

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT TARIME

CRIMINAL SESSIONS CASE NO 69 OF 2022

REPUBLIC

VERSUS

1. CHANGA S/O CHANGA MAHERI

2. CHACHA MWITA CHANGA

JUDGMENT

5th & 20th Dec, 2022

F. H. Mahimbali, J.:

The particulars of the charge against the accused persons in this case claim that around 21:30 hours on the 1st day of May, 2021, at Kewanja village within Tarme District in Mara Region these two accused persons namely, **Changa s/o Changa Maheri and Chacha Mwita Changa** attempted to murder two persons namely; Ezra Sasi Johaness (for the first count) and Samwel Nyahili (the second count) which is an offence contrary to section 211 (a) of the Penal Code, Cap 16 R.E 2019.

The accused persons were then arrested and ultimately charged with two offences of attempted murder (contrary to sections 211 (a) of the Penal Code, Cap 16 R.E 2019), where both pleaded not guilty to the charge in respect of each respective counts.

The prosecution summoned a total of four witnesses and tendered two exhibits in efforts of establishing the charge against the accused persons.

Mr. Ezra Sasi Johanness testified as PW1. In his testimony he stated that while in guard area at Kewanja village being with Mr. Samwel (PW2) they were invaded by some armed men. In the said invasion, one person first entered into their guardroom and ordered them (PW1 and PW2) to remain seated as they were under arrest. Hearing this, he courageously switched on the lights. That person then got out and while there out, he started inquiring as to why they were guarding at his land. PW1 replied that they were just employees. He then threatened by words that he would endanger both of them (**leo tutawamaliza**). That person he had identified is Chacha Mwita Changa (2nd accused person). As the inner lights were brightly illuminating, equally with the outer lights, he had also been able to identify Changa Changa @ Maheri (1st accused person). By that time, he had also managed to spot other men

who were a bit less close to the guard room but could not identify them as they were a bit far. Those people together started throwing stones against them. They cried for help but none responded on time. As stoning continued and threatening, he thought of escaping as it was disastrous. Amongst those men there out, PW1 managed to identify one Mr. Changa Changa Maheri (first accused person) who was his ex-guard worker. In efforts to escape from that wrath, Mr. Chacha Mwita Changa who was identified first) had then attacked him by panga and inflicted it against his legs, hands. As if that was not enough, Mr. Changa Changa Maheri (1st accused person), then joined force with Chacha Mwita Changa and used a panga and inflicted it against his left hand (on three places), Chest and further the same Changa Changa Maheri had cut him with a big panga heat on his left eye and chopped it permanently. As he was then about to be overpowered, he had managed to escape and ran to his home while with one eye only. By that time, his fellow Samwel he had left him in the guard house.

In his recollection, the total men he had seen at the scene were four but, out of them, he had managed to identify two: Changa Changa Maheri and Chacha Mwita Changa. As to how he had managed to identify them while it was night time, PW1 states that as the scene of

crime was illuminated of bright electricity light (with high intensity), close distance he had been with the two doers (about one meter), familiarity with them (fellow villagers) and ex-co-worker (Changa Changa Maheri) and that the incident lasted for about ten minutes. As he managed to escape and reached his home, he first informed his father SASI JOHNNANESS MAGUTI what befell them all this narrated above at the guard place and named the two culprits as the ones responsible. He was thus taken/aided by being taken to Nyamongo Police Station where he also saw his fellow Samwel who was badly injured on his head. He was then given PF3 for his medical examination and treatment at Nyangoto Health Centre (exhibit PE1), where after the first aid and preliminary treatment was ultimately sent to Bugando Medical Centre. In his treatment with the damaged eye, it was then taken out completely after it had been permanently damaged.

As to whether he had any quarrel with anyone of them, he completely negated it. That at all the time he and the first accused as well as the second accused persons lived in harmony and that he wondered as to why they did this to him as he had not wronged any of them.

