

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

(AT SONGEA)

ORIGINAL JURISDICTION

CRIMINAL SESSION CASE NO. 5 OF 2021

THE REPUBLIC

VERSUS

FADHILI CHENGULA

JUDGEMENT

18.03.2022 & 01.04.2022

U. E. Madeha, J.

Fadhili Chengula, being the accused person is charged with the offence of attempt to murder contrary to section 211(a) of the Penal Code Cap [16 R.E. 2019]. The incident occurred on 09.04.2013 at the Ruhuwiko area within Songea Municipality in Ruvuma Region. The accused person is said to have attempted to murder Yuvensia Mlaponi. The accused denied the charge, hence, in a bid to prove the charge against the accused person, the prosecution paraded five (05) witnesses and tendered (01) exhibit that is the

victim's PF3. The evidence testified by the prosecution can be briefly summarized as follows.

PW1 Yuvensia Mlaponi in her testimony testified to the effect that; she went to the Mazense market on 06.4.2013. On her way, she met the Accused alongside Shinyanga Road. The Accused was in dire need of the company of PW1 so as to seat down and have a talk, PW1 ignored the Accused's request and continued with her journey. On the same day in the evening, the Accused was moving around the areas of the Anglican church. The Accused requested to talk to PW1 for the second time. Unfortunately, PW1 refused and resumed her journey. On 08.04.2013, PW1 met the Accused again. Nothing terrible happened. On 09.04. 2013 at around 09 pm, PW1 met the Accused again at Mazense market premises. They agreed to talk and immediately the Accused asked PW1 to go somewhere and have a talk. PW1 accepted the request. Thereafter, the Accused told PW1 to go to Ruhuwiko Street with the aim of socializing and greeting their grandmother. They boarded a Toyota Hiace and began their journey to greet the Accused's grandmother at Ruhuwiko. Immediately after arriving at Ruhuwiko, the Accused instead of going straight forward to greet the Accused's grandmother as scheduled earlier, the accused told PW1 to go to the field to

harvest some maize which was not planned earlier. They started moving towards the Accused's farm. On their way to the Accused farms, they began to leave the settlements behind and went further into the bushes that are in the middle of nowhere. As soon as they arrived in the field then the Accused strangled PW1. Thereafter, PW1 lost consciousness and when she wake up in the evening, she found herself naked. Her clothes were thrown there. She saw her underwear around. She heard the voices of people who told her that they were there to rescue her, who were later identified to be PW2, PW3, and PW4.

PW2: Hamadi Ismail, resides at London in Songea. He collects Ulanzi as his source of income at the edge of the river Ruvuma. On 09.4.2013, he was on his way to cut down the bamboo tree at the banks of the Ruvuma River. It was around six o'clock in the evening when he arrived in the bush. He was shocked to find PW1 asleep. He realized that the woman lying there was abused and naked to the extent that her breasts were visible that is could be seen with empty eyes. Later on, he immediately left the place and met Andrea. He narrated what he had seen and told him everything. He told him about a woman lying lifelessly in taller grasses. Unfortunately, he was not in a position to know if she was healthy or not. They immediately went to report

the matter to the village's government. Two more people appeared and returned to the scene. It was already night so they used a torch to view because it was very dark. Upon arriving at the scene, they took the victim and left her with the Village chairperson.

PW3: Andrea Mahaiki, on his sworn evidence, he stated that he was a journalist working for Uhuru Media Group and writing for Uhuru newspaper. On 09.04.2013 in the evening, he received terrible news from PW2 that one sister had died and was thrown by the river bank. He thought it was the best idea to search around the area for their safety, but before going to the scene, he decided that the information should be forwarded and reported to the village government. He was accompanied by four (04) people to the scene. After arriving at the scene, they heard a voice screaming that you have come to finish me. With the help of the torch's flashlight, they were in a good position to see a naked woman. The naked woman was scared but they told her that they were good Samaritans who had come to rescue her in the middle of nowhere because it was a dark night. For the sake of her dignity, they directed the woman who had accompanied them to give her clothes so as to cover herself. She was lamenting of a sore throat which made her feel pain in her body. She told them that she had been hurt by one person named

Fadhili (the Accused). The Accused had left with the victim's phone. They took that woman to the village chairman. Later on, they went to the police station after calling her parents. At the police station, they heard PW1 complaining of pain in her throat and tongue. She was provided with PF3 and taken to the hospital for a check-up and doctor's consultation.

