

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CRIMINAL SESSION NO. 24 OF 2019

(ORIGINAL JURISDICTION)

THE REPUBLIC

-VERSUS-

DANIEL KONABO KASOMO

JUDGMENT

Date of last order: 08/09/2021

Date of the Judgment: 09/09/2021

AGATHO, J.:

The accused person Daniel Konabo was arraigned before this court facing a charge of attempted to murder c/s 211(a) of the Penal Code [CAP 16 R.E. 2002]. The brief facts of the case are that on 29/1/2016 at Michungwani area, Muheza District, Tanga Region he attempted to murder Asia d/o Said by burning her on various parties of her body using a hot electric clothing irony thereafter dumped her into a toilet chamber located behind Mwl. Anna Elias' house. The accused person pleaded not guilty to the charge. To prove their case the prosecution brought eight (8) witnesses PW1 – Dr Benedicta Mallya, PW2- Anna Elias, PW3- Mahonge, PW4 – WP 8041 D/C Amina, PW5 – Asia Said, PW6 – G. 4346 D/C Anthony,

PW7- Mohamed Haji and PW8 – Inspector Joseph, and three exhibits: P1 – PF3, P2 - Sketch map of the crime scene, and P3 – Identification Parade Register. Defence side brought one witness, DW1 – Daniel Konabo, the accused person himself. He did not tender any exhibit. However, they had one exhibit D 1- Mohamed Haji's statement recorded at Muheza Police Station.

Summary of each witness' evidence:

The accused person Daniel Konabo was arrested and prosecuted for attempting to murder one Asia Said on the 29th day of January 2016 at Michungwani area within the District of Muheza and Region of Tanga contrary to section 211(a) of the Penal Code [CAP 16 R.E. 2002], which provides that:

"Any person who –

- (a) Attempts unlawfully to cause the death of another is guilty of an offence and is liable to imprisonment for life."

The accused person pleaded not guilty to the charge. Consequently, the prosecution summoned eight (8) witnesses and produced three exhibits to prove that it was the accused person who attempted to murder the victim, one Asia d/o Said.

PW1: Dr. Benadicta Jeremiah Mallya (she was Assistant Medical Officer at Kididima Health Centre) testified that on 29/01/2016 Asia Said was brought to Kididima Health Centre. She was crying and she had severe pain. She had burn wounds on several parts of her body: face, left breast, back, buttocks and on her legs. Asia told her that someone came to her home. He locked the door and scotched/burnt her with hot irony and after that she was ditched in a toilet chamber. PW1 treated Asia. According to PW1 she had reached second degree of burn. Dr Mallya testified that this goes beyond the skin, it attacks nerves, and internal organs are also affected. She said whatever Asia was taking she was vomiting. PW1 went on saying that she had to admit her so that she could be treated. The witness added that Asia was discharged on 04/02/2016. As for the burn wounds, PW1 testified that the wounds were big: on her chest 3cm X 3cm, buttocks 2cm X 2cm and on the breast 2cm X 3cm deep These details are in exhibit P1. PW1 stated further that Asia was burnt with hot iron which was placed on her skin in different parts of her body. Dr Mallya said the victim could have died due to severe pain and her blood vessels and nerves were damaged. This could have interfered with blood circulation. She could have had heart attack and eventually could have died. According to PW1

on 04/02/2016 Asia was discharged, and on 05/02/2016 she (PW1) filled the PF3 which she tendered, and it was received and marked as exhibit P1.

PW2 Mwl. Anna Elias Nyerekwenda, a secondary school teacher residing at Michungwani area, Muheza District in her testimony stated that she was staying with Asia as a house girl and her two children. On 29/01/2016 while she was at the market, she was phoned by her friend Mwl. Flora and told to go to the hospital. But she went home first and found nobody there. She then went to Kididima Health Centre where she found Asia and the neighbours. Asia was crying and she told her the whole story. PW2 said she was told by Asia and the neighbours that there was young man who came to her home, and she said that she (PW2) owed him some money TSHS. 200,000/=. PW2 said she was told that the man threatened Asia with a knife while asking for the whereabouts of PW2. They accused and Asia went into the rooms to look for PW2. They could not find her. The young man took electric clothing irony and connected to the socket, tied Asia, and started burning various parts of her body (chest breast, back and buttocks), thereafter he dumped her in a toilet chamber. PW2 was told that Asia stated calling for help from the toilet chamber and a girl called Erica from Mahonge's family, a neighbouring house heard Asia

crying for help. The girl called more neighbours who come and removed Asia from the toilet chamber and took her to hospital.

PW2 added that from the hospital she went to the Muheza Police Station to report the incident. PW2 also said she asked Asia who scotched/burnt her, she said the person who did it did not hide face and he is not new. She knows his face. But she does not know his name. PW2 testified further after same days she was told to take Asia to the Police Station where she could identify the person who burnt her.

At the Police Station Asia was taken to another room. At the identification parade Asia identified the person who burnt and dumped her in the toilet chamber. PW2 also said she knows the person who did it. She identified him at the docket, and she said he stays in the same town where they live. She testified that he is staying not very far from her home. PW2 said back then she had debts, but she owed nothing to the accused person. PW2 said she owed money to Aniseth and Aminiel.

PW3 - Joshua Samwel Mahonge, testified that on 29/01/2016 while he was staying at Michungwani area with his siblings Erica, Moses and shamba boy Charles. He testified that at around 12:48 PM came a girl named Irene. She is Seba's house girl. She told Erica that she went to

Asia's home and tried to call she heard her replying from far. PW3 said the girls went there and when they came back they said Asia is responding from far and thought she was possessed by evil spirit. They asked PW3 to go with them and pray for Asia. PW3 and Charles went to Mwalimu Anna's home where Asia stays and called her. They heard her responding from far and the voice came from the toilet chamber. PW3 said he removed the cover of the toilet chamber. And with the help from Charles and other neighbours and using electric cable as a rope and they lowered into the toilet chamber and asked Asia to wear it and they pulled her out of toilet chamber. She was burnt on various parts of her body and her body was covered in sewage, dirt, or feces. That the women washed her. PW3 went on testifying that then together with Charles they took motorcycle and took Asia to the Kididima Health Centre.

PW4 WP 8041 D/C Amina she testified that she is a WP at Muheza Police Station. She said that an identification parade day she was asked by OC - CID to escort Asia to the identification parade ground. After reaching the identification parade ground she gave Asia to WP Glory.

PW5:- Asia Said, is the victim herself she testified that she stayed at Michungwani, Muheza District at Mwalimu or Madam Anna's house. On

29/01/2016 in the morning at around 9:00 AM while children were at school come a young man who entered the house without knocking the door. He asked for Madam Anna. PW5 told him Mwalimu Anna is not home. He did not believe her. He locked the door and took the keys. Then ordered PW5 to go with him to search for Madame Anna in the house. They went to the first room she was not there. Thereafter, they went to Madam Anna's room. He took the door key which was under the door and opened the room. He checked the room Madam Anna was not there. PW5 said the accused asked her what he should do to her, and he left for a short while when he came back PW5 told him she had not chosen anything he gripped her hand backward and tied her with Mtandio and told her not to shout. He pushed her on the bed and threatened to stab her with a knife. He took a cloth and covered PW5's face. PW5 went on narrating that then the accused took her to the floor. The accused was suffocating and squeezing her. The accused was strong, and he overpowered PW5. The PW5 said she felt something hot is burning her skin she knew it was a clothing irony.

PW5 said the accused burned her face, chest, hands, breast, and stomach. The PW5 unzipped her dress a bit and showed the court the

scars that was caused by the burn wounds. Referring to the incidence, PW5 said that although she was dressed up the accused was pulling up her clothes up or down and burn her in various part of her body.

PW5 said she became unconscious, and regained conscious and found herself in the toilet chamber. She cried and shouted until when the neighbours came to remove the cover of the toilet chamber and pulled her out with a wire. But while she was in the chamber she could not help herself because she had no energy but accused sealed the toilet chamber with its cover. PW5 stated that the accused reopened the chamber and ordered her that when she gets out to leave for her home and not staying there with Madam Anna. And he said when Madam Anna comes back and finds her like that she will pay his money back. The accused thereafter resealed the toilet chamber with the cover and left. PW5 said that it was her friend Irene who regularly comes to her home who heard her crying from the toilet chamber. At this point the Court observed that the PW5 sobbing. She was crying. PW5 testified that Irene opened the toilet chamber cover, and when she saw PW5 she screamed for help. People came and lowered the wire which was used as a rope into the chamber and pulled PW5 out. She was covered with sewage/feces. The women

washed her up. Thereafter PW5 says she was taken to Kididima Health Centre where she was admitted and treated for her burn wounds. PW5 testified that on that day Madam Anna came to the hospital and she told her the whole story.

