

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

AT MUSOMA

CRIMINAL SESSIONS CASE NO. 8 OF 2021

REPUBLIC

VERSUS

NIKORAU SI MATARE @ NIKOLAS NKOMBE @

KABWELE @ NKOMBE KABWELE.....1ST ACCUSED

WEREMA ISOMBE.....2ND ACCUSED

BHOKE MARIGO.....3RD ACCUSED

JUDGEMENT

16th Nov & 12th December, 2022

M. L. KOMBA, J.:

On the fateful morning of 29th day of May, 2014, Kigingwa s/o Chacha, Mayati s/o Chacha and Mjumbe s/o Range (the victims) met their permanent disability at Muhoji village in Butiama District Mara Region. Their disability was caused by multiple cut wounds on various parts of their bodies and removal of arms. According to PF 3 (which were collectively Marked as Exhibit P1), Kigingwa Chacha (PW1) was injured in ribs, stomach hand and left leg. His ribs were vigorously broken. Mjumbe Range (PW2) was beaten in various parts of the body including head by club and his left hand was chopped by machete while punching machete directed to his head. Mayati

Chacha lost his two arms which were chopped by machete after being randomly beaten.

As a result, Nicorausi Matata @ Nicolas Nkombe Kabwele, Werema Isombe and Bhoke Marigo were both accused and consequently, arrested and arraigned before this court facing charges of attempt murder contrary to sections 211(a) of the Penal Code, Cap. 16 R.E 2019. Particulars in information revealed that the accused persons altogether on 29 /05/2014 at Muhoji village within Butiama District in the Region of Mara did attempt to kill Kigingira s/o Chacha, Mayati s/o Chacha and Mjumbe S/o Range. The first and third accused pleaded guilty to the charge while the second accused person denied the charge against him.

The incident started in the evening of 28/05/2014 where the second accused' cow stuck in the mud while coming back from grazing. It was alleged that the effort to rescue it proved failure and the shepherds (young men) decided to ask for assistance from a nearby homestead where they met PW1 and left the cow in the mud after the joint effort failed and took the rest home. In their return they found nothing and decided to inform the second accused. In the following morning that is 29/05/2014 accused went to PW2 to ask the missing cow and were informed someone slaughtered it, then the second

accused called the 3rd accused and report the matter, then they joined the 2nd accused at PW2 home.

It was further alleged that all accused collected all victims from their respective home alleging that they are taking them to the village office. It was said while on the way, they stopped in the valley and all accused persons started assaulting victims by using local weapons (machete, club, stick/piece of wood). They cut victims in various parts of their body by using machetes including cutting of their arms and ribs. After a while the crowd of villagers (wana Yowe) emerged who then went to victims' home and took their cows. To prove this story for the second accused to be convicted, the prosecution had a total of five witnesses namely, Kigingira Chacha (PW1), Mjumbe Range (PW2), Juma Isombe (PW3), Mayati Chacha (PW4) and G.8299 Detective Cpl Adam. The prosecution had 2 exhibits which are PF 3 for all victims which was collectively marked (Exhibit P1) and the statement of Mayati Chacha as (Exhibit P2).

At the trial, the prosecution was represented by Ms. Monica Hokororo and Nico Malekela, both learned State Attorneys. The second accused persons were represented by Mr. Daud Mahemba and Mr. Wambura Kisika, both learned counsels.

On the prosecution **evidence, PW1 testified that** he is a peasant who resides in Muhoji village. He informed the court that he was a farmer but currently he is doing nothing due to disability. On 29/05/2014 he was at home in the morning then suddenly he saw three people who are Bhoke Marigo, Matare and Werema Isombe, who knocked and ordered him to go outside the house and then to the village office. He said on the way they passed to Mjumbe Range and to Mayati and make the total of three. He informed the court that Bhoke was the hamlet leader, Matare was the Sungusungu leader and Werema had no position in leadership and that he knows these people as they stayed in the same hamlet and village. He bolded that Werema, is his in-law.

