

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

SITTING AT SHINYANGA

CRIMINAL SESSION NO 13 OF 2020

THE REPUBLIC

VERSUS

PAULO CHACHA @ MANG'ENYI..... 1ST ACCUSED

MARWA MIKWABE.....2ND ACCUSED

JUDGEMENT

15th & 30th November, 2022

NDUNGURU, J:

The accused persons Paulo Chacha @ Mang'enyi and Marwa Mikwabe were charged with two counts the 1st count of the offences of Attempted to murder contrary to section 211 (a) and 2nd count is Acts Intended to cause Grievous Harm contrary to section 222 (a) of the Penal Code, [Cap. 16 R.E 2002]. The offence stated in particulars of the offences that, both accused persons on 31st day of December 2018 at Misoza Bar Village within Bariadi District in Simiyu Region did attempt to murder one Juma s/o Handa, and on the same date at the same place within Bariadi District in Simiyu Region with intend to disfigure using a sharp object did

unlawful cut the left hand of Buluda s/o Mabula and caused grievous harm to him. Accused Persons denied to commit the offence.

On 24/11/2020 when the court conducted the Plea taking and Preliminary hearing, prosecution adduced the facts of the case by stating that on 31/12/2018 at Misoza bar there was a dance of which people were supposed to pay for entry fee the music hall. Accused Persons were among persons forced to enter free which made the victim to notify to the manager of the bar informing him that accused persons forcefully entered the bar/music hall unpaid.

The manager intervened and followed them and asked them to get outside the hall, confrontation occurred between the accused persons and the victim, the accused persons hit the victim with bottle of beer. As they were forced to get out, while out, they attacked the victim using a panga and cut him on different parties of his body. They then ran away from the incident. The matter was reported to police and the victim was taken to hospital for treatment.

Investigation mounted and the police managed to arrest all accused persons. When interrogated, they admitted to commit the offence. On 14/01/2019 they were arraigned at Bariadi District Court.

During the trial, the Republic was represented by Ms. Rehema Sakafu assisted by Ms. Safi Kashindi both State Attorneys while Mr. Frank Samweli learned advocate was for the accused persons. To prove the information against the accused persons the Republic called four witnesses **Juma Handa** (the victim), **John Andrew** (Manager of the Bar/Music Hall), **Hassan Mrisho Kivugo** (Medical Officer) and **PF. 22301 A/INSP** (Police Officer) whilst the defence side had two witnesses **Paulo Chacha @ Mang'anyi** and **Marwa Mwikwabe** (defending themselves).

The summary of evidence for the prosecution started with **PW1 Juma Handa** (the victim). He informed the court that he is a resident of Bariadi dealing with Music also is a mobile phone technician. He testified that on 31/12/2018 at about 23:00hrs he was at Misoza Bar which is located at Bariadi, he said he was a gateman receiving entry fee to music hall. At the gate he was with Ema and Maghembe Nyeye. While receiving payments, accused persons came asking him to enter free into the hall, he said he demanded them to pay the entry fee instead, they pushed him and forcefully entered the hall without payment.

He went on saying that the 1st accused had carried a black bag while the 2nd accused entered with battles of beer. The Manager of the bar

asked him why he allowed people to enter the bar with the bag, he said upon being asked by the manager, he entered into the hall found the accused persons and told them to get out. They denied, then the 2nd accused picked a bottle of beer and hit PW1 in his head, he started bleeding. The people who were in the dancing hall intervened by taking the accused persons out, while the victim was at the gate looking to be taken to hospital. One Buluda came there and asked him why he was bleeding, he told him that, he was injured by accused persons. While still talking, accused persons came again. They pushed him down. The 1st accused picked a panga which he had in the bag he wanted to cut the victim into his neck, as he protected himself with his left hand accused managed to cut his one finger. He said he pushed Marwa who had caught him tightly, he rushed to get back to the hall. The 2nd accused followed him and cut him with a panga on his right hand, he fallen down bleeding. He was taken to Police Station.

He further testified that, he knew the accused persons even before the event, they used to visit their friend who was his neighbor at his living place and they sometimes used to attend at night there. He said, he identified them as there was a strong electric light at the place with strong white light not coloured and when they injured him, he was very close to

them just one pace. The whole event from forcing to enter the hall, hit him with the battle, taken out and cutting him with a panga took almost 30 minutes.

He said after the incident he went to Somanda Hospital where he received treatment. He identified the accused persons by pointing fingers to them on the dock.

PW2 John Andrew Masunga, he is the owner of Masoza bar he deals with selling beer, water, soda and other drinks. He testified that on 31/12/2018 at about 23:00hrs his bar had music and drinks, he said he set the entry price fee in music hall at Tshs. 2,000, the victim was assigned to collect the entry fee assisted by Emma.

He stated that while he was in the hall, he saw two men had entered carrying bags and bottles of beer. Upon seeing those men, he went to PW1 and asked him why did he allow them to enter with bags and bottles of beer and play with bottles of beer in their hands. He said the victim told him that they forced to enter and have not paid fee, thereafter the victim entered into the hall to take them out, but could not manage as accused persons resisted to get out. He said the 2nd accused person is a person who hit the victim with a bottle of beer. He identified him by the aid of strong electric light.

PW2 went on telling the court that when they managed to take the accused outside, the victim was outside the gate, the 2nd accused went again to the victim and held him tightly, while the 1st accused person who had a bag picked a panga and wounded the victim by cutting him the finger of the left hand, and wounded him on the light arm.

He further said that in the course of the event, one Buluda appeared and tried to intervene to the arrest 1st accused, he also was injured. They managed to take the victim to hospital. He said he was not too far from the event, at the scene there was electric light lump for security purpose and the event took place almost thirty minutes.

When crossed examined, he testified that accused persons were arrested while they were at their home on the very night.

PW3 Hassan Mrisho Kivugo a medical Officer at Itilima District Council who when the event occurred in 2018, he was working at Somanda Hospital. He said on 31/12/2018 at night he received a patient one Juma (the victim) who had a severe cut wound in various parts of his body including on head, left and light hand with severe pain chest and the wounds were bleeding.

He told the court that he treated the victim by protecting the blood wounds from bleeding by doing a surgery. He then conducted an X-ray which revealed the right hand was broken. In his investigation, he said the wound was caused by sharp object and the wounds were fresh as the blood was still oozing.

He ended by testifying that the front arm had wounds and fractures at both bones. He filled the PF3 then returned it to Police. He tendered the PF3 which the court admitted as **Exhibit P1**.

PW4 was **A/INSP Ame Makeme Omari**. A Police officer. His evidence is on how he investigated the case. He informed the court that on 02/01/2019 at about 8:00 am he was assigned the case file with No. **NBRD/R/2219 of 2018** with the offence of grievous harm for investigation. The suspects were the accused persons who were already arrested.

He said that the offence happened on 31/12/2018 at about 23:20 at Misoza Bar Bariadi. When interrogated they admitted to wound the victim Juma Handa and Buluda Mabula. He testified that on 01/01/2019 he went to Somanda Hospital to visit the victim. They found the victim had wounds on head, right arm and left hand, on interrogating the victim he told him that at the material date and time he was at Misoza

Bar he was wounded by the guys who forced to enter into the dancing hall without payment, they attacked him and wounded him. PW4 said he recorded the statement of the victim then sent it to the office of the State Attorney In charge.

When cross examined, he said that the accused used a panga but the said panga was not brought before the court as exhibit.

Paulo Chacha gave his evidence as DW1. He denied to commit the offence by saying that it is not true that he caused grievous harm to Juma. He said, on 31/12.2018 he woke up early in the morning went to his daily duties as he by then was a "*machinga*". He said at 6:00am he went back home and went to bed, at 23:00hrs, went policemen with 8 persons he managed to know one person Emmanuel who was a friend of Juma (the victim). He said he knocked the door and he was arrested and was taken to Police. When reached at the Police station, he said he was asked where was a panga, he respondent he didn't have it. He was beaten. Being beaten he signed something which he did not agree.

He went on informing the court that he knew Emma, he met him for the first time at Bariadi town where he was living with Juma. He was living at the same street (mtaa). He ended by saying that Emma used to seduced his wife when he is at his job.

DW2 was **Marwa Mwikwabe**. His testimony was that he is a suspected of attempting to kill Juma Handa (the Victim) the allegation which is not true. He said on 31/12/2018 he went to his business with the 1st accused uncle. He said he arrived at his home at about 06:00pm. He took bath then entered on bed, at night police arrived at their home he was arrested without knowing the reasons for the arrest.