On his part, Mr. Samwel Nyahiri Wambura who is the victim as per second count, testified as PW2. He also testified almost similar to PW1. His testimony is to the effect that on 1/5/2021 he had started job at the guard place joining PW1 (Ezra Sasi Johanes). That while in the guard room, around 21:30 hours they noted someone to have entered into the guardroom and ordered them (himself and Ezra PW1) to sit down and that were under arrest. On that attention, Ezra courageously got up and switched on the inner lights. Then, other two men got in and the other two remained. In his recollection the said men were five in number. So, in the said room by that time, had been a total of five men (Ezra, PW2 and three men who were armed with pangas). They were then attacked by them unjustifiably. That himself was badly attacked and cut by panga on his head and hand where he was badly injured. In the course of the said invasion and attacking, he had managed to identify only two men out of five: Changa Changa Maheri and Chacha Mwita Changa. He had managed to identify those two because there was bright electricity light illuminating the scene very well and that he knows these two persons (accused persons) thoroughly as he is familiar with them and that they lived in the same village. He knows them for a long time, and that himself and those wrong doers (accused persons) are all born, grown up

and live in the same village. As who had cut him on his both injuries (head and hand) he named Changa Changa Maheri.

He described the incident to have lapsed for almost ten minutes. As they cried for help, and that as people delayed to attend their call for help; he had first escaped to the nearer bush for saving of his life. Shortly after, some people (rescuers) came to the scene including Matiko Nega. They took him to Nyamongo Police and later to Nyangoto Health Centre where he got first medical aid and later taken to Bugando Hospital. The first person he told him about the culprits was Mr. Andrew Thomas (his neighbour and also fellow villager).

WP9755 D/C Imaculata, testified as PW3. In her testimony she just stated how she investigated the case after being assigned so by her superior – OC CID. That in her investigation, she had noted the victims of this case (PW1 and PW2) were badly wounded by use of sharp objects (pangas) and the ones who were implicated with the said attacks were these accused persons. That the first accused person was arrested on 2/5/2021 but the second accused person was arrested on 13/5/2021 after they had intensified efforts to arrest him.

PW4 is Chacha (clinical Officer) working at Nyamwaga Hospital. He stated that he is the holder of Diploma in Clinical Medicine in which he graduated in 2014 at Mafinga Clinical Officer and Training Centre. He was employed in 2015. His duties as Clinician are attending sick patients, diagnosis, giving appropriate prescription, counselling, surgery and the medical examination. While on duty on 1st May, 2021 at night time, at Nyangoto Health Centre discharging his medical duties, he then received two victims: Ezra Sasi and Samwel Nyahili. The two had big cut wounds and were in critical condition. That in his recollection, Mr. Ezra Sasi had cut wounds on his left-hand, head and his left eye completely damaged. Mr. Samwel on the other hand, had big cut wounds on his head and was almost unconscious. The victims had PF3s with them, thus after he had offered them with first aid medication, and referred them to Bugando for further medications as they were in critical conditions and that they needed major examinations by MRI and CT scans which medical facilities were not available in any hospital within Mara Region by that time.

On 27/7/2021, he had received the medical information (discharge forms) from Bugando Hospital and used the said information to fill the remaining data into the said PF3s together with the earlier observations

he had in respect of the said victims and then accordingly filled the medical information into the respective PF3s. The same he tendered and were admitted as exhibits PE1 and PE2 respectively.

Following the evidence gathered from the prosecution via PW1-pw4, it was ruled that prosecution's case had been established sufficiently that needed the accused persons to give their testimony pursuant to section 293 (1) of the CPA as far as the prosecution's evidence pointing figure at both accused persons is concerned.

In his sworn defense testimony, Mr. Changa Changa Maheri (1st accused person), stated that on 1/5/2021 at 21:00 hours, he was just at his home Kewanja village. Thus, with these charges levelled against him in respect of the two offences, he disputed them as being a frivolous charge against him. Though he admitted to have also been a guard man of the said crime scene prior to the date of the incident, nevertheless, he denied to have been responsible with the said accusations. He just wondered to be arrested by Police on 2/5/2021 at his home associating him with this charge.

With what had been testified by the prosecution witnesses via PW1 and PW2, he denied them as being not true and that he disputes them. He thus prayed that he be acquitted just on this account of denial.

