

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE NO 3 OF 2021

REPUBLIC

VERSUS

EX-WP 1869 D' SGT FATUMA SAID

JUDGMENT

16th and 29th June, 2021

KISANYA, J.:

Following an information filed by the Republic on 29th March, 2021, the accused person namely, **EX-WP 1869 D'SGT Fatuma** of Tanzania Police Force was indicted in this Court for an offence of acts intended to cause grievous harm contrary to section 222(a) of the Penal Code [Cap 16, R.E.2019]. It was the prosecution case that, on 20th October, 2014 at Kenya Village within Serengeti District in Mara Region, with intent to maim, the accused person caused grievous harm to **Stivin s/o Magesa** (hereinafter referred to as "the victim" or "PW1").

The accused person pleaded not guilty to the information which was put to her. During the preliminary hearing, the following facts were not disputed:

1. That the accused was residing at Igogo Line Police, Mwanza.

2. That the victim stole the accused person's properties.
3. That the accused relocated the victim to Kenya Village where, she arrested and found him in possession of properties stolen from her house.
4. That the accused person took the victim to Kenya Police Station.
5. That the victim was convicted and sentenced by the Mkuyuni Primary Court for stealing the accused person's properties.

Further to that, the Medical Examination Report (PF3 [**Exh. P1**]) was admitted and its contents read over to the accused person. According to Exhibit P1, the description of the injuries sustained by the victim were *"loss of 1st, 2nd, 3^d and 4th fingers hanging only by ½ cm of skin."* In other words, the four fingers were amputated or maimed. Therefore, in terms of section 192 (4) of the Criminal Procedure Act [Cap. 20, R.E. 2019] (the CPA), the prosecution is not obliged to prove the above facts and the contents of Exhibit P1.

Since the accused refuted to have cut the victim's fingers, the prosecution marshaled two witnesses to prove its case. On the other hand, apart from the accused, the defence had no additional witness.

During the trial, the Republic was represented by Mr. Frank Nchanila, learned State Attorney while the accused had the services of Mr. Thomas Makongo, learned advocate assisted by Mr. Arsein Mollandi Tabuya, learned advocate. The Court sat with three assessors namely, Mr. Risiki A. Magesa, Mrs. Tatu Vicent

Sembu and Mrs. Merciana Changarawe. I am thankful to the learned counsel for both parties and the ladies and gentleman assessors for discharging their respective duties.

The summary of evidence adduced by the witnesses for both parties is set out hereunder: The victim, **Stivin Magesa Mwita (PW1)** was the first prosecution witness. His testimony indicates that he started to work for the accused on 26th April, 2014, at the age of 14 years. The consideration was salary of TZS 50,000 per month. At first, his duty was to sell water. Later on he became the accused's house boy and moved in her house. Things did not go well between the two. The accused failed to pay him his salary. By October, 2014, the accused owed him six months' salary equal to TZS 300,000.

On 17th October 2014, the accused received a call from the victim's mother. She was informed that the victim's mother was sick and needed some money for medical treatment. The accused could not give PW1 TZS 30,000. She told him to sell any of her properties. Therefore, on 18th October, 2014, PW1 sold the accused's TV deck and shoes at TZS 30,000 and sent the money to his mother.

PW1 adduced further that, he decided to return to his village on 19/10/2014. Upon arriving, he received the accused's call. She wanted to know about his mother's health condition. In the course of conversation, the accused requested for his mother's contacts. Thus, PW1 gave her the contact of one Wangombe.

However, it appeared that the latter led the accused to his (PW1) village on 20/10/2014. She was with two other police officers. All were armed with guns and a club. They arrested PW1 and took him to Kenya B Police Station, on the allegation of stealing the accused's properties.

PW1 went on to depose that, he was tortured by the accused at the police station. He testified that the accused tied his legs and hands, undressed his shirt and covered his face by using the said shirt. Thereafter, the accused ordered him to lie on the stomach (*kifudi fudi*). PW1 adduced further that he managed to lift his shirt and peep at the accused cutting his right hand thumb thereby chopping off his four fingers. She then massaged the cut wounds by using hot water and salt. PW1 claimed that he was injured at the time the accused had ordered other police officers to leave the police post because she was senior to them.

