

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BIHARAMULO**

CRIMINAL SESSIONS CASE NO. 87 OF 2017

THE REPUBLIC

VERSUS

**MUGAMBO SAANANE
BAHATI JOHN**

JUDGMENT

Date of last order 12/05/2021

Date of judgment 13/05/2021

Kilekamajenga, J.

The victim, Rajabu Anthony, was attacked on the night of 19th April 2013 by unknown people. The man hunt by the police led to the arrest of six suspects including the two accused persons standing before this court. The other four suspects were discharged for lack of evidence. The accused persons were finally charged with attempt murder contrary to **section 211(a) of the Penal Code, Cap. 16 RE 2002**. The information before the court showed that the accused persons attempted to murder Rajabu Anthony on 19th Day of April 2013 at night hours at Lusese village within Biharamulo District in Kagera Region. When the case was scheduled for hearing, the republic was represented by the learned State Attorney, Mr. Emmanuel Kahigi. On the other hand, the accused persons

enjoyed the legal services of the learned advocates, Messrs Dastan Mujaki and Peter Matete. During the trial, the accused persons pleaded not guilty obliging the prosecution to summon five witnesses to prove the case to the required standard.

In proving the offence, Rajabu Anthony (PW1) who was the victim of the attack testified that on 19th April 2013, at around 1 am, he was attacked and seriously wounded. He saw and identified the attackers through the window before they entered into the house. Also, in the house, the victim had a conversation with the attackers for about 10-15 minutes in a room lighted with a solar bulb. He was just two footsteps away from the attackers during that brief conversation. He identified the attackers because there was bright light and they were not strangers to him. He informed the court that the bulb was 5 watts powered with a hundred watts solar panel. He named the accused persons and Alex Samson as the persons who attacked him. His testimony was supported with the evidence of PW2 who was the wife of the victim. On her part, PW2 saw the accused persons at a glance through the window. Thereafter, she jumped into the next room and ran away through the front door which was not normally used. PW2 also confirmed that their house was lighted with solar power both inside and outside the house. The light enabled her to see the accused person because so far she knew them before the attack.

PW4 also confirmed that the house of the victim had solar light though they also used torches to light the place. He further informed the court that the victim and the first accused person had a conflict which was reported to him as the village chairman. He tried to reconcile them but the first accused person refused any compensation vowing to revenge by taking away the victim's life. On the other hand, PW3 who was the police officer informed the court that he arrested one of the suspects in this incident (Masumbuko) and interrogated him. The suspect confessed to participate in the attack with the accused persons. However, the alleged suspect jumped bail and was not among the accused persons. He further testified that the attacker led to the arrest of six suspects. The prosecution finally remained with the two accused persons after charges were dropped against the other suspects. PW5 who was the medical doctor confirmed to receive the victim on 19th April 2013 in the early morning. Later, the victim suffered from other complications including seizure prompting reference to Bugando Medical Centre for further medical examination and treatment. PW5 filled-in the PF3 form on 17th November 2015 when the victim returned from treatment.

On the other hand the defence lined up two accused persons as the only defence witnesses. DW1 was Mgambo Saanane who testified that on 24th April 2013 he was arrested. He was handcuffed together with the second accused person who was arrested before him (DW1). Thereafter, the two were taken to the house of

Alex Samson who was also arrested. Thereafter, he was taken to Biharamulo Police Station and taken to court after five days. He further informed the court that he knew the victim (Rajabu Anthony) because his (DW1) shamba was located near the house of the victim. DW1 had the view that the victim named him as an attacker because he bought a shamba which the victim also wanted it. He insisted that the victim's house had no solar lights and that on 19th April 2013 at night hours he was at home sleeping with his wife. However, he did not summon his wife because she was already married to another man.

The second defence witness (DW2) was Bahati John who informed the court that he was arrested on 24th April 2013. He was handcuffed and taken to another house where another person was arrested and they were handcuffed together. He did not know the first accused person before the arrest. He was taken to another house where a third suspect was arrested. They were finally taken to Biharamulo Police Station where he was informed that he attacked Rajabu Anthony. He was later taken to the court. DW2 further testified that he did not know the victim because he comes from another village (Kikomakoma village). On the night of 19th April 2013 he was just at home with his wife. He insisted that the victim framed this case against him though he has no any conflict with him (victim).

At this stage, it is apposite to determine whether or not the prosecution proved its case to the required standard. In this case, the prosecution evidence is solely based on the evidence of PW1 and PW2 who allegedly saw the accused persons at night. It is therefore crucial to lay down the principles of law governing the application of evidence visual identification at night. In the case of **Yassin Maulid Kipanta v. R [1987] TLR 183** provides guidance thus:

'Where evidence against the accused person is solely that of identification, such evidence must be absolutely water tight to justify a conviction.'

See, also the case of **Abdallah Bin Wendo v. R. (1953) 20 EACA 166**. In the case of **Waziri Amani v. R [1980] TLR 250**, the Court of Appeal had the following observation:

'...evidence of visual identification, as courts of East Africa and England have warned in a number of cases, is the weakest kind and most unreliable. It follows, therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.'

In the case of **Baya Lusana v. R. Criminal Appeal No. 593 of 2017**, CAT at Mwanza (unreported) the Court of Appeal of Tanzania has highlighted the conditions for the application of evidence of visual identification thus:

*The law on the evidence of visual identification is well settled as the court is warned not to act on such evidence unless all the possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely water tight. In that regard, the trial court must consider the following guidelines: **One**, the time the witness had the accused under observation; **two**, the distance at which he observed him; **three**, the conditions in which the observation occurred, for instance whether it was day time or night time; **four**, whether there was good or poor lighting and **five**; whether the witness knew or had seen the accused before or not.*

Furthermore, in the case of **Said Chally Scania v. Republic, Criminal Appeal No. 69 of 2005** which was quoted with approval in the case of **Baya** (supra), the Court of Appeal observed that:

*'We think that where a witness is testifying about another in unfavourable circumstances like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all aids to unmistakable identification like proximity to the person being identified, **the source of lights, its intensity**, the length of time the person being identified was within view and also whether the person is familiar or a stranger.*

I understand the evidence of identification is one of the weakest evidence to be relied on by the court especially if such identification was done at night. In the instant case, facts and evidence fit squarely in the above principles of the law. **First**, the victim's house was lighted with solar power both inside and outside

the house. His testimony on the existence of solar lights was supported with the evidence of PW2 and PW4. **Second**, the victim had a conversation of about 10-15 minutes before cutting him. During the alleged conversation, the accused persons informed the victim that as long as he witnessed them killing another person, they were going to kill him as well just as they did to another person that witnessed the killing. The conversation was done under the 5 watts bulb powered by solar panel of 100 watts. The victim remembered that one of the attackers wanted to break the bulb but the second accused person refused because they were confident that the victim was not going to survive. **Third**, the victim was just two footsteps away from the accused persons. The distance does no cast doubt whether he could identify them especially where the light was bright.

Fourth, PW2 who was the victim's wife also saw the accused persons through the window before they entered into the room. She was consistent that she only saw the two accused persons and not Alex Samson. In her testimony, she was enabled with the solar lights to identify them. PW2 later jumped into the next room and escaped through a behind door. If the solar light enabled PW2 to identify the accused person just at a glance, I believe, it was bright enough to allow the victim to see them clearly.

Fifth, the victim knew the accused persons before the attack. The first accused person lived in the next village but he had a *shamba* next to the victim's house. This fact was also supported by the testimony of the first accused person (DW1). Also, the son of the first accused person worked for the victim as a herdsman. On the other hand, the second accused person grew-up with the victim in the same village. There is no shred of doubt that the victim knew the accused persons. He could not have made any mistaken identify about them in a room with solar bulb at a distance of just two footsteps away. **Sixth**, the victim and the first accused person had a quarrel which was reported to the village chairman (PW4).

Seventh, according to the evidence of PW4, the first accused person had previously promised to revenge on their dispute through the victim's life. This court had no reason to doubt the testimony of PW4 because he was the village chairman and had no interest to serve. **Eighth**, PW3 told the court that one of the accomplices who jumped bail (Masumbuko) confessed to participate in attacking the victim. Though this was pure hearsay, I had no reason to doubt the testimony of the police officer (PW3) because he had no interest to serve in this case. **Nineth**, immediately after the attacker, the victim named the accused persons to his wife and other people. The victim told PW2 that in case he died, the accused persons and Alex Samson were responsible. On the next day, the police investigating the case interrogated the victim at the hospital and he

named the accused persons and Alex Samson. The consistency and immediate naming of the accused persons showed credence in the victim's testimony. The immediate naming of the accused persons led to their arrest on 24th April 2013. The accused persons were arrested five days after the incident when the victim was still receiving treatment in hospital. In the case of **Wangiti Marwa Mwita and Others v. Republic [2002] TLR 39** the court stated the value of naming the accused persons thus:

'The ability of the witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as an unexplained delay or complete failure to do so should put a prudent court into inquiry.'

In this case, the accused persons were charged with attempt murder contrary to **section 211(a) of the Penal Code** which provides that:

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.

In line with the above provisions of the law, there is no doubt that the accused persons attempted to kill the victim. Apart from the evidence at hand also the

scars displayed by the victim before this court showed the accused person's intention to kill. The victim was cut on the head several times with a sharp object. Furthermore, the evidence suggested that the accused persons were among the gang of attackers. Under the doctrine of common intention, even if some of the attackers escaped, the accused persons may be criminal responsible if the prosecution case is proved to the required standard. See, **Section 23 of the Penal Code.**

The proof of this offence required the prosecution evidence to prove beyond reasonable doubt that the accused persons actually attempted the murder of the victim. On the other hand, the accused person had an obligation to cast doubt on the prosecution case. In the defence, the accused persons denied being at the crime scene during the attack. They wanted the court to believe the defence of alibi. However, they failed to comply with the requirements of that defence. Under the law, there are certain conditions to be met for the defence of alibi to apply. **First**, the accused must give notice to the prosecution and the court of the intention to rely on the defence of alibi. In practice, such notice is normally given during preliminary hearing or even earlier. **Second**, if the accused person failed to give notice before hearing, he/she should do so immediately after the closure of the prosecution case. See, **section 194(4)(5) and (6) of the Criminal Procedure Act, Cap. 20 RE 2019.** Failure to comply with the

above conditions and where the accused person has failed to support his defence, the court may take the discretion not to accord any weight to that defence. I am alive of the fact that an accused person cannot be convicted on his weak defence where the prosecution has not proved its case but he/she has an obligation to cast doubt on the prosecution's case. The accused person has the right to call witnesses and fortify his/her whereabouts on the day and hour of the alleged incident. In their defence, the accused person alleged that they were at home with their wives on 19th April 2013 during night hours. However, they were not willing to summon their wives.

In conclusion, I have carefully examined the prosecution evidence and the demeanour of the accused persons and I am full convinced that the accused persons committed the offence charged. I also considered the opinion of Honourable assessors who all had the view that the accused persons committed the offence. I hereby convict the accused persons, namely Mgambo Saanane and Bahati John of the offence of attempt murder contrary to **section 211(a) of the Penal Code, Cap. 16 RE 2019.**

Ntemi N. Kilekamajenga
JUDGE
13th May 2021

Court:

Judgment delivered this 13th May 2021 in the presence of the learned State Attorney, Mr. Emmanuel Kahigi and Mr. Dastan Mujaki (Advocate) the counsel for the first accused person who was also holding brief for Mr. Peter Matete (Advocate) for the 2nd accused.

Ntemi N. Kilekamajenga
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Mr. Emmanuel Kahigi (SA): My Lord, we have no criminal records concerning the accused persons. However, the accused persons should be given a higher/stiff sentence to be a lesson to other persons in the community.

Mr. Dastan Mujaki (Advocate): My Lord, generally the accused persons have been in prison for eight years. They have learnt the lesson for being in prison. The accused persons are first offenders. The first accused has 12 children from three wives. But there is only one wife remaining who is caring for the children. On the second accused person, he has eight children who need him. He has stayed in the prion and learnt a lesson. That is all.

1st accused person: My Lord, I pray for the Court to impose a lenient sentence because this case was framed against me. I have stayed in prison for 8

years. I have 12 children from three wives and the children have no one to care for them.

2nd accused person: My Lord, I pray for the Court to impose a lenient sentence. I had two wives. Only one wife remained behind. I have stayed in prison for more than eight years. I have already learnt a lesson. I need a lenient sentence so that I may serve prison and go out while still energetic.

Ntemi N. Kilekamajenga
JUDGE
13th May 2021

SENTENCE

I have considered the mitigating factors advanced by the accused persons. Especially, I have considered the fact that the accused persons have stayed in prison/custody for more than eight years. Based on those reasons, I hereby sentence the accused persons to serve 10 years in prison. Order accordingly.


Ntemi N. Kilekamajenga
JUDGE
13th May 2021


Court: Right of appeal explained to the parties. Honourable assessors thanked and discharged.