PW5 went further testifying that on 02/02/2016 she was taken to the Police Station to identify the person who burnt her. PW5 said at the identification parade she walked three rounds and touched the accused shoulder. She said she was thereafter put into a room at the Police Station and later she was taken back to the hospital. PW5 said she can recognize the accused because she knows him, she has seen him before. He used to pass outside Madam Anna's house. The PW5 recognized the accused and pointed her finger at him while sitting at docket. PW5 described the accused as slim, dark colour, tall and has a round face.

PW6:- G. 4346 Detective Anthony a Police Officer at Muheza Police Station in the criminal investigation unit. He testified that he was the one who did the investigation of a case file Muheza TR/200/2016 which was about attempted murder. The file had first information. PW6 conducted investigation, at included visiting the crime scene, the home of Mwalimu Anna Elias. He inspected the crime scene and gathered exhibits

clothing irony (Philips model) silver colour, and electric cable (used as a rope) and drew sketch map of the crime scene. On 31/02/2016 when the PW5 was better he went to write her statement at Kididima Hospital. According to PW6, PW5 told him that she knows the person who burnt and pulled her into the toilet chamber. She has seen him before. PW6 testified further that PW5 gave him (PW6) description of the accused, that he was tall, black, slim and was wearing grey shirt with red stripes.

Thereafter, PW6 went to the Police Station and took some Police Officers and went to look for the suspect. They knocked the door of various houses. This was on 31/01/2016 when they were at Michungwani area. PW6 said they reached at the suspects house they knocked the door and a mother opened the door. They told to wake up her sons. One of the two young men who wake up wore the grey shirt with red stripes. PW6 says after seeing the boys (young men) they arrested them and took them to the Police Station for interrogation. They denied allegations.

PW6 said he was told that on 02/02/2016 the identification parade was conducted by Inspector Joseph in which the victim recognized and identified the accused/suspect Daniel Konabo. PW6 said he wrote

additional statement for the victim (PW5) and after identification parade they allowed the victim (P5) to return to the hospital.

PW6 was shown the sketch map of crime scene he drew he recognized it and he tendered it and it was admitted as exhibit P2.

PW7:- Mohamed Haji stays at Mindu Village, Mkuzi ward, Muheza District. On 02/02/2016 he was at Muheza Police Station following up on his case about a person who stole his clothes. He participated in the identification parade. He was asked by Inspector Joseph to participate in the identification parade. On that day there were ten persons who participated in the parade all male, young men some tall other average height, slim, black, (dark colour), others light colour. And then two suspects/young men were brought, and they also joined in the line one stood next to PW7 on his (PW7) left side. He was the fourth person from right, PW7 was the third from right. They counted from right to left. PW7 stated that then a girl with wounds on her face was brought. She walked in front of the line and touched the shoulder of the person standing next to him (PW7) on the left, and thereafter she went around behind the line and touched that same person again. PW7 stated that the person who was touched his shoulder by the wounded girl is present here in the Court. PW7 pointed his finger at

the person sitting on the docket. The PW7 testified that after the identification parade he wrote his statement. That statement during cross examination it was tendered as exhibit D1.

PW8:- Inspector Joseph Michael Mdaki, Police Officer at Tanga, Police Field Force Unit (FFU) but in 2016 he was working at Muheza Police Station. He was in charge of the identification parade. On 02/02/2016 he was directed by the OCD of Muheza to conduct it. He selected persons who participated in the parade (identification parade). As per PGO 232, he chose ten young men who were slim, tall, average height, black/dark colour. Some were not dark colour. Their height did not vary much. He selected those with similar physical appearance with that of the two suspects. Then he told them to line up in a straight line. Thereafter, he asked D/C Dawson to bring the two suspects Angelo Konabo Kasamo and Daniel Konabo Kasamo and direct them stand anywhere in the line. He informed their rights including to call any relative to be present, etc.

Then he (PW8) directed the police officer to bring the victim (PW5) to identify the suspect. WP Amina brought the girl. She then was taken by WP Glory to the identification parade ground. The girl walked in front of straight line and touched the suspect's shoulder. Thereafter she went

around/behind the line she touched the suspect on the shoulder again. He (PW8) directed the girl to be taken away and be kept the room at the Police Station. PW8 said after that he asked the two persons who stood next to the suspect. Thereafter PW8 wrote his statement as per requirement of the PGO PF 186 also tendered PF 186 as exhibit P3.

With above evidence the prosecution the closed its case. After considering the prosecution evidence, the court found the accused to have a case to answer. The accused person **(DW1) Daniel Konabo Kasamo** denied having committed the offence. In his defence stated that in 2016 he was staying at Masista street, Michungwani, Muheza District. Then he was a student in secondary school. He was staying with my mother and young brothers, Angelo, Isaac, Esther, Happy and Hekima. On 29/1/2016 in the morning he was at home. He was feeding cattle. After that He went in the street. He went to collect money from the people he sold beef. He said a day before the incidence there was cattle they slaughtered.

Among the people from whom he went to collect money was Mr. Kubo. Who stayed at Michungwani at Masista street. He testified that Mr. Kubo is now in Mwanza. DW1 went further stating that he came back home at around 10:00AM. At home there was his mother alone. He stated

that on that day after going back home at around 12:00 noon he went to Madam Flora and came back home at around 14:00PM. After that he did not go anywhere.

DW1 testified that on 31/1/2016 he was arrested by the police. He said that from 29/1/2016 to 31/1/2016 he was at home. He stated that he was arrested on 31/1/2016 at 24:30 when he was conducting his private studies and a friend's (Francis) house. DW1 narrated further that when the person knocked, he opened the door he saw about six policemen, two went behind him and two stood in front and the other stood behind the two who were in front of DW1. The police officer told DW1 that "Mwambie Danny atoke ndani." The police went on searching, and where DW1 was staying there was another room they saw people sleeping. After the police officer asked DW1 what is his name. He told him his name is Daniel. When the police officer was questioning him another police officer came while holding DW1's mother asking her to show where is her son.

She told them that her son is this one pointing at DW1. They wanted to handcuff him he asked them what the problem is. They did not answer him they said he will know everything at the police station. He asked the police officer if he could go to school and report the matter next morning

so that he could thereafter go to the police. The police officer refused. DW1's mother was arrested at home.

DW1 said that he was not told who filed complaint against him. At the police station he was not taken any statement. He was interviewed on the third day and the statement was written. On that day DW1 was asked about the girl who was burnt by clothing irony. He said that he did not know about that. DW1 added that at that time the girl was the house girl of Madam Anna. He knew her. She has seen her about five times at Madam Flora's home.

DW1 testified that in the afternoon of the second day there were two people(suspects) arrested and brought to the police station in connection to the same case. They became three. One of them was Aminieli. He remembers him. DW1 and others were brought in Tanga at criminal investigation unit. They were interrogated and sent back to Muheza Police Station.

DW1 continued to testify that the other two suspects were freed, and he was detained. He also stated that the next day 2/2/2016 identification parade was conducted. This identification parade was done behind the

police station building. The identification parade was conducted at 18:00PM.

DW stated that Muheza Police station there many tree (Mijohoro). There was already darkness due to the tree at the time of identification parade. The police officers switched on the lights so that identification could be done.

It was DW1's testimony that when were in the identification parade ground, came the victim with Madam Anna who is her employer/guardian. At the identification ground DW1 said his clothes were dirt because he was at the Police cell for four days.

He stated that in the identification parade, the persons who were brought were not like him. He was slim, and dark colour. The person next to him was light colour and short. Those who were brought in the parade they were not tall.

DW1 testified that the girl (victim) walked in front for the first round, and then second round and the third round she touched his shoulder.

DW1 stated that his young brother Angelo Konabo Kasamo was also in the line but he did not know the offence he was suspected of committing may be this one he (DW1) was charged with. DW1 added that Angelo was

not told who complained against him. He further said that Angelo is short and light colour.

The DW1 said he knew the girl (victim) before because she was working at Madam Anna, and Madam Anna had a friend her name is Madam Flora. And DW1 and Madam Flora had friendship. The witness said that where he came to know the girl (victim) she used to come at Madam Flora's house. That is also where he came to know Madam Anna. During that time Madam Anna rented a room in one house of Kidumba. Madam Flora had also rented a room in another house of Kidumba but in a different street.

The DW1 said it not true that he had attempted to kill Asia or to injure/harm her. He continued stating that Madam Anna is not owing him any money. He said he had no relationship with Madam Anna.

Issues for determination:

Having briefly highlighted the evidence from both prosecution and the defence and to draw the findings and reach its conclusion the court framed three main issues for determination as drawn from the learned counsels' submissions. The counsels' industrious legal research is also acknowledged. The main issues are:

- (1) Whether there was attempted murder?
- (2) Whether the accused person attempted to murder the victim?
- (3) Whether the prosecution proved the case beyond reasonable doubt?

But apart from the above main issues, there are other sub issues as shown below:

- Whether the identification parade was properly conducted?
- Whether threatening to stab with knife and not doing it is a defence to attempted murder?
- Whether there were inconsistencies, and contradictions in the testimonies adduced by the prosecution witnesses?
- Whether the inconsistencies and contradictions were minor or go to the root of the matter?
- Whether not tendering some exhibits: clothing iron and a rope is fatal could it lead to injustice?

In the present case, that is immaterial because the accused person used the electric clothing iron (Philips, silver colour) though the same was not tendered as exhibit the testimony of PW1 and PW5 confirmed that it was hot clothing iron that was used to burn various parts of the victim (PW5) body. Moreover, the accused person (DW1) after burning the accused on her certain parties of her body she threw her into the toilet chamber and sealed with the chamber cover. The wounds were deep,

grievous. According to PW1 that was second degree burn which goes beyond the skin into the nerves and blood vessels. The accused act of throwing the victim (PW5) into toilet chamber and resealing it. Shows that the accused intended to murder her. Moreover, he wanted to get rid of evidence. Because had the victim died in there nobody would have even suspected that she was in there because the smell would not come out. This clearly shows intention (mens rea).

Learned counsel Wantora had three issues for determination: the accused innocence (he had quarrels with neither Madam Anna nor the victim), the flawed identification parade – contrary to PGO 232: organisation of the parade, flawed selection of participants, presence of other persons uninvolved in the parade, parade conducted at 18:00 and the surrounding area with trees; lack of prior description of the suspect, inconsistency on the date the parade was conducted – 2/2/2017 and on signature 2/2/2016; inconsistencies and contradictions in the prosecution's witnesses, he also complained of failure of the prosecution to bring exhibits, rope and clothing irony; these are items to be grasped from defence counsel Mr Wantora's submissions. We shall address them by examining the evidence adduced and the law. The testimonies of DW1,

PW2, PW4 PW5, PW6 PW7 PW8, and DW1 show that the identification parade was conducted on 2/2/2016. Moreover, the identification parade register PF186, which was tendered and admitted as exhibit P3 at the bottom it is dated 2/2/2016. It is my view that this is a minor inconsistency. In **Mohamed Said Matula's case** and **Issa Hassan Uki v Republic, Criminal Appeal No. 129 of 2017 Court of Appeal of Tanzania at Mtwara (unreported)** the CAT has guided the courts to disregard minor inconsistencies.

As for identification the PW5 testified that on the material date the accused came to her home (that is to Mwl. Anna Elias' house) and entered the house without knocking. He asked for Mwl. Anna and he was told by PW5 that she was not home. The accused locked the door and told PW5 that she was lying. He and PW5 started looking for Mwl Anna from the first they did not find her and went to Mwl. Anna and he found the keys under the door and unlocked it. They went in and he tied the PW5 with mtandio, threaten her with a knife and covered her face and told her not to scream. He then started to burn her on various parties of her body: the face especially the cheeks, breast, chest, stomach, back and hands. He then threw her into the toiled chamber and resealed it with chamber cover. The

PW5 stated that she knew the accused because he has seen before. She said before the incidence the accused used to pass outside Mwl. Anna's house. The incident occurred in the morning of 29/1/2016 at around 9:00 AM. There is no mistaken identity because the accused was threatening her with a knife while she was pushed on the bed, also the accused tried to strangle her. This shows that the PW5 was able to see him and recognize him because he had seen him before. Moreover, PW5 was able to identify the accused during identification parade conducted on 2/2/2016 at Muheza Police Station. She was also able to point the finger at him at the court when she was testifying before the court. The testimony of PW5 is direct evidence. It is the best evidence as provided for under section 62(1)(a) of the Evidence Act [CAP 6 R.E. 2019]. Its credibility is unquestionable. Even during cross examination, that evidence was neither discredited nor shaken. The court also observed the scars that she has on the face, chest, and stomach. The testimony of PW5 is watertight and though she was a single eyewitness she knew the accused as she has seen him before. Thus, such identification of the accused by a single witness is unflawed, reliable and conviction may be entered as it was held by the CAT in **Hassan Juma Kanenyera and Others v R [1992] TLR 100 at 101**. It was further held in that case that the situation may be horrifying but if the witness

manages to overcome the fear by remaining alert in mind and observing the accused despite the torture such a single witness' evidence of identification though as a matter of practice requires corroboration may warrant conviction if the court is fully satisfied that the witness is telling nothing but the truth.

As for corroboration, the testimony of PW5 was corroborated by testimony of PW1, PW2, PW3, PW4, PW6, PW7 and PW8. That testimony also to some extent corroborated by testimony of DW1 who confirmed that he had seen PW5 at least five times at Mwl. Flora's home. It means the PW5 and DW1 know each other.

PW5 and DW1 both stated that they had no quarrels before. Therefore, there was no reason why should PW5 lie about the accused being the one who burnt and dumped her in the toilet chamber.

The defence brought one witness (DWI) the accused person himself. He denied any wrong doing. In his testimony he said he was arrested at his friend's home, that is Francis' home on 31/1/2016 at midnight around 24:00. He also admitted that he knew the victim and has met at her at least five time at Mwl. Flora's home. He also said Mwl. Flora is his friend. Further he added that he knows Mwl. Anna. However, he neither had

quarrels with Mwl. Anna nor the victim (PW5) Asia Said. The DW1 faulted the identification parade, that the persons brought in the identification parade were mixture of tall and medium, dark colour and light. But they were all male. He also said they were in total 10 including the suspects. In this case while those who were arrested were two, the suspect to be identified was one whose description PW5 Asia Said (victim) gave to D/C Anthony on 31/1/2016 at Kididima Health Centre. That the suspected is a young man, tall, dark colour(black), slim and with a round face. Therefore, according to exhibit P3, the PF 186, ten (10) young men plus two suspects (Daniel Konabo and Angelo Konabo) who were in police cell to make a total of 12 is within the range prescribed by the PGO 232 for identification of one suspect and even two suspects. From this, it means the PGO 232 was not contravened. Moreover, the case of **Muhidin Mohamed Lila@Emolo and Three Others v R, Criminal Appeal No. 443 of 2015** does not apply because the victim gave the description of the suspect/accused to the police detective D/C Anthony (PW6).

One minor issue that could be raised is why was Angelo Konabo arrested and detained as a suspect, and why was he brought at the identification parade and lined up while the perpetrator is just one person

and not two. Moreover, the victim gave description of one person. It is not clear why the police did so because already they had the description of the suspect/accused. Perhaps they wanted him (Angelo Konabo) to be in the identification parade. But in my view such inconsistency did not vitiate the identification parade.

The DW1 also stated the identification parade was conducted at night at around 18:00 and that at the police station. He also said there were lights switched on the identification parade. It means the argument that there was darkness is irrelevant. Moreover, the DW1 admitted that at the identification parade Asia Said (PW5) touched his shoulder. Nevertheless, he was shocked why the victim identified him while he did not commit the crime. The PW5 and DW1 know each other. In the case of **Ambros Elias v R, Criminal Appeal No. 368 of 2018 at page 11 (unreported)** judgment delivered on 15/04/2021, and **Mbaruku v R, Criminal Appeal No. 279 of 2019 (unreported)** the CAT held that identification parades serve no meaningful purpose when the witness alleges that he or she is familiar with the suspect. Moreover, from the testimony of DW1 it was apparent that he did not deny that he was the one wearing grey shirt with red stripes.

The main issues for determination:

The main issues for determination before the court with regards to whether the prosecution proved the case beyond reasonable doubt were:

- 1. Whether there was attempted murder?**
- 2. Whether the accused is the one who committed the offence?**
- 3. Whether the case has been proved beyond reasonable doubt?**

Regarding the first issue, **whether there was attempt murder?**

Mr Wantora learned counsel for the defence argued that there was no attempted murder. He submitted that the testimony of PW5 supported his submission because the victim stated that the perpetrator was holding a knife and he had an opportunity to stab her if he really intended to kill her, but he did not do so. It was correctly submitted by Ms. Kayuni, SA that to answer the issue **whether there was attempt murder** we look at the ingredients of attempted murder. These ingredients were stated in the case of **Boniface Fidelis @ Abel v R, Criminal Appeal No. 301 of 2014 at 13 CAT (unreported)**. To begin with, there must be a proof of the intention to commit main offence of murder. Referring to the evidence adduced before this court she submitted that the accused had intended to

commit murder. The testimony of PW5 was credible and reliable. It is the law that direct evidence is the best evidence as per section 62(1)(a) of the Evidence Act, [CAP 6 R.E. 2019]. The evidence of the person who says he saw it, or he heard it. The PW5 is the victim herself. The offence was committed to her. She gave testimony of what she saw, and what was done to her. she testified that the accused burned her in various parts of her body with hot electric clothing iron and thereafter he dumped her in the toilet chamber. Although the accused did not say that he intended to murder Asia Said (PW5), the acts he committed were loud enough to show that he wanted to kill her. The act of burning the victim on various parties of her body with electric clothing irony and dumping her in the toilet chamber and resealing it with the chamber cover. This proves intention of the murder.

In the case of **Bonifas Fidelis@Abel's case** it was held that "the second ingredient there should evidence to prove the appellant began to employ the means to execute his intention." The accused in the present case stated to execute his intention by asking the victim what she wants him to do to her. Then when she said she has not chosen anything. The

accused started burning her with the hot clothing iron by pulling her clothes up and continue to burn her in various parts of her body.

Besides the above ingredients, Ms. Kayuni SA rightly submitted that there should be overt that manifests accused person's intention. The overt act is the one that indicates intention to kill or causing grievous body harm. The act of the accused to burn the witness and eventually dumping into a toilet chamber proves there was intention to kill her. It was also the testimony of PW1 that the burn wounds were big and were severe that were likely to cause death.

As for the fourth ingredient it was submitted by Ms. Kayuni SA referred the court to **Bonifas Fidelis@Abel's case** where it was stated that there should have been an intervening event which interrupted the event which without it the main offence could have been committed. It is true that there an intervening event in our case at hand, that intervention was Asia Said voice which was heard from far in the toilet chamber. Asia's friend Irene heard the voice she called neighbours and Joshua Samwel Mahonge (PW3) helped to pull Asia (PW5) out for the chamber. Had PW3 failed to come pull PW5 out of the chamber she would have died. There was indeed attempted murder.

As for the second issue whether the accused is the one who committed the offence. Ms. Kayuni SA, submitted that it is true that it is the accused who committed the offence. She went further submitting that this is as per the evidence adduced before this court. She argued that it is so because, the victim (PW5) Asia Said in her testimony she stated clearly that she knew the person who did the act before, and she had seen him several times before where he was passing outside Mwl. Anna's home. The question of PW5 and DW1 knowing each other has been corroborated by the testimony of the accused (DW1) himself. It was observed that the accused in his testimony unequivocally stated that he knew the victim and has seen her at least five times before. The question of familiarity is important aspect as it was held in the case **Chrsitopher S/O Ally v R, Criminal Appeal 510 of 2017, CAT at Mbeya at p. 12 (unreported)**.

In the case of **Abdallah Rajabu Waziri v R, Criminal Appeal No. 116, CAT at Tanga, at p. 10 (unreported)**, in which was state that

"It is common ground that the PW4 knew the appellant prior to the event, and that the scene crime is a single roomed village house. The PW4 lit the matchstick and saw the appellant slaughtering the victim. The light from matchstick

provided sufficient light for proper identification of the appellant."

In the present case the victim and the accused know each other. Moreover, the incidence occurred in the morning. There was enough light. Further, the acts were not abrupt. The accused went into the house, sat on the sofa, had conversation with the victim. The accused also walked from one room to another in searching for Mwl. Anna. There is not any inconsistency no doubt that the PW5 knew the accused and properly identified him. To add more the PW5 testified that the accused did not hide his face.

