

IN THE HIGH COURT OF TANZANIA
(MWANZA REGISTRY)
AT GEITA
CRIMINAL SESSION NO. 237 OF 2016
THE REPUBLIC
VERSUS
PETER S/O JAMES @ MSHASHI
JUDGMENT

Date of Last Order: 13/12/2021
Date of Judgment: 17/12/2021

M. MNYUKWA, J.

PETER JAMES @ MASHASHI, herein the accused person, stands charged with the offence of attempt to murder c/s 211(a) of the Penal Code, Cap. 16 [RE: 2002], now [RE: 2019]. It is alleged that on 01.11.2015, at night hours at Kahumo Village within Chato District in Geita Region the accused person attempted to kill Nyabahimba Msubi. The accused pleaded not guilty to the information.

During the hearing, the trial was conducted with the aid of three assessors namely; Jumanne Nkaina (56 yrs), Shija Malale (52yrs), and Mussa Samson (54 yrs.). I appreciate the counsels for their cooperation



during the trial without forgetting the gentlemen and lady assessors who sat with me and stated their opinion based on the facts of the case. After the summing up to the Gentlemen and Lady Assessors, they all found the accused person guilty of the offence of attempt to murder as charged.

The Republic was represented by Mr. James Pallangyo learned State Attorney, and the accused was afforded the service of Mr. Erick Lutehanga learned advocate. To prove the information laid against the accused the prosecution paraded three witnesses: Rigobert Kalisa, (PW1) G8334 D/C Muhidini (PW2), and Nyabahimba Msubi (PW3) and tendered two pieces of documentary evidence while on the other hand, the accused Peter James@Mshashi (DW1) defended himself.

PW1 RIGOBERT KALISA testified that he is a medical doctor who worked from 2003 to 2020 at Chato District Hospital. On 01.11.2015 at night hours he was called to go to the hospital to attend a patient. He went on that the patient who has a PF3 was also accompanied by her relatives and a police officer. On observation, he find out that the patient who is a victim in this case has a cut wound on her hand inflicted by a sharp object that separated the flesh from the bone. He went on that, following the nature of the cut wound, he decided to give the patient first aid and referred her to Bugando Hospital. The patient was treated at



Bugando Hospital and upon recovery, in three weeks, she went back to Chato Hospital to fill the PF3 which he tendered as an exhibit P1. He describes that the wound was severe and dangerous to the health of the victim and it affects the hand which cannot work properly as before.

When cross-examined he avers that he gave the referral form to the victim and doctor from Bugando did not fill the PF3 though knowledgeable about the medical treatment of the patient.

PW2 G8334 detective constable MUHIDINI testified that he is a police officer and his duty station is Chato working as a criminal investigation officer. He went on that on 01.11.2015, at around 21.00 hrs, the victim by the name of Nyabahimba Msubi came to the station accompanied by her relatives and the village chairman one Peter Mkina. The victim was wounded on her right hand. He went on that; he accompanied the victim to the hospital who was attended and admitted for first aid before she was later on referred to Bugando Hospital for further treatment. He avers that, he recorded the victim's statement while at Chato Hospital before she was sent to Bugando Hospital. On her statement, the victim named the accused Peter James @Mashahi who was her divorcee to have attacked her. She further pointed out that, the



accused once did a similar act of assaulting her on her neck on 07.06.2015 and the accused escaped.

PW2 went further testifying that the victim narrated the story that she was familiar to the accused before the incident and on a fateful night, there was a solar light in her house and to the neighbour's house adjacent to her home and there was also a bright moonlight where the accused attacked her and fled. PW2 testified further that he managed to arrest the accused on 19.12.2015 when they were informed that the accused was at his residence. After the arrest, the accused's caution statement was taken who denied having committed the offense. He was later assigned the case file and completed the investigation. PW2 was also shown exhibit P2 which is a sketch map admitted during the Preliminary Hearing and testified to have drawn the map in connection with the accused accusation of attempt to murder.

