

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT TARIME

CRIMINAL SESSIONS CASE NO. 23 OF 2021

THE REPUBLIC
VERSUS
PHILIMON WANSATO MWITA

JUDGMENT

15th July & 3rd August, 2022.

A. A. MBAGWA, J.:

The accused Philimon Wansato Mwita stands charged with two offences of attempt to murder contrary to section 211(a) of the Penal Code.

In the first count it is alleged that the accused on the 9th day of February, 2010 at around 13:00hrs at Ngarawani village within the district of Serengeti in Mara region attempted to murder Ryoba Mwita Kondoko.

In the second count it is alleged that the accused on the 9th day of February, 2010 at around 13:00hrs at Ngarawani village within the district of Serengeti in Mara region attempted to murder Ester w/o Ryoba Mwita.

When the accused was arraigned in this court, he pleaded not guilty to the information as such, the matter went to a full trial.

Throughout the hearing of this case, the Republic was represented by Peter Ilole, learned State Attorney whilst the accused enjoyed services of Paul Obwana, learned advocate.

The prosecution side, in a bid to prove the allegations, paraded three witnesses namely, **Ester Ryoba Mwita PW1, Ryoba Mwita PW2** and **Rhobi Nyamhanga PW3**. Further, the prosecution tendered in evidence, during preliminary hearing, three documentary exhibits to wit, PF3 of the two victims notably, Ester Ryoba Mwita (PW1) and Ryoba Mwita (PW2) and a sketch map of the scene of crime. All the three exhibits were received and marked as exhibit P1 collectively.

In defence, the accused fended for himself under oath and called other three witnesses namely, Daniel Bitara Rimo (DW2), Makoyo Magaigwa Makoyo (DW3) and Wankuru w/o Mwita Kondoko (DW4).

As I begin my deliberation on this case, it is apposite to mention that the accused and victims are relatives. The victim Ryoba Mwita Kondoko (PW2) is the elder brother of the accused though from different mothers whereas Ester Ryoba Mwita is a wife of PW2 and therefore a sister-in-law of the accused.

It appears there has been long standing land disputes between Ryoba Mwita Kondoko (PW2) and his young brothers of the accused's mother.

It was the evidence of PW1 Ester Ryoba that on the fateful day at around 13:00hrs, she was grazing cattle at the area nearby her home. All of the sudden, three guys namely, Philimon Wansato Mwita Kondoko (the accused), Marwa Mwita Kondoko and Latoya Mwita Kondoko emerged and asked her as to what she was doing thereat. As PW1 was still puzzling, they suddenly attacked her and cut her on various parts of her body. PW1 specifically mentioned the accused Philimon Wansato Mwita as the person who cut her. PW1 raised an alarm but shortly thereafter fell unconscious due to severe multiple cuts she sustained as such, she did not know what transpired thereafter.

Ryoba Mwita Kondoko, who was at home, heard an alarm. He thus raised up and quickly rushed to the scene of crime. On arriving at the scene, he found his wife PW1 laying on the ground with a number of severe cut injuries. Again, PW2 raised an alarm to seek help but before people could gather, the three culprits to wit; Wansato Mwita Kondoko (the accused in this case), Marwa Mwita Kondoko and Latoya Mwita Kondoko, who were still around, aggressively attacked him while uttering that they warned him to vacate the land. According to PW2, the assailants including the accused

cut him with machetes on different parts of his body including head, arm, hand and legs. Consequently, PW2 then fell down and lost consciousness. PW2 stated that the assailants believed that he was dead because before he completely fell unconscious, he heard them saying that he (PW2) was gone.

Rhobi Nyamhanga (PW3) was among the persons who arrived at the scene of crime in response to the alarm raised by PW2. He found PW2 laying on the ground while excessively bleeding. He, in collaboration with other samaritans, rushed him to Mugumu Designated District Hospital. Owing to the severity of injuries that PW2 sustained, he was referred to Bugando Referral Hospital. Although PW2 survived by mercy of God, he has sustained permanent physical disorder. PW2 demonstrated to the court the cut wounds on his body. The prosecution tendered PF3 of the two victims (exhibit P1 collectively) which tell it all the nature and extent of the injuries that were inflicted on the victims.

PW3's evidence was that, on arrival at the scene, he only saw two culprits namely, Marwa Mwita Kondoko and Latoya Mwita Kondoko. PW3 insisted that he did not see the accused Philimon Wansato Mwita at the scene.

In his defence, the accused Philimon Wansato Mwita denied the charge. He stated that on the fateful day he was at his home with his mother and two

brothers namely, Marwa Mwita Kondoko and Latoya Mwita Kondoko. He said that, at one time, his brothers left for about two hours and when they returned home, it is when they told him about assaulting the victims. The accused told the court that it is his two brothers who assaulted the victims. While asked as to why he did not respond to the alarm to render assistance to the victims, the accused replied that he did not assist the victims because he was supporting his brothers hence there was no way he could go to help the victims.