He informed the court that when he was taken to police where he was beaten forcing him to admit to have caused grievous harm to Juma, but he denied that he had never gone to bar called Misoza. But what he knows is that PW1 had a dispute with his uncle (DW1) as he was told by his uncle that there Juma and Emma were following his wife. He therefore prayed the court find the evidence tendered by prosecution as a lie because he had not committed the offence. DW2 ended his defence.

Being the end of the Prosecution and defence case, the ball is left rolling for the court to decide on whether the prosecution has discharged his noble duty. The court in its decision will deal with the main issue that is, whether the prosecution has managed to prove the case to the standards required by the law. Now for this matter, my determination the bellow formulated issues will assist to arrive at the main issue raised above;

- i. Whether the accused persons Paulo Chacha @ Mang'enyi and Marwa Mwikwabe attempted to murder one Juma Handa.
- ii. Whether the prosecution proved the case that the accused person with intention acted to cause grievous harm to Buluda Mabula.

I will start with the first issue that "*Whether the accused persons attempted to murder the victim*". The attempted murder is the statutory offence created under section 211 of the Penal Code. For the offence to be proved, the prosecution has to give evidence which establish all the ingredients of the offence. these are (i) intention to commit the main offence of Murder (ii) how the accused began to employ the means to execute the intention, (iii) overt act which manifest the intention and (iv) an intervening event.

All prosecution witnesses have testified the accused attacked the victim (PW1) on how hitting with bottles of beer on head and cut with panga on both hands. This testimony of PW1, PW2 PW3 and PW4 and the same was backed by the PF3 (Exhibit P1).

It is evident from the evidence of PW1 (the victim) that on 31/12/2028 at about 23:00hrs he was at Misoza Bar as a guardsman of the gate and at the same time collecting the entry fee for entering into the bar, on that material date the bar was providing music. While there

at the gate collecting entry fee, accused persons pushed him and forcefully entered the hall without payment. When they entered in the hall, they carried bottles. The manager of the bar ordered PW1 to take them out, they denied then 2nd accused picked a bottle of beer and hit the victim on his head which injured him.

He said, people managed to intervene and take them out. While outside 1st accused picked a panga which was in his bag intending to cut the victim on his neck, fortunately while protecting himself he was cut on his fingers. 1st accused caught him tightly and cut him with a panga on his right hand, he fell down bleeding, he was taken to police then to hospital.

PW2 proved the same that on the material date and time he saw the accused persons entered the music hall with a bag and bottles of beer. He said he asked PW1 why he allowed them to enter with a bag and the bottles of beer, he was told by the victim that they forced to enter and they did not pay the entry fee. The victim entered the hall to take them out but they resisted. They did hit him with a bottle on his head. They were taken them out. While outside the hall, and victim went at the gate, 2nd accused held the victim firmly then the 1st accused who had a panga picked it and cut the victim on his fingers and wounded the victim on his right hand. The victim was taken to hospital.

PW3 is a medical officer who attended the victim at Somanda Hospital. His testimony is to the effect that on 31/12/2018 he received the victim one Juma who had severe/big wounds in various parts of the body including on his head, left and right hand with a severe pain chest. He said the wound were severely bleeding. And when examined and conducted the X ray test, it revealed the right hand was broken with an open fracture at the front arm of both bones.

PW3 proved that PW1 was injured and he tendered exhibit P1 (the PF3). The PF3 (Exh P1) revealed that the patient had multiple cut wounds in left hand, chest and right fore arm which had heavy bleeding, muscle cut deep, bones fracture and the X-ray revealed victim had broken arms.

The evidence of PW4 is that on 01/01/2019 he went to Somanda Hospital to visit the victim. He found the victim with wounds on his head, right and left hand. When interrogated him he was told that on 31/12/2018 at 23:00hrs while he was at Misoza Bar he was wounded by the accused persons.

The evidence on record revealed who injured the victim has been established by only two witnesses PW1 and PW2. These are the witnesses who were present when the accused persons wounded the victim at Misoza Bar/music hall). More specific the evidence of PW1 (a victim of the

situation) that accused persons entered the music hall and they attacked and injured him later he was taken to hospital. The evidence of PW1 is to the effect that that accused reached at Misoza Bar/Music Hall, they forced to enter the hall, when they were noticed to have a bag and bottles in their hands they were taken out, in the process, they attacked PW1 with bottles on his head again when they were dragged out, they again attacked and wounded the victim on the different parties of his body by using a panga.