Mr. Chacha Mwita Changa @ Maheri who is the second accused person, testified as DW2. In his testimony, he admitted to have been living at Kewanja village in Kemando hamlet which is within Tarime District Council. He testified that on 13/5/2021, at 16:00 hours, he was arrested while at his home by hamlet chair by name of Matiko Nega Mwaturubani while in companion with Sasi Johanness who is the father of Ezra (PW1). That when he was arrested, he did not know what was he being accused of until on 14th May, 2021 when he was told so by police of Nyamwaga. He therefore disputed the charges being untrue against him. He challenged the testimony of PW1 as being openly contradictory on how he was identified. As he could not describe his dress code as he did to Changa Changa @ Maheri, how could he then be relied upon if he really saw him at the scene, he queried. On this account, he prayed that he be acquitted from these charges as they are not true. On this account, he stated that since the prosecution's case is weak, contradictory and not established beyond reasonable doubt, he prayed for acquittal from the charges. That was all for defense case.

In his closing submission, Mr. Magwayega learned advocate for both accused persons, bolstered that the prosecution have failed to discharge their mandatory legal duty of establishing the guilty of the duo accused persons beyond reasonable doubt pursuant to section 3 (a) of the TEA. *First*, he expounded that the incident happened at night time. As per circumstances of this case none, between PW1 and PW2 told the court on the power and intensity of the illuminating bulbs/lights. There was no any description of the accused persons' dress code. That as to him, this is a very serious deficient, relying to the famous case of **Waziri Amani** which insisted that for offences committed at night, there ought to have been a clear and full identification of the culprits and not partial. *Secondly*, is on contradiction. Whereas PW1 says the first person to enter into the room was the 1st accused person Changa Changa @ Maheri, PW2 utters a different story that he didn't know that guy who first entered the said guardroom. To him this is a serious contradiction. Further, on what PW4 had testified and the tendered exhibits PE1 and PE2, the culprits were not known. Moreover, he challenged the prosecution's evidence on credence in respect of the type of weapon used. Whereas PW1 says panga, PW4 in exhibit PE1 describes the weapon used as blunt object. Since panga is a sharp

object, Mr. Magwayega is of the view that PE1 exhibit is then contradictory to the testimony of PW1 which is in respect of the same offence.

On the side of prosecution's case, Ms Janeth Kisibo learned Senior State Attorney, submitted in her close submissions that their first and second witnesses (EZRA S/O SASI JOHANES -PW1 and SAMWEL S/O NYAHIRI WAMBURA - PW2) have established that the accused persons were identified at crime scene and the conditions were favourable for adequate and correct identification as required by law and by various decisions of the decided cases such as the case of **Waziri Amani vs Republic** (1980) TLR 250. Some of conditions for considerations in respect of this case are:

1. Familiarity between PW1, PW2 and the accused persons. They grew up together in the same village of Kewanja, PW1 was fellow Security Guard to first accused person.
2. Source of the light i.e it was night hours, however there were an electricity lights around the scene of crime especially inside the room and outside. The mentioned light was extensive and

powerful enough to view something which is at 7 paces (steps) away.

3. There was a minor distance between the accused persons and the witnesses as explained by PW1 and PW2 which was about one meter.
4. The incident took place for a long time. It took more than 10 minutes when PW1 and PW2 were being attacked by the accused persons.
5. PW1 described in detail the culprits he identified at the crime scene in terms of attire to the second accused who had worn a black jacket.
6. Participation of each accused person in commission of the crime was properly explained by PW1 and PW2, how each accused slashed the victims' bodies at the scene.

That PW1 and PW2 named the accused persons to PW1's father one SASI S/O JOHANES MAGUTU later on to the Police Officers, also PW2 mentioned the second accused rightly on the second day after he had gained conscious. It is trite law that the ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his

reliability in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry (See **Marwa Wangiti Mwita v Republic**, Criminal appeal No 6 of 1995).

The prosecution are of the firm view that they have succeeded in proving that both accused persons attempted to murder the victims vide the kind of injuries they caused and accused's utterance at the scene, of which it is clearly said **"leo tutawamaliza"**. The same is clearly shown vide first and second prosecution Exhibits which are their PF3s (of PW1 and PW2). Since the eye of PW1 was removed, he also suffered other three slashed injuries in his chest and left hand and that PW2 suffered one huge slashed injury on his forehead which resulted for him to undergo a heavy head surgery, as a result even when he was testifying, he was revealing indications of unfitness due to the said injuries.

Submitting on the issue of contradictions, she stated that it is the republic's humble submission that there is no material discrepancy in the whole of the prosecution case. The discrepancy and contradictions occurred; the same cannot corrode and shake the version of the prosecution as it does not touch the roots of the Prosecution evidence. This principle is well stated in the case of **Ridhiwani Nassoro Gendo vs Republic (criminal Appeal NO 201 of 2018) [2020] TZCA**

1790; (30 September 2020), citing a passage of the learned authors of Sarkar, The law of evidence 16th Edition, 2007 PG 19.

"Normally discrepancies in evidence are those which are due to normal/errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness maybe. Lies of the accused person may corroborate the prosecution's case"

She further submitted that in a case of **CHIKWID DENIS OKECHUKWU AND OTHERS VS REPUBLIC**, CRIMINAL APPEAL NO 507, PAGE 19 stated as follows:

"..... it has been the practice of the court when considering the question of discrepancies and inconsistencies of evidence, to look at serious discrepancies and consider them in wholesome. The court does not pick out some few sentences and consider them in wholesome"

In addition to that, she cited the case of **SAID ALLY AND OTHERS VS REPUBLIC**, CRIMINAL APPEAL NO 249 OF 2008 (UNREPORTED) has this to say about discrepancy;

"..... it is not every discrepancy in prosecution case that will cause the prosecution case to flop, it is only where the gist of the evidence is contradictory then the prosecution case will be dismantled".

With the current case, she added that there is no gist of evidence which contradict each other, the root of the case stands steady, and only occurred due to unstable mind of PW2 and due to lapse of time and material issues at the scene.

With credence to witnesses, she submitted that it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing the witness (see the case of **Goodluck Kyando vs Republic** [2006] TLR 363). Whether or not a witness is credible is a matter to be decided by the court on the basis of the evidence on record, in this particular case, it is the prosecution's humble submission that all 4 prosecution witnesses were credible and they are entitled to credence.

From the above submission backed up by legal authorities, it is the Republic's concern that the prosecution's case has been proved beyond reasonable doubt to mount conviction against the duo accused persons.

I have thoroughly digested the prosecution as well as the defense case in respect of these accusations against the accused persons. The vital question is only one, whether the prosecution's case has been proved beyond reasonable doubt as per law.

This being a criminal case, it is worthy and instructive at this stage, to look at what section 110 and 112 read together with section 3 (2) (a) of the Evidence Act [Cap 6 RE 2019] as far as the burden and standards of proof is concerned. These two concepts were interpreted in the case of **Woodmington Vs OPP**, (1935) AC 462. In the case of **Christian Kale & Another Vs. The Republic** (1992) T.L.R 302 CAT and **John Makorobera & Another Vs. The Republic** (2002) T.L.R 296, which insistently held that the accused person should only be convicted of an offence he is charged with on the basis of the strength of the prosecution case not on the weakness of the defence case. In line with this principle of burden and standard of proof, another important principle becomes necessary as enunciated in the case of the case of **Mariki George Ngendakumana Vs The Republic**, Criminal Appeal No. 353 of 2014 CAT - Bukoba (unreported), which inter alia held that:

"It is the principle of law that in Criminal Cases the duty of the prosecution is two folds, one to prove that the offence was committed, two that it is the accused person who committed it"

In this case, the accused persons are charged with two offences of attempted murder contrary to section 211 (a) of the Penal Code (supra). Under this law the prosecution was supposed to prove the followings:

- i. Evidence of the intention of unlawfully killing by the accused persons against **Ezra Sasi Johaness and Samwel Nyahili.**
- ii. Evidence how the accused persons began to employ the means to execute the unlawful intention of killing the victims.
- iii. Evidence of overt acts manifesting the accused persons' intention.
- iv. Evidence that proves intervening events which interrupted the accused persons' from fulfilling the main offence.

