

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL SESSIONS CASE NO. 11 OF 2020

(Originating from Mbulu District Court PI No. 5/2016)

THE REPUBLIC

VERSUS

MUCHUNO S/O PAULO INNA @MCHUNO

JUDGMENT

ROBERT, J:

The accused person Muchuno s/o Paulo Inna @ Muchuno stands charged with the offence of Murder contrary to section 196 of the Penal Code, Cap 16 R.E 2020. The prosecution alleged that on 11th day of April, 2016 at Gaterer village within the District of Mbulu in Manyara region the accused person murdered one Jacob s/o Paulo @ Mathay.

The brief facts of this matter reveals that the accused person and the deceased Jacob Paulo were blood brothers and both of them were residents of Hydom village within the District of Mbulu in Manyara region. The alleged

offence took place on the 11th day of April, 2016 at Gaterer village, Mbulu District in Manyara region.

On the fateful day at about 13:30 hours the deceased was sleeping in a house at Gaterer village while some children were playing around the house. The accused went to that house and took a hoe and a panga with intent to assault the deceased. The deceased and the children who were playing around the house raised an alarm and the accused person threw out the hoe and a panga. He then took a club from the entrance of a paddock and used it to hit the deceased on the head and legs while saying "I will kill you today". The children who were playing around raised alarm which got the attention of a neighbor by the name of Herson s/o Aweda who arrived at the scene and asked the accused person to stop assaulting the deceased. The accused person stopped the attack and ran away leaving the club at the scene of crime. The deceased sustained injuries to the head and legs. He was taken to Hydom Lutheran Hospital for treatment where he passed away on 14th day of April, 2016.

The matter was reported to police who investigated the matter and arrested the accused person. The postmortem examination revealed that cause of death was due to respiratory failure and aspiration pneumonia.

Consequently, the accused person was arraigned and charged with the offence of murder.

At the hearing of this matter, the prosecution was represented by Mr. Mutalemwa Kishenyi, Senior State Attorney assisted by Grace Mgaya, Senior Attorney whereas the accused person was under the services of Dennis Sanka, learned counsel.

When the matter came up for plea taking on 15th May, 2020 counsel for the accused person moved the court under section 219(1) of the Criminal Procedure Act, Cap. 20 R.E 2002 that they intended to rely on the defence of insanity based on statements of prosecution witnesses and behavioral pattern exhibited by the accused person. The court ordered the accused person to be detained in a mental institute at Mirembe Hospital in Dodoma pending medical examination and the medical officer in-charge of the said mental hospital to prepare and transmit to the court a written report on the mental condition of the accused settling out, in his opinion, whether at the time when the offence was committed the accused person was insane so as not to be responsible for his action.

At the preliminary hearing held on 6th October, 2020 the accused person pleaded not guilty to the charge of murder. The prosecution and defence did not agree on any substantial matters in the memorandum of facts not in dispute apart from the personal particulars of the accused person and the fact that the accused person was arrested and charged with the offence of murder.

In order to establish the offence of murder during trial of this case, the prosecution called two witnesses to prove their case. PW1, Herson Aweda, recounted that on 11/4/2016 he was at home at the village of Gaterer in Mbulu District. At around 13.00 hours he heard screams and noises from the neighboring house. He went to the house and found the accused person beating his brother Yakobo Paulo, the deceased, with a club. He asked the accused person to stop beating the deceased and threatened to call the police if he continued beating him. The accused person dropped the club and ran away leaving Yakobo Paulo injured.

The accused having fled from the scene of crime, PW1 together with the people who were present at the scene, one child known as John Keha and two other children as well as one Paulina Mathay, the accused person's aunt, helped the deceased to dress the open wounds in order to stop bleeding.

Then PW1 called one Yekonia Dennis to bring a car so that they may take the deceased to hospital. After that he left the scene and headed to a funeral in a neighboring family. After two days, he was approached by police officers who asked him to show them a place where Yakobo was beaten. At the scene, the police took the club which was allegedly used by the accused person to assault the deceased. The club was admitted in court as exhibit P4. He was later told by Paulina Mathay that Yakobo died in the hospital.

PW2, F2446 D/CPL Josia, informed the court that on 15/4/2016 he was assigned to investigate the murder of Yakobo Paulo. He went to Gaterer village to examine the scene of crime and interrogated witnesses namely, John Keha, Augustino Deles and one Herson. He found a big club at the scene of crime which witnesses said the accused person used to hit the deceased. He also drew a sketch map of the scene and filled a certificate of seizure to seize the club. After investigation he kept the exhibits in the exhibits room at Hydom police station. He also witnessed the postmortem examination of the deceased's body together with the deceased' relative, Augustino Deles. He arrested the accused person in the local bars at Hydom area because evidence adduced by John Keha and one Herson indicated that they saw the accused person beating the deceased. The deceased was also

found with injuries on the head, hands and legs which supported the evidence given to the police by witnesses.

At the closure of the prosecution case, the court ruled that the accused person, Muchuno s/o Paulo Inna had a case to answer and invited him to defend himself.

On the defence side, the accused person defended himself on oath as DW1. He stated that he lived in Hydom village since 1990s. He denied to be involved in the killing of the deceased Yakobo Paulo or to be present at the scene of crime. He informed the court that he doesn't remember anything about killing the deceased. He stated that the police officer who arrested him at Hydom are the ones who told him that he killed his brother Yakobo Paulo. He informed the court that he was arrested soon after being discharged from hospital where he was hospitalized for three days. He stated further that he has been treated for mental disorders at a hospital in Mbulu and later at Isanga mental institute where he was hospitalized for 42 days. He remembered to have told doctors at Isanga that sometimes he feels like people are dialing phone numbers in his head which is disturbing him.

After the defence case was closed, the counsel for both sides made their final submissions. Submitting on behalf of the Republic, Mr. Mutalemwa Kishenyi, Senior State Attorney stated that, in a case of murder the prosecution is required to prove that both actus reus and malice aforethought existed. He argued that both elements of the crime were proved beyond reasonable doubt by the prosecution.

In respect of actus reus, he submitted that the prosecution managed to prove that Jacob Paulo is dead. As to who caused his death, the prosecution established that evidence adduced points to the the accused person as the one responsible for his death. PW1 testified that on the fateful date he saw accused beating the deceased using a club. The deceased was taken to hospital where he died after three days. He argued that the prosecution did not bring more witnesses to prove what happened because under section 143 of the Evidence Act, Cap. 6 R.E 2019 a fact can be established by any particular number of witnesses.

Submitting on the cause of death, the learned state attorney stated that although the post-mortem report it has been stated in various decisions that where the evidence of eye witness is found to be credible and trustworthy medical opinion pointing to alternative possibilities is not acceptable as

conclusive. He cited the case of **Abdul- Abdul- Baad Timim vs SMZ (2006) TLR 188.**

He submitted further that PW1 is a relative of both the accused person and the deceased and therefore the court has no reason to doubt him with regards to what caused the death of the deceased.

Submitting on the mens rea, he argued that the accused person was admitted to Isanga Mental Institute and the report from Isanga was admitted as part of the court record. The report indicated that the accused was suffering from a mental disorder. He therefore submitted that if the accused person is found guilty, he should be dealt with under section 219 of the Criminal Procedure Act.

On his part, counsel for the accused person submitted that the prosecution failed to prove that the accused person murdered the deceased. He reminded the court that on 15/5/2020 the defence side informed the court that they will rely on the defence of insanity due to statement of witnesses and behavioral pattern of the accused person. The court ordered the accused person to be detained at Isanga Mental Institute. The report from Isanga indicated that the accused was mentally insane at the time of

the commission of the alleged crime. The report was admitted as exhibit C1. There is therefore no question on the intention of the accused person in committing the alleged crime. He submitted that the question remaining is whether the accused person committed the offence charged.

The learned counsel submitted that, prosecution witnesses, PW1 and PW2 as well as exhibits tendered did not prove that the accused person murdered the deceased. He maintained that the testimony of PW1 did not establish if the alleged assault by the accused person resulted into the death of the deceased and PW2's testimony failed to prove that the accused person killed the deceased. He argued that PW2 testimony established that the alleged murder weapon (club) was used to injure the deceased and not to kill him. In connection to that, he argued that the post-mortem examination report indicates that the deceased died due to respiratory failure after being choked with food remains. Therefore, there is no evidence to prove that the accused person killed the deceased.

The learned counsel cited the case of Mohamed **Said Matula vs Republic (1995) TLR 5** where the Court of Appeal of Tanzania held that the onus is on the prosecution to prove not only the death but also the link between the said death and the accused. He argued that the evidence in the

present case does not show a link between the accused person and the alleged death.

He submitted further that, based on the mental condition of the accused person he prayed that the accused person be found not guilty however, the court should order him to go to a mental institution for treatment but not as a criminal lunatic.

In this case the court was assisted by three assessors, Sophia Joseph, Fatuma Juma, and Farida Diagwa. After summing up to assessors, two of the assessors opined that the accused person committed the crime without knowing and therefore he is not guilty whereas the last assessor simply said she thinks the accused person is guilty because he is mentally sick.

It is basic that in a case of murder the prosecution is required to prove beyond reasonable doubt that both actus reus and malice aforethought existed. In order to convict the accused person the court will have to examine whether the two elements have been established to the required standard.

The cause of death of the deceased, Jacob s/o Paulo as established by the post-mortem report (exhibit P3) indicates that death was due to respiratory failure due to aspiration pneumonia. The summary to that report

indicates that the deceased was admitted on 12/4/2016 midnight with a cut wound on the forehead 4cmx2cm length and a wound on the parietal region 5cm length x 1cm depth, a cut wound on left and right arm (1cm x 1 cm each), a swollen orbital but he had no typical sign of traumatic brain injury.

Evidence adduced by PW1 established that the deceased was taken to hospital after being assaulted with the accused person several times using a club obtained from the entrance of a paddock. He died three days after being admitted to hospital. There was no evidence to the effect that the accused person was suffering from any form of a disease which could end his life abruptly. The postmortem examination report was received during preliminary hearing and the doctor who conducted Post-mortem examination was not brought to testify. This court is aware that the court is not bound by the opinion of the expert.

In the circumstances of this case, considering the testimony of PW1 on the alleged assault done to the deceased three days prior to his death, the fact that the deceased was admitted to hospital due to the injuries inflicted by the alleged assault and the fact that there is no evidence establishing that the accused person was choked by food. The court is hesitant to accept as conclusive the cause of death stated by the medical expert in the post-

mortem report, exhibit P3. In the summary report of exhibit P3, the expert indicated that he saw brownish food particles in the mouth of the deceased which is likely to be stomach content aspiration. It seems to this court that the conclusion made by the expert as to what caused the deceased's death was not based on reliable medical examination. The court is in agreement with the submission made by the learned state attorney which is guided by the decision in the case of **Abdul- Abdul- Baad Timim vs SMZ (2006) TLR 188** where the Court of Appeal held that when the evidence of eye witness is found to be credible and trustworthy, medical opinion pointing to alternative possibilities is not acceptable as conclusive. The court finds the testimony of PW1 credible and trustworthy in establishing the cause of death.

Having established that the accused person's actions caused the deceased's death, the principal question that arises in this case is whether the accused person was insane at the time of the commission of the acts within the terms of section 13 of the Penal Code. This matter was first raised by the defence case as a triable issue during the plea taking. The court sought from the medical officer in-charge of Mirembe Hospital in Dodoma, the examination of the mental condition of the accused and an opinion as to

whether at the time when the offence was committed the accused person was insane so as not to be responsible for his actions. The report prepared by the institution was admitted as exhibit C1. Its contents and conclusions are undisputed by the parties. This court was asked to accept its findings and conclusions.

In essence, that court commissioned report dated 2/7/2020 with Ref. No. 10753/2020 was made by Dr. Enock Eteregho Changarawe Psychiatrist at Isanga Institution. It gives a comprehensive account of the medical examinations conducted on the accused and provides opinion on the question asked by this court.

The report is based on medical examination and clinical interviews of the accused person. It reveals the medical condition of the accused as diagnosed by the expert, which indicates that: The accused person is mentally ill patient since 1995; he was jailed before for one year because of violence; he is on tablets Haloperidol 1.5 mg once at night. It concluded that the accused person is suffering from mental disorder Schizophrenia and he was therefore insane during the time he committed the alleged offence.

The general principle of criminal liability is that everyone is presumed to be sane unless proved otherwise. Section 13 of the Penal Code provides that 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 the mind. The onus rests upon the accused person to prove his plea of insanity.

Considering the entirety of circumstances, the evidence adduced in this case and the expert medical opinion, I am fully satisfied that the defence of insanity is made out and the accused person is entitled to the benefit of section 13 of the penal code because at the time of committing the alleged offence he was suffering from a mental disorder and therefore he was incapable of understanding what he was doing.


Considering the requirement of section 219(2) of the Criminal Procedure Act, I hereby make a special finding that the accused committed the act charged but by reason of his insanity he is not guilty of the offence charged.

Accordingly, under section 219(3) of the Criminal Procedure Act, I order that the accused person be transferred and kept in a mental hospital, that is, Isanga Institution, as a criminal lunatic where he should be dealt with

according to the law. The record of the proceedings and orders to be transmitted to the relevant authorities by the Registrar.

It is so ordered.




K.N. ROBERT
JUDGE
23/10/2020