

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

CRIMINAL SESSION CASE NO 03 OF 2020

REPUBLIC

VERSUS

OMARY MOHAMED @ HASSANI ACCUSED

JUDGMENT

I. ARUFANI, J

The accused person, Omary Mohamed @ Hassan is charged before this court with the information of attempt to murder contrary to section 211 (a) of the Penal Code, Cap 16, R.E 2002. It is stated in the particulars of the offence that, on 5th day of August, 2017 at Namalowe area in Milonde Village within Tunduru District in Ruvuma Region the accused person did unlawfully attempted to cause death of one Elihuruma Dalson @ Moshi by cutting him with a machete on his head and neck.

When the information was read to the accused person he pleaded not guilty to the information. During hearing of the case I was assisted by Ms. Eliza Chale, Mr. Hamisi Mkilima and Ms. Bahati Mbano, ladies and gentleman assessors. While the Republic was represented by Ms. Tumaini Ngiluka, Senior State Attorney who was assisted by Ms. Amina Mawoko and Ms. Jeneroza Montano, State Attorneys, the accused person was

represented by Mr. Eliseus Ndunguru, learned advocate. In the course of proving the information leveled against the accused person the prosecution paraded before the court five witnesses and tendered in the case two documentary exhibits. On the side of the accused person he fended for himself without calling any witness.

The first prosecution witness to testify before the court was **Elihuruma Dalsen Moshi, (PW1)**. He told the court that, on April 2017 he was hired by a company known as CSL to make water tank lid at Milonde Village and to dig water trench from Milonde – Kiuma to Matemanga area within Tunduru District in Ruvuma Region. He told the court that, in doing the said work he was using labourers he got through the announcement he made in the village. He said he used to give work of digging water trench to the labourers by piece and each labourer used to be given a piece of length of trench which he had an ability to finish. He said each labourer was being paid according to the length of the trench he dug. He said the money for paying the labourers he used to get from the company which gave him the work.

PW1 said that, he know the accused person as he was one of his labourer in the work he was doing of making water trench and said he was a hard working person. He said he worked with the accused person as his labourer in the work from April to August, 2017. He went on saying that, at the end of the work of digging water trench the accused person was claiming from him the sum of Tshs. 50,000/= for the work he had done. PW1 said that, the stated debt was referred to the Village Authority and they agreed that, the claim of the accused person would have been paid at

the Village office after the money being sent to PW1 by the company which had hired him. PW1 said he continued being in good relationship with the accused person.

PW1 testified further that, apart from the work of constructing water project he was also planting onions in the farm he was given by one **Yasin Kalanje Yasin, (PW2)**. He said he was using different labourers in the farm work and some of those people were the accused person, Paulo Msukuma, Saidi Kandila and Ngunga. He said he used to pay those labourers according to the work done by each of them. He said when he was doing farm work he used to sleep in the farm at a rack bed he made at the farm as he used to water the garden during the night and said he used to do that work with people who were ready to work with him during the night for the purpose of increasing their income.

He said on 5th August, 2017 he was at his farm with Saidi Kandila, Paulo Msukuma, Ngunga and the accused person who were planting onions from 08:00 to 18:00 hours. He said after the mentioned labourers finished their work he paid them their money and when he wanted to pay the accused person he said he wanted to continue with night work. He said the rest of the labourers departed and left him with the accused person. PW1 said that, they started preparation of watering the onions and thereafter they went to ignite the water pump. He said when he was igniting the water pump the accused person had a machete and a knife which he used at the farm.

PW1 said that, after igniting the water pump the accused person invaded him and started cut him by using a machete on his face, head and

neck. PW1 said to have tried to hold the machete which the accused person was using to cut him and it broke into two pieces and cut his fingers. He said the event took about ten to twelve minutes. He went on saying that, he managed to know the person who was cutting him was the accused person as he knew him very well and he was working with him in his farm for the whole of that day. He also said that, when the accused person was cutting him, and when he was trying to snatch the machete from him were looking each other and he managed to see him as there was a bright moonlight which enabled him to identify him properly.

He said as he had used a lot of energy he fell down and the accused person continued to pierce him on his head by using the piece of machete remained to him and he bleed profusely. He said while lying down the accused person looked at him if he was still alive and lifted up his hand and after seeing he was still alive he started cutting him on his neck by using the piece of machete he had. PW1 said that, after seeing the intention of the accused person was to kill him he started praying his God. He said to have feel as if wanted to vomit and he vomited blood. He said after the accused person seeing he had vomited blood he believed he had already died.

PW1 said that, the accused person kicked him on his legs and after seeing the accused person was killing him he acted as if he was dying and started snoring with a small voice like a person who was dying. PW1 said that, thereafter the accused person cut the belt of his coat and took it and searched for money in the coat and took about Tshs. 70,000/= to 80,000/= and departed. He said after seeing the accused person had

departed he tried to stand up but he failed. He said to have crawled up to his hut and slept on his rack bed. He said as he was oozing blood on his face and head he was not seeing properly.

PW1 said that, later on he heard a person who was calling him and he discovered was Waziri Matokeo. He said that, thereafter he heard the voice of (PW2) and **Boldin Robson Silayo, (PW4)** calling him. He said when he was asked by those persons as to what happened to him he said to have told them it is Omari, (accused person) who was left with him cut him. He said the mentioned persons found a transport and took him to Kiuma Hospital where he was treated. He said the doctor stitched his wounds and he was given blood transfusion and water drips. Later on his relatives were informed about that event and on 7th August, 2017 they went to take him to Muhimbili National Hospital (henceforth; MNH). He said he stayed at MNH up to 22nd December, 2017 when he was discharged. PW1 said that, when he was taken from the farm he was conscious and after being taken to Kiuma Hospital he was semi – conscious until 16:00 when he became conscious.

When PW1 was cross examined by the counsel for the accused person he said that, PW2 was at his farm on the date of event and he saw the accused person when he was at his farm but he don't know when PW2 departed from his farm. He said his statement was recorded by the police officer when he was at the hospital. He said from the date of the event he has not seen the accused person until when he has come to see him in the court. He said when the accused person was cutting him he didn't say anything and said when he asked the accused person what he wanted

from him, the accused person didn't say anything to him. He said there was no any quarrel between him and the accused person on the date of event. He also said is the one mentioned the accused person was the person cut him.

Yasin Kalanje Yasin, (PW2) told the court that, in 2017 he gave PW1 five acres of land out of his twenty five acres of land so that he can plant onions. He said PW1 was using labourers to assist him in the farm he gave to him. PW2 said to have seen the accused person, Boldin and Kandina working in the farm of PW1. He said he saw the accused person in the farm of PW1 two times. He said the second time to see the accused person in the farm of PW1 was on 5th August, 2017. He said on that date he was at his farm from 08:00 hours and he departed from his farm at about 13:00 hours and went to his home as he was not feeling well and left PW1 and his labourers continuing with work at farm he gave him.

PW2 said that, on 6th August, 2017 at about 06:45 hours he received a phone call from Waziri Matokeo who told him to take a motor cycle and went with it to the farm of PW1 as he had been invaded and injured. PW2 said to have gone to Boldin Robson Silayo, (PW4) to inform him about the stated event as PW2 was the relative of PW1 and thereafter he went to find a motor cycle. He said after getting the motor cycle he went to the farm of PW1 with PW4. PW2 said that, after reaching at the farm of PW1 they found him on his rack bed and there was blood on the bed. He said when he asked PW1 what happened to him PW1 told them he was cut by the accused person.

PW2 said that, after getting the said information they took PW1 to Kiama Hospital by using the motor cycle they used to go to the farm of PW1 and PW4 embarked on the same motor cycle with PW1 so that he could have hold him. PW2 said to have used another motor cycle which followed them later on to go to the hospital. He said after arriving at the hospital PW1 was received in the hospital and thereafter they returned to their home to change their clothes as they had blood. He said when he returned to the hospital at about 12:00 hours to see the patient he heard people saying the accused person had been arrested and he had been taken to the police station.

PW2 said that, after getting the said information he took a motor cycle and went to Matemanga police station where he was interviewed and his statement was recorded. He said thereafter he went to the farm of PW1 with PW4 to take the properties of PW1. He said after going to the place where there was a water pump they found a coat which had a blood. He said thereafter they continued to take care of PW1 and later on his relatives went to Kiama Hospital and said they wanted to take PW1 to Dar es Salaam as most of his relatives were living at Dar es Salaam.

When PW2 was cross examined by the counsel for the accused person he said that, PW1 said the accused person injured him because he was claiming from him the money of digging water trench. He said when he departed from his farm on the day before the event he left Paulo, Omary Mohamed Hassan, Elihuruma Moshi, Kandina and other people he has forgotten their names at the farm of PW1. He said when the accused person was being interviewed at the police station he was together with

PW4 and they heard the accused person confessing he committed the offence. When he was re-examined by the State Attorney he said when the accused person was confessing he was being interviewed orally and his confession was not recorded.

Boldin Robson Silayo, (PW4) told the court that, on 5th August, 2017 he was working in the farm of PW1 and said he was with the accused person together with other people who in total were about four to five people. PW4 said on that day they worked up to 18:00 hours when they finished the work. He said when PW1 was paying them their money the accused person said he wanted to continue with the night work. PW4 said that after being paid their money they departed from the farm of PW1 and left the accused person and PW1 at the farm.

PW4 said that, in the morning of the following day which was 6th August, 2017 he was informed by PW2 that he wanted to go with him to the farm of PW1 as PW1 had been injured and he was seriously sick. He said PW2 followed him by using a motor cycle and after going to the farm of PW1 they found PW1 lying on his bed and covered by a bed sheet. PW4 said when they asked PW1 what happened to him he said he was dying and said the accused person who was left with him on the previous day was the one cut him. He said they found PW1 had cut wounds on his head, face and neck and he was oozing blood. PW4 said after seeing that situation they took PW1 to Kiuma Hospital by using a motor cycle they used to go to the farm and PW2 used another motor cycle which followed them later on to go to Kiuma Hospital.

PW4 said that, after PW1 be taken to Kiuma Hospital he was received and attended by a doctor. He said that, thereafter he took the clothes of PW1 which had blood for the purpose of going to wash them at his home. He went on saying that, when he was at the bus stand he made a phone call to the Village Chairman to ask him whether the accused person had been arrested and the Village Chairman said he had not been arrested. He said later on he saw the accused person walking on the road while going to the bus stand. PW4 said to have notified the Kiuma Hospital's watchmen who arrested the accused person and took him to Matemanga Police Station by using a Bajaj transport. PW4 said that, when they took the accused person to the police station he was with the Village Chairman, watchman from Kiuma hospital and PW2.

PW4 said that, when the accused person was interviewed at the police station they heard him saying he know PW1 and when he was asked why he wanted to kill him he prayed to be forgiven. PW4 said that, after taking the accused person to the police station they went to the farm of PW1 with PW2 to take the properties of PW1. He said when they went to the place where the water pump had been placed they found a coat of PW1 which had blood. He went on saying that, on 7th August, 2017 PW1 was transferred to Muhimbili National Hospital.

When PW4 was cross examined by the counsel for the accused person he said that, when the accused person was arrested he had no machete or knife but he had something long in his clothes which he didn't manage to identify what was that. He said when the accused person was being interviewed at the police station he was present and he was together

with PW2. He said it is true that Waziri Matokeo is the one informed them about the event of PW1 being injured but said he do not know the said Waziri Matokeo and said they didn't find him at the farm of PW1. He said on 5th August, 2017 was his second time to work with the accused person in the farm of PW1.

He said he know the accused person and he remember they left him with PW1 at the farm of PW1. He stated further that, when they took PW1 to the hospital he was conscious. He also said he don't know whether the accused person cut PW1 because of the money he was claiming from him or not. He said he came to know the accused person was claiming money from PW1 after going to the police station. When he was re-examined by the State Attorney he said they arrested the accused person as were told by PW1 that, the accused person is the person cut him. He also said to have been informed by PW2 that the person informed him about the event of PW1 to be wounded was Waziri Matokeo.

