THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF DODOMA)

AT DODOMA

SITTING AT SINGIDA

CRIMINAL SESSIONS CASE NO. 14 OF 2018

THE REPUBLIC

VERSUS

1. **JACKSON OBED**
2. **WILSON SHILA @ MKOMA**

JUDGMENT

Date of Last Order: 02/12/2022

Date of Judgment: 12/12/2022

Mambi, J.

The accused persons, **JACKSON OBED and WILSON SHILA @ MKOMA** jointly stand charged with an offence of an attempt to murder contrary to Section 211(a)) of the Penal Code CAP 16 [R.E 2019]. The incidence occurred on the 8th of March 2016 within Tengelangulu Sub Village, Kyengege Village, Iramba District in Singida Region.

The facts and evidence can be summarized as follows:

The facts and evidence from prosecution indicate that on the 8th of March 2016 at about 19:40hrs, at Tengelangulu Sub Village, Kyengege Ward, Shelui Division, Iramba District within Singida Region the accused attempted to murder one FLORENCE D/O JOHN.

It was alleged that on that fateful date at around 19:40hrs, the victim one FLORENCE D/O JOHN was on the sitting room at her house with her children one SAMWEL S/O EDWARD and IBRAHIM S/O SHABANI while other children were in their bed room. Within a short time they heard a blow, and after few minute two persons appeared armed with machetes and clubs ("knobbed sticks"). The evidence by prosecution show that the accused were seen wearing long jackets and they had torches that had bright light. The facts show that the accused ordered the victim and her children that they were under arrest. The evidence and facts further show that the victim together with her son one SAMWEL S/O EDWARD strived to escape through the back door and managed to get outside, but the victim was caught and attacked causing serious wounds on her body where she lost her two middle fingers. The evidence of prosecution witnesses show that the victim and other witnesses such as n SAMWEL S/O EDWARD, MARY D/O EDWARD, ELIZABETH D/O OBELY and one IBRAHIM S/O SHABABNI managed to identify accused persons using the bright light from the torch and solar.

It is also on the prosecution facts that the incident was reported to Police whereas the accused persons were arrested and investigation commenced immediately.

In a bid to prove the charges against the accused persons, the prosecution called five (5) witnesses including the victim.

The evidence testified by prosecution witnesses can be briefly narrated as follows:

The first prosecution witness was Edward Obed Jeremia **(PW1)** who was the victim's husband. In his evidence PW1 testified under oath that before his wife was attacked, some of his relatives including the accused persons convened the meeting to discuss about his family. He stated that *"Kikao kiliitishwa na Edson na Jackson@ na ikao kilihusu tuhuma za uchawi dhidi yangu na mke wangu".* He testified that the meeting was held at the house of the first accused that is Jackson Obed. PW1 in his testimony testified that the accused persons forced him to prove his witchcraft. He said that the accused persons told him that they got information from the witchdoctor that he is a witch. He testified that the family meeting decided that they have to kill him. PW1 testified that he informed the Village Government but nothing was done.

PW1 further testified that on the material date that is on the 8th day of March 2016 at around 19.20 hrs he left his home to charge his phone to his neighbour. He testified that within a short time, he was informed by his neighbours (Ester) that there were people shouting at his home. He told the court that he rushed to his home and upon arrival he saw the torch lighting at him by a person who had a "Panga". PW1 stated that: *"Nilikimbia kwenye zizi la ng'ombe nikakutana na mtu mwingine akitokea zizini nikakimbilia shambani huku wakinifukuza".* He said that he saw the person who was chasing him. He said that he later run away with his daughter for rescue. PW1 further testified that:

"Nikarudi nyumban kumsaidia mke wangu bahati nzuri watu wengi walishakuja". Mke wangu alikuwa amezirai akivuja damu kichwani na mikononi. "alikuwa amekatwa vidole viwili vya mkono wa kushoto". Hakuna ndugu aliyetupa ushirikiano wakati wa kupeleka mama hospital.

PW1 also testified that he is still threatened by his relatives such as Wilson Shila (the second accused). PW1 further testified that he remember some of the people who participated on the meeting to discuss his family where in that meeting Wilson Shila (the second accused) said he will kill me. PW1 told the court that he attended the family meeting which was also attended by Wilson Shila, Jackson Obed and Edson Edward, Edna Wilyton, Daudi and others.

The second prosecution witness **(PW2)** Florence John who was the victim who lost her two middle fingers of her hand told the court that she knows all the accused persons who are his brothers-in law ("Mashemeji"). In her evidence, PW2 told this court that on 8/6/2016 in the evening at 19.40hrs she was at home with her children. She said that: "*ghafla watu wawili waliingia wakimulika tochi yenye mwanga mkali walimulika na wakagonga mlango wakasema mpo chini ya ulinzi".*