He further informed the court that while they are on the way to the village office, accused started to cut him and the other two. He said they cut him at the ribs on the stomach, around the left leg from down upward above the knee, the right hand was injured and the head. He insisted he has marks as result of operation as part of treatment. He stated further that, other people whom were together Mayati and Jumbe were injured too. He refuted that there was no yowe (crowd of People).

While at the scene he passed Juma Isombe (PW3) and found him and other victims laid down. PW3 asked accused why are they doing that, the accused replied that PW1 and others were thieves, they steal Weremas' cow. Then they were taken to Bunda Hospital. It was the testimony of PW1 that the three people whom among them were village leaders went to his home and collect 10 cows worth 2,500,000/, and that his health is deteriorating due to frequently burner.

When was cross examined, PW1 testifies that village leaders found one kilogram of uncooked meat in the house of Mayati. He informed the court further that he was informed by his wife who took his cows on the fateful date and he remembered his cows' marks. He further testified that he went to hospital for treatment but he doesn't have documents to verify that and he does not remember the dates when he was under treatment. He left accused at the scene of crime when he was taken to hospital. He further informed the court that he was warned by doctor not to be engaged in heavy activities as during the crime when they cut his ribs the intestine was almost out and he was assisted by piece of clothed (kitenge) from his sister which was used to tie his stomach before he was taken to hospital.

PW2 who is Mjumbe Range testified that his one arm was chopped on 29/05/2014. He narrated that three people including Werema Isombe and Bhoke Marigo went to his home, they collected him and tell PW2 that they are going to village office but when they reached in the valley accused persons cut PW2 by using machete. He testified that accused wanted to cut his head when he punched with his left hand then machete chopped left hand and de-tached arm. He narrated that they beaten his head with club alleging that PW2 participated in stealing meat from Werema's cow which was missing.

During cross examination PW2 testified that he passed to police before going to hospital. They were three men who went to hospital, two men and Kigingwa who was called to the scene by Werema and Bhoke. It was his testimony that when Kigingwa arrived his hand was already chopped. Mayati Juma found his arm was already chopped and he was laying in the pool of blood. He further informed the court that he doesn't own cows as his eleven cows were taken by 1st accused and others and he confirmed that his family did not informed police on that.

During re examination he mentioned names of people who cut him who were Nkombe, Bhoke and Werema and explained that they were on the way to village office but did not reached to the office.

Juma Isombe PW3 testified that he has been living in Muhoji village since he was born. He testified that on 29/05/2014 around 08:00 hrs in the morning when he was on the way to Saragana while riding his motorcycle, along the valley he found six people (6) among them three people were seriously injured who are Mjumbe Range, Mayati Chacha and Kigingira Chacha Range. Other people were Matare, Werema Isombe and Bhoke Marigo. He testified further that when he saw three victims, Mjumbe was laying down raised up his hand without arm, the arm was chopped and was laying a side. Mayati was seriously injured while lost both hands he was not able to speak while Kigingira who was also injured his body was full of blood especially in his upper part.

He confirmed in the court that he knew all the people whom he saw in the valley as they were living in the same village. He asked those who were not injured what was going on and he was told that those who were injured were thieves though he did not see the cow and they shouted if PW3 and the victims were in the same company.

Later on, other arrived at the scene, victims were assisted to be taken to hospital. He proceeded that, those who were not injured were three at the scene but in court he identified one, the second accused. He testified that he was informed by victims that they were injured by the accused by using machetes, sime and big stick.

During cross examination he revealed that he saw meat in the cooking pan estimated to be two Kilogram. He said the incident happened in the morning and he saw only six people at the valley, three of them were already injured and he did not say who injured them.