Another witness testified before the court is **Dr. Omary Halfan Haji, (PW3)** who told the court is working at Kiama Hospital and said he attended PW1 after being taken to their Hospital. He said when he saw PW1 at the hospital he was bleeding and he had blood all over his body. He said PW1 had injuries on his head, face, neck and two fingers of his right hand which appears were caused by sharp instrument. PW3 said to have started to control bleeding and gave PW1 water drips and blood transfusion and stitched his wounds. PW3 said that, after controlling the bleeding, they gave the patient antibiotics treatment to prevent wounds

from being infected and thereafter the patient was taken to the ward for further observation.

PW3 went on saying that, on 7th August, 2017 he was followed by the relatives of PW1 who requested him to allow them to take the patient to MNH for treatment and caring of his relatives as he had no relatives at Milonde Village. PW3 said that, after discussing the said request with his workmates they agreed to allow them to take PW1 to MNH. He said they informed the police force about the request of the relatives of PW1 to take him to MNH and the police force told them they had no objection. He said that, thereafter he prepared a referral letter which was accompanied by PF3 given to them by the police force which was admitted in the case as exhibit P1. He said when he was attending the patient at the beginning he was semi-conscious but later on he became conscious.

When PW3 was cross examined by the counsel for the accused person he said that, the patient was not in a position of telling him what had happened to him. He said to have been interviewed by police officer and when he was asked what was the name of PW1 he said is Heri Huruma Moshi. On further cross examination he said he had not discovered any error in the name of PW1. He also said he didn't fill anything in the PF3 handed to them. He also said to have seen the wounds inflicted on the boy of PW1 had the duration of less than 24 hours. When he was re-examined by the State Attorney he said that, the patient became unconscious because of losing blood and said the PF3 was filled by a doctor of MNH.

Dr. Karpal Singh @ Sohal, (PW5) told the court is working at MNH in the department of Oral and Maxillofacial Surgery. He said on 9th

August, 2017 he was assigned to attend PW1 who had been admitted in their ward. He said he saw PW1 with injuries on his head, face and neck. He went on saying that, when they asked the patient about his history he told them his name is Elihuruma Moshi and said he was coming from Tunduru District and said he was referred to MNH by a hospital which he cannot remember its name.

He said the patient told them he was assaulted by a person and sustained the said injuries. He said by that time the patient was conscious and he had an ability of expressing himself. PW5 said after getting the history of the patient they started attending him. He said they opened the wounds which had been stitched after seeing they had been infected by bacteria which had caused pus in the wounds. He said they gave the patient antibiotics treatment and as part of the nose of the patient had been cut they referred him to the department of Plastic Surgery.

PW5 said that, the injuries sustained by the patient were grievous harm as some part of his body had been permanently disfigured and had high possibility of causing death to him. He said the injuries were seen were caused by a sharp object like a machete or knife. PW5 said that, after seeing the patient was continuing well he filled a PF3 which was sent to them together with the referral letter which referred the patient to their hospital. The PF3 was admitted in the case as an exhibit P2. He said the information he filled in the PF3 he retrieved from the file of the patient which was at their hospital.

In his defence the accused person told the court that, in 2017 he was living at Milonde Village with his parents but now is living at Songea with

his brother namely Halifa Mohamed Hassan. He said he know PW1 as in 2017 he gave him and other people who were more than eight a labour work of digging water trench at Milonde Village. He said after finishing the work PW1 failed to pay them and said he was waiting money from the company which gave him the work.

The accused person said he was claiming Tshs. 185,000/= from PW1 and said he took his complaint to their Village office. He said after being heard the Village Chairman gave PW1 the date when he would have gone to pay their money. He said that, despite the fact that PW1 was given the time of paying his debt but he has not been paid his money todate and said he don't know if other labourers have been paid.

He said on 5th August, 2017 he was at Milonde Village and denied to have gone to the farm of PW1. He said he has never gone to the farm of PW1. He stated further that, he was surprised when he was arrested and told he had cut PW1. He said he doesn't remember when he was arrested but he was arrested at 09:00 hours of August, 2017. He said he was arrested by Kuchekicheki and Saidi Mbalamaengo. He said when he was arrested he had been informed by Kuchekicheki that, there were bricks for constructing a Mosque which they were going to load in a tractor and that person told him he was looking for other people of going to do the said work with him. He said after going to the place where the work was supposed to done he found they had prepared a Bajaj and they told him he was under arrest as he had injured PW1 and took him to Matemanga police station.

The accused person said that, he didn't see PW4 when he was being arrested. He also said PW2 was not present when he was arrested but he followed them to the police station by using a motor cycle. He said after being taken to the police station he was interviewed by DC Seif and another policeman and they beat him. The accused person said that, at the evening of the same date he was taken to Tunduru Police Station where he slept up to the next day. He said DC Seif followed him in the next day and asked him if he was the one injured PW1 and said after denying to have injured PW1, DC Seif took his photograph and he has not seeing him again.

He denied to have been hired by PW1 to plant onions in his farm. He said that, although PW2 and PW4 said to have seeing him working in the farm of PW1 on 5th August, 2017 but he said it is not true that he worked in the farm of PW1 on the date of event. He also said when he was arrested he had nothing and said if he was found with anything it would have been tendered in the case as an exhibit. He said the statement to show he confessed to have injured PW1 was not tendered in the court by any witness. He went on saying that, he doesn't know Waziri Matokeo. He disputed the evidence of PW2 and PW4 who said he cut PW1 because of the money he was claiming from PW1.

He disputed the evidence given by PW1 that they were using moonlight on the date of event to plant onions by saying the moonlight cannot be used to plant onions. He said there is no witness said the person who assaulted PW1 by cutting him had intention of killing him. At the end he prayed the court to set him free. When the accused person was cross examined by the State Attorney he said he don't know PW1 very well as he

only know him as he gave him a labour work of digging water trench at Milonde Village. He said he don't know if PW1 had onions farm. He said he didn't know PW4 and said he came to see him in the court.