PW2 the Bar/music hall manager, he proved that accused persons are the ones who entered in the bar/music hall he tried to prevent them from entering a hall with a bag meanwhile held bottles of beer in their hands. He said, the accused persons attacked the victim with a bottle of beer and cut the him with a panga. The evidence available is that the victim was wounded at about 23:00 hours. That is at night. The question that arises is whether the accused persons were properly identified. The task job to me at this moment is to prove if the said PW1 and PW2 managed to identify the accused persons attacking the victim at the moment when the event occurred. I underscore the principles established and couched the by the court on how to determine the issue of identification.

In determining this issue at hand, I subscribe the position stated by the Court of Appeal in the case of **Mussa Mbwaga V. R**, Criminal Appeal No. 39 of 2013 (CAT-Mbeya) (unreported), which at Page 10 of 15 stated:

*"In addition to the much-cited guidelines from the case of **Waziri Amani V. Republic**, (1980) TLR 250, subsequent decisions of the Court of Appeal have enlightened further, leading to a considered view that the said guidelines are not (mwarobaini)' to all cases of this kind. It is worth noting further that those guidelines need to be given a purposive interpretation as circumstances of each case determine the fate of the parties involved. Therefore, those guidelines ought to be considered objectively. Generally, the court should consider the following before arriving at its decision:-*

- *The kind of light that existed and its intensity.*
- *Time taken by the witness to have the accused person under his/her observation.*
- *The distance between the assailant and his victim.*
- *Whether the victim knew the assailant before the fateful moment. If so, when and how often.*
- *The whole evidence considered, were there any material impediments or discrepancies, affecting correct identification of the assailant by the witness.*
- *In the course of such observation of the assailant by the witness was there any obstruction experienced by the witness"*

Looking the above guideline on issue of identification, I find it is pertinent the evidence of PW1 and PW2 complied with the guideline stipulated in the cited case above. I test the guidelines basing the evidence established by the prosecution witnesses specifically PW1 and PW2 qualified the principle in the guideline as hereunder I am about to state;

One, the evidence of PW1 and PW2 is to the effect that the event occurred about 23:00hrs. In their evidence told the court that both identified the accused persons attacking the victim as there was a strong electric light at the place. This fact proves that the environment favoured proper identification of the accused persons.

Two, both PW1 and PW2 proved that the time from when the accused persons came at the scene, forced to enter the hall, hit the victim, when taken out and cut the victim with a panga took almost 30 (thirty) minutes. The time of 30 minutes in confrontation between the accused persons and PW1 and PW2 were enough time to identify the accused.

Three, the regards the distance between the accused and the victim, PW1 informed the court that when he was injured, he was very close to the accused persons they were almost at one pace, the distance which was favorable for the witness to identify the accused persons.

Fourth, it is in record from the testimony of PW1 that he knew the accused person even before the event, they used to visit their friend who is the victim's neighbor at a place he was living and sometime used to attend there at night. In other way, accused persons in their defence informed the court that they knew the victim Juma. For instance, DW1 told the court that he knew EMMA, he met him for the first time at Bariadi Town where he was living with Juma they were living at the same street, Emma used to seduce his wife when he was at his job.

Fifth, it has been established by PW1 and PW2 that when the accused persons attacked the victim there was strong electric light. There was no any impediment to prevent the witnesses to identify accused person wounding the victim. I find nothing obstructed the witness to identify the accused person attacking the victim which by cutting with a panga in several parties of his body. I therefore, basing on the above finding and the evidence, without any coulour of doubt, the prosecution has proved that accused persons are the ones who wounded the victim.

Now, whether the accused persons with malice aforethought attempted to murder the victim Juma Handa. As this case is a criminal case, it is trite law that the burden to prove the case is lying in the hands of the prosecution side. In this case therefore the prosecutions cannot skip to

establish all essential elements to prove the offence of attempted murder.

The Court of Appeal in **Bonifas Fidelis @ Abel V. The Republic**, Criminal Appeal No 301 of 2014 as follows.

- (i) *intention to commit the main offence of murder.*
- (ii) *how the accused begun to employ the means to execute his "intention.*
- (iii) *An overt act which manifets the accused intention.*
- (iv) *an intervening event, which interrupted the accused from fulfilling his main offence*

Basing on the authority above, it is the duty of this court to look the evidence/testimonies of the prosecution witnesses and find whether they complied the above essential ingredients of attempted murder as stipulated under section 211 (a) of the Penal Code have been proved. I have had an ample time to read between the lines the testimony of the Prosecution witnesses and as I have said above, the eye witnesses who were present when the accused persons attacked the victim are the victim himself and PW2, therefore my task will be assessing their evidence if they managed to prove the essential ingredients of attempted murder. The main and essential ingredient is intention. In evaluating the evidence, I find no cogent evidence tried to establish the intention of an accused persons, this made me look at the conducts of accused persons since they entered the Bar/music hall to the time when they attacked the victim.

The evidence of PW1 and PW2 is to the effect that, at the material time, PW1 was at the gate of Misoza Bar and music hall collecting entry fee, accused persons forced and entered the music hall without payment leaving the victim at the gate. While they were inside, PW2 saw them with a bag and carried bottles of beer in their hands dancing. Upon seen them with those staffs in their hands, PW2 went to victim and asked him why he did allow them to enter the hall with a bag and bottles.

The evidence available is that they force to enter the hall without paying the entry fee. The victim entered into the hall to take them out, accused persons rejected, the did hit the victim with a bottle of beer on his head later they cut the victim with a panga which they had in their hand.

Now, the test is whether accused persons were attempted to murder the victim. I find the prosecution's evidence has some pitfall to establish that accused attempted to murder the victim. In considering the conduct of the accused persons since entered Misoza Bar/music hall, they forcefully entered the hali without paying the entry fee and entered, leaving the victim at the gate. The act of passing through the gate without attacking the victim when they were at the gate is too far to establish that accused

had intention to murder the accused, it could be that they could attempted to murder even before entered the hall.

More also, PW2 notified the court that he noted that accused had entered in the hall carrying a bag and bottles of beer dancing, he found it was dangerous to dancing with a bag and holding the bottles of beer in hands, he decided to tell the victim to take them out, they resisted and when they tried to force it is when they attacked the victim. This fact also raises a pitfall to prove the intention of the accused persons.

The allegation that accused person to have the bag and bottles of beer in hands passing the gate without paying the entry fee is not a good ground that they were preparing to attack the victim. The fact that when they entered the hall continued with dancing without disturbing any person in the hall justify that the accused persons had no intention to harm the victim. PW1 and PW2 evidence is to the effect that people who were there prevented the accused to continue with the act of attacking the victim.

As for these findings, the prosecution has failed to establish the essential elements of the offence of an attempted murder above. Consequently, accused persons is found not guilty to the offence of attempted murder.

It is my findings that though the prosecution failed to prove that essential ingredients of attempted murder under section 211 (a) of the Penal Code, but in length of my discussion it is clear that the prosecution proved that accused person harmed the victim. I have directed my mind basing on the facts that the act of the accused persons to harm the victim by using bottles of beer and the panga which then caused wounds in the several parties of the victim's body is unlawful act and is prohibited by the law of the land. The law under section 300 of the Criminal Procedure Act Cap 20 R:E 2022 provides that,

-300.- (1) Where a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) Where a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

(3) For the purpose of this section, the offences specified in section 222 of the Penal Code shall, where a person is charged with the offence of attempted

murder under section 211 thereof, be deemed to be minor offences.

In this particular case accused persons were charged with the offence under section 211 (a) which have been not proved, but the evidence proved that the said accused persons committed the offence under Section 222 of the Penal Code, provides;

*222- Any person who, with intent to maim, disfigure or disable any person or **to do some grievous harm to any person** or to resist or prevent the lawful arrest or detention of any person-*

*(a) **unlawfully wounds or does any grievous harm to any person by any means whatever;***

It is with those findings, the prosecution proved that the accused persons wounded the victim, I therefore convict them for their act to cause grievous harm to the victim contrary to Section 222 of the Penal Code Cap (16 R.E 2022).

The last issue that whether the prosecution proved the case that accused persons with intention acted to cause grievous harm to Buluda Mabula. In this aspect the prosecution has never tendered any evidence. Nor the victim was called to testify. In the case **Aziz Abdalla v. Republic**, (1991) T.L.R. 71 as observed that;

".....the Prosecution is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. In my view, where such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the Prosecution"

The issue and allegation that Buluda Masunga was attacked and injured has never been proved. No witness was called to testify the same even the alleged victim was never called to testify on the allegations. I proceed to dismiss it and find accused persons not guilty to the second count as charged but they will remain with the conviction under section 222 (1) of the Penal Code Cap 16.



It is so ordered,


D.B. Ndunguru
Judge
30/11/2022

COURT: Right of appeal explained.


D.B. Ndunguru
Judge
30/11/2022