

IN THE HIGH COURT OF TANZANIA
MUSOMA SUB-REGISTRY
AT TARIME
CRIMINAL SESSIONS CASE NO. 38 OF 2023
REPUBLIC
VERSUS
JANES OMOLLO OGONDA @ JOHANES OMOLLO OGONDA

JUDGMENT

18th & 25th March, 2024

M. L. KOMBA, J.:

Accused herein is charged with the offence Act intended to cause grievous harm contrary to section 222 (a) of the Penal Code [Cap 16 R. E 2022]. According to facts by prosecution, accused is alleged to cause grievous harm to EDWIN S/O GEORGE KWAVE on 25th November, 2022 at 06:00 am in Bwiri village within Rorya District in Mara Region. Accused person denied to commit the offence, the denial attracted full trial of the matter.

It was victim Edwin George Kwawe (PW1) was the first to build prosecution case. He informed this court that it was morning of 25/11/2022 around 06:00 am while he was inside the house sleeping with his young brother, Emmanuel George they hear the door of their room pushed, when they rise

up (as they were not in total sleep), they found Janes, accused inside their room who started to whip Emmanuel by special stick (omera). When victim asked accused why he was whipping his young brother Emmanuel, accused started to whip PW1.

It was the testimony of PW1 that when accused started to whip him in various part of the body. Victim struggled and managed to take the stick so as to stop him from beating. He said when accused saw he has no stick, he took machete which was inside the room and cut the thumb of the right hand of the victim. He clarified that in their room there was hoe, machete and water gallon. They shouted and their mother (Salome) appeared and found he was already injured and Janes was still in their room. When accused was asked the reason he did this to the victim he did not reply and went outside. He explained further that by that time there was a sun shine and the door of their room was open, he managed to see Janes while he was in their room.

Victim reported the matter to hamlet chairperson (Anna Maranga) who gave him an introduction letter to Police for him to be given PF3.

Together with his mother the victim went to Shirati Police Post, he gave short explanation on what happened and was given PF3. Victim was treated at KMT hospital which is located at Kabwana in Rorya District, where he was escorted with his mother. After treatment he was released from hospital on the same day.

Victim further testified that on 06/12/2022 he was informed by the hamlet chairperson that Janes was arrested. To prove if it was true, on 07/12/2022 victim visited Shirati Police post and found accused was under custody.

While cross examined by defence counsel, PW1 informed this court that Emmanuel was beaten but he was not injured but elder brother, who is now victim wanted to know why Janes beat Emmanuel. He confirmed that Janes is their relative who live in different homestead and victim's father had no grievous with the accused. Witness remembers the attire of the accused on fateful day.

PW2 (Emmanuel George Kwawe) informed this court that on 25/11/2022 he was in their room with his brother, sleeping, sudden a person pushed the door and enter into their room living the door open and started to beat witness. This witness does nothing but his brother wanted

to know why accused beat him. That man leaves PW2 and turn to the victim and started to beat him. Edwin was furious and struggled to take a stick and succeeded.

Witness proceeded that, after the battle and lose control of the stick, Janes took machete which was inside their room and cut the victim on thumb of the right hand. Victim shouted and Salome, their mother responded. She asked accused why he beat children, accused did not reply instead he disappeared. This witness mentioned the attire of the accused Janes and that while he beat him, they were in one foot step distance and explained that Janes is his uncle (baba mdogo).

During cross examination PW2 testified that his father George Kwawe and accused are in good terms.

Victim was treated by **Peter Opasi Akeyo (PW3)** at KMT hospital. He testified that he received victim, Emmanuel around 11:00 am who was escorted by his mother Salome. Victim complained of the general body pains and had a cut on his right thumb, when examined he noticed that the thumb was chopped by 1cm length and 0.5 deep, blood vessels were open and he was bleeding. This witness testified further that he stitched the

wound and managed to control blood. He further noted that the wound was caused by a sharp object. As victim had PF3, witness fills in and it was admitted as ExhP1.

PW4 (PF 19219 Insp George Mlaponi) testified that on 06/12/2022 he received a phone call from Bwiri village chairperson (SamweliOgango) and was informed that Janes was under custody in the village. Together with other police started to go the village but they couldn't make it due to the condition of the road and asked the accused to be sent to the point he was. This witness received accused at neighbour village called Nyaboli and he surrendered accused at Shirati police station.

H. 1610 DC Cpl Venance (PW5) was investigator of this saga. He recorded the statement of the victim and he testified that during interrogation he noticed the right thumb of the victim was wrapped with a piece of clothes and it was bleeding. Victim informed inspector that on the morning time of 25/11/2022 when they were still asleep with his young brother Emmanuel, the door was pushed and Janes Omollo entered in their room with a stick and started to whip Emmanuel. Edwin then by force took the said stick from Janes. Janes took machete which was near him and cut the thumb of Edwin. Following that incidence, victim said they shouted and

their mother responded and Janes disappeared. According to this investigator, the victim was treated at KMT hospital and in the following day he visited the scene and draw the sketch map (Exh P2). This witness also interrogates PW3 while at KMT hospital and informed this court that accused was arrested on 06/12/2022 and was surrendered to Shirati Police.

During cross examination he explained apart from the hoe and water gallon he also saw blood stains in the room where the victim was and insisted that accused was arrested while in Bwiri village.

After being found with a case to answer, Accused entered defence as DW1 (**JANES OMOLLO OGONDA @ JOHANES OMOLLO OGONDA**) and testified that he was residing at Bwiri village and on 25/11/2022 he was in his homestead doing his normal activities including tying cows. At evening he saw victim, Edwin George Kwawe with a bandage on his hand upon asked he answered he was injured a day before. He further testified that he was not in good terms with his brother George Kwawe due to land dispute among them although he was arrested on 06/12/2022 concerning this case.

During cross examination he maintained that on 25/11/2022 he was in farm grazing like 100 meters from his home. And from his home to the house of his brother George Kwawe is like 200 meters but was not possible to go to his brother home because there are farms on the way. In a different note informed this court that he is a prisoner, he was convicted on body harm in Criminal Case No. 15 of 2023.

The accused is charged with acts intended to cause grievous harm contrary to section 222(a) of the Penal Code, Cap 16. For easy of understanding let me reproduce the section as follows;

222. Any person who, with intent to maim, disfigure or disable any person or to do some grievous harm to any person or to resist or prevent the lawful arrest or detention of any person-

(a) unlawfully wounds or does any grievous harm to any person by any means whatever;

(b).....

(c) (d)(e).....

is guilty of an offence, and liable to imprisonment for life.

Cardinal principle is for prosecution to prove the offence against accused as in charge sheet and the standard in criminal cases is proving beyond reasonable doubt. The testimony by prosecution witnesses must not leave a shadow of any doubt that the person charged indeed committed the

crime in the manner stated in the information. In **Galus Kitaya vs The Republic**, Criminal Appeal No. 196 of 2015 Court of Appeal held that;

'It is cardinal principle of criminal law that the duty of proving the charge against an accused person always lies on the prosecution.'

From the re-cited provision, the prosecution has to prove there is a person who was disfigured or disabled or was harmed and it is actually is the accused who did that. In the case at hand, prosecution has two eye witness. These are PW1 (victim) and PW2. PW1 informed this court that he was asleep with his young brother PW2 and heard the door of their room pushed and saw accused inside their room. Accused person started whipping PW2, when asked the reason behind the whip the victim and chop one thumb. The same was testified by PW2.

Both witnesses informed this court that crime occurred in the morning and it was a sunrise. PW1 explained he managed to see everything by using sun light as the door was open. The two witnesses saw the accused assaulting the victim, these are eye witness and their evidence is the best as per section 62 of the Evidence Act, Cap 6.

On this, it is part of our jurisprudence that in order to base a conviction on evidence of identification, such evidence must be watertight. See **Republic**

vs Eria Senwato [1960] EA 1974. Subsequently, it was held in the most celebrated case of **Waziri Amani vs Republic** [1980] TLR 250 that, such evidence should only be acted upon after all the possibilities of any mistaken identity have been eliminated and the court is satisfied in full that the evidence before it is unquestionable.

I have considered the totality of the evidence of PW1 and PW2 and taking the facts that the incident did not take place in a flush, the assailant was at zero distance and the incident was committed in the morning where there was a sunlight. I am satisfied that the conditions prevailing identification was favourable for the correct identification and recognition of the accused person.

PW1 and PW2 were brothers of the same mother, they all know accused as their uncle, brother of their father. That means they knew the accused before the incident and PW1 informed this court he knows the accused since 2010. With regard to such evidence of recognition, courts were guided by cases of **Shamir s/o John vs The Republic**, Criminal Appeal No. 166 of 2004 and **Frank Joseph Sengerema vs The Republic**, Criminal Appeal No. 378 of 2015 both of which are unreported, that:-

'Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made.'

Accused is a relative of victim and PW2, for instance, victim know accused for more than 10 years before the incidence and the crime was committed in the morning where he used the sunlight to see properly and he was able to recognize accused.

Was the assault cause any effect to the victim? That is the pending analysis now. While in court victim testified that accused whipped him when he loose control of the stick, he took machete and cut the right thumb of the victim. Further, PW3 testified that when he attends the victim, the victim was in general pain while his right thumb was chopped by 1cm.

From the prosecution testimony and Exh P1 this court satisfied that victim was injured during attack and the type of injury caused disfigure to the victim as he lost part of his right thumb. Due to that disability he failed to register for form two exams because by that time he was unable to write properly.

In defence, accused testified that he was not involved in any crime on 25/12/2022, he was in his normal daily activities. He denied to commit the

crime; and in law, accused person is not convicted because of his weak defence, but rather the evidence forwarded by the prosecution incriminates him to the extent that there is no other hypothesis than the fact that it is the accused person committed the offence which he stands charged. (See **Anthony Kinanila and Another vs Republic**, (Criminal Appeal 83 of 2021) [2022] TZCA 356 (16 June 2022). Furthermore, the accused testimony did not shake the case by prosecution. See **Yusuph Nchira vs The Republic**, Criminal Appeal No. 174 of 2007.

From the analysis, the visual identification and recognition done by both PW1 (victim) and PW2 whom I found to be credible witnesses was impeccable and watertight and therefore I find safe to rely on it. From analysis, I hereby convict the accused **JANES OMOLLO OGONDA @ JAHANES OMOLLO OGONDA** of the offence of acts intended to cause grievous harm contrary to section 222 (a) of the Penal Code, Cap 16.

It is so ordered.




M. L. KOMBA
Judge

SENTENCE

In consideration of the aggregated and mitigating factor I hereby sentence the accused **JANES OMOLLO OGONDA @ JOHANES OMOLLO OGONDA** to eight (8) years imprisonment. In addition, in terms of section 348 (1) of the Criminal Procedure Act, I hereby order accused **JANES OMOLLO OGONDA** to pay compensation of the five hundred thousand Tanzanian shillings (Tsh.500,000/=) to the victim Edwin George Kwawe (**PW1**). The compensation should be paid within two years of this judgment.

It is so ordered.

Right of appeal is explained.

DATED at **TARIME** this 25th day of March, 2023.




M. L. KOMBA
JUDGE

