**IN THE COURT OF APPEAL OF TANZANIA**

**AT TABORA**

**(CORAM: KIMARO,J.A., MBAROUK, J,A., And MASSATI, J.A.)**

**CRIMINAL APPEAL NO. 152 OF 2005**

**EMMANUEL YUSUFU @ NORIEGA.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the conviction of the High Court of Tanzania at Tabora )**

**(Mwita,J.)**

**dated 18th day of March, 2005**

**in**

**Criminal Sessions No.34 of 1997**

**.....**

**JUDGMENT OF THE COURT**

**20th October, 2009 & 29th October,2009**

**KIMARO, J.A.**

In the High Court of Tanzania sitting at Tabora, the appellant was charged and convicted of the offence of murder contrary to section 196 of the Penal Code, CAP 16 R.E.2002. He was alleged to have intentionally

killed Ismail Omary Mkanga at Ilagala village, within Kigoma District on the 3rd day of November, 1995.

From the evidence led at the trial there is no dispute that the deceased was killed by the appellant. The evidence shows that sometimes in 1993, the appellant's father fell sick. Unfortunately the disease he was suffering from could not be diagnosed at Kabanga Hospital where he was being treated. Believing that his father was bewitched, the appellant resorted to witch doctors in Kasulu District for consultation on the cause of the disease his father was suffering from. The answer he got was that it was the deceased who bewitched his father. Upon his return home, he found his father dead. Since the appellant believed that his father died because of the witchcraft administered upon him by the deceased whom he described as a reputed wizard, he was angered. Consequently, the appellant resorted to drinking and smoking bhang. He also developed a grudge against the deceased because of that belief and he hated the deceased.

According to the appellant's own confession, in August 1995 he met the deceased in a market and he made remarks which the appellant considered to be a threat to kill him by witchcraft. On 3rd November, 1995

the appellant while armed with a "panga" met the deceased who was on his bicycle. As the deceased stopped the bicycle, the appellant without any exchange of words hacked the deceased on the neck with a "panga" and he continued cutting him until he severed the head from the rest of the body. When the appellant was arrested, he admitted the killing in a caution statement as well as an extra judicial statement which were admitted in evidence as exhibits as P3 and P2. without any objection. In terms of the post mortem examination report which was received in evidence as exhibit P1, the deceased died because of excessive bleeding. The big blood vessels were cut completely.

During the trial, the appellant in his defence reiterated what he said in his caution and extra judicial statements but raised the defence of insanity caused by intoxication. The learned trial judge in rejecting the defence of the appellant remarked as follows:-

> *"In terms of section 14 of the Penal Code intoxication is a defence to a criminal charge if by reason thereof the*

*person charged at the time he committed the offence did not understand what he was doing and the state of intoxication was caused without his consent by the malicious or neglect act of another man. The onus of proof is upon the prosecution to prove beyond reasonable doubt that, despite the intoxication the accused was capable of and did form the specific intention to kill or cause grievous harm to the deceased.*

*In the instant case, as pointed above,*

*the accused had intended to kill the deceased and he knew what he was doing when he killed the deceased. Furthermore, there is no evidence on record from which an inference may*

*be drawn that the state of intoxication, if any, was caused without the accused consent by malicious or negligent act of another man. I am, therefore, of the considered opinion that the defence of intoxication is not available to the accused.* "

The appellant was then convicted of murder and sentenced to death by hanging. He was aggrieved by the conviction and the sentence and he is now before us with this appeal. Before us the appellant is represented by Mr. Method R.G. Kabuguzi, learned counsel. He also appeared for him at a certain stage in the trial court. When the preliminary hearing was conducted on 11th December, 1998 Mr. Kabuguzi, learned Advocate was a State Attorney then, working with the Office of the Attorney General. He appeared in Court to prosecute the case on behalf of the Republic. His appearance before us to prosecute the appeal on behalf of the appellant is inappropriate and it is not ethical. Advocates should refrain from such practice. The respondent Republic is represented by Mr. Jackson Bulashi, learned Senior State Attorney.

Initially three grounds of appeal were filed by the learned counsel for the appellant but during the hearing of the appeal he abandoned two grounds and remained with one ground. In the sole ground of appeal the learned trial judge is faulted for grossly erring in law and fact when he held that the offence of murder c/s 196 of the Penal Code, Cap 16 of the Laws had been thoroughly proved by the prosecution against the appellant.

In support of the appeal the learned counsel for the appellant considered the way in which the appellant caused the death of the deceased by cutting him with a "panga" until the head was completely separated from the rest of the body, and the utterance he made thereafter that "nimeua na nitaua sana leo". That the appellant was a drunkard and used to smoke bhang. According to the learned counsel for the appellant, such a conduct is inconsistent with a person who is sane. Under the circumstances, contended Mr. Kabuguzi, the appellant was entitled to the defence of intoxication under section 14 (2) (b) of the Penal Code. The learned trial judge should have made a special finding under section 219 (2) of the Criminal Procedure Act, CAP 20 R.E.2002 that the appellant killed the deceased but for reason of insanity he was not guilty of murder and should have acquitted him. He prayed that the appeal be allowed.

In his brief reply, the learned Senior State Attorney for the respondent supported the conviction and sentence. The defence of the appellant, his extra judicial and caution statements (exhibits P2 and P3,), argued the learned Senior State Attorney, show that the appellant planned the death of the deceased. He knew what he was doing and therefore the defence of intoxication amounting to insanity was an afterthought and it was rightly rejected. He prayed that the appeal be dismissed because the appellant killed with malice aforethought.

As indicated from the beginning of this judgment, the case is not complicated because the appellant admitted killing the deceased. The circumstances under which he caused the death of the deceased have also been shown. His defence of intoxication was rejected. It is true the learned trial judge in brushing aside the defence of intoxication did not consider section 14(2)(b) of the Penal Code but only focused on section 14(2)(a). This being the first appeal Court, the appellant is entitled as a matter of right to have the evidence of the trial court re-evaluated with a view of being satisfied that justice was done. See the case of **Kasema Vs R.** CAT Criminal Appeal No.214 of 2006 (Unreported) where the Court said that "it is the appellant's legitimate right to have the entire evidence re-

evaluated". The only issue before us is whether the appellant was entitled to the defence of intoxication under section 14(2)(b) of the Penal Code. The section provides that:-

> *"Intoxication shall be a defence to a criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not understand what he was doing and the person charged was by reason of intoxication insane temporarily or otherwise, at the time of such act or omission."*

Under subsection 3 of section 14 it is further provided that:-

> *"Where the defence under subsection (2) is established, then*

*in a case falling under paragraph (a)of that subsection, the accused shall be discharged and in a case falling under paragraph (b) of that subsection the provision of this Code and of the Criminal Procedure Act relating to insanity shall apply."*

Meanwhile section 219(1) of the Criminal Procedure Act, CAP 20 R.E.2002 which deals with the defence of insanity specifies the time when the defence must be raised. The accused must raise the defence of insanity at the time the plea is taken. Where there is evidence to prove insanity the court makes a special finding to the effect that the accused did the act but for reason of insanity, is not guilty of the offence.

From the evidence on record was the appellant entitled to the defence of the intoxication amounting to insanity? Without wasting our time we must say that we entirely agree with the learned Senior State Attorney that the learned trial judge properly evaluated the evidence before him and came to a proper finding that the appellant was properly

convicted. Why? The evidence that was relied upon to convict the appellant was his own confession and the extrajudicial statement. (exhibits P2and P3).

In the caution statement (exhibit P3) the appellants says at page 36 of the record of appeal that:-

> *"Nakumbuka baada ya kufa baba nilikwenda kwa mganga wa kienyeji ambaye jina lake simfahamu* ***...akanipigia ramli na akanieleza kwamba aliyemuuwa baba yangu kwa uchawi ni Mzee TEMBO yaani marehemu ISMAILS/O OMARY ...Nakumbuka ramli hiyo nilipiga mwaka 1993. Tangu wakati huo nilikuwa ninatafuta nafasi nzuri ya kulipiza kisasi. Nakumbuka mnamo tarehe 03/11/95 majira ya saa 13.00 hrs niliondoka nyumbani kwangu eneo la KILOMBERO***

*nikiwa na panga nia yangu ilikuwa kwenda kukamilisha nia yangu ya kumuua mzee TEMBO (ISMAIL S/O OMARY). Nilipita ILAGULA Kijijini*

*ambako nilipata habari kutoka kwa kijana mmoja jina simfahamu kwamba ISMAIL S/O OMARY yuko shambani. Nilifuata barabara ya kwenda LUSESA ambako ndiko kuna shamba la ISMAIL S/O OMARY. Nilipofika eneo la KONA*

*kabla kidogo ya kivuko cha mto MALAGARASI –ILAGALA nilikutana naye akiwa anaendesha baiskeli. Bila kusemeshana jambo lolote niliinua panga nikamkata kwenye shingo nyuma, akaanguka chini. Niliendelea kumkatakata kwenye shingo na mikono aiipokuwa*

***akijaribu kunizuia wakati wote alikuwa amelala chini.***

***Niliendelea kumkata kwa panga mpaka nikatenganisha kichwa na kiwiliwili."***

(Emphasis added).

From the appellant's own narration of how the death of the deceased occurred it cannot be said that he was intoxicated to the extent of being insane. He remembered vividly what he did. His sense of memory was working properly otherwise he would not have remembered all the events that took place. In terms of section 13 of the Penal Code a person is said to be insane when he is incapable of understanding what he is doing, incapable of appreciating that he ought not to do the act or the omission and does not have control of the act or the omission. In the case of **Hilda Abel Vs R** [1993] T.L.R. 246 the Court said:-

*"Insanity within the context of section 13 of the Penal Code is a question of fact which could be*

*inferred from the circumstances of*

*the case and the conduct of the*

*person at the material time."*

The appellant's motive for the killing is that he was angered upon being informed by the witchdoctor that it was the deceased who caused the death of his father. He planned revenge and he remembered very well how he executed it. We also agree with the learned Senior State Attorney that the defence of intoxication amounting to insanity was an afterthought. As indicated above, section 219(1) requires an accused person intending to rely on the defence of insanity to raise it at the time of plea taking. This means that in murder trials it must be pleaded at the time of preliminary hearing. The record of appeal at page three does not show that the appellant raised that defence.

All in all we are of the considered opinion that if at all the appellant was intoxicated, it was not to the extent of making him fail to know what he did. He remembered each and everything he did. We find that the appellant's appeal has no merit and we dismiss it in its entirety.

DATED AT TABORA this 27th day of October 2009.

N.P. KIMARO

**JUSTICE OF APPEAL**

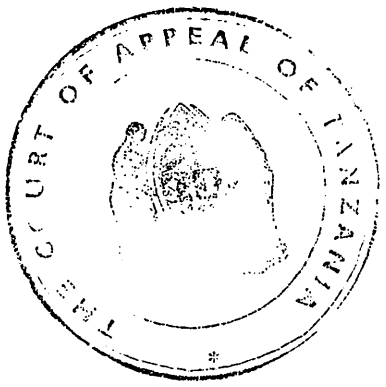
M.S. MBAROUK

**JUSTICE OF APPEAL**

S.A. MASSATI

**JUSTICE OF APPEAL**

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




(J.S. MGETTA)

**DEPUTY REGISTRAR**