

**IN THE HIGH COURT OF ZANZIBAR**

**HELD AT TUNGUU**

**CRIMINAL CASE No. 13 OF 2017**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**VERSUS**

**1. SUDI MOHAMED SALUM**

**2. NASSOR MOHAMED SALUM**

**3. MUHSIN ALI MOHAMED**

**4. HASHIM KHATIB ALI**

**JUDGMENT**

20<sup>th</sup> June & 08<sup>th</sup> September, 2023

**A. I. S. Suwedi, J**

The above named accused persons are facing the charge of Attempt unlawfully to cause death contrary to section 210 (a) of the Penal Act, No. 6 of 2004 of the Laws of Zanzibar. On 5<sup>th</sup> day of July, 2017 this Court has been informed by the Director of Public Prosecutions that the accused persons on 3<sup>rd</sup> day of June, 2017 at or about 5pm at Ubago area in Central District within the Southern Region of Unguja jointly attempted unlawfully to cause death of one **Moh'd Njenga Ali** by attacking him with machete

and chainsaw which resulted in wounding him severely in his head, both arms and legs.

In the alternative, the accused persons are charged with the offence of Grievous Harm contrary to section 225 of the Penal Act (supra) and it has been stated that on 3<sup>rd</sup> day of June, 2017 at or about 5pm at Ubago area in Central District within the Southern Region of Unguja, the accused persons unlawfully did grievous harm to **Moh'd Njenga Ali** by causing severe injuries in his head, both arms and legs by using machete and chainsaw.

Before this Court the accused persons were having the legal representation of the AJM Solicitors and Advocates Chamber and so the preliminary hearing conducted under section 171 (1) of the Criminal Procedure Act, No. 7 of 2004 whereby only 2 facts were agreed among 11 facts submitted by the prosecution's side. The accused persons admitted the fact that they are charged with the offence of Attempt Unlawfully to Cause Death and their names and the rest are subject to be proved.

With regard to the main count, section 210 (a) of the Penal Act (supra) and it says:

210. Any person who:

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

(b).....

Is guilty of a felony, and is liable to imprisonment for life

Initially, I am directing my mind to what constitute an attempt. The same is defined under section 395 (1) of the Penal Act, No. 6 of 2004 that:

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

From what I understand an attempt is an inchoate crime, that is, something which has begun but has not been completed. Therefore, an attempt to commit a crime is where an individual, with the intent to actually commit a crime, undertakes an action in furtherance of that crime, but ultimately fails and hence the four elements were derived here. Self-same said by the Court of Appeal in the case of **Bonifas Fidelis @ Abel v. R**, Criminal Appeal No. 301 of 2014 (unreported). The appellant in that case was earlier charged with Attempted Murder under section 211 (a) of the Penal Code, the Laws of Tanzania and the Court had this to say:

It seems to us that four essential ingredients of attempted murder can be discerned from section 211 (a) read together with section 380. **Firstly**, proof of intention to commit the main offence of murder. **Secondly**, evidence to prove how the appellant began to

employ the means to execute his intention. **Thirdly**, evidence that proves overt acts which manifests the appellant's intention. **Fourthly**, evidence proving an intervening event, which interrupted the appellant from fulfilling his main offence, to such extent if there was no such interruption, the main offence of murder would surely have been committed

Section 211 (a) and section 380 referred above are mutatis mutandis to section 210 (a) and section 395 of the Penal Act, No. 6 of 2004 respectively, and therefore the prosecution's side instantly had to prove the following elements:

- (a) Accused persons had intent to cause death
- (b) That they took substantial step toward completing the death
- (c) They manifested their intention of causing death by some overt act
- (c) Failure to complete the death.

Having settled in that position, now the task is to observe the evidence given so as to determine whether it establish the stated elements of the offence.

The case by prosecution's side made up by 5 witnesses, the story was that on 03/06/2017 at 5:00pm at Ubago, PW1 was at Bondeni in their cultivation area for picking coconuts. While PW1 was at the top of the coconut tree, came 3 people but he remembered **Sudi** by single name who

said that "leo umeingia kwenye mikono yangu sikuachi". **Sudi** then called his brother **Nassor** who then called Mafyeku (**Muhsin**) and **Hashim**. The stated persons requested a chain saw from one **Hamduni** and they started to cut down the coconut tree which the PWI is on.

PW1 jumped to cytherea fruit tree which also cut down. PW1 then jumped to another coconut tree and the persons stated cut it down. Then he jumped to another cytherea fruit tree and it was also cut down and this time it went down with PW1. After that action, the accused persons beat PW1 and cut him by machete. They cut PW1's both hands, legs, thigh, head and other several areas.

The evidence further shows that PW1 was left at that area and stayed until morning. In the morning, PW1 asked for help from a woman who came to feed her cattle's. A woman called PW1's sister and afterwards her brother arrived. They took him to Mnazi Mmoja Hospital via Dunga Police station and there he was admitted for 3 months.

PW1 then identified the persons mentioned by first names, **Sudi** and **Cholo (Nassor)** are staying in the same area and **Mafyeku (Muhsin)** and **Hashim** are staying at Kitumba. Thereafter, PW1 identified **Sudi** as the 1<sup>st</sup> accused, **Nassor** as the 2<sup>nd</sup> accused, **Mafyeku (Muhsin)** as the 3<sup>rd</sup>

accused and **Hashim** as the 4<sup>th</sup> accused person. What I have noted during cross examination of the PW1 is that the area where the crime occurred used to belong to PW1's family and then it was sold, though he was not sure by the time the area was already sold.

The story was connected by the evidence of PW2 who is a brother of PW1 and his evidence started on 04/06/2017 in the morning when he received a phone call from his sister to go to Bondeni to look for PW1. His sister testified as PW5 and she narrated how she got the news from Salha that PW1 is at Bondeni with injuries and then called PW2. PW2 went to Bondeni and found PW1 with injuries at his hands, legs, buttocks and head. PW2 and PW5 took PW1 to Mnazi mmoja Hospital via Dunga Police Station, PW1 managed to inform them who did cause the injuries to him while they still at the area of the scene persons as **Sudi Mohammed Salum, Nassor Mohammed Salum, Muhsin and Hashim.**

PW3 who owned an acre at Kidimni was present on the material day and his evidence was that on 03/06/2017 at about 18:00 hours he heard chain saw noise from his neighbour's area. He followed the noise and there he found a coconut tree down, he saw the 2<sup>nd</sup> accused, 1<sup>st</sup> accused and 2 others whom he didn't know. Seeing them, he thought that they are cutting trees by using chain saw; he took his own business and went away.

PW3 confirmed the crime scene to be Kidimni rice valley, once you finished the valley you enters Ubago.

On the next day, PW3 heard news from his staffs that PW1 was beaten and he went to the area and found the news to be true and it was in the same area he saw Cholo and others cutting down trees by chain saw. He saw PW1 covered with blood that one cannot dare to look at him and also he said to have seen injuries in several areas of his body and he mentioned head, hands, foot and others. He also visited PW1 at Mnazi Mmoja Hospital.

The prosecution's side strengthened its case by summoning a Police Officer (PW4) who took pictures at the crime scene on 07/06/2017 at about 02:30pm. He informed this Court that the information was given to him by In-charge of Investigation of Dunga Police Station and the case was Dunga/IR/94/2017. He took his 5D Canon and he arrived at the scene Ubago at about 03:30pm. He found down 2 coconut trees and Cytherea fruit tree. He took 4 pictures and he put alphabet marks (A, B, C & D) and he finally handed to the Head of Investigation.

Additionally, 4 pictures marked as A, B, C and D were tendered and accepted as P Exhibit No. 1 jointly. Picture with mark "A" shows the cut

down Cytherea fruit tree with its stump and a coconut tree, picture with mark "B" shows the stump of coconut tree and a coconut tree, picture with mark "C" shows the cut coconut tree whereas picture "D" shows branches of Cytherea fruit tree and coconut trees.

On the other hand, the evidence by the defence generally tried to raise some doubts from the prosecution's evidence. From the evidence of the 1<sup>st</sup> accused who testified as DW1, he denied the facts read out that he caused injuries. He said that he knows PW1 since he is a famous thief. Then he talked about Kidimni and Ubago that are 2 different areas. PW3 said 18:00 hours but the charge sheet stated 17:00 hours. On pictures, he said that there are several areas in which the trees are cut down for construction purposes. The prosecution witnesses mentioned him as he owned a plot of land near the area. Besides, no any chainsaw or machete brought to Court.

DW2 also denied the allegation and he confirmed to know PW1 as he once caused him to be arrested for theft and he was imprisoned for that crime, that why PW1 mentioned him. PW1 stole from someone's place and he did not do the crime as the land is not owned by him. On the picture tendered, DW2 said they can be taken anywhere as the camera did not detect area.



DW3 on his side denied the allegation as well and he is unaware of the reason why PW1 mentioned him. He said that he is dealing with cooperative defence and has participated two times in arresting PW1, perhaps he has some grudges. He further stated that he is also having problem with PW3 as he once had a fight with him because he stole his coconuts.

Lastly, DW4 is also participating in arresting PW1 severally as he is working with "Sheha" of Kidimni in Community Police. He is an assistant of Sheha but the case of PW1 is not known as it wasn't registered, the case did not occurred in their shehia. He also informed this Court that in 2022 PW1 was imprisoned for stealing his motor cycle. The community is sick and tired with PW1 because of his behaviours.

The case tried with the help of the three assessors; however one assessor got serious sick before giving out his opinion and became difficult for him to attend the Court sessions. Hence, he was exempted from the list of assessors under section 264 (1) of the Criminal Procedure Act, No. 7 of 2004 and the case proceeded with the aid of two assessors. I eventually took them to the case, evidence and the law and they successfully gave out their opinion in favour of the accused persons. From the circumstances

explained before us, both assessors were of the view that the case is cooked one.

On my side I started to examine the intention as to whether the prosecutions side managed to establish that the accused persons had intent to cause death of PW1? The evidence by the prosecutions show that the accused person acted with the intention to commit a crime. Though, I am not sure if they intended to cause the death of PW1 at that moment or to commit another crime. The evidence reveals that the 1<sup>st</sup> accused person found PW1 at the top of the coconut tree within their agricultural area. Having seen him there, the 1<sup>st</sup> accused said "*leo umeingia kwenye mikono yangu sikuachi*" who then called his brother (2<sup>nd</sup> accused) who called the 3<sup>rd</sup> and the 4<sup>th</sup> accused persons and they requested a chain saw from one, **Hamduni**. The sequence shows that the accused persons after seeing PW1 who is a well-known thief according to them formulated an intention to commit a crime, and what happened on that day exactly prove that they had intent to commit a crime. Though PW1 said the accused persons thought that he was dead that is why they left the area, but how he knew that they thought he is dead.

To me it would be easy to conclude that the accused persons intended to kill PW1 if I could have some facts and the missing facts

triggered me to have another thought. **One**, the fact that the accused persons caused PW1 to fall down from the tree, this fact is not so clear to have a thought that the accused persons had intent to kill. No heights of the felled trees were provided to measure distance of the fall and no distance from one tree to another was given so as to measure the possibility of jumping from one tree to another. Also, the camera used to take photos (exhibit No. 1) is not the one which can display location, date and time, so the pictures tendered do not show those things. What if the pictures were taken elsewhere? Especially if you consider the photos show that the trunks of trees are gathered together. PW2 who stated to have seen the accused persons at the scene of crime did not see PW1 at the top of the trees. He came to hear the story and after following up he found the PWI with injuries at the same area he saw accused persons last evening. What if he was beaten in another place and came to be thrown there?

Additionally, the prosecution's evidence indicates that PW1 was beaten by machete and he sustained injuries, again there are missing facts to weigh the injuries. The place and extent of the injury caused is one among of the significant criteria in the determination of the intention to kill a person. In this case injuries were seen by PW2, PW3 and PW5 and according to them injuries were at the head, hands and legs. However,

according to their testimony, PW1 was covered with blood you cannot even look at him and it is my assumption that they did not observed him properly.

From the statement of PW1 and other witnesses, PW1 was admitted to Mnazi Mmoja Hospital but no medical evidence was given. If the doctor attended and examined PW1 would come to testify, it would help us to know the extent of the injuries and the area of the body where injuries are. The absence of that, this Court failed to figure out the exact place and much more the extent of the injuries. Knowing exact place and the extent of injuries under my considered view could help me to determine the fact that the accused persons intended to cause the death of PW1 or not. Otherwise, I am of the view that the prosecution failed to establish that the accused persons had intention to cause death of PW1.

As far as the offence of Attempt unlawful to Cause Death is concern, intention is most significant element and because it was not proved, I see no reason to proceed with the remaining elements.

In the alternative, accused persons were charged with the offence of Grievous Harm contrary to section 225 which says:

Any person who unlawfully does grievous harm to another is guilty of felony, and is liable to imprisonment for term .....

Taking into account of this offence, the prosecution had the duty to prove the following:

- a) The accused persons caused injuries to the PW1
- b) That the injuries amounted to grievous harm, i.e. serious injuries
- c) That the grievous was unlawfully done.

From there I have taken into consideration the evidence adduced before me to see whether the accused caused injuries to PW1. It is the evidence of PW1 that the injuries sustained caused by the accused persons who are well known to him. He testified that on 03/06/2017 at 5:00pm at Ubago, he went to pick coconuts at their cultivation area and he was found with the accused persons at the top of the coconut tree. After cutting the trees that he was jumping, at the end he fell with a cytherea. After that accused persons beat him and cut him by machete. They cut PW1's both hands, legs, thigh, head and other several areas. This confirmed that the injuries sustained by PW1 caused by accused persons.

However, the question I asked myself was whether the injuries amounted to grievous harm or whether the evidence was sufficient to prove beyond reasonable doubt that the injuries amounted to grievous

harm? The law defines "grievous harm" under section 4 of the Penal Act (supra) that:

"Grievous harm" means any harm which amounts to a maim or dangerous harm, or which seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense;

To measure that the harm caused to PW1 falls within the meaning given by the law I think I need to rely on the expert opinion. The prosecution's side did not brought a medical practitioners as said earlier herein. The evidence by the prosecutions shows that PW1 was taken to Mnazi Mmoja Hospital and he was admitted for 3 months. Without a doctor who have attended him, I will just guess that PW1 was admitted because of the injuries sustained. If the doctor was brought, I would have known the exact problem that caused him to be admitted for 3 months and also I would know that the injuries sustained were serious to fall within the ambit of section 4. Otherwise, I have no any other option except to say that the evidence is not showing that the injuries sustained were serious. Henceforth, the second ingredient was not proved and so I am not going to bother with the third ingredient.

Having said so, I am agreeing with the opinion of the two respected assessors that the main count of Attempt unlawful to Cause Death was not proved and so the alternative charge of Grievous Harm. Therefore, I find all accused person not guilty and I am consequently acquitting them.

**DATED at TUNGUU ZANZIBAR this 08<sup>th</sup> day of September, 2023**



**A. I. S. Suwedi**

**JUDGE**

The judgment delivered in the presence of the Mr. Annuwar Saadun, learned Senior State Attorney for the DPP as well as the accused persons and their advocate, the learned Counsel Mwanaidi Abdallah. Right to Appeal explained.



**A. I. S. Suwedi**

**JUDGE**

**08/09/2023**