Moreover, it was PW1's testimony that the police officers including, the accused took him to Mugumu Police Station before heading to Mugumu District Designated Hospital (Mugumu- DDH) for medical treatment. He testified further that he was handed over to the accused who took him to Mwanza on the next day. Upon arriving at Mwanza, he was charged and convicted of stealing and sentenced to six months' conditional discharge.

When cross examined, PW1 admitted that he did not appeal against the conviction and sentence. He stated further that the TV deck and shoes taken from

the accused were sold in Mwanza and not Serengeti. He also told us that the Officer Commanding Station (OCS) of Kenya Police Post was not among the officers who arrested him. PW1 also stated that he sustained other injuries due to the club inflicted on his legs by the accused.

The next witness was **H. 503 PC Yairus** (PW2), a police officer, stationed at Kenya Police Station on the material date. He testified that, on the material day the OCS of Kenya Police Station one, CPL Joseph, PC Erasmus and the accused went to Magange Village in Serengeti District. They returned to the police station after four hours. They had PW1 and properties alleged to have been stolen from the accused in Mwanza. PW2 was ordered by CPL Joseph to record the said properties which included, shoes, TV deck, clothes, bag and other properties.

It was PW2's testimony that, the accused claimed that other properties were missing and took PW1 from the reception for interrogation. Few minutes later, he heard a calling for help. PW2 responded and found the victim's right hand fingers chopped off. At the same time the accused was holding *sime* which had some blood stains.

During cross-examination, PW2 admitted that the accused was neither arrested nor required to record the statement after committing the offence. When asked about the whereabouts of the sword (*sime*) found in possession of the accused, PW2 replied that it was not his duty to tender it in evidence. He went on

to testify that the accused took the said sword from the OCS room. When asked as to why such fact was not adduced in his evidence in chief, PW2 replied that he was not in a position of remembering each fact. He testified that upon responding to a calling for help, he found the victim's face covered by shirt. PW2 also stated he could not remember when the accused arrived to Kenya for the first time. PW1 deposed to have reported the offence committed by the accused to the OCS.

The accused who gave her evidence on oath denied having participated in committing the offence. She testified that she met PW1 for first time when she was investigating the case of attempt rape that had been levelled against him in September 2014. According to her, she bailed and stayed with PW1 at her house for three days, before the latter could steal her properties. On 19th October, 2014, she travelled to Mugumu Serengeti to relocate PW1. She reported to Officer Commanding- Investigation Department (OC-CID) who gave her the police officers to assist in tracing the victim.

Recalling the fateful day (20/10/2014), the accused testified that she went with PC Erasmus and CPL Joseph to the victim's village where they found him in possession of a bag which had her certificates. The accused recalled further that other properties including shoes and lady's prints (*vitenge*) were with the victim's mother while the TV deck and remote control were seized from the teacher's house/shop.

The accused refuted the claim that she maimed the victim. She testified that the victim was attacked by an angry mob at the teacher's house and his hand injured in the course of defending himself. She deposed that they proceeded to Kenyana Police Station before heading to Mugumu Police Station. It was the accused' evidence that, if she had committed the offence the Officer Commanding Station (OCS), Officer Commanding District (OCD) and Officer Commanding- Investigation Department (OC-CID) of Mugumu-Serengeti could have arrested her. She also claimed that PW1 could not have been handed over to her for purposes of taking him to Mwanza. DW1 tendered a copy of judgment of Mkuyuni Primary Court in Criminal Case No. 800 of 2015 (**Exh. D1**) in which, the victim was convicted of stealing her properties.

After closure of the defence case, Mr. Thomas Makongo and Mr. Arsein Molland Tabuya, learned advocates who appeared for the accused and Mr. Frank Nchanila learned state attorney for the republic opted not to make their final submissions.

Therefore, I summed up the case to the ladies and gentleman assessors who aided the Court during trial. In so doing, I guided them on the nature of evidence and law governing, visual identification, credibility of witness, circumstantial evidence, contradictory evidence and ingredients of offence of acts intended to cause grievous harm. Upon asking them to give their opinion, all

assessors were of unanimous opinion that, the prosecution had proved its case and entered verdict of guilty against the accused person.