The accused brought other three witnesses to testify in his favour. The testimonies of Daniel Bitara Rimo (DW2) and Makoyo Magaigwa Makoyo (DW3) were to the effect that they arrived at the scene of crime immediately after the incident but did not see the accused at the scene. They told the court that they only saw Marwa Mwita Kondoko and Latoya Mwita Kondoko who left at the scene after seeing them coming. Further, Wankuru w/o Mwita Kondoko (DW4), the accused's mother testified to the effect that the accused was at home at the time when the alleged offences were committed. She however contradicted the accused's evidence as she stated that Marwa Mwita Kondoko and Latoya Mwita Kondoko were not seen at home the whole of the 9th day of February, 2010.

After the closure of the case for both sides, counsel had opportunity to make their final submissions.

Mr. Iole candidly submitted that the prosecution proved both counts beyond reasonable doubt. He elaborated that the victims PW1 and PW2, properly identified their assailants as the incident took place in the broad day. He contended that the victim's evidence is always the best evidence. Still on identification, Iole expounded that the victims knew the assailants very well before the incident for the accused person and other two assailants are young brothers of Ryoba Mwita Kondoko (PW2) and were living in the nearby localities as such, the identification was proper.

The learned State Attorney continued that the prosecution side brought PF3 of the two victims which establish that the victims were seriously attacked. He also pointed out that the weapons used by the accused were deadly, a fact which signifies that the accused intended to cause death of the victims.

Mr. Iole criticized the defence evidence on the ground that it was full of contradictions. He lamented that DW1 said that he was not at the scene of crime rather he was at home with Marwa Mwita and Latoya Mwita but

DW4's evidence was that Marwa and Latoya were not at home the entire day.

Further, the learned State Attorney pinpointed that DW2 Daniel Bitara said that he only heard the alarm raised by Ryoba Mwita (PW2) but did not hear the alarm raised by Ester Ryoba (PW1) nor was he aware that Ester was injured. In contrast, DW3 admitted that both victims were injured and he saw them at the scene of crime. The learned State Attorney opined that such contradictions raise doubt as to their credibility.

Mr. Ilole further told the court that the defence testimony concentrated on telling the court that the accused was not seen at the scene of crime. He thus invited the court to consider the fact that none of the defence witness witnessed the incident. Ilole further prayed the Court to take judicial notice of the case between **Republic vs Marwa Mwita Kondoko**, Criminal Sessions Case No. 189 of 2015 in which the accused Marwa Mwita Kondoko, a co-assailant was convicted by this court, sentenced to five years and ordered to pay compensation of Tanzanian shillings of one million five hundred thousand to the Ester Ryoba and Ryoba Mwita.

The learned State Attorney concluded that the prosecution case was proved beyond reasonable doubt. As such, he beseeched the court to find the accused guilty and consequently convict him.

In contrast, Mr. Paul Obwana was of strong views that the Republic failed to prove its case beyond reasonable doubt. He said that it was incumbent upon the prosecution to prove the case as provided under section 110(1) and (2) of the Evidence Act.

Obwana submitted that PW1 and PW2 had the duty to prove what they alleged but that was not done. He said that the prosecution evidence is tainted with a number of loopholes;

The learned defence counsel contended that the case was initiated by a defective charge or information contrary to section 135 of the Criminal Procedure Act. He clarified that the information reads Philimon s/o Wansato Mwita whilst PW1, PW2 and PW3 referred him as Wansato s/o Mwita Kondoko. According to the counsel, Wansato Mwita is different from Philimon s/o Wansato Mwita. He submitted that it is the law that where the charge is defective, it cannot ground conviction. The counsel sought reliance on the case of **Geofrey Simon and another vs Republic**, Criminal Appeal No. 296 of 2018, CAT at Arusha at page 8 to support his

averment. He concluded that the information is incurably defective hence it should be dismissed.

Further, Mr. Obwana argued that the ingredients of the offences were not established. He quickly referred to the case of **Alex Megard vs the Republic**, Criminal Appeal 571 of 2017, CAT at Bukoba at page 5, without elaborating more what is all about.

The defence counsel continued to attack the prosecution evidence that PW1 and PW2 did not establish beyond reasonable doubt that it is the accused who attacked them. It was Obwana's considered opinion that the evidence of the victims required corroboration and since such corroboration was not adduced, their evidence remains mere assertions.

Furthermore, Mr. Obwana invited the court to consider and believe the defence evidence. He submitted that DW1 testified that he was not at the scene and his evidence was corroborated by DW3, DW2 and DW4. Obwana expounded that DW4 told the court that she was with the accused at home at the time when the offences were committed.

The defence counsel explained that the alleged contradictions in the defence evidence do not go to the root of the case because the main issue is whether the accused is the one who attacked the victims. The contention

that DW4 did not see the other accused Marwa Mwita and Latoya Mwita at home the whole day on the fateful date does not mean that it the accused who committed the offence, the counsel opined.

Mr. Obwana continued to tell the court that DW4 stated that the accused was present at home for all that time when they were going to search for the culprits Marwa Mwita and Latoya Mwita at the accused home. The defence counsel opined that this is an indication that the accused was not involved in the commission of the alleged offences and therefore was not mentioned by any person.

Finally, Mr. Obwana assaulted the demeanour of PW2. Mr. Obwana submitted that since PW2 testified that the accused is not a biological son of his late father, such evidence suggests that PW2 had grudges with the accused and therefore there was a possibility to frame up the case against the accused. The counsel invited the court to treat PW2's evidence with caution.

I have carefully appraised the evidence adduced by parties. I have also accorded a deserving attention to the counsel's submissions. Without much ado, it is important to state here that there is no dispute that the two victims were attacked and severely injured. According to the PF3 of the

victims (exhibit P1) along with the evidence of PW1, PW2 and PW3, the injuries sustained were so severe. This tells it all that the attackers, indeed, intended to kill the victims but, by mercy of Almighty God, the victims survived contrary to the attackers' will.

The pivotal issue therefore for determination is whether, the accused Philimon Wansato Mwita was among the attackers.

There is direct evidence from the victims namely, PW1 and PW2. The duo consistently testified before the court that they were attacked by three hooligans namely, Philimon Wansato Mwita Kondoko (the accused), Marwa Mwita Kondoko and Latoya Mwita Kondoko. PW1, who was attacked first, clearly told the court that it is the accused specifically who cut her. Further, PW2 who was attacked after PW1 also mentioned the accused as among the three assailants. The two witnesses were firm and consistent throughout their testimony on how the incident occurred and who were the attackers.

The accused brought three witnesses but none of them witnessed the incident. Both DW2 and DW3 arrived at the scene of crime after the incident had taken place. Further, of all the defence witnesses and PW3 Rhobi Nyamhanga, none of them talked to the victims immediately after

the incident to know the assailants. This is because both victims fell unconscious shortly after they were attacked. Thus, it remains a fact that the only eye witnesses are the victims i.e., PW1 and PW2.

I also keenly observed the demeanour of Daniel Bitara Rimo (DW2) while in witness box and I arrived at the conclusion that he was not a truthful witness. He gave a contradicting account when he was being cross examined as to whether he witnessed the incident. Further, his appearance suggested that he was telling lies. For example, while under cross examination, DW2 stated that he did not witness the incident because there were bushes between where he was grazing and scene of crime. However, later on, he said that he found Marwa Mwita and Latoya Mwita Kondoko cutting the victim (PW2) when he arrived at the scene. To cap it all, upon further cross examination, DW2 said that Marwa Mwita and Latoya Mwita Kondoko took at their heels when they saw him coming to the scene of crime. Admittedly, his testimony was inconceivable and inconsistent with truth.

Moreso, the accused's mother DW4 testified that the whole day of 9th February, 2010, Marwa Mwita Kondoko and Latoya Mwita Kondoko were not at home whereas the accused testified to the contrary. This made me

to accord less weight to her evidence as it appears that she was trying to exonerate her son from liabilities.

Mr. Obwana submitted that the information is defective on the ground that the accused's name is Wansato Mwita and not Philimon Wansato Mwita as reflected in the information. With due respect, this attack is without any merits. The record speaks loudly that during preliminary hearing, the accused admitted the name as indicated in the information. In addition, PW1 clarified that Philimon is a baptized name otherwise the accused is commonly known as Wansato Mwita.

In view of the foregoing, I am inclined to believe the testimonies of the victims PW1 and PW2 that the accused Philimon Wansato Mwita was among the three attackers who severely injured the victims. It is therefore my considered views that the prosecution proved the case against the accused beyond reasonable doubt.

In the circumstances, I find the accused Philimon Wansato Mwita guilty of attempt to murder in the 1st and 2nd counts. Consequently, I convict Philimon Wansato Mwita of attempt to murder in the 1st and 2nd counts contrary to section 211(a) of the Penal Code.

It is so ordered.

The right of appeal is explained.



A handwritten signature in blue ink, which appears to read "A. A. Mbagwa".

A. A. Mbagwa

JUDGE

03/08/2022