IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL SESSION NO. 13 OF 2020

THE REPUBLIC

VERSUS

BRAISON S/O SADICK MOSHA@BOSII

JUDGMENT

Last order: 14/3/2023
Judgment: 30/3/2023

MASABO, J:-

The accused person, BRAISON S/O SADICK MOSHA@BOSII, has been arraigned in this court over the offence of attempted murder contrary to section 211(b) of the Penal Code [Cap 16 R.E 2019], now RE 2022 (the Penal Code). It was stated in the particulars of the offence that on 15th September 2018 at Maweneji village Southern Mwika area within Moshi district, he attempted to murder one Godson Nelson Shirima. When these particulars were read over and explained to him, he entered a plea of not guilty.

Discharging their burden of proof, when the case was called for trial, the prosecution led the 4 witnesses. The victim who testified as PW1, E.6548 D/SGT Rick testified as PW2, the victim's wife one Neema Godson Shirima testified as PW3, and a doctor who testified as PW4. They also produced two

exhibits. A sketch map of the scene of the crime (Exhibit P1) and a medical report (PF) which was admitted as Exhibit P2.

These led evidence that, for Godson Nelson Shirima, the victim, who is a domiciled at Maweneji Village Southern Mwika area within Moshi district, 15th September 2018 was a normal day and he had no difficult following his daily routine. He woke up in the morning, went out for work and on return home in the evening he went straight to a family-owned business styled in the name of "Bar Mpya" and managed by his beloved wife one Neema Godson Shirima (PW3). While there, he met the accused person who is his neighbour and for no apparent reason, the accused made abusive utterances against him. Surprised by the utterance, PW1 asked the accused what was wrong but the response was not normal. It came in a form of a blow. The accused hit his head with an iron bar which severely injured him and took away his conscious. With the help of other people PW3, who was present at the scene and eye witnessed the incidence reported at a police station, obtained a PF3 and had the victim rushed to KCMC Hospital for treatment.

A medical examination performed on the victim while at KCMC established that the victim's skull bone was broken and had multiple fragments. Thereafter, a head surgery was performed on him to repaired the injured part but he remained unconscious for a period of 120 days. PW1 told the court further that, even though he has regained his conscious, his life has not been the same. His health has deteriorated since then. His head has been permanently deformed following removal of some of the fragments

from the skull bone. He most often loses his memory. His sight has been weakened and as of today he has remained in medication. PW2 tendered as exhibit P1 a sketch map he drew when he went to the scene of the crime. The medical report (Exhibit P2) was tendered by Dr. David Msuya, a specialist surgeon and head of the surgery department at KCMC hospital.

At the closure of the prosecution case, the court ruled that a *prima facie* case requiring the accused person to answer the charges has been established. After he was addressed of his rights, he opted to defend himself on oath. Testifying as DW1, he admitted commission of the crime but stated that, on the fateful day, there was a football match between Simba and Young African teams. Many people including him, PW1 and other people he did not name, had gathered at Bar Mpya to watch the match. As they were watching the match a quarrel ensured between the fans of the two teams. In the course of the quarrel PW1 hit him and injured his jaw. In self defence, he took a stool and hit PW1. He thereafter, went to the police station and reported the matter. While still recording his statement, PW1 arrived to report the same incident. Because PW1 appeared to have been seriously injured compared to him, he was arrested, kept under custody and later on charged.

On the part of the accused person, his defence which I have duly considered, seems to be an afterthought and less convincing. The fact that he could not name even a single person among the 'many football fans' with whom he was watching socker at PW1's bar entertains a serious doubt on the truthfulness of his story considering that he too was domiciled at Maweneji

village hence familiar to the residents of Mawenjeni some of whom might have been at the bar. His omission to name them suggests he is hiding something and that his story has been solely fabricated for exculpation purposes.

Back to the prosecution's evidence, the offence of attempted murder against which the accused person herein stands charged is a creature of section 211 of the Penal Code, Cap 16 which states thus:

> 211. Any person who-:
> (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 [emphasis added].

Evidently, for the charge of attempted murder to succeed, three major ingredients must be proved, namely the overt act, the intention to cause death and that the act was of such a nature likely to endanger human life. In the present case, the first and third ingredients are uncontested hence easily established through the testimony of PW1 and PW3 as corroborated by DW1. From these witnesses, it is established that the accused hit PW1's head with a heavy object which caused him a head injury. It is similarly established that the injury sustained by PW1 was grievous and endangered the PW1's life. As per PW4 and Exhibit P2, PW1's wound had a measurement of 6x4 centimeter and his skull bone was broken and needed a surgery to repair. This evidence considered conjointly with the testimony that PW1

remained unconscious for 120 days after the attack, entertains no doubt that the injury inflicted on PW1 was grievous and endangered his life.

Intention, which is the remaining ingredient, can be best established when the above provision is read together with the section 380(1) of the Penal Code which amplifies how the offence of attempt is committed. It states that, the offence of attempt is committed:

> 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.

Further to this provision and most relevant to the offence of attempted murder is the decision of the Court of Appeal of Tanzania in **Bonifas Fidelis @ Abel vs Republic** [2015] T.L.R. 156 [CA]. In this case, the Court propounded a guidance to be applied by this court when determining charges of attempted murder. It stated that, to establish whether attempted murder has been committed, the court must address itself to the following four points:

> "**Firstly,** proof of intention to commit the main offence of murder, **secondly**, evidence to prove how the accused 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 intervention event which interrupted the appellant from fulfilling his main offence, to such extent that, if there was

no interruption, the main offence of murder would surely have been committed. "

Proof of intention entails an ascertainment of whether the attack was intended to cause death or to just inflicting grievous harm. Such ascertainment is invariably a challenging task. The challenge was well articulated by the Court of Appeal in **Enock Kipela v. Republic,** Criminal Appeal No. 150 of 1994 (unreported) as cited in **Bakiri Rajabu Bakiri vs Republic** (Criminal Appeal 292 of 2021) [2022] [Tanzlii] when it stated that:

" Usually, an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of weapon, if any, used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow or blows were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of a particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing."

Starting with the nature of the weapon used to inflict the blow on PW1, the evidence on record exhibits a disparity on the weapon used by the accused person. Whereas the victim stated that he was hit with an iron rod, PW2 stated it was an iron bench and DW1 stated it was a bench (*stuli*) but did not specify whether it was made of wood or iron. In my considered view, the disparity is very minor and attracts no weight because, in any case, considering the vulnerability of the part of the body at which the blow was

lirected, it matters less whether the blow was inflicted with an iron rod, an iron bench and wooden bench as any of them is capable of causing the injury sustained by the victim. As for the amount of force used, it is apparent that the blow was inflicted with excessive force. As stated earlier on, PW1 sustained a wound measuring 6x4 centimeter and a broken skull bone which would obviously have not sustained had the blow been inflicted with moderate or little force. Also relevant in determining the accused's true intention is the testimony by PW3 that immediately before inflicting the injury, the accused person told PW1 that he will kill him. When this utterance is considered conjointly with the nature of the weapon, the vulnerability of the body part attacked and the extent of the injury sustained, might be taken to suggest that the accused had intended to kill PW1. However, the accused's subsequent conduct suggest otherwise. As stated earlier on, the accused inflicted only one blow and much as there was no intervening factors inhibiting the fulfilment of the intention to kill, he ran away. Had he real intended to kill PW1, he would possibly have inflicted a second or third blow or at least remained to see if his mission had succeeded. The fact that he did not, casts a doubt on his true intention.

In the foregoing I have come to the conclusion that, much as it has been sufficiently proved that the accused person inflicted a blow on PW1's head and the injury sustained was grievous and endangered the life of PW1, the prosecution has not sufficiently proved that when inflicting the injury, the accused had intended to kill PW1. The offence of attempted murder which the accused stands charged has, consequently, not been proved.

Considering the evidence on record, I am of the firm view that, although the accused is not guilty of the offence of attempted murder contrary to section 211(b) of the Penal Code, there is enough evidence to establish that he committed a lesser offence of unlawfully wounding or causing grievous harm to the victim contrary to section 222(a) of the Penal Code, Cap 16. In the consequence there to, although the accused person was not charged with the said lesser offence, by the powers clothed in this court by section 300(3) of the Criminal Procedure Act [Cap 20 R.E 2022], I find the accused person, BRAISON S/O SADICK MOSHA@ BOSII guilty and I convict him of the said lesser offence of unlawfully causing a grievous harm contrary to section 222(a) of the Penal Code [Cap 16 16 RE 2022] as an alternative to the offence of attempted murder.

DATED and DELIVERED at MOSHI this 30th day of March 2023.

THE HIGH COURT OF TANZANIA

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J.L. MASABO
Judge
30/3/2023