THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL SESSION CASE NO. 101 OF 2016

REPUBLIC

VERSUS

FRANK s/o JASTON MWAIHOJO

JUDGMENT

Date of Order: 03/03/2020
Date of Judgment: 05/03/2020

Dr. A. J. Mambi, J.

This judgment emanates from the murder case that involved from an accused who appeared to be insane. The Court received a report from Isanga Mental Hospital Institute dated 17 January 2018 with ref 10322/2017 that indicated that the accused did commit an offence while he was insane and even when he was sent to Isanga he still appeared to be insane before he attended his medical treatment.

For easy reference, I wish to narrate the facts from prosecution as follows:

The accused person **FRANK s/o JASTON MWAIHOJO**

stands charged with an offence of Manslaughter contrary to section 195 of the Penal Code CAP 16 [R.E 2002] He is so charged after causing the death of one MALONGO S/O MANDARAS@MLANGUZI. The incident occurred on the 10th day of January, 2015 at Ipinda village within the district and region of Mbeya.

It was alleged that on the material date On the material date, the deceased MALONGO S/O MANDARAS and his wife one ROSENER D/O SOLO were at the local *pombe* shop where they were drinking alcohol. Thereafter, at about 2000hrs the two returned to their home. Upon reaching there, they found the main door of their house broken.

When they entered inside, they inspected their house and discovered that, one bag of maize (debe) stolen and they decided to go to the house of their neighbors one ESTER D/O MWAPILAGE to inquire as to what happened to their house. When they reached at that neighbour house the deceased called the accused who used to live there when but there was no any reply. However, within a short time, the accused came out from his house. Thereafter the accused invaded the deceased and started fighting in front of the deceased wife. The accused continued to assault the said deceased before his wife rushed to call other people for help.

The prosecution facts further reveled that, the accused killed the deceased before other people arrived for help. Having killed the deceased the accused drugged the body and throw on the latrine pit where he covered it with soil. The villagers continued to search for

the said MALONGO MANDARAS, on 11th day of January, 2015 about 500hrs, they managed to find the body of the deceased (MALONGO MANDARAS) buried in a hole which was prepared for latrine.

In a bid to prove the charges against the accused person, the prosecution called four witnesses while the defence had one witness (The accused himself).

The First Prosecution witness (PW1) in his testimony testified that on 11/01/2015 he with the VEO for Ipinda Village, went to the scene of the crime and found the deceased body covered with soil. PW1 testified that he interviewed the deceased wife who said that the deceased was killed by Frank Jastun (the accused). PW1 further testified that he recorded the caution statement for the accused and the accused was just ok. He told this court that he started interviewing the accused from 12 noon to 13 pm and the accused admitted to have killed the deceased.

The second prosecution witness (PW2) was Mr. Mwaimbigila. PW2 testified that between 2014 – 2016 he was the village executive officer at Ipinda Village. He said that on 11/01/2015 become was that one person (Malongo) was killed by the accused. He testified that he went to the scene and found the deceased s killed. He said that; *"Mwili wa marehemu ulikuwa umefukiwa kwenye shimo la choo"*. He also stated that he was aware that the accused had mental health problem. He Said: "Frank (*mshtakiwa) alikuwa na matatizo ya akili na alishawahi kujeruhiwa tu*".

On the other hand the third prosecution on the material date the went to their *shamba* with the deceased but when they came back they found the accused had broken their door and stolen their maize. She said that her husband met the deceased and they stated quarrelling and fighting with the accused. She said that *"Kulikuwa na mwanga mkali wa mbalamwezi ambapo alimwona mshitakiwa akimkata marehemu na Jembe"*. She said that she went to call the neighbor and her children for help but she went back, the accused had already cut his husband with a hoe before he died. She said that:

The last prosecution witness (PW4) was the police Officer with No. No. F2717 Detective Corplo David. (PW4) in his testimony testified that on 11/01/2015 while working at Mbalizi Police Station was informed on the death of the deceased (Frank) at Ipinda Village, Mbeya. He said that he went to the scene of crime and draw the sketch map. He said that: *"Eneo lilikuwa na damu nyingi, kofia ya marehemu na mburuzo wa kitu kuelekea nyuma ya nyumba na Tuliufuata mburuzo hadi tukakuta mwili wa marehemu umefukiwa kwenye shimo"*.

On the other hand, the defence had only one witness the accused (DW). In his testimony DW testified that he was attacked by the deceased who had a knife and he killed the deceased since he was defending himself. He stated that *"Nilivamiwa na marehemu Malongo na sikuua makusudi"*. He said that he was once sent to Isanga Hospital and was treated for a while.

Having heard and analyzed the evidence and submission from both parties to the key issues may be drawn as follows:-

1. Whether the accused person was responsible for an offence he stands charged
2. Whether the accused was sane or insane when he committed an offence he stands responsible.