On cross-examination, he testified that the accused committed another offence which was reported to the police station and the accused escaped. He avers that it is true that the sketch map was drawn after 4 months later for the victim was still admitted to the hospital. He went on that he took the statement of the victim while at the hospital and at a time the victim was not in a good condition and while drawing the sketch



map (exhibit P2) he was assisted by the village chairman and the victim was around. He went further that the house with solar lights marked as symbol F and B and the victim did not disclose the time she observed the accused.

PW3 NYABAHIMBA MSUBI an adult 49 years of age and the victim, in this case, testified that, she married and lived with the accused for 13 years and were not blessed with any issue before she decided to leave the accused due to the conduct of the accused who was used to alcohol and bangi which turned him cruel. She went on that she decided to go back home and lived with her father after the accused threatened to kill her.

PW3 testified that, way back on 07.06.2015 while preparing food, the accused came and attack the victim on her neck and fled. She managed to identify the accused and communicated the same to the police station and she was treated at Chato District Hospital. She went on that she decided to get married to George Simba in 2015. Later on 01.11.2015 while living with George Simba, while in the kitchen she saw two people coming from a distance of 17 meters and when they were closer, she managed to identify the accused with the aid of solar light, and outside there was a cooking spot (jiko la mafiga). She went on that,



the accused followed her when she started running and cut her with a machete and fled. She raised alarm and people gathered to the scene and went to report the matter to Chato police station where she was given a PF3 and sent to Chato District Hospital for treatment and following her situation, she was given first aid and referred to Bugando Hospital.

When cross-examined, she testified that, she did not report to the police the threats from the accused rather to the village chairman who wrote her a letter. She maintained that, she managed to identify the accused for she had with her a solar light, and she knew the accused and there was bright moonlight. She went on that she was unconscious for four days in Bugando Hospital and she did not write any statement. She further testified that she wrote her statement at police station. She went on that at a time she was living with the accused, they were arrested and sent to the police station for fighting in public.

The prosecution marked their case closed and this court find that the case against the accused person was established and therefore required to enter his defence. On the premises, the defence side has one witness DW1, the accused.

DW1 PETER JAMES@MSHASHI an adult testified that, he knows the victim for she was his wife since 2001 who deserted him and went to live



with George Simba. He went on that the victim was caught in adulterous association by the wife of George Simba and he was informed that the two had a fight and the victim was injured on her neck and admitted to Chato Hospital where he went and found her in hospital injured. He claimed to be notified by his brother-in-law and in the hospital, he also went to greet a daughter of his brother-in-law who gave birth.

He went on that when he was at his home, the victim and her sister went to his residence demanding a piece of shamba and he refused for it was the victim who deserted him. Unsatisfied, the victim's sister threatened him and after three days he was arrested for possessing 5 grams of bangi which he admitted to have been using with the victim for shamba purposes.

He went on to testify that, he was kept in custody for one year and later on released, and shortly, he was arrested and arraigned in court over the offence of attempt to murder and was sent to remand custody until 2020 when he was released on bail. he claims that he was framed for the offence charged for he was not involved.

In cross-examination, he testified that he found the victim in adultery association with Simba George and called witnesses and the victim decided to desert him and went to live with George Simba. He



insisted that, he only knows that the victim was wounded on her neck and does not know about the hand-wound. DW1 insisted that, the victim fought with the wife of George Simba and she was wounded and again he found her with George Simba and the victim decided to desert him. The defence side closed their case and counsels had their closing remarks.

Mr. Erick Lutahanga learned counsel was the first to give his closing remarks. He alleges that the prosecution did not manage to prove the case beyond reasonable doubts as required. First, he stressed on Exhibit P1 that the document is incomplete for not being duly filled and it was filled by a person who did not treat the victim and not dated when the patient was received in the hospital which doubted the date of the commission of the offence.

Secondly, on exhibit P2 he disputed that the exhibit did not show the location of the solar lights and the place the offence was committed. He went further that the drawer of the sketch map was led by the chairman of the small village. Surprisingly that chairman was not called before the court to testify and the whole evidence does not show if he was present at the scene of crime.

