

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

ORIGINAL JURISDICTION

CRIMINAL SESSION CASE NO. 36 OF 2022

REPUBLIC

VERSUS

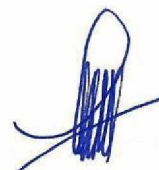
BOAZ S/O SIMBACHAI.....ACCUSED

JUDGMENT

15/5/2023 & 31/5/2023

Mlacha, J.

The accused, Boaz Simbachai (83) is charged of Attempted Murder contrary to section 211 (a) of the penal code, cap 16 R.E. 2022. It was alleged that he attempted to cause the death of Chawe Athumani on the 8th March 2022 at Bubango area within the district and region of Kigoma. He pleaded not guilty to the charge. The prosecution lead by Edna Makala state attorney called 5 witnesses to assist them to discharge their burden of proof. The accused gave evidence on oath in his defence and had two witnesses to call. The court called one witness who is the doctor who attended the accused.



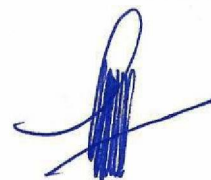
It was the evidence of PW1 Chawe Athumani that on 8/3/2022 while at home, during morning hours, preparing himself to go to the town after the morning tea, he heard someone knocking the gate. He moved close to see what was the matter. He opened the gate and saw the accused standing outside the gate with a machete (panga). He knew him because he is his neighbour. They have lived together for a long time. The accused cut him on his head (the left side of the head) and he fell down. He cut him again on the head (at the right side behind the ear). PW1 saw Salala Bakari (PW2) coming. He is his neighbour. He rose an alarm calling for assistance. He then lost consciousness. He gained consciousness at the hospital. He was released after 3 days but have dizziness to-date. He could identify the PF3 (Exhibit P3).

PW2, Salala Bakari (PW2) said that, on 8/3/2023 as he was moving to his working area to sell coffee with 2 buckets of coffee on both hands, he saw the accused cutting PW1 with a machete on the head who fell down. PW1 rose an alarm. PW2 also rose an alarm. The accused run away with the weapon. He saw the machete which he described as long, bent on the front area. He attended the wounds using his cap to prevent bleeding. People who respondent instantly included Amani Saidi and Tausi Kasimu

Ndoroma. They picked PW1, put him on a motorcycle and took him to hospital. PW1 was unconscious at this time, he said. He went on to say that he saw the accused while at a distance of 5 footsteps. He saw him through the bright sun light. He was also a person known to him earlier. He added that PW1 had nothing on the hand. He could identify the accused at the dock.

PW3 Amani Said told the court that he was nearby at a coffee pub (kijiwe cha kahawa) when he saw the accused with a machete moving to the shop. He then saw him coming smoking cigarette moving towards his house. He reached the door close to the gate of PW1. He came out through a different door. He had the same machete on his hand. He then saw him beating a sign board at the door of PW1. He saw PW1 moving out. He had nothing on the hand. He saw the accused cutting PW1 with the machete on the head who fell down. He was at a distance of 15 footsteps and could see properly. The accused moved inside his house. They picked PW1 and set him to hospital.

PW4 Dr. Godwini Malyatabu (31) is a clinical officer at Bitale health center. He told the court that he received PW1 on 8/3/2022 with cut wounds. He was semiconscious. He could hear and feel pains. The wounds were still

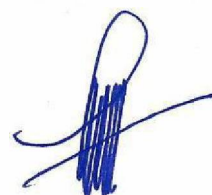


fresh with blood, he said. He said that PW1 had 2 cut wounds on the head; one was on the upper side of the head at the left hand side. The second was on the right hand side between the ear and the rear side of the head (Kisogoni). He stitched the wounds. He described the first wound as being; 5 centimeter long and 2 centimeters deep. He said that the second wound was not deep, it was superficial. He had the opinion that they were caused by a sharp instrument. He described the first wound as being dangerous. He gave the patient a rest for 3 days. He discharged him with a reference to a higher hospital for further treatment. He identified the PF3 (Exhibit P1) which he filled after treatment.

PW5 J 1612 D/Constable Safiyu was the investigator. He visited the scene of crime and drew the sketch map which he identified in court. He questioned the witnesses and recorded their statements.

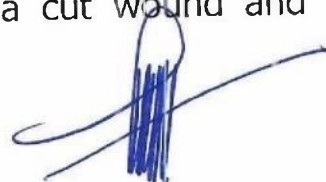
It was the defence of the accused (DW1) that he rose up on 3/3/ in the morning and checked the wall of his house. He saw a sign board which he decided to remove. He had an iron chisel (Tindo) which he used to remove it. While doing so, PW1 came from behind and cut him with a Machete on his right shoulder. He moved to Mahembe police post to file charges of wounding. A police started to record his statement but was soon prevented

by another policeman (Afande Hamisi) who arrested and sent him to Mwandiga police post. He took him around in small pharmacies around the area and asked them what could have been the cause of the wound. The declined saying that was not in their profession. He took him to Kigoma central police station where he was questioned by Afande Shafii and Afande Hamisi. They saw his wound but said he did not qualify for a PF3 and treatment. He complained to the RPC who happened to pass around. The RPC ordered them to give him a PF3. He was released in the evening at 6:00PM and went to Maweni hospital where he got treatments. He received 11 stiches at the wound. He returned to the police who allowed him to go home. He was sent to court on 29/4/2022 in criminal case No. 73/2022 of the district court of Kigoma charged of wounding. They were charged later to attempted murder. DW1 proceeded to tell the court that he has a land dispute with PW1. Their houses are joined by a wall and a gate. In the particular day he came out to remove a sign board which had been put on his wall hence the conflict. He said that he is the one who was cut by PW1. He showed the cut scar on the rear side of the right shoulder. DW1 stressed that he had a long standing dispute with PW1. It started in 2019. He sued PW1 at the ward tribunal but he was sent back to the



mosque for reconciliation. Religious leaders came and advised them to close the gate but PW1 could not do so. DW2 Rashid Issa (44) is a cyclist (bodaboda). He said that he picked DW1 on 8/3/2022 and sent him to Mahembe police post. He had a wound on the rear side of his right shoulder. He left him there and proceeded with his other activities. DW3 Michael Boaz Simbachai (42) is a son of DW1. He told the court that he received a call from his neighbour on the day who said that his father had been wounded by PW1, Chawe Athumani. He told him that he had gone to Mahembe police post. He moved to the police post. Soon his father came on a motorcycle. He had a wound on his right shoulder. His condition was bad. Afande Hamis came and took him to Kigoma central police station. They took him inside but released him later with a PF3. He sent him to hospital where he was treated. He was later charged.

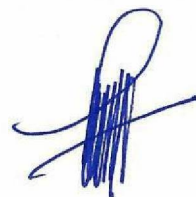
The court on seeing that the accused had a big scar on the rear side of the shoulder and a PF3 filled by Dr. Peter Edmund of Maweni Referral Hospital Kigoma, it found it proper to call him as a witness of court to say something on the cut wound and the PF3 (Exhibit C1). He came and said that the accused came at the hospital with a cut wound and received



treatment. He had the opinion that the wound was caused by a sharp instrument.

Next is an examination of the evidence to find if the prosecution have proved their case beyond reasonable doubts.

If one can look at the evidence from the prosecution quickly, one can say that there is good evidence showing that the accused cut PW1 on the head who fell down and turned semiconscious. PW1 received 2 cuts on the head one of them being big and deep. The head is a dangerous place showing that the accused must have intended to kill PW1. But looking at the defence brought forward, one may say, the way I am compelled to say that the prosecution case has serious gaps leading to doubts to the prosecution case. DW1 has a big scar on the rear side of his right shoulder and DW3 has proved to the court that it was fresh on the material date. That is, the accused came at the hospital that day with a fresh wound which was stitched and attended by doctor. DW2 corroborated the story when he said that he picked his father and sent him to hospital with a cut wound. DW3 has tendered the PF3 to prove this. Looking through the evidence, it is clear that both the accused and PW1 had cut wounds. The two doctors have established this fact. Each of them was cut suggesting a



fight or something more than what was presented by the prosecution. This element is missing in the prosecution case. The issue now is what real happened? No answer. The answer was supposed to come from the prosecution but no evidence establishing the fact. They took an approach aiming at proving that the accused committed the crime without a word on what caused the cut wound of the accused. That fact was left as a gap in the prosecution case.

Having examined the evidence critically, it has come to my mind that there are two possibilities. **One**, the accused was cut by PW1 while removing the sign board and who received two cuts as a revenge. **Two**, the accused cut PW1 when he came to prevent him to remove the sign board and received his cut from people who had come in response to the alarm of PW1. These are the possibilities. It is a controversy left by the prosecution. The issue now is why is it that the prosecution did not resolve this controversy? There is no answer to this question. My loud thinking have led me to a belief that there were some coaching of prosecution witnesses at the time of recording of the statements to hide some facts.

There is a second scenario. The prosecution has it that the accused cut the deceased and moved to his house with the machete. No efforts were made

to arrest him as is usually the case. One may wonder the way the accused (83) could cut PW1 in a broad day light and be left to go freely as if he is a giant who could not be apprehended. The accused is very old man and weak. He could simply be apprehended and put under arrest with his machete on the spot. Why it that was not done? No answer!

Failure to disclose to say anything on the way the accused was cut and the reason as to why he could not be arrested after committing the crime, discredit prosecution witnesses. That fact has cast doubt in the prosecution case which is now resolved in favour of the accused. I find that the prosecution have failed to discharge their burden of proof beyond reasonable doubts. I find the accused not guilty and acquit him.



A handwritten signature in blue ink, appearing to read "L.M. Mlacha", is written over a horizontal line.

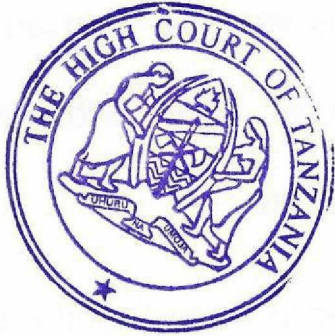
L.M. Mlacha

Judge

31/5/2023

Court: Judgment delivered in the presence of the accused and his counsel Japhet Kaiza and Happiness Mayunga state attorney who represents the Republic.

Right of Appeal Explained.



A handwritten signature in blue ink, consisting of a stylized 'L' and 'M' followed by a horizontal line.

L.M. Mlacha

Judge

31/5/2023

ORIGINAL

