

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

CRIMINAL SESSIONS CASES NO. 51 OF 2015

THE REPUBLICPROSECUTOR

VERSUS

1. KULWA S/O MAIGE1ST ACCUSED PERSON

2. SHIJA S/O MAIGE2ND ACCUSED PERSON

JUDGMENT

11th & 18th May, 2022

Kahyoza, J.:

Kulwa Maige and **Shija Maige** (the accused persons) stand charged with the offence of attempted murder contrary to section 211(a) of the **Penal Code [Cap. 16 R.E 2019]** (the **Penal Code**). It is alleged that on 4th day of November, 2015 at Nyashana village within Kwimba District in Mwanza Region, the accused persons unlawfully attempted to kill one **Lucy d/o Zakaria**. The accused persons pleaded not guilty to the charge.

To prove the accused persons guilty beyond reasonable doubt, the prosecuting State Attorney summoned four (4) witnesses, who are **Lucy**

Zakaria (Pw1), Zakaria Elias Funga (PW2), John Lukuba (Pw3), and No. G 44672 PC Benjamini (Pw4). The accused persons defended themselves on oath. They did not summon any witness or tender exhibit.

Lucy Zakaria (Pw1), the victim, while in the kitchen cooking on 12/11/2012 was suddenly assaulted and injured by people she identified as Kulwa and Shija. The assailants hit her with a bush knife on her back head, on her hands which were on top of her head. They placed her legs near the fire. She used light from a touch she held and from the fire wood to identify her assailants. She identified Kulwa, Shija and Dai. Dai was standing aside. She knew them as they were residing in the same village. She tendered a PF.3 as exhibit P.1.

After **Lucy Zakaria (Pw1)** sustained injuries, **PW2 Zakaria Elias Funga,** took her to police, obtained a PF.3 and headed to the hospital. **No. G 44672 PC Benjamini (Pw4)** whilst at police station on 4/11/2012 at around 22:00 hrs attended **Lucy Zakaria (Pw1)** who was assaulted and had wounds on different parts of her body. **Lucy Zakaria (Pw1)** reported to **No. G 44672 PC Benjamini (Pw4)** that Kulwa and Shija attacked and injured her.

Kulwa Maige (Dw1) and Shija Maige (Dw2) defended themselves on oath denying to commit the offence. They denied to be anywhere near the scene of crime. They deposed that sometimes back they had quarrels with the victim's family. They quarreled over the land dispute, which was determined in their favour. They deposed that the victim suspected them because they had quarrels over land ownership.

It is a duty of the prosecution to prove an accused person guilty beyond reasonable doubt. In this case, it is beyond dispute that the complainant was assaulted and injured. According to the PF.3., the victim **Lucy Zakaria (Pw1)** was injured severely. The only issue is whether the accused persons were properly identified as perpetrators. The only identification evidence is that of **Lucy Zakaria (Pw1)**. She deposed that she recognized the accused persons and another person Dai. The offence was committed at night at around 19:00hrs when she was preparing food. She deposed that she identified the culprits as they were village mates, well-known to her and they conversed before they attacked her. They demanded to know why she killed their father and why she grabbed their land. She stated that she identified the accused by help of light from a touch, which had new batteries and that there was light from the fireplace.

She added that they the accused persons stood closer to her as the kitchen was small.

It is trite law that visual identification is weak evidence, to rely upon such evidence, it must be water tight eliminating the possibility of mistaken identity. See **Joseph Melkiory Shirima @ Temba Vs. Republic**, Criminal Appeal No. 261 of 2014 CAT(unreported) where the Court of Appeal stated-

"...evidence of visual identification is of the weakest kind and most unreliable. As such, no court should act on such kind of evidence unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that it is absolutely watertight."

There is no doubt in this case that **Lucy Zakaria (Pw1)** knew the accused persons well before the incident. The accused persons admitted this fact. Thus, she stood a better chance to recognize them by help of sufficient light. She explained that light was from touch with new batteries and from the fire place. I have no doubt that light from touch with new batteries bore light with such intensity to be able to indemnity familiar persons. I only doubt if **Lucy Zakaria (Pw1)** did properly identify the culprits and whether her evidence can be relied upon.

The offence was committed at night and only one witness identified the accused persons. It is a settled position of the law that when a Court is considering the evidence of a single witness must exercise great care. See **Ahmad Omari V R**, Criminal Appeal No 154 OF 2005 (CAT unreported), where the Court stated that **there is a need to take greatest care when dealing with the evidence of a single witness**. There is yet another position of the law that when the court is dealing with the identification evidence of a single witness it must find out if that witness is a credible. This position was taken in **Chacha Jeremiah Murimi and 3 Others v R** Cr. App. No. 551/2015 where the Court of Appeal stated that-

"In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The conditions for identification might appear ideal but that is not guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is in our view reassuring though not a decisive factor". (Emphasis provided)

The prosecution's identification witness, **Lucy Zakaria (Pw1)** is not a credible witness. She was not consistent. She stated during cross-examination that she identified the accused persons because she suspected them because of their previous wrangles. She said that they once set her

house on fire. It is not clear whether she saw and identified the accused persons or she suspected them due to misunderstanding. Thus, **Lucy Zakaria (Pw1)** had a reason to lie. She wanted the accused persons behind the bar as they had set her house on fire in the past and because they had a land dispute. She had an incentive to lie.

In addition, during examination in chief **Lucy Zakaria (Pw1)** deposed that her assailants did not cover their faces, however, during the cross-examination she deposed that they covered their faces downwards. It is very risky to rely on the evidence of **Lucy Zakaria (Pw1)** to convict the accused persons.

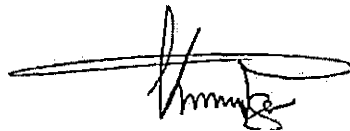
At the end of the summing-up, the Ladies and Gentleman assessors opined unanimously that the accused persons are not guilty of the offence of attempted murder. The first assessor opined that the identification evidence was too weak and that suspicion however great cannot be the bases of convicting an accused person. The second assessor contended there was no evidence to establish that the accused persons injured **Lucy Zakaria (Pw1)**. The last one believed the Republic did not prove the accused persons guilty beyond reasonable doubt. I totally agree with the

Ladies and Gentleman assessors that **Lucy Zakaria (Pw1)**'s identification evidence is too weak to ground conviction.

In the end, I find that the prosecution failed to establish the accused persons guilty beyond reasonable doubt. Consequently, I find the accused persons not guilty and acquit them of the offence of attempted murder contrary to section 211(a) of the **Penal Code [Cap. 16 R.E 2019]**.

It is ordered accordingly

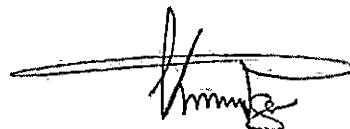
Dated at Mwanza this 18th day of May, **2022**.



J.R. Kahyoza
JUDGE

Court: Judgment delivered in the presence of the accused persons, Mr. Kalumuna, the defence advocate and Mr. Leonard, the Principal State Attorney for the Republic. The Ladies and Gentleman assessors present. B/C Ms Jackline, (RMA) present.

The Ladies and Gentleman assessors thanked and discharged.



J.R. Kahyoza
JUDGE
11/05/2022