IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 145 OF 2019

THOMAS PIUS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania, at Dar es Salaam)

(Feleshi, J.)

dated the 6th day of September, 2017
in
Criminal Session Case No. 24 of 2008

.....

JUDGMENT OF THE COURT

12th July & 2nd August, 2022

LILA, J.A.:

The appellant was charged before the High Court of Tanzania at Dar es Salaam in Criminal Session Case No. 24 of 2008 with the offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E 2002 (now R.E 2019) (the Penal Code). The prosecution alleged that on 6th July, 2006 at Hoyogo village within Mkuranga District, Coast Region the appellant murdered one Mary Shelumbati. Upon full trial, the appellant was convicted and sentenced to the mandatory death sentence. However, on appeal to the Court through Criminal Appeal No. 245 of 2012, the Court ordered a retrial of Criminal Case No. 24 of 2008. The

trial ensued again; the appellant was again convicted and sentenced to death by hanging, hence the present appeal.

The appellant's conviction was founded on purely circumstantial evidence that he was seen by John Milingo in the morning of 6th July, 2006 having some blood stains in his hands and shorts. That was following his visit to his uncle one Moses Milingo (PW1) in which the late Mary Shelumbati (the deceased) stayed. PW1 was the deceased brother. On 4th July, 2006, PW1 went to the farm leaving the deceased at his house and returned the following day in the evening but did not find the deceased although the doors were open. As it was evening time, he decided to sleep. The deceased body was found lying in the sweet potatoes farm in the morning of 6th July, 2006 by a child who had gone to attend a short call. An autopsy report by PW5 revealed that death was due to head injury. The information by John Milingo who did not survive to give his testimony but his statement tendered under section 34B(2) of the Evidence Act Cap. 6 R. E. 2019 (the EA) led to the appellant's arrest and later his cautioned statement (exhibit P3) and extra judicial statement (exhibit P4) were recorded in which it is said the appellant incriminated himself.

The appellant, in his defence, admitted to have visited first his uncle John Milingo (PW1) and the next day he went to Moses Milingo's home, where he found the deceased and her children. He stated that he left the place (at PW1) the next day at about 10:00hrs. He was later arrested on accusation that he killed his aunt Mary Shelumbati. He denied to have made any statement at the police. As regards the extra judicial statement he, during examination in-chief, said he was not certain to have made it but later he admitted making the statement before the Mkuranga Primary Court Magistrate but he denied to have admitted killing the deceased. In all, he denied any complicity in the murder.

At the end of the trial, in convicting the appellant, the trial court relied on two pieces of evidence. First; the documentary evidence which were a cautioned statement (Exhibit P3) and extra judicial statement (Exhibit P4) that the appellant admitted to have killed the deceased by using a leg of the bed (tendegu) which he found at the back of the house and John Milingo's statement (Exhibit P5) that he saw the appellant on 6th July 2006 at around noon with blood stained hands and shorts. Two; an oral account by Moses Milingo that the appellant visited his home before the incident date. The trial court was satisfied that such

evidence connected the appellant with the offence. The decision aggrieved the appellant, hence the present appeal armed with a three point memorandum of appeal. But for a reason to be unveiled a little later, we see no reason to recite them.

As was before the trial court where the appellant enjoyed free legal services from Mr. Mohamed Mkali, learned advocate, before us he was represented by Mr. Mashaka Ngole, learned advocate whereas the respondent Republic was represented by a team of learned brains lead by Mr. Emmanuel Maleko, learned Senior State Attorney assisted by Ms. Lilian Rwetabura and Ms. Neema Moshi, both learned State Attorneys.

In the course of perusing the record ready for the hearing of the appeal it came to our notice that the appellant was tried with the offence of murder and a judgment which resulted in his conviction was rendered on 8/11/2016. Sentence was reserved until such time when the appellant's inquiry into his mental status would be ascertained. Purporting to act under section 220(1) and (2) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA), an order submitting the appellant to the mental hospital for medical examination was made by the learned trial judge. Close to ten months passed before the appellant's sentence was on 6/9/2017 "seemed" to have been passed. The propriety or

otherwise of the procedure of making an order for enquiry into the state of the appellant's mind after conviction and at the time of imposing sentence prompted us to seek views from the learned counsel of the parties.

Mr. Ngole and Mr. Maleko addressed the Court. They were of a concurring view that the procedure adopted by the learned trial judge was novel to the conduct of criminal trials particularly when a question of insanity of the accused is at issue. They were agreeable that the provisions of section 220(1) and (2) of the CPA only comes into play when an accused person seeks to rely on the defence of insanity or when, during the trial, the accused exhibits or the court takes note of some indications suggesting that he was insane at the time of the commission of an offence. To them, it was their view that, if the learned trial judge wished to satisfy himself of the mental status of the appellant then he ought to have invoked those provisions at the stage of plea taking. Doing what he did, the learned counsel were of the strong view, the learned judge strayed into a serious error. And, they went further to submit that, as the steps taken presupposed knowledge on the part of the learned trial judge of the doubtful mental status of the appellant during the trial but did not take necessary steps as per the law, then the

appellant was unfairly tried rendering the whole trial a nullity. They consequently beseeched the Court to invoke the revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 (the AJA) and nullify the proceedings and judgment of the trial court and set aside the sentence meted out.

The united front of the learned counsel crumbled when it came to the way forward after making an order nullifying everything done by the High Court. We shall come to this issue a bit later.

Upon revisiting the record of appeal, it is apparent that the learned counsel views reflect nothing but the truth of the matter. Our position is predicated on the revelations of the trial court's proceedings of 8/11/2016 and 6/9/2017 which tell this, we quote:-

> *"**8/11/2016***
>
> *Corum Feleshi, J.*
>
> *For the Republic: Ms. Nancy Mshumbuzi, SA*
>
> *For the Defence: Mr. Mohamed Mkali, advocate*
>
> *Accused Person: Present in person*
>
> *Assessors 1st: All present*
>
> *2nd: "*
>
> *3rd: "*

CC: Eveline

Ms. Mshumbuzi, SA: *My Lord, the case is scheduled for judgment. We are ready.*

Mr. Mkali, adv: *My Lord, we are also ready.*

COURT: *judgment is delivered in open Court in the presence of the above named counsel, the accused person and Court Assessors.*

E. M. Feleshi

JUDGE

8/11/2016

ORDER: *The accused is found guilty as charged and is convicted of murder contrary to section 196 of the Penal Code, Cap. 16 R. E. 2002. However, sentence is adjourned pending inquiry into the accused's sanity.*

ORDER

Acting under section 220(1) & (2) of the Criminal procedure Act, [CAP. 20 R. E. 2002] the accused person THOMAS PIUS to be detained in a mental hospital for medical examination where the medical officer in-charge of the mental hospital shall, within forty two days of the detention prepare and transmit to it his 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.

Order accordingly.

E. M. Feleshi

JUDGE

8/11/2016"

And on 6/9/2017, this is what transpired in court:-

"Ms. Mwasiti Athuman, Senior State Attorney: *the case is coming for sentence. On 8/11/2016 the court ordered for mental examination against the accused. I beg to report that the Isanga Institution conducted her examination and then sent her report to this Court. The same was received on 5/4/2017. I pray to tender it for admission for sentence's purposes.*

Mr. Ndunguru, advocate*: I have gone through it and I have no objection regarding its admission.*

COURT*: Isanga Institute Report Ref 100420/2017 dated 6/4/2017 is admitted and marked Exhibit "P.5"*

E. M. Feleshi

JUDGE

6/9/2017"

Then the previous criminal antecedents of the accused and his mitigation were taken. In passing the sentence, the trial court stated:-

> *"COURT: Sentence is passed in judgment and delivered in the presence of Mwasiti Athuman, SSA and Ms. Veronica Mtafya, SA for the Republic and the accused in person who is represented by Mr. Amon Ndunguru, advocate and in the presence of ladies assessors. Right of appeal is explained.*
>
> *E. M. Feieshi*
>
> *JUDGE*
>
> *6/9/2017"*

And to perfect the record, sentence meted out on this date (6/9/2017) was recorded as part of the judgment which was rendered on 8/11/2016 and the appellant was sentenced to suffer death by hanging. This explains why the date of delivery of the judgment is indicated as being 8/11/2016 and 6/9/2017. Apparently, however, the contents of the report by the Officer In-charge of the mental hospital or rather the findings on the accused's (now appellant) state of mind at the time of committing the offence was not read out or in any way disclosed.

Before we resolve the issue ahead of us, we seize this momentous opportunity to expound a few legal aspects on insanity commonly troubling. In terms of section 12 of the Penal Code, every person is presumed to be of sound mind and to have been of sound mind at any time which comes in question until the contrary is proved. However, that rule is not without exceptions. Under section 13 of the Penal Code, a person shall not be criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind hence making him incapable of understanding what he is doing, incapable of appreciating that he ought not to do the act or omission or does not have control of the act or omission. In brief, insanity is raised so as to show that the accused lacked the culpable mental state required as an element of the offence charged. It is relied on as defence from criminal culpability. Various jurisdictions have adopted means or ways to conduct an incapacity test which examines whether an accused person was able to quite appreciate what he was doing when he committed an offence or that his illness left him unable to distinguish right from wrong with respect to his criminal conduct.

In our jurisdiction, insanity is governed by sections 216, 219 and 220 of the CPA. These provisions apply in three different circumstances. We shall demonstrate.

We begin with the situation where the accused intends to rely on insanity as defence. Relevant here is section 219(1) of the CPA. It prescribes that:-

> *"219.- (1) Where any act or omission is charged 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."*

Our understanding from these provisions, is that it is the duty of the defence to raise and prove insanity, not for the prosecution to prove sanity (See the book by A. A. F. Masawe; **The BURDEN OF PROOF**, How to defend Yourself in Criminal Cases, Pages 47 – 52). Section 219(2) and (3) of the CPA stipulate the procedure to be followed after the plea by the defence (the accused or his advocate), that is the trial court should suspend the trial and order the accused be mentally examined after which a report is returned to the court and whence it is

established the accused was insane and there is evidence that he committed the offence, a special finding is made by the court and the court shall order the accused be detained in a Mental Hospital or deal with him according to section 8 of the Mental Health Act or discharge him on condition that he be kept under supervision of any person for ensuring his safety and that of the public. That procedure was exhaustively expounded in the High Court case of **Republic vs Madaha** [1973] EA 515 and cited with approval by the Court in the unreported case of **MT. 81071 PTE Yusuph and Another vs Republic,** Criminal Appeal No. 168 of 2015 and also cited in **Mwale Mwansanu vs The Director of Public Prosecutions**, Criminal Appeal No. 105 of 2018 (unreported) that:-

> *"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, fifth, the court then decides on the evidence, whether or not the defence of insanity had been proved on the 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 numerated consequential orders."

The details above are sufficient. It is quite unnecessary to add a word. We now turn to another circumstance in which insanity is invoked as provided under section 220(1) of the CPA. We let the provision guide us:-

"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 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. (Emphasis added)."

Plain as it is, this provision is applied or invoked by the court trying an accused person, that is to say during the trial. Elaborating this plain truth, the Court, in the case of **Majuto Samson vs Republic**, Criminal Appeal No. 61 of 2002 (unreported) stated that:-

> *"From the provisions of this section, our understanding is that in a criminal charge* ***the court has the discretion to adjourn the proceedings and order the accused person to be examined in a mental hospital. However in exercising the discretion it is necessary first to lay ground upon which the court could find that the accused person may have been insane at the time the offence was committed..."*** (Emphasis added)

Another instance where the issue of insanity may be raised is where an accused person cannot stand trial in terms of section 216 of the CPA. This situation arises where it is noted that an accused person cannot follow the proceedings at his trial. The concern here is with the accused's mental status at the time of trial not during the commission of the offence. The accused's ability to stand trial becomes the major

concern of the court. Its invocation and its distinction with the procedure under sections 219 and 220 of the CPA were lucidly discussed in the case of **Francis Siza Rwanda vs Republic**, Criminal Appeal No. 17 of 2019 (unreported). In that case the learned counsel who represented the accused doubted the mental status of the accused when the case was called on for preliminary hearing and prayed the trial court to order him to be detained in a mental hospital for medical examination under section 219(1) and (2) of the CPA. The Court observed that:-

> *"On our part, having carefully heard and considered the rival arguments together with the record of appeal, we shall start with the first ground of appeal that the report for medical examination of the appellant's state of mind was not disclosed during trial nor was there a special finding on it. It should be understood that the law provides two separate procedures for a defence of insanity. If an accused person intends to raise a defence of insanity as a bar to a trial, in that, the accused person is incapable of standing trial, the procedure of raising it is provided under sections 216 to 218 of the CPA. Whereas, if an accused person wishes to raise it as a defence of insanity to a charge or information that at the time of committing the offence he was insane, the procedure is provided under sections 219 and 220 of the CPA.*

We are fortified in that account in the light of what we said in the case of MT. 81071 PTE Yusuph Haji @ Hussein v. The Republic (supra) that: -

There is a marked distinction between unfitness to make a defence due to insanity and 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 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 metal condition at the time of the commission of the alleged offence (see Tarino v. The Republic [1975] 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 allege act. Such a defence is governed by the provisions of sections 219 and 220 of the Act."

On the provisions of section 220(1) of the CPA cited above, these crucial legal positions stem out. **One**, a court trying an offence has power to adjourn proceedings and enquire into insanity, **two**; such

power is exercised during trial, **three**; the exercise of such power is discretional and **four**; before making such order the court must lay down grounds for making such an order or that there must be circumstances suggesting that the accused might have been insane at the time he committed the alleged offence.

Now reverting to the instant case, much as the trial court had power and discretion to order the appellant be detained in a mental hospital for medical examination of his mental status at the time of commission of the offence, the proceedings of 8/11/2016 reveal at least these serious shortcomings. **First**; no grounds for making or reasons for making an order detaining the appellant to a mental hospital were told or shown, **second**; the order was made after the trial was concluded, judgment rendered and the appellant was already convicted and **third**; the findings of the mental hospital as indicated in exhibit P.5 were not read out and not in any way dealt with. If the whole exercise and the report were unnecessary, we are left wondering why the court made the order detaining the appellant in a mental hospital for a period close to ten months. We see no justification for that. Since the trial judge had opted to invoke the provisions of section 220(1) of the CPA, he was obligated to comply with it to the letter and not half-heartedly as he did.

From the nature of the step taken by the learned trial judge, it seems clear to us that the appellant's trial proceeded while the trial court was lingering in doubts over his mental status only to take steps after conviction on 8/11/2016. It should further be recalled that the information alleges that the accused committed the offence on 6/7/2006. This tells us that the appellant's mental status was examined after almost ten years. It is highly probable and we doubt if the report would be rational given the long time that had passed and the appellant having passed through other life experiences and desolations.

Considering all the circumstances, we hold that due process of law was delayed and the appellant was unfairly tried which renders the trial a nullity.

Should we order a re-trial, is the issue we had deferred which we now turn to consider. We are minded that the learned Senior State Attorney was firm that the prosecution have a strong case against the appellant. He put reliance on two kinds of evidence. First is the testimony by PW1 that the appellant visited his residence where he stayed with the deceased and second is documentary evidence tendered by PW4 which are the appellant's extra-judicial statement (exhibit P4) and witness statement of John Milingo (exhibit P5) tendered under

section 34B(2) of the TEA in which he stated that he saw the appellant with blood stained hands and shorts. The other evidence is that of PW2 and the accused cautioned statement (exhibit P3). Based on that evidence Mr. Maleko was firm that the prosecution was able to circumstantially establish the appellant's responsibility with the murder of the deceased justifying an order for re-trial of the appellant.

On the other side, Mr. Ngole was opposed to the prayer by the respondent. He reasoned that exhibit P5 was irregularly admitted into evidence for failure to comply with the requisite conditions under section 34B(2) of the TEA hence should be disregarded. That will have the effect of dismantling the prosecution case as, in the absence of evidence that the appellant was seen with blood stained hands and shorts, there would be nothing linking the appellant with the murder charge. As for the cautioned and extra-judicial statements, Mr. Ngole drew our attention to the fact that once the appellant's mental status is doubted then such statements taken from him would not be of any assistance to the prosecution. At last, in rejoinder, Ms. Rwetabura conceded that exhibit P5 did not meet the required test for it to be valid hence should be expunged but was insistent that justice of the case calls for an order

for re-trial being made considering that a certain person (the deceased) lost her life.

On our part, much as we would sympathise with the death of the deceased, we are not convinced that an order for re-trial would meet the ends of justice in the circumstances of this case. That is for very obvious reasons. One; following the concurrent views by both sides that exhibit P5 was not read out it is hereby expunged. Two, given the doubtful mental status of the appellant at the time of commission of the alleged offence and his arrest, it cannot with any degree of certitude and certainty, be concluded that he made exhibits P3 and P4 while he was himself. These serious infractions, given opportunity, will be corrected by the prosecution which is against the spirit embraced in **Fatehali Manji vs Republic** [1966] E. A. 341 which discourages making an order for re-trial which will accord the prosecution opportunity to correct the anomalies and or fill the yawning gaps in the case. Moreover, at the back of our minds is the undisputed and glaring fact that the appellant has been behind bars for almost sixteen years now and has undergone trial twice and this will be the third time if we grant it.

For the foregoing reasons, we invoke our powers of revision under section 4(2) of the AJA and nullify the proceedings and judgment of the trial court, quash and set aside the sentence meted out and hereby order the appellant be released from prison forthwith if not held for another lawful cause.

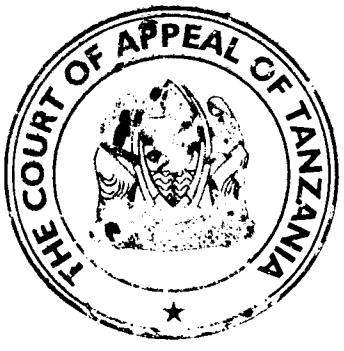
DATED at **DAR ES SALAAM** this 29th day of July, 2022.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of August, 2022 in the presence of Mr. Mashaka Ngole, learned counsel for the appellant via video conference and Ms. Neema Moshi, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL