

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI SUB REGISTRY
AT MOSHI**

CRIMINAL SESSION CASE NO. 94 OF 2022

**REPUBLIC
VERSUS
WILIBRAIT S/O MAKUNDI**

JUDGMENT

04/03/2024 & 08/03/2024

SIMFUKWE, J.

The accused person Wilibrat s/o Makundi stand charged with the offence of Attempt Murder contrary to **section 211(b) of the Penal Code, Cap 16 R.E 2022**. The particulars of the offence were that on 3rd day of June 2022 at Mamba Komakundi area within Moshi District in Kilimanjaro Region, the accused person did unlawfully attempt to cause death of one Charles Godfrey Koka. The accused person pleaded not guilty to the charge.

During the preliminary hearing there was nothing material to the charges which was undisputed.

The prosecution called four witnesses to prove the charges against the accused person and tendered one exhibit (Exhibit P1 the PF3 of the victim Charles Godfrey Koka). The accused person called his wife (DW2) to support his defence.

PW1 Dr. Justin Luis Kijazi testified among other things that he is a Medical Doctor at KCMC Hospital. On June 2022 he was stationed at KCMC Hospital at General Surgery Department. His daily responsibilities included treating patients, emergency surgery and elective patient's surgery. In June 2022, he had a working experience of four years.

On 4/6/2022 in the evening, PW1 was at KCMC Hospital at Emergency department attending surgery patients. He recalled that on that date he received a patient from Marangu Hospital who had been referred to KCMC Hospital. The patient was accompanied by two relatives: his son and his brother. As a general rule they started by recording the personal particulars of the patient. The said patient had a stitched scar on his head and he was unconscious. It was reported that the said patient had been unconscious for almost seventeen hours. Thus, he was referred to KCMC for further examination. They conducted a CT scan of his head which was done at the Radiology department. The results were that there was blood clot on the right-hand side of his head. They had to operate that patient

on emergency as leaving that blood clot could cause more harm. The surgery was done on the head of the patient. After the surgery, the patient was admitted at the ICU for observation. Thereafter, the patient continued to be treated until when he was much better. Then, he was transferred to the general ward. After being discharged, the patient was required to attend clinic as such kind of patient tend to have complications like compassion, paralysis etc.

PW1 stated that the relatives of the patient gave them a PF3 so that they could fill it. He identified the PF3 which he had filled through his names, signature, official seal and his roll number 2994. He prayed to tender it as exhibit. It was admitted as exhibit P1.

PW2 WP 2463 S/SGT Happiness a police officer at Majengo police station; narrated that on June 2022 she was stationed at Himo Police Station at Criminal investigation Department. Her daily responsibilities included investigation of cases, arresting criminals and taking them to court. By then she had a working experience of 25 years.

On 10/6/2022 in the afternoon PW2 was at work at Himo police Station. While there, she was assigned a case file which concerned causing grievous harm - Himo IR 1729. The suspect was Wilbright Makundi, the victim was Charles Godfrey Koka. After she had received a case file, she

went to the lock up as the suspect was already arrested. Then, PW2 went to KCMC Hospital as she was informed that the victim was in a serious condition at KCMC. She found him at ICU (Intensive Care Unit). Due to the condition of the patient, she was not allowed to see him. She went back to her working station and continued to collect evidence of other witnesses.

On 15/6/2022 PW2 went back to KCMC Hospital and found the victim shifted to a normal ward but he was still unconscious. He managed to see the doctor who had attended the victim and recorded his statement. The said doctor filled a PF3 of the victim. PW2 was given that PF3 and she went back to her working station. She collected the statements of witnesses and the PF3 and prepared the case file for referring to the National Prosecution Office. She said that she did not record the statement of the victim because he was unconscious. PW2 identified the suspect of this case who was the accused in the dock.

PW3 Raheli Johanson Temu a hamlet chairperson of Rina, testified that, on 02/6/2022 at night she was at home sleeping on a sofa when she received a phone call from Stephen Dawson Njau. The said Stephen required PW3 to go to Wilbright Makundi and see what was going on there. She told him that she was afraid to go there alone as it was night.

After a while, Stephen sent one youth Frank Innocent Makundi. PW3 left with the said youth and went to the scene at Wilbright Makundi. She found Frank the brother of Charles. Behind the house of Wilbright, PW3 found Charles Godfrey Koka laying down. She tried to call him; he did not say anything. She followed Wilbright and asked him what had happened. He replied that he heard someone roaming around his house, he asked who was that person twice or three times. Then, the said person went behind the house. Wilbright made follow up and found him squatting at the yams. Wilbright lighted his torch towards that person who then stood up as if he wanted to attack Wilbright who had a handle of a hoe. Wilbright hit that person with that handle on his head. Wilbright did not report/say that the said person had robbed him anything.

Thereafter, Frank the brother of Charles made a phone call to a neighbour seeking assistance of a motor vehicle.

PW3 stated further that she had never received any suspicion in respect of Charles and she knew Charles as a driver. She identified the accused Wilbright Makundi in the dock and said that she never had grudges with him.

PW4 Frank Godfrey Koka the brother of the victim testified among other things that on 3/6/2022 at 23:00 hrs he was asleep at home. While

asleep, neighbours of Wilbright Makundi went to wake up him and informed him that his young brother Charles Godfrey Koka was assaulted and that he was unconscious. He asked them where was he? They said that he was at the homestead of Wilbright. PW4 accompanied them and went to see his brother. At the scene, PW4 found Charles unconscious but he was groaning. He was laying down at the farm. He went to the owner of the homestead Wilbright and asked what had happened. The owner of the homestead told PW4 that he used to go to patrol to his grocery at night. When he was coming out of the house, he heard someone in his farm. He asked who was he, but that person kept quiet. He went back and took a handle of the hoe. He then went to his farm and hit that person. He did not say whether there was any confrontation or not.

PW4 said that he had never heard any incidence of crime of Mr. Charles. He informed this court that Wilbright and Charles were friends, thus they even wondered what had happened. Both of them were drivers of Noah shuttles from Tarakea to Moshi.

PW4 stated further that after being assaulted, Mr. Charles has paralysed on one part and three fingers of the right hand were cut. Thus, he cannot do anything.

Mr. Mashurano the learned State Attorney prayed this court to observe the victim who was before the court. The victim stood before the court with the aid of another person.

PW4 continued to say that the victim has lost memories as after being discharged from hospital his son told him that he was assaulted by Wilbright, the victim Charles replied that it was impossible.

PW4 finalised his testimony by identifying the accused person in the dock. He remarked that he could not have grudges with the accuse because he was very close to his young brother.

It was ruled that the accused person had a case to answer.

In his defence, the accused stated inter alia that he knew Charles Godfrey Koka as his fellow villager and neighbour. He said that he never had grudges with the said Charles. He stated further that on 3/6/2022 at night he was asleep with his family when he heard a crash of a door. He asked who was that while still inside. After about five minutes without a reply he heard a crash continuing, he decided to go out. He took a handle of a hoe and went behind the house where he saw a person squatting who had covered his head and had an iron in his hand. The accused thought that he would be hit with that iron rod. Thus, he timed that person by hitting him with the handle which he had. That person fell down. The

accused called neighbours by raising an alarm. Neighbours responded and went there and his wife also came out. The brother of the victim was called. He went at the scene. Then, the accused made a phone call to the village chairperson; he said that he could not go. He directed the hamlet chairperson to go.

The accused recalled that the brother of the victim made a phone call to his neighbour who had a car. Then, they took the victim to Marangu police Station and thereafter to Hospital.

The accused narrated further that next day on 4/6/2022 he went to the Police Station to give his statement in the company of his wife. They found the sister of the victim who said that the accused should not be given chance to say anything as he wanted to kill her young brother. Then, the accused was arrested. He stayed at Marangu police station for seven days. Thereafter, he was taken to Central Police Station where he stayed for 27 days. He concluded that on 3/6/2022, no misunderstanding had happened between him and the victim.

DW2 Sura Wilbright Makundi a wife house of the accused corroborated the defence of the accused person. She added that, she never heard that her husband had grudges with the victim Charles.

That marked the end of evidence of both parties. According to the evidence adduced by both parties the following facts are not disputed:

1. That the accused person did cause grievous harm to the victim Charles Godfrey Koka by hitting him on his head with a handle of the hoe.
2. That the accused person cooperated with the relatives of the victim to take him to hospital.
3. That, the accused person and the victim were drivers of shuttles of Tarakea – Moshi.
4. That, the accused and the victim are neighbours.

Section 211(a) and (b) of the Penal Code (supra) provides that:

"211. Any person who-

(a) attempts unlawfully to cause the death of another; or

(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."

From the above provision, the prosecution had the onus to establish through evidence the elements of the offence of Attempt Murder which

are: ***doing any act or omission to do any act of the nature likely to endanger human life.***

In the case at hand, as noted herein above, the accused person does not dispute the fact that he did hit the victim on his head with a handle of the hoe. He did not dispute the extent of injury sustained by the victim. What he tries to insinuate is that he is not guilty because he committed the offence in the cause of self defence.

Section 18 of the Penal Code (supra) provides that:

"18. Subject to the provisions of section 18A, a person is not criminally liable for an act done in the exercise of the right of self defence or the defence of another or the defence of property in accordance with the provisions of this Code."

Section 18A (1) (a) of the Penal Code (supra) provides that:

"18A.-(1) Subject to the provisions of this Code every person has the right-

(a) to defend himself or any other person against any unlawful act or assault or violence to the body;"

Section 18B (1) and (2) of the Penal Code (supra) provides that:

"18B.-(1) In exercising the right of self defence or in defence of another or in defence of property, a person shall be entitled to use only such reasonable force as may be necessary for that defence.

(2) A person shall be criminally liable for any offence, resulting from excessive force used in self defence or in defence of another or in defence of property." Emphasis added

From the above provisions, I am of strong opinion that despite the fact that the accused person had the right to defend himself and his property, he used excessive force in the cause of that self defence. PW1 a medical doctor stated the extent of injury which the victim sustained. That is severe head injury. In the PF3 (exhibit P1) PW1 commented that the patient must need more observation as he might develop complications. The victim was present in court during the trial; however, he did not testify as he was unable to speak, he stood before the court with the aid of another person. To buttress the testimony of PW1, the prosecution tendered a PF3 of the victim.

In the case of **Republic v. Christopher s/o Ngambilo (1967) HCD 388** it was held that *intention to kill is proved when one aims at vulnerable part of the body of the victim*. Also, see the cases of **Mustafa Daga s/o**

Andu v. Rex (1950) 17 EACA 140, **Rex v. Luseru Wandera s/o Wandera** (1948) 15 EACA 105 and **Myano s/o Ileme v. Rex** (1951) 18 EACA 317.

Pursuant to the available evidence and the above cited authorities, it is beyond reasonable doubts that the accused committed the offence charged. The accused did use a handle of the hoe to hit the victim on his head which is vulnerable part of the body. Therefore, he is criminally liable for the offence of Attempt to Murder as charged.

Based on the above findings, I find the accused person Wilibrait s/o Makundi guilty of the offence of **Attempt to Murder** contrary to **section 211(b) of the Penal Code**, and convict him as charged.

Dated and delivered at Moshi, this 08th day of March 2024.



X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

08/03/2024