She said that she was with her son called Samwel (PW3) and they run away to the second verandah and opened the door. She said that; *"Nilipigwa tochi mwanga mkali nikaanguka chini".*She said: *Mwanga wa tochi ulikuwa mkali ukanisaidia kumtambua Wilson Shila.* PW2 further testified that the light was from behind her and this enabled her to see his "Shemeji Wilson Shila (the second accused) in front of her. PW2 stated that" *Nikamwambia shemeji yangu mbona unataka kuniua".* PW2 stated

that Wilson Shila (Second accused) cut her on her hand and head. She said that her two arm fingers (middle fingers) were cut off by the second accused. She stated that "Vidole vyangu viwili vikakatwa hadi kukatika". PW2 told this court that she knew her "Shemeji" (brother-in-law) Wilson Shila for a long time. As indicated under page 6-7 of the proceedings PW2 further told this court that *"Nilikatwa mapanga na shemeji yangu ambaye ni mshtakiwa wa pili."Nilimulikwa tochi toka nyuma ikawa rahisi kumwona Wilson Shila aliyekuwa mbele yangu ambaye alinivamia". "Nilikuwa namfaham mshitakiwa tangu zamani akiwa kama shemeji yangu. Mwanga mkali wa tochi uliotoka nyuma yang undo ilinifanya nimtambue mshtakiwa wa pili kwa mbele ambaye ni shemeji yangu".*

PW3 (Samwel Edward**)** who was the son of the victim (PW2) testified that he remember that on the material date that On 08/6/2016 at 19.30 while at home they were invaded at time by people who were armed at home. He said that two person one tall and other short and fat with weapons and torches with strong light invaded them at the verandah. He testified that through the accused torch light, he managed to recognize Jackson Obeid (his young father) who is the first accused.

PW3 stated that; *"Nilimtambua kichwani kwa kutumia mwanga mkali wa tochi na pia kwa vile alikuwa baba yangu mdogo". "Nimemfahamu baba yangu mdogo (Jackson Obeid) tangu nikiwa mdogo". "Tulikimbia kutoka kwa mlango wa pili lakini nikapigwa bapa la panga".* PW3 told this court that they also had bulb from the solar that had strong light on the place where he was sitting with his family. He said that when they came back home after five minutes he found his mother was sent to the Hospital.PW2

her Mother had various cut wounds at her head and her two fingers were cut away by the accused persons. PW3 told the court that he saw Jackson Obeid and his collegue holding "Panga" with "fimbo".

PW4 (Andrew Daniel) who was the assistant doctor for the hospital testified that on 9/8/2016, at around 00.45am at night while was on duty he received one patient with many injuries in various parts of her body. Hr he said that: *"Alikuwa na jeraha katika mkono wa kushoto na jeraha kubwa shingoni".* PW4 told this court that he made examination and filed the form (PF3) from the police. He said that: *"Majeruhi alipata ulemavu wa kudumu baada ya vidole vyake viwili vya katikati vikiwa vimekatwa kabisa". Majeruhi alikuwa na majeraha makubwa ya kuhatarisha maisha"*

He told the court that the patient who was seriously injured had wounds that showed she was cut with a sharp object.

The last prosecution witness was F 22130 Mkaguzi Msaidi Polisi – Thomas Chalamila. PW5 in his testimony testified that On 9/3/2016 he was at the office. On that date he was assigned to prepare caution statements of the accused persons namely Wilson Shila and Jackson Mkoma. He said that h4 prepared the caution statement for Wilson Shila who is setting in this court wearing black suits. PW5 stated that before he recorded the accused cautioned statement, he explained him his rights under the law. He said that the accused (Wilson Shila) voluntarily agreed to make his explanation on the cautioned statement.

During defence, all the two accused persons testified their evidence through an oath and they categorically denied their involvement on the offences they stand charged.

On his defence, **DW1** (Jackson Obed) testified to this court that he was not responsible for conspiracy to attempted murder of the victim. DW1 testified on 8/3/2016 he was just at the Village Center, Kiengeke at his home at around 19.30 watching news at one Mgahawa. He stated that he was with Samwel Charles, Juma, Siima. DW1 told the court that the victim's husband Edward Obeid is his brother and they have good relationship and they had never had quarrel with his bother Edward (PW1) or his wife (Victim). He stated that:

"Niliwahi kusikia mke wa Edward (PW1) aliwahi kushambuliwa na tuliposikia Yowe tulienda kwenye eneo la tukio na hatujawahi kwenda Hospitalini kumwona shemeji aliyekatwa".

DW1 (the first accused) also called his witness (**DW2)** to support his evidence. On his defence, **DW2** (Samwel Charles) testified to this court that on 8/3/20216 in the evening he was at the village at the Mgahawa and he met Jackson Obed at the Mgahawa. He stated that; *"Baada ya muda tukasikia Yowe, tukaenda kwenye eneo la tukio" .*

DW2 testified that it was around 19hrs when we went to the scene to see what was wrong where they found the wife of Edward (PW1) namely Florence was cut off her two fingers. He stated that: *"Kwa vile kulikuwa na watu wengi eneo la tukio, haikuwa rahisi kujua kama Jackson alikuwepo".*He further stated that *"baada ya kipenga (Kelele za kuashiria hatari) tulitawanyika na Jackson kwenda eneo la tukio".*

In his evidence, the second accused (**WILSON SHILLA**) who is referred as **DW3** on his defence evidence testified that he was not responsible. He

said that he have never attacked the Victim (Florence) on 8/3/2016 at around 19hrs. DW3 further stated that on the material date he was drinking Soda at the 'Kioski' owned by Joseph Itila. He stated that: *"Baada ya muda mvua ikaanza kunyesha ambapo Yuda, John waliingia Mgahawani na baada ya muda tukasikia kipenga/yowe kuwa kuna uvamizi"* He testified that he took his weapon and went to the scene and found many people including Village leaders. DW3 told this court that they went back home on 9/3/2016 in the morning, and met village executive officer who arrested him. He stated that: "hatujawahi kukaa kikao cha kuwatuhumu Edward na Mke wake juu ya uchawi".

DW3 (the accused) also called his witness (**DW4)** to support his evidence. On his defence, **DW4** (John Clement) testified that on 8/3/2016 in the evening it was raining where he met Wilson Shilla (the second accused) at one Grocery Owned by Jose Hiza. DW4 told this court that he heard Kipenga/Mayowe that there was something wrong at the house of Edward (PW1). He said that he went to the scene and found many people. He stated that; *"Nilikuta mke wa Edward alikuwa ameshambuliwa na kukumbizwa Hospital ya Wilaya"*. DW4 in his evidence testfied that *"Yowe lilipigwa baada ya tukio na Wilson Shilla (the second accused) nilikutana*

naye baada ya kipenga/yowe la tukio". DW4 also stated that; *"Nilikutana na Wilson kabla ya kipenga na kabla ya tukio".*

Having carefully considered the evidence and submissions supported with cases and the provisions of relevant laws from both the prosecution and defence, my view this case raises some legal issues that need to be determined to find out whether the prosecution has presented credible evidence that can establish the guiltiness of all the accused in their charges they jointly stand. As indicated under the facts and evidence in the case the main issues include:

(a) Whether the accused persons were properly identified by the witnesses especially PW2 and PW3

(b) Whether the defence of alibi exonerate the accused from the offences they stand charged

(c) Whether the prosecution has proved the case beyond reasonable doubt on the charges against all the accused persons.

(d) Whether all the accused persons are jointly responsible for the offence they stand charged

The main issue to be determined in this case is, *whether the accused persons were properly identified and recognized by the key witnesses such as PW2 (the victim), and PW3 (the victim's son).* In this case the prosecution has relied on identification of the accused persons especial the first and second accused who were alleged to be identified by PW2 and PW3.

The question before this court is whether the accused persons were properly identified at the scene of crime. Before addressing and determining the issues of identification in our case at hand, I wish to refer some relevant authorities or cases that have addressed and laid down some principles in similar cases. There are some principles laid down through case laws by the court in dealing with the issue of identification. The issue of identification was highlighted, discussed and clarified by the court of Appeal of Tanzania in ***Fadhili Gumbo Alias Malota and Three Others V. Republic [2006] TLR 50.***The court in this case observed and held that:

> *Where the witnesses were close to allow proper identification and were not contradicted that* ***they knew*** *the appellants* ***before the date*** *of the incident, their identification by name cannot be faulted (emphasis supplied).*

In our case some of the witnesses such as PW2 (the victim) and PW3 testified that they easily identified the accused persons since they knew them before as their relatives. Reference can be made to the testimonies and evidence by the two witnesses. For instance PW2 who was the victim in her evidence testified as follows;

> *Nilimulikwa tochi toka nyuma ikawa rahisi kumwona Wilson Shilla aliyekuwa mbele yangu ambaye alinivamia".* ***"Nilikuwa namfaham mshitakiwa (Wilson Shilla) tangu zamani akiwa kama shemeji yangu. Mwanga mkali wa tochi*** *uliotoka nyuma yangu undo ilinifanya* ***nimtambue mshtakiwa wa pili kwa mbele ambaye ni shemeji yangu".*** *(See pages 6-7) of the proceedings*

The evidence of PW2 was corroborated by the evidence of PW3 who testified similar evidence with PW2. PW3 in his part of testimony testified as follows:

"Nilimtambua Mshatikiwa wa kwanza kichwani kwa kutumia mwanga mkali wa tochi na pia kwa vile alikuwa baba yangu mdogo". ***"Nimemfahamu baba yangu mdogo (Jackson Obeid) tangu nikiwa mdogo".***

Reading from the above testimonies or evidence by PW2 and PW3 it is clear that the two witnesses identified and recognized the two accused person. While PW1 identified the second accused person the third witness (P3) identified the first accused.

PW3 in his evidence further testified that he also used the bright light from bulb of the solar that had strong light on the place where he was sitting with his family

Since the witness (PW2, the victim) and PW3 were close with assistants of enough and bright light from the torch and bright bulb from solar power and the fact that they knew the all accused persons as a relatives (brothers-in-law to PW2 and step-father/baba wadogo to PW3) and the fact that the witnesses named them by their proper names in the court there is no colour of doubt that both PW2 and PW3 properly identified the accused persons.

As indicated in the above case I have just referred (supra), that it is hard for me in our case in hand to fault the identification and recognition of the accused persons by names as all key witnesses (PW2 and PW3) were close to allow proper identification and the court that their evidence was not contradicted that **they knew** the accused persons **before the date** of the

incident. These matters and evidence clearly direct my mind in coming to the definite conclusion on the issue of identity that PW2 and PW3 properly identified the accused persons as indicated in the case I have cited and discussed below.