Regarding the **identification of the accused**, the prosecution counsel submitted that the identification of the accused by the PW5, the latter witness (PW5) stated that she did not know the name of the accused but she knew his face. The PW5 told the PW2 that she know the person who did the act though she does not know his name but his face is not new. He has seen him before. PW5 told the same to PW6 D/C Anthony. The PW6 said in his testimony that the victim told him that she know the accused and she also informed him the clothes that the accused was wearing on that material day. PW6 also stated that after getting description of the accused/suspect he took prompt measures to start looking for the

accused, and they reached his home and arrested the accused and his young brother. It is apparent that what brought to the arrest of the accused who is before this court is the information of the whole incidence as reported by PW2 (after being informed at the hospital by Asia) she went to report to the police station. Another important fact that led to arrest of the accused was the description that was given by PW5 to PW6.

While advocate Wantora faulted the identification parade, the identification of the accused at identification parade has been through the testimonies of PW5, PW7 and PW8. The accused (DW1) testimony has corroborated those testimonies, who testified that the identification parade was conducted, and he was identified, and that PW5 (victim) was the one who identified him. DW1 did not deny that he was identified at the parade. To show that the PW5 is familiar with the accused she when testifying before this court recognized the accused and pointed the finger to him indicating that he was the one who did the acts.

Regarding the testimonies of the prosecution witnesses before this court Ms. Kayuni learned SA concurred with defence counsel that there are several inconsistencies, including the question as to how many rounds the victim (PW5) walked at the identification parade to identify the accused.

Some witnesses said two, and the victim said three rounds. However, the prosecution counsel argued while citing the case of **Deogratius Deemay Gurtu v R, Criminal Appeal 553 of 2016 CAT at page 3**, where the CAT held that in the cases the inconsistencies are unavoidable. The CAT cited Emmanuel Josephat v R (supra) where it was held that

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

The CAT went on citing its own cases of **Dickson Elia Nsamba Shapwata & Another v R, Criminal Appeal No. 92 of 2007**; and **Lusungu Duwe v R, Criminal Appeal No. 76 of 2013 CAT (unreported)** which 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."

The case of **Mohamed Said Matula (supra) at p.3** is also informative on inconsistencies in the testimonies. It held that there is a duty on the court to determine whether the inconsistencies are minor, or they go to the root. It was while Mr Wantora argued that inconsistencies

render the testimonies unreliable, Ms. Kayuni's submitted that the inconsistencies are minor and they do not go to the root. It is not disputed that Asia was burned in her various parties of her body with clothing irony and dumped into the toiled chamber, and that she identified the accused person.

Yet another inconsistency relates to situations where the oral testimonies given by some of the prosecution witnesses were inconsistent with the statements written at the police station. The learned State Attorney submitted that what the witnesses stated before the court does not cause any injustice because they added more information in what they stated orally. She referred this court to the case of **Abdalla Rajab Waziri v R, (supra) at page 9** where the CAT held that some variations in the statement and oral testimony where especially there is more information in the oral testimony than the written statement that could be due to nature of questions asked or the question was not asked at the police station. That did neither affect credibility of the witness nor prejudiced the accused.

As for the third issue this court considered the evidence given by eight (8) prosecution witnesses particularly the direct evidence of PW5, the

circumstantial evidence of PW1 (Dr Mallya), PW2, PW3, PW4, PW5, PW6, PW7 and PW8 corroborated the that best evidence of the victim.

From above the evaluation of prosecution and defence evidence prosecution is reliable and credible. Thus, the prosecution has proved the case beyond reasonable doubt. Consequently, the accused person is found guilty, and I convict him for the offence of attempted murder c/s 211(a) of Penal Code [CAP 16 R.E. 2002].

DATED at TANGA this 09th day of September, 2021.


U. J. AGATHO
JUDGE
09/09/2021

Date: 09/09/2021

Coram: Hon. U. J. Agatho, J

For the Republic: Kazungu (S/A) & Kayuni (S/A)

For the Accused: Wantora, Advocate

Accused: Present

Assessors: (1) Batuli Salim Ruwa

(2) Janeth Rashid Tombola

(3) Mariam Raymond Mbelwa

B/C: Alex

Court: Judgment delivered this 09th day of September 2021 in the presence of Ms. Kazungu (State Attorney) for the Republic and Mr. Wantora Advocate for the accused and the accused.




U. J. AGATHO

JUDGE

09/09/2021

Court: Right of appeal explained.



U. J. AGATHO

JUDGE

09/09/2021