In re-examination PW3 testified further that he was informed by the victims that they were assaulted by three accused persons **(two of whom are not subject of this case)**

Mayati Chacha was a victim but he passed away in 2021. His statement was admitted in court and was to the effect that he was a guard in the farm of Majinge Charles which is located in Muhoji village. During interrogation he narrated that it was 08:55 hours the morning of 29/05/2014 where three people went to his home and second accused informed him to be suspected to be involved in the missing cow saga. After searching his house, they found

meat which was estimated to be 2kg in the pot where the third accused ordered him to carry it up to the village office. He narrated further that on the way they passed to Mjumbe Range (PW2) house who also was informed to be needed in the village office and they proceed to the village office.

It was his narration that on the way along the valley, three accused persons started to attack him and PW2. 1st accused cut the victims in various parts of their body and later on the other two joined which resulted his two arms to be chopped. It was Mayati Chacha complaint that he was hit in his private part by 2nd accused then he collapsed. Mayati Chacha gain conscious while he was in hospital, he saw PW1 who was admitted and informed him that he was assaulted by accused on allegation that he assisted him and PW2 in stealing Werema's cow. Mayati Chacha admitted to be found in possession of 2kg of meat but he had neither skin nor head of the said stolen cow. Mayati Chacha linked the incident of his assault and grievances of some of cattle owners who lack grazing land as he did not allow them in Majinges' farm.

PW4 who is G. 8299 Detective Cpl Adam testified to the effect that in 19/06/2014 he was assigned the file by OC-CID for investigation purposes concerning grievous harm which took place in Muhoji village, Musoma Rural.

He testified further that on that day he went Bugando hospital where he found Mayati Chacha, Mkurya by tribe who was admitted in room number 8 who lost his two arms. PW4 informed the court that he conducted interrogation and that he was guided by section 34B (2) of Cap 6 and he informed the victim his right as required in law.

During cross examination PW4 narrated that PW1 and Mayati Chacha they met at the valley and later on they meet at the hospital. He further narrated that he was informed by Mayati Chacha that Werema's cow was missing and Mayati Chacha and other two were suspected to slaughter it. Mayati Chacha was seriously injured but he managed to mention people who attacked him who were three including the second accused.

The prosecution case was marked closed and the accused persons were required to enter their defense in accordance with section 293(2) of the Criminal Procedure Code Cap 20 R.E 2019. The defense case was opened and there was only one witness.

In his defense DW1 testified that 28/05/2014 his cow stuck in the mud. He was informed over the phone that young men (shepherds) failed to rescue it and asked for assistance from Mayati Chacha (PW4) whom they failed

again. They leave one cow with Mayati and when they go back, they did not find the cow. In the next morning DW1 went to PW1's home and found him and his wife and was told that jita men came and removed the skin.

DW1 informed the court that he calls hamlet leader, Bhoke Marigo (3rd accused) who interrogated Mayati Chacha then Mayati Chacha went inside and come up with some meat in the cooking pot. Later on, 3rd accused and Mayati Chacha went inside the house and found a lot of meat in a big cooking pot and the skin was under the bed.

It was DW1 testimony that 3rd accused went to PW2 and brought him in Maytait Chacha's home where PW2 informed them that he was going in bush and found Mayati Chacha's whom he assisted to unskin the cow and was given few meats. When they went to PW2 they found meat and he said he decided to call village chairman, Kichambati Paulo and informed of the incident and decided to take the victims to the village office. He testified further that on the way to the village office, along the valley, they found yowe people coming to their direction, the crowd of yowe includes Juma Isombe, Matare, Mnanka Kitahita to mention few.

He informed the court that victims (PW2 and Mayati Chacha) decided to run away escaping the group of people (yowe) whom chased them and were brought to the place they left was meat before they started to beat them while he (DW1) was watching. He further informed the court that the group followed Kigingira Chacha and brought him to the scene area. Later on Police who were called by the 3rd accused arrived and took him (DW1) on the instant and made his statements. After 5 days he was instructed to accompany with people whom they were together in the event. DW1 informed 1st and 3rd accused to accompany him to Butiama police station where they were arrested for their participation in attempt murder.

During cross examination DW1 testified that he was present, holding big stick when victims were injured and that they were injured before they arrived to the village office. He confirmed that he was the one who took PW2 and Mayati Chacha from their homes as he was informed that Mayati Chacha was the one who was supposed to watch the cow while in mud. He further narrated that a cow was missed on 28/05/2014 and yowe were made on 29/05/2014 and he did not say whose cow's skin was found under the bed although it was not identified whether the skin was from his missing cow.

He further testifies that the cow went missing on 28/05/ 2014 but he did not inform village leaders on the same day.

On re examination DW1 informed the court that they normally search for missing item before they make yowe and that he did not make yowe on 28/05/2014 because he was not sure whether his cow was missing.

Now in determining the fate of the accused person before this court, the prosecution must prove beyond reasonable doubt that, indeed, accused attempted to kill victims contrary to sections 112 (a) of the Penal Code Cap 16 RE 2019.

We have seen from the evidence adduced, the prosecution relies on PW1, PW2 and Mayati Chacha testimony who are victims and an eyewitness who identified the accused persons during the commission of the crime. Apart from victims' evidence, the prosecution also relies on the evidence of PW3 who arrived at the scene immediately after the crime where he found victims in pool of blood and accused persons carrying their weapons. In analysing these two key aspects in this scenario, I will also consider the evidence of both parties adduced before the court.

In the first aspect of identification, victims who also are eye witness, testified to have witnessed the accused persons assaulting them. All victims testified that the incident took place in the morning, in an open space at the valley not inside the house, there were sun light. All victims were injured by machetes, club and piece of wood that means in order those weapons to be used parties need to be closer. PW2 testified that its accused person who cut him first and then they cut Mayati both hands. He further added that 3rd accused was a leader at kitongoji level so he was known apart from the fact that 2nd and 3rd accused went to his home in the morning and they walked on the way to the village office where they did not reach. PW3 have been leaving in Muhoji village since 1974 he knows many people including those in leadership. He testified that he found six people at the valley, three were injured and other three were not injured and he managed to identify all six people.

In order for this court to rule out if the identification of accused by victim was watertight, the evidence adduced by victims must be subjected to a test to make sure that there was a positive identification for this court to be able to rely on. In this regard, I will sail in the principle of identification as

enunciated in the landmark case of **Waziri Amani vs Republic** [1980] TLR 250 in which the Court of Appeal held that;

"The evidence of visual identification is of the weakest and most unreliable. It follows, therefore, that no courts 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 watertight".

The Court of Appeal went further to elaborate on how the possibility of mistaken identity could be eliminated as it stated that, the court would be expected to determine the following questions; the time the witness had the accused under observation, the distance he observed him, the condition the observation occurred, whether it was day light or at night, whether there was poor or good lighting, whether the witness knew the accused or had seen the accused before or not. (See also **Aus Mzee Hassan vs Republic**, Criminal Appeal No. 17 of 2020, **Yohana Kulwa @ Mwigulu & 3 Others vs Republic**, Consolidated Criminal Appeals No. 192 of 2015 and 396 of 2017, **Alfred Kwezi @ Alphonse vs Republic**, Criminal Appeal No. 216 of 2021). The Court of Appeal insisted that, when the court is satisfied that there was no mistake of identity then the court can convict the accused relying on the identification of the accused person.

In our case at hand there is no doubt that the crime took place in the morning, full of sun light. PW1, PW2 and Mayati Chacha managed to identify accused as they know him, they live together in the same village and the accused was accompanied by village leader, 3rd accused when they go to PW2 home in that morning. The crime took place in an open space, at the valley. The distance between accused and victims was reasonable to allow the identification during the commission of the crime. As hinted earlier on, weapon used, machetes and club need to be close so that they can be used. PW1 was injured at the leg and chest, PW2 lost his arm while punching machete which was directed to his head, Mayati Chacha lost his both arms, that means the assailants were too close. Further to that, all victims were able to identify the 2nd accused as they live in the same village and further Mayati Chacha know 2nd accused as he keeps livestock and looking for grazing land to the farm which Mayati Chacha was employed as a guard. Before I rule out that the accused was positively identified, I proceed to weigh the credibility of victims who were eye witness. In the cause, eye witness 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 the case of **Mawazo Mohamed Nyoni @ Pengo & 2 Others vs Republic**, Criminal Appeal No. 184 of 2018 where it held that: -

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

Further in the case of **Kadumu Gurube vs Republic**, Criminal Appeal No. 183 of 2015, while quoting with authority the case of **Marwa Wangiti Mwita vs Republic**, Criminal Appeal 6 of 1995, it was stated that, naming of the suspect at the earliest time possible add value to the credibility of the witness. PW3 testified to have been informed by victims who did that brutality immediately after it happened while they were at the scene. In fine, I proceed to find that victims were credible witnesses and their testimony can be relied upon while considering the principle in **Selemani Makumba vs. Republic (2006)** TLR 379 that best evidence come from the victim, although this is not a rape case but I can borrow the spirit that, in the case at hand, victims are the ones who were assaulted and they managed to testify and identify the culprits.

It is my finding that, the 2nd accused was properly identified by victims as their testimony covered all circumstances surrounding the positive identification and removed all possibility of mistaken identity.

Moving on with the defense of the 2nd accused. He testified that he was instructed by police officer from Butiama Police Station to report to the said station together with people whom they were together where crime was committed. He went with 1st and 3rd accused who all of them were arrested. The other two pleaded guilty remain with 2nd accused who in trial testified to participate in taking PW2 and Mayati Chacha from their home with the intention of escorting them to village office. He further testified to observe when victims were buttered at the valley while he was holding long stick. That being not enough he professed to see PW3 at the scene and denied to participate in assault while admitting that he is the one who raise yowe in the morning of 29/05/2014.

It is a trite law that, the best evidence in a criminal case is one in which the accused person confesses his guilt. This is the settled position of law as it was stated in a number of Court of Appeal decisions including the case of **Jacob Asegelile Kakune vs Republic**, Criminal Appeal No. 178 of 2017,

in which the Court of Appeal cited the case of **Mohamed Haruna Mtupeni vs Republic**, Criminal Appeal No. 259 of 2007, whereby the Court stated;

'The very best of witnesses in any criminal trial is an accused person who freely confesses his guilt.'

In the case at hand, the 2nd accused admitted to collect PW2 from his home and 3rd accused followed Mayati Chacha from his home and joined 2nd accused at PW2 and collectively they started to move, as alleged, to the village office where victims were attacked on the valley while he was holding a long stick. These facts were corroborated by the testimony of PW1, PW2 and PW3 who said they saw 2nd accused at the scene of crime. Again, DW1 testimony corroborates with PW3 that accused were assaulted by Machetes, sime and big stick as 2nd accused informed the court, he was holding big stick. More over DW1 testified to invite 1st accused and 3rd accused to the crime and when he was directed by police officer from Butiama Police Station to report with those whom they were together at the scene he took 1st and 3rd accused. The two accused, 1st and 3rd accused pleaded guilty to the offence. Now comes the question what about the 2nd accused who called other accused and secretly and jointly planed and execute what they planned. I find common intention in 1st, 2nd and 3rd accused as provided under section 23 of the Penal Code Cap. 16 which reads: -

S. 23. 'When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.'

Much guidance on the interpretation of the section can be harvested in the decision of the Eastern Africa Court of Appeal in the case of **Wanjiro Wamiero & Others V. R.** (1955) 22 EACA at page 523 where the Court, (in relation to section 21 of the Kenya Penal Code which was identical with our section 23 of the Penal Code cited above) held that: -

'... in order to make the section applicable, it must be shown that the accused had shared with the actual perpetrators of the crime, a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged...'

For common intention doctrine to be invoked, there must be two or more people who have shared common intention to pursue an unlawful act and in the execution of the pre-planned plan the offence was committed by both or some of them. The doctrine was well elaborated in the case of **Diamon S/O**

Malekela@ Maunganya vs R, Criminal Appeal No. 205 of 2005, the Court of Appeal held that;

"Much has been said and written on "common intention" as a basis of criminal liability. Suffice it to say here that the doctrine of common intention, as distinguished from similar intention, can only be successfully invoked where two or more persons form a common intention to prosecute an unlawful purpose and they commit an offence and are eventually jointly charged and tried together'.

See the case of **Issa Mustapha Gora & Another vs R**, Criminal Appeal No. 330 of 2019.

In the case at hand PW2 and (Mayati Chacha) testified to be visited and then assembled by all accused. Moreover, the 2nd accused testified to call other accused person and informed of the allegation concerned victims as a result all accused, intentionally decided to take victims to the place known to themselves where they can complete their mission. PW3 testified that he met accused persons (2nd accused among them) at the scene of crime, while they had the victims, this corroborates with the evidence of PW2 and PW4 whom testified that they victims were assaulted while at the valley. Mayati Chacha lost both hands as a result of assault this is corroborated with the

testimony of PW2 who said after they chop his arm, they turned to Mayati Chacha whom they cut both hands.

In terms of section 23 of the Penal code Cap. 16 RE, all the accused persons had a common intention to prosecute an unlawful purpose that resulted in the commission of the offence of attempt murder.

Reverting to the second accused defense, he denied the charged offence against him. In his defense, the accused person denied to have been involved in assault the victim rather he testified he was present at the scene, just standing holding long stick. He denied to inflict harm to any of the victims although he testified victims were injured. He acknowledge to know other accused as he was the one who called them to attend the saga. It is a trite law that, the accused only needs to cast a shadow on the prosecution evidence and their duty is on the balance of probabilities. Now weighing the evidence from the prosecution side with the defence side, I am of the view that, the prosecution has successfully proved the case beyond a reasonable doubt against the 2nd accused.

First, the prosecution has managed to prove the identification of the 2nd accused which was watertight, it was done during day time under sun light. Second, witnesses were able to prove that the accused persons with

common intention attempt to kill the victims. The second accused only deny the charge, without establishing evidence to cast a shadow as to his identity as well as to successfully contest his participation in making common intention and organization of the crime which the prosecution successfully relied on.

All that being said, the prosecution has managed to prove the case beyond a reasonable doubt. Therefore, the second accused named Werema Isombe is hereby convicted for the offence of attempt murder contrary to sections 211(a) of the Penal Code Cap 16 R.E 2019.

M. L. KOMBA

JUDGE

12th December, 2022

SENTENCE

The 2nd accused person has been convicted with an offence of attempt to murder contrary to sections 221(a) of the Penal Code Cap 16 after a full trial.

I have acutely gone through both aggravating and mitigation factors as submissions by respective counsels. It is factual that the accused is the source of this crime as he collected victims from their home claiming to be involved in the loss of his cow. He participated in assault, the weapon used,

machete is dangerous in its own, victims lost arms that indicate the force used was too high and there were several blows. Victims have permanent disability and are incapacitated to participate in economic activities

In addition, victims undergo treatment due to wounds sustained. Having taken into account the above reflections, I hereby sentence the 2nd accused **WEREMA ISOMBE** to one-year imprisonment. I also ordered the accused to compensate each victim, a total sum of Tanzanian shillings three hundred thousand (300,000/=) and to compensate the family of Mayati Chacha a total sum of Tanzanian shillings three hundred thousand (300,000/=). Compensation should be paid within two months from the day of this pronouncement and will be administered by Deputy Registrar of the High Court.

It is so ordered.

Right of appeal is fully explained.




M. L. KOMBA
JUDGE

12th December, 2022