IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: LILA, J.A., KOROSSO, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 105 OF 2018

MWALE MWANSANU ..... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, at Mbeya)

(Levira, J.)

Dated the 27th day of November, 2017
in
Criminal Sessions Case No. 21 of 2015

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JUDGMENT OF THE COURT

15th February & 2nd March, 2021

KOROSSO, J.A.:

The appellant was arraigned and convicted of murder contrary to section 196 of the Penal Code, Chapter 16 of the Revised Edition, 2002 (the Penal Code), and sentenced to the mandatory sentence of death by the High Court of Tanzania, Mbeya Registry (Levira, J.). It was alleged that on the 15th June, 2012, at Nkalisi Village within Rungwe District in Mbeya Region, the appellant did murder one Ikeke Ihola @Maria. The appellant categorically denied the charges.

The prosecution evidence relied on five (5) witnesses, two (2) exhibits and one (1) statement of the doctor who conducted the

Postmortem examination admitted in terms of section 34B of the Tanzania Evidence Act, Chapter 6 Revised Edition, 2002 (the Evidence Act), was that on the fateful day, Henry Mwaiselo (PW1) and his friends Emmanuel Mwakifwamba and Isaack Mwaipungu were playing football in one of the compounds in the village. The appellant holding a panga and a hoe came by and stood on the side. PW1 kicked a ball which fell on the appellant who then kicked it back to the players. The football game continued and then the ball landed on the appellant again and this time he did not kick it back. When PW1 moved to retrieve it, the appellant threatened to kill him and threw a machete at him. PW1 and his friends started running while shouting for help and soon after, one Ikeke Ihola (the deceased) whose house was closeby came outside Upon seeing her, the appellant was heard saying; "*nilikuwa nakutafuta, wewe ni mchawi*" (unofficially translated; "*I was looking for you, you are a witch*") and then approached the deceased and cut her with a machete on her arm. The deceased started running in the direction of her neighbour's house to seek help while being closely chased by the appellant who continued to cut her wherever the machete landed.

While this was ongoing, Helena Kilema Mwasumbi (PW2) who was then at her home, heard the deceased crying for help. PW2, had earlier, while enroute to fetch water, met the appellant carrying a hoe and a

panga, and they had greeted each other. On hearing the voice of the deceased calling for help, PW2 went outside and saw her running in her direction holding a bleeding arm. While PW2 was trying to wrap the deceased's bleeding arm with a piece of; "*a kitenge*", the appellant appeared holding a machete. In apprehension, the deceased and PW2 started running and the deceased was heard saying; "*inawezekana nitakufa*" (unofficially translated; "*I might die*") and the appellant replied "*ndio utakufa*" (unofficially translated; "*yes, you will die*"). When the appellant reached them, he again cut the deceased with a machete. PW2 fell down and then rose up and ran while the appellant continued to cut the deceased on the head several time despite the fact she had fallen down by then. PW2 shouted for help, which was not forthcoming until later when some people came and the appellant left the scene. The village leaders and police were informed of the incident and the deceased was taken to her house and then to the hospital but upon reaching the hospital, she was declared dead. The appellant was arrested the next day hiding in the bush.

The defence relied on one witness, the appellant himself. The appellant gave his defence under oath, denying involvement in the offence charged, vehemently pleading his innocence. He testified that on the respective day, at around 17.00hours, he came from his *shamba*

carrying a hoe and a machete and on his way home, he visited the local pombe shop where he met his friends and they enjoyed the local brew for some time. That he did not remember what transpired thereafter, including how he went back home, and he became aware of his whereabouts sometime later and was surprised to see many people around him who beat him on the head, eyes and body and that he was later arrested accused of killing the deceased.

After a full trial, having heard the evidence from both sides, the High Court convicted the appellant of the offence charged satisfied that the prosecution had proved the charges to the standard required, convicted and sentenced to death as stated earlier. Aggrieved by the decision of the trial court, the appellant filed a memorandum of appeal fronting five (5) grounds of appeal. His counsel also lodged two supplementary grounds of appeal. For reasons to be soon revealed we shall only reproduce the grounds in the supplementary grounds of appeal. They are:-

1. *That the Hon. Trial Court Judge erred to convict and sentence the appellant based on exhibit P1 and exhibit P2 which were wrongly admitted contrary to the requirement of the law.*
2. *That the Hon. Trial Court Judge erred to hold that the appellant committed the offence charged with Malice aforethought.*

On the day set for hearing of the appeal the appellant was represented by Mr. James Kyando, learned Advocate while the appellant was connected through a video conferencing link from Ruanda Prison. Ms. Mwajabu Tengeneza and Ms. Bernadetha Thomas, both learned State Attorneys, represented the respondent, Director of Public Prosecutions (DPP).

Mr. Kyando, at the outset with the leave of the Court, abandoned the memorandum of appeal which had been filed earlier by the appellant on the 25th June, 2018 and opted to proceed with the supplementary memorandum of appeal he filed on the 5th February, 2021, reproduced hereinabove. In supporting the appeal, the learned counsel for the appellant adopted the filed written submissions and the list of authorities and preferred not to submit any further but await to rejoin after the submissions by the respondent-DPP.

In the appellant's written submission amplifying on the 1st ground of appeal the learned Advocate contended that when the trial started, the parties were informed that the report ordered by the High Court for examination of the mental status of the appellant at Isanga Medical Institute, Dodoma had been received and it was subsequently admitted *suo motu* as Exhibit P1. He contended further that after its admission, the report was not read aloud in court and thus denied the appellant an

opportunity to know its contents. The learned counsel submitted that a similar scenario ensued when the postmortem report was admitted as Exhibit P2, whereby after it was admitted it was also not read out to appraise the appellant on the contents therein. The counsel thus argued that failure to read aloud in court, Exhibits P1 and P2 upon being admitted as exhibits was a fatal omission having the effect of denying the appellant a fair trial. To reinforce his argument, he cited the holding of this Court in **Jumanne Mondelo vs Republic**, Criminal Appeal No. 10 of 2018 (unreported). In that case, the importance of reading a document after being admitted as an exhibit was emphasized that failure to do that occasions a serious error amounting to miscarriage of justice. He thus prayed that in view of the said irregularities, Exhibit P1 and P2 should be expunged from the record.

The counsel for the appellant argued further that once Exhibit P1 is expunged for being admitted un-procedurally, it will mean that the appellant's right to be heard was denied, since the appellant had expected to rely on Exhibit P1 to support his defence of insanity. To support this contention, the Court was referred to the holding in **Mohamed Ally Chuma vs Republic**, Criminal Appeal No. 158 of 2017 (unreported) and implored us to be inspired by it. In that case, we considered the consequences where there is omission to consider

medical reports. The learned counsel thus prayed that the current proceedings be nullified and a retrial be ordered.

Addressing the 2nd ground of appeal, which we were invited to consider as an alternative to the 1st ground of appeal, the appellant lamented about the finding of the High Court that malice aforethought was proved against him which led to his conviction of murder. The bone of contention being the trial court's analysis of the evidence of PW1 and PW2, which the learned counsel argued that it proved that the appellant was living peacefully with the deceased prior to the incident. According to him, that evidence meant that in the absence of any other plausible reason shown for him to have killed the deceased then what remained was that he was in a state of temporary insanity influenced by his state of intoxication. The said assertion he argued, is fostered by other evidence such as PW1's statement that prior to the incident, the appellant was talking to himself and the fact that the appellant testified that prior to the incident he had been drinking at pombe a shop culminating in failing to remember how he reached his home.

The learned counsel for the appellant beseeched the Court to be inspired by the decision of the defunct Court of Appeal of Eastern Africa in **Republic vs Nyonde Wopera** [1948] EACA 145. He finalized his submissions by seeking the Court, without prejudice to the prayers in

the 1st ground of appeal, in the alternative, to invoke powers under Rule 38 of the Tanzania Court of Appeal Rules, 2009 (as amended) (the Rules) to quash the conviction for murder and substitute with one of manslaughter.

On the part of the DPP, Ms. Tengeneza initiated her submission by outlining the respondent's stance, their objection to the appeal by supporting the conviction and sentence meted out to the appellant. Responding to the 1st ground of appeal, she argued that Exhibit P1 was admitted in terms of section 220(1) of the CPA by the trial court *suo motu*, and after the report was admitted, an inquiry on the mental status proceeded as prayed by both sides for the court to make a special finding on the mental condition of the appellant. After some probing, she conceded that Exhibit P1 was admitted irregularly because that was within the process of the inquiry; after being admitted it was not read out and the fact that the assessors were not availed of the contents of Exhibit P1. She argued that despite the said anomalies, the appellant was not prejudiced because the contents of Exhibit P1 had already been availed to the appellant's side considering the fact that the appellant's counsel discussed its contents and he also invited the trial court to make a special finding on the mental condition of the appellant. She thus implored the Court to find the irregularities gleaned to be minor,

especially when balanced with the fact that the contents of the Exhibit P1 did not in any way affect the appellant's defence since it would not have advanced the defence case in any way and they could have used it if they wanted to.

With regard to the case cited by the learned counsel for the appellant, **Jumanne Mondelo vs Republic** (supra), she argued that it was distinguishable. She argued that although in that case the medical report was also not read aloud in court during the conduct of the trial and that there was also no information regarding the report to the appellant, which did not apply to the instant case since the appellant's counsel was well aware of Exhibit P1. On the irregularity related to the admissibility of the statement of the doctor who conducted the post mortem and the post mortem-Exhibit P2, the learned State Attorney conceded that apart from not being read out in court during trial, there was failure to fully comply with the requirements prescribed under section 34B(2)(a)-(f) of the Evidence Act, which are all supposed to be fulfilled cumulatively. She therefore conceded that without doubt admissibility of Exhibit P2 and the statement of the doctor who conducted the postmortem was erroneous and therefore the said evidence should be disregarded.

Ms. Tengeneza contended further that even if Exhibit P2 was to be expunged, there was still evidence aplenty proving the cause of the death of the deceased. She referred us to **Ghati Mwita vs Republic**, Criminal Appeal No. 240 of 2011 (unreported), the Court stated that cause of death may be established by other evidence apart from the postmortem report. She then ventured into alluding the evidence available which proved the cause of death of the deceased, such as the evidence of PW1 and PW2, having testified that the appellant cut the deceased with a machete on the head and arm and PW2 testified seeing the deceased's arm bleeding from the cut wounds. She also referred to PW2's evidence showing that later upon escorting the deceased to the hospital and before being admitted, the deceased was pronounced dead by the doctors and thus the prosecution evidence undoubtedly found that the deceased died from the injuries from the cutting and slashing caused by the appellant's attack on her with his machete.

In response to the 2nd ground of appeal, the learned State Attorney resisted the contention that malice aforethought was not proved and that at the time of committing the offence the appellant was intoxicated to the extent of suffering from temporary insanity. She argued that even if the appellant had taken alcohol prior to the incident, his conduct thereafter exemplifies that he was not drunk to the extent that he was

unaware of what he was doing. She referred us to the evidence of PW2 who stated that when she met the appellant prior to the incident carrying a hoe and a machete, he looked normal and he greeted her. PW2 also heard the appellant saying to the deceased; "yes you will die" in response to the deceased's remarks that "she feels she might die".

Ms Tengeneza invited us to accept the evidence of PW1 on having seen the appellant cutting the deceased with a machete and following her when the deceased ran from him and continuing to cut her with a panga and uttering; "that he had been looking for the deceased because she was a witch" together with the weapon used in the attack, that is, the machete imputes malice aforethought. Other evidence she implored us to accept is the fact that the appellant ran away to hide in the bush after having attacked the deceased. She refuted the defence contention that the appellant ran away for safety purposes to be far-fetched because if he had been seen earlier undoubtedly, he would have been arrested. She also challenged the appellant's defence stating it is tainted with lies. She argued that the appellant's evidence was contradictory having testified during examination in chief that he had stated that the next day after the incident he found himself at home but when cross-examined, he changed gear saying that the next day he found himself in the bush.

With regard to the appellant's defence of intoxication, the learned State Attorney implored the Court to find it implausible taking into account all the circumstances as presented in evidence related to the killing of the deceased by PW1 and PW2. She stated that, taking all factors into consideration, nothing falls within the ambit of section 14 of the Penal Code, and only shows that the appellant knew what he was doing. She cited the case of **Bura AE vs Republic** [1994] TLR 13 to augment her assertion. Finally, she prayed that the appeal be dismissed, the conviction and sentence be upheld.

The rejoinder by the appellant's counsel was mostly to reiterate the submission in chief. He argued that, the appellant was prejudiced by Exhibit P1 not being read despite the fact that they had referred to it in their submissions. That the appellant's comments on Exhibit P1 during the trial should not be taken to mean the contents were fully understood, and that even if that was the case, what they have underscored is non-compliance with the law through the trial court's failure to ensure that exhibits are read out upon admission and the fact that Exhibit P1 was admitted prematurely contravening section 219 of the CPA.

On the 2nd ground, he reiterated his submissions that there was no malice aforethought and that the words said to have been uttered by

the appellant only go to show that he was not in his normal state of mind. He also challenged the argument that the appellant's conduct inferred malice aforethought, stating that it is a misconception to say the appellant ran away after the incident, since according to the appellant, he ran away after he was beaten by some people and that he was unable to clearly remember what transpired. He thus prayed for the appeal to be allowed and fronted an alternative prayer that a conviction of manslaughter be substituted from that of murder, by the Court invoking its powers under Rule 38 of the Tanzania Court of Appeal Rules, 2009 (the Rules).

We have dispassionately considered and pondered the rival arguments on the appeal before us found in the written, oral submissions and all the cited references. In determining the 1st ground of appeal, we think the issue for our determination is whether Exhibit P1 and P2 were properly admitted into evidence. We are constrained to parade the relevant procedure where the accused desires to plead insanity as a defence. In the instant case subject of this appeal, sections 219(1) and 220(1) of the CPA were used by the trial Judge to order examination of the appellant in the mental hospital upon the appellant prayer and also to make a special finding on the mental status of the appellant. The provisions reads:-

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

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.

S. *220(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 position, 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.*

S. 220(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.

S.220(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 provisions of section 219 shall apply to every such case."

The procedure to be followed where the accused intends to plead insanity as a defence at the time of commission of the offence was explicitly stated in a High Court case of **Republic vs Madaha** [1973] EA 515, adopted and elaborated in **MT. 81071 PTE Yusuph and Another vs Republic,** Criminal Appeal No. 168 of 2015 (unreported) thus:-

"***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 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 enumerated consequential orders."*

Having scrutinized the relevant provisions and gone through case law, we are of the firm view that the above procedure as reproduced hereinabove is the correct one where the accused shows intention to rely on the defence of insanity.

Revisiting the record of appeal, Exhibit P1, the medical report from Isanga Medical Institute was admitted *suo moto* by the trial court immediately after conducting an inquiry for the purpose of making what was termed a special finding and marked Exhibit P1. Applying the above reproduced procedure in the instant case, we find that the first and second ingredients propounded in **MT. 81071 PTE Yusuph and**

Another vs Republic (supra) were followed to the hilt as shown in the record of appeal on proceedings related to plea taking and preliminary hearing dated 4th May, 2016.

After receipt of the medical report, the trial court was expected to proceed within the lines of the **third** condition; where the case was supposed to proceed with the prosecution leading evidence to establish the case up to closing their case and thereafter the defence presenting their case and ending with the court making a special finding, but this was not what transpired in the instant case. The trial judge, prompted by the counsel for the prosecution and defence embarked on determination of the insanity of the appellant (the inquiry) and thus strayed into an error by making a special finding on the insanity of the appellant in the absence of any adduced evidence from the prosecution and the defence on the issue as expected under the **fifth** condition. This departure from the procedure defeated the purpose of the third requirement. Indeed, without doubt, there was premature determination of the appellant's mental status at the time of commission of the alleged offence.

The question that tasked our minds is whether under the peculiar circumstances of this case it can be stated that the said irregularity prejudiced the rights of the appellant, bearing in mind that each case

shall be determined according to its own facts. According to the record of appeal, the special finding made by the trial court was made after the trial court's receipt of the medical report from the mental institution within the confines of section 220(2) of the CPA. It is obvious that, upon receiving the report and being satisfied with its authenticity in line with sections 220(2) and 291(2) of the CPA, there was no need to admit it as an exhibit, since it was already part of the court record.

Noteworthy, is the fact that Exhibit P1 received under section 220(2) of the CPA is not an ordinary exhibit and that is why upon receipt of such report by the court, parties are availed of it so that they can prepare their cases, and thus in effect complying with the **third** requirement. We are thus constrained to disagree with the learned counsel for the appellant who implored us to find that the fact that Exhibit P1 was not read out is an incurable irregularity.

We agree with the learned State Attorney's assertion that the case of **Jumanne Mondelo vs Republic** (supra) referred to us by the learned counsel for the appellant is distinguishable. Apart from the foregoing reasons there is also the fact that in the said case the expunged PF3 which was admitted as Exhibit P1 was tendered by an incompetent person to tender and could not be examined on its contents. With regard to Exhibit P1 not having been read out in court,

whilst we are aware of the settled position restated in various decisions of this Court including **Jumanne Mondelo vs Republic** (supra) on the effect of failure to read the contents of a documentary exhibit we have already stated above that in the instant case, it was not proper for the trial judge to admit the medical report similar to how a normal exhibit is admitted. This is because upon being received by the court, the medical report was already part of the court record not requiring any admission. Describing it as Exhibit P1 should be taken to be only for the purpose of facilitating ease of reference for the parties and did not mean it was an exhibit similar to other exhibits tendered in court by witnesses from either side.

We also agree with the learned State Attorney's stand that the irregularities identified in the admissibility of the medical report -Exhibit P1 were minor and did not prejudice the rights of the appellant. This is because as reasoned above, there was no legal requirement for the medical report admitted under section 220 (2) of the CPA to be read out in court. The fact that the report may have been admitted prematurely, as we have already found, but this did not in any way prejudice the rights of the accused, since, the appellant was thereafter availed with the prosecution evidence and later gave his evidence in defence. Besides, Exhibit P1 was available and he had the opportunity to rely or

challenge it and his defence of insanity would not have been bolstered by the contents of the report whose findings were that the appellant was sane at the time of commission of the offence.

On the complaint that the assessors were not informed about Exhibit P1, what is clear is that when the report was admitted, the assessors were yet to be selected as seen at page 8 of the record. We are aware that by virtue of section 265 of the CPA, a trial at the High Court has to be with the aid of assessors and thus it is expected for assessors to be availed with all the evidence for and against the accused person presented in court. In the present case notwithstanding the trial court having prematurely determined the issue of insanity before the assessors were selected, which was erroneous in itself and the fact that the said erroneous finding was not availed to the assessors, the errors were not prejudicial to the appellant under the circumstances of this case to lead this Court to find the proceedings a nullity as invited to by the learned counsel for the appellant. For reasons stated above, we find nothing to lead us to so hold.

The learned State Attorney and the counsel for the appellant are agreed that P2 was admitted after procedures were flouted and that this was fatal and in consequence, that Exhibit P2 should be expunged to which we are in agreement. Exhibit P2 was admitted under section

291(1) and (4) of the CPA after the statement of the doctor who conducted and prepared the Post Mortem of the deceased Dr. Geoffrey Sanga was admitted under section 34B of the Evidence Act. We are aware that the admissibility of the said documents was not resisted by the counsel for the appellant during the trial, but there is nothing on record to establish **first**, that section 34B of the Evidence Act was fully complied with. In terms of the said provision, a court may admit a written statement of the maker of a statement where he cannot be called as a witness for various reasons, such as death, physical or mental illness or being outside the country and being impracticable to call him as a witness, or if the court is satisfied that all reasonable steps to procure his attendance have run futile or where he cannot be found as unidentifiable or cannot attend by operation of law (See **Shilinde Bulaya vs Republic**, Criminal Appeal No. 185 of 2013; and **Vicent Ilomo vs Republic**, Criminal Appeal No. 337 of 2017 (both unreported). The authorities convey that the conditions for admission of the witness statement as stipulated under section 34B are cumulative.

For a witness statement to be admissible under this section all the conditions stipulated under Section 34B (2) must be met collectively. Our perusal through the record of appeal shows the conditions

stipulated under section 34(2)(a)-(f) were not complied with or waived by the trial court and the reasons thereto.

Second, upon being admitted into evidence Exhibit P2 was not read aloud in Court. Apart from the cases cited by the counsel for the appellant in relation to this matter, there are numerous decisions of this Court pronouncing the fatality of not reading a document admitted in evidence because this denies the parties an opportunity to know and understand the contents of the admitted document (See **Sijali Shaban vs Republic**, Criminal Appeal No. 538 of 2017, **Sunni Aman Awenda vs Republic**, Criminal Appeal No. 393 of 2013, and **Abdallah Nguchika vs Republic**, Criminal Appeal No. 182 of 2018 (all unreported)). The Consequences in case where an admitted is not read in court can also be found in the cited decisions and we thus agree with the learned State Attorney and the counsel for the appellant that expunging such a document is the available remedy for such anomaly. The Post Mortem Report Exhibit P2 together with the statement of the doctor who conducted the postmortem and admitted under section 34B of the Evidence Act are hence expunged.

Having expunged Exhibit P2, the learned State Attorney argued that the remaining evidence by PW1 and PW2 was enough to prove the cause of death of the deceased, while the appellant's counsel contended

that expunging Exhibit P2 leaves no evidence to prove cause of death. We agree with the learned State Attorney that cause of death may be proved by other factors apart from medical reports. There are various decisions of this Court which have dealt with this aspect. In **Mathias Bundala vs Republic**, Criminal Appeal No. 62 of 2004 (unreported), the Court observed that:

> *"... it is not the requirement of the law that the cause of death must be established in every murder case. We are aware of the practice that death may be proved by circumstantial evidence even without production of the body of the alleged dead person."*

Another case which addressed this issue and set factors to consider to prove cause of death is **Ghati Mwita vs Republic** (supra), in which we held that:-

> *"In the absence of the autopsy report, three main issues arise, all of which are necessary for the determination of this appeal. The **first** is whether or not there is sufficient material to establish the fact of death of the deceased to the required degree of certainty. If so, the **second** issue would be whether or not such material leads to the conclusion that the death was unnatural and; if positively found, the **last** question would be whether or not the evidence sufficiently implicates the appellant as the causer of death..."*

Certainly, the above decisions apprise us that the cause of death may be proved even by circumstantial evidence or established facts. In the case at hand, the fact that the deceased died an unnatural death is not disputed by either side. In the present case we are of the firm view that the evidence of PW1 and PW2 on what they witnessed on the fateful day has not been shaken. Their testimonies related to having witnessed the appellant using his machete to attack the deceased continuously from some time without relenting, even chasing her to continue to attack her with his weapon. From the said testimonies we are left in no doubt on the extent of the injuries/wounds sustained by the deceased from the appellant's attack on her. There is no dispute that upon being taken to the hospital before admission, the deceased was declared dead. The credibility of PW1 and PW2 remained intact since the trial judge who was in a better position to adjudge this found PW1 and PW2 to be credible witnesses. The above factors clearly establish that the first, second and third requirements above have been satisfied and the cause of death has been established. Undoubtedly, the deceased died from the wounds sustained from the machete cutting from the appellant.

On the second ground, which we are invited to determine, as an alternative ground, the complaint is that in the event the Court is to be

satisfied that the appellant did kill the deceased, the appellant should not have been convicted of murder in the absence of malice aforethought. The argument fronted by the counsel for the appellant is that the appellant was intoxicated to the extent that he did not comprehend what he was doing and that what he was doing was wrong at the time he killed the deceased, and that therefore there was no malice aforethought proved. During the trial, the appellant had put forward the defence of intoxication arguing that he had been drunk to the extent that he was not aware of what he was doing for a large part of the time since he did not even remember how he reached home or in the bush he was found the next day.

As a general rule intoxication is not a defence of murder. Section 14(2) of the Penal Code states:-

> "*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.*"

The case of **Republic vs Michael Chibing'ati** [1983] TLR 441, ventured at interpreting section 14(2) of the Penal Code stating that:

> "*In a murder charge, intoxication would serve as a defence in three circumstances, namely; where the person charged did not at the time of the act or omission complained of, know what he was doing and*

the state of intoxication was caused without his consent by the malicious or negligent act of another person; where such person is by reason of intoxication insane, temporarily or otherwise or where it cannot be established that such person had the capacity to form the intention to kill or cause grievous harm."

From the above excerpt, the circumstances where a defence of intoxication will be considered include **one,** where the accused did not know what he was doing, **two**, that the state of intoxication was caused without his consent by malicious or negligent act of another person. **Three**, the accused is, by reason of intoxication insane, and **four**, that is temporarily or otherwise or it cannot be established that such person had the capacity to form the intention to kill or cause grievous harm.

In considering whether malice aforethought was proved or not and whether the defence of intoxication was proved, the learned High Court judge reasoned:-

"...had it been that the accused was incapable of understanding what he was doing, one would expect him to react the first time when the ball was thrown to him; instead, he returned it politely to PW1 which also suggests that he was sober. In the circumstances I see no merit in the point raised by the learned defense counsel in this regard. I see the defence of

intoxication raised during final submission to be nothing but an afterthought."

Having considered the evidence before us, we are satisfied as rightly pointed out by the trial judge, that the defence of intoxication was an afterthought. The appellant's testimony if true, established that the intoxication was self-induced having gone to drink with friends on his own volition. Subsequently, the appellant was seen carrying his hoe and a machete and met people and greeted them and from the evidence of PW1 and PW2, there was nothing that showed he was in an intoxicated or confused state of mind. PW1 testified that while at the compound where they were playing football, the appellant stood watching them play, and managed to return the ball back the first time. There was no discernible sign that he was intoxicated to a level that he was temporarily insane, that is, not knowing what he was doing and that what he was doing was wrong. When we consider the last ingredient on whether or not it can be established that when he was cutting the deceased, he had no intention to kill or cause grievous harm, we find this ingredient is in tandem with establishing whether or not malice aforethought can be inferred against the appellant in the killing of the deceased.

We have had occasions to discuss when malice aforethought can be imputed. In **Elias Paul vs Republic**, Criminal Appeal No. 7 of 2014 (unreported) we observed:-

> *"Malice may also be inferred from the nature of the weapon used and the part or parts of the body where the harm is inflicted. In this case a stone was used and was hit on the head, chest and abdomen which are vulnerable parts of a human body."*

The counsel argued that the conduct of the appellant prior to the incident showed of someone who was not in a normal state of mind and referred us to the evidence of PW1 who had stated that while standing on the side of the area, PW1 and friends were playing football, the appellant seemed to be talking to himself. He also invited the Court to consider the act of chasing PW1 with a machete after he was hit by the ball the second time; the remarks said to have been uttered by the appellant when he saw the deceased that he had been looking for her she was a witch, utterances and behaviour which even surprised PW1, PW2 and the deceased as acts of a person who was not in a normal state which should influence the Court to give the benefit of doubt to the appellant and find that when this occurred the appellant was not in his normal state of mind.

On the part of the learned State Attorney, she beseeched us to consider the appellant's conduct prior to the incident as testified by PW2, that he was normal and they greeted each other, and it seems by that time he was coming from his drinking spree. She also urged us to have regard to the evidence of PW1 who stated that prior to changing and chasing him after being hit by the ball the second time, the appellant was normal and even returned the ball back to them the first time it hit him. Further, that the utterances he made, clearly showed he had ill intention towards the deceased. Finally, the fact we were asked to consider that the appellant continued cutting the deceased even after she fell down and the weapon used, that is, the machete and the place he concentrated cutting the deceased, her head, established malice aforethought.

We find the evidence on this issue is very clear. We agree that the evidence of PW1 and PW2 related to the conduct of the appellant before and after the incidence, his utterances against the deceased saying she was a witch and he has been looking for her and that she will die; show evil intent. The act of chasing the deceased and cutting her haphazardly without mercy with a machete, a dangerous weapon and in the head strengthens argument that the appellant did intend to kill or cause grievous harm to the deceased. Taking all the above factors into

consideration, we have no doubt in our minds that malice aforethought was proved. We are thus constrained to hold that the prosecution did prove the case of murder against the appellant and that the defence raised has no legs to stand on.

For reasons discussed herein above, we find no merit in the appeal and we accordingly dismiss it.

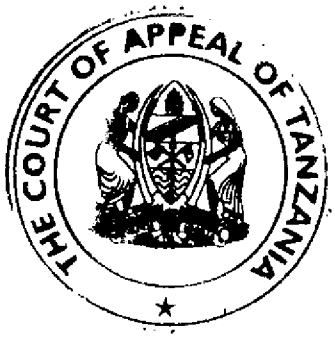
DATED at **MBEYA** this 26th day of February, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 2nd day of March, 2021 in the presence of the Appellant in person, unrepresented through video conference and Ms. Monica Ndekidemi, 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