IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MASSATI, J. A., MUSSA, J. A. And MWARIJA, J. A.)

CRIMINAL APPEAL NO. 168 OF 2015

MT. 81071 PTE YUSUPH
HAJI @ HUSSEIN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Tabora)

(Mwambegele, J.)

dated the 4th day of November, 2014
in
Criminal Session Case No. 111 of 2011

.....

JUDGMENT OF THE COURT

12th & 19th April, 2016

MUSSA, J.A.:

In the High Court of Tanzania, Tabora Registry, the appellant was arraigned for two counts of murder, contrary to section 196 of the Penal Code, Chapter 16 of the Revised Laws (the Penal Code). The allegation on the first count was that on the 23rd November, 2009, at Kitambuka Sabuhene Village, within Kasulu District, the appellant murdered one MT 84720 PTE. Hildelfonce Buluja @ Masanja. On the second count it was claimed that on the same date and place, the appellant also murdered MT 85282 PTE. Rashid Hasani @ Nawani.

When the case was called for plea taking before Lukelelwa, J., Mr. A.G. Katabazi, learned Advocate, who was representing the appellant pleaded that during the trial the latter intends to raise insanity as a defence to the information laid against him. The learned Judge was heedful and, accordingly, adjourned the proceedings and ordered the appellant to be detained at a mental hospital for medical examination in terms of section 220 (1) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (the Act).

The way it appears, the appellant was duly examined and, a good deal later, a consultant psychiatrist based at Isanga Mental Institution, namely, Dr. Mndeme Erasmus, transmitted to the High Court a written report on the mental condition of the appellant, incidentally, expressing the opinion that the appellant was insane during the commission of the offence. Upon receipt of the report, the High Court summoned the appellant before it and, from the record of proceedings, this time the appellant entered appearance and was represented by Mr. Sichilima, learned Advocate, whereas Mr. Mokiwa, learned State Attorney, stood for the Republic.

In the course of the proceedings, the presiding Judge (Lukelelwa, J.) is recorded to have admitted the medical officer's report (apparently) *suo motu*

and marked it exhibit "P1". The Judge gave a summary of the opinion of the consultant psychiatrist to the effect that the appellant was insane during the commission of the alleged offence. He then inscribed the title: "EVIDENCE AS TO INSANITY OF ACCUSED AT THE TIME OF COMMISSIONS" and invited counsel from either side to express their respective inputs. As one would have expected, in response, Mr. Sichilima simply adopted the language of the medical officer in the report and submitted that the appellant was insane at the commission of the offence. Likewise Mr. Mokiwa similarly played partisan by gleaning over the statements of the intended prosecution witnesses and drawing the conclusion that the appellant was sane at the commission of the offence. Having heard the rival submissions from either side, the presiding Judge proceeded thus:-

RULING

Having gone through the Medical report exhibit "P1" and the statements of Prosecution intended witnesses, in particular the statement of MT 70235 L/CPL MOSHI, I go along with the submissions of Mr. Mokiwa learned State Attorney that the accused might have been ***SANE*** *when he killed the two deceased persons. I therefore order and direct that the case shall go on full trial. Plea of the accused to be taken on 26/07/2013. The prosecution to*

amend the information to reflect a charge of two counts of murder. Order accordingly.

S. B. LUKELELWA
JUDGE
23rd July, 2013.

The plea and preliminary hearing were, respectively, taken and held on the scheduled date, whereupon the appellant denied the prosecution accusation. At the close of the preliminary hearing, the appellant, through Mr. Sichilima, expressed that during the trial, he would wish to call the referred Dr. Mndeme Erasmus. Thereafter, the proceedings were adjourned for trial on convenient date to be fixed by the Deputy Registrar.

At a later stage of our judgment, we intend to revisit the foregoing procedure adopted by the trial court to pronounce the mental condition of the appellant and assess its attendant consequences. For the moment, let us reflect on what transpired during the trial.