In view of the above and upon considering the provision of section 222(a) of the Penal Code (supra), the following ingredients of offence of acts intended to cause grievous harm are required to be proved. **First**, that the accused caused some injuries to the victim (PW1). **Second**, that the injuries amounted to grievous harm in law. **Third**, that the act that caused the grievous harm was unlawfully. **Fourth**, that the accused intended to maim the victim (PW1).

In my view, the second, third and fourth ingredients depends on determination of the first ingredient. Therefore, I will address first the following issues premised from the first ingredient:-

1. Whether the victim (PW1) sustained any injury on the material date.
2. If the first issue is answered in affirmative, whether it is the accused who caused the injuries to the victim (PW1).

In the event the answer to the above two issues is not in affirmative, I will not address issues related to other ingredients of acts intended to cause grievous harm namely; (a) whether the injuries amounted to grievous harm in law; (b) whether the act that caused the grievous harm was unlawfully; and (c) whether the grievous harm was intended to maim the victim (PW1).

Starting with the first issue, both parties do not dispute that PW1 sustained injuries. PW1 testified how his four fingers of the right hand were cut. His evidence is supported by PF3 (**Exh. P1**) and PW2. I have indicated earlier that, **Exh. P1** and its contents were not demurred by the defence. Also, the accused (DW1) did not dispute that PW1 was injured on the material date and taken to Mugumu-DDH. Therefore, the first issue is answered in affirmative, the victim sustained injuries on 20th October, 2014.

The next issue is whether or not it is the accused who caused the injuries to PW1. Parties are not at issue that PW1 and the accused knew each other before the incident. As stated earlier, it was also not disputed that PW1 stole the properties from the accused's house at Igogo Line Police, Mwanza and fled to his village in Serengeti District. Furthermore, parties do not dispute that, the accused traced and arrested PW1 in his village. It is common ground that at the time of arresting PW1, the accused was with CPL Joseph and PC Erasmus of Kenya Police Station. Lastly, parties are not at issue that, upon being arrested, PW1 was taken to Kenya Police Station. I have also stated while addressing the first issue that, the accused does not dispute that the victim was injured.

The first controversy is on the place where the victim was injured. PW1's testimony is to the effect that his four fingers of the right hand were chopped off by the accused at Kenya Police Station. On the other hand, the accused states

that PW1 was injured by an angry mob at the teacher's house/shop in the village, where the TV deck and shoes were recovered.

It is in evidence that PW2 did not participate in arresting PW1. His evidence did not cover what happened in the village where PW1 was arrested and the stolen properties recovered. He named CPL Joseph who happened to be the OCS of Kenyana Police Post and DC Erasmus as the officers who went with the accused to arrest PW1. Although both police officers were listed during preliminary hearing, they were not called to testify. It is not known as to why the prosecution opted not to call them. In the absence of the evidence of the said CPL Joseph and PC Erasmus, evidence on what happened at the time of arresting the victim is deduced from PW1 himself.

Both PW1 and PW2's evidence indicates that the accused took the victim from the reception of Kenyana Police Station for interrogation. I have gone through PW2's evidence. He did not adduce on PW1's condition when the latter was surrendered to the police station or before being taken by the accused for interrogation. Again, PW1 is the sole witness on what happened thereafter. He deposed that the accused undressed him, covered his face by using the said shirt, tied his legs and hands and ordered him to lie down on the stomach. Later on, his four fingers were cut. On his part, PW2 did not see the accused cutting the victim.

He arrived at the scene of crime and found that PW1's fingers chopped off. In that regard, PW1 is a single witness of identification.

I am alive of the settled law that conviction can be based on the testimony of a single eye witness provided the witness passes the test of reliability. However, the law is also clear that such evidence must treated with a greater care.