Thirdly, he stressed the contradiction between the evidence of PW2 and that of PW3. He avers that, it is the evidence of PW3 that she was



unconscious but PW2 insisted that he wrote her statement while at the hospital. When looking at Exhibit P1 on part 2 shows that the victim was unconscious. This part is filled in only if the victim is unconscious, and this part was filled in by writing the name of George Simba, the one who was taking care of the victim. He remarked that, the rationale of filing that part means George Simba was the one who gave information concerned with the patient, a victim.

Spotting another contradiction, he claims that PW2 who drew the sketch map stated that there was only one kitchen at the scene of crime which was an open kitchen, roofed with grasses and built by trees on both sides while the victim, (PW3) stated that there was only one kitchen, but she stated that the kitchen was built by bricks and it was roofed with grasses.

Again, he claims that the victim (PW3) stated that she saw the accused carrying the panga, a distance of 17 meters and it was at night, around 21:00 hours. PW3 stated that another person called Yohana also saw the accused, but surprisingly enough, no one raised an alarm though Yohana also was familiar that the accused previously had cut the victim. He insisted that the circumstances are doubtful. For they did not raise an alarm and the victim did it only after being cut.



The learned counsel went on that, (PW3) testified that she ran away but she saw the person who cut her when she was running which in a normal circumstance, it is impossible to see a person who cut another person when running. Pointing to the prosecution evidence which alleged that the accused was arrested after the commission of the offense, there is no arrest warrant tendered before the court and he insisted that the arrest warrant was supposed to be brought before the court.

On the side of the prosecution, Mr. James Pallangyo learned state attorney opposed defence counsel submissions. He insisted that the prosecution has managed to prove the case beyond doubts as required by the law. supporting his argument, he cited the case of **Magendo Paul & another vs Republic** Criminal Appeal No. 19 of 1993 which held that when the evidence is so strong against the accused person and it leaves only remote possibilities as to his favour, the case is said to be proved beyond doubts.

It was his further remarks that, with the evidence of PW1, PW2, and PW3 the case is proved beyond doubts for the evidence met the elements of visual identification stated in the case of **Waziri Amani vs Republic** 1980 TLR 250. He insisted that PW3 stated the objects and the nature of the light, and managed to identify the accused by calling him on his



mother's name and the attire that the accused used to wear. On the distance, he maintains that PW3 was able to see the accused from the distance of 17 meters, and when she came closer to a distance of 3 meters and following the testimony that PW3 and DW1 lived together as wife and husband for 13 years, which was not objected by DW1, PW3 could make a quick and proper identification.

He maintains that, PW3 named the accused as soon as people gathered after the alarm was raised and soon as the matter was reported to the police station. He insisted that PW3 named the accused at the earliest possible opportunity which shows the ability of the witness to name the accused at the earliest possible opportunity. This shows that PW3 is credible and her evidence can be relied on by the court. He insisted that, on the issue of credibility of the prosecution witness, it is a settled principle of law that every witness is credible and needs to be trusted unless the court holds otherwise. Remarking on the evidence of DW1, he insisted that at some points, DW1 was laying and therefore his credibility was questionable, therefore, his lies corroborate with the prosecution case.

Insisting, he refers to the case of **Felix Lucas Kisimila v Republic**, Criminal Appeal No. 129 of 2009 where it was stated that lies



of the accused person may corroborate the prosecution case. Referring to the court records, the accused had committed another offence of attempt murder on 07/6/2015, which is criminal session No. 25 of 2017 but the accused lied that he was arrested because he was charged with the offence of being found in possession of bangi.

Insisting on the contradictions noted by the defence counsel, he claims that those are minor contradictions which do not go into the root of the case for they are remote possibilities in favour of the accused in which this court should not take into consideration. Insisting, he cited page 19 on the case of **Ridhiwani Nassoro Gendo v Republic**, Criminal Appeal No. 201 of 2018.

Again, he remarked that, prosecution side brought three witnesses, who gave direct oral evidence as required under *section 62 of the Evidence Act, Cap. 6 R.E 2019*. the evidence which proved facts before the court of law, and therefore there was no need for documentary evidence. He went on that, since PW2 arrested the accused and testified so, there was no need to tender the RB to show that the offence was reported and the arrest warrant to show that the accused was arrested. The evidence of PW2 is enough to prove it all. Insisting, he also cited page 21 of the case of **Abas Kondo Gebe v Republic**, Criminal Appeal No.