PW4: William Milanzi, was a dweller in Bombambili at that time. In his testimony, he said that PW1 was aged twenty (20) years old by then. He was called at around 19:00 hours by PW2 who phoned him and asked if he knew PW1 or knows her whereabouts. He went further by informing him that she was at London Street whereby she was in critical condition feeling very bad. He went to pick her up at the police station. PW2 told PW4 that he was the source of information. On his way to scrape Ulanzi at the river bank, he found PW1 lying lifelessly in a critical condition. They took PW1 to the nearby police station where she wrote down her statement. She stated that, she had been injured by the Accused who stabbed her in the neck and throat. She was injured by a man named Fadhili. That, the inhuman act left her with a sore throat. He mentioned the Accused who wanted her to join him on his way to pay a visit and see his grandmother. Suddenly on their way the Accused changed the direction by turning around in a second and

strangled her. Instead of going to the Accused's grandmother as agreed earlier, they went into the woods and taller grass when the Accused satisfied that he had left the human settlement far from where they were in the middle of taller grass and woods, he decided to surprise her. They later went to the hospital to get oral medication to cure her sore throat.

PW5: Dr. Benedicto Ngaiza, in his testimony, confirmed to have examined the body of PW1 and stated majestically that he only saw bruises in the area around the neck, head, and tongue. Dr Ngaiza further agreed to have filled the PF3. Upon examination, he realized that the victim had been injured by a blunt object so the victim (PW1) had no serious injuries. He tendered PF3, and it was marked as exhibit **P1**.

That was all with the prosecution case. The Court ruled that the accused has the case to answer to the charge, and he elected to defend himself.

DW1 Fadhili Changula, said that he had never set his eyes or met the Complainant anywhere under the sun and denied all the allegations alleged by the prosecution side. He said that he did not stab PW1 with the sharp object. He said that the prosecution's evidence is inconsistent because all the witnesses are lying and deceiving the court. That the prosecution

witnesses testified that the victim was not seriously injured and had bruises. In relation to the exhibit, there was no chain of custody indicating the preservation of the PF3. The doctor's evidence indicated that the victim was injured by a blunt object. His testimony was not true. He further argued the court should disregard the prosecution's evidence.

Briefly, that is the summary of evidence by the two sides, that is, for the prosecution and for the defence. On the basis of that evidence, this Court will now move to analyse if the prosecution has established the accused person guilty to the required standards.

Thus, in the present matter, where the accused person is charged with the offence of attempted murder, the prosecution is duty-bound to prove the following issues;

1. Whether the offence committed by the accused amounted to attempted murder.
2. Whether the accused person is the one who inflicted grave injuries to the victim?

3. Whether the prosecution has proved the case against the accused beyond a reasonable doubt to indicate that the accused person is responsible for the attempted murder of the victim.

Reverting to the evidence presented by the prosecution part, It shows that the accused was on his way to the Ruhuwiko area. They had an agreement with PW1 which was visiting the accused's grandmother, who resides at Ruhuwiko street. Upon arrival at Ruhuwiko, the accused told the PW1 to go and harvest some maize in his field which was not their plan. It was very late in the evening. They crossed over people's houses and proceeded on their journey to harvest corn at Ruhuwiko. The accused decided to strangle the PW1, stripped off her clothes and left her naked. This incident was not witnessed by PW2 neither PW3 nor PW4. The only person that witnessed this incident was the PW1 herself.

Staring with the first issue, whether the offence committed by the accused amounted to attempted murder. Considering the nature of the injuries and the condition of PW1, it is the view of this court that, they were not of such a nature to make any reasonable person conclude that death was contemplated. Based on the evidence of PW1 (victim) and PW5 (doctor) evidence it can be observed that, PW1 suffered bruises on his neck and

throat, and she was taken to the hospital where she was given medication and allowed to return home. PW1 was in a stable condition such that she was able to walk and talk to the prosecution witnesses. Probably this is due to the nature of the un-severe injuries which are bruises on the neck and tongue, this could not be a case of attempted murder. PW1 had recovered on the same day after the incident, as she was able to record the police statement on the same day. According to PW1, PW5 and PF3, the accused appeared to have previously been charged with the offence of assault causing bodily harm or sexual assault contrary to *Section 35 of the Penal Code Cap 16 R.E. 2019*.

It is the view of this Court, that the evidence in the present case does not establish that the accused person deserved to be charged with the offence of attempted murder, rather, if any, it is the offence of assault causing bodily harm and attempted rape that deserves to face the accused.

In the circumstances, the other issue that needs to be looked at, is Whether the accused person is the one who inflicted grave injuries to the victim? This Court has no doubt about the question of identification. The victim, in this case, knew the accused well because they had met several times. On that

particular day of the incident, it was in the afternoon with the help of the daylight they could see each other very well.

The two agreed to head towards Ruhuwiko street, reaching there the accused took PW1 to the bushes with taller grass. The identification was clear although, the evidence is of one witness who is none other than the victim who was present at the scene. There is no doubt that the accused was with the victim at the bush and strangled him in the neck areas. The victim got bruises on the neck and the tongue. It was testified that PW2 was on his way to earn his daily bread which is to cut bamboo juice (ulanzi) at the bank of the Ruvuma River. He was shocked to find the victim naked. Thereafter, he quickly went to report the matter to the village chairman. After arriving at the village chairman's home, he narrated what he had seen and the village chairman quickly left with him to go where he had seen the naked woman lying down. They hurriedly went back to the river bank to save PW1.

According to the testimony of all the prosecution witnesses PW1 was lying down naked. The victim was taken to the nearby hospital and released after taking oral medication. The doctor said that the victim was not badly injured

but had minor bruises around her neck and tongue. He gave her medicine to swallow and allowed her to go home.

Moreover, there is sufficient evidence to prove that the victim was present with the accused on the same day in an agreement to visit Ruhuwiko street. That's the problem that led to the accused to be charged with the offence of attempted murder. PW1 named the accused at the earliest stage or opportunity so there is no doubt that they were together. Reference is made to the case of **Joseph Mkubwa and Samson Mwakagenda v. Republic**, Criminal Appeal No. 94 of 2007, whereby they cited the case of **Mohamedi Bin Alhul v. Republic (1942) 9. EACA 72** and stated that:

"The ability of the witness to name the suspect at the earliest opportunity is an all-important assurance of his credibility In the same way as an unexplained delay or complete failure to do so should put a prudent court to inquiry."

The third issue to be determined is whether the prosecution has proved the case against the accused beyond any reasonable doubt to indicate that the accused person is responsible for the attempted murder of the victim. The

prosecution side has the duty to prove the charge against an accused person beyond reasonable doubts. According to *Section 3(2) (b) of the Law of Evidence Act (Cap 6 R.E. 2002)*. The onus of proof in criminal cases is always on the side of the prosecution. This has been reinforced in several decisions, for instance in the case of **Ally Bakari and Pili Bakari v. Republic** (1992) TLR 10. In that case, it was stated that it is the prosecution side that assumes the burden of proof. Also see *Section 112 of The Evidence Act, Cap 6 (R.E. 2019)*.

Section 112 of the Evidence Act Cap 6 (R.E.2019) provides thus.

"112. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person".

The prosecution evidence shows that they have not discharged their duty to prove the case beyond any reasonable doubt that the accused committed the offence of attempted.

As far as I can see, I have come to the point of looking at the nature of the harm. Examining this case carefully and critically, the victim got bruises

around her neck and tongue. She was orally treated and got medication at the hospital whereby she got relief and continued well. If she experienced bruises around her neck and tongue which does not lead to an attempted murder offence, the question is whether the prosecution has proved their case to the required standards of beyond reasonable doubt.

The evidence in its totality suggests that this case should not have been an attempted murder case but rather an assault case. It can be further categorized as a sexual assault case, where the subordinate Court has jurisdiction to hear it. Looking at the nature of the case the accused harmed the victim's tongue and neck this offence does not directly imply an attempted murder case. The reason is, that the elements of attempted murder, in this case, have not been met.

I stress once again that the prosecution has a great responsibility to look into whether the offence, they are charging the accused with has all the elements of the offence and if the ingredients of the offence are absent the benefits of doubt goes to the accused person. Thus, he is supposed to be released since the charge sheet does not contain all the ingredients of the offence. The elements of the offence of attempted murder were critically and described in the case of **Alex Madard v. the Republic**, Criminal Appeal

No. 571 of 2017, where the Court of Appeal explained *Section 211 of the Penal Code Cap 16 (R.E.2019)* and stated that;

"As was alluded to earlier on, the appellant was charged with the offence of attempted murder contrary to section 211 of the Penal Code. That said section is couched as follows.

211. Any person who- (a) attempts unlawfully to cause the death of another; or (b) with intent unlawfully to cause the death of another, does any act or omits to do any act which it is his duty to do, the act or omission being of such a nature as to be likely to endanger human life, is guilty of an offence and is liable to imprisonment for life.

The above provision created two categories of the offence of attempted murder with different ingredients. The ingredients in paragraph (a) is the unlawfulness to cause the death of another without showing its nature. As to paragraph (B), the ingredients are the intent which will normally be an ill intent, and the unlawfulness of an act or

omission which by its nature is likely to endanger the human life."

The prosecution has not proved their case to the required standard beyond reasonable doubt; that the offence for which the accused was charged is attempted murder and those elements of attempted murder have not yet been ascertained. As I mentioned earlier, the ingredients mentioned in the case of **Alex Madard** (Supra) and **Section 211 of Cap 16**, do not exist.

It is the trite law that the prosecution should prove all the ingredients of offence beyond reasonable doubt, see also the case of **The Director of Public Prosecutions v. Morgan Maliki and Nyasa Makorii**, Criminal Appeal No 133 of 2013 (Unreported) which states that:

"A prima facie case is made out if, unless shaken, it is sufficient to convict an accused person with the offence which he is charged or kindred cognate minor offence... the prosecution is expected to have proved all the ingredients of the offence or minor cognate are thereto beyond a reasonable doubt. If there is a gap, it is wrong to call upon

the accused to give his defence so as to fill it in, as this would amount to shifting the burden of proof".

Therefore, the prosecution must establish a prima facie case. This is important because if no prima facie case is established the Court could always give an accused person the benefit of doubt and acquit him.

Consequently, I hereby differ with the opinion of the two lady assessors who found that the accused person is guilty of the offence of attempted murder.

Therefore, the prosecution has not proved the case beyond reasonable doubts. The accused is, therefore, not guilty of the charge against him and accordingly, he is acquitted from the charge of attempted murder contrary to *Section 211(a) of the Penal Code Cap [16 R.E. 2019]*. I order his release from custody unless he is held for some other lawful reason. It is so ordered.

DATED and **DELIVERED** at **SONGEEA** this 01th day of **APRIL** 2022.



[Handwritten signature]

U. E. MADEHA
Judge
01/04/2022