

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(TANGA DISTRICT REGISTRY)**

**AT KOROGWE**

**CRIMINAL SESSION NO. 03 OF 2019**

**(ORIGINAL JURISDICTION)**

**THE REPUBLIC**

***-VERSUS-***

**SELEMANI SHENGOMA@KIKWETE@HAJI**

**JUDGMENT**

*Last order & Judgment: 10/12/2021*

**AGATHO, J.:**

The accused person, Selemani Shengoma was arraigned before this Court facing a charge of murder c/s 196 and 197 of the Penal Code [CAP 16 R.E. 2002]. The prosecution alleged that on 31/05/2016 at night hours at Kilimilang'ombe Village, Handeni District, Tanga Region he murdered Shabani Haji by hitting him with a heavy piece of wood. The accused person pleaded not guilty to the charge. To prove the charge the prosecution brought five (5) witnesses PW1 – Grace Ezekiel Mwaikono; PW2 G. 9889 D/C Flavianus; PW3 – Dr Mbonea; PW4 - Mzigwa Mnondwa; and PW5 Hassan Said@Bago. They tendered two (2) exhibits, P1 – Accused extra judicial statement, and P2 – postmortem report. The

defence on their side had one witness DW1 – the Accused himself, and they did not tender any exhibit.

The prosecution was represented by Paul Kusekwa and Ms. Sarah Wangwe learned State Attorneys. And the Accused was represented by Advocate Switbert Rwegasira.

Before going into details of the evidence adduced by both parties. There are two things that needs to be clarified from the outset: first the trial commenced before Hon. Judge A.R. Mruma, and he heard the two prosecution witnesses PW1 and PW2 and one exhibit was received, that is exhibit P1 (the Accused's extra judicial statement). I succeeded him in the session that commenced on 15/11/2021 as he was transferred to another duty station. Prior to the session conducted in June 2021, the case at hand was adjourned on 18/03/2020 following a prayer by the defence counsel that the Accused be examined his mental status during the commission of the offence. The prayer was granted, and the Court ordered by virtue of section 220(2)(3) and (4) of the Criminal Procedure Act [Cap 20 R.E 2019] read together with Section 219(2) and (3)(a) of the same Act that the Accused be sent to Isanga Mental Hospital for examination to determine his mental status at the time of the commission of the offence.

On 15/06/2021 this Court received the report from Isanga Mental Hospital. The Court ordered that the prosecution shall proceed to lead evidence from where PW2 ended. This was done. When I took over as presiding judge, the trial proceeded with hearing of PW3's testimony.

The Court also ordered that, at the closure of the prosecution case and if it is found that the Accused is incapable by reason of mental health to make his defence then the Court will proceed to make orders pursuant to Section 216(3) of the Criminal Procedure Act [Cap 20 R.E 2019] and in line with decision of **MT. 81071 PTE Yusuph Haji@ Hussein v R, Criminal Appeal No. 168 of 2015 (CAT -Tabora – unreported)**.

The medical report from Isanga Mental Hospital signed by Dr Changarawe was on 15/06/2021 read out during trial, and it became part of Court record. The report showed that the Accused was sane when the offence was committed. As stated earlier, the medical examination was done following the order given by this Court on 18/03/2020 under section 220 (2)(3) and (4) read together with section 219(2) and (3)(a) of the Criminal Procedure Act [Cap 20 R.E 2019].

That order was given amidst the trial. It is also on record that the Court observed that the current mental status of Accused was not inquired into.

Thus, the Court did not inquire as to whether the Accused is capable of making his defence. Nevertheless, it ruled on 15/06/2021 that after the closure of prosecution case the Court will determine whether the Accused is incapable of making his defence due to mental health problem (unsoundness of his mind) then the Court will proceed to make orders under Section 216(3) Criminal Procedure Act [Cap 20 R.E 2019] and in line with the decision of CAT in **MT. 81071 PTE Yusuph Haji@ Hussein v R, Criminal Appeal Ni. 168 of 2015 (CAT -Tabora – unreported)**.

However, the Court on 08/12/2021 after the closure of the prosecution case ruled that the Accused has a case to answer. It also found that the Accused can make his defence. Nonetheless, considering the Accused's demeanor the Court was of the view that he may be incapable of understanding the trial proceeding. For that reason, the provision of section 221 of the Criminal Procedure Act [Cap 20 R.E 2019] was invoked.

Having elucidated the background of the trial proceedings, and turning to the prosecution case, they paraded five witnesses. To begin with, PW1 – Hon. Grace Mwaikono (Resident Magistrate, and justice of peace). She testified that the Accused was brought to her on 08/06/2016 at Chanika Primary Court. She said wrote extra judicial statement of the Accused. She

followed the Chief Justice's Guideline in writing confessions (extra judicial statements). The Accused told her that he was not tortured, and he came to her voluntarily and willingly. She inspected him if he had scars or fresh wounds. She also asked him if he was ready to explain to her what happened. She testified that the Accused confessed to have killed his brother. She tendered the extra – judicial statement which was admitted as exhibit P1.

The second prosecution witness was PW2 – G 9889 DC Flavianus. He was the one who investigated the incident. He started the investigation on 31/05/2016 when he was assigned the task by OC CID after receiving the information from Kilimilang'ombe Village that there was murder incident. He went to the crime scene and found the deceased body lying on the sulphate bag in one room where the deceased and accused sleep. The house had two rooms. In one of rooms he deceased and the accused were sleeping, and the other one was used as a kitchen. He drew the sketch map of the crime scene. The house where the body was found belonged to the deceased. He said they took the body to Handeni District where postmortem was conducted. The postmortem examination revealed that

the deceased died because of the wound on his head inflicted by a blunt object which damaged his skull and caused severe internal bleeding.

On 02/06/2016 PW2 he was informed by OC-CID that the accused had been arrested by the Wananchi. Then Police went to the Kilimilang'ombe village to pick the Accused and brought him to Handeni Police Station. On 03/06/2016 PW2 interrogated the Accused. He testified that the Accused confessed to have killed his brother. The PW2 wrote the Accused's cautioned statement which was not admitted in evidence for contravening the law, section 57(2)(e) of the Criminal Procedure Act [Cap 20 R.E 2019] as it showed that the interrogation commenced on 03/06/2016 at 08:01AM but it did not show the time it ended. PW2 also said he discovered in his investigation that the accused was not in good terms with his later brother. He added that the accused revealed that the deceased has misappropriated his TSHS. 5 Million which he had sent to his mother. The PW2 testified that the Accused disappeared immediately after the deceased death.

He added that he heard that the deceased is married and had children but he neither interrogated his wife nor the children. He further said it took six days to take the Accused to the justice of peace because the latter was occupied with other duties.

PW3 was Dr Mbonea Jeremiah Yonaza. He told the Court that in 2004-2019 he worked at Handeni District Hospital. On 31/05/2016 he was asked to do examination of deceased body that was in the mortuary at Handeni District Hospital. He examined the deceased body from the feet to the head. And thereafter, he wrote a postmortem report. He stated that the deceased body had a big wound on the head, he was bleeding on his nose and ears and there was black mark on the neck. According to his postmortem examination the cause of death was the big wound that led to brain laceration on the head and the skull fractured caused by being hit by a heavy and blunt object.

He testified that he was told the death occurred few hours before the postmortem examination. He said he does not when exactly when it occurred. But he can identify the cause of death before 72 hours. He stated that when the deceased was brought, he was bleeding. If the deceased body would have been brought after 72 hours he would have decomposed. The PW3 concluded that he does not know who killed the Accused.

He said he does not know where the rope on the deceased neck went. He said he did not remove it. The death was caused by being hit with heavy

object. He stated that he did not examine whether hanging by rope was the cause of death. According to him it was the heavy object that hit the deceased head and fractured his skull that led to brain to cease to function.

PW4 – Mzigwa Mnondwa, this is deceased and Accused's mother. She said he had five children: Shabani Haji (deceased), Salima, Subira, Selemani and Salehe. One Shabani Haji is deceased.

She testified that on 31/05/2016 she found Shabani dead. She said the Accused (Selemani) went to Morogoro to do crop production to his boss. PW4 stated that she was phoned by the Selemani's boss that he has become insane. Then she sent a person to take him. She said upon his returns the Accused stayed home for five days thereafter the incident occurred. She testified that the Accused went to Morogoro when he was ok. But he came back home totally insane. Selemani was sharing room with his brother Shabani. PW4 said the distance between her house and their (deceased and Accused) house was about 20 metres. She said because he was insane and every time, he sees cattle or goats he says they are his. She added that he wanted to sell her goats. PW4 added that the Accused quarreled with his brother (Shabani) once while at the farm.

She went on stating that when she woke in the morning on 31/05/2016 she went to take her slippers from Shabani's room then she left, then she went back again, and she wanted to wake Shabani up so that he can go to milling to grind maize. She found Shabani dead, she started shouting. She saw blood on his mouth oozing into the bed. She added that Selemani (the Accused) was not in the room when she saw the Shabani's body. She testified that upon her raising alarm the village leaders, and the police came later. She stated that they took the body for postmortem and thereafter they started looking for Selemani. They told her that they looked for Selemani because they sleep in the same room. She stated that does not know who killed Shabani because he was dead and there was nobody in the room. She recalled that a night before the incident she cooked ugali and left it for Shabani. She said when he came back it was night, she did not see him. She further said that Selemani ate his ugali.

She remembered that Selemani wanted to sell her goats. She said Selemani became insane when he went to Morogoro. That was in the same year 2016. She said she wanted to take him to hospital to check his mental status. She stated that she did not hear noise or cry when Shabani was killed because she was asleep. She testified that she suspected Selemani

because of his insanity. She said that she did not see him killing his brother.

She further told the Court that Shabani was a peasant, divorced and did not have any quarrels with anybody. She said that Shabani and his wife had one daughter. This child was staying with his maternal grandmother. His wife was married to another man. Shabani's wife and her new husband are living at Msisma village. The PW4 added that the person who married Shabani's ex-wife sometimes comes to Kilimilang'ombe. He did not have any fights with Shabani. She concluded by saying that she want to go with Selemani if he is ok from his insanity. She would like him to return home if he has recovered.

When asked by assessors she said she found the slippers inside. She testified that Shabani asked for slippers at around 20:00PM. She went to take the slippers at 07:00AM from Shabani's house. The door was not locked. The quarrels between Shabani and Selemani started after he came back from Morogoro. She stated that she had thought Selemani went to the toilet when she found Shabani is dead on the bed.

She said she went to Selemani's boss in Morogoro. She also said there is a person in Kilimang'ombe who asked for Selemani that man said his brother

is in Morogoro. When Selemani went to Morogoro he was not drinking or smoking anything. She also said Selemani's father is dead. She told the Court that Selemani has not made any trouble to her.

PW4 said at 20:00PM after Shabani has showered ugali was not ready yet. When she finished cooking Selemani was there at home. She slept early she does not know when Selemani went to sleep. She stated that on the material date she knocked their door, but nobody answered or opened the door. She entered the room and took the slippers.

PW5 – Hassan Said @Bago the Accused is PW4's brother. He lives at Kwediziwa area Kilimiang'ombe village. On 31/05/2016 he was at home Kilimiang'ombe. It was around 07:00AM heard people crying, he went out of the house. He realized that the noised/cries came from my sister Mzingwa. When he reached at his sister's home, he saw his sister crying that his son has been killed. He said there were many people and when they went inside, they found really Shabani is dead on the bed, his head is wounded on the left side.

As he was moving close to the bed, he saw the head skull broken, and on the floor, there was a heavy piece of wood with blood stains. he also saw

he had shoe lace tied on the deceased neck. Thereafter, people phoned the police. They came later and took the deceased body to the Hospital.

The house in which the deceased died it was like a kitchen. It was a single room house. It was a small one. It was known as the deceased and Accused's house. The deceased is Shabani Haji Waziri.

The moment he went to the crime scene he did not see the Accused. PW5 said they took the deceased's body to the Hospital. He does not know what the doctor did. But eventually the body was taken to mortuary. They asked the doctors if they have finished the examination to let us take the body for burial. They gave us the body and we went to bury it. He does not know who killed Shabani Haji. He did not see anybody there. Shabani had two male siblings (Selemani and Salehe), female (Salima, and Subira).

Shabani was sleeping with the Accused in the same room. After his death, Selemani was apprehended on the third day. He was arrested at Kilimilaang'ombe. PW5's house is about 70 feet from the crime scene. He saw Selemani in the evening of the incident night.

He wrote a statement yes. He said Shabani Haji is my nephew. I got information about the death. The school children were the ones who said there was an incident there. He knows Selemani for a long time. Selemani

was sane. The problem started when he went to Morogoro. His sister got information that Selemani has become insane. After he was brought back, he saw Selemani he was indeed insane. PW5 said the things Selemani was talking about he seemed insane. He added that they took him to witch doctors, but it did not help.

After the incident Selemani (the Accused) disappeared. And his mother was saying that Selemani might have killed his brother. Nobody saw him killing his brother. The PW5 said he went into the room with the village Chairperson, VEO and *Kitongoji* chair (Mganga Mbwana). Selemani was arrested close to the Kwediziwa street office, and it was the third day it was around 20:00PM. The PW5 said he is a militia. He got the information from various people. He found the Accused kept under restraint in the Kwediziwa street office.

The PW5 testified that when they were given the body the shoe lace was not there. He also saw the deceased head skull broken.

The PW5 stated further that the deceased and the Accused's bodies looked alike. They were both slim. The deceased normally smoked cigarettes. He does not know if he was drinking

The defence side had one witness, DW1 – Selemani Shengoma@Kikwete. He testified that he lived at Kilimilang'ombe Village, Handeni District. He is a peasant. He lived with his mother. He is not married. He was still making my life. He said then this allegation happened. He protested that it is not true that he killed Shabani. He knew him because he was at their house. He is his brother. DW1 said he saw him (deceased) when he was arrested. The house is the same but he (deceased) is married and he has his wife. The house was mine. DW1 testified that the deceased was coming and sleeping at his house. He went to Morogoro. But the job was of gossip (umbea). DW1 testified that when he saw that there were too many gossips he stopped. He stated that he did not have any quarrels with the deceased. The normal disagreements are common. He said they did not have any fights.

DW1 said when he went back home from his movements, he found a person killed in his house. The DW1 said he himself is a street boy. The deceased was not allowed to come back and sleep in the Accused's house. He was married and he had a child. The DW1 did not know if Shabani was divorced. When he left for Morogoro Shabani was married. He did not kill Shabani. He asked why he should deny to have killed him. He is his

brother. He said on the incident day he slept in his friend's house it was weekend. He also wondered if a person is married, why was he (Shabani) not with his wife at his home. He said he suspect that he was brought to his house while already killed.

DW1 said that he did not say anything to the justice of peace. She just checked if he has any wounds or scars and then she handed him back to the Police.

The DW1 said the prosecution witnesses have not proved that he killed Shabani. He added that it is up to the judge to set him free or can decide as he thinks fit. He prayed that the judge should determine his fate.

The DW1 said the name Kikwete is the name of his grandfather. He said he came back from Morogoro after his mother phoned and told him that he should return. He came back from Morogoro in 2014, and the incident took place in 2016. He came back home when they suspected he is insane. He said it is ok for mothers to be worried when their children are far away for a long time. They want to see them.

The DW1 testified that he got information that Shabani died on the same day in the morning. He heard about it when he was at home. He does not remember when he was buried. He did not participate in the burial. He told

the Court that he was arrested that is why he could not attend the burial. The DW1 said his mother (PW4) is the one who told him that Shabani has been killed. He asked his mother why Shabani was killed and then placed his body in his house. the DW1 went on saying that Shabani has his own house at his in laws. He said the house where deceased body is found is his as he built it himself.

He testified that the incident occurred on a weekend, he was in the street. He went at the crime scene. It is his home. He was arrested on the same day. He was arrested at home. He was arrested by militia including the PW5. He has never smoked cannabis. He told the Court that he was taken to Isanga Mental Hospital where they checked him and they said he was sane. He said they gave him some tablets. They told him to return home to continue with the case.

The DW1 said they have family goats. When he went to Morogoro the house was left with nobody. They did put goats in the house. Asked about Shabani's wife he said she is called Fatuma, and his daughter is called Msekwa.

The DW1 stated further that on 30/05/2016 after taking his dinner mama is the one who cooks. Then he left and went out to play pool table, betting

and he slept there in his friend's ghetto. He slept at Muhando Mgaza's home. He said he has never been taken to any witch doctor. He stayed home (Kilimilang'mbe) from 2014 to 2016. The DW1 said that he normally takes business to Mnadani. He added that he did not know if his brother (Shabani) was divorced.

Regarding alias name Kikwete, DW1 said the name Kikwete he got it when he came back to Kilimilang'ombe Handeni that is when he got that name. It is the name of his grandfathers from both maternal and paternal sides.

He stated that each person eats at his own time. he admitted that there was firewood in the room. He said his Mama kept them in his(accused) house. Mama kept goats and firewood.

The DW1 stated that he was not home. After eating dinner, he went out. He does not know when the deceased came to his house. He said he does not know who killed and brought him there. The DW1 said when he left for Morogoro he left his house to Shabani.

The DW1 also stated in his testimony that the doctors at Isanga Mental Hospital said he is sane. People say he is insane. He protested by saying that the insane people are at Mirembe Hospital. He said he was phoned to

come back home. He stayed in Morogoro from 2010 to 2014. The DW1 said he believes what his mother said.

He said when he came back from Morogoro he found Shabani at Kilimilang'ombe. After coming back from Morogoro he stayed with him in 2014 to 2016. DW1 told the Court that they lived together. He said after eating dinner cooked his Mama he left. He said he did not sleep with him (deceased) in his house. He said the deceased was not sleeping in his house. DW1 concluded that there were times he was working in the mines.

In the case at hand the Court is confronted with two key issues (1) whether the Accused murdered the deceased with malice aforethought? and (2) whether the defence of insanity was proved to the hilt? Along that how should the Court resolve the contradiction of the PW4 and PW5 testimonies that the Accused is insane on the one hand, and the medical report from Isanga Hospital which shows that the Accused was sane during the commission of the offence on the other? Moreover, if the Accused is incapable of understanding the proceedings what should be done? Further, if the Accused is found guilty what appropriate penalty should befall him? These issues were determined with the help of the learned counsels for prosecution and defence.

The Prosecution's counsel submitted that the accused was charged for murder of Shabani Haji c/s 196 and 197 of the Penal Code [Cap 16 R.E 2002]. That he murdered the deceased on 31/05/2016 at night at Kilimilang'ombe village, Handeni District. We brought five witnesses and two exhibits to prove the charge. The prosecution submitted that they have proved the charge beyond reasonable doubt.

To cement their position, Mr Kusekwa S/A, argued that though there was no eyewitness, the charge was proved by circumstantial evidence that was consistent and credible. It linked the Accused with the murder. We are saying so because there were actus reus and mens rea.

There is no dispute that Shabani Haji was killed and hence he is dead. This was proved by exhibit P2 tendered by PW3 Dr Mbonea. The same exhibit shows that the death was unnatural. The PW3 testified that the death was caused by the hit by heavy object on the head which fractured or broke the deceased skull.

The learned S/A asked, is it the Accused who caused the death of the deceased? The PW1 (Grace Mwaikono – justice of peace) testified that the Accused was taken to her where he confessed to have killed his brother. The Court of Appeal has held in **Posolo Wilson@Mwalyego v R,**

**Criminal Appeal No. 613 of 2015 at page 7** that confession made before civilian or any other person who is credible may be used to convict the Accused. In the present case the Accused confessed to have killed the deceased before PW1.

Another circumstance that points to the Accused as the one who killed the deceased is that on 30/05/2016 the PW4 testified that on that day he Accused was home she gave him food (dinner), and that the Accused used to sleep with the deceased in the same room and house. The PW4 testified that the Accused had quarreled with his brother (deceased) over the family goats. The Accused wanted to sell the family goats. The PW4 also testified that on 31/05/2016 morning the deceased was found dead in the room he was sharing with the Accused. This testimony was corroborated by the testimony of PW5 (the deceased and accused's uncle) who testified that after the incident the Accused disappeared for about three days. He was arrested on 02/06/2016 at night near the street office.

Basing on the above testimony that the Accused went hiding after the incident, and death being a big event the whole village was aware, the Accused also in his defence he said he went home on the same day of the incident in the morning. This defence is incredible because the testimonies

of PW4 and PW5 show that the Accused was arrested on third day (02/05/2016). Mr. Kusekwa, S/A prayed that the Court should find the Accused to have lied because PW4 and PW5 were credible witnesses and they are entitled to credence as it was held in the case of **Goodluck Kyando v R [2006] TLR 363**. These circumstances show that the Accused is the one who was involved in the incident. And there is nobody to be pointed to this, the Accused vanished after the incident, he was not found in the room he was sharing with his brother, and he had quarrels with his brother. The prosecution contends that there is no any other person who can be blamed for the death of the deceased than the Accused. This has also been held in the case **Mustapha Maulidi v R, Criminal Appeal No. 241 of 2014 CAT at Mtwara** (unreported).

At this juncture we ask whether the Accused murdered the deceased with malice afore thought as defined under section 200 the Penal Code [Cap 16 of 2019] and as held in **Chrizant John v R, Criminal Appeal No. 313 of 2015 the Court of Appeal of Tanzania at 27 – 28**. The things to be considered are the weapon, force used, the body part inflicted, conduct of the Accused before and after the incident.

The weapon used is a heavy wood, the force used was big as it caused a big head wound and broke the skull of the deceased's head. The body part inflicted with the wound was the head. The conduct of the Accused after the incident is that he went hiding after committing the offence. The State Attorney persuade the Court that the charge against the Accused has been proved.

The Court had an opportunity to observe the demeanor of the Accused, as it ordered before that the medical examination be done to determine the mental status of the Accused during commission of the offence. That was done, and the report was received, and it showed that he was sane. Although since the beginning of the trial, one may draw distinct inference. The State Attorney submitted that the Accused seemed at times to be insane. This has been apparent in his defence he said that he came back to Kilimilang'ombe in 2014 while the PW4 and PW5 said that he came back five days before the incident. It was the learned State Attorney's argument that it may be that the Accused was indeed insane, or he has lied to Court to exonerate himself from the charge.

The Court indeed saw the demeanor of the Accused. He appeared sometimes during the trial to have lost his mind. It means he was at times

of sound mind and after a short while he showed signs of being of unsound mind. While Section 13 of the Penal Code [Cap 16 R.E 2019] entitles the Accused to plead defence of insanity. However, such defence has to be raised in accordance with the law. That is section 219(1) of the Criminal Procedure Act [Cap 20 R.E 2019]. That provision of the law requires the defence of insanity to be raised when the Accused is called to plead. This was not done. Instead, it was raised when the PW2 was adducing his evidence. Legally speaking there was no defence of insanity raised in this case because the same was raised in contravention to Section 219(1) of the Criminal Procedure Act [Cap 20 R.E 2019]. Moreover, the evidence on record (medical report from Isanga Mental hospital) ruled that the Accused was sane when the offence was committed. This eliminated the possibility of this Court to do special finding as required by section 219(2) of the Criminal Procedure Act [Cap 20 R.E 2019].

In his defence, the accused (DW1) denied the charge. It is the law that the prosecution has duty to prove the charge beyond reasonable doubt. This was held in the case **Jonas Nkize v R [1992]TLR 214.**

The defence counsel submitted amidst trial (when PW2 was testifying) that the Court has seen the Accused behaviour/demeanor which showed that

he could be insane. The Court therefore ordered the Accused to be undergo medical examination at Isanga Mental Hospital to determine his mental status whether he was sane or insane during the commission of the offence. The medical report dated 01/03/2021 was brought before this Court. The report shows that the Accused was sane during the commission of the alleged offence. Following that report, and according to the law under Section 216 of the Criminal Procedure Act, the Court directed that the trial shall proceed by both parties to proceed to adduce evidence.

After receiving the medical report and the case adjourned to another session, the trial resumed in this session. And since the prosecution had already brought two witnesses (PW1 and PW2) in the previous session, during the present trial session they brought three witnesses (PW3, PW4 and PW5). In proving their case, the prosecution ought to prove the ingredients of murder as stated in the case of **R v Masunga Nzengo, Criminal Session No.46 of 2019 HCT at Nzega – Tabora**. The court enlisted the ingredients of murder to be:

- (1) There is death of a person
- (2) The death was caused by unlawful act or omission
- (3) The death was caused by accused with malice afore thought

- (4) Whether the prosecution has proved the case beyond reasonable doubt.

