IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., MUSSA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 203 OF 2014

MATHIAS TANGAWIZI @ LUSHINGE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Mwanza)

(Kibella, J.)

dated 28th day of March, 2014
in
(HC) Sess. No. 65 of 2010

JUDGMENT OF THE COURT

2nd & 8th June, 2015

MUSSA, J.A.:

In the High Court of Tanzania, sitting at Geita, the appellant was arraigned for murder, contrary to section 196 of the Penal Code, Chapter 16 of the revised laws. The information laid at his door alleged, that on or about the 24th May 2008, at Kaduda Village, within the District of Geita, the appellant murdered his mother-in-law, namely, Sophia Kamuli. At the end of the trial, the appellant was found guilty, convicted and handed down the mandatory death sentence (Kibella, J.). The circumstances giving rise to

the arrest, arraignment and the ultimate conviction of the appellant may be recapitulated as follows:-

On the fateful day, around 3:00 a.m. or so, the appellant paid a surprise visit at the residence of his brother in law, namely, Lucas Mwendesha (PW1). Upon being welcomed, the appellant desperately informed the host that he was suffering from a terminal disease which cannot be cured. PW1 advised him to go to hospital but, instead of taking the advice, the appellant demanded to be given an exercise book so that he inscribes his Will. PW1 obliged and, indeed, the appellant settled down to write on the exercise book which was given to him. A little while later, he posed a bit and asked to be shown where the toilet was. PW1 was, again, obligatory and, upon being shown, the appellant went to the toilet but was back in a moment.

Next, the appellant requested PW1 to accompany him outdoors so that the two of them sit at the fireplace. Once again, PW1 had no qualms and was heedful. Whilst there, the appellant resumed writing his Will. A good deal later, he complained that he was having a stomach ache,

following which he went back to the toilet. This time, the appellant was not seen back and, obviously worried, PW1 went to fetch him at the toilet where he found no trace of him. Upon consultation with his wife (the appellant's sister), PW1 sought the assistance of some neighbours to track down the appellant in the surroundings but the exercise ended in futility.

In the meantime, around 7:30 a.m., on that fateful day, the deceased was within the precincts of their house of residence, as it were, engaged in a routine household business of chopping logs for firewood. At that moment in time, the deceased's husband, namely, Samwel Ndelema (PW3), was departing from the residence, destined for the paddy fields. The elderly couple were sharing the household with their granddaughter, namely, Shida Juma (PW4) who was cooking inside the house. Just then, PW3 and PW4 heard the deceased wailing in the words:-

"Jamani nisaidieni nimekufa"

Looking over, both witnesses saw the appellant stabbing the deceased with a spear several times. Thereafter, the appellant pulled out the spear from the deceased's body and bolted away. In the meantime,

the injured deceased retreated towards the house in desperation. She, however, collapsed just as she passed the doorstep and died moments later. Upon medical examination, her death was attributed to hemorrhagic shock, secondary to multiple stab wounds.

In his sworn evidence, the appellant did not quite refute the detail about killing his mother-in-law. He had, actually, similarly confessed the killing in an extra-judicial statement which was earlier adduced into evidence by the prosecution (exhibit P3). In his narrative, the appellant gave a lengthy account according to which he eventually depicted himself as a victim of sorcery. He explained how his child developed and finally succumbed to a strange disease; and how he was, himself, similarly attacked by an unusual illness. As it turned out, the appellant was obsessed by a hunch that the misfortunes befalling on him resulted from evil spirits implanted upon him by his mother-in-law. The last straw of the illness was reached when the appellant developed a nosebleed, and to tape from his own telling:-

"I felt what had befell my late child has reached me. I decided to inform my sister at about 02:00

a.m., on how they will live with my family. After done so (sic), suddenly I felt going to my mother-in-law asking for her to remove their witchcraft so that I recover."

Indeed, when the appellant arrived at the residence of his in-laws, he found the deceased in the activity of chopping firewood. Nonetheless, upon seeing him, the deceased, allegedly, threw the axe with which she was working and started running away. The appellant said that, if anything, the deceased's act of fleeing away, confirmed his worst fears that she was a witch. In the upshot, the appellant stumbled across a sharp weapon which was thereabout and stabbed the deceased with it. Thereafter, he, assertedly, resumed his common senses and ran away. Throughout his defence, the appellant's account for the killing oscillated between the claim that he was not in his senses and, sometimes, he gave the opposite claim that he knew what he did. As hinted upon, against the foregoing backdrop, the appellant was convicted and sentenced to the extent already indicated. Aggrieved, he presently seeks to impugn the

verdict upon a memorandum of appeal comprised of seven points of grievance.

At the hearing before us, the appellant was represented by Mr. Vedastus Laurian, learned Advocate, whereas the respondent Republic had the services of Ms. Ajuaye Bilishanga, learned Senior State Attorney. At the very outset, Mr. Laurian consolidated and conveniently crystalised the points raised in the memorandum into one ground, namely, that on the circumstances of the case, the learned trial judge ought to have substituted the conviction for the lessor offence of manslaughter. The learned counsel for the appellant then sought to impress that the appellant was so obsessed with the idea that he was being bewitched to the effect that the balance of his mind was disturbed by the obsession. If we understood him well, Mr. Laurian was, in effect, contending that the appellant did not know what he was doing or that he did not have control of what he did. To say the least, the learned counsel was advancing the defence of insanity in terms of section 13 of the Penal Code. The trial judge was, seemingly, alive to this defence, as he made the following remark in the course his judgment:-

"From the above defence the first point which the accused tries to establish is that during the commission of the offence he was mentally unsound. No doubt here the accused was raising the defence of insanity during his defence. In law that was improper, the accused ought to have raised that defence at a time when he was called to plead as required by section 219 of the Criminal Procedure Act, (Cap. 20 R.E. 2002) which provides:-

"219-(1) Where any act or omission is charged against any person as an offence and it is intended at the trial of that person to raise the defence of insanity, that defence shall be raised at the time when the person is called upon to plead."

However, in criminal charge, the court has discretion under section 220 of the Criminai Procedure Act, to adjourn the proceeding and order the accused to be examined in a mental hospital. In law the court can only exercise that discretion if there are basis upon which the court could find that the accused person may have been insane at the time the offence was committed. In this case the accused appeared mentally normal during the whole trial even on the basis of the testimony which I will discuss hereunder there is no indication from the defence and the prosecution evidence, which suggested that the accused was insane at the time he killed the deceased."

As correctly remarked by the trial judge, where it is intended to raise the defence of insanity the most appropriate stage for raising such a defence is when the accused person is called upon to plead. As a general

rule, evidence as to an accused's state of mind should be called by the defence and not the prosecution but, where the accused is unrepresented, the interests of justice may require that the prosecution should call evidence as to the accused's state of mind (see **Philip Musivi Musele vs. The Republic** (1956) 23 E.A.C.A. 622).

During the trial, the appellant was represented by an advocate in the name of Mr. Kelvin. Unfortunately, the learned counsel did not assert, at the plea taking, that the appellant intended to raise the defence of insanity. We consider this inaction by the learned counsel to be considerably disquieting, the more so as from the manner in which the appellant presented and behaved himself before PW1 there was clearly reason to doubt his sanity and call for medical evidence. It should be recalled that the appellant strangely called at the residence of his brother-in-law at such an early hour as 3:00 a.m. (he actually said it was 2:00 a.m.). According to PW1, the appellant spent a good three hours writing his so-called Will before he unceremoniously disappeared without such a gesture as a farewell. Unfortunately, the exercise book in which the Will was written was not adduced in evidence after the prosecution attempt to do so was objected to by Mr. Kelvin.

The trial emanated from committal proceedings and as such the details of PW1's account were, presumably, available from the very outset of trial. Viewed from that perspective, the fault squarely lies on the shoulders of the learned counsel for the appellant.

In any event, in the light of the appellant's questionable behaviour as disclosed by the evidence of PW1 it was, certainly, the duty of the trial judge to adjourn the proceedings in terms of section 220 (1) and order the accused person to be detained in a mental hospital for medical examination. It was, we think, in the best interest of justice for the trial court to have the benefit of the medical examination report ahead of its verdict. This did not happen and we are a shade unsure if the trial court would have arrived at the same verdict if it had the benefit of a medical report. To this end, we are minded to invoke our revisional jurisdiction and nullify the entire proceedings of the High Court. We, thereafter, step into the shoes of the High Court and order the accused to be detained in a mental hospital for medical examinations in terms of section 220 (1) of the CPA. Thereafter the medical officer shall prepare and transmit the report to the High Court.

Upon resumption, the trial of the appellant should commence afresh before another judge and a new set of assessors. In the meantime, the appellant should remain in custody.

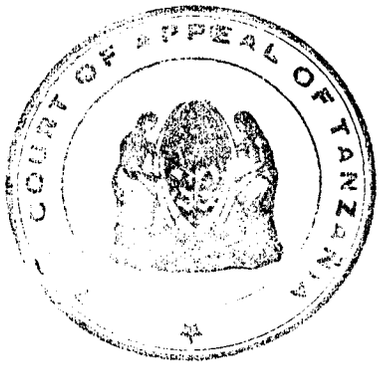
DATED at **MWANZA** this 5th day of June, 2015.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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



Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL