

IN THE DISTRICT REGISTRY OF SHINYANGA

SITTING AT BARIADI

CRIMINAL SESSION NO 108 OF 2022

THE REPUBLIC

VERSUS

JOHN S/O MOSES @ MABULA..... ACCUSED

JUDGMENT

MKWIZU, J:

The accused person, John s/o Moses @ Mabula is charged with the offence of Attempting Murder contrary to section 211 of the Penal Code [CAP 16 R.E. 2002]. The background facts of this case are that on 2/3/2018 at around 21.00hrs at Mwawai hamlet in Maswa District within Simiyu Region, while on his way back home, the victim Richard Mayenga was attacked by two person using machetes, and an iron bar. He raised an alarm which alarmed people around the scene, and he was rescued, taken to the police, and later to the hospital.

The investigation was mounted, a police officer with Police force No. E.3076 D/CPL Jonas drew the sketch map plan of the scene (exhibit P1). The accused was arrested after he was named by the victim as the culprit..

To substantiate, the information against the accused the prosecution called three witnesses, RICHARD MAYENGA, the Victim, (PW1), the doctor who examined the victim, OCTAVIAN KARENGA NYANGALA(PW2) and the Police officer with Police Force Numbers E. 3076 DSGT JONAS, the

Investigator (PW3). Unfolding the event, PW1, the victim said he spent the evening of the fateful date at Gerald Julius's Shop with Gerald before they later at around 18.00 shifted to Dereva wa Tanesco's Grocery where they had what he described as enough beer to few minutes to 21.00hrs. He said, while at the Grocery, the accused peeped in and left without saying a word to anybody. After finishing drinking, he together with Gerald left back home through Njiapanda (Lalago and Simiyu) where they departed each taking a way to his home. Few minutes after they have departed, he explained, he met the two people and asked them as how they would go in that thin path, and on that process, he lit the torch which he had and managed to identify the accused person among the two people who were in front of him.

PW1 went further to tell the court that, in an attempt to let the accused and his fellow go, he stepped on the grass, and immediately after having allowed them to go, the accused's associate hit him with an iron bar on his left hand and immediately thereafter, the accused joined him on the right side and cut him with a machete on different parts of his body including on his head, cheeks the cut that extended to the ear and on his back. He raised an alarm which was heard by Gerald Julius and neighbors namely Mashonda and Emmanuel. Gerald Julius came first to the scene followed by the other neighbors. The victim said, he was rushed to the police where they were issued with a PF3 and then to the Hospital after he had so advised Gerald and his fellow.

Speaking of his condition at the scene after the incident and thereafter, PW1 said, he was conscious at the scene but loss his conscious later when he reached the hospital. He was treated, admitted, and refereed to Bugando hospital.

Testifying on how he identified the accused person, the victim (PW1) said aided by the torch light he had at the material time he managed to identify the accused, a person he is familiar with since 1996 and a neighbor at appropriately two meters apart and named him to the person who arrived at the scene immediately after the incident and to the police officer, PW3.

PW2 is one **Octavian Karenga Nyangala**, a medical officer at Maswa District Hospital said on 02.3.2018 at night hours while on duty at the hospital, he received the Victim named Richard Mayenga aged 67 years unconscious with cut wounds on different parties of his body namely on his ear, head and on his back. They stitched the wounds to prevent bleedings and he thereafter referred the victim to Bugando for further treatment. PW2 said, he was later given a PF3 to fill which he tendered as exhibit P2 after he had properly identified it in Court. He said the victim sustained a life-threatening injury such that if not for an immediate treatment he would have lost his life.

He during cross examination disclosed that the PF3 indicates that the victim was drunk at the time of incident. He had used alcohol. The victim's serious cut wound was located on his left ear and other cut wounds on his head.

E 3076 DSGT JONAS, is_a police officer who was by then stationed at Maswa Police Station. He, on 3/3/2022 at around 8:00hrs while at his working station assigned a case file of attempted murder where Richard Mayenga was involved as a victim to investigate. He visited the scene, drew a sketch map plan, and visited the Victim who was at that time admitted at Maswa Hospital. He interviewed the victim and recorded his

statement while at Maswa Hospital before he was sent to Bugando Hospital. On his statement, the victim named the accused John Moses@ Mabula as the culprit and that he identified him by face and voice through the aid of the torch.

Pw3 went further stating that, he traced the accused person who had fled to the unknown place and managed to arrest him through informers. PW3 also informed the court that Victim had told him that he had no problem with his neighbors, the accused, John Moses @Mabula and that the accused was only hired by one Ntemi Gwesa with whom they had a land dispute before the DLHT.

During re-examination, this witness told the court that he was in drawing the sketch map plan assisted by Gerald Julius who at that time was not aware of the involvement of the accused person in the incident that is why he did not include the accused's house in the sketch map plan.

The defence case had only one witness, the accused person, JOHN MOSES MABULA, an adult, male, and resident of Maswa, Mwawai street. Giving his defense on oath, the accused person said, he is a house painter and blundering expert. That on 2/3/2018 he spent his day in UMba's house in Maswa Town painting. He worked up to 18:00hrs and went back home wearing a dirt black t-shirt and blue jean. He remained in his house to the next morning and went back to the same job knowing nothing about the incident.

Speaking on his arrest, the accused said, he was arrested on 4/3/2018 at around 1:00 am by the police accusing him of attempting to murder the victim, Richard Mayenga. He was taken to the police where his statement

denying the accusations was recorded. He said he told the police that he does not know why he was arrested except for the fact that had a case with the victim's nephew, where his goats had destroyed crops, the incident which ended by him paying the victim compensation. He admitted to having no problem with Richard Mayenga, the victim.

He criticized the prosecution's evidence for having contradictions. He said while PW3 said he was hired by Ntemi Gwesa, PW1 evidence was silent on that fact. He lastly prayed for acquittal.

The counsels for both sides did give their closing submissions after the closure of the defence case.

Mr. Daudi Masunga learned counsel was the first to give his closing submissions. He submitted that the prosecution failed to prove the case beyond reasonable doubts as required. First, he said, the prosecution relied on weak identification evidence. PW1 is alleged to have identified the accused wearing white shirt and khaki trousers without describing the circumstances of the scene of the crime, particularly on the nature of the light except for the mentioning of the torch that aided him in the alleged identification of the accused. That PW1 could not name the accused to the people who came to the scene in response to the alarm. He on this point relied on the decision of **Marwa Wangili and others V.R**, (2002) TLR, 39 page 43 claiming that even the persons who rendered assistance at the scene were not brought to court as witnesses to explain the condition that the victim was in at the scene. He also wondered how the identifying witness could accurately identify the accused while drunk as

testified by the Doctor, PW2. if a drunk person can properly and accurately identify a person in the dark.

He secondly pointed out to contradiction on the prosecution evidence. The defence counsel said, while PW1 said the blow of the iron bar by the unidentified person at the scene ended into breaking his hand, Doctor (PW2), said nothing about the victim's cracked hand.

On the side of the prosecution, Mr. Daniel Masambu learned State Attorney opposed defence counsel's submissions. He contended that the prosecution has managed to prove the case beyond doubts as required by the law. His reliance was on the identification of the accused by PW1 which he said was reliable as the accused was a person known to the victim, the torchlight aided the identification at a distance of two meters from where the accused was and that accused was identified by his attire, which he also had worn shortly before the incident. He was also of the view that the naming of the accused to the people who came at the scene and to the police is an assurance of the identifying witnesses' credibility. He cited to the Court the case of **Musa Saguda V.R Criminal Appeal No. 440/2017** CAT and **Riziki Jumanne V.R, Criminal Appeal No. 370 of 2019**, CAT (All unreported).

Regarding the accused malice aforethought, as defined by section 200 of the Penal Code (Cap 16 RE 2019) the State Attorney said, the accused used a machete to cut the victim on different parts of his body, the blows were directed at the face and head vulnerable parts of the human body and the Accused was seen in two incidents following up with the victim the conducts that establish an ill intention. The case of **Sembon Musa V.R, Criminal Appeal No. 236 of 2020** CAT (unreported) page 16 was

cited inviting the court to find that the prosecution has proved the offence to the required standards.

I have considered the evidence and the parties closing submissions. Three issues are key in this matter.

- 1) Whether there are unlawful acts committed in the manner intending to cause death to the victim, Richard Mayenga.
- 2) Whether those acts were inflicted with malice aforethought and
- 3) whether it is the accused in court, John Moses@ Mabula who committed the alleged offence.

There is no doubt that the Victim Richard Mayenga was on 2/3/2018 attacked on his way back home and sustained severe injuries on his left ear, head, and on his back, as established by his own evidence supported by PW2, the doctor. It is in the Doctor's evidence that the cut wounds were severe that they had to undergo multiple stitching to prevent bleeding with the detailed information of the sustained wounds in the PF3 exhibit P2. These undisputed facts have sufficiently proved the first and second issue above, that is an attempt to kill and malice aforethought by whoever inflicted the injuries to the victim.

The only issue for consideration here is whether the accused person before the Court, John Moses Mabula is responsible for the explained injuries. Prosecution side insisted that it is the accused while the accused dissociated himself from the accusations.

Principally, the duty to prove the charges against an accused person beyond reasonable doubt rests on the prosecution's shoulders. This is the principle lying at the heart of every criminal trial. It is not for the accused person to establish his innocence. This responsibility never shifts throughout. 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."

On that sagacity, the burden to prove as to who acted in the manner explained above to attempting to murder the victim in this case lies on the prosecution.

Looking at the prosecution evidence closely, it is certainly that the case against the accused rests entirely on the visual identification evidence of PW1. It has been consistently stated that visual identification evidence is relied upon by the Court to convict an accused person only where all chances of misguided identity are eliminated and when the court is satisfied that the evidence before it is absolutely watertight. See, for instance, **Waziri Amani v.R.** (1980) T.L.R. 250, **Shamir John vs Republic**, Criminal Appeal No. 166 of 2004; **Said Chally Scania v. R.**, Criminal Appeal No. 69 of 2005, **Jaribu Abdalla v.R.**, Criminal Appeal No. 220 of 1994, and **Felician Joseph vs Republic**, Criminal Appeal No.

152 of 2011 (all unreported) to mention just a few. In **Felician Joseph vs Republic**, (supra) the Court held:

*"... visual and aural identification evidence, be that of a stranger or a previously known person particularly one done under unfavorable conditions, such as at night, is of the weakest kind and unreliable. Such evidence should be approached with utmost circumspection. **No court should act on such evidence unless all possibilities of mistaken identity are eliminated, and the court is fully satisfied that the evidence is absolutely watertight"**(
Emphasis added)*

And key factors that are to be taken into account in considering identification evidence are well enumerated in the case of **Waziri Amani V R** (Supra) as follows:

" ... 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 nighttime, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not."

As testified by PW1, the attack of the victim was committed at around 21.00hrs, night hours of the day meaning that the identification of the accused was made under difficult circumstances and for that reason, the conditions in cited authority above must be tested to see if the

identification evidence by the identifying witness qualifies for unmistakable identity of the culprit.

The prosecution evidence is certain that PW1 was aided by the Torch light he personally had which according to his evidence was illuminating brightly observing the accused person at a distance of approximately two meters. That accused person is a person familiar to him for he is a resident of Mwawai hamlet and his neighbour who he has known since 1996. It is also on the prosecution case that the accused was named to the person who came first at the scene immediately after the incident and to the police.

I would have accepted this evidence as valid if not for the following glitches which I find to have tarnished the quality of the identification evidence by the prosecution. **First**, the Prosecution evidence is silence on the time spent by the Victim in observing the accused at the scene with the torch light on. This leaves the court without an answer as to whether the victim had enough time to observe his culprit for proper identification. The fact that the Victim (PW1) and the accused are familiar to each other before the incident, doesn't by itself guarantee unmistakable identification in unfavorable circumstances of this case, where the identification happened during the night and by a drunkard identifying witness. I say this mindful of the position of the law articulated in the case of **Issa Mgara @ Shuka v. R**, Criminal Appeal No. 37 of 2005 (unreported) that even when witness is purporting to recognize someone whom he knows, mistakes in recognition of close relatives and friends are often made. The evidence ought to have gone beyond that to unfold to the court all the

circumstances that guarantees a correct and positive identification of the accused.

Second, is on how the torch light allegedly used at the locus in quo was isolative in aiding the victim's identification. While stressing that the torch light provided enough light for a correct identification at the scene, PW1 admitted having not been able to identify the second person, (accused's associate). He, during cross examination said, the man was wearing black clothes without more. This information did not only feature in his examination in chief, but also was not revealed to no one after the incident. Again, while telling the court that this unidentified person had an iron bar which he used to attack him on his hand, PW1 did not explain how he managed to identify the weapon used by that person at the scene. Answering a defence Counsels question during cross examination PW1 said:

"I could not identify the other person who was with the accused. He had worn black clothes, but I could not identify him by physique, shape, face and other"

The worry hear is, had the torch light illuminated the scene properly, the victim could not have failed to identify the accused's associate even by his physical appearance, face, colour and his attire on the same scene and the same source of light that is said to have illuminated the area properly. This evidence therefore raised doubt to the intensity of the light at the scene explained by the victim.

Thirdly, the implausibility of the identification evidence by PW1 is also confirmed by PW3, the investigator of the case who told the court that in mentioning the accused as the culprit, PW1 said accused, whom he

had no grudges with was hired to kill him by one Ntemi Gwesa whom he had a land dispute with before Maswa District Land and Housing Tribunal. The question here is how and when did the victim get this information. Was it before or after the incident? This fact brings into the records speculative evidence on how the accused was connected to the offence by the prosecution.

Fourth, is the contradiction in the prosecutions evidence. While PW1, says he named the accused to the people who came at the scene immediately after the incident naming one of them as Gerald Julius, PW3, the Police officer told the court that Gerald Julius was not aware of the involvement of the accused in that offence at the time he assisted him in sketching the map plan of the scene a day after the incident.

Again, testifying on the extent of injuries sustained during the attack, PW1 told the court that his hand was broken by an iron bar by the unidentified culprit (accused's fellow at the scene). This evidence lacked support from the Doctor, (PW2) a medical expert who examined and treated the victim after the incident. Speaking of the sustained injuries by the victim, the Doctor (PW2) who received the victim on the material night immediately after the incident said victim had sustained cut wounds on his left ear, head and on his back which they stitched to prevent bleeding.

It is a common knowledge that a rupture of a hand is not a simple injury to be ignored by any medical practitioner. There is no doubt that such injuries need a serious treatment. In this case therefore, it was expected of the Doctor to point out to that an injury and explain how he medically treated it. This evidence is lacking in both his evidence and the PF3 rendering the credibility of the victim questionable.

More strangely, while it is the prosecution position that there were more than two people assisted the victim at the scene on the material night, one being Gerald Julius who spent a considerable time with the victim at his shop during the day and in the evening at ***Dereva wa TANESCO's*** Bar drinking beer, this important witness was not called as witness in court without reasons leading to the drawing of an adverse inference against then prosecution, that had he been called he would have given evidence in their detriment. I am so convinced because the accused is said to have followed the victim who was all along with Gerald at the Gerald's shop, and at the Bar where they were drinking beer which was expressed as an indication that accused was all the time tracing the victim. This witness, without doubt is, in my view a vital witness in this case. Had he been called; he could have corroborated the victim's evidence on the accused conduct before the incident and the identification evidence asserted by the Victim before the Court which till now remain hanging. His abandonment without reason raises doubt on the truthiness of the prosecution evidence. My reasoning here is guided by the decision of the Court in **Aziz Abdalla v. Republic** [1991] T.L.R. 71.

This evidence coupled with the defence evidence which on its totality gave a picture of who the accused is, his relationship with the victim where he spent his days on 2 and 3 of March 2018, and how he was arrested, has failed to connect the accused with the accusations he is facing.

It is from the above discussion that this Court is convinced that the circumstances at the scene did not afford the victim an opportunity for a positive and unmistakable identity, a doubt which is resolved in favour of

the accused person. To that end, the Prosecution evidence is found weak to ground the accused conviction.

Consequently, accused, **JOHN MOSES@ MABULA** is found not guilty and therefore acquitted of an attempted murder.

Dated at Bariadi, this 15th SEPTEMBER 2022




E.Y. MKWIZU
JUDGE
15/09/2022

COURT: Right of appeal explained.


E.Y. MKWIZU
JUDGE