

IN THE HIGH COURT OF TANZANIA
MUSOMA SUB-REGISTRY
AT TARIME
CRIMINAL SESSIONS CASE NO. 158 OF 2022
REPUBLIC
VERSUS
NYAIMANO S/O GHATI MARWA

JUDGMENT

12th & 19th March 2024

M. L. KOMBA, J.:

Edna John Magesa is a primary school teacher who was well trained at Kinampanda Teachers' Collage in Singina holding a Certificate in Child Hood Education. Prior to her current school, she was teaching at Nkende Primary School in Tarime urban which is located in Mara District. She was teaching pre-school classes. On 08/10/2021 Edna was at her working environment at Nkende primary school resting under the tree and she saw a motorcycle with three people, among them there is a driver, a pupil and an adult whom she knows him to be Nyaimano Ghati and his child, Neema Nyaimano Ghati.

According to Edna, Nyaimano dropped from the motorcycle while furious and confronted Edna who was with teacher Mary Mwarabu. Nyaimano wanted to

know who beat his child. Edna responded that Neema was punished for disciplinary ground as she took somebody's property without permission. Following that answer, Nyaimano confronted and attack Edna who fall down and sustained injuries. The matter was reported to police and after investigation Republic found Nyaimano has to face the charge of Act intended to cause grievous harm contrary to section 222(a) of the Penal Code, Cap 16.

When the case was ready for hearing, Ms. Grace Mwanga, Senior State Attorney and Ms. Monica Matwe, State Attorney represented Republic while accused person was fended by Ms. Mary Samson. Accused person was not in court, he was bailed out and failed to appear for his case. When the matter started this court inquired the defence counsel if she has instructions from her client and denied to have proper instructions from the accused. Following the series of his failure to attend court, sureties were held liable for their promises and the matter was ordered to proceed in absentia.

Edna John Magesa testified as PW1 who said that on 08/10/2021 while at Nkende Primary school environment under the tree she was attacked by the accused who went there with his child. Accused wanted to know why his child was punished and upon clarification from PW1 he slapped PW1, hold and pulled her long hair, turned her several rounds while holding her hair before

pushing her and fall on stones and moram. PW1 informed this court that she felt pain as she falls on formerly broken leg. She cries for help and Street chairperson (PW2) was around who rescue PW1 and the accused disappeared. By assistance from other teachers, she stood from the ground where she falls and sit on the chair.

It was her further testimony that she was given a letter to police for the latter to give her PF3 for treatment. In the following day it was discovered that iron bar which was inserted in her leg twisted from normal position due to the fall and she was referred to Bugando Medical Centre for further treatment. PW1 testified to know the accused as they live in the same street and he usually pass over the PW1 house when going to town.

Street chairperson was paraded as **PW2 (Mary Samweli Salasala)** who testified that in the year 2022 her office was located within Nkende Primary school. On 08/10/2021 she was at Nkene primary school where she had an official visit at school on a follow up of pupils' statistics. While at the school she saw a motor cycle with a pupil. One person uttered abusive language attacked teacher with his hands. He holds hair of one teacher, rotates and pushed her. The said teacher falls down and called for help. She testified she find teacher was in pain and she advised to report the matter to police

station. Witness testified that she heard some pupils talked that the man was Neema Nyaimano's father. The man was tall, wearing white and blue shirt with black jeans trouser with bare head (without hat). It was day time so she managed to see correctly as the man was five steps away from her. On 09/10/2021 PW2 participated in drawing of the sketch map.

Teacher Edner was attended by **Dr Joseph Masiaga Chacha (PW4)** of Tarime District Hospital. On 09/10/2021 he was at his working station and he received a patient known as Edna John who was injured. Edna had one wound in head and the head was swollen and she was complaining of extensive pains in the right leg. Witness further testified that the victim informed him that she once had a major operation and her leg was planted an iron bar in it. Following that information, he ordered x-ray to be taken and from the reading he saw a bent iron bar inside the leg and its nuts (fixtures) were seen to be loose. He referred the patient to Bugando Medical Centre. This witness tendered PF3 which was admitted as Exh P1.

Ass Insp Vitus testified as PW3. In the year 2021 he was Constable with Force Number G.4393 and was assigned to arrest the accused who was at Busulwa Hill in Kahama. Witness testified that he was assisted by Cpl Yusuph of Galama police post. He had information from informer about availability of

accused through the phone number. They used phone number given by informer pretending they were mineral customers and managed to arrest him and transported him to Tarime Police Post and handle him to investigator of this case. He informed the court the accused was not in court.

The crime was investigated by E.7050 Sgt Mohamed of Tarime Police Post. He testified that together with Inspector Ally they went to school for the purpose of drawing a sketch map. They were assisted by Street chairperson called Mary. Witness informed this court that, assault occurred within a school compound while the victim was under the tree and there was moram. He was informed the man went to school and was shown the place victim was and the place she hit when she falls. The sketch map prepared and was admitted as exhibit P2. He went to the house of Nyaimano and was informed by family member that Nyaimano was not around but latter on he was arrested on 26/10/2021 while he was in Kahama and in 27/10/2021 he was brought in Tarime. This witness managed to interrogate accused while in police custody. He knows him before the crime so it was easy to remove him from lock up and interrogated him on offence of Acts intended to cause grievous harm. PW5 testified that accused denied to commit the offence. He further informed this court that accused has several allegations of cattle stealing and there was a time he run to near by country as a means of escaping authorities.

That makes the end of prosecution case. As hinted earlier, accused is nowhere to be found and the case is conducted in absentia.

The accused is charged with Acts intended to cause grievous harm to Edna Joseph Chacha contrary to section 222(a) of the Penal Code, Cap 16. I find it prudent to reproduce the section so as to know the ingredients of the offence.

The section reads;

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. This being the criminal case the standard of proving is beyond reasonable doubt. The testimony must not leave a shadow of any reasonable doubt that the person charged indeed committed the crime in the manner stated in the information. By doing so, prosecution has to prove the elements of the acts intended to cause grievous harm.

It is trite that the accused person must not be convicted because he has forward a weak defence, but rather the evidence led by the prosecution incriminates him to the extent that there is no other hypothesis than the fact that 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).

From the re cited provision, the prosecution has to prove there is a person who was disfigured or disabled or was harmed and it actually the accused who did that. From the testimony one can say prosecution is built by two witnesses who are eye witnesses. These are PW1(victim) and PW2. PW1 informed this court that she was under the tree and emerge accused with his child and managed to mention names as Nyaimano Ghati and Neema Nyaimano Ghati and find the victim and another teacher sit under the tree. Accused asked the reasons why his child was punished before clarification he attacked the victim by slapping her and turning her around, pulling her hair and pushed to fall down. This story is collaborated by PW2 who is Street chairperson who saw a man who arrived in motorcycle and attack teacher Edna by his hands. Teacher Edna was pushed and fall down then

she cries for help. It was the cry which made PW2 to go closer and assisted the victim while on the ground then accused disappeared.

The two witnesses saw the accused assaulting the victim, these are eye witnesses. The evidence of this nature, visual identification is said to be indescribable and is only under special circumstances may be worked upon. Before relying on, such evidence must be subjected to careful scrutiny due regard being paid to all the prevailing conditions to see if in all the circumstances there was readily sure, opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled. Further, I am very much aware that it is not always impossible to identify assailants, even very violent ones, and even where the victim is terrorized and terrified. See **Philipo Rukaiza @ Kitwechembogo**, Criminal Appeal No. 215 of 1994 CAT at Mwanza Registry (unreported).

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 during broad daylight. I am satisfied that the conditions prevailing identification was favourable for the correct identification of the assailant. PW1 informed this court he knows

Nyaimano for two years as they live in the same street and accused together with his child used to pass on victim's house when they go to town. PW 1 explained it was noon then was able to see properly and able to identify the assailant. Am convinced that PW1 is a credible witness and the assailant is no other than the accused herein. See **Kennedy Owino Onyachi & Others vs Republic** (Criminal Appeal 48 of 2006) [2009] TZCA 48 (22 December 2009)

What is remaining is to determine if the assault caused any effect to the victim. While in court victim testified that accused slapped her and held her hair and moved her around while holding hair and pushed her. That action made her fall down on stones and moram. PW 1 hit on the already broken leg and was in pain. PW 4 testified that when he attended the victim, she was in extensive pain while complaining of her right leg. He testified that x-ray picture revealed the insertion was bent (iron bar).

From the prosecution testimony and Exh P1 this court is satisfied that victim was injured during attack and the type of injury may cause disfigure to the victim as her right leg was supported by iron bar.

From the analysis, the visual identification evidence of both PW1 (victim) and PW2 (street chairperson) whom I found to be credible witnesses was

impeccable and watertight and therefore it is safe to rely on it. From the above analysis, basing on prosecution testimony I hereby convict the accused **NYAIMANO S/O GHATI MARWA** of the offence of acts intended to cause grievous harm contrary to section 222 (a) of Penal Code, Cap 16.

It is so ordered.



NK
M. L. KOMBA
Judge
19th March 2024