

IN THE HIGH COURT OF TANZANIA
MUSOMA SUB-REGISTRY
AT TARIME
CRIMINAL SESSIONS CASE NO. 32 OF 2023
REPUBLIC
VERSUS
EMMANUEL S/O NGUKA @ ANDITI

JUDGMENT

12th & 21st March 2024

M. L. KOMBA, J.:

On 20/12/2022 at 20:00 hrs Aska Erick Somba received a visitor in her home at Bubombi village. On that day her husband was in safari leaving behind his wife and her sister-in-law who is called Suzana Emmanuel. Suzana left her matrimonial home due to family misunderstandings and decide to live with her brother, Erick Somba. After exchanging of greetings between Suzana, Aska and the guest, it is alleged by prosecution that that guest took knife and chop the right ear of Suzana and she was bleeding. It was from that account prosecution arrested **EMMANUEL S/O NGUKA @ ANDITI** the above named accused and charged him with Acts intended to cause grievous harm contrary to

section 222 (a) of the Penal Code, Cap 16 R.E 2022. Accused person denied allegation and the denial attracted full trial.

It was **Aska Erick Somba** who was the first prosecution witness to testify in court as PW1. She informed this court that it was around 20:00hrs of 20/12/2022 while set dinner on a mate she hears a sound at the door "hodi". Suzana opened the door and Emmanuel Nguka (her husband) entered in a sitting room and sit on the chair. Suzana too sit on the chair near her husband. She said Suzana know the voice of her husband so it was easy for her to open the door. After greetings this witness hear the accused talked to her wife that as she has refused to return to matrimonial home, he planned to leave her disabled. He immediately pulled his knife from the wrist and cut the left ear of Suzana, left breast was chopped and Suzana neck was also injured. Following that incident, PW1 went outside and rise an alarm for assistance and one neighbour (Fredrick Silas) responded. While entering they found Suzana laying on the floor unconscious. That neighbour took Suzana to KMT hospital.

During cross examination this witness testified that the light used in that day was from solar bulb, the battery was powerful so provide bright

light. She explained it was one blow from the ear to neck and then breast while the accused was in white shirt and black jeans.

Fredrick Sila testified as PW2 to the effect that on 20/12/2022 at night he was at his home and heard yowe (an alarm) from neighbor house and he responded. He found Suzana laying on the floor in the sitting room while bleeding from the left ear, neck and left breast. He took Suzana to Kirongwe police post then to Shirati police post for PF3 but he was advised to go to hospital. He took Suzana to KMT hospital.

This witness proceeded that he knows Emmanuel, husband of Suzana as they grow together and prayed together. They were neighbours when they were young.

During cross examination he testified he did not see Emmanuel cutting Suzana although he was the first person to enter in the house where crime took place. About condition of Suzana he said when she was awake Suzana complained of pains.

Suzana was treated by **Dr Peter Okasi Akeyo (PW3)** who informed this Court that he received Suzana on 20/12/2022 while crying and her body soaked on blood with chopped ear and open veins. It was his testimony that victim has three wounds caused by sharp object, she lost

one ear, a wound on her neck and on the left breast. Doctor stitched the open wound and admitted patient for further observations. It was the PW3 testimony that wounds on Suzana body was caused by sharp object as indicated in Exh P1.

The crime was investigated by **H. 479 D/C Cpl Gabriel (PW4)** of Shirati Police Station who was assigned that duty by head of investigation Department in the night of 20/12/2022. In order to get proper information as he was informed the victim has cut wounds by machete and was taken to KMT hospital, in the same night witness went to KMT hospital within Shirat and managed to see Suzana who had no left ear and wounds on her neck and left breast and she was bleeding. It was his testimony that Patient was crying saying her husband has cut her. They inquiry whereabouts of her husband she replied he was living in Bubombi. As the patient had no PF3, they left one to the doctor.

It was his further testimony that on 21/12/2022 he visited the scene together with other police. He noted the victim was living with her brother Erick who was not around but they found his wife, Aska. He confirmed to get assistance from Aska to know the environment where the victim sit. Witness saw blood on the floor under chair of the victim, he then draw sketch map which was admitted as Exh P2. On the same

day, that is 21/12/2022 accused was arrested and upon interrogation he denied to commit crime. While at the scene this witness was informed by PW1 that they were preparing food and they heard some one knocking, Suzana noted the voice of her husband and opened the door. Upon entering he sat on the chair. He was informed that accused was complaining the habit of his wife to remain in their home and informed his wife he must injure her. He then pulls a knife and chop the ear of Suzana.

During cross examination he informed this court that accused was arrested on 21/12/2022 while he in his village.

Upon being addressed in terms of section 293 of the Criminal Procedure Code, accused opted to defend his case under oath and had one more witness.

Emmanuel Nguka, appeared as **DW1** and testified that he lives with his mother and his children. On 20/12/2022 he had his normal activities till night when they had a family meeting with Dorina Nguka his mother and his brother William Nguka. They were discussed how to raise school fees for his child who was studying in Tabora. The meeting started on 19:00 hrs and end up around 21:30 hrs and he went to sleep.

He acknowledges to know Suzana as his wife but she has returned to their home without any disability, she was fit. But when he saw Suzana in court he saw her with a piece of ear and he did not ask who injured her. She acknowledged to be arrested on 21/12/2022.

During cross examination he testified that the said the family meeting had not specific amount to raise for the school fees although the fees which was due was 1,400,000/=and they end up to pledge but there was no cash nether amount on pledge. Unfortunately, both family member failed to fulfill their promise. The family meeting was chaired by his brother William and used the house of their mother as a venue. They sit on sofas accused and his brother sit on two-seater sofa while their mother seated on a single sofa. During discussion he left to answer call of nature and he returned, the meeting was closed by William and they all dispersed.

She testified Suzana had a habit of leaving matrimonial home several times. Even her family did not know reason for her habit of leaving matrimonial. The last time she leaves which was November 2022 accused was not at home although he was not aware that his wife was living with Aska who was known to for a long time.

William Nguka appeared as **DW2**. He is a brother of DW1 who testified that he is a farmer and carpenter. He lives with his mother and young brother Emmanuel and their children. On 20/12/2022 he was at his home and after dinner they had a meeting which started around 19:00hrs and finalized at 21:30 hrs, their mother closes the meeting by prayer and dispersed. He further testified that in the following day, that is 21/12/2022 he heard Suzana was injured.

During cross examination he said the meeting which was conducted in the house of their mother was not opened but their mother was the first to speak. During meeting he sat on the sofa alone and their mother sat on her special chair which was not sofa but he did not remember where accused sat. In the meeting he promised to contributed and he testified he really contributed more than Tsh. 100,000/ the amount was sent to their brother and communicated to their mother and Emmanuel about his contribution. To confirm that there was a serous meeting he said all members participated to the meeting up to the end, no one went even to attend short call.

It was his further testimony that when he heard Suzana was injured he visited her at KMT hospital where she was on female ward and saw her

with a piece of ear and when she asked her what was wrong, she did not reply.

That marks the end of summarizing testimonies by witnesses. The accused is charged under section 222 (a) acts intended to cause grievous harm and the victim is Suzana, his wife. It was the prosecution who charged the accused and therefore they as supposed to prove the offence against the accused as per section 110 and 112 of the Evidence Act, [Cap 6 R.E 2019] thus;

*110.-(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts **must prove that those facts exist.***

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

*112. The burden of proof as to **any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person.***

PW1 said she saw accused chopping the victim's ear. This is an eye witness. Under the law her evidence is the best as per section 62 of the Evidence Act, Cap 6 and **Juma Makonge @ Mwansi vs Republic**, Criminal Appeal No. 128 of 2021 but on the other side this type of

evidence is crumbly and must be relied upon when all impairment has been eliminated because mistake is always done. See **Frank Joseph Sengerema vs The Republic**, Criminal Appeal No. 378 of 2015.

That is to say, for a witness to see correctly at night there must be light which enable witness to see the surrounding environment, time spent by witness in observing the accused should be considered, the distance between the accused and the witness who was under observation matters, there should be no any impairment during observation, familiarization of the accused and the witness add more credit on identification together with 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).

PW1 testified he saw accused at her home and it was night but at the sitting room she said there was solar lamp which had bright light. The same is collaborated by PW2 who said he managed to see Suzana while

bleeding by using the solar lamp which was at the sitting room. Furthermore, accused was familiar to PW1 as PW1 informed the court they have meet several times. That testimony was confirmed by the accused who also acknowledge to know the Aska. From the testimony of PW1 and PW2 this court is satisfied that the identification of the guest at the house of PW1 was done correctly.

Second stage is for prosecution to prove that there is a person was injured on 20/12/2022. PW1 testified to see the accused while in her sitting room chopping the ear of the victim and she made an alarm. That testimony is collaborated by PW2 who heard an alarm and responded. He discovered the alarm was from his neighbor Erick and when he entered in the sitting room he found Suzana on the floor while bleeding. When he looked closer, he found wound on her ear, neck and breast. This was also collaborated by PW3, a doctor who informed this court that Suzana lost her left ear and had wounds on the neck and breast. Before I conclude if the action by accused can fall squarely to the offence charged I shall reproduce the section which accused was charged;

222 (a) 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)

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

From the provision of law, a person who wound or cause grievous harm to another is said to commit an offence. PW3 testified that victim had three wounds and one of them was open wound caused by removal of an ear. It was left ear and was admitted.

Accused defended on alibi that he was in a meeting when the crime occurred. Although he did not give the required notice, this court shall consider his defence. See **Ludovick Sebastian vs Republic**, Criminal Appeal No. 318 of 2007 (unreported). Accused testified the time crime occurred around 20:00 hrs he was in a meeting, a family meeting which was intended to raise school fees for his child who is studying in Tabora. The meeting ended around 21:30 hours.

I noted DW1 and DW2 had contradictions on some aspects including type of seats used by members of the meeting, the opening of the meeting, closure of meeting and outcome of the meeting. 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 94 of 2016) [2016] TZCA 266 (18 October 2016)** and **Republic vs Samwel S/O Magabe Nyamhanga (Criminal Sessions Case No. 9 of 2023) [2024] TZHC 847 (14 March 2024)**.

The contradictions pointed suggest DW1 and DW2 were in deferent meeting while both said they were together in the same meeting. This court reject the defence for the reason of accuracy.


Prosecution witnesses, PW1 and PW3 and PW4 had variance on presence of the PW1 at the hospital. While PW1 and PW4 testified that Aska did not escort Suzana to hospital, PW3 testified that she filled PF3 by the assistance of Aska who was at the hospital. I find this is minor contradiction as it has nothing to do with the injury which is the root of the charge leveled against the accused, as it is settled that a contradiction can only be considered as fatal if it is material going to the root of the case. See **Sebastian Michael & Another vs DPP**, Criminal

Appeal No. 145 of 2018 and **Chrizant John vs Republic**, Criminal Appeal No. 313 of 2015, (unreported).

General principle of law is that, defence has to shake the prosecution case. What I can see from the defence of the accused herein it failed to shake the prosecution allegations although it is not the duty of accused to show his innocence. See **Abas Matatala vs Republic**, Criminal Appeal No. 331 of 2008.

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




M. L. Komba
Judge
21 March 2024

SENTENCE

In consideration of the aggregated and mitigating factor I hereby sentence the accused **EMMANUEL S/O NGUKA @ ANDITI** to five (5) years imprisonment. In addition, in terms of section 348 (1) of the

Criminal Procedure Act, I order the accused to pay compensation of the five hundred Tanzanian shillings (Tsh.500,000/) to the victim **Suzana Emmanuel**. 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 21st day of March, 2023.



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M. L. KOMBA
JUDGE