In this case PW1 and PW2 confidently suggest that the accused persons in this case are the ones who committed the duo offences of attempted murder as charged. Both PW1 and PW2 testified to have seen the two accused persons who are familiar with at the scene of crime while armed. PW1 says he first identified Chacha Mwita Changa when he just switched on the inner lights. Later, he saw Changa Changa Maheri. The two were amongst the four men who invaded the guard place. That PW1 was first attacked by Chacha Mwita Changa and later Changa Changa Maheri joined force and eventually injured on his left eye which

was then completely damaged. Pw2 says how he was attacked by Changa Changa Maheri by use of the panga weapon he inflicted on his head.

Both accused persons deny responsibility of the said charges. Each says was at his home. However, in consideration of the testimony of the prosecution case via PW1 and PW2, it is evidently clear that the two accused persons were clearly identified as culprits of the incident. I say so because, though the incident happened at night time, but there was sufficient intensive light illuminating the scene. Furthermore, there was short distance between the victims and the doers (about one meter) and there was conversation between them (PW1 and the second accused person). As if this is not enough, the incident lapsed for about ten minutes in which then there was much attention to what was going on. There was also a familiarity factor between the PW1 and PW2 on one hand and the accused persons. Worse of the story, both accused persons were spontaneously named by each witness which then made assurance of what they testified.

The only discrepancy was on the number of the invaders. Whereas PW1 mentioned the invaders being four, PW2 mentioned them being five.

It is trite law that every witness is entitled to credence and must be believed and his/her testimony accepted unless they are good and cogent reasons for not believing a witness. This is as per the case of **Mathias Bundala vs Republic**, Criminal appeal No. 62 of 2004 CAT at Mwanza where it approved the case of **Goodluck Kyando vs Republic** (2006) TLR 363, where the court held that:

"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless they are good and cogent reasons for not believing a witness".

I am aware that this incidence happened at day time and courts of law are warned while dealing with the issue of reliability of visual identification of suspects to consider the mode of identification. In the case of **Patrick Nabiswa v Republic**, Criminal Appeal No.80 of 1997 (unreported) the Court of Appeal of Kenya stated that:-

"This case reveals the problems posed by visual identification of suspects. This mode of identification is unreliable for the following reasons which are discussed in BLACKSTONE'S CRIMINAL PRACTICE, 1997, Section F.18

(a) Some person may have difficulty in distinguishing between different persons of only moderately similar appearance, and many witnesses to crime are able to see the perpetrators only fleetingly, often in very stressful circumstances;

(b) Visual memory may fade with the passage of time; and

(c) As is in the process of unconscious transference, a witness may confuse a face he recognized from the scene of the crime (it may be of an innocent person) with that of the offender."

In dealing with such glitches, a court of law needs to scrutinize and analyse with greatest care the evidence tendered on the issue to exclude the possibility of mistaken identification of a suspect. The factors affecting accurate of facial recognition includes: -

1. Shorter duration to the culprit
2. Relatively longer retention interval between the crime and the identification / the earliest opportunity to name the culprit.

In the instant case, the following criteria need to be applied when admitting eye witness testimony: -

1. Degree to which the eye witnesses paid attention to the culprit– both PW1 and PW2 testified how they saw the accused persons at the scene armed with pangas. They started attacking them by use of stones and later pangas. PW2 took a hide and further observed them.

2. Length of time on observation. This incidence appears to have survived for ten minutes. As per narration of facts by PW1 and PW2, it is undoubtful in the given circumstances if there was any mistake of identity.
3. Length of time between the occurrence of the crime and the reporting. It passed relatively shorter period between the occurrence and reporting of the incidence. PW1 is said to have reported first to his father upon his arrival at his home and shortly at police. PW2 on the other hand reported first to Mr. Matiko Nega and Mr. Andrew Thomas (his neighbour and also fellow villager) and later police on the same day.
4. The eye witnesses' identification certainty - how certain that it was the accused persons. As per PW1 and PW2's testimony looked so certain, steady and credible. Their demeanours could not suggest anything implanted or cooked and that they are familiar with the accused persons as fellow villagers and co-worker (PW1 and the first accused person).

5. The quality of the view the eye witnesses had.... i.e. though night time, but there was bright intensity lights which sufficiently illuminated the venue and the objects without any doubt to the closeness of the distance they had been.

Based on the fore mentioned criteria, I'm confident that the visual identification could have not been impedimental to the seeing witnesses who must have identified this accused persons correctly. In the case of **Riziki Method Myumbo v R, 2007**, the first appellate judge held that:-

"Visual identification is a class of evidence that is vulnerable to mistake, particularly in the conditions of darkness. Courts must, as a rule of prudence, exercise caution in relying on such evidence. It may result in a substantial miscarriage of justice."

In fact, I'm aware that for the criminal incidences happening at nights, courts should be very clear with the aiding factors favouring correct visual identification of the culprits in clearing danger of mistake of identity (See **Waziri Amani v. Republic** [1980] TLR 250; **Michael Godwin & Another v. Republic**, CAT-Criminal Appeal No. 66 of 2002;

and **Florence Athanas @ Baba Ali v. Republic**, CAT-Criminal Appeal No. 438 of 2016 all unreported). In the instant case, I have sufficiently warned myself that in the circumstances of this case, there was no such mistaken identity of the accused persons. To rule otherwise, is to do injustice to criminal justice, in which I am not in a position to condone it.

In law contradictions and inconsistencies in the witness's statement or testimony can only be considered adversely if they are fundamental. Errors of observation, memory failure due to passage of time, panic and horror are considered to be of trifling effect and those are to be ignored (see **Sylvester Stephano v. Republic**, CAT-Criminal Appeal No. 527 of 2016 (Arusha-unreported). In **Luziro s/o Sichone v. Republic**, Criminal Appeal No. 231 of 2010 (unreported), the Court of Appeal held:

"We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case, minor discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded. It is only fundamental discrepancies going to discredit the witness which count."

The foregoing position underscores the splendid position propounded by the Court of Appeal of Tanzania in **Dickson Elia**

Nsamba Shapurata & Another v. Republic, CAT - Criminal Appeal No. 92 of 2007 (unreported) in which the learned Justices quoted the passage in Sarkar's Code of Civil Procedure Code. It was held as follows:

"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to material disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case material discrepancies do."

In **Mukami w/o Wankyo v. Republic** [1990] TLR, the Court of Appeal took the view that contradictions which do not affect the central story are considered to be immaterial. Looking at the contradictions purportedly raised by the PW1 as argued by Mr. Magwayega learned advocate, I am tempted to hold that they are, by their very own nature, ones that are not fundamental that they affect the central story. They corrode nothing on the credibility of the prosecution's case which was built on the evidence of two witnesses who also said to have seen the accused persons at the scene attacking them. That they failed to identify their dress code at the scene has not been an important ingredient of establishing identification of the accused person at the

scene if all other things were well captured and told. On the issue of the weapon used, whether the said panga was blunt or sharp is immaterial on the issue of number of attackers being four or five is equally not a material discrepancy. That a minor to my view assures the health of oral testimony and that has not rehearsed the evidence before testifying (see **Masanja Mazambi vs Republic** (1991) TLR 200 and **Onesmo Laurent @ Salikoki vs Republic**, Criminal Appeal No 458 of 2018, CAT at Moshi).

Whether the said victims (PW1 and PW2) were actually injured, the testimony of PW1, PW2 and PW4 is abundantly clear on that. PW1 amongst other injuries, his left eye chopped in and is permanently disabled (PE1 Exhibit). With PW2, it is also clear that he had a deep cut wound involving skull (Deep cut wound/head at mid *fontanelle* with permanent disability) by sharp object (PE2 exhibit is clear on that).

