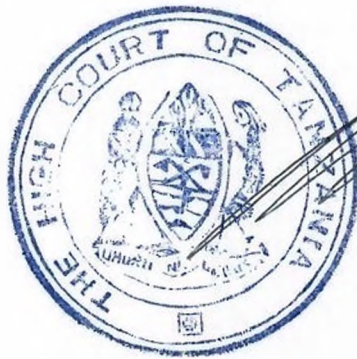
*..... in matters of identification, it is not enough merely look at factors favouring accurate identification. Equally important is credibility of witnesses. The conditions for identification might appear ideal but that is no guarantee against untruthful evidence.*

All that being said it is my finding that, PW1 and PW2's testimonies fail the test and so cannot be relied. The question whether the accused persons were properly identified by these witnesses is therefore negatively answered and with that question answered as such; and since this case depended entirely on a claim of identification of the culprits, then it is obvious that the main question whether the accused persons are responsible for attempting to murder Hussein Ally lacks, supportive evidence.

In the circumstances and for the reasons stated, the prosecution side has failed to prove the instant case to the required standards. I therefore share the opinions of ladies and gentleman assessors in this case by finding the two accused persons one Ramadhani Posa and Omary Ramadhani, not

guilty of attempt murder contrary to section 211 (a) of the Penal Code and as such I accordingly acquit them. It is so ordered.

**DATED** at **KONDOA** this 22<sup>nd</sup> Day of October, 2020



**M.M. SIYANI**  
**JUDGE**