THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

CRIMINAL SESSION CASE NO. 157 OF 2022

THE REPUBLIC

VERSUS

RASHID ABDALAH NJUMWAKI..... 1st ACCUSED

SAID RAJAB JUMA SIGE .....2ND ACCUSED

HIDAYA ALLY MBUJU.....3RD ACCUSED

JUDGEMENT

Date of last Order: 21/02/2024

Date of judgement: 13/03/2024

NGUNYALE, J.

The three accused persons, Rashid Abdallah Njumwaki, Said Rajabu Juma Sige and Hidaya Ally @ Mbuju hereinafter to be referred to as the 1st, 2nd and 3rd accused persons were charged with the Information of wounding with intent to Maim contrary to Section 222 (a) of the Penal Code Cap 16 R. E 2019. It was alleged that, on 6th April, 2020 at Msangani area within Kibaha District in Coast Region unlawfully wounded one Mwita Chacha by beating him with heavy object on his right eye with intent to maim as a result he lost his eye.

In court both parties were represented. The Republic as the prosecutor was ably represented by Ms. Asifiwe Mzava learned State Attorney and Mr. Uhagile also learned State Attorney whilst the first accused person was represented by Mr. Gerson Mosha learned Counsel, the second accused person was represented by Ms. Robi Simon Magaigwa learned Counsel and the third accused person was represented by Ms. Agata Fabiani also learned Counsel. Earlier, it was noted that the occurrence of the offence under scrutiny was motivated by mob justice undertaken after the victim was alleged to have committed the offence of rape as it will be demonstrated shortly.

The facts of the case are not very complicated as extracted from the record and the witnesses. The prosecution side paraded five witnesses namely PW1 Mwita Chacha Mwita, PW2 Mohamed Ramadhan, PW3 Dr. Leo Gloria, PW4 Dr. Cyprian Tomoka and PW5 Insp Omari Mwinyi Madenge whilst the defence paraded four witnesses namely DW1 Rashid Abdallah Njumwaki, DW2 Hidaya Ally Mbunju, DW3 Ally Hassan Mbunju and DW4 Salum Ally Kapoyola.

In the evening of 6th April 2020 between 16:00 and 17:00 hours, the victim PW1 went to the M – pesa service to withdraw money which was sent to him by his employer PW3. While moving back home, he met a girl

standing along the road, he could not bother with the said child instead he passed her and turned to the forest to look for firewood. In the course of gathering firewood, he was surprised when he was invaded by the people who were well known to him DW1, DW2 and DW3 i. e the 1st, 2nd and 3rd accused persons. The accused persons started to fight him using sticks alleging that he has raped the child. He raised alarm. Upon raising alarm PW2 responded, he went to the scene with his wife where he found the punishment to the victim going on. He asked them what was wrong? DW1 told him that the victim was a rapist, he had raped the child. PW2 told them to take him to *Mjumbe* of the street government. They left the scene going to *mjumbe*. While going to *mjumbe*, PW2 said that, he witnessed the first accused person who moved from the back and used a hard object to fight the victim to his right eye causing serious injury to the eye. The street Chairman DW4 witnessed the victim who was injured thus he advised them to take him to police. PW3 said that she received information about the arrest of PW1 on 06th April 2020 evening. Next day on 7th April 2020 morning he went to Kibaha police station to bail the victim, on the way she was told by the OCS that the victim was serious ill. After the accused had been bailed, she took him to Mbezi hospital for treatment and later to Muhimbili. The condition of the eye was still not good, 0n 6th June 2020 she decided to take him to CCBRT hospital. At

CCBRT hospital it was established that his eye cannot serve the victim any more it was seriously damaged. The doctors were satisfied that the eye had completely lost vision, it was removed by PW4 the eye specialist. DW1 completely disassociated himself with commission of the offence, generally the defence (DW2, DW3 and DW4) testified to the effect that the victim's eye had problem even before 6th April 2020.

Earlier, at the close of evidence in support of the charge it was established that the 2nd and 3rd accused persons had no case to answer. The two accused persons were acquitted accordingly for the offence of wounding with intent to Maim contrary to Section 222 (a) of the Penal Code Cap 16 R. E 2019 for having no case to answer. The trial remained with the 1st accused person.

Upon completion of the trial, the court remained with a legal duty to determine the matter by critical review of the elements of the offence charged against the accused as set under section 222 (a) of the Penal Code. For clarity, the section is quoted hereunder:

> *" 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) - (h) N/A,*

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

The main issue for the determination by the court is whether the prosecution met the requirement of the law to prove the case against the 1st accused person beyond reasonable doubt. It is a principle of law that, in proving any criminal offence, the prosecution bears the burden of establishing that, the offence was committed and it is the accused person and nobody else who committed the offence charged. The burden of proof never shifts unless otherwise provided by the law. See the cases of **Mohamed Said Matula Vs. R** [1995] T.L.R. 3. Also, sections 110 (1) and (2) and 112 of **Evidence Act**, [Cap. 6 R.E 2022] which require that, the burden of proving existence of fact lies on the person who wishes the court to believe its existence. And the standard of proof is beyond reasonable doubt as exhibited under section 3(2) of the **Evidence Act**, [Cap. 06 R.E 2022]. The standard and burden of proof beyond reasonable doubts were also given consideration by the Court of Appeal in the case of **Nathaniel Alphonce Mapunda and Benjamin Mapunda Vs. R** [2006] TLR 395, when the Court observed thus:

> *"As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, in the case of Mohamed Said Vs. R this Court reiterated the principle by stating that in a murder charge the burden of proof is always on the prosecution, and the proof has to be beyond reasonable doubt"*

What amounts to proof beyond reasonable doubt was well discussed in the case of **Samson Matiga Vs. R**, Criminal Appeal No. 205 of 2007 where the Court of Appeal held:

> *"A prosecution case, as the law provides, must be proved beyond reasonable doubt. What this means, to put it simply, is that the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence"*

In determining whether the prosecution proved their case beyond reasonable doubt against the accused person, three issues are to be discussed, **one** whether PW1 was grievously harmed, **two**, if he was grievously harmed did that harm resulted to permanent disfigurement and, **three** whether the harm was caused by the accused person and nobody else.

The first Issue is whether the victim PW1 was grievously harmed. It is alleged under the information that the accused persons assaulted PW1 on the right eye resulting to permanent disfigurement. The prosecution witness PW1 who is the victim testified to have been injured by the 1st accused person (DW1) on his right eye by hitting him using a blunt object. His evidence was supported by PW2 who was at the crime scene. PW2 testified that, he witnessed DW1 hitting PW1 on his eye using his shoe. The other three prosecution witnesses were not at the scene of crime but

PW4 who is a doctor at CCBRT evidenced that PW1's eye was injured and he was responsible in removing the eye after being satisfied that it was permanently damaged to the extent of losing vision. The findings of PW4 were exhibited by exhibit PE1 a PF3. Basing on that evidence, it is my view that; the 1st issue is answered in affirmative that the victim (PW1) was grievously injured.

The second issue is as to whether the injury resulted to permanent disfigurement. It has already been established through the testimony of PW4 that the victim was subjected to procedures of removing the eye. The same was done after being satisfied that the retina completely raptured. From that view, then the 2nd issue is also answered in affirmative.

The third issue is whether the harm was caused by the accused person in court and nobody else. From the prosecution evidence PW1 and PW2, the two told the court that after PW1 was hit, the eye started to discharge water and blood. Also, PW3 told the court that next day on 7th day of April 2020 she went to Kibaha police station. There, she found PW1 in a bad condition as the eye was discharging water and blood. She bailed the victim and took him to the dispensary at Mbezi. Unfortunately, there is no any proof that PW1 was taken to dispensary. PW3 again told the court

that at the dispensary PW1 could not receive treatment because they had no PF3 though a file was opened. She just bought some antibiotics for the victim to take and they went home. It is a wounder for PW3 who is a professional doctor to take home the victim who was alleged to be in bad condition if at all it was true that he was in such bad condition. Again, PW3 told the court that PW1's condition was worsening and on 15th April 2020 she decided to go to police to collect the PF3. The following question is, why the PF3 was not issued on the 1st day when PW3 alleged that the victim was in bad condition. How could the victim of an offence receive treatment without a PF3. Again, PF3 was issued on 15th April 2020 but the victim (PW1) was taken to hospital CCBRT on 6th June, 2020 as per the evidence of PW5 and exhibit PE1 state. The sequence of taking care of the injury if at all the injury occurred on 6th Apr. 2020 casts doubt to the prosecution evidence as far as the injury is concerned. How could the police officers release the victim on 7th April 2020 for the purpose of being taken for treatment without availing him with PF3. The OCS and other police officer are aware of the legal essence of the PF3 for the fate of the victim of the criminal offence. It is still a wounder because the PF3 was not issued on 7th April 2021.

It is from those doubts. The court is invited to believe the defense evidence that PW1 was not injured on that day as he had that defective eye even before 6th Apr 2020 as testified by DW1, DW2, DW3 and DW4 and that on the fateful day PW1 was not injured by the accused person. May be PW1 sustained injures in the other way around outside 06th April 2020.

In the case of **Robert William @ Chikira Versus Republic**, Criminal appeal no 167 of 2022, the court of appeal said that;

> "*Any doubt whether inherent or created by cross-examination, must as a matter of* ***principle benefit the accused person****. That said, I find the trial Court to have erred in convicting the appellant while in fact, the evidence did not prove the charge." [emphasis added]*

In the result and for the afore stated reason, I find the 1st accused person not guilty of the offence of wounding with intent to maim contrary to sections 222 (a) of the Penal Code, [Cap 16, R.E. 2022] as charged and proceed to acquit him as I hereby do.

Dated at Dar es Salaam this 13th day of March 2024.

D. P. NGUNYALE

JUDGE

13/3/2024

The judgement has been delivered this 13th day of March 2024 in the presence of Ms. Asifiwe Mzava, State attorney for the republic and the accused present in person.

Right of appeal explained.

D. P. NGUNYALE

JUDGE

13/03/2024