

IN THE COURT OF APPEAL OF TANZANIA

AT MBEGA

(CORAM: RAMADHANI, J.A., SALATTA, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 149 OF 1994

BETWEEN

LEONARD MWALONGO. APPELLANT

AND

THE REPUBLIC. RESPONDENT

(Appeal from the Conviction and
Sentence of the High Court of
Tanzania at Njombe)

(Kileo-PRM/Extended Jurisdiction)

dated the 3rd day of May, 1994

in

Criminal Sessions Case No. 12 of 1991

JUDGMENT OF THE COURT

RAMADHANI, J.A.:

In this appeal Leonard Mwalongo, the appellant, is aggrieved by the decision of Mrs. E.A. Kileo, Principal Resident Magistrate (Ext. Jurisdiction), as she then was, of convicting him of the murder of Osmund Palingombe and the sentence of death passed on him.

The appeal was represented by Mr. Mkumbe, learned advocate, while the Republic/respondent had the services of Mr. Mbago, Senior State Attorney. Mr. Mkumbe had only one ground of appeal and that was that the learned Principal Resident Magistrate ought to have found that the appellant was insane when he committed the crime. Mr. Mkumbe attacked the trial Principal Resident Magistrate for basing her decision on an alleged extraneous medical report which was not tendered in evidence pursuant to Section 220 (2) of the CPA and is

not part of the appeal record".

May be we pause here so as to give some explanation which would make the submission of Mr. Mumbo intelligible.

At the trial it was agreed by Mr. Putika, then learned counsel for the appellant, and Mr. Mboise, learned State Attorney, that since the appellant had deposed in his extra-judicial statement that he was not of sound mind when he committed the offence, then he should be subjected to a medical examination. Mr. A.C. Prema, Principal Resident Magistrate (Ext. Jurisdiction), as he then was, ordered the appellant to be sent to the Isanga Institution in Dodoma for medical examination.

After a couple of mentions, the case came before Mrs. Kileo being prosecuted by Mr. Munuo, a different State Attorney, but defended by the same Mr. Putika. The issue of medical report from the Isanga Institution was never raised at all and in fact the plea of the appellant was:

"It is true that I killed the deceased. I was provoked. We had quarreled. ("Tulikuwa na ugorvi wa kinila")".

At the end of the day, in her judgment, Mrs. Kileo made a reference to the medical report saying that it was to the effect that the appellant was not insane and she proceeded to convict him.

So, on the first day of hearing this appeal and after having the assistance of both counsel, we ordered,

under Rule 34 (1) (b), that the medical report be produced as an exhibit in this Court. When we resumed hearing the appeal it was admitted as Exh. P.5.

Mr. Mkumbe submitted that Exh. P.5 should not be relied upon because it does not say anything about the mental state of the appellant at the time of committing the offence but gave his state at the time the examination was done. We may as well say it here and now that we agree with him. That report does not advance the case of either side and we are not going to use it all in this judgment.

May be we go back to the merits of the appeal and restate that the only ground advanced is that the appellant was of unsound mind when he killed the deceased. To determine that we have to revisit the evidence.

The appellant was a close relative of the deceased and indeed almost all of the key prosecution witnesses were brothers or cousins. On the fateful day, 17/12/89, at about 17.00 hours, the deceased went to the "porbe" shop in which Ernest Mlelwa (PW.2) was an attendant. While he was there drinking, the appellant appeared, walked around and then left. He neither bought any local brew nor did he greet the deceased. At about 20.30 hours the deceased also left and on the following day PW.2 heard that the deceased had been killed. The same news of the death reached a younger brother of the deceased, Kanisius Mwalongo (PW.5), at his place of work. He went to dig a grave in the company of the appellant, his brother. After completing that task the appellant asked for some money

from PW.5 so that he could escape because, he said, he was the one who killed the deceased.

PW.5 went to break the news to their eldest first cousin, Isidori Iwalongo (PW.4), who ordered a member of peoples militia, Richard Mlowe (PW.3), to arrest the appellant. That was done and the appellant was sent before PW.4 to whom he confessed, in the presence of PW.3, to have killed the deceased because he had suspected him (the deceased) to have killed his (the appellant's) father in 1982. PW.4 stated that the appellant's father, who was his paternal uncle, died of natural causes. All these witnesses were of the firm view that the appellant was quite normal when they were with him after the killing and had a lucid recollection of events.

Apart from what the prosecution witnesses said as to what the appellant told them, the appellant himself gave three versions of the incident. In his extra-judicial statement, Exh. P.4, the appellant said that on 17/12/89 when he woke up he found himself trembling and laughing and that he was not in his right senses. However, in the evening he went to fetch some firewood. He returned home but forgot his axe in the forest. So, he went back for the axe and, as he was returning home, came across the deceased and chopped the back of his head once. ~~As~~ the deceased fell down, he threw the axe and went home. The following day he heard that the deceased was killed by unknown persons. He concluded that he killed the deceased while he was in a confused state of mind. That was a contradiction.

In his cautioned statement, Exh. P.1, the appellant said that he had planned with some of his brothers to avenge the death of their late father by killing the deceased who had bewitched their father. So, on the fateful day they followed him from the club and one of his companions hacked the deceased on the head with an axe which they had purposely taken for the job.

In Court, in his sworn evidence, the appellant said that he was informed that the deceased had bewitched his father. So, together with his brother called Pius, they followed the deceased to the club. It is better if we let the appellant recount:

"We remained at the pombe shop until around 8 p.m. Osmund the deceased left. I followed him having been provoked. (Nilighadhibika). As I followed him he turned back and said 'you are the one I was looking for'. He slapped me. I struck him with the axe which Pius had collected. Pius had brought the axe to the pombe shop on the understanding that should the deceased come to the pombe shop, then we would axe him."

In all the three versions what emerges is that the appellant committed nothing but murder. In his sworn evidence in court he said that he intentionally followed the deceased to the pombe shop with an axe. This tallies with what PW.2, the attendant at the pombe shop, said. Again in his cautioned statement, the appellant had planned

to kill the deceased but tried also to implicate others. The reason he gave was the belief that the deceased bewitched his late father seven years ago. That was murder. In the extra-judicial statement the appellant alleged that he had some mental disturbance. However, we wonder how he remembered the state in which he was, that is, he was trembling and laughing without reason. Let us, for the sake of argument, concede that he had mental disturbance, it is palpably clear, nevertheless, that in the evening he had his full senses back. He went to hew firewood. He remembered that he had forgotten his axe in the forest and so, went back to fetch it. Now, these are not actions of one with some mental disturbance.

We agree with Mr. Mbago that murder was proved beyond reasonable doubt and that the appellant was properly convicted.

We, therefore, dismiss the appeal in its entirety.

DATED at MBEYA this 10th day of June, 1999.



A.S.L. RAMADHANI
JUSTICE OF APPEAL

B.A. SAMATTA
JUSTICE OF APPEAL

K.B.K. LUGAKINGIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(A.G. MWARIJA)
DEPUTY REGISTRAR