The question of disputed identification was also clearly addressed in ***WAZIRI AMANI V. R (1980) TLR 250*** which is one of the most celebrated case when it comes to issues of identification at evening and night. In this case the court laid some principles to be considered in determining whether identification was properly done as follows:

> *"Although no hard and fast rules as to the manner a trial judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions as the following posed and resolved by him; the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further* ***whether the witness knew or had seen the accused before*** *or not* (emphasis supplied). ***These matters are but a few of the matters to***

which the trial judge should direct his mind before coming to any definite conclusion on the issue of identity" (emphasis supplied).

As I explained above, in our case in hand the witness (PW2 and PW3) knew the accused persons before as they are close relative. This means that in our case in hand the witness knew or had seen the accused persons before since they were their relatives.

In my considered view, both PW2 and PW3 has clearly testified reliable evidence by showing that they clearly identified and recognized the two accused persons at the scene of crime. At this juncture I wish refer the Court of Appeal decision in ***Jumapili Msyete versus the Republic Criminal Appeal No 110 of 2014 (unreported)*** stated that;

> *"For the purpose of analysis and the experience enriched from case law, cases of identification may be identified into three broad categories. Visual identification, identification by recognition, and voice identification. In visual identifications, usually, the victims would have seen the suspects for the first time.* ***In recognition cases, the victims claim that they are familiar with or know the suspects.*** *In the last category the victims would usually claim to be familiar with the voice of the suspects although they may or may not have seen him. It is akin to identification by recognition"* (emphasis added).

Indeed the court in the above case (*Jumapili*) was very clear by discussing three major categories of identification. For more clarity, and reference for

our case at hand and future references, I will reproduce the said categories and how can the court came to the conclusion as to whether the accused person was properly identified or not depending of course on the category of identification.

The court in ***Jumapili*** *(supra)* at page 14 (supra) noted that for the purpose of analysis and the experience enriched from case law, cases of identification may be identified into three broad categories namely; **visual identification**, **identification by recognition,** and **voice identification**. In visual identifications, usually, the victims would have seen the suspects for the first time. In **recognition cases**, the victims (like PW2 the wife of the brother of the accused persons) and PW3 (the son of the accused persons' brother in our case) claim that they are familiar with or know the suspects/accused persons. In the last category the victims would usually claim to be familiar with the voice of the suspect although they may or may not have seen him.

The court (in **Jumapili case**) observed that it is akin to identification by **recognition** and evidence to prove each of those types of identification would significantly vary in the type, and weight be attached to each. The court went on by stating that "but for each type of identification, evidence could classified as foundational, complementary, assistive and corroborative". This means that foundational evidence is that which lays down **how** a victim was able to identify the suspect. Thus in **recognition** cases, the foundational evidence would be how **the victim came to know the suspect**. Identification of these types of identification, it has been held that identification **by recognition is more reliable** than that by strangers or by voice [emphasis added].

Indeed the last **category of identification that is recognition** in the above case is more relevant to our case in hand whereby the witness (PW2 and PW3) testified in this court that they were familiar with the accused persons who brutally cut the victim's hand who lost her two middle fingers. According to PW2 and PW3 the accused persons were their relatives and neighbours at the same village and "Kitongoji".

Having said so, the issue in my hand is whether the two accused persons were properly identified on the material date. My answer to this issue (identification) is in the affirmative and my analysis based on various authorities and the evidence adduced by the prosecution witnesses above have directed my mind to come to definite conclusion that there is no doubt that the accused persons were properly identified at the scene. I say so in view of the following aspects of the evidence. As I said above that PW2 and PW3 easily identified and recognized the two accused parsons (the 1st, and 2nd) since they knew them and they met them at a close range in the victim's house. Indeed the evidence show that there was also exchange of words between the accused persons and the victim. The evidence of PW2 and PW3 also reveals that the accused persons uttered some words by telling them that "mpo chini ya ulinzi". On top of that the victim "told one of the accused that shemeji yangu unataka kuniua". For the above reasons, and with all due respect, I do not agree with the learned Advocates (defence counsels) that the accused persons were not properly identified. I am satisfied in this case that the accused persons who went to the victim's house and brutally cut her fingers in front of her son (PW3) while there was enough light from accused persons torch and bulb from solar power at the victim's house given the fact that the accused

persons (1st and 2nd) were also known before by the victim and PW3 were sufficiently identified and there was no any mistaken Identity as to their Identification.

The evidence of PW2 and PW3 can also be supported by PW1 who is the victim's wife. In his evidence Edward Obed Jeremia (PW1) testified that testified under oath that before his wife was attacked, some of his relatives including the accused persons convened the meeting to discuss about his family. He stated that *"Kikao kiliitishwa na Edson na Jackson@ (the fits accused) na ikao kilihusu tuhuma za uchawi dhidi yangu na mke wangu"(the victim, PW2).* He testified that the meeting was held at the house of the first accused that is Jackson Obed. PW1 in his testimony further testified that the accused persons forced him to prove his witchcraft. PW1 in his evidence informed the court that he attended the family meeting which was also attended by Wilson Shilla, Jackson Obed and Edson Edward, Edna Wilyton, Daudi and others.

In my view the evidence of PW1 corroborates the evidence of both PW2 and PW3 as he showed that there was a family conflict where there was a meeting that discussed his fate and his wife after being alleged to be witches.

As I alluded above, I am of the firm view that, in our case the witness (PW2) and PW3 knew and recognized the accused persons before since they were close relatives staying together at the same village as indicated in their evidence. The above considered, particularly the facts that PW2 and PW3 knew the accused persons before; and the fact that the accused persons came closer to PW2 and PW3 and exchanged some words in a bright light all these makes this court to believe that the identification was

proper. I am satisfied that the evidence of PW2 and PW3 on identification of accused persons they identified was watertight. This at the end eliminated all possibilities of mistaken identity. As I stated above, in the present case, the type of identification relied upon is that of recognition which is the most reliable mode of identification.

The accused persons in their evidence during their defence testified almost similar stories to show that they were not responsible for the offences they stand charged. Indeed all the accused persons testified that they were not at the scene of crime. For instance On his defence, **DW1** (Jackson Obed) testified to this court that he was not responsible for conspiracy to attempted murder of the victim. DW1 testified on 8/3/2016 he was just at the Village Center, Kiengeke at his home at around 19.30 watching news at one Mgahawa. To prove his evidence that he was not at the scene he called his witness (DW2). However, while one would have expected that DW2 to inform the court that on the material date he was together with DW1, he testified contradicting evidence. For instance DW2 in his evidence testified that

> *"Kwa vile kulikuwa na watu wengi eneo la tukio,* ***haikuwa rahisi kujua kama Jackson alikuwepo****".He further stated that "****baada ya kipenga*** *(Kelele za kuashiria hatari) tulitawanyika na Jackson kwenda eneo la tukio".*

Reading between the lines on the above evidence, it appears DW2 is not sure if he was together with the first accused on the material date and the time of incident. This show that the accused was not with DW2 and the evidence of DW2 is contradictory to his (accused) evidence. DW2 in his evidence was also contradicting himself as while at one point he is

saying it was not easy to see if the first accused was at the scene due to many people, on the other hand he is saying they went together at the scene. In this regard the evidence of both DW1 nad DW2 was not reliable and has no weight.

On the other hand DW1 testified that he once heard that the victim was attacked and they went to the scene but he never went to the hospital to see the victim. I wish to quote the statement by DW1 as follows;

> *"Niliwahi kusikia mke wa Edward (PW1) aliwahi kushambuliwa na tuliposikia Yowe tulienda kwenye eneo la tukio na hatujawahi kwenda Hospitalini kumwona shemeji aliyekatwa".*

If DW1 went to the scene and he was seen by DW2 why DW2 said it was not able to see DW1 at the scene?. On top of that if DW1 had good relationship with his brother and the victim as he testified why he has never gone to the hospital to visit the victim?. All these statement by DW1 creates doubts if he was telling the truth.

Looking at the evidence of the second accused (**WILSON SHILLA**) who is referred as **DW3,** the second accused testified that he was not responsible. He said that he have never attacked the Victim (Florence) on 8/3/2016 at around 19hrs. DW3 further stated that on the material date he was drinking Soda at the kiosk owned by Joseph Itila. He stated that: *"Baada ya muda mvua ikaanza kunyesha ambapo Yuda, John waliingia Mgahawani na baada ya muda tukasikia kipenga/yowe kuwa kuna uvamizi"*

To support his evidence DW3 (the accused) also called his witness (**DW4**. **DW4** (John Clement) on his defence evidence testified that on 8/3/2016 in the evening it was raining where he met Wilson Shilla (the second accused) at one Grocery Owned by Jose Hiza. DW4 told this court that he heard Kipenga/Mayowe that there was something wrong at the house of Edward. He said that he went to the scene and found many people. Again while one would have expected DW4 to corroborate and support the evidence of DW3 that they were together on the material date at the time of incidence, DW4 testified contradictory evidence. For instance DW4 in his evidence testified that *"Yowe lilipigwa baada ya tukio na Wilson Shilla (the secede accused) nilikutana naye **baada** ya kipenga/yowe la tukio".* *"Nilikutana na Wilson **kabla** ya kipenga na kabla ya tukio".*

The evidence of DW4 above creates doubts and contradictory stat ment. It appears DW4 is not sure if he was together with the second accused on the material date and the time of incident. This show that the DW4 was not with the second accused and the evidence of DW4 is full of contradiction to the evidence pf the second evidence. On top of that, the DW4 in his testimony was also contradicting himself as while at one point he is saying he met the second accused **before** the alert of danger danger ("yowe") he also at the same time saying he met with the second

accused **after** the alert of danger ("yowe"). This in my view the evidence of both DW3 and DW4 was not reliable and has no weight.

It appears both accused persons were just laying and they were not serious on their evidence as their evidence contradicted with the evidence of their witnesses they called.

This court finds the evidence relied by the prosecution, is justifiable to prove the accused persons (the 1st and 2nd and) guiltiness on the offence they are charged.

It is clear from the evidence and records in our case at hand that PW2 and PW3 testified that in the night of the material date the accused persons invaded the victim's house and attacked the victim by severely injuring in her various parts of body that included removing away two fingers from her hand.

In this regard I am satisfied in this case that the accused persons were responsible for the offences they are charged with basing on the evidence of the prosecution witnesses. In the light of all that, no reasonable court would have failed to find the 1st and 2nd accused persons guilt.

Basing on the above analysis of the evidence, the issues is whether the prosecution proved the case against the accused persons beyond reasonable doubt. The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state **(**See ***Ali Ahmed Saleh Amgara v R [1959] EA 654)***. The state indeed has the primary duty of proving that the accused has committed the *actus rues* elements of the offence charged, with the *means rea* required for that offence. This can be as I had recently hold that reflected and founded on the famous maxim that "*he who alleges must prove*". What is then this

means to the eyes of the law. In my view as viewed by others that this means the principal burden is on the accuser, and in criminal cases the accuser is the prosecution, usually the state or Republic. It is the trait law that in criminal cases the burden of proof has always remained on the state throughout, to establish the case against the accused beyond reasonable doubt. What does then this mean in the end? The conclusion to be drawn here with regard to this principle is that since the burden lies throughout on the state, the accused has no burden or onus of proof except in a few cases where he would be under the burden to prove certain matters. This position was more clarified by the court in ***W Milburn v Regina [1954] TLR 27*** where the court noted that:

> *"it is an elementary rule that it is for the prosecution (the Republic) to prove its case beyond reasonable doubt and that should be kept in mind in all criminal cases".*

I understand that, as this court has already alluded in various cases that a prosecution case must, as the law is, be proved beyond reasonable doubt. This, simply, means that the prosecution evidence must be strong to leave no doubt to the criminal liability of an accused person. Looking from the sequence of events and evidence adduced by the prosecution through their witness, there is clear conclusion that the prosecutions have proved their case beyond reasonable. The sequence of evidence, facts and events that led to the way the victim was cut her two fingers of her hand, the way the 1st and 2nd accused persons were identified and the way the accused persons testified their evidence show that the accused persons were responsible for the offence they stand charged with. The witnesses (PW2 and PW3) recognized and identified the accused persons at the scene and

in court that they saw them with the assistance of bright light from the accused torch and bulb light from the solar at the scene. The evidence of PW2 and PW3 also show that they **knew** the accused persons **before** as their relatives thus it was very easy for the witnesses to identify and recognize the accused persons. For easy reference, I wish to re-reproduce brief evidence of PW2 and PW3 as follows;

PW2 who was the victim in her evidence testified as follows;

> *Nilimulikwa tochi toka nyuma ikawa rahisi kumwona Wilson Shilla aliyekuwa mbele yangu ambaye alinivamia". "**Nilikuwa namfaham mshitakiwa (Wilson Shilla) tangu zamani akiwa kama shemeji yangu**. Mwanga mkali wa tochi uliotoka nyuma yangu undo ilinifanya nimtambue mshtakiwa wa pili kwa mbele ambaye ni shemeji yangu". (See pages 6-7) of the proceedings*

On the other hand, PW3 who testified similar evidence with PW2 testified as follows:

*"Nilimtambua Mshatikiwa wa kwanza kichwani kwa kutumia mwanga mkali wa tochi na pia kwa vile alikuwa baba yangu mdogo". "**Nimemfahamu baba yangu mdogo (Jackson Obeid) tangu nikiwa mdogo".***

My analyses of the evidence have revealed that PW2 and PW3 who were eye witnesses were not only reliable witnesses but also witnesses of truth and their evidence clearly showed that the first and second accused had a hand in the attempted murder of the victim. See also ***Christian s/o Kale and Rwekaza s/o Bernard vs Republic TLR 1992*** at page 302.

Looking at the defence evidence, it appears defence witnesses DW1 and DW3 (the accused persons) were trying to relay on defence of alibi that on the material date and during the incidence they were not at the scene but their witnesses DW2 and DW4 contradicted in their evidence and they failed to show if they were actually together with both the accused person at the scene. It appears in their evidence all the accused persons were trying to rely on the defence of alibi. However, I have considered the defence of alibi relied by all the accused in their defence and found that defence does not hold water

It should be noted that, any accused person according to the law is entitled to rely on defence of alibi if he was not at the scene of crime. The alibi defence is raised by a suspect who states that he was not at the scene of the crime at the time the crime was alleged to have been committed. Worth at this juncture to refer the case of ***Karanja v Republic [1983] KLR 501 [1976 – 1985] EA*** as found in the book titled *"Criminal law"*, 2015 at page 159 authored by William Musyoka, the court stated that the ***alibi*** is a Latin verb meaning 'elsewhere' or at another place. The accused ideally raises the defence when he says that he was at a place other than where the offence was committed at the time when the offence was committed. The court indeed has the duty to consider an alibi defence where it is raised and the court need to evaluate the evidence presented in support of it before accepting or dismissing as failure to consider an alibi where properly raised may be fatal to the conviction. The analyses from the above evidence and defence (which implies *"alibi"* defence) from the accused persons shows that it is hard for the accused persons to rely on *alibi* defence as it does not exempt them from offence they stand charged

in this case, since they failed to explain that they were not at the scene of crime on the material date when the victim was attacked. On top of the evidence of the prosecution especially PW2 and PW3 clearly indicated the accused persons went to the scene and committed the offence they stand charged. Basing on the above analysis and reasons, this court finds the defence evidence by the accused persons that they were not at the scene on material date and time has no merit.

In my considered view, the evidence by the first and second accused do not exonerate them from the criminal liability on the charges they are facing given the fact that they were seen by the witnesses at the scene. The prosecution evidence shows that they have discharged their duty of proving the case beyond reasonable doubt. The sequence of events, starting from the meeting conducted by the accused persons to discuss the victim and her husband to the event of invading and attacking the victim in front of her children gives no other reasonable hypothesis than that; it was the first and second accused persons who maliciously caused the victim to lose her two middle fingers from her hand. As already stated, the evidence adduced by the prosecution is irresistibly pointing a finger to the first and second accused persons and not to anyone else. I have carefully considered the evidence by both prosecution and defence as indicated in the preceding pages of this judgment. My observation from the evidence on record has convinced and satisfied that me that the case against the accused persons has been conclusively proved beyond reasonable doubt.

The above considered findings and evidence I am satisfied that the prosecution evidence from their witnesses is watertight and the case against the accused persons have been proved beyond reasonable doubts

Having established that the prosecution has proved their case beyond reasonable doubt, the other issues whether all the accused persons are responsible for attempting to kill the victim that lead to maiming and permanent damage to her one part of the body if they had malice.

Before determining the above issues, I will revisit the relevant provisions of the law and cases relating *malice* for committing any criminal offence. I will also refer the relevant provision of the Penal Code Cap 16 [R.E.2019] which seem to set down key principles and conditions on how malice afore-thought can be said to have been established to indicate all the accused persons internationally committed the offence which they stand incriminated. Reference will also be made to the relevant provisions of the Penal Code Cap 16 [R.E.2019] which seem to set down key principles and conditions on how malice aforethought can be said to have been established to indicate the accused internationally committed the offence which he stand incriminated. Briefly, malice aforethought as enshrined under section 200 of the Penal Code Cap 16 [R.E.2019] is said to be established on proof of any of the following circumstances:

> *(a) an **intention** to cause the death of or to do **grievous harm to any person,** whether that person is the person actually killed or not.*
>
> *(b) **knowledge** that the act or omission causing death will probably cause the death of or **grievous harm to some person**, whether that person is the person **actually killed or not**, although that knowledge is accompanied by indifference whether death or*

grievous bodily harm *is caused or not, or by a wish that it may not be caused.*

(c).... (d)....

The Court of appeal in **Saimon *Justine, Mbonea Mbwambo and Elia Mnandi Versus Republic Criminal Appeal No. 53 OF 2006*** clearly explained as to how malice aforethought can be established. The court in this case defined malice aforethought as *"any one or more of those states of mind,* ***preceding or co existing with*** *the act or omission by which death is caused, and it may exist where that act is unpremeditated".*

To remove doubts on the understanding of how malice is established one may argue that the issue of malice aforethought can be regarded to have been manifested by such acts as the **culprit's utterances** before or after the event, **the amount of force used,** the nature and size of weapon(s) used (pangas/machete in our case) , the part of the body (head in our case) to which the attack is directed, the conduct of the accused, the purpose for which the injury or grievous harm is inflicted etc (as has always been held). However, all these must be established by evidence (*emphasis supplied with*).

In our case in hand where the accused persons who are charged with attempted murder that has led to ***grievous harm to some person*** or maiming, one could conclude by saying that it is clear that all three elements of malice aforethought under section 200 above have been established. Such acts, as the accused's' plan to conspire and cut the victim's various parts that has caused maiming shows that they had an intention to kill or cause ***grievous harm to the victim*** before or after the event. The conduct of accused persons using a sharp object like a panga

(matched) to cut and cause serious wound on victim's hand as indicated by PF3 shows that **they knew** that **they intended** to kill the victim **or cause maim**. Thus the accused persons knew that if they could cut the victim on her head and hand with a sharp object (panga) she could **either sustain grievous harm by causing permanent damage** to her body or die.

Having established the key elements of malice aforethought the prosecution therefore had to establish beyond any reasonable doubt that the accused person either intended to cause death or grievous harm to the victim or that they knew that his unlawful act would probably cause death or grievous harm to the victim. As I observed earlier, the evidence in our case clearly indicates that the prosecution has properly discharged its duty of establishing beyond reasonable doubt. I am of the firm view that there was malice aforethought in our case; in that by their actions or omissions, the accused persons knew that their unlawful action may have led to cause the death of the victim or bodily harm.

As I observed and alluded earlier that the prosecution has proved their case beyond reasonable doubt basing on the evidence by PW2, PW3 and PW1 shows that it is actually the accused persons who intentionally and brutally cut the two fingers hand of the victim. parts of body especially from albino who seem to be more victims.

The evidence by PW1, PW2 and PW3 in this court in my firm view is clearly watertight to warrant this court to believe that the prosecution have proved their case beyond reasonable the accused persons. The fact that the accused persons after accomplishing their mission of cutting the victim's hand, they disappeared without even going to visit the victim who was

their sister-in-law at the hospital, shows that they were responsible and thus this court believe that that the prosecution has proved that case against the accused beyond reasonable doubt. This creates no any doubt that it is the accused persons who were responsible for the offences they stand charged.

To show how the accused can be deemed to have had malice when he was committing a crime the court may infer his or her conduct before or after committing such offence. The position was underscored by the court of Appeal in ***ELIAS PAUL VS THE REPUBLIC, CRIMINAL APPEAL NO. 7 OF 2004, CAT MWANZA*** (unreported) at pg.12 .The court in this case observed that:

> ***"The conduct of an accused person before or after killing may also infer malice****. The appellant in this case did not respond to the alarm raised by PW4. Under normal circumstances one would have expected him to respond to the alarm. After all, the deceased was his neighbour! So, responding to the alarm would have been a prudent thing for him to do in the circumstances. It is also in evidence, and undisputed for that matter, that the appellant left the scene immediately after the killing. If he was all that of an innocent person he would not have left the said scene. It is also undisputed that he was seen and arrested hiding under a bed in his house.*

In our case at hand it is clear that this Court can infer the conduct of the accused person before and after cutting the victims hand. PW1 testified that before the accused persons attacked the victim (PW2)

they conducted the meeting and alleging that PW1 and the victim were witches. The reference on the conduct of the accused can be made after cutting the victims hand fingers the accused persons diapered. This shows that the accused persons had malice.

I have carefully analyzed the sequence of evidence and events of the attempted murder of the victim as presented by prosecution and their witnesses including some exhibits. I have carefully considered the evidence by both prosecution and defence including as indicated in the preceding pages of this judgment. My observation from the evidence on record has convinced and satisfied that me that the case against the accused persons has been conclusively proved beyond reasonable doubt against three the accused persons.

Now whether the accused persons intentionally committed the offences which they stand incriminated. Before I answer this issue, I am incumbent to begin with a collateral issue whether the accused persons did cut or severely wounded the victim with a sharp object or any other weapon that might have caused him to lose his hand that has led to the permanent damage of some of his body parts. That will have addressed one of the basic constituents of criminal offence namely "*actus reus*". Basing on the prosecution's evidence by PW1, PW2, PW3 and PW4 I adopt my previous above reasoning to respond to this issue affirmatively. I say the accused persons did commit the offences they stand charged of conspiracy to attempt to murder contrary to Section 211(a) of the Penal Code CAP 16 [R.E 2019]. In this regard I find the first ingredient of the offence, namely overt act established.

The next issue is whether the accused persons intended to commit offences they stand charged. I have already explained the position of the law with regard to malice afore thought in my previous discussion in this judgment. Briefly, malice aforethought or *"mens rea"* is usually a state of mind concealed in a person. I don't need to waste time by repeating as how the malice aforethought is established under the law as I have already exhausted in my previous discussion on this issue in line with relevant provisions of the law and cases. As I earlier highlighted in the previous pages, in cases like we have, malice is manifested by looking among others the weapon used, party of the body aimed (whether vulnerable), amount of force used and or number of times in inflicting the injury and assailant's after event conduct. As I noted earlier in my preceding analysis that the court ***ELIAS PAUL VS THE REPUBLIC, CRIMINAL APPEAL NO. 7 OF 2004, CAT MWANZA*** (unreported) pg.12 in responding to the issue of malice, observed as follows:

> *"**The conduct of an accused person before or after killing may also infer malice**. The appellant in this case did not respond to the alarm raised by PW4. Under normal circumstances one would have expected him to respond to the alarm. After all, the deceased was his neighbour! So, responding to the alarm would have been a prudent thing for him to do in the circumstances. **It is also in evidence, and undisputed for that matter, that the appellant left the scene immediately after the killing. If he was all that of an innocent person he would not have left the said scene.** It is also undisputed that he was seen and arrested hiding under a bed in his house. If he was innocent there was no need for him to hide".(emphasis supplied with).*

In our case in hand, conducts of all accused persons before and after the act, and circumstances of the case prove establish that he had knowledge that their acts might have caused death or bodily injury to the young boy victim. The conduct of the accused persons of conducting the meeting to discuss the victim and her husband and threatening them and disappearing shows that they had malice.

A combination of all these events considered in line with the evidence, I see no conclusion other than that the accused persons went at a scene of crime with an intention of committing unlawful act of cutting the victim's body and removing her two middle fingers from her hand. The fact that the prosecution evidence has clearly indicated that the first and second accused persons actually cut victim's hand using an object like a "panga" which led to her maim and permanent damage to some of her fingers, make this court to come with the conclusive findings that the accused persons are responsible for offences they are charged. I am of the considered view, satisfied and find that the second constituent of the offence of murder, namely "*mens rea*" has been established. To that end, I find the offence of attempted murder fully established against the accused persons and are eventually and accordingly convicted with attempt to murder contrary to Section 211(a) of the Penal Code CAP 16 [R.E 2019].

A. J. MAMBI

JUDGE

12/12/2022

SENTENCE

Having been convicted with an offence of attempted murder this court has to find an appropriate sentence. Generally the maximum sentence for an offence of attempted murder is life sentence. However, the provision of the law empowers the court to invoke the lesser punishment depending on the circumstance of the case. In terms of section 211 (b) of the Penal Code Cap 16 [R.E.2019], the accused persons are sentenced to two years and six months imprisonment.

Each accused person is also ordered to pay the victim the amount of nine hundred thousands (tshs.900,000/=) as compensation for loss of fingers.

A. J. MAMBI

JUDGE

12/12/2022

Judgment delivered on this day of 12th of December 2022 in the presence of all parties

A. J. MAMBI

JUDGE

12/12/2022

Order: Right of appeal explained.

A. J. MAMBI

JUDGE

12/12/2022