

IN THE HIGH COURT OF TANZANIA
MUSOMA SUB-REGISTRY
AT TARIME
CRIMINAL SESSIONS CASE NO. 09 OF 2023
REPUBLIC
VERSUS
SAMWEL S/O MAGABE NYAMHANGA

JUDGMENT

08th & 14th March, 2024

M. L. KOMBA, J.:

"Thereafter I felt like I have stones in my mouth, it was my teeth which were chopped by accused outside the ceremony hall. The right side of my face was injured."It was in those environments, Waibe found himself a victim which prosecution term it as attempt murder contrary to section 211(a) of the Penal Code, Cap 16. Samwel Magabe Nyamhanga, accused herein is suspected to be responsible for the attempt as pointed by the victim.

The accused person denied the charge and hence the full trial involving calling of five prosecution witnesses and one for the defense. The prosecution had alleged that on the 29/03/2022 at Kemakorere Village

within Tarime District in Mara Region unlawful attempted to cause death of Waibe Chacha Matiko.

During the trial, Ms. Grace Mwanga, Senior State Attorney, Monica Matwe and Lusako Mwaiseke learned State Attorneys represented the Republic while Mr. Leonard Magwayega, defence counsel represented the accused.

Breaking the ice for the prosecution was Waibe Chacha Matiko, (PW1 or the victim) who testified that he is living in Nyarero but on 28/03/2022 he went to Kemakorere to celebrate the wedding of Marwa Matinde Wambura as hinted. Relatives, invitees and others gather in hall for cerebration. He said he saw his sister-in-law (Anna Christian) who holds his hand to outside the hall and she tell this witness that she wanted to go for a short call but she met someone who wanted to rape her.

Victim informed this court that he decided to escort her and after few steps Anna saw a person who wanted to rape her and show his in-law. This witness identified a person to be Samwel Magabe (accused) who was standing outside the hall. He said he knew accused previously as they live in neighbor villages and do shop together in markets. He testified he know accused for more than ten (10) years. When Anna pointed the accused,

victim proceeded that, he saw accused took machete which was hidden in his wrist and cut him (the victim) on face side, at the cheek. When this witness wanted to shout, he felt something like stone in mouth, it was his teeth. He loose conscious and regain conscious when he was under medication, he was then referred from Nyamwaga dispensary to Tarime District Hospital and latter on to Musoma referral Hospital for treatment. He was given PF3 which was filled after treatment and returned it to Nyamwaga Police post.

After the incident accused run away and through informers, on 05/8/2022 this witness was informed the presence of accused in Kemakorere and with the aid of police they (victim and police) managed to arrest accused on that day. He further testified that his health is not good as during rainy season he has headache and he hardly eat hard food like sugarcane or hard meat due to injury sustained.

While cross examined by Mr. Magwayega, he explained that, inside the toilet had no light but lights from the wall lighten the whole place. He further testified that accused was five (5) steps away from the gate of the ceremony hall and his in-law Anna had a torch in her hand.

Anna Christian testified as PW2 and informed this court that on 28/3/2022 she went to Kemakorere village to attend a wedding ceremony which was conducted at the homestead of Wambura Matinde. Many people attended the wedding. She testified that she asked for a torch from her grandmother, one Wagesa, for her to go to toilet where there was no light in toilet room. When approaching toilet, she informed this court that she saw someone hiding at the edge of the toilet and suddenly that person touched witness' right hand and pulled her behind the toilet where it was darkness. She testified that after struggle she managed to remove her hand from a person whom she saw his face and attire.

After that saga, PW2 went back to the hall and called PW1 his brother-in-law and explained to him what happened and PW1 decided to escort her. She testified that while they were outside the hall, few steps from the hall to toilet she saw the man who was pulling her and show PW1. This witness said PW1 went closer to the man so that he can inquire what was wrong, in friction of time the man pulled his machete which was hidden in his wrist and cut PW1 and run away to farms. She confidently testified further that after that action accused run away in farms. She shouted and good Samaritans gathered for assistance. Then she heard one saying "*Samwel*

Magabe ameua” to mean Samwel Magabe has killed somebody. PW2 testified further that those Samaritans assisted the victim to reach dispensary.

During cross examination PW2 clarified that a person who wanted to rape her was hidden around the toilet and she managed to saw accused by the aid of the light which came from the wall. She insisted that PW1 knew the accused as she planned for his arrest.

G.7499 D/C Corporal Abel appeared as PW3 and testified that on 05/8/2022 together with other police he was assigned to arrest accused at Kemakorere village. By assistance of the victim whom they communicated via telephone they met at the agreed point and it was the victim whom introduced accused to this witness and other police. He further testified that upon arrival they introduced themselves to accused and then accused mentioned his name thereafter they arrested him and surrendered to police post. The one they arrested is the accused in this case.

PW4 was investigator with identity of F. 5564 D/C Sgt Hussein. He testified that on 13/4/2022 he was assigned to investigate the crime. By the aid of phone number of the victim investigator managed to get PW2 and

recorded interrogation with her. This witness was informed by PW2 that she was with the victim when the crime occurred and she witnessed the incident. PW4 further testified that accused was arrested on 05/8/2022 and was under custody at Nyamwaga police post. He said, when interrogated, accused denied to commit the offence claiming he was in Kahama but he had no proof.

PW4 went on testifying that in his investigation he discovers it was the accused who committed the crime and the victim and accused person know each other before the incident as they used to meet in markets (minada) and on daily undertakings (mahemezi). As investigator he made a follow up of the PF3 and studied it as part of investigation which was tendered and admitted as Exh P1.

On cross examination PW4 insisted that accused failed to prove he was on safari and failed to surrender a person whom he claims to be accompanied on safari to prove his allegation and said it was the duty of the accused to surrender his witnesses and not the police.

Ndalagwa Nyerere Kamali testified as PW5. A doctor by profession, a dentist. He testified that he attended a patient with a name of Waibe who

had a wound in his face and broken jaw. Waibe was referred to Musoma Regional Hospital from Tarime. Explaining on size of the wound he said the wound was big which was stitched, the wound was connected with the jaw bone. As the victim had problems in teeth too, witness performed IMF (Inter Maxillary Fixation), a simple language is fixing broken jaw with a special wire. As he lost three teeth Waibe has permanent disability as his teeth will never grow again and the opening in a jaw may cause risk of bacteria who may easily pass through the opening to brain. He also informed this court that his life style is not normal as he has restriction on food. After the process he filled PF3 (Exh P1) which has his name and registration number (3980). While cross examined, PW5 clarified that Waibe lost three teeth.

That makes the end of prosecution case. This court ruled that the accused has a case to answer under section 293 and he agreed to enter his defence under oath.

Samwel Magabe Nyamhanga (DW1) informed this court that on fateful day (29/3/2021) he was on his way from Kahama where he was doing business to Tarime and he had sleep over in Mwanza to his friend Daniel and arrived

in Tarime on 30/3/2022. He knew about wedding but he did not hear about attack of anybody since return from Kahama.

During cross examination DW1 confirm to know Waibe, the victim as they used to meet in auctions. At Kahama he rented a house of Joseph whom he knows only one name and paid 20,000/= per month. He explained further that he has no bus ticket to prove he was in safari but he remembered he paid bus fare at the rate of Ts. 10,000/= from Kahama to Mwanza and he paid again Ts.10,000 from Mwanza to Tarime when his wife was returning.

It was his further testimony that he returned to Tarime on 30/3/2022 where he proceeded with agriculture activities (maize, beans and banana). While in Kahama he was moving in different town/ centers looking for customers and when his child was born, he was in Igunga.

DW2 was the accused wife, her name is Sara Felix Siki, she testified that they were staying in Kamaha till 29/3/2022 when they decided to return to Tarime. Upon reaching Mwanza, they had less bus fare so she connected to Tarime and her husband remained in Mwanza till the following day, that is 30/3/2022 when he arrived in Tarime.

During cross examination, this witness testified that while in Kahama they rented a room for 25,000/ per month. When they return to Mwanza then Tarime and they paid bus fare to the tune of 12,000/= per person. She confessed to be married by accused who paid 6 cows as dowry and they are blessed with one child who was born while her husband was doing business in Nzega. When they return his husband continued with his activity of making wood (kupasua mbao).

That marks the end of summarizing testimonies by witnesses. The accused is charged under section 211(a) attempt to murder. In his testimony the victim informed this court that he managed to see a person who attacked him and mentioned his name. It was prosecution establishment that the crime occurred during night and the victim together with PW2 saw the accused by the aid of electricity light. That is to say, in this case prosecution had eye witnesses. This reminds me on the readings on visual identification which is considered to be weak evidence unless some conditions have been fulfilled.

For a person to see correctly at night there must be not only a light but bright light which enable witness to see the surrounding environment, time spent by witness in observing the accused, the distance between the

accused and the witness, any impairment during observation, familiarization of the accused and the witness, if they ever meet and the frequency, the interval between observation and identification, ability of the witness to name or describe the accused to the next person he saw, confirmation by other person on the identification and all possible mistakes has to be eliminated. See **Chacha Jeremia Murimi & 3 Others v. Republic, Criminal Appeal No. 551** of 2015, **The Republic vs Shida Mahugija**, Criminal Session Case No. 21 OF 2018 and **Republic vs Steven Wambura Nafu @ Steven Mwita** (Criminal Sessions Case No. 185 of 2022) [2023] TZHC 23892 (15 November 2023).

It was the testimony of PW2 that on her way to toilet she saw a person hiding in walls of the toilet and when approaching that person hold her hand and pull her in the dark. By the aid of the light which was hanged at the wall she managed to see that person. She struggled for a while before she managed to relieve herself in that trap. She went to the hall and called her brother-in-law (PW1) for him to escort her to toilet as she has to attend a call of nature. In few steps while escorted to toilet she saw a person who was pulling her, he was standing on the wall of the hall, she shows him to PW1. When PW1 approaching the man who was three steps

away, according to PW2 the man pulled machete which was hidden in his wrist and cut PW1 on his face and then the man disappeared. PW2 testified further that she heard people surrounded him in law saying Samwel Mugabe has killed.

Collaborating the facts, PW1 testified that he was called by his sister-in-law (PW2) to escort her to toilet and on the way PW2 shows to PW1 a man who pulled PW2 in darkness who was near to them. A man was standing outside the wall and his name was Samwel Magabe. When Samwel saw PW1, he took machete from his wrist and cut PW1 on his right side of face. It was the testimony of PW1 that he knows the man for like ten (10) years as they used to meet in markets and in normal cause of the day (mahemezi). Although he lost conscious after the attack but he insisted to recognize the accused during attack.

Exhibit D1 was admitted during hearing but in due cause of composing judgment I found the document has no signature of the witness contrary to the requirement of section 34 B (2) (b). That mean it was illegally prepared. Due to that irregularity, I shall not retain the said the document in court record and I hereby expunge it from the court record.

These two people (PW1 and PW2) saw the accused committing the crime. It was night but the area had electricity light. PW2 observed accused for a while because they were pulling each other as the accused pulled PW2 to the dark, PW2 was struggling to be released from the trap, that action took some time, the distance between PW2 and accused favoured identification, there was no distance between them as accused was holding the hand of PW2. That means PW2 was able to see accused without impediment. There was bright light and managed to see how accused was dressed. When PW2 pointed the accused to PW1 it was second time and she remembered clothes.

Further, position where accused was standing make easy for PW2 to see him, his face and attire and the same to PW1 where recognition was easy to him (PW1) as he knew accused before the day he was attacked. As it will be recalled however, from record, the accused was not stranger to victim as they used to meet in normal undertakings of the day. To that end, victim claimed to recognize the face of the accused. With regard to such evidence of recognition, courts were guided in the 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'.

This court finds the identification and recognition was done properly and therefore PW1 and PW2 were credible witnesses whose evidence is the best as provided under section 62 of the Evidence Act, Cap 6. See also **Daniel Malongo Makasi and 3 Others vs Republic**, Criminal Appeal No. 346 of 2020 and **Juma Makonge @ Mwansi vs Republic**, Criminal Appeal No. 128 of 2021.

PW5 informed this court that he received a victim on 01/4/2022 at Musoma referral Hospital where he was referred from Tarime. Victim has a wound at the right side of his face, it was stitched. Upon observation he noticed wound was connected with jaw bone. In his procedures, doctor fix the victim's jaw with wire. Reading Exh P1. There is nowhere it was written that injuries sustained by the victim was life threatening rather, it is in record that victim lost three teeth.

Accused who testified as DW1 denied to commit the crime claiming that he was not in Tarime while the victim was injured. He was on his way from Kahama to Tarime and had a sleep over in Mwanza. In law it is called a defence of alibi which is provided under section 194 of the Criminal Procedure Code, Cap 20 R.E 2022 (the CPA). For easy of reference the relevant sub sections provides;

*194(4) Where an accused person intends to rely upon an alibi in his defence, **he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case.***

(5) Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish case for the prosecution is closed.

*(6) Where the accused raises a defence of alibi without having first furnished the prosecution pursuant to this section, **the court may in its discretion, accord no weight of any kind to the defence.***

The law dictates that accused must give notice to this court and to prosecution that he intends to rely on defence of alibi. In the case at hand there is no record if the accused provides the said notice. In the absence of notice, court must analyse it and give reasons for rejecting if it will reject. See **Ludovick Sebastian vs Republic**, Criminal Appeal No. 318 of 2007

(unreported). So far as analyzing defence of alibi is discretion, this court will consider the defence of the accused as testified by DW1 and DW2.

Accused testified that he was in Kahama from September 2021 to 29/3/2022 when he decided to return to Tarime. The same position was maintained by DW2. While in Kahama they rented a room and run their life just like other people do. Studying thorough the testimony of the two defence witness I find contradictions on the amount paid for rented room, bus fare from Kahama to Mwanza and form Mwanza to Tarime.

Further, there is variance in economic engagement of the accused upon return from Kahama. DW1 was on transit between 29/3/2022 and 30/3/2022 the night when crime was committed. He failed to satisfy this court that he slept in Mwanza (to Daniel) on 29/3/2022. The duty of accused is to shade doubts on prosecution case, so far as he maintained he was in safari, accused failed to convince this court that actually on the night of 29/3/2022 he slept to Daniel by his failure to parade Daniel as a witness or provide a bus ticket to prove he was on safari in 30/3/2022.

I find the prosecution evidence is strong and the accused failed to shake it and therefore the defence of alibi does not hold water. See **Edson Simon Mwombeki vs Republic**, Criminal Appeal No. 94 of 2016.

There is no doubt that the victim was injured as per Exh P1 but his wound was not life threatening to amount attempt to murder. This is so because PW5 did not indicate in Exh P1. I am not censuring him but it was words of Court of Appeal that;

'The duty of an expert is to furnish the court with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the court to form its own independent judgment by application of these criteria to the facts proven in evidence.' See **Republic vs Kerstin Cameron [2003] T. L. R. 85.'**

In the absence of scientific opinion on causation of death, I find prosecution has failed to prove the offence of attempt murder. As the victim was injured and he lost his three teeth, I find that is grievous harm as stipulated under section 222 of Cap 16 thus;

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) unlawfully attempts in any manner to strike any person with any kind of projectile or with a spear, sword, knife or other dangerous or offensive weapon;

(c) (d)(e)

(f)....(g)....(h).....

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

From the above analysis, basing on prosecution testimony I hereby convict the accused **SAMWEL S/O MAGABE NYAMHANGA** of the offence of acts intended to cause grievous harm contrary to section 222 (a) of Penal Code, Cap 16.

It is so ordered.



NKK
M. L. KOMBA
Judge

SENTENCE

In consideration of the aggregated and mitigating factor I hereby sentence the accused **SAMWEL S/O MAGABE NYAMHANGA** to four (4) years imprisonment. In addition, in terms of section 348 (1) of the Criminal


Procedure Act, I hereby order accused to pay compensation of the five hundred Tanzanian shillings (Tsh.500,000/) to the victim **Waibe Chacha Matiko (PW1)**. The compensation should be paid within one year after completion of imprisonment sentence.

It is so ordered.

Right of appeal is explained.

DATED at **TARIME** this 14th day of March, 2023.




M. L. KOMBA
JUDGE