He also said he don't know PW2 but said he saw him chasing them with a motor cycle when they were going to Matemanga police station and said he saw him at the police station. Although he said on 5th August, 2017 he was at Milonde Village but he said he was arrested on 4th August, 2017 and taken to Matemanga police station with an offence of injuring PW1. He said after being taken to Tunduru Police station he stayed there for six days before being taken to court. He said moonlight cannot be used by people to identify each other. He said is praying the court to forgive him as he has learnt a lot after being taken to the prison.

When he was re-examined by his counsel he said he was not telling the court he committed the offence of injuring PW1. He said if the court will find he has committed the offence leveled against him is praying the court to forgive him. He said he don't know who assaulted PW1. He stated that, he don't know anything in relation to what was said by PW1 that after being kicked on his leg he acted as if he had died. He sated further that, there is nobody came to testify before the court about the date of his arrested.

After hearing the evidence from both sides the court allowed the counsel for the parties to make to the court their final or closing submissions. I commend them for their well-researched final submissions and for the purpose of not making this judgment unnecessarily long I will be brief to the points raised in their submissions. The counsel for the

accused person submitted that, the prosecution failed to prove the information leveled against the accused person beyond reasonable doubt. He told the court that, the prosecution failed to establish the accused person was properly identified as the person invaded and cut PW1 and caused injuries to him as held in the case of **Waziri Amani V. R**, [1908] TLR 250.

He argued that, the prosecution failed to summon material witnesses to the case who were Waziri Matokeo who was the first person to see PW1 with injuries, the Police Officer who filled the PF3 and DC Seif who was the investigator of the case. He also told the court the prosecution failed to bring to the court the machete said was used to cut PW1 and knife which was said the accused had in his possession. In addition to that the counsel for the accused person said the prosecution failed to bring to the court a sketch map of the place of event which would have shown the environment of the place where the offence was committed.

He went on arguing that there is inconsistency in the evidence of the prosecution in relation to whether the accused person was working at the farm of PW1 on the date when PW1 was assaulted. He said there is also inconsistency in relation to the consciousness of PW1 at the time of being taken by PW2 and PW4 to the hospital and the evidence of PW3 who was the doctor received and attended PW1 at the Kiuma Hospital. Another inconsistency said by the counsel for the accused person is in relation to the reason caused the accused person to be arrested.

He said while PW2 said the accused person was arrested because he was mentioned by PW1 as the person caused injuries to him, PW4 said the

accused was arrested after being suspected is the one injured PW1 as he was claiming money from him. The learned counsel for the accused person argued that, if the accused person was suspected he was the one caused injuries to PW1 because the accused person was claiming his money from PW1 what about other people who were claiming their money from PW1.

He argued further that, the arrest of the accused person was unlawful as his arrested was made contrary to section 15 (1) and (2) of the Criminal Procedure Act, Cap 20 R.E 2019 as the accused was arrested when the offence was being committed. He also argued that, the element of *mens rea* in the commission of the offence was not proved as PW1 said when he asked the person who was cutting him the reason for doing that evil act to him he didn't respond anything to him.

Further to that, the counsel for the accused person prayed the court to consider the defence of alibi raised in the defence of the accused person. He submitted to the court that, despite the fact the said defence was not raised during Preliminary Hearing and they did give notice of relying on the same as required by section 194 (4) of the Criminal Procedure Act but still the court can base on section 194 (6) of the same law to consider the same. At the end he prayed the court to find the offence laid against the accused person has not been proved to the standard required by the law and acquit him.

Ms. Amina Mawoko, learned State Attorney submitted on behalf of the Republic that, they have proved the offence laid against the accused person to the standard required by the law. She told the court that, the evidence they have adduced in this court to prove the offence laid against

the accused person is direct evidence which established the accused person is the person cut PW1 by using a machete. She said the issue required to be determined in this case is whether the accused person attempted to murder PW1. She told the court the evidence of PW1 established that, on 5th August, 2017 he was with the accused person in his farm for the whole day up to 19:30 hours when the accused person invaded him and cut him on his head, neck and hand by using a machete.

She said the evidence of PW1 was corroborated by the evidence of PW2 who said to have seeing the accused at the farm of PW1 on the date of event and PW4 who said he left PW1 and the accused person at the farm of PW1. She said the evidence of PW3 shows after PW1 being taken to Kuima Hospital he was in bad condition and after attending him he referred him to MNH. PW5 said the injuries inflicted to PW1 were dangerous injuries as they might have caused his death. The State Attorney told the court there was no room for mistaken identity of the accused person as PW1 had stayed with him for the whole day and there was a bright moonlight which enabled him to identify him when he was cutting him.

She told the court that, as held in the case of **Lubanga Siantemi V. R**, [1980] TLR 275 the evidence of a single witness can sustain conviction if the court is satisfied the witness is telling nothing but the truth. She submitted that, as PW1 mentioned the accused person at the earliest opportunity to PW2 and PW4 as the person cut him with a machete then as held in the case of **Marwa Wangiti V. R**, [2002] TLR 39 it cannot be said the accused person was not identified properly. She said the accused

person was the last person to remain with PW1 and his failure to say who else cut PW1 shows PW1 was not assaulted by any other person than the accused person.

As for the defence of alibi raised in the defence of the accused person the learned State Attorney argued that, as it was not raised during preliminary hearing and there is no notice to rely on that defence issued as required by the law it should not be considered. She said there is no witness brought to the court to corroborate that defence. She argued further that, as there is no question asked to the prosecution's witnesses during cross examination about that defence of alibi the accused person is estopped to rely on that defence. The learned State Attorney argued that, although Waziri Matokeo was not called to testify before the court but the prosecution has a right to choose which witness they want to call in a case. At the end she prayed the court to find the information laid against the accused person has been proved beyond reasonable doubt as required by the law.

Having heard the evidence from both sides and after considering the closing submissions made to the court by the counsel for the parties the court has found there is no dispute that PW1 was invaded and injured on his head, face and neck. The stated fact was proved by the evidence of all prosecution witnesses and without being disputed by the accused person. That fact was also proved by PF3 admitted in the case as exhibit P1 which shows PW1 was found with multiple lacerations inflicted on his scalp, face and neck by using a sharp object. The dispute or issue for determination in the case at hand is whether PW1 was injured by accused person. If the

answer to the above issue will be in affirmative the next issue will be whether the accused person attempted to murder PW1.

Before dealing with the above issues the court has found proper to state at this juncture that, the position of our law as held in the case of **Jonas Nkize V. R**, [1992] TLR 213 is that, the onus of proving criminal charge laid against an accused person lies on the prosecution and the standard of proof required is beyond reasonable doubt. While being guided by the above principle of the law the court will start with determination of the first issue which states whether PW1 was injured by the accused person. The court has found one of the evidence adduced before the court to establish the person injured PW1 is the accused person is the evidence of PW1 himself who told the court the person injured him is the accused person.

PW1 told the court in his testimony that, on the date when he was injured, he was with the accused person and other labourers in his farm for the whole day of 5th August, 2017 up to 18:00 hours when other labourers departed and left him and the accused person at his farm. The above evidence of PW1 that he was with the accused person on his farm on the mentioned date was corroborated by the evidence of PW2 and PW4. PW2 said that, on the mentioned date he was at his farm which was neighbour to the farm of PW1 from morning up to 12:00 hours when he departed to his home as he was feeling sick and said he saw the accused person doing labour work at the farm of PW1 and he left the accused person and other labourers at the farm of PW1. On his side PW4 said he was working with the accused person and other labourers planting onions at the farm of PW1

from morning up to 18:00 hours when they departed and left PW1 and the accused person at the farm.

PW1 said that, after being left with the accused person later on he went to ignite the water pump for the purpose of watering the garden and immediately after igniting the water pump the accused person invaded him and cut him on his head, face and neck by using a machete. PW1 said he managed to identify the accused person as the person invaded him and cut him as he was with him on the whole date of event and there was a bright moonlight which enabled him to identify the accused person when he was cutting him. PW1 stated further that, he managed to identify the accused person as the event of invading and cutting him took about ten to twelve minutes which enabled him to identify the accused person as the person invaded him and cut him.

The counsel for the accused person told the court in his closing submission that, the accused person was not identified properly as PW1 did state clearly to the court about the brightness of the moonlight he said he used to identify the accused person. The court has considered this argument which was also said by the accused person in his defence but found has not been able to fault the evidence given by PW1. The court has found PW1 stated clearly in his testimony that the moonlight which he used to identify the accused person was very bright. The counsel for the accused person assailed the evidence of PW1 in respect of identification of the accused person on the ground that PW1 failed to explain the attires worn by the accused person on the date and time of event.

The court has found that, although it is true that PW1 said he doesn't remember the shirt worn by the accused person on the date and time of the event but he said the accused person had worn a jeans trouser. To the view of this court a mere failure to remember the type of the shirt worn by the accused person while is still remembering he had worn a jeans trouser cannot be used as a sufficient ground to say the accused person was not identified properly. The court has also come to the above finding after taking into consideration that, about three years have lapsed from when the event occurred which to the view of this court it is not easy for a person to remember each and everything of that date of event.

The court has also found the merit of the argument by the counsel for the accused person that the accused person was not properly identified as the person injured PW1 has been suppressed by the evidence of PW2 and PW4 who told the court that, immediately after being informed PW1 had been injured and after going to see him at the farm he told them the person injured him was the accused person who was left with him on the previous date. To the view of this court and as rightly argued by the learned State Attorney one of the factors used to determine a victim of an offence has managed to identify the suspect which has been followed in several cases is the ability of the victim to name the suspect at the earliest opportunity. See the case of **Marwa Wangiti Mwita & Another V. R** cited in the final submission of the State Attorney and the case of **Jaribu Abdallah V. R**, [2003] TLR 271.

The counsel for the accused person argued further that, there are serious inconsistencies in the evidence of the prosecution which goes to the

root of the case. One of the inconsistencies he raised is about the number of labourers who were working in the farm of PW1 on the date of event. He argued that, while PW1 said there were four people and the accused person inclusive, PW2 said there were five people and the accused person inclusive. The court has found what was said by the counsel for the accused person is not true. The court has found while PW1 said there were about five labourers in his farm who were Omari Mohamed Hassan (the accused), Paulo Msukuma, Ngunga, Saidi Kandila and another person he has forgotten his name, PW2 said he saw more than three people at the farm of PW1. PW2 mentioned some of the people he was still remembering to be Omary Mohamed Hassan (the Accused), Paulo, Boldini and Kandina.

The counsel for the accused person argued further that, while PW1 said PW2 stayed at his farm from morning up to the evening but PW2 said he departed from his farm at about 12:00 hours. The court has found there is nowhere PW1 said in his evidence that PW2 stayed at his farm up to the evening. The court has also found the argument by the counsel for the accused person that PW1 said the first person to go to see him were PW2 and PW4 while PW2 said the first person to go to see PW1 was Waziri Matokeo is equally not true as there is nowhere in the evidence of PW1 said the first persons to go to see him were PW2 and PW4. To the contrary the court has found PW1 said in his evidence that, the first person to go to see him was Waziri Matokeo and followed by PW2 and PW4.

He also argued that, while PW3 said PW1 was unconscious but PW2 said PW1 was conscious. The court has found that, although it is true that PW2 said PW1 was conscious and PW3 said he was semiconscious but it

has failed to see any contradiction in the evidence of the mentioned witnesses because these two witnesses were talking of the condition of PW1 when he was at different places. The court has found while PW2 said when they followed PW1 at the farm they found him conscious and he talked to them, PW3 said to have found PW1 semiconscious when he was attending him at the hospital.

The above stated condition of PW1 is supported by the evidence of PW1 himself as he said when he was followed by PW2 and PW4 at the farm he was conscious and when he was at the hospital there was a time he was conscious and there was a time he was semiconscious. Under that circumstance the court has failed to see any contradiction in the evidence of PW2 and that of PW3 in relation to the consciousness of PW1 on the date and time of being found he had been injured and when he was taken to Kiuma Hospital where he was attended by PW3.

The counsel for the accused person argued further that, there is a contradiction in relation to the reason which caused the accused person to be arrested and charged with the offence at hand. The counsel for the accused said while PW2 said the accused person was arrested because he was mentioned by PW1 as the person injured him but PW4 said the accused person was arrested as they suspected he was the one injured PW1 as he was claiming money from PW1. The court has found that, although it is true that PW4 said they suspected the accused person is the one cut PW1 as he was claiming money from PW1 but after reading the evidence of PW4 in totality together with the evidence of PW1 and PW2 the court has found the cause of the accused person to be arrested and

charged with the offence is not because he was claiming money from PW1. The court has found that, as said by the above the mentioned witnesses the accused person was arrested and charged with the offence as he was mentioned by PW1 to be the person injured him.

The court has also found that, although it is true as even the accused person admitted he was claiming money from PW1 and said there were other people who were claiming their money from PW1 but there is no any evidence which is suggesting PW1 was injured by those other people who were claiming their money from PW1. To the contrary the court has found the evidence given by PW1 is very clear that the person injured him was the accused person and not anybody else. The court has also arrived to the above view after seeing that, as rightly stated by the learned State Attorney in the closing submission and appearing in the evidence of PW1, PW2 and PW4 the accused person was the last person to remain with PW1 and it has not been stated why PW1 would have lied he was injured by the accused person. In the premises the court has found this argument is without merit.

From all what I have stated hereinabove, the court has found there is no material contradiction or inconsistency in the evidence of the prosecution which goes to the merit of the matter as alleged by the counsel for the accused person. The position of the law where is alleged there is contradiction or inconsistency in the evidence of the prosecution as held in the case of **Mohamed Said Matula V. R**, [1995] TLR 3 is that, the court is required to decide whether the alleged contradictions or inconsistencies goes to the root of the matter or are just minor

contradictions or inconsistencies. In the light of all what I have stated hereinabove and the position of the law stated in the above cited case the court has found it is not only that the contradictions and inconsistencies alleged by the counsel for the accused person are in the prosecution evidence are not in existence and if there is any is a minor one which does not go to the root of the matter.

The counsel for the accused person raised another argument that the prosecution failed to summon material witnesses to testify in the case. He said the witnesses who were supposed to be summoned to testify in the court and were not summoned are Waziri Matokeo, the Police Officer who filled the PF3 and the Investigator of the case namely DC Seif. He argued that, although section 143 of the Evidence Act states there is no specific number of witnesses required to prove any fact in a case but as held in the case of **Raphael Mhando V. R**, Criminal Appeal No. 54 of 2017, CAT at Tanga (unreported), where an important witness has not been summoned to testify in a case the court is required to draw an adverse inference that, if he was summoned he might have gave an unfavorable evidence against the party who was required to call him.

The court has been of the view that, although it is true that where a party has failed to call a material witness the court is required to draw an adverse inference in relation to the act of failing to call the said witness but as rightly argued by the learned State Attorney the prosecution has a right to choose which witness to call in a case. To the view of this court, the court will only be required to draw an adverse inference if a party's case leaves reasonable gaps which were supposed to be filled by the witness

who was not called. The above view of this court is being bolstered by the position of the law stated in the case of **Boniface Kundakira Tarimo V. R**, Criminal Appeal No. 351 of 2008 (unreported) where it was stated that:-

"It is thus now settled law that, where a witness who is in a better position to explain some missing links in the party's case is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such interference is only permissible one."

From the above quoted excerpt it is crystal clear that the court is only required to draw an adverse inference where there are missing links which would have been explained by the witness who was not called and adverse inference is not required to be drawn to every witness who was not called. That being the position of the law the court has tried to consider the evidence adduced in the case at hand to see whether there is any missing link which was not explained by the prosecution's witnesses testified before the court which would have been explained by the witnesses who were not called but failed to see any material missing link which can make the court to draw an adverse inference against the prosecution for not calling those witnesses.

The court has considered the contention by the accused person's counsel that as the PF3 which was admitted in the case as exhibit P2 shows the event occurred on 6th August, 2017 at about 07:00 hours while PW1 said the event occurred on 5th August, 2017 at 19:30 hours that contradiction would have been explained by Waziri Matokeo and the Police Officer who filled the PF3. The court has been of the view that, although it

is true that the date and time of occurrence of the offence indicated in the PF3 is different from the date and time stated by PW1 but the court has found the said discrepancies was resolved by other prosecution witnesses who testified before the court.

The court has arrived to the above finding after seeing that, the evidence of PW1 that the event occurred on 5th August, 2017 at about 19:30 hours is supported by the evidence of PW2 and PW4 who said were told by PW1 the event occurred on 5th August, 2017 at 19:30 hours and not 6th August, 2017. The evidence of PW1 was corroborated further by the evidence of PW3 who during cross examination he said the injuries sustained by PW1 had a period of less than 24 hours which means were sustained within the period stated by PW1, PW2 and PW4. The argument by the counsel for the accused person that it might be possible that PW1 was injured by Waziri Matokeo that is why he was not called to testify before the court has been found by the court has no basis as is a mere assumption which is not supported by any evidence or inference.

The court has considered the argument by the counsel for the accused person that the prosecution was required to apply for an order of compelling DC Seif who was an investigator of the case to come to testify before the court as according to section 127 (1) of the Evidence Act is a compellable witness but failed to see merit in his argument. The court has arrived at the above view after seeing that, the prosecution stated clearly that the said witness has already been terminated from his employment and their effort to get him to come to testify the failed to succeed and he was not showing cooperation to them. To the view of this court and as

stated in the case of **Boniface Kundakira Tarimo** (supra) that is sufficient reason to justify why DC Seif was not called to testify before the court.

The counsel for the accused person raised another argument that the weapon alleged to have been used to cut PW1 which was a machete and the sketch map of the place of event which would have shown the environment of the place alleged the offence was committed were not tendered in court to support the evidence of the prosecution. The court has found that, although it is true that the mentioned exhibits would have supported the prosecution evidence and were not tendered in the case but they have not affected the case of the prosecution.

The court has arrived to the above finding after seeing the role which would have been played by those exhibits would have been to prove PW1 was injured while at his home. To the view of this court the evidence adduced before this court proved those facts and as stated earlier in this judgment the issue of PW1 to be cut or injured while at his farm is not in dispute. Therefore failure to bring those exhibits to the court has not affected the evidence of the prosecution.

The court has also considered the defence of the accused person that he didn't go to the farm of PW1 on the date of event and said he had never gone to the farm of PW1 which his counsel argued it as a defence of alibi governed by section 194 (4), (5) and (6) of the Criminal Procedure Act. The court has found that, as rightly stated by the counsel for both sides no notice of relying on such defence of alibi was given by the accused to the court and the prosecution before hearing of the case

started and there is not notice of relying on that defence given to the prosecution before closing its case as required by subsection 4 and 5 of section 194 of the Criminal Procedure Act. The court has been of the view that, although it is true as argued by the counsel for the accused person that the court has discretion under subsection 6 of the cited provision of the law to accord or not accord weight on the said defence but it is the view of this court that, the said discretionary power is required to be exercised judiciously.

That being the position the court has found it has not been informed why notice to rely on that defence of alibi was not given to the court and the prosecution as required by the law if the accused wanted to rely on that defence. The court has also found there is no any particular given by the accused person to show where he was on the date and at the time is alleged he committed the offence apart from saying he was at Milonda Village. In addition to that, the court has also found as rightly argued by the State Attorney in the closing submission there is no any question asked by his counsel to any of the prosecution witness during cross examination of the prosecution's witnesses which is laying foundation of the stated defence of alibi.

It is because of the above stated reasons the court has found there nothing material in the defence of the accused person or in the closing submission of his counsel managed to move the court to exercise the discretionary power conferred to it by section 194 (6) of the Criminal Procedure Act to accord weight to the said defence of the accused person. In the premises the court has found the course to take in relation to the

said defence of alibi of the accused person which has not managed to convince the court to accord weight to it is to reject the same as it was held in the case of **Anangisye Masendo Ng'wang'wa V. R**, [1993] TLR 202.

The counsel for the accused person raised another argument that the arrest of the accused person was unlawful as he was arrested by persons who were not police officers and the accused person did not commit the offence in the presence of the person arrested him which is contrary to section 15 (2) of the Criminal Procedure Act. The court has gone through the provision of the law which the counsel for the accused person alleged was violated in arresting the accused person but found it is not only that section 15 of the Criminal Procedure Act has no subsection 2 cited by the counsel for the accused person but is also not dealing with arrest of a person suspected he has committed an offence in absence of a person who has arrested him. It provides for procedures to be followed when a police officer deposes subordinate to arrest without warrant

To the contrary the court has found the provision of the law which is dealing with arrest of a suspect by a private person who is present during commission of an offence is section 16 (1) of the Criminal Procedure Act. The court has found that, although it is true that the accused person was not arrested during commission of the offence but he said in his defence that, he was arrested by Kuchekicheki and Saidi Mbalamaengo. The accused person did not say what was the rank or position of those persons so that it can be said he was arrested by people who were not allowed by the law to arrest a suspect under that circumstances.

To the contrary the court has found that, PW4 told the court that, the accused person was arrested by Watchmen from Kiuma Hospital and said before the accused person being arrested the information of the commission of the offence had been reported to the Village Chairman and the Village Chairman had instructed Militiamen to go to arrest the accused person but he was not found at his home.

Having found the Village Chairman had been informed about the occurrence of the offence and Militiamen had been sent to arrest the accused person the court has been of the view that, although it was not stated if warrant of arrest was issued to the persons who arrested the accused person as required by section 13 of the Criminal Procedure Act but it has not been stated if there is any miscarriage of justice caused in the process of arresting the accused person. The court has arrived to the above finding after seeing that, the above cited provision of the law shows Village Council, through its Secretary is empowered to issue warrant of arrest if information of commission of an has been reported to him.

Since the court has not been informed the person who arrested the accused had not been mandated to arrest him and it has not been established there was any miscarriage of justice caused to the accused person at the time of his arrest and as after been arrested he was taken to the police station where legal process in relation to his case was put in motion it cannot be said his arrest was unlawful. It is because of the above stated reason the court has found that, even if there is some violation of legal procedure committed in arresting the accused person it cannot be taken as a ground of faulting the prosecution case.

In the light of what I have stated hereinabove the court has found the evidence adduced before this court by the prosecution's witnesses which the court has no reason to fault their credibility has managed to satisfy the court the first issue framed in this court for determination is supposed to be answered in affirmative that, the accused person is the one invaded and injured PW1 by cut him on his head, face and neck by using machete. Therefore the first issue is answered in affirmative.

Having arrived to the above finding the next issue to determine as framed in this matter is whether the accused person attempted to murder PW1. Before indulging in determination of the above issues the court has found proper to state at this juncture that, the offence of attempt to murder laid against the accused person is not supposed to be made solely under section 211 (a) of the Penal Code. That provision of the law is also supposed to be read together with section 380 (1) of the Penal Code which define the word "**attempt**" which is used under section 211 (a) of the Penal Code. The above finding of this court is being fortified by the view taken by the Court of Appeal of Tanzania in the case of **Bonifas Fidelis @ Abel V. The Republic**, Criminal Appeal No. 301 of 2014, CAT at Arusha (Unreported). When the Court of Appeal of Tanzania was dealing with criminal appeal originated from the charge of the offence of attempted murder preferred under section 211 (a) of the Penal Code it stated as follows:-

*"We must hasten to point out that section 211 (a) is not a standing alone provision in so far as all the ingredients of attempted murder are concerned. The word "**attempt**" which*

is mentioned under section 211 (a) is defined under section 380 of the Penal Code. This means, to appreciate the scope of the ingredients of the offence of attempted murder, sections 211 (a) and 380 must be read together."

In order to be able to appreciate the gist of the two provisions of the law referred in the above decision of the Court of Appeal of Tanzania the court has found proper to quote in this judgment what is stated in those provision of the law. The provisions states as follows:-

"211. – Any person who-

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

(b) N.A

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

380 (1) *When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such extent as to commit the offence, he is deemed to attempt to commit the offence."*

While bearing the position of the law stated in the above quoted provisions of the law the court has carefully read sections 132 and 135 of the Criminal Procedure Act together with types of the forms of stating offences in information provided in the second schedule to the Criminal Procedure Act and come to the finding that, the omission to add section 380 (1) of the Penal Code in the information laid against the accused person has not caused any miscarriage of justice in the trial of the accused

person. The court has arrived to the above finding after seeing the ingredient of an intention to commit the offence which was supposed to be drawn from section 380 (1) of the Penal Code is incorporated in the word attempt used in the particulars of the offence.

The court has also arrived to the above finding after seeing the important thing to be considered by the court when is faced with situation like the one at hand is to see if the accused understand the nature of the offence is facing and he managed to follow the course of the proceedings. The above view of this court is bolstered by what was stated by the Court of Appeal of Tanzania in the case of **Mussa Mwaikunda V. R** [2006] TLR 387 where it was stated inter alia that:-

"The minimum standards which must be complied with for an accused person to undergo a fair trial are; he must understand the nature of the charge, he must plead to the charge and exercise the right to challenge it, he must understand the nature of the proceeding to be an inquiry into whether or not he committed the alleged offence, he must follow the course of the proceedings, he must understand the substantial effect of any evidence that may be given against him, and he must make a defence or answer to the charge."

From the above holding of the Court of Appeal, the court has found that, although section 380 (1) of the Penal Code was not cited in the information laid against the accused person so as to be read together with section 211 (a) of the Penal Code but to the view of this court the said omission has not established the standards laid in the above referred case

were not met in the accused person's case. The court has arrived to the above finding after seeing the accused person and his counsel has not complained the accused person failed to plead to the charge or failed to follow the proceedings of his case or failed to understand the offence is facing before the court.

Back to the second issue the court has found that, the main ingredient of the offence of attempt to murder as can be deduced from section 211 (a) read together with section 380 (1) of the Penal Code is the intention of the accused person to commit the offence of murder which the counsel for both sides termed it in their final submissions as either malice aforethought or *mens rea*. That being the position of the law the court has found one of the evidence adduced in this case to establish the accused person had intended to murder PW1 is the evidence of PW1 who said the intention of the accused person was to kill him.

The court has found that, as rightly argued by the learned State Attorney PW1 stated clearly that, when the accused person was cutting him he asked him what he wanted but the accused person did not say anything to him. PW1 said that, instead of the accused person to tell him what he wanted from him he continued to cut him and kicked on his legs and after pretending he was dying is when the accused person stopped to cut him and took his coat which had money and after taking the money he departed. The evidence of PW1 that the intention of the accused was to kill him is supported by PW3 and PW5 who said the injuries inflicted to PW1 were dangerous injuries as they might have caused his death.

The court has considered the argument by the counsel for the accused person that as PW1 said when the accused person was cutting him he didn't say to him what was his intention then the element of mens rea found in the offence of attempt to murder was not established but failed to side with his argument. The court has come to the above finding after considering the kind of weapon used to cut PW1, part of the body of PW1 which was cut which is his head and neck together with number of cuts inflicted to PW1 and found are enough to establish the intention of the accused person was to kill PW1 and not anything else. The above finding of this court is getting support from the case of **Enock Kipela V. R**, Criminal Appeal No. 150 of 1994 which has been cited with approval in number of cases where it was stated that:-

"Usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors including the following:-

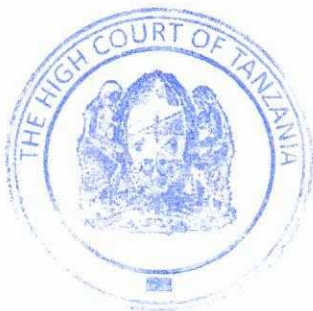
- (1) the type and size of the weapon if any, used in the attack;*
- (2) the amount of force applied in the assault;*
- (3) the parts of the body the blow or blows were directed at and inflicted on;*
- (4) The number of blows."*

When the above listed factors used in the evidence adduced before this court by PW1 which is well corroborated by the evidence of PW2, PW3,

PW4 and PW5 which the court has no reason to disbelieve it has caused the court to find malice aforethought or intention of the accused person to cause death of PW1 has well been established in the case at hand. In the premises the court has found the second issue is supposed to be answered in affirmative that the accused person's intention was to cause death of PW1.

In the final result the court has come to the settled finding that, as unanimously opined by ladies and gentleman assessors who assisted me in the trial of the accused person the offence of attempted murder leveled against the accused person has been proved to the standard required by the law which is beyond reasonable doubt. In the upshot the accused person is hereby found guilty and convicted in the offence of attempt to murder contrary to section 211 (a) read together with section 380 (1) of the Penal Code, Cap 16 R.E 2019. It is so ordered.

Dated at Songea this 21st day of October, 2020




I. ARUFANI

JUDGE

21/10/2020

COURT:

Judgment delivered today 21st day of October, 2020 in the presence of Ms. Amina Mawoko and Ms. Jeneroza Montano, both State Attorneys for the Republic and in the presence of the accused person who is also represented by Mr. Zuberi Maulidi, Advocate. Right of Appeal to the Court of Appeal is fully explained to the parties.



I. Arufani
I. ARUFANI

JUDGE

21/10/2020