472 of 2017 which held that oral evidence is crucial in proving the case and the court must rely on it.

He went on that, the defence counsel failed to cross-examine the crucial issue and brought it during defence and those arguments were not featured when the prosecution side adduced its evidence. Giving an example, he referred to DW1 who stated that the victim was injured when she was found in adulterous association with the wife of George Simba but PW3, was not cross-examined when she testified. He asserted that the defence side knew very well that was a lie that's they did not cross-examine. He retires maintains that; the prosecution had proved its case beyond reasonable doubt that the accused attempted to kill the victim by cutting her on the dangerous parts of the body.

Having heard the evidence from the prosecution and the defence side as well as the remarks by the learned counsels on their final submissions, there is no doubt that PW3 is the victim in this case and based of her evidence, and physical observation of the court, PW3 has a scar on her hand, and taking into consideration that PW1 testified and tendered PF3 exhibit P1, it is well proved that the victim suffered a severe assault unlawful inflicted and the perpetrator has formed intention of ending PW3 life. For that reason, I find the charge of attempt to murder



is properly placed before this court and I proceed to determine the case to find whether it was the accused PETER JAMES@MSHASHI who attempted to murder the victim.

I need to address my mind to the predominant legal principles which cover both aspects of criminal law as well as the law of evidence which are of relevance to this case and will guide me in this judgment. These principles are meant to ensure that no innocent person is convicted of freak or flimsy evidence. The prosecution is placed with a heavy burden than that of the accused.

The first long-established principle in criminal justice is that of the onus of proof in criminal cases, that the accused committed the offence for which he is charged with, is always on the side of the prosecution and not on the accused person. It is reflected under Section 110 and Section 112 of the Evidence Act, Cap.6 [RE: 2002], now [RE: 2019] and cemented in the case of **Hemed vs Republic** [1987] TLR 117 where it was held that: -

"...in criminal cases, the standard of proof is beyond reasonable doubts. Where the onus shift to the accused it is on the balance of probabilities".



The second principle is that the standard of proof in criminal cases that is required by law is proof beyond a reasonable doubt. The Court of Appeal of Tanzania in the case of **Mohamed Haruna @ Mtupeni & Another v R**, Criminal Appeal No. 25 of 2007 (unreported) held that: "

"Of course, in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."

In the premises, therefore, the prosecution has the duty to prove that the elements of the offence of attempt to murder are met for the accused accusation to stand. The prosecution must prove that it was the accused who unlawfully attempted to cause the death of the victim NYABAHIMBA D/O MSUBI.

The prosecution had three witnesses PW1, PW2, and PW3 who testified in connection to the incident of attempt to murder. First, the evidence of medical doctor PW1 established that he observed the victim, who was unlawfully inflicted a severe cut wound, an act of such nature that endanger human life. Secondly, PW2 a police officer testified to have first attended the victim at Chato police station and accompanied her to the hospital and later arrested the accused and investigated the case, in



fact, the accused denied being arrested in connection of the charge he is facing but was before this court present and faced his trial.

Thirdly, the evidence of PW3 the victim and before going to details, and taking into account the time when the alleged crime was committed, which is stated to be at around 21:00hrs, and without fail to recall that, the victim PW3 was before this court and her testimony was that before the assault he saw and identified who assaulted her. It is imperative that, with all other evidence, I have a testimony of the eyewitness which I should subject to test. It is now tasking me to start with the issue of Identification by PW3 who is the only prosecution witness testified before this court to have seen and identified the accused. Therefore, I am now obliged to first determine as to whether the identification of the accused by PW3 was proper, and there *was no mistake of identity*.

Undeniably, the law of visual identification is that such identification must be watertight to find conviction. It is pertinent that I refer to the guidelines on visual identification as stated by the Court in its important decision in **Waziri Amani v. Republic** [1980] TLR 250, where the Court cautioned that:

"... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of 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."

Then, the Court stated that:

"Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."

[Emphasis added]

(See; **Yusuph Sayi & 2 Others vs R Criminal Appeal No. 589 of 2017 and Mabula Makoye & Another vs Republic Criminal Appeal No. 227 of 2017**)

In line with the recent decision in **Elias Gervas & 6 Others vs Republic** Criminal Appeal No. 308 of 2019 referred with authority the



case of Raymond **Fransis v. R** [1994] TLR 100, the attention of the courts was drawn that, in all cases whose determination depends essentially on the evidence of visual identification such as the one now under consideration, and they consequently observed thus: -

"It is elementary that in Criminal cases whose determination depends essentially on identification, evidence on conditions favoring a correct identification is of the utmost importance."

Guided by the above authorities, in my determination, therefore, I subject the evidence of PW3 on detailed and careful inquiry to find if PW3 stood a chance of proper and honest identification of the accused person as testified during the trial.

First, PW3 established that the accused person is her divorcee that they married and lived for 13 years from 2002 to 2015 when the relationship sours and the victim decided to go back to her father. The DW1 conceded and did not object. From that point, an inference is drawn and PW3 managed to establish that she was familiar to the accused before and therefore generates a high degree of correct identification.

Secondly, it is undisputed either by the prosecution or the defence side that the incident of attempt to murder occurred at around 21.00hrs and there was a need of light for a person to properly identify the assailant. PW3 testified that at the fateful night there was a solar light on

her house and the other on the neighbouring house which lit the place. She maintained that, the light was bright and there was also a bright moonlight. PW3 testified that, she saw the accused from a distance of 17 meters and she managed to properly identify him as he came closer and stood three meters from her besides a cooking fire. PW3 has managed to establish that there were multiple lights which provides good light that favours her identification of the accused taking into consideration that they were familiar, and PW3 testimony had established that, the accused did not take her by surprise rather, she managed to observe him from 17 meters until when she came closer to her, a distance of three meter and she had her formed opinion that it was indeed the accused when he stood three meters before her, she greeted him by calling in his mother's name though he did not reply and instead he chase her and cut her with a machete. PW3 testified further that, she was certain that the accused was the one who cut her with machete because she was the one who chased her and she heard his fellow asked the accused to stop cutting again the victim and to leave the scene of crime because her husband was coming. Thus, I find elements of visual identification were met and the circumstance were favourable for the PW3 to make a proper identification of the accused person.



Again, I am accord with the principle that the important point as to the credibility of the witness for eye witness testimony can be a very powerful tool in determining a person's guilt or innocence but it can also be devastating when false witness identification is made due to honest confusion or outright lying. In **Jaribu Abdalah v Republic** [2003] TLR 271, CAT, quoted with authority in the case of **Mawazo Mohamed Nyoni @ Pengo & 2 Others vs Republic, Criminal Appeal No. 184 of 2018** held that: -

"In a matter of identification is not enough merely to look at factor favoring accurate identification equally important is the credibility of the witness, the ability of the witness to name the offender at the earliest possible moment is reassuring though not a decisive factor"

Considerably, I subjected the evidence of PW3 to test if at all is credible and if her evidence can be relied on by this court. First, PW3 established that they had a long-lasting quarrel with the accused from when they were married to the time they divorced. She even added that she left her matrimonial home when the accused threatened to kill her. In his defence DW1 did not object to threatened to kill the victim rather he stated that PW3 was adulterous. But when PW3 testified, DW1 though assisted by an attorney did not cross-examine to rebut the claims which



mean the accused did not disclose the truth to his attorney. In the recent decision of **Rashidi Sarafu vs Republic** Criminal Appeal NO. 467 of 2019 which referred with authority the case of **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (unreported). In the last case, the Court stated as follows:

"As a matter of principle, a party who fail to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."

See also **Cyprian Athanas Kibogoyo v. Republic**, Criminal Appeal No. 88 of 1992, **Damian Luhehe v. Republic**, Criminal Appeal No. 501 of 2007.

Secondly, PW3 claims that the accused once on 07.06.2015 did a similar act of assaulting PW3 on her neck and the accused escaped. The accused denied the accusation and claims that the same were inflicted during the fighting with the wife of George Simba. Mr. Pallangyo, the learned State Attorney when referring to the court records, he disclosed that the accused was arrested in connection to the offence of attempt to murder registered as criminal session No. 25 of 2017 as claimed by PW3 but the accused unproven alleged that he was arrested because he was charged with the offence of being found in possession of bangi.



Thirdly, PW3 testified that their relationship with the accused soured to the extent that the accused threatened to kill her. Stressing the reasons, she claims that the accused started using bangi and alcohol that turned him cruel. During the defence case, DW1 admitted that he was using bangi and people tends to believe that it could turn a person to be violent that's why he was alleged to have committed the said offence, which in fact, taking to the circumstance of this case, the evidence of DW1 corroborates that of PW3.

Fourth, PW3 testified that the victim on arrival at the police station named the accused to have assaulted her. As stated in the case of **Marwa Wangiti Mwita & Another vs. Republic, Criminal Appeal No. 06 of 1995**, that: -

"The ability of the witness to name a suspect at the earliest opportunity is an important assurance of his credibility; in the same way as unexplained delay or complete failure to do so should put prudent court to inquire"

The evidence of PW2 corroborated that of PW3 that the accused was named at the earliest time possible that adds to the credibility of PW3.

As I have hinted earlier, the accused is not duty-bound to prove his case rather to raise doubts to the prosecution evidence. The accused



alleged that he was in custody for one year and at the time he was released, he was arrested and charged with the offence of attempt to murder until he was released on bail in 2020. The accused is impliedly establishing the defence of alibi that at the time the alleged offence was committed he was in the custody and for that reason, he did not commit the offence.

It is clear under *section 194(4) of the Criminal Procedure Act, Cap 20 [RE:2019]* that the defence of alibi is good in law but for it to apply, it has to meet several requirements. The accused was required to give notice to the court and the prosecution at earlier time of the trial normally during the preliminary hearing stage or immediately after the closure of prosecution case failure of which, and with no witness to support, the court has a discretion of not to accord any weight to the defence.

In determining the concern of the accused defence of alibi, I find persuaded by the definition provided by the Court of Appeal of Kenya in the case of **Karanja vs Republic** [1983] eKLR 501 quoted with approval by the Court of Appeal of Tanzania in the case of **Msafiri Benjamin V. Republic**, Criminal Appeal No 549 of 2020 stating that:

"The word "alibi" is a latin adverb, meaning "elsewhere" or "at another place". Thus, if an accused person alleged that he was not present at a place at the time an offence was committed



and that he was at another place so far distant from that at which it was committed, that he could not have been guilty, he is said to have set up an alibi."

Essentially, the above excerpt reveals that the defence of *alibi* is raised when an accused says he was at a place other than where the offence was committed at the time when the offence was committed. Subjecting the defence of *alibi* in the instant case, I find the following; first, the records did not show that the notice was issued as required by law under section 194 of the Criminal Procedure Act Cap 20 RE 2019 and second, the accused person who is on bail, did not parade before this court any witness though in a preliminary hearing stated that he will call witnesses and in his defence he mentioned his brother in law who knew that PW3 had a fight with George Simba's wife or any other person who would establish that the accused was indeed elsewhere when the crime was committed, or else any documentary proof to raise doubt over the prosecution case.

In the instant circumstances therefore, I accord no weight on the defence of alibi raised by the accused person.

Lastly, before I enter verdict, I went to the contradictions which in fact were noted by defence counsel and acknowledged by the prosecution. I am consistent that human recollection is not infallible thus



not expected to remember exact details of what transpired considering that the witnesses gave evidence more than years from the date of the fateful incident and taking into consideration that the criminal act occurred six years back contradictions must prevail. In the case of **Maramo Slaa Hofu & 3 others V. Republic**, Criminal Appeal No 246 of 2011 as quoted in approval in the case of **Dickson Anyonyisye V. The Republic**, Criminal Appeal No 155 of 2017, the Court pointed out that;

"Normal discrepancies are bound to occur in the testimonies of witnesses, due to normal errors of observations such as errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Minor contradictions or inconsistencies, embellishments or improvements on trivial matters which do not affect the case for the prosecution should not be made a ground on which the evidence can be rejected in its entirety."

[See **Filbert Gadson @ Pasco vs Republic** Criminal Appeal No. 267 of 2019, also **Alex Ndendya V. Republic**; Criminal Appeal No. 207 of 2018] (unreported). I proceed to scale whether the contradictions claimed by the defence goes to the root of the case and proceed to resolve in his favour. Going through the court records and the submissions by the defence counsel, I was able to find that the inconsistencies found are



minor and did not discredit the evidence of PW3 so that to be resolved in the accused's favour.

Thus, from the evidence of prosecution, I am satisfied that the essential ingredients of attempt to murder as stated in the case of **Bonifas Fidelis @ Abel V. The Republic**, Criminal Appeal No 301 of 2014 were met in our case at hand. The Court of Appeal discerned them from section 211(a) read together with section 380 of the Penal Code, Cap 16 R.E that;

*"**Firstly**, proof of intention to commit the main offence of murder. **Secondly**, evidence to prove how the accused begun to employ the means to execute his "intention. **Thirdly**, evidence that proves overt acts which manifests the accused intention. **Fourthly**, evidence proving an intervening event, which interrupted the accused from fulfilling his main offence to such extent if there was no such interruption, the main offence of murder would surely have been committed."*

Considering the evidence of the prosecution, it is clear that the accused had intended to kill the victim and had manifested that intention by overt acts. This can be proved by the act of the accused to use the sharp object to cut the deceased, the cutting was done on the dangerous vital part of the body and the fact that he wanted to cut again the victim

but was interrupted by the suspicious that the husband of the victim was coming.

In the upshot, I have reached the following conclusion based on the fact that, the law is settled that the accused ought to be only convicted on the strength of the prosecution evidence. I am satisfied that the prosecution's evidence is credible and reliable. I do not think that the positive evidence of PW3 which was corroborated by the evidence of PW1, PW2 and DW1 and the documentary evidence exhibit P1 and P2 is shakeable.

I have carefully examined the demeanour of the defence witness when testifying at the dock, I am in accord with all assessors that the prosecution has proved their case beyond reasonable doubt against PETER JAMES@MSHASHI, the accused person. In the event, I find that PETER JAMES@MSHASHI is guilty as charged. I, therefore, convict him for the offence of attempt to murder contrary to section 211 of the Penal Code, Cap. 16 [RE: 2002] now [RE: 2019].


M.MNYUKWA
JUDGE
17/12/2021

Judgment delivered on 17th day of December, 2021 in the presence of State attorney for the republic, defence counsel for accused person, court assessors and accused person.



M.MNYUKWA
JUDGE
17/12/2021

AGGRAVATING FACTORS

Ms. Luciana Shabani (S/A):

We don't have previous criminal records of the accused. We pray the court to impose severe sentence to the accused as a lesson to him and to other members of the community.

Sgd. M.MNYUKWA
JUDGE
17/12/2021

MITIGATING FACTORS

Mr. Erick Lutehanga (Adv):

My Lord, we pray your honourable court to have mercy to the accused person due to the following reasons.

- (1) The health status of the accused. The accused's health status is not good and that was a reason for him to be released on bail when he was in custody. The accused is suffering from asthma. He was suffering since 2017. The accused got asthma when he was remanded.
- (2) The accused was arrested in the year 2015 and he was released on bail on 2020. The accused had learnt a lesson.
- (3) The age of the accused. He is now 52 years. He is of old age.
- (4) The accused had a family that depends on him. He has six children and his last born is aged 2 months, he needs care, love and support of his father.
- (5) My Lord, the accused was in deep love with victim. The accused failed to tolerate the act of the victim to desert matrimonial home while he was still loving her and worse enough she was married by another person.

In view of the above we pray for leniency during the imposition of sentence. That's all.



Sgd. M.MNYUKWA
JUDGE
17/12/2021

SENTENCE

I have duly considered both the aggravating and mitigating factors. Especially I have considered the fact that the accused person have stayed in custody for almost five years. Based on those reasons, I hereby sentence the accused person Peter s/o James @ Mshashi for an offence of attempt to murder to serve 10 years imprisonment.

Order accordingly.




M.MNYUKWA
JUDGE
17/12/2021

Court:

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


M.MNYUKWA
JUDGE
17/12/2021