At the main hearing of the case, the prosecution lined up six witnesses, four documentary exhibits and three physical exhibits comprised of a sub-machine gun and two magazines. For his part, the appellant gave an affirmed statement but his desired wish to call Dr. Mndeme Erasmus was

severely curtailed by the presiding Judge (Mwambegele, J.) in the following words:-

> *"**Court:** We (sic) intended to call Dr. Mndeme of Isanga Institution but in view of the fact that this report is already an exhibit in this court, we will not call him."*

The foregoing pronouncement similarly begs the question as to its soundness and would, just as well, be the subject of our comments. In fact, given the seemingly fundamental flaws that undermined the proceedings giving rise to this appeal, we need not explore on the details of the evidence which was adduced during the trial. It will suffice if we sum up that at the end of the trial proceedings, the presiding Judge acquitted the appellant of the two counts of murder but, in lieu thereof, he substituted a conviction for the lesser offence of manslaughter, contrary to section 195 of the Penal Code. Upon the substituted conviction, the appellant was sentenced to a term of twenty (20) years imprisonment. He is aggrieved and presently seeks to impugn both the conviction and sentence upon a memorandum of appeal which is comprised of three grounds, namely:-

"That the trial before the High Court was a nullity as the appellant was denied, the right to cross-examine the prosecution witnesses after the assessors had questioned them and was denied his statutory right to call the Dr. from Isanga Institution.

In the alternative.

2. That part of the evidence of PW4 PF 18012 Asst. Insp. DAVID SHABAN, PWA5 YASINTA CHULEHA BUSUNGU and PW6 E 8379 D/CPL HAJI together with Exhibits P3 and P4 were wrongly admitted.

3. The sentence of 20 years Imprisonment was manifestly excessive."

At the hearing before us, the appellant was represented by Mr. Kamaliza Kayaga, learned Advocate, whereas Mr. Ildephonce Mukandara, learned State Attorney, stood for the respondent Republic.

Mr. Kayaga commenced his submission by abandoning the second ground of appeal. As it turned out, the learned counsel for the appellant concentrated his efforts on the second limb of the first ground to the effect

that the appellant was denied his statutory right to call the medical officer into testimony. In this regard, Mr. Kayaga referred us to section 291 of the Act which, he said, imperatively imposes a duty on a trial court to inform an accused of his right to have a medical officer availed for cross-examination. The leaned counsel for the appellant urged that, to the extent that his client was denied the opportunity, he was not, so to speak, accorded a fair trial and the entire trial was, in the result, vitiated.

At our prompting, Mr. Kayaga similarly deplored the procedure adopted by Lukelelwa, J. in the earlier proceedings which culminated into the determination of the appellant's mental status during the commission of the offence. The learned counsel submitted that such determination was prematurely resorted to, just as it was improperly made on the strength of counsel submissions and not evidence. For his part, Mr. Mukandara fully adopted the submissions of his learned friend and urged that to redress the flaws, there should be a new trial before another Judge and a new set of assessors.

In our determination of the raised points of contention we propose to first address the procedure adopted by Lukelelwa, J. which culminated in the pronouncement that the appellant was sane during the commission of the

offence. To begin with, we wish to preface our consideration with an observation that there is a marked distinction between unfitness to make a defence due to insanity and the plea of insanity as a defence to a charge or information. Sections 216 to 218 of the Act, lay down the procedure to be followed where an accused person is suspected to be incapable of making his defence. In such situations, the issue is as to the unfitness of an accused person to plead and to take his trial and, thus, the unsoundness of mind must relate to the time of the trial and the inquiry must be in relation to an accused's mental condition at the time of the trial as distinct from his mental condition at the time of the commission of the alleged offence (See **Tarino vs The Republic** [1957] E.A. 553).

Conversely, where it is desired to plead insanity as a defence, the issue, would be as to the state of mind of the accused at the time of the commission of the alleged act. Such defence is governed by the provisions of section 219 and 220 of the Act. From the record of proceedings of the court below, it is beyond question that the appellant desired to make a plea of insanity as a defence to the charge. In the first instance, the presiding Judge correctly, in our view, predicted the order for the appellant's detention

at a mental hospital under the provisions of section 220 which stipulates as follows:-

> *"S. 220 (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.

(4) If, on the evidence on record, it appears to the court that the accused did the act or made the omission charged but was insane so as not to be responsible for his action at the time when the act was done or omission made, the court shall make a special finding in accordance with the provisions of

subsection (2) of section 219 and all the provisions of section 219 shall apply to every such case."

