

**IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA**

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 158 OF 2017

MOHAMED ALLY CHUMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the conviction of the High Court of Tanzania
at Mtwara)
(Mlacha, J.)**

**dated the 17th Day of March, 2017
in
Criminal Sessions Case No. 37 of 2013**

RULING OF THE COURT

12th & 17th February, 2020

KWARIKO, J.A.:

Mohamed Ally Chuma, the appellant, was convicted by the High Court of Tanzania sitting at Mtwara of the offence of murder contrary to section 196 of the Penal Code [CAP 16 R.E. 2002]. He was sentenced to suffer death by hanging. Aggrieved by that decision, the appellant has come before this Court on appeal.

Initially, this appeal was called on for hearing on 11/2/2019. On that date, Mr. Rainery Songea, learned advocate, representing the appellant, informed the Court that the appellant could not follow up the proceedings in Court as he was suffering from a mental disorder. For

that reason, he successfully prayed for adjournment so that the appellant could attend medical treatment. On the stated reasons, the Court adjourned the hearing of the appeal so that the appellant could attend medical examination.

At the resumed hearing on 12/2/2020, the appellant appeared along with Mr. Songea as his counsel, while the respondent Republic was represented by Mr. Ndunguru, learned Senior State Attorney. Before the hearing commenced, Mr. Songea prayed for adjournment for the reason that no report had been filed regarding the appellant's mental status which prayer was not opposed by Mr. Ndunguru.

However, before we could decide on whether to grant an adjournment, we wanted to satisfy ourselves whether the order of the High Court dated 5/5/2015 with respect to a closely related matter had been complied with. That order followed a prayer by the defence that the appellant be sent to a mental hospital for examination of his state of mind at the time he was alleged to have committed the offence of murder. The High Court granted that prayer and in terms of section 220 (1) of the Criminal Procedure Act [CAP 20 R.E. 2002]. It ordered the appellant to be sent to a mental hospital for examination of his mental

status at the time he was alleged to have committed the offence of murder.

Upon perusal of the Court's record, we found the medical officer's report from Isanga Institution dated 19/8/2015 and received by the High Court on 24/8/2015. However, during the trial, this report was not considered by the High Court in accordance with the law. We therefore invited counsel for the parties to address us on the said omission. Both Mr. Ndunguru and Mr. Songea were of the same opinion that non-consideration of the medical report was a fatal irregularity which resulted to unfair trial. They urged us to exercise our revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] (the AJA) and nullify the proceedings of the High Court subsequent to its order dated 5/5/2015 and order a retrial of the appellant before a different judge before whom the report could be considered.

We on our part, agree with the counsel for the parties that the omission to consider the medical report was a fatal irregularity which had the effect of denying the appellant a fair trial. We therefore invoke our revisional powers under section 4(2) of the AJA and proceed to nullify and quash the proceedings of the High Court subsequent to its order dated 5/5/2015, judgment and conviction and set aside the

sentence against the appellant. We nevertheless order a retrial of the appellant by a different judge and a new set of assessors. Faced with a similar situation, the Court also took a like position in the case of **Jackson Protaz v. R**, Criminal Appeal No. 442 of 2018 (unreported). Considering that the appellant has been in incarceration since August, 2013, we direct the High Court to expedite the trial of the case to a logical conclusion.

In the meantime, the appellant shall remain in custody awaiting his retrial.

It is so ordered.

DATED at **MTWARA** this 14th day of February, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 17th day of February, 2020 in the presence of Mr. Rainery Songea, learned counsel for the appellant and Mr. Wilbroad Ndunguru, learned State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.


G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL