

TANZANIA / JUDGMENT

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA CRIMINAL SESSION CASE NO. 164 OF 2022 REPUBLIC VERSUS
BAKARI S/O ADAMU MSUKWA

RULING

Date: 22 November 2024 & 25 November 2024 SINDA, J.: The above-named accused person was charged with attempt murder contrary to Section 211 (a) of the Penal Code, Cap.16 R.E 2022 (the Penal Code). It was alleged that on 7 September 2020, in evening hours in Shiwinga Village, Malenge Ward within Mbozi District and Songwe Region, did attempt to murder one Emily Jeckman Hayola. The accused person denied the charge against him. 1 During hearing, the prosecution was represented by Ms. Thea Mshana and Mr. Ignas Urban, both Learned State Attorneys. The accused person was represented by Mr. Michael Mwaipasi, Learned Counsel. In support of that charge, the prosecution called three witnesses Emily Jeckman Hayola (PW1), Jamuhuri S/O Mnino Mkondya (PW2) and Dino Simon Mwaja (PW3). The nature of their evidence as testified in Court is as follows: - PW1, testified that on 7 September 2020 around 20:00 hours to 21:00 hours, he went to escort his friends. As he arrived back home with his motorcycle, while opening the gate, he saw his brother-in law, the accused herein. That, the accused asked him why he chased away his sister. PW1, while at the gate told the accused he would go to his home the next day and talk about it. The accused then shot him with a gun and he fell down. PW1 also mentioned there was someone else who attacked him with a machete on his head. He asked them to take the motorcycle, of which the accused and his companions did and left. He added that, three people rode on the motorcycle as they drove away. 2 PW1 added, that he could identify the accused person with the help of the solar light which was very bright. That after the attack, he ran to the coffee farm and made noises, and people came by. He was taken to the hospital while unconscious and regained consciousness while at Mbeya Referral Hospital. During cross-examination, PW1 stated that he recognized his wife but failed to recognize the third person. That after he was shot, he did not lose consciousness immediately. He added that the solar light is at the gate and it lights a big area. Also, he does not have any other evidence to confirm that the accused was the one who injured him. On his part, PW2 testified that on 6 September 2020, PW1 went to his house and informed him that his wife left and asked to be given a letter to follow up on her. The next day, at about 21:00 hours he heard noises at PW1's house. He went there and found a lot of people. PW1 was in the coffee farm, harmed and bleeding. PW1 stated that he was

injured by his wife and his brother in law, whose name was not mentioned to him. That PW1's injuries were covered and was taken to the hospital. The distance 3 from the coffee farm to PW1's house is around 100 meter. PW2 explained to have identified PW1 because of the light from the torch. When cross-examined, PW2 stated that he does not know PW1's brother in law as he only knows the wife. That PW1 says he was shot, but PW2 was not at the scene of crime when the alleged attack happened. PW3, stated that he is a medical doctor. That, on 8 September 2020 he attended to PW1 who was referred to Mbeya Referral Hospital from Songwe hospital. That PW1 was injured on the head. The next day, they decided to admit him and cleaned his wounds. PW1 had three injuries, the biggest was on his head with three centimeters. That, he had a blood clot and a piece of metal which was removed. They further did a CT scan on his head and observed he had iron particles which had gone inside the head and brain. That, they did not have a specialist to remove the iron particles and advised him if he needed to remove them he was to go to Muhimbili Hospital. That, PW1 was under medication for three to four months, and he was released after he had gotten better. That, PW1 was given medicines to help with his recovery process. PW3 also mentioned to have wrote a report 4 concerning the medical treatment of PW1, after being instructed by the director of the hospital. The report was tendered and admitted before this court as Exhibit PE1. As he was questioned by the defence counsel, PW3 stated that he was told PW1 lost consciousness. That the iron particles in his head might not be as a result of a gunshot. He also explained that from the nature of PW1's injuries, loss of memory is possible. Following the closure of the prosecution case on 22 November 2024, I was obliged to determine, in terms of the provisions of section 293 (1) of the Criminal Procedure Act, Cap. 20 R.E 2022 (the CPA), whether the accused person has a case to answer for the attempted murder of one Emily Jeckman Hayola. In terms of provisions of section 293 of the CPA, my duty is to assess the evidence of the prosecution to find out whether the prosecution has established a prima facie case sufficiently to require the accused person to enter a defense. 5 Having heard and analysed the evidence of the Prosecution witnesses I have to say I find the evidence to be quite lacking, especially on the issue of identification. In the matter at hand, PW1 stated that the accused was the one that attacked him. He managed to identify him using the solar light at the gate of his house. The rest of the witnesses, that is PW2 and PW3 do not know who the perpetrator of the offence is. Whereas all they know is based on hearsay. The law on the evidence of visual identification is well settled as the court is warned not to act on such evidence unless all the possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely water tight. In that regard, the trial court must consider the following guidelines: One, the time the witness had the accused under observation; two, the distance at which he observed him; three, the conditions in which the observation occurred, for instance whether it was day time or night time; four, whether there was good or poor lighting and five, Whether the witness knew or had seen the accused before or not. See: *Waziri Amani vs Republic* [1980] T.L R 250. 6 It is also a general rule that, evidence on visual identification during night to perpetrators of an offence made by a single witness is unsafe to be acted upon unless there is other corroborative account. This was discussed in the case of *Baya S/O Lusana vs. Republic*, Criminal Appeal No. 593 of 2017 that cited the case of *Wamalwa & Another vs Republic* [1999] 2 EA 358. In this case it was further observed that: "The Court should always warn itself of the danger of

convicting on identification evidence where the witness only sees the perpetrator of an offence fleetingly and under stressful circumstances." I will also borrow a leaf from the case of Juma Hamad vs The Republic, Criminal Appeal No. 141 of 2014 (Unreported). The court provided: "When it comes to the issue of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witnesses was reasonably bright to enable identifying witness to see and positively identify the accused persons. Bare assertions that "there was light" would not suffice." From the record, and based on the evidence provided by PW1, it is unclear whether the said solar light was powerful enough. Or if at all it pointed towards the perpetrator to enable identification. Because the offence took place during the night, these details although small, should have been well explained so as to determine if the identification of the accused was correct. That being the case, while relying on a pool of authorities cited above. I am of a firm view that the identification of the accused is questionable for a number of reasons. To mention but a few, PW1 was the only one who identified the accused, which goes against what was discussed in the case of Wamalwa & Another vs. Republic (Supra). But also, PW1 mentioned three people took his motorcycle and drove away. But, he could only identify the accused. This as a result questions if there was enough light at the scene of crime. Since I have been left with no evidence to implicate the accused person in terms of section 293 of the CPA. Therefore, there is nothing on record to defend. The spirit of section 293 (1) of the CPA is such that, the accused can only stand in a witness box if a prima-facie case has been established and also that, the Court may convict him of the offence charged even where he opts not to defend. In the instant matter, no such case has been established. 8 That said, it is a ruling of this court that the accused person has no case to answer, as the prosecution evidence failed to establish the same against him. Accordingly, he is acquitted under section 293 (1) of the CPA. I order his immediate release unless lawfully held for other lawful cause. It is so ordered. DATED at MBEYA on this 25 day of November 2024. A. A. SINDA JUDGE 9

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