The proper procedure to be followed where it appears that the defence of insanity during the commission of the offence is imminent, was succinctly advised in an old High Court decision of **Republic vs Madaha** [1973] E.A. 515 where it was observed:-

"Insanity being a matter of defence, the onus of establishing it lies on the accused. ***The normal procedure is that the defence, after the close of the prosecution ease****, leads evidence, including medical evidence, to establish the fact according to the standard of proof required of an accused person."* (Emphasis supplied).

As to what actually transpires in practice, the court further highlighted:-

"There is a growing practice in the High Court whereby, after an accused person has been arraigned and has pleaded to the charge, counsel for the prosecution or defence indicates to the court

that the issue of insanity may be raised and applies to have the accused person detained in a mental hospital for medical examination. The court invariably make an order under section 168 (1) on such application. After the receipt of the medical report, the case proceeds in the normal way. The prosecution leads evidence to establish the charge as laid and closes its case. The defence adduces evidence of insanity and the prosecution may then lead evidence negating insanity....The court then decides on the evidence whether insanity has been proved on a balance of probabilities."

It should be recalled that section 168 (1) of the repealed Criminal Procedure Code, which was referred by the High Court in that decision, was a replica of the present section 220 (1) of the Act.

Upon our close scrutiny, we find the highlighted procedure to be salutary and we, accordingly, fully adopt it. To cull from the laid procedure, five important requirements underlie therefrom of which we propose to elaborate in sequence. **First**, where it is desired to raise the defence of

insanity at the trial, such defence should best be raised when the accused is called upon to plead. **Second**, upon being raised the trial court is enjoined to adjourn the proceedings and order the detention of the accused in a mental hospital for medical examination. **Third,** after receipt of the medical report the case proceeds the normal way with the prosecution leading evidence to establish the charge laid and then closes its case. **Fourth**, upon the closure of the prosecution case, the defence leads evidence as against the charge laid, including medical evidence to establish insanity at the commission of the alleged act. And, finally, **fifth**, the court then decides **on the evidence**, whether or not the defence of insanity had been proved on a balance of probabilities. If such enquiry be determined in the affirmative, the court will then make a special finding in accordance with section 219 (2) and 220 (4) of the Act and proceed in accordance with the enumerated consequential orders.

When all is said and applied to the situation at hand, it is quite obvious that the meddling began after the receipt of the medical report when, instead of letting the case to proceed the normal way, the presiding Judge prematurely embarked on the determination of the issue of insanity. That was clearly in abrogation of the above enlisted **third** requirement. What is

more, the learned Judge did not determine the matter "on the evidence" as he would have been expected under the **fifth** requirement. He actually freely gleaned over the depositions of the intended witnesses and, having heard the submissions of counsels from either side, he proceeded to determine the matter. In this regard, we would wish to reiterate that unless they have been put in evidence, the depositions of intended witnesses which were adduced during the committal proceedings are, after all, not evidence worth being used to establish a fact (See **Ngeti Mwaghnia vs The Republic** [1961] E.A. 3).

To this end, we are constrained to conclude that the proceedings giving rise to this appeal were materially flawed on account of the premature determination of the appellant's mental status at the commission of the alleged offence. To be sure, the appellant was unduly prejudiced but, to add salt to the subsisting impairment, during the main trial, the appellant was further denied the opportunity to call the medical officer who prepared the report on his mental status. Seemingly, Mwambegele, J. did not wish to temper with the earlier order of his brethren and, thus, gave the order unilaterally without affording the parties a hearing. Indeed, the order constituted the last straw in the double-jointed predicament which befell on

of the Act which stipulates as follows with respect to medical evidence:-

> *"291 (3) Where the evidence is received by the court, the court may, if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination, the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection."*

Upon numerous occasions, this Court has reiterated that the requirement ought to imperatively complied with by trial courts (See, **Jackson Monga vs The Republic**, Criminal Appeal No. 145 of 2009 – **Selemani Kisava @ Emilo vs The Republic** (both unreported) and;

Thus, all things being equal, we are fully satisfied that as a result of the fundamental flaws which characterized the hearing of this case, the appellant did not get a fair hearing. That being so, we find ourselves

constrained to nullify the entire proceedings, and set aside the conviction and sentence in the exercise of our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws. Given the nature of the offence and the appellant's antecedents, the interests of justice enjoin us to order a retrial before another Judge and a new set of assessors. It is so ordered.

DATED at **TABORA** this 18th day of April, 2016.

S. A. MASSATI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL