

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MBAROUK, J.A., LUANDA, J.A. And JUMA, J.A.)

CRIMINAL APPEAL NO. 129A OF 2015

ZAINABU HASSANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Bukuku, J.)

dated the 13th day of March, 2014

in

Criminal Session Case No. 105 of 2005

JUDGMENT OF THE COURT

20th & 25th May, 2016

LUANDA, J.A.:

ZAINABU d/o HASSAN (henceforth the appellant) was charged and convicted by the High Court of Tanzania with murder. She was sentenced to suffer death by hanging. Aggrieved by the finding of the trial High Court, she has preferred this appeal.

In this appeal, Mr. Stephen Magoiga learned counsel represented the appellant; whereas the Republic/respondent had the services of Ms Anjelina Nchalla, learned Senior State Attorney.

Mr. Magoiga raised three grounds of appeal. But after he had addressed us on the first ground, which concern the procedural

irregularity, which is fatal to the proceedings and which this ground alone is sufficient to dispose of the appeal, the Court and Ms. Nchalla joined hands to the observation made by Mr. Magoiga. The ground raised runs as follows:

" That the entire proceedings judgment and subsequent sentence and conviction of the appellant were nullity by failure of the trial judge to comply with the mandatory provisions of sections 216 – 220 of the Criminal Procedure Act, Cap 20 RE 2002 as to the insanity or incapacity of the appellant. In the alternative and/without prejudice to the above".

Mr. Magoiga took us through the record of appeal to elaborate the nature of the irregularity. He told us to the following effect. On 20/11/2008 when the case came for hearing, Mr. Butambala, learned advocate who represented the appellant informed the learned trial judge (Rwakibarila, J.), that the appellant appeared to be mentally unfit to stand trial as she was unable to follow up the proceedings. Mr. Butambala prayed that the appellant be sent to a mental hospital for determination of her mental status. Rwakibarila, J. granted the prayer. He made an order to the effect that the

appellant be sent to a Government Mental Hospital for assessment and recommendation of her mental status prior to her trial.

On 1/11/2012 the case came for hearing before Mruma, J. Mr. James Njelwa, learned counsel, who represented the appellant informed the Court that his client has hearing problem as such she could not follow the proceedings. Mruma, J adjourned the case to another hearing date and ordered the appellant to be provided with either hearing gadgets or interpreter. On 19/9/2013 the case came up for hearing before Teemba, J. It transpired that the order of Mruma, J was yet to be complied with. The case was once again adjourned. On 7/11/2013 the case came for hearing before Bukuku, J. Indeed on that day, the case took off by taking the evidence of three prosecution witnesses and adjourned to another date. The trial proceeded on later dates till it was finalized. However, it is not shown in the record whether the appellant could follow the proceedings. Whatever the position, Mr. Magoiga told us that the order of Rwakibalila, J. was not complied with as per the requirement of Ss 216 – 220 of the Criminal Procedure Act, Cap 20 R.E 2002. (the Act). He submitted that the proceedings are a nullity as no special finding was made in respect of the appellant's mental

status. The same to be quashed, sentence set aside and the Court to order a retrial. At some stage, Ms. Nchalla informed the Court that the order of Rwakibarila, J. was complied with in that the appellant was sent to hospital and a doctor wrote a report which she said the respondent had a copy. She wanted to impress the Court that the trial of the appellant was properly conducted. This might be true. We shall revert to this issue at a later stage in this judgment.

It is in the record and not in dispute that on 20/11/2008 Rwakibarila, J. ordered the appellant to be referred to the Government Mental Hospital for determination of her mental status. The appellant appeared to be of unsound mind. This is very crucial because in majority of criminal cases, the accused will only be found guilty if it is shown he has committed the act complained of (**actus reus**) with the necessary intent (**mens rea**). Though Rwakibarila, J. did not cite the enabling provision to that effect, it is obvious that he had invoked S. 220(1) of the Act. Following that order, the doctor was required to examine her and write a report and dispatch to the High Court. Upon receipt of that report, the High Court was required to consider the report along with any available evidence pertaining to her mental status and make a special finding to that

effect as to whether or not she was sane. This procedure is provided under S. 220 of the Act which reads:-

*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. [Emphasis is ours]*

In the instant case, the High Court did not make any special finding as to the mental status of the appellant. It proceeded with the hearing of the case. We are not sure whether the appellant was mentally fit to stand for her trial and whether at the time of the commission of the offence she was sane. It is clear then that the possession of a doctor's report *per se* as contended by Ms. Nchalla is not enough without the trial court making a special finding. The court must go further in determining her mental status by making a special finding. So, before a trial court proceeds with hearing of a case involving an accused person who appears to be of unsound mind and who was ordered by the trial court to undergo a medical examination of his mental status, it should not proceed with the hearing of the case unless and until the said court made a special finding as is mandatorily required by S. 220(4) of the Act to determine his mental status. To proceed with hearing without first making a special finding to such person is a fundamental omission which goes to the root of the trial. The omission renders the proceedings a nullity. We agree with Mr. Magoiga.

The same are quashed and the sentence set aside. Since the life of a human being was lost, we order, in the interest of justice, the appellant be tried **de novo** before another judge and a new set of assessors.

Order accordingly.

DATED at **MWANZA** this 23rd day of May, 2016.

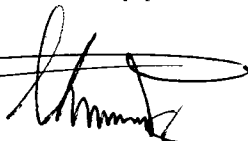
M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL



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


J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL