

**IN THE HIGH COURT OF TANZANIA**  
**MUSOMA SUB REGISTRY**  
**AT TARIME**  
**CRIMINAL SESSIONS CASE NO. 18 OF 2023**  
**REPUBLIC**  
**VERSUS**  
**NYASEBA S/O MATIKO IRONDO**

**JUDGMENT**

*07<sup>th</sup> & 13<sup>th</sup> March, 2024*

**M. L. KOMBA, J.:**

JOSEPH S/O MARWA NDEGE escaped his death on 16/6/2021 when he survived a gun shot and a number of blows of sharp object into his chest, wound at the forehead and backbone. He run short of oxygen and his lungs was flooded with blood. It was Doctor Pascal Francis of Musoma referral hospital who served his life. While Joseph was under treatment police had information and send PF3 for recording proposes. Then they (police) decided to investigate the matter.

Police arrested accused above named and charge him with the offence of attempt to murder JOSEPH S/O MARWA NDEGE (victim) contrary to section 211(a) and 380(1) of the Penal Code, Cap 16 R.E 2022 (Cap 16). After the information read over and explained to the accused person in the language he understood, he denied the offence preferred against him hence the plea of not guilty entered against him. As the cardinal principal

in criminal law, the burden of proof always lies on prosecution side. In the case at hand the prosecution represented by Ms. Grace Mwanga Senior State Attorney and Ms. Monica Matwe, State Attorney while Mr. Leonard Magwayega, defence counsel, represented the accused.

It was PW1 (Ass Insp Aloyce Nguluo) who testified that on 16/6/2021 he received a call from Police Constable (PC) Yusuph of Nyamongo Police Post who informed him that there was three young men at the police with a weapon which was seized from someone. He decided to go to Nyamongo police post and find three men standing outside the building. Upon inquiry he was informed by Constable Yusuph that the young men seized the weapon (Pistol with number AP 07056380, Make CZP- 10C380 auto) from a person who was misusing it and they surrendered to police counter. It was his further testimony that constable Yusuph named the young men to be Nyaseba, Chacha Mwita and Kirindo, they then disappeared.

PW1 then, decided to go to the center of the village, Mjini kati for investigation and managed to be informed by some people that somebody was taken to Nyangoto Dispensary for treatment and he went to dispensary where he found someone who was seriously injured. He was confusingly bleeding with wounds in his face, chest (lung), backside of his

body and on thigh. The victim was accompanied with Juma Shabani who explained to this witness what happened. PW1 decided to go to MG bar where the crime is reported to take place. He found many pieces of bottles on the floor, two used bullets, one bullet head and two pieces of copper. He collected items found and register them in exhibit book kept in Nyamwaga Police station. He reported the incident to OC-CID and the case file was transferred to Nyamwaga Police post where Exhibits were stored.

It was his further testimony that the accused was arrested (without mentioning the date) and reported to Nyamongo police post before he was taken to Nyamwaga police. He confirmed to see the accused whose name is Nyaseba. He explained his failure to arrest them at the very night because they were defensive.

During cross examination this witness testified that he was informed many people attacked the victim including the accused. Explaining cause of attack PW1 said he was informed by Juma Shabani that due to quarrel that victim fired on air but he was attacked and caused more chaos which forced him to surrender his weapon on the table. The accused used the opportunity to take the weapon and shot the victim while on the way to dispensary.

PW1 was further informed by those who witnessed the crime that it was accused who shot the victim because they know him and he shot while in the street it was not in bar and this witness was alone while collecting exhibits which were handled to OC-CID.

J. 101 DC Constable Logward appeared as PW2 and testified that he was investigator of the crime and he assumed that role from 18/6/2021. He testified that when he read from the file, he noted that Victim was injured by two bullets on his left thigh, he was injuries in his left rib and he was stabled with sharp object on his back. Through investigations and story from the witnesses he discovers it was Nyaseba Irondo who injured the victim.

It was his further testimony that on 16/6/2021 he went to the hospital where the victim was getting treatment and interrogate some people including Dr. Francis who filled PF3 and handled it to witness who store it in file. The witness went on testifying that accused was arrested on 23/6/2021 while at his home and was taken to Nyamwaga police station. On 27/6/2021 he interrogated the victim and on 28/6/2021 he visited the] scene of crime (MG bar) and draw a sketch map which was admitted as Exhibit P1.

During cross examination he explained that police were searching for the accused since 16/6/2021 when the crime occurred and managed to arrest on 23/6/2021. He insisted that accused did not visit Nyamongo Police Post while acknowledged that investigation was started prior to his assignment. He confessed he did not remember names of witnesses who were interrogated by other police but he just interrogates the victim and his wife. He informed this court that what he knows is that the crime took place at MG Bar which is located at mjini kati village in Nyamongo around 22:00 hrs.

When asked by defence counsel who injured the victim, he confidently informed this court that it was Nyaseba the accused alone injured the victim by bottle and when the victim fall down Nyaseba took victims weapon which was in victim's wrist and shot the victim. He insisted that by that time the victim was unconscious and was injured while inside the bar. Witness further clarified that the victim was in Bar he was not attacked on his way from the office and the weapon was not surrendered to any police post. He has never seen the weapon and there is no record in any exhibit book although he confirms the victim was shot by the accused and he was the one who stab the victim with sharp object and throw the bottle on his head.

The victim was treated by Dr Pascal Francis (PW3) of Musoma Referral hospital whom testified that the victim had wound on the left side of his chest, left thigh, complications on breathing and the blood was flooded into his lung. He informed this court that PF 3 (Exh P2) was filled by Daniel Yoyo, a Clinical Officer under PW3 supervision.

During cross examination he informed this court that PF3 was filled on 19/06/2021 and handled to police on the same day, the report shows the victim was attacked on his way from work.

Victim testified as PW4 who under oath informed this court that on 16/6/2021 he sustained injuries on head, shoulder and left ribs/lungs. Elaborating on how he sustained injuries he said on 16/6/2021 he was in Nyamongo at MG bar with his friend Juma having drinks. The place had many people but managed to spot Nyaseba the accused herein who sit with his friends next to exit door. Suddenly he saw a bottle thrown to his direction by accused and hit him on the right ear. It followed another bottle which hit him on the forehead and he was bleeding.

PW4 further testified that after the throw of bottles followed quarrel among customers in the bar, he fired on air as a defence so that he can escape. Reaching at the door he finds accused who attacked him by stabbing him on the rib and at the back then he falls down. Immediately

accused took his pistol and he (the victim) lost conscious. He gains conscious while at Musoma Referral hospital where he was under treatment for one month. It was his further testimony that police visited his home on 27/6/2021 and interrogated him (Exh D1). He confirmed to know the accused as they usually met in bar and streets.

During cross examination this witness insisted not to know people who shared a table with the accused (Elias Joel, Chacha Mwita and Dogo K) and that he was stabled when he was at the door. He further testified that he received his pistol back in the year 2023 from Nyamwaga police where it was surrendered by accused. He informed this court that police decided to handle it back because he did not injure any person during that day. When he was reminded the number of the pistol, he acknowledges to be the same and when given back his pistol he informed police not to have interest with the case. He knew who hit him with bottles and therefore he did not ask any person.

Upon closure of prosecution case this court ruled that there is *premafacie* case established and the accused has to enter defence. Accused was the only defence witness who testified as DW1.

Accused testified that on 16/6/2021 he was in MG bar having drinks with a girl and sudden there arise commotion among the two groups of people

who sits in different directions, he said those people were firing each other. Following that quarrel many people lay down including himself but that was after he was hit with something on his hand. He lost consciousness and upon re-gaining it, he found a pistol one step away from him. As he remembers the saga which passed few minutes ago, he decided to take it and surrender to Nyamongo police post where he was escorted by Chacha Mwita Tano (a motorcycle driver).

It was the testimony of DW1 that he asked for PF3 as he was injured and he was treated at Nyabichumwa dispensary and remained at home till 23/6/2021 when he was arrested by Police called Aloyce (PW1) and taken to Nyamongo post for two days before taken to Nyamwaga police station. It was his stance that he did not shoot the victim neither committed any crime.

Having gone through the evidence adduced by both parties, I find the pertinent issue to deal with is whether the prosecutions proved their case beyond reasonable doubt. In **Galus Kitaya vs. The Republic**, Criminal Appeal No. 196 of 2015 CAT at Mbeya it was held as follow;

*'It is cardinal principle of criminal law that the duty of proving the charge against an accused person always lies on the prosecution. In the case of **John Makolebela Kulwa Makolobela and Eric Juma @ Tanganyika** [2002] T.L.R. 296 the Court held that: "A*



*person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt'*

See also **Joseph John Makune vs Republic** [1986] TLR 44 and **Mohamed Haruna @ Mtupeni & Another vs Republic**, Criminal Appeal No. 25 of 2007 on the standard of proof that is beyond reasonable doubt as this is criminal case.

Prosecution has only one eye witness who is a victim and testified as PW4. This witness informed this court that he was at the MG bar on the fateful day having a drink and there arise quarrel among the customers. In elaborating further what happen he gave contradicting testimony; **First** he said he did not know who sat near table except accused person while in his caution statement (Exh D1) he explain he know four people who was with the accused. **Second**; he testified to saw accused throw bottles on his direction which hit his ear and forehead while in his statement he said he did not know where the bottles were from. **Third**; he identified and recognized accused and testified to know the accused for a long time as he has hands disability, but this court witnessed the accused while in court with normal hands and energetic. And even when the accused asks to show his hands, there was no any disability noticed.

Not only that the victim had contradicted testimony, I found a lot of discrepancies that tainted the whole prosecution evidence in continuation of what was alleged by the victim. **Fourth;** while PW1 testified that he seized two bullet covers, bullet head and pieces of copper at the scene and registered to exhibit book, PW2 said there was no such record in the exhibit book. **Fifth;** when PW1 and PW4 testified that accused and other two people surrendered the weapon in the same night at Nyamongo police post, PW2 said the pistol was not recovered while PW4 (the victim) said he was given his pistol by police. **Sixth;** when PW2 said accused throw one bottle and stab the victim with knife at the same time, PW4 said he was beaten twice with a bottle while on the table and he was stabbed by sharp object at the door on his way out.

That being not enough, while PW1 and PW2 testified that accused shot the victim on his left thigh, victim confess not to be wounded on his left thigh, he said nothing about the gun shot. About the scene, victim testified to be injured while he was inside the bar while PW2 and Exh P1 is to the effect that the crime was committed under the tree which was outside the bar and exh P2 is to the effect that victim was on his way from work.

Accused denied to commit any offence and his testimony was supported by PW4, the victim that the weapon was surrendered on the same day when he was injured.

I shall not stretch much in analysing the prosecution evidence which is tainted with discrepancies. These contradictions and discrepancies are not minor to the offence of attempt to murder which levelled to the accused. I find contradictions goes to the root of the case. See, **Sebastian Michael & Another vs The Director of Public Prosecutions**, Criminal Appeal No. 145 of 2018, **Mohamedi Said vs Republic** [1995] TLR 3; and **Dickson Elia Nsamba Shapwata & Another vs Republic**, Criminal Appeal No. 92 of 2007). **Sylvester Stephano vs Republic (Criminal Appeal 527 of 2016)** [2018] TZCA 306 (3 December 2018) and **Republic vs Rashid Jumanne @ tolu & Another** (Criminal Sessions Case 51 of 2022) [2022] TZHC 15248 (12 December 2022).

It is disgusting that even the victim is not sure on how he was injured. It was said by the Court that a witness who tell a lie on a material point should hardly be believed in respect of other points. See **Mohamed Said vs The Republic**, Criminal Appeal No. 145 of 2017, see also **Zakaria Jackson Magayo vs The Republic**, Criminal Appeal No. 411 of 2018.

This court finds difficulty to believe other prosecution testimony due to shortfall pointed. I find difficult to believe testimonies of PW1, PW2 and PW4 as they contradicted on important points. This brands their testimonies to contain lying at some points.

Where was the crime occurred and who actually saw the accused commit the crime was not answered from the discrepancies pointed. The prosecution evidence raises doubts and, in our jurisdiction, doubts are decided in favour of the accused person. See **Chacha Ng'era vs Republic**, Criminal Appeal No. 87 of 2010, **Aidan Mwalulenga vs Republic**, Criminal Appeal No. 207 of 2006 **Halfan Ismail @ Mtepela vs Republic**, Criminal Appeal No. 38 of 2019, **Masoud Mgesi vs Republic**, Criminal Appeal No. 195 of 2018 (all unreported) and **Makaranga S/O Sweya @ Limbe vs The Republic** (Criminal Appeal No. 37 of 2022) [2023] TZHC 20755 (5 September 2023).

In the upshot, I have found critical deficiencies in the prosecution case. I have gone through the testimonies of the prosecution witnesses, their testimonies are illogical, and it is not safe for the court to trust their testimonies. Therefore, I am left with no scrap of evidence to support the conviction of the accused person for the offence of attempt to murder.

For the reasons above, I find the prosecutions have failed to prove their case beyond reasonable doubt as required by the law.

The Court of Appeal of Tanzania in the case of **Mohamed Haruna @ Mtupeni & Another vs Republic**, Criminal Appeal No. 25 of 2007 once held that:-

*'Of course, in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence.'*

Ultimately, I find **Nyaseba Matiko Irondo** not guilty and acquit him of the offence of attempt to murder contrary to section 211(a) and 380(1) of the Penal Code [CAP 16 R.E 2022].

Given under my hand and seal of the court this 13<sup>th</sup> day of March, 2024.



NK  
**M. L. KOMBA**  
Judge

Right of appeal is fully explained.

NK  
**M. L. KOMBA**  
Judge  
**13<sup>th</sup> March, 2024**