Before I respond to the above legal issues let me at this juncture briefly highlight the role played by my assessors in assisting in this case. In the course of their discharge of the legal obligations in terms of Section 298 of the Criminal Procedure Act, Cap 20 [R.E.2002] the honorable assessors, unanimously, opined and proposed to this court that the accused person killed the deceased while he was insane. They all opined that the accused had no malice when he killed the deceased. The honorable assessors' opinion was a product of their personal physical follow up of the proceedings. What I did was to remind the honorable assessors the basic principles to focus vis-a-vis the evidence, in the course of stating their opinion. For record purposes I restate what I reminded them.

It is the cardinal principle of law that in murder cases conviction cannot stand unless the prosecution has successfully established both an overt act (*actus reus*) and malice aforethought (*mens rea*). Where the latter is not established the offence changes from murder to manslaughter.

The standard of proof is neither shifted nor reduced. It remains the prosecution's duty to establish the case beyond reasonable doubts.

The evidence in the case in hand was not complicated. The case was heard to its conclusion for few days continuously. The evidence was therefore very fresh to everybody. Yet, I restated it to the assessors. At the end, the honourable assessors were invited to now state their opinion focusing on two main issues namely, whether the accused person was responsible for an offence he stands charged and if yes, whether the accused was sane or insane when committing the act.

In their submission, the defence through the learned advocate Mr. Isaya Mwanri submitted that they have doubt on the cause of the death of the deceased. She argued that it it true that the accused killed the deceased but he did that while he was insane as indicated under the report from Isanga Mental Hospital.

The prosecution through Ms. Sara (the learned State Attorneys) briefly submitted that the evidence is clear that the accused did kill the deceased. She argued that the court should consider whether the accused was sane or insane and make the decision.

Having summarized the evidence and submission from both parties let me now address the key issues I have raised. I will start with the issue that *whether the accused actually killed the deceased and whether he was sane or insane.* The Defence had raised the defence of insanity basing on the report from the Isanga Mental Health Centre, Dodoma. Indeed section 12 of the Penal Code Cap 16 which provides for presumption of sanity is clear and it provides that:

12. Presumption of sanity

"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".

Similarity section 13 of the same Act which deals with persons of unsound mind provides that:

"(1) 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–*

(a) incapable of understanding what he is doing;

(b) incapable of appreciating that he ought not to do the act or omission; or

(c) does not have control of the act or omission.

(2) A person may be criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects referred to in subsection (1) to that act or omission".

I understand that, as this court has already alluded in similar cases that a prosecution case must, as the law is, be proved beyond reasonable doubt. This, simply, means that the prosecution evidence must be strong to leave no doubt to the criminal liability of an accused person. The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state **(**See ***Ali Ahmed Saleh Amgara v R [1959] EA 654)***. The state indeed has the primary duty of proving that the accused has committed the *actus reus* elements of the offence charged, with the *mens rea* required for that offence. This can be as I had recently hold that reflected and founded on the famous maxim that "*he who alleges must prove*". What is then this means to the eyes of the law. In my view as viewed by others that this means the principal

burden is on the accuser, and in criminal cases the accuser is the prosecution, usually the state or Republic. It is the trait law that in criminal cases the burden of proof has always remained on the state throughout, to establish the case against the accused beyond reasonable doubt. What does then this mean in the end?. The conclusion to be drawn here with regard to this principle is that since the burden lies throughout on the state, the accused has no burden or onus of proof except in a few cases where he would be under the burden to prove certain matters. This position was more clarified by the court in ***W Milburn v Regina [1954] TLR 27*** where the court noted that:

> *"it is an elementary rule that it is for the prosecution (the Republic) to prove its case beyond reasonable doubt and that should be kept in mind in all criminal cases".*

However, from the evidence produced by the prosecution and even the defence, it is clear that the accused did kill the deceased while he was insane. The main issues before convicting the accused person is whether the accused person had malice in committing an offence that is charged. I will also refer the relevant provisions of the Penal Code Cap 16 [R.E.2002] which seem to set down key principles and conditions on how malice aforethought can be said to have been established to indicate the accused internationally committed the offence which he stand incriminated. Under section 200 of the Penal Code Cap 16 [R.E.2002] malice aforethought is said to be established on proof of any of the following circumstances:

(a) an ***intention to cause the death*** of or to do grievous harm to any person, whether that person is the person actually killed or not.

(b) ***knowledge*** that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

(c) .....

The Court of appeal in **Saimon *Justine, Mbonea Mbwambo And Elia Mnandi Versus Republic Criminal Appeal No. 53 OF 2006*** clearly explained as to how malice aforethought can be established. The court made a reference to **Stroud's Judicial Dictionary**(2000 edition) which describes malice aforethought as any one or more of those states of mind, preceding or co existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated. Malice aforethought has therefore been held to have been manifested by such acts as the culprit's utterances before or after the event, the amount of force used, the nature and size of weapon(s) used, the part of the body to which the attack is directed, the conduct of the accused, the purpose for which the

injury or grievous harm is inflicted etc. But all these must be established by evidence.

Looking at the evidence from the prosecution in line with evidence from the defence as testified by the accused person (DW1), in the present case, there is no doubt that elements (c) and (d), of Section 200 of the Penal Code Cap 16 do not apply. It is clear from the evidence that the accused person who was insane had quarrel and fight with the deceased before the accused killed the deceased. This can be traced from the DW1 evidence when he admitted and testified that on the material date he was angry after the deceased invaded him. DW also testified that he was sick and attended Isanga Mental Hospital for treatment. The evidence of both prosecution and defence is corroborated by the Report from Isanga Mental Hospital that revealed that the accused was insane when he killed the deceased. The conclusion from the Psychiatrist from Isanga reads as follows:-

> *"During his stay at Isanga Institution, he was observed and he showed certain abnormal behaviours like talking to himself, having visual hallucination (he was looking up most of the time, during the conversation) and laughing inappropriately. He admitted that he killed the victim and buried him as he was the thief. He did not know the victim. He also said that he was epileptic patient, since he was in primary school and he was treated by traditional healers."*

A combination of all these events considered, I see no conclusion other than that the accused person did not have intention of committing unlawful act of killing the deceased. I am of the considered view, and find that the second constituent of the offence

of murder, namely *mens rea* has not been established since the ingredients of malice afore thought has not been established. See ***EDWIN S/O MBUNDA SEUSI VERSUS THE REPUBLIC, CRIMINAL APPELA No. 468 OF 2007*** at Iringa. I am mindful of the requirement provisions of section 200 of the Penal Code, Cap. 16 [R.E. 2002] on malice aforethought which has not been established in our case at hand. As conceded by the learned Senior State Attorneys, there is no evidence on record to establish malice aforethought and the accused committed an offence while insane.

I have also considered the opinion of the assessors who had all similar opinion that the accused did kill the deceased while insane. I shake hands with my assessors and agree with their opinion that the accused had no malice as he did while he was insane.

I have gone through the report by psychiatrist from Isanga Mental Hospital dated 17th of January 2018 and observe that the result was that the accused did commit an offence while he was insane. I also made my findings in terms of section 220 (4) and 219 (2) of the Criminal Procedure Act, Cap. 20 [R. E. 2002]. My findings reveal that It appears that, from the medical examination report (from mental hospital), the accused person is insane. The court has made the special findings and found that, from the accused demeanor and the way she speaks and answers questions, she clearly seems to be insane. Under Section 220 (4) and 219 (2) of the Criminal Procedure Act, Cap. 20 [R. E. 2002], the court is satisfied that FRANK JASTON MWAIHOJO who stands charged with the offence of murder did murder the deceased but by reason of his

insanity, therefore he is not guilty of the offence he is standing charged with.

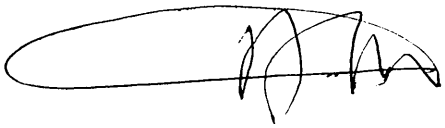
I thus invoke section 13 of the Penal Code, Cap 16 that since the accused was unsound mind while committing an offence he is not criminally responsible for an act or omission he did. I am saying so, since at the time of doing the act/killing he was suffering from disease (most likely Epilepsy with post-Ictal Psychosis) affecting his mind and he was thus incapable of understanding what he was doing and had no control of the act or omission.

As the accused committed an offence that involve physical violence, it is hereby ordered that he be kept in a Mental Hospital as a Criminal Lunatic where the superintendent of the Mental Hospital is further ordered to prepare a report in writing after the expiration of three years from the date of this order and submit it together with the proceedings of this court, or a certified copy in respect thereof to the Minister responsible for legal affairs or take other action provided under section 219 (3)(a) and 220 (4). In the light of the above, I am satisfied that the accused deserve to be kept under the mental Hospital as Criminal lunatic until the responsible Minister for legal Affairs decides otherwise.

THE HIGH COURT OF TANZANIA

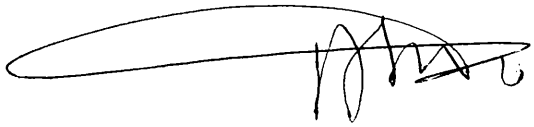
DR. A. J. MAMBI
JUDGE
5/3/2020

Judgment delivered in Chambers this 5th day of March, 2020 in presence of both parties.



DR. A. J. MAMBI
JUDGE
5/3/2020

Order: The right of Appeal is Explained.



DR. A. J. MAMBI
JUDGE
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