IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

SITTING AT BUKOBA

ORIGINAL JURISDICTION

CRIMINAL SESSION CASE NO. 118 OF 2020

THE REPUBLIC

VERSUS

1ST HALID S/O AVORD @ NIYONKURU

2ND BIMENYIMANA S/O FESTO

JUDGMENT

28/11/2022 & 07/12/2022

E. L. NGIGWANA, J.

The accused persons Halid s/o Anord@Niyonkuru and Bimenyimana Festo here in after to be referred as the 1st and 2nd accused respectively stand charged with the offence of Attempted Murder contrary to section 211 (a) of the Penal Code, [Cap. 16 R:E 2019] now R:E 2022.

The particulars on the information is to the effect that on 7th day of May, 2020 at Kagera Sugar area within Misenyi District in Kagera Region, the accused persons did attempt to murder one Hatungimana s/o Simon @ Alex.

Upon arraignment, each accused pleaded not guilty to the charge hence, the matter went to a full trial. In the efforts to prove the allegations leveled against the accused persons, the prosecution side featured four (4) witnesses as follows; Hatungimana s/o Simon @ Alex (PW1), Minani s/o Cosma (PW2), Johanes s/o Charles Tinga (PW3) and F.5804 D/C Ezekiel, and tendered two exhibits to wit; Report on Postmortem Examination (exhibit P1) and sketch map of the Crime Scene (exhibit P2). On their part, the accused persons

fended themselves. The 1st accused testified as DW1 while the 2nd accused testified as DW2.

At the hearing of this matter, the Republic appeared through Mr. Erick Shija, learned Senior State Attorney and Mr. Noah Mwakisisile, learned State Attorney while both accused persons were represented by Mr. Geofrey Rugaimukamu, learned counsel.

PW1 told this court that on 07/05/2020, he woke up in the morning and went to a butcher shop owned by one John whereby he met the accused persons there and the first accused gave him Tshs. 60,000/= which he had previously borrowed from him and since he had Tshs. 1,000,000/= in his pocket, he took the said money out of his pocket and put together with the money he received from the first accused, to make a total of Tshs.1,060,000/= and then hidden it into his trousers pocket, and he did so in the presence of the 1st accused. He added that the 1st accused saw that lump sum and asked him to buy meat for him but he refused, as a result, he left the accused persons and went back to his room that situates at Camp No. 5 within Kagera Sugar area.

He went on testifying that, upon entering his room; he got into his bed and got asleep while the door was open. He added that around 13:00hours the accused persons entered into his room, he suddenly woke up from sleep and saw the accused persons clearly and identified them as it was day time and the accused persons were not strangers to him, about two hours before the invasion, they were together. He said that, since he was still on bed and had no knowledge that the accused persons had an evil intention, it was too late to resist the accused persons because the 2nd accused person took hold of

his hands by force and tightly while covering his mouth using a piece of cloth to prevent him from raising an alarm while the 1st accused who had a small knife was picking Tshs. 1,060,000/= from his trouser, and having done so, he joined the 2nd accused, where as he touched him (PW1) on chin and did cut him on the throat using a sharp knife.PW1 added that before he lost his consciousness, he heard the 1st accused uttering this Swahili words; "***Huyu ameshakufa, twende zetu***" PW1 went on testifying that few minutes later due to that attack and excessive bleeding, he completely lost his consciousness and finally found himself at Kagera Sugar Hospital and he saw his uncle (PW2) beside him and mentioned to him the accused persons as the persons who attacked him on 07/05/2020 and stole his money amounting to Tshs. 1,060,000/= He added that he also mentioned the accused persons to the police (PW4).

When cross-examined by the learned counsel for the accused persons, PW1 revealed that he was living with three persons in his room but at the time of the incident, they were at work. He also admitted that there were other persons who were aware that he had money. When asked to how he identified the accused persons, PW1 said the accused persons were his fellow employees and friends of him, he met them few hours before the incident, and that the incident took place during day time that is to say; around 13.00hours therefore identification was easy. He added that he did not close the door because it was day time hence had no fear on his safety and security. When cross-examined on the role played by each accused, PW1 said the 2nd accused took hold of his hands tightly and covered his mouth to stop him from raising and alarm, while the 1st accused who had a knife, having picked the money form his pocket, joined the 2nd accused to attack him, and

he is the one who did cut him on the throat and then uttered the words" **Huyu ameshakufa, twende zetu".** He added that the 1st accused wore a black trouser and a black t-shirt while the 2nd accused wore a red short and a red t-shirt. He also said his eyes were not covered by the accused persons to prevent him from seeing.

PW2 confirmed that the victim regained his conscious slowly and finally mentioned the accused persons to him and to PW4 as persons who invaded and harmed him on 07/05/2020 and stole from him Tshs. 1,060,000/=. PW3 who is a medical doctor testified that the victim was attended at Kagera Sugar Hospital on 07/05/2020 by his fellow medical called Jerome Mujaki (now, deceased) whom they worked together for five (5) years.

He added that the victim (PW1) was admitted on 07/05/2020 and discharged on 23/05/2020 because he was seriously injured as indicated in the PF3 (Exhibit P1. The evidence of PW4 is to the effect that he, together with few Kagera Sugar employees and the police called James Mpanga arrived at the scene of crime and found the victim lying on his bed unconsciously but bleeding profusely and rushed him to Kagera Sugar Hospital. He added that; he went back to the scene of crime and drew the sketch map of the crime scene (exhibit P2). He also confirmed that the victim named the accused persons to him. PW4 also said, as an investigator of this case, he discovered that that the offence was committed by the accused persons because; one, they were identified by the victim at the scene of crime as it was day time and the accused persons were not strangers to him; two, the victim mentioned the accused persons to PW2 and to him at the earliest possible time, and there, on that on the fateful day, though it was a working day, the accused persons did not go to work without any justification.

In his defence, DW1 testified that on 07/05/2020, he did not go to work because he was sick. He admitted to know PW1 as he was his fellow employee. He also admitted that he had no conflict with PW1, however he disputed to have committed the offence. He also disputed to have ever borrowed the sum of Tshs. 60,000/= and to have met the victim on 07/05/2020.

DW2 testified that on 07/05/2020, he did not go to work. He also admitted that PW1 was his fellow employee, and was living in the room which was very close to the victim's room. DW2 also admitted that on 7/05/2020, during morning hours, he did go at butcher shop area as stated by PW1 but he disputed to have met or seen PW1 there. He further disputed to have committed the offence, and alleged to have met the 1st accused person in the police station.

After the closure of the defence case, neither final oral submission nor written submissions were preferred by both prosecution side and the defence side.

Now, it is pertinent at this stage to determine whether or not the offence of Attempted Murder has been proved as against the accused persons beyond reasonable doubt as the standard of proof in criminal cases is that of beyond reasonable doubt. Section 3 (2) (a) of the Evidence Act Cap 6 R.E 2002 provides that;

"A fact is said to have been proved in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists."

This standard was insisted in the case of **JONAS NKIZE V.R [1992] TLR 213** where this court through Katiti, J. (as he then was) stated that;

"The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or Ignoring it is unforgivable, and is a peril not worth taking".

Emphasizing the same standard, the court of Appeal of Tanzania **in Furaha Michael versus The Republic, Criminal Appeal No. 326 of 2010** (Unreported) had this to say;

"The cardinal principle in criminal cases places on the shoulders of the prosecution the burden of proving the guilt of the accused beyond all reasonable doubt".

The onus never shifts away from the prosecution and no duty is cast on the accused person to establish his or her innocence. See **Said Hemed versus Republic [1986] TLR** 117.

In the instant case, the evidence placing the accused persons at the scene of crime is the evidence of the identifying witness (PW1). Now, the question to be resolved here is whether the accused persons were correctly identified?

It is trite law that in order to convict the accused person on the evidence of visual identification, the court must be satisfied that the evidence is watertight. In the case of **Waziri Amani v. Republic** [1980] TLR 250, it was held 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."

The Court further 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 dear to 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."*

In **Raymond Francis v. Republic** [1994] TLR 100, the Court of Appeal had this to say;

"It is elementary that a criminal case whose determination depends essentially on identification evidence on conditions favoring a correct identification is of utmost importance."

In the case of **VITALIS BERNARD KITALE VERSUS REPUBLIC,** Criminal Appeal No. 263 of 2007, (CAT) Arusha, (unreported) the Court of Appeal held that;

"*We do not think that knowing the appellant alone is sufficient. There should be more concrete detailed description of the appellant. The witness should have given a description of the appellant as he saw him at the time of the incident*".

Addressing the evidence of visual identification by a single witness, the Supreme Court of Uganda in the case of **John Katurumu versus Uganda [1998]** UGSC 14 held that;

"*The legal position is that a court should warn itself of the danger of possibility of mistaken identity in such case. This is particularly important where there are factors which present difficulties for identification at the material time. The court must in every such case examine the testimony of the single witness with greatest care and where possible look for corroborating or other supported evidence.* ***If after warning itself and scrutinizing the evidence, the courts finds no corroboration for the identification evidence, it can still convict if it is sure that there is no mistaken identity.***" **(Emphasis supplied)**

In the instant case, it is my considered view that the accused persons were properly and correctly identified by PW1 because; **one** the incident took place during day time that is to say around 13:00hours and the victim's eyes were normal and open. **Two,** the accused persons were well known to the identifying witness (PW1) and even in their defence, both accused person have admitted to know the accused, and that on 07/05/2020 they did not go at work. The 2nd accused further admitted that his room was very close to the room of the victim while the 1st accused admitted that he was living at a distance of about 50 meters from the victim's room, and all were working at Kagera Sugar Plantations. **Three,** the identifying witness met the accused persons at the butcher shop and had conversation few hours before the incident. **Four,** the identifying witness described how the accused persons wore and the role played by each of them. **Five**, the identifying witness, having regained his consciousness, mentioned the accused persons to PW2 and PW4, the fact which was confirmed by PW2 and PW4. In my view, the

evidence of PW1 is reliable direct evidence of visual identification against the accused persons.

One may ask why an identification parade was not conducted?. The answer is not far to fetch. The Court of Appeal in the case of **Shamir John versus the Republic,** Criminal Appeal No.166 of 2004 (Unreported) held that where the accused persons are well known to the identifying witness, there is no need for conducting an identification parade. Now, since as per evidence adduced before this court, the accused persons were well known to the identifying witness (PW1), there was no need of conducting an identification parade.

Furthermore, the ability of a witness to name a suspect at the earliest opportunity is an all- important assurance of his credibility. This position was stated in the case of **Marwa Wangiti Mwita and Another versus Republic [2002] TLR 39**, where it was held that;

"***The ability of a witness to name a suspect at the earliest opportunity is an all- important assurance of his credibility,*** *in the same way; unexplained delay or complete failure to do so should put a prudent court to inquiry."* ***(Emphasis added)***

In this case, PW1 after regaining his consciousness, mentioned the accused persons to PW2 and PW4 as persons who invaded and harmed him. In the case of **Ahmad Omari versus Republic,** Criminal Appeal No.154 of 2005 (Unreported) the Court of Appeal of Tanzania when determining the issue whether the evidence of a single identifying witness can ground conviction, the Court quoted with approval the decision in the case of Anil **Phalen versus State of Assam** 1993 AIR 1462 which held that;

*"A conviction can be based on the testimony **of a single eye witness** and there is no rule of law or evidence which says to the contrary provided the **sole eye witness passed the test of reliability in basing conviction on his testimony alone."***

Basing on what I have endeavored to discuss and being guide by the herein above cited authorities, I am satisfied that in absence of corroboration this court still safely convict since accused persons were correctly identified by a credible and reliable single identifying witness (PW1).

Section 211 (a) the Penal Code under which the accused persons stand charged provides that;

"Any person who

(a) Attempts unlawfully to cause death of another, is guilty if an offence and is liable to imprisonment for life."

When considering the offence of Attempt Murder, the contents of section 380 of the Penal Code, [Cap. 16 R. E 2022].

380 (1) when a person; intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention to such extent to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of further prosecution of his intention."

The Court of Appeal of Tanzania in the case of **Samwel Jackson Saabai @Mngawi and 2 Others versus Republic**, Criminal Appeal No. 138 of 2020 and the case of **Boniface Fidelis @Abel versus Republic,** Criminal Appeal No. 301 of 2014 four ingredients of Attempted murder arising from section 211 (a) read together with section 380 of the Penal Code were summarized as follows:-

(a) Proof of intention to commit the main offence of murder.

(b) Evidence of prove how the accused/ appellant began to employ the means to execute his intention.

(c) Evidence that proves overt acts which manifested the accused's/appellant's intention (over act means an act directed towards another person that indicate an intent to kill).

(d) Evidence proving an intervening event, which interrupted the accused/appellant from fulfilling his main offence to such extent if there was no such interruption, the main offence of murder would surely have been committed."

In the instant case, the weapon used was sharp knife. The fatal wound was inflicted on PW1 by cutting his throat with a knife. Having done so, the 1st accused uttered the words: **Huyu ameshakufa, twende zetu".**

Therefore, applying the position set in place by the Court of Appeal in the herein above cases to the matter at hand, on the first ingredient, it goes without saying that the act of cutting PW1 on the throat with a sharp knife clearly intended to cause death to PW1 with malice afore thought since

malice afore thought may be inferred in the weapons used on the part of the body attacked and the words uttered before or after the incident.

Furthermore, it has been proved by the prosecution through PW1 that the 2nd accused took hold of his hands tightly and the 1st accused did cut him on the throat. The injuries sustained by PW1 were classified by the Medical Practitioner as grievous harm. Part III, Item (V) of PF3 (Exh.P1) which is about the degree of the injury sustained reads; **"Grievous harm (would die if no immediate surgical intervention)".** Item (iii) of exhibit P1 shows how the injuries sustained by PW1 were described. It reads; "***Traverse deep cut wound on the anterior aspect of the neck which perforated a trachea just below the Adam's apple the tracheal perforation was two centimeters wide- air leaking through.***"

PW1 was admitted from 07/05/2020 and discharged on 23/05/2020. PW2 and PW4 confirmed that PW1 was seriously injured. In that premise, I find the 2nd and 3rd ingredients have been fulfilled.

Coming to the 4th ingredient, when PW1 was hurt and almost unconscious, he heard the 1st accused stating that they have killed him "***Huyu sasa ameshakufa, twende zetu***". Therefore, the intervening factor was the severe condition he had which led the accused persons to believe that he was already dead, and they had completed their mission, hence the third ingredient had been fulfilled too.

The defence of each accused person that he did not commit the offence is just an attempt to mislead the court and does not shake the prosecution case since the accused persons were correctly identified by PW1 as the only persons who entered into his room and attacked him.

Moreover, no justifiable reasons given by the accused persons as to why they did not go at work on the material day. The 1st accused just said he was sick but he produced no sick sheet. The 2nd accused simply said he was tired that is why he did not go. Indeed, it is my considered view that they have not raised any reasonable doubt which can be resolved in their benefit.

In the upshot, it is apparent that all ingredients of Attempted Murder have been proved beyond reasonable doubt and having considered the totality of the evidence placed before me, I find the accused persons guilty of the offence of Attempted Murder as charged. Consequently, I hereby convict the accused persons of the offence of Attempted Murder under section 211 (a) of the Penal Code Cap 16 R. E 2022 as charged.

It is so ordered.

Sgd E. L. NGIGWANA

JUDGE

07/12/2022

ANTECEDENTS.

Erick Shija, learned Senior State Attorney:

Your Lordship, we have no previous criminal records of the convicts, however we pray for a stiff punishment as a lesson to the convicts and a warning to other persons of the same habit because the act committed by the convicts is unacceptable in a civilized society as their intention was to eliminate the life of an innocent person and have caused mental, physical and psychological trauma to PW1.

That's all.

MITIGATION.

Mr. Geofrey Rugaimukamu, Defence counsel:

Your Lordship, I pray that when passing a sentenced to the convicts the court should consider that the convicts are first offenders who have been in custody since May 2020 hence they have learned a lot.

That's all.

1st Convict:

My Lord I have heard what the defense counsel said. I have one thing to add; I pray for court leniency because I have a family depending on me.

That's all.

2nd Convict:

I pray for court mercy since I am currently parentless.

That's all.

SENTENCE.

There is no doubt that the maximum sentence for the offence of Attempted Murder is life imprisonment, however, section 211 (a) of the Penal Code uses the word "liable" meaning the court has discretion to impose a lesser sentence depending on the circumstances of each case. In the case at hand, the convicts are first offenders and have been in custody since May, 2020, therefore deserves some leniency.

However, it is worth noting that the act of invading and cutting the victim (PW1) on his throat using a sharp knife with the intention of eliminating his life is not tolerable and acceptable. The convicts are still young persons who are energetic, hence ought to have directed their minds and energy towards good deeds. Since they have done the contrary, a sentence which will serve

as a lesson to them is inevitable. Having considered the circumstances of this case in general, antecedents and mitigation factors, I hereby sentence each convict to serve ten (10) years imprisonment.

It is so ordered.

E. L. NGIGWANA
JUDGE
07/12/2022

Court: Judgment delivered this 7th day of December, 2022 in the presence of both accused, Mr. Geofrey Rugaimukamu, Defence Counsel, Mr. Erick Shija and Mr. Noah Mwakisisile, learned State Attorneys for the Republic, Hon. E. M. Kamaleki, Judge's Law Assistant and Ms. Lonsia Kyaruzi, B/C.

E. L. NGIGWANA
JUDGE
07/12/2022

Court: Right of Appeal explained.

E. L. NGIGWANA
JUDGE
07/12/2022