The next question to consider is whether those who injured the victims (PW1 and PW2) had the intention of unlawfully attempting to kill them. The offence of attempted murder in the ambit of section 211 (a) of the Penal Code encompasses doing any act or omitting to do any act which act or omission unlawfully is then likely to endanger human life. In the case of **Boniface Fidelis @ Abel Vs. Republic**, Criminal Appeal

No. 301 of 2014, CAT at Arusha, held that the offence of attempted murder is not a stand-alone offence. It must be read together with section **380(1) of the Penal Code**. It is one of the offences that has not gained independence from section 380(1) of the Penal Code. The said section 380(1) of the Penal Code, has the following wording:

*380.-(1) When a person; **intending to commit an offence, begins to put his intention into execution** by means adapted to its fulfilment, and **manifests his intention by some overt act** but does not fulfil his intention to such extent as to commit the offence, he is deemed to attempt 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 fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.*[Emphasis added]

It seems according to this section, there are four essential ingredients of attempted murder that can be discerned from section 211 (a) read together with section 380. **Firstly**, proof of intention to commit the main offence of murder. **Secondly**, evidence to prove how the accused persons begun to employ the means to execute his intention. **Thirdly**, evidence that proves overt acts which manifests the appellant's

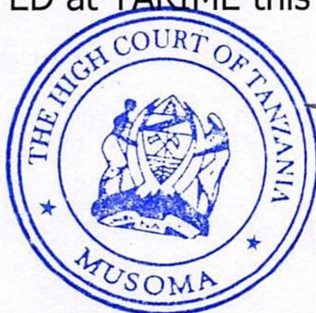
intention. **Fourthly**, evidence proving an intervening event, which interrupted the appellant from fulfilling his main offence, to such extent if there was no such interruption, the main offence of murder would surely have been committed.

In the instant case, we have seen the evidence of intention to commit the main offence of murder. That has been established by the invasion of the accused persons at the scene armed with pangas and utterance of words: "**leo tutawamaliza**" against the victims. From that point, the overt act started being executed by the accused persons by attacking the victims seriously on dangerous parts of their bodies; on heads and eye. The overt acts by the accused persons which manifest the accused persons' intention (see exhibits PE1 and PE2) which establish how the victims were badly endangered. That in the course of execution of the accused persons' intention against the victims and the manifestation of the overt acts, there was an interruption by the victims' running in escape of their lives from the scene in which were then rescued by first aid medication at Nyangoto health centre and later at Bugando Medical Centre. Had there not been these interruptions by escape from the scene and prompt education chances of survival were

minimal in the circumstances of this case (as per exhibits PE1 and PE2) and physical injuries identified to the victims (PW1 and PW2).

With all these explanations, I conclude by saying that the prosecution's case has been proved beyond reasonable doubt that what was committed was really attempted murder as per law, and that the victims narrowly escaped their death as per the injuries occasioned and that it is these accused persons who are responsible. However, as per available evidence, the first accused person is guilty for both counts (as he endangered both victims and as for accused person Chacha Mwita Changa, he is guilty for the 1st count only. That said, I hereby enter conviction against all the accused persons as for offences of attempted murder as follows: Mr. Changa Changa Maheri is convicted to both counts; and Mr. Chacha Mwita Changa is convicted for the first count only. I so find and order.

DATED at TARIME this 20th day of December, 2022.



F. H. Mahimbali
JUDGE

Court: In consideration of the aggravating factors for the prosecution, I am of the considered view that, the offence committed is grave one. The weapons used, areas of inflictions and the injuries occasioned the convicts deserve a stiff penalty.

According to law, an offence of attempted murder is punishable up to life sentence in prison. Since the convicts are first offenders, I sentence them as follows.

First accused:

- For the first count he is sentenced to serve custodial sentence of eight years.
- For second count, eight years as well.

As regards to the 2nd convict, Changa Mwita Chacha who has been convicted for the first count only, he is sentenced to serve a custodial sentence of eight years.



F. H. Mahimbali
JUDGE


On top of that, the Mr. Changa Changa Maheri shall pay a compensation to the first victim Ezra a sum of 2,000,000/= and to the second victim – Samwel Nyahili a sum of 2,000,000/= as well.

Mr. Changa Mwita Changa (2nd convict), shall pay a total sum of 2,000,000/= to the first victim Mr. Ezra.




F. H. Mahimbali
JUDGE

Right to appeal against conviction, sentence and compensation order, is hereby explained to any aggrieved party.


F. H. Mahimbali
Judge