In that regard, I am duty bound to determine whether PW1 is credible and reliable witness. Case law has established the ways in which the credibility of witness can be assessed and determined. For instance, in **Nyakuboga Boniface vs R**, Criminal Appeal No. 434 of 2016 (unreported), the Court of Appeal cited with approval its decision in **Salum Ally vs Republic**, Criminal Appeal No. 106 of 2013 (unreported) wherein, it reiterated its previous position on ways of assessing credible and reliable by holding that:

*"...on whether or not, any particular evidence is reliable, depends on its credibility and the weight to be attached to such evidence. We are aware that at its most basic, credibility involves the issue whether the witness appears to be telling the truth as he believes it to be. In essence, this entails the ability to assess whether the witness's testimony is plausible or is in harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in the circumstances particularly in a particular case. The test for any credible evidence is supposed to pass, were best summarized in the case of **Abbdalla***

Teje @ Malima Mabula vs Republic, Criminal Appeal No. 195 of 2005 (unreported), to be:

- (i) Whether it was legally obtained;*
- (ii) Whether it was credible and accurate;*
- (iii) Whether it was relevant, material and competent;*
- (iv) Whether it meets the standard of proof requisite in a given case, otherwise referred to as the weight of evidence or strength or believability.*

The law is also settled that a witness who tell a lie on some important matter cannot be believed in respect of other points. See for instance **Mohamed Said vs R.**, Criminal Appeal No. 145 of 2017 (unreported) and **Zakaria Jack Magayo vs R.**, Criminal Appeal No. 411 of 2018 (unreported) where that stance was taken by the Court of Appeal.

In our case, it was the prosecution' case during the preliminary hearing that the PW1 stole the accused person's properties. However, in his evidence, PW1 denied to have stolen any of the accused properties. He also stated that the accused's TV deck and shoes were sold in Mwanza and that he was instructed to do so by the accused. PW1's evidence was contradicted by PW2 who testified that TV deck and shoes were in the list of properties recovered from the victim. In that regard, I find PW1's evidence on the properties stolen from the accused nothing but a lie. I also observed his demeanor when giving evidence on this fact and noticed that that it was compatible with the person who was telling the truth. In

my opinion, the fact on the properties stolen from the accused is vital in the case at hand. It provides for the reason of the accused travelling from Mwanza to Serengeti and arresting the victim thereby laying a foundation on the malice aforethought. Therefore, if PW1 lied on such fact, this Court cannot believe him in respect of other facts, including the fact that he was permitted by the accused to sell the said properties or identified the accused as the one who cut him.

Furthermore, PW1 stated that he was tortured by the accused who hit him by using a club. When cross examined, he testified that the club was inflicted on his legs thereby causing him injuries. However, the Medical Examination Report (PF3) [**Exh. P1**] does not show whether the victim had any injuries on other parts of his body, the legs in particular.

Also, the circumstances of the case shows that PW1's hands and legs were tied and his face covered. He deposed that he was ordered to lie on the stomach and straighten his tied hands. Yet, he testified that he was able to see the accused cutting his right hand fingers by using a machete. It was not clearly stated as to how PW1 who laid down on the stomach while his hands straightened, his eyes covered could stretch or uncover himself and see another person. In my opinion, PW1 gave an implausible evidence.

Lastly, PW1 adduced that the accused injured him after ordering other police officers to leave the police station because she was senior to them. On the other

hand, PW2 did not support him on this fact. In fact, PW2 evidence is to the effect that he was at the Police Station. As stated earlier, the OCS (CPL Joseph) was not called to testify. In any case, PW1 was not competent witness to testify on whether the accused was senior to all police officers of Kenyana Police Station. In the first place, he did not name the said police officers and their respective ranks. Also, it appears that the police officers of Kenyana Police Station were not known to him. This is because PW1 stated that the OCS was not among the police officers who arrested him. However, PW2 and DW1 told the Court that the OCS participated in arresting PW1.

From the foregoing, I am of the view that PW1 is not a witness worthy of being trusted. I find him incredible and hereby disregard his evidence.

As a result, there remains no evidence to prove how the victim (PW1) was arrested and the stolen properties seized or recovered. Such evidence could have been adduced by CPL Joseph and PC Erasmus who were not called to enter the witness box. In that regard, I am enjoined to draw adverse inference against the prosecution on the matter. In consequence, the accused has raised doubt on the prosecution case. Her evidence was to the effect that PW1's was attacked by an angry mob at the teacher's house/shop where the TV deck was found. Indeed, this is a reasonable doubt because PW2 did not testify on the victim's condition when he was surrendered to the police station by the accused, CPL Joseph and PC

Erasmus. Also, PW2 did not testify to have examined PW1 before being taken from the reception by the accused.

What remains is the circumstantial evidence adduced by PW2 that, the victim was taken by the accused from the reception for interrogation and that, few minutes later, he heard the victim crying for help. That upon responding, he found PW1's fingers chopped off and the accused holding a sword (*sime*) which had blood stains. Is such evidence sufficient to conclude that the victim was injured by the accused?

As stated earlier, PW2's evidence that he was present at the police station was contradicted by PW1 who deposed that, the accused had ordered all police officers to leave the police station. Further to that, PW1 stated that the accused cut him by using a machete while PW2 states that the accused person was found in possession of a sword which had blood stain. Such evidence raise doubt on the prosecution case. PW2 being a police officer was expected to know the difference between a machete and sword and clarify on the matter. It is not clear whether the Court should take into account evidence adduced by PW1 or PW2 on the above two aspects. In the end, I find that the prosecution evidence on the said two issues affect the credibility of PW2.

Even if it is considered that the said contradiction does not go to the root of the case to the extent affecting PW2's credibility, the law is settled that an accused

person can be convicted based on circumstantial evidence if such evidence irresistibly leads to the conclusion that the crime was committed by the accused person and not any other person. In other words, the inculpatory facts adduced by the prosecution case must not give rise to any other interpretation or explanation than the conclusion that the accused person arraigned before the court is guilty of the charged offence. See **Hamida Mussa vs R** [1993] T.L.R. 123, where it was held that:

"circumstantial evidence justifies conviction where inculpatory fact or facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt"

In the instant case, PW2 did not state the victim's condition when he was surrendered to the police station and taken by the accused for interrogation. In that regard, one of the hypothesis is that, the victim might have been taken from the counter while he had been injured.

There is also evidence on the machete or sword found in possession of the accused when PW2 responded to the alarm. However, the said weapon was not tendered in evidence. Also, it was not proved whether the blood stains on the sword was of human being, let alone the victim. Therefore, such evidence is not sufficient to implicate the accused to the charged offence.

Generally, this case was poorly investigated. It is not known as to why the accused was not arrested immediately after committing the offence and named by PW1 and PW2. The accused participated in taking the victim from Kenyana Police Station to Mugumu Police Station. She was among the police officers who took him to Mugumu-DDH. Yet again, the police authorities in Serengeti District at Mugumu handed over PW1 to her. She then travelled with the victim from Mugumu Serengeti to Mwanza where he was charged with offence of stealing. In my view, these facts are not harmonious with the person who had committed the offence. None of the senior police officers especially those stationed at Mugumu Police Station was brought to testify on what went wrong.

In view of the above, I am of the opinion that the circumstantial evidence does not irresistibly point out that the victim was injured by the accused. In the result, the second issue is answered not in affirmative. I will therefore not venture into addressing other issues on the remaining ingredients of acts intended to cause grievous harm.

For the reasons I have endeavored to explain, I humbly differ with the ladies and gentleman assessors who opined that the accused is guilty of the offence. Their opinion was premised on evidence of PW1 whom I have found not reliable and credible. Further, the ladies and gentleman assessors did not consider the contradictions between PW1 and PW2's evidence and that the circumstantial

evidence was capable of explanation other than the accused person being guilty of the offence.

Ultimately, I find **EX-WP D'SGT Fatuma Said** not guilty and acquit her of the offence of acts intended to cause grievous harm contrary to section 222(a) the Penal Code [supra].

DATED at MUSOMA this 29th day of June, 2021




E.S. Kisanya
JUDGE

Court: Judgment delivered this 29th day of June, 2021 in the presence of Ms. Monica Hokororo, learned State Attorney for the Republic and the accused person. The ladies and gentleman assessors present.


E.S. Kisanya
JUDGE
29/06/2021

Court: (i) Right of appeal to explained

(ii) Assessors thanked and discharged.


E.S. Kisanya
JUDGE
29/06/2021