IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DODOMA DISTRICT REGISTRY

AT SINGIDA

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE NO. 3 OF 2022

THE REPUBLIC

VERSUS

1. MOSHI ATHUMANI

2. HAMIS OMARY

JUDGMENT

Last order: 27/09/2023
Judgment: 06/10/2023

MASABO, J.:-

The accused persons herein, **Moshi Athumani** and **Hamisi Omary,** are jointly charged with the offence of attempt murder contrary to section 211(a) of the Penal Code Cap. 16 R.E 2019 (now R.E 2022). The particulars of the offence are that, on 11th day of August 2019 at Senenemfuru village, Ughandi Ward, Mungumaji Division within the District and Region of Singida they attempted to murder one **Salum Athuman Salum,** the victim. When the accused persons took plea on 14th September 2022, they denied the allegations hence this trial during which, the Republic was represented by Mr. Nehemia Kilumuhana assisted by Ms. Caren Rwebangila, State Attorneys. The defence team comprised of Mr. Peter Ndimbo and Ms. Salma Musa, learned counsels for the first and second accused persons, respectively.

The prosecution case was built on three witnesses, the victim Salum Athumani who testified as PW1, a militia one Omary Cosmas who testified as PW2 and the investigator of the case, PF21602 Asst. Insp. Said Anyitike testified as PW3. In addition, PW3 tendered a PF3 which was admitted as Exhibit P1. The accused person had no witnesses other than themselves. They testified on oath as DW1 and DW2, respectively.

From the prosecution side, the following story was discerned. That, the victim, PW1 and the accused persons are all residents of Senenemfuru village, Ughandi Ward, Mungumaji Division within the District and Region of Singida and they are a family. PW1 and the first accused person are siblings and the second accused person is a husband to the first accused person, hence PW1's brother-in-law. That, the fateful day, 11th August 2019, was a market day at Songambele area within Senenemfuru village. PW1 went to the market and while there, at around 20hours he bought a ¼ kg of goat meat (mutton) worth Tshs. 2000/=. He entrusted the meat on one Muhidini so that he can roast it for him while he went to a shop to buy a voucher leaving his meat being roasted by the said Muhidini. When he came back, he did not find Muhidini. He found the two accused persons who used to sell soup at a nearby place. Apparently, Muhidin had left the meat with them. Doubtful of the size of the meat which appeared to be leaser than what he bought and entrusted in Muhidin, PW1 asked the 2nd accused what has happened to the meat. The second accused sarcastically questioned him if it was possible for the meat worth Tsh 2,000 to fit into a waist.

Suddenly, the second accused took a chair and hit PW1 with it on his mouth. PW1 walked back for about 2 steps to spit blood. The second accused followed him and attempted another blow at him. Luckily, he missed him but he fiercely wrested him to the ground while he held his neck with a fist. As PW1 was still being held by the second accused on the ground, he heard the first accused announcing that "let me stab him with a knife". She approached him and stabbed him with a knife on various part of his body including on right ribs, buttock, shoulder, head and stomach. After she had finished, she asked the first accused to leave PW1 as she has finished him.

They then ran away and disappeared. Meanwhile, PW2 heard PW1 calling for help and when he went to the scene, he found him lying on the ground while bleeding. PW1 told him that he had been stabled with a knife by the accused person whom he identified through the tube light present at the market and through his familiarity with them as they were all known to him and they grew up together in the same village. Following the direction given by PW1, PW2 run after the accused persons and with the assistance of his fellow militia one Jumanne Haji managed to arrest the accused at about 120 meters from the scene. They were both running towards their home. After apprehending them, PW2 notified the hamlet and village authorities and when they arrived, he handled over both accused persons being in good health.

Meanwhile, PW1 walked home with no help. His brother, took him to Senene Mfuru hospital and was later on taken to Iguguno Police Station where he

was issued with a PF3 and went for treatment at RC Iguguno dispensary. At the dispensary, he received treatment whereby he had the wound stitched save for the one inflicted on his right ribs which was found to be above the dispensary's treatment capacity. PW1 was then discharged and went home. Two days later his condition changed. He had diarrhea and his feces was mixed with blood. On 13/8/2019, he was rushed to Singida hospital. After being medically examined, it was discovered that the cut wound to his ribs was deeper and required a surgery to treat. He had the surgery after which he remained in hospital for one-week before he was discharged and went home. While at home, his condition changed and when he was returned back to Singida Hospital it was found that the wound was too deeper and had not been healed and hence a second surgery by which part of his intestine was removed. After the second surgery he spent one to two months in hospital before he was discharged.

For the defence, theirs was a total denial and an alibi. DW1, Moshi Athumani, stated to be the victim's sibling and wondered why she was being accused of attempting to murder her brother with whom she has a good relation. She refuted the claims that she was at the market on 11/08/2019. She told the court that on this date she was at home nursing her new born baby (Aisha) who was then three months old. She denied to be arrested with one Omary Cosmas and Jumannne Haji. She said she was informed of the incident by Batilimayo Masoud, a hamlet leader and an attendant at Senenemfuru dispensary. DW2, Hamis Omary, supported her and said he was also home with her and after they received the bad news, they went to the dispensary

only to be informed that, the victim was no longer there as he had been taken to Iguguno RC dispensary. As it was on night and they had a new born baby, they went back home and in the next morning they went to greet the victim at his home. When they asked him who had injured him, he had no clue. As a family member, DW1 contributed Tshs. 45,000/= to the victim's treatments costs, funds which were also donated by DW2. DW1 testified further that when the victim was admitted at Singida hospital she went to see him and she was accompanied by her two brothers in law.

Regarding their arrest, DW1 and DW2 testified further that on 18/8/2019, about a week after the incident, they received a phone call from the Ward Executive Officer who told them to go to his office and when got there, he told them that he has called them so that he can take them to security bodies as there were phones troubling him. He did not mention the name of the person who was troubling him with the phones. He then told to board a motorcycle which took them from Ughandi to Mtinko Police Station. When they got there, they were incarcerated and later on transferred to Singida Police Station before being taken to court on 28/8/2019 charged with injuring the victim. In cross examination, DW1 stated that, at the market there are no lights. All business close at 18hours. When cross examined by prosecution, he said the victim is her brother. Regarding his relationship with the victim, she stated that they maintain a good relationship. They had no grudges before the incident and even after the incident they leave peacefully. Thus, she is surprised why the victim came to testify against her. In the end, she prayed for forgiveness since she did not commit the offence

and didn't know who committed it. DW2 had a more or less similar story as to their arrest and arraignment in court. He too wondered why he is being implicated for attempting to murder the victim with whom he has a good relationship, they knew each other for a long time and for the period since he married the victim's sister with whom they have a total of 6 children, they have been no grudges between him and the victim. At the closure of the defence case, the counsels for both parties informed the court that they had no intention to file final submissions.

Having dispassionately considered the records and keenly scrutinized the evidence adduced throughout the trial, I will now proceed to determine the case starting with the provision of section 211(a) of the Penal Code, Cap 16 under which the offence of attempted murder facing the accused person herein is established. It states thus; "any person who attempts unlawfully to cause the death of another is guilty of an offence and is liable to imprisonment for life." Applying this provision in **Hamis Tambi vs. Republic** [1950] 20 EACA 176, the then Eastern Africa Court of Appeal held that, in a charge of attempt murder, one of the essential ingredients to be proved is the intent to kill. Thus, it is not enough for the prosecution to prove the overt act. For the charge to succeed, the prosecution must as well prove that there was an intention to cause death. The position was well articulated by the Court of Appeal of Tanzania in the case of **Bonifas Fidelis @ Abel vs Republic** [2015] T.LR. 156 (also reported as **Bonifas Fidelis @Abel vs. Republic,** Criminal Appeal No. 301 of 2014[2015] TZCA 307, TanzLII where it held that:-

> We must hasten to point out that section 211(a) is not a stand-alone provision in so far as all the ingredients of attempted murder are concerned. The word "attempt" which is mentioned under section 211 (a) is defined under section 380 of the Penal Code. This means, to appreciate the scope of the ingredients of the offence of attempted murder, sections 211(a) and 380 must be read together.

Section 380, provides

> 380.-(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such extent as to commit the offence, he is deemed to attempt to commit the offence.
> (2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.
> (3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence

Having extensively considered these two provisions, the Court of Appeal concluded that,

> It seems to us that four essential ingredients of attempted murder can be discerned from section 211 (a) read together with section 380. **Firstly,** proof of intention to commit the main offence of murder. **Secondly,** evidence to prove how the appellant 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 intervening event, which interrupted

> the appellant from fulfilling his main offence, to such extent if there was no such interruption, the main offence of murder would surely have been committed.
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> From the perspectives of the provisions of sections 211 (a) and 380 (1), the intention to commit the offence is essential, and we may dare say the most important ingredient of an offence of attempted murder. We say so because, if this ingredient is not proved, we will not bother our judicial time to the remaining ingredients. [The emphasis is added]

Proof of intention to commit the main offence of murder, which as per the authority above, is the most essential ingredient of the offence of attempt murder, entails an ascertainment of whether the attack was intended to cause death or to just inflict grievous harm, a task which is invariably challenging. Articulating how challenging this task may be, 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 stated that, the task is challenging because:-

> " 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 attacker's utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing."

With this guidance, I will now assess the evidence. What is certain in the evidence on record is that, PW1 sustained serious injuries as result of an attack. According to his narration, he sustained wounds on his buttocks and on his back and on the right-side ribs and that, as result of the later wound, he had two surgeries and spent a fairy long time in hospital. Exhibit P1, which is his medical report shows that PW1 was stabbed by a sharp object on the right pattern flank, sustained visceral injury and was operated two times ending up with right hemicolectomy, broadly understood in medical terms to mean a surgery by which the right side of the colon (large intestine) is removed. This was undoubtedly a serious injury. Whether this suffices as proof of intention to murder, is the question yet to be answered. As the parties are at logger heads on the person or persons who inflicted the above injuries on PW1, I will pose here for now and revert back to this question after I have resolved the question whether, the accused persons herein have been sufficiently implicated by the evidence on record.

Admittedly, as there was no eye witness to the offence other than the victim himself, the main evidence implicating the accused persons for this offence which was committed in the night at around 20 hours, is the visual identification, which as per the law, is the weakest of all and can only be relied upon to convict if all chances for mistaken identity have been eliminated hence water tight. As stated by the Court of Appeal in **Mussa Hassan Barie & Albert Peter @ John** v R, Criminal Appeal No 292 of 2011 (unreported):

> The law on visual identification is, we think, now fairly settled. It is of the weakest kind, especially if the conditions of identification are unfavourable. So, no court should base a conviction on such evidence unless, the evidence is absolutely watertight. (See **Waziri Amani vs R** (*supra*).
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> Although, no hard and fast rules can be laid down as to what constitute favourable conditions (as those would vary according to the circumstance of each case) factors such as whether or not it was day time or at night if at night, the type and intensity of light; the closeness of the encounter at the scene of crime; whether there were any obstructions to clear vision, whether or not the suspect(s) were known to the identifier previously; the time taken in the whole incident; and many others, have always featured in considering whether or not identification of suspects is favourable (See **WAZIRI AMANI vs R** (*supra*).

In the present case, as stated earlier on, the parties were familiar to each other. Not only are PW1 and the 1st accused persons siblings, they grew up in one house and they admittedly knew each other very well and so is the second accused person who also told the court while testifying as DW2 that, the victim and himself knew each other very well as, apart from being his brother-in-law, they have both been residing in the same village and he knew the victim well even before he married his sister. The familiarity between them significantly narrows the chances for mistaken identity. The fact that the incident started with a conversation over the victim's mutton also narrows the chances for mistaken identity as it offered an opportunity for the victim to know the people he was conversing with and who apart from being well known to him, were just one pace from him. Further, PW1 told the court that he identified the accused person with the aid of solar power

light illuminating the scene of crime which uses twelve bulbs. Much as DW1 was of different view when she told the court that there is no light at the market as it is just a place where people conduct business up to 18 hours, I find her version to be an afterthought as, when PW1 testified on this issue she did not cross examine him. PW1's evidence as to the presence of light at the scene was corroborated by PW2 who testified that, the area was illuminated by light coming from a place where they used to cook and roast meat, which is nearby the scene. Besides, even if I were to buy her story that there was no light, the familiarity between them, the conversation they had prior to the incidence and the distance at which they were standing, leans towards a conclusion that they were positively identified.

Not only that, PW1 mentioned both accused persons at his earliest opportunity and in so doing, he demonstrated the credibility and reliability of his claim that, his assailants were none other than the accused person herein. As per PW2 who was the first to arrive at the scene, immediately after he had arrived and asked PW1 what has befallen him, he told him that he was assaulted by the accused persons and pointed to him the direction they have head to. Following that lead, PW2 with the assistant of a fellow militia, managed to apprehend the accused persons while they were running towards their home. In cases dependent on visual identification such as in the present one, the ability of a witness to mention a suspect at the earliest opportunity is of utmost importance as stated in **Marwa Wangiti &Another vs. Republic** [2002] TLR 39 and **Jaribu Abdalla vs. Republic** [2003] TLR 271. In **Jaribu Abdalla** (supra) at page 273 it was held thus:-

> In matters of identification, it is not enough merely to look at facts favoring accurate identification; equally important is the credibility of the witness. The conditions for identification might appear ideal but is not guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is, in our view, a reassuring, though not a decisive factor.

In the foregoing and furtherance to PW1's ability to name the accused person, which I find to be re-assuring that his evidence is credible, I am convinced that the accused persons were positively identified and the evidence against them is watertight. I say so considering also that, in their testimonies PW1, DW1 and DW2, assured the court that the relationship between them and PW1 has been cordial before and after the incidence which suggests that PW1 harbors no ill intention to maliciously implicate them.

As for the accused persons' claim that they were at home taking care of their new born baby and doing domestic work, I have considered it but found it seriously wanting and a mere afterthought hence accorded it no weight as it was belated raised and with no support. The accused persons told the court that they have 8 children and 6 of these live with them in the same roof. Had their claims been true, they would have brought at least one of the children to support their seemingly alibi but they did not. Even the hamlet leader cum dispensary attendant who allegedly notified them of the incident through a phone call was not brought to substantiate. This left PW2's testimony that he apprehended them while they were running towards their

home, unshaken. The question as to whether the accused persons were sufficiently implicated is, in the foregoing, answered positively.

Reverting to the question whether intention to murder was proved, what is certain in the evidence on record is that, the victim sustained serious injuries as result of an attack. According to his narration, he sustained wounds on his buttocks and on his back and on the right-side of his ribs and that, as a result of the later wound, he had two surgeries and spent a fairy long time in hospital. Exhibit P1, which is his medical report shows that he was stabbed by a sharp object on the right pattern flank, sustained visceral injury and was operated two times ending up with right hemicolectomy, broadly understood in medical terms to mean a surgery by which the right side of the colon (large intestine) is removed. This was undoubtedly a serious injury.

Evidently, the nature/extent of this injury when considered alongside the weapon (domestic knife) used to inflict multiple wounds inflicted on PW1's body which have not only left him permanent marks on his body but disfigured his stomach (as he demonstrated to the court room during trial), and the weapon used to inflict suggest that the accused persons' conducts was life threatening. However, having assessed all the evidence in totality, I have entertained a serious doubt on whether the accused persons intended to murder PW1. The following are my reasons: First, as already stated, the victim and the accused persons are at one regarding their relationship. Not only are they biologically related, but have no grudges against each other. They had a cordial relationship which has continued even after the life-

threatening incident. Because of this, I am unable to comprehend why would have the accused persons wanted to murder PW1.

Second, the incident started with an exchange of words with the victim alleging that his meat has been reduced, a claim which could have been taken to insinuate that, the duo ate his meat. What followed, although disproportionate, might have been a mere fight and the utterance by DW1 that 'I have finished him', not necessarily meant that he had killed him. It might have as well meant that, he has seriously injured him and that he could not fight them back. Here, I am mindful that, in his testimony PW1 told the court that he was on top of the 2nd accused hence the possibility that, DW1 felt that her husband was overpowered and she acted in defence of him.

The testimony that PW1 managed to walk to his home with no assistance suggest that, the force used to inflict the injury on his ribs was not excessive otherwise he would not have managed. PW1 told the court that only after he has arrived at his home, his brother came and sent him to Senenemfuru dispensary and later on, to Iguguno RC dispensary where he was partially treated. What I have found strange in his testimony is the averment that, the wound on his right rib was not treated at Iguguno RC dispensary as was found to require more examination and treatment which was unavailable at the dispensary. Yet, he was discharged and allowed to go home instead of being given a referral letter for further treatment. PW1's further testimony is that, two days after he was discharged from Iguguno RC dispensary, his

condition deteriorated. This story sharply contradicts with the medical report (Exhibit P1) as it shows that, when PW1 went to Singida hospital, three days after the incident, the wound was already stitched hence the question where did he had the wound stitched. Did he locally stich the would at home? More intriguing is the failure by the prosecution to tender the medical report from Iguguno dispensary which was the first to attend PW1. As per PW3, there were two PF3, the first one was used for treatment at Iguguno dispensary and the second one for Singida hospital but he only tendered the later while giving no explanation as to the omission to tender the first PF3. In my considered view, the first PF3 was significantly material in the ascertainment of whether the injuries on the rib was part of the injuries inflicted on PW1 by the accused persons and the extent thereto. Its omission was fatal and attracts an adverse inference against the prosecution that, had it been produced, it would have shown that the said wound was not among the injuries inflicted on PW1 by the accused persons and if it was, it was just mild and due to this, he was not given a referral but treated and allowed to go home or in the alternative, that the injury was mild and easily treatable but PW3 mishandled it by stitching it locally.

For the foregoing reasons from which I have entertained doubts, I decline to convict the accused persons with the offence of attempt murder contrary to section 211(a) of the Penal Code against which they stand charged. Rather, I find both of them guilty of a lesser offence of unlawfully wounding or causing grievous harm to the victim contrary to section 222(a) and 225

of the Penal Code, Cap 16, an offence which I find to have been established by the evidence on record.

In the consequence thereto, although the accused persons were not charged with the said lesser offence, I invoke the provisions of section 300(3) of the Criminal Procedure Act [Cap 20 R.E 2022] and convict both accused persons of unlawfully causing a grievous harm contrary to section 222(a) and 225 of the Penal Code [Cap 16 16 RE 2022] as an alternative to the offence of attempt murder.

DATED and **DELIVERED** at SINGIDA this 10th day of October 2023.

J.L. MASABO

JUDGE