IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: KWARIKO, J.A., GALEBA, J.A., And MASOUD, J.A.)

CRIMINAL APPEAL NO. 222 OF 2022

MIBURO MUSSA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mlacha, J.)

dated the 20th day of May, 2022

in

Criminal Sessions Case No. 15 of 2021

.....

JUDGMENT OF THE COURT

7th & 20th May, 2023

MASOUD, J.A.:

Miburo Mussa, the appellant in this appeal, was convicted of a charge of murder in the High Court of Tanzania at Kigoma contrary to section 196 of the Penal Code [Cap. 16 R.E. 2019 now R.E. 2022]. The particulars of the offence in respect of which the appellant was charged, tried and found guilt was that, on 17th August, 2020 at Nyarugusu Refugees' Camp within Kasulu District in Kigoma Region, he murdered one Nenelimana Jackline, the deceased.

The appellant (DW1), the deceased's husband, one Bambarukonjari Anthony (PW3), and the deceased, were all refugees, living at Nyarugusu

Refugees' Camp. In the morning of the fateful day, the appellant, allegedly, went to the residence of PW3 where the deceased, PW3 and one, Kazimana Valeria (PW4) were inside talking. Learning that the appellant was outside asking to meet him, PW3 asked the deceased to meet him outside and see what he was up to. After the deceased had met him outside, it became clear that the appellant insisted on meeting PW3.

Subsequently, PW3 asked the deceased and PW4 to meet the appellant together outside and see what he was exactly up to. PW3 did not want to meet the appellant because he had previously threatened to slash him into halves, and to kill the deceased, as the latter had refused to marry him. After PW4 and the deceased had gone out to meet the appellant, PW3 peeped through the window, and observed the appellant as he was talking to the deceased and PW4. PW3 heard the appellant urging them to let him meet him but in vain.

When the appellant appeared to be leaving, PW4 too decided to leave. As the deceased started to escort PW4, the appellant emerged suddenly and followed them from behind, and allegedly attacked the deceased by continuously slashing her up with a machete which he had pulled out from a white robe that he put on. The incident was allegedly witnessed by PW3,

PW4 and Ndasenga Florida (PW5). The latter was at the material time fetching some water just nearby the crime scene.

The appellant was arrested at the scene of crime on 17th August, 2020 by a militia man who ably took the machete from him, while the body of the deceased was still laying on the ground. He was, subsequently, handed over to the police along with the machete while the deceased was rushed to hospital. The deceased was confirmed dead on 18th August, 2020 by Nebo Edson Mwamakamba (PW2), a medical doctor, who examined the deceased's body. The examination revealed that the cause of death was excessive bleeding due to multiple cut injuries caused by a sharp object.

In a bid to prove the case against the appellant, the prosecution summoned a total of eight (8) witnesses, tendered two documentary exhibits, to wit, the report on the post mortem examination (exhibit P1) and the crime scene sketch map (exhibit P2), and tendered one real exhibit, a machete (exhibit P3). On the other hand, the appellant had no witness other than himself. He denied to have committed the offence. He testified that he was not at the crime scene in the morning of the fateful day.

At the end of the trial, the High Court found the appellant guilty of the offence of murder as charged and sentenced him to death by hanging.

It is, however, worthwhile to point out that at the plea taking stage, the trial court at the instance of the counsel for the appellant made an order committing the appellant to mental hospital for medical examination of his mental condition at the time of commission of the offence he stood charged. As result, a written report on the mental condition of the appellant was availed and received by the trial court as forming part of the record. Consequently, the trial court made a special finding to the effect that the appellant "*is sane and was sane at the time of commission of the offence*" he stood charged.

Aggrieved by the decision of trial court, the appellant lodged this appeal to this Court challenging the conviction and sentence. Enjoying the service of Mr. Method Kabuguzi, learned advocate, the appellant raised supplementary grounds of appeal prepared by his advocate in lieu of four grounds contained in the memorandum of appeal he had initially lodged. For convenience, we would rephrase and list the supplementary grounds in the following manner and order:

1. *The proceedings of the High Court were conducted in abrogation of the principles of natural justice for not affording the appellant the aid of an interpreter on 11th August, 2021 and on 1st March, 2022.*

2. *The appellant's defence of insanity was prejudiced by the Honourable Presiding Judge's purported "special finding" he made on 1st March, 2022.*

3. *In the totality of the evidence of both sides on record, such capital sentence of suffering death by hanging which was imposed upon the appellant after being convicted of the offence of murder, contrary to section 196 ad 197 of the Penal Code, was not legally grounded.*

Mr. Shabani Juma Masanja, learned Senior State Attorney, who was at the hearing assisted by Ms. Edna Jackson and Ms. Naomi Joseph Mollel, both learned State Attorneys, for the respondent Republic, opposed the appeal.

Mr. Kabuguzi orally argued the supplementary grounds of appeal on behalf of the appellant. For convenience, we have decided to begin with the second ground that the special finding prejudiced the appellant's intended defence of insanity. With this ground, the learned advocate made his arguments with reference to the proceedings of the trial court of 11th August, 2021 and 1st March, 2022 appearing from pages 31 up to 35 of the record of appeal.

He contended that the procedure adopted by the trial court of considering the report on the mental condition of the appellant and making a special finding that "*he is sane and was sane at the time of commission of the offence he stood charged*" before the trial could take off, denied the

appellant an opportunity to be heard on the defence of insanity which he intimated to raise at the trial. The learned advocate relied on the case of **Stephen Silomon Mollel v. Republic**, Criminal Appeal No. 248 of 2016 (unreported), arguing that at the end of the day, the defence of insanity was considered prematurely based on the report and not the evidence adduced at the trial of the case. Since the appellant's defence was, according to the learned advocate, never heard and never considered by the trial court, we were in respect of this ground urged to nullify the proceedings of the trial court and order a retrial of the matter.

Ms. Mollel in her oral reply, did not object that there was, indeed, a special finding that was made by the trial court subsequent to the receipt of the written report from the mental hospital on the mental condition of the appellant. She did not also dispute that the appellant was committed for medical examination as to his mental condition. Her argument however, was that there was nothing on the record of appeal showing that the appellant intended to raise the defence of insanity.

As such, in as much as such indication is not on the record, the appellant cannot be heard arguing that he was denied an opportunity to lead evidence at the trial in relation to the intended defence of insanity. Be it as it may, the special finding complained of did not prevent the appellant from

adducing evidence on the defence of insanity when the defence case was opened, the learned State Attorney argued.

In view of the above, Ms. Mollel contended that there was no violation of the procedure as to the handling of such report and making a special finding on the mental condition of the appellant before the trial. There was therefore, according to Ms. Mollel, no failure of justice was occasioned to the appellant. She cited the case of **MT. 81071 PTE Yusuph Haji @ Hussein v. Republic**, Criminal Appeal No. 168 of 2015 (unreported) in support of her submission.

With the above authority, the learned State Attorney submitted that, it was open to the appellant to adduce evidence on his defence of insanity after the prosecution had closed her case. However, since the appellant chose not to adduce evidence on the defence of insanity, he cannot be heard now complaining that he was denied an opportunity to adduce evidence on that defence.

Emerging from the rival arguments of the parties is an issue whether the finding by the trial court that the appellant was sane at the trial and at the time of commission of the offence he stood charged was procedurally reached.

In resolving the issue, we find it pertinent, in the circumstances, to reproduce the proceedings of the trial court which resulted into the special finding in order to be clear with what exactly transpired. The relevant part from pages 31 up to 35 of the record of appeal reads thus:

> *"**Date:** 11/8/2021*
>
> ***Coram**: Mlacha J.*
>
> ***Republic**: Happiness Mayunga, State Attorney.*
>
> ***Accused (name):** Miburo s/o Mussa, present under custody and represented by Edna Aloyce- Defence Counsel.*
>
> ***Law Assistant:** V. Kagina*
>
> ***Court Clerk:** Ombeni Kazyoba*
>
> *Notice of Trial on information for murder c/s 196 and 197 of the Penal Code was duly served on the accused now before the court on 30/7/2021.*
>
> *Information is read and explained to the charge in his own language and he is required to plea thereto.*
>
> ***Plea**: Nilimuua lakini sio kwa lengo.*
>
> ***Entered plea** of not guilty to the charge.*
>
> ***Sgd L.M. Mlacha***
> ***Judge***
> ***11/8/2021***

Ms. Edna Aloyce: *My Lord, we think the accused's mental status is not good. I pray that he should be sent to Isanga Hospital for mental examination under section 219 of the CPA.*

Happiness Mayunga, SA: *We do not have any objection to the prayer my Lord.*

Order: *Prayer granted. Let the accused be sent to Isanga Mental Hospital, Dodoma for examination. This order is made under section 219 and 220 (1) of the CPA. It is so ordered.*

Sgd: L.M. Mlacha

Judge

Date: *1/3/2022*

Corum: *L.M. Mlacha*

For Republic: *Happiness Mayunga*

Accused (name): *Miburo s/o Mussa, present under custody and represented by Mr. Sadiki Aliki (Defence Counsel).*

Law Assistant: *V. Kagina*

Court Clerk: *Ombeni Kazyoba*

Happiness Mayunga, SA: *My Lord, the case is coming for orders and we are ready.*

Sadiki Aliki, advocate: *We are ready my Lord*

Court: *There is a report from Isanga Institution. The accused is informed accordingly.*

Happiness Mayunga, SA: *When the case came for preliminary hearing on 11/8/2021, the defence counsel prayed to the court to order the mental health of the accused to be examined. The court made an order of examining the mental status at Isanga. On 9/2/2020, Dr. Enock Changarawe said that the accused was sane at the time of committing the crime. I pray the report to be received officially.*

Court: *The report from Isanga dated 17/1/2022 is received and becomes part of the record.*

Sgd: L.M. Mlacha

Judge

1/3/2022

SPECIAL FINDING OF THE COURT

Court: *Let the report be read in court. It is read by the State Attorney in open court.*

Sgd: L. M. Mlacha

Judge

1/3/2022

Question: *What is your name?*

Answer: *Miburo Mussa.*

Question: *Do you have a wife?*

Answer: *I don't have a wife. I divorced her.*

Question: *Are you a refugee?*

Answer: *I am a refugee from Nyarugusu. I come from Burundi.*

Question: *Should I send you back to Burundi?*

Answer: *(With a smile) "vita haijaisha". There is war there. I ran from wars in 2015.*

Question: *Who is Nenelimana Jacline?*

Answer: *We agreed to marry her. She moved to be married to another guy. She is dead. I never killed her intentionally.*

Court: *I agree with the opinion of the doctor that the accused is sane and was sane at the time of killing the deceased.*

Sgd: L.M. Mlacha

Judge

1/3/2022

Order:

(i)The case is adjourned till next session for preliminary hearing at the date to be fixed by the DR.

(ii) AFRIC

Sgd: L. M. Mlacha

Judge

1/3/2022"

We considered the above proceedings in light of the rival arguments we highlighted above. We have observed how the trial court dealt with the prayer of the appellant at the plea taking stage and the subsequent report in the procedure that he adopted, which procedure is the subject of the second ground of appeal.

We also considered the provisions of sections 219 (1) and 220 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2019 now Cap. 20 R.E. 2022] in relation to the prayer and the order for medical examination which were respectively preferred and made under those provisions. Given the import of the said provisions which underline a situation where an accused person intends to raise a defence of insanity at his trial, we have no doubt that the appellant desired to raise that defence at the trial when he made the prayer. This takes care of dismissing the argument by the learned State Attorney that there was no such an intention on the part of the appellant to make a plea of insanity as a defence to the charge.

As we stated in the case of **Mwale Mwansanu v. Director of Public Prosecutions**, Criminal Appeal No. 105 of 2018 (unreported), the procedure to be followed where an accused person intends to plead insanity at the time of commission of the offence as a defence was explicitly stated in the case of

Republic v. Madaha [1973] E. A. 515, adopted and elaborated in **MT. 81071 PTE Yusuph Haji** (supra) 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."*

Applying the above procedure in the instant case and comparing it with the procedure that was adopted by the trial court, we are satisfied that the

first and second procedural steps as per **MT. 81071 PTE Yusuph Haji** (supra) were fully observed by the trial court. However, the third, fourth, and fifth procedural steps, were never observed by the trial court. We say so because, upon receipt of the report, the trial court did not proceed with the trial in a normal way. Rather, upon the prayer by the learned State Attorney for the report to be received officially, the trial court determined the insanity of the appellant by making the special finding that the appellant was sane at the time of commission of the offence without there being any evidence adduced by the parties on the issue.

It follows that there was, with the special finding, a premature determination of the appellant's mental status at the time of commission of the alleged offence. The appellant was thus blocked by the Court's finding from adducing evidence on the defence of insanity at the trial. We are, therefore, in agreement with the appellant's counsel that the special finding, at the plea taking stage, denied the appellant an opportunity to adduce evidence on his mental condition which as a result prejudiced him, for he did not get a fair hearing.

As the procedural requirements mandatorily applicable were not complied with to the letter, we find that the proceedings by the trial court

were fundamentally flawed. We thus find merit in the second ground. With this outcome, it is an academic exercise to dwell on the other grounds.

In the end, we are constrained to allow the appeal, nullify the trial court's proceedings from 1st March, 2022, quash the conviction and set aside the sentence meted out against the appellant. Considering the nature of the offence, we order an expedited retrial of the case before another Judge in accordance with the law. Meanwhile, the appellant shall remain in custody pending his retrial.

It is so ordered.

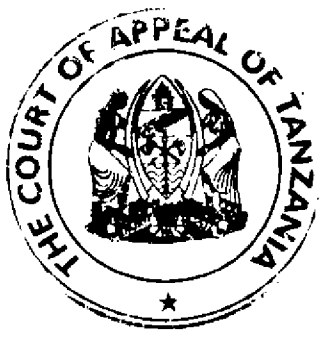
DATED at **DAR ES SALAAM** this 17th day of May, 2024.

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 20th day of May, 2024 connected via video facility in the presence of Mr. Method R. G. Kabuguzi, learned counsel for the Appellant, Appellant in person and Ms. Edna Jackson Makala, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL