IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MROSO, J. A., RUTAKANGWA, J. A. AND KILEO, J. A.)

CRIMINAL APPEAL NO 17 OF 2005

JACOB ISSA STUART@ MCHAFUKOGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(**Appeal from the decision of the High Court of Tanzania at Mtwara)**

(Lukelelwa,J)

Dated 16th Day of March 2005
In
Criminal Sessions Case No 26 of 2002

JUDGMENT OF THE COURT

10 March & 9 May, 2008

KILEO, J.A.

The High Court of Tanzania sitting at Mtwara (Lukelelwa, J) convicted the appellant, Jacob Issa Stuart Mlaponi@ Mchafukoga, of murder and sentenced him to the mandatory sentence of death by hanging. From that decision he has come to this Court.

Mr. Malamsha, learned advocate, who represented the appellant at the hearing of this appeal, has submitted the following grounds of appeal:

1.That the learned trial judge erred in law and fact in convicting the appellant on the offence of murder as charged taking into account that the appellant's conduct before and after the incident clearly reflected that he was not of sound mind.

2. That on the totality of the evidence on record there is doubt as to who took and actually killed the deceased and therefore the doubt should have been resolved in favour of the appellant.

3. That the learned trial judge failed to correctly assess existence of malice aforethought as an essential ingredient of murder before he could convict the appellant with the offence.

4. That the learned trial judge erred in law in shifting the burden of proof to the appellant.

Mr. Luena, learned State Attorney, argued the case on behalf of respondent Republic.

This appeal revolves mainly around the question whether the trial court properly evaluated the evidence relating to the state of mind of the appellant at the time of commission of the crime to justify holding him accountable for murder.

The deceased, a girl child aged about four years and a half at the time of her death, was a stepchild of the appellant. He had married her mother, Christina Laurent (PW3), just about five months prior to the incident. The couple shared a bed with the deceased. PW3 slept in the middle- i.e. between her husband and her child. On the fateful night, PW3 woke up in the middle of the night only to find both her husband and her daughter missing from the bed. Alarmed, she contacted the appellant's uncle (PW2) who was living in the same compound with the appellant's family. PW3 also raised an alarm, which was responded to by PW1, Vincent Koka, the ten-cell leader of the area. Just as PW1 got to the appellant's compound he saw the appellant emerging from a path carrying the child. The appellant was half naked; he only had his shirt on. The child was completely naked and she was observed to be bleeding from her nostrils and mouth. She was also breathing with difficulty and her neck appeared to be loose. PW3 noted further that her child's private parts had been violated. When queried by PW1 the appellant said nothing but to PW3 he is said to have said that witches had taken the child. The appellant did not appear to be bothered by his nudity; in fact he remained that way for quite a while. The child was taken to the local dispensary but for lack of sufficient medical facilities she could not be treated properly. The mother was merely given aspirin and advised to take the child to Mkomaindo Hospital. They couldn't make it to the hospital however, as the child's life came to an end the following morning. The postmortem examination report that was tendered in

court indicated that the deceased was "strangulated" causing suffocation and death.

On 6/2/2003 the appellant appeared before the High Court for plea. On this day however, Mr. Milanzi, learned defence counsel, asked the court that expert opinion be obtained regarding the appellant's mental health as the appellant had indicated that he once suffered from epilepsy. Following Mr. Milanzi's suggestion, an order was made under section 220(1) of the Criminal Procedure Act (CPA) for the detention of the appellant in a mental hospital for medical examination. The record of the trial court shows that on 19/04/2004 a written report of the mental condition of the appellant was received in terms of section 220(4) of the CPA. One Dr. J. Aligawesa, the consultant psychiatrist in charge at Isanga Institution, who examined the appellant, gave a summary and conclusion of his examination in the following words:

"SUMMARY

(1) The accused killed his close relative i.e his stepdaughter four years child. The act was irrational and Motiveless.

(2) *He had history of epilepsy with psychosis since the age of 15 years. It seems He was partially treated by traditional healers.*

(3) He killed his close relative i.e his stepdaughter. This is typical of individual with mental illness, they kill close relatives.

(4) *He attacked his victim for no apparent reason and used excessive force to strangulate his victim which is not of keeping with normal human behaviour.*

CONCLUSION

The accused suffered from major mental illness epilepsy with psychosis whereby he developed psychotic confusion and lost touch with reality and in such a state attacked and killed his victim without apparent reason. The question of and the impact his action had upon his victim were overwhelmed by the psychotic confusion with which further deprived of the ability to conform his conduct to the requirements of the law.

He was therefore insane at the material time when he committed the alleged offence.

Meanwhile he is cooperative and rational and can enter plea.

Dr. J. Aligawesa
CONSULTANT PSYCHIATRIST
INCHARGE OF ISANGA INSTITUTION"

The trial judge did not accept the medical report, he found the appellant to have killed with malice aforethought.

Having heard both the defence counsel and the learned State Attorney who submitted before us and after a consideration of the whole circumstances of the case the following matters became apparent:

First, it was necessary to call in evidence the doctor who performed the postmortem examination so as to clarify his report. The report tendered in court showed that the cause of death was strangulation causing suffocation and death. Evidence at the trial showed that the deceased met her death several hours after the appellant had been seen carrying her. The question that arose is whether a person whose death is said to have been caused by suffocation can last for several hours after suffocation before meeting with death. Only a medical expert could answer this question.

Secondly, the trial court considered, in its determination of the case, the psychiatrist's report, which was not part of the evidence. On 19/4/2004 the following entry was made in the record of the trial court:

> *"A written report on the mental condition of the accused under section 224(4) of the Criminal act 1985 has been received.*
>
> *The accused is cooperative, rational and can enter a plea according to the report."*

The trial judge considered the medical report and at the end rejected it. However, the provisions of the law relating to medical reports obtained pursuant to the provisions of section 220 of the CPA were

not properly adhered to. Section 220 (1)-(3) of the CPA provides thus:

220. Court's power to inquire into insanity

(1) Where any act or omission is charged against any person as an offence and it appears to the court during the trial of such person for that offence that such person may have been insane so as not to be responsible for his action at the time when the act was done or omission made, a court may, notwithstanding that no evidence has been adduced or given of such insanity, adjourn the proceedings and order the accused person to be detained in a mental hospital for medical examination.

(2) A medical officer in charge of the mental hospital in which an accused person has been ordered to be detained pursuant to subsection (1) shall, within forty-two days of the detention prepare and transmit to the court ordering the detention a written report on the mental condition of the accused setting out whether, in his opinion, at the time when the offence was committed the accused was insane so as not to be responsible for his action and such written report purporting to be signed by the medical officer who prepared it may be admitted as evidence unless it is

proved that the medical officer purporting to sign it did not in fact sign it.

(3) Where the court admits a medical report signed by the medical officer in charge of the mental hospital where the accused was detained the accused and the prosecution shall be entitled to adduce such evidence relevant to the issue of insanity as they may consider fit.

When read carefully, it becomes clear that the provisions of section 220 of the CPA require that a medical report sent to a trial court pursuant to this provision be admitted in evidence before the trial court can make reference to it. After admission of the medical report both the defence and the prosecution are entitled to adduce evidence relevant to the issue of insanity as they may consider fit. The procedure in this case was flawed from the beginning. It appears that the learned trial judge assumed that once the report had been filed in court it formed part of the evidence. We are of the settled view that this was a misdirection, which resulted in a miscarriage of justice as evidence not properly before the court was acted upon to the detriment of the appellant.

Mr. Luena, learned State Attorney said, and we entirely agree with him, that an order for a re- trial would be appropriate in the circumstances of the case so that the issues raised may be resolved.

In the light of the above considerations we find that this is a situation where we can safely say that there was a mistrial. In the result we quash the conviction entered against the appellant and set aside the sentence imposed. We order a re- trial of the case against the appellant. The issues raised will be properly addressed by calling, as witnesses, medical officers for clarification. The trial court is directed to bear this in mind during the re-trial.

DATED At **DAR ES SALAAM** this 7th Day of May, 2008.

J.A. MROSO
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

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

COURT OF APPEAL OF TANZANIA

(F. L. K. WAMBALI)
SENIOR DEPUTY REGISTRAR