While other ingredients were proved, what remained contentious is a third ingredient that the accused caused the death of the deceased with malice aforethought. A question is whether the accused had malice aforethought?

The testimonies of PW4 (accused's mother) and PW5 (accused's uncle) showed that the Accused had been suffering from mental illness, insanity and that is why they as relatives went to take him from Morogoro and returned him home (Kilimilang'ombe).

Apart from the above testimonies of PW4 and PW5 this Court had an opportunity to see for itself the demeanor of the accused during trial which confirms that the accused may indeed be insane which is the contrary to what the Isanga Mental Hospital has opined.

The defence counsel argued that in the circumstance of this case there is contradiction between what the medical experts have said and the testimonies of PW4 and PW5 and the Court also has observed the demeanor of the Accused. In the case of **Abdul-Abdul-Baad Timim v SMZ [2006] TLR 188**, the issue was whether the opinion of an expert witness can override credible and trustworthy evidence of an eyewitness.

The Court held that when the evidence of eyewitness is found to be credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Although there is the medical report from Isanga Mental Hospital which showed that the accused was sane during the commission of the alleged offence, the evidence of PW4 and PW5 is credible and trustworthy as the Court has seen by itself. I found this argument to be valid. However, as I have stated earlier the defence of insanity was raised in contravention to Section 219(1) of the Criminal Procedure Act [Cap 20 R.E. 2019].

The learned defence counsel submitted that the case of **Masunga Nzengo's case** explained about the third ingredient of murder that is malice aforethought. He argued that in the present case the Accused did not act with malice aforethought. He invited the Court to invoke Section 221(1)(b) and 221(4) of Criminal Procedure Act [Cap 20 R.E 2019] which provides that if the Court is satisfied that the Accused is found guilty of offence charged shall sentence him to be detained during the President's pleasure.

The testimony of PW1, and the Accused's confession (exhibit P1) confirmed that the Accused had quarrels with his brother (deceased). He blamed him

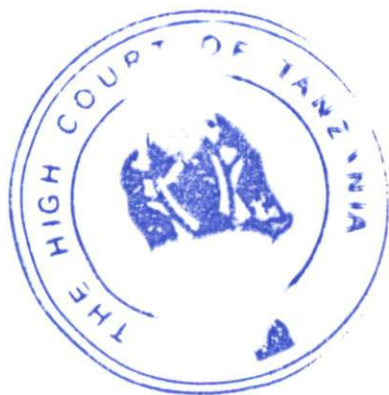
for misappropriating his TSH. 5 Million which he sent to his mother. They also had disagreements on the family goats, where the Accused wanted to sell them. The inference can also be drawn in the accused's testimony that he did not like his brother to sleep in the house which he (accused) claimed to be his while he (deceased) is married. This shows that the Accused had motive to harm or kill his brother (deceased). As that is not enough, he vanished immediately after the incident. He went missing for three days, and on the third day he was arrested at night near the street office. The testimonies of PW4 and PW5 confirmed that the house was of the deceased and that they (deceased and accused) were sharing room. The Accused's defence that he was not at the crime scene is incredible. He did not call a person owning the Ghetto where he claimed to sleep that night as a witness. These facts indicate that the Accused did some acts while sane.


Turning to the defence of insanity, in this case the defence of insanity was not raised before the prosecution lead its evidence. It was raised amidst trial when the PW2 has finished giving his testimony. It may thus be said to be an afterthought. Thus Section 216 of the Criminal Procedure Act was not invoked. Again Section 219(1) of the same Act was contravened

because the defence was raised while hearing has commenced. But although the medical report showed the accused was sane during the commission of the offence, and for the sake of justice and given the demeanor of Accused during trial that was supported by testimonies of PW4 and PW5, the Accused appeared not to be understanding the trial proceedings and the Court therefore invoked the provisions of Section 221(1)(b) of the Criminal Procedure Act [Cap 20 R.E 2019].

To conclude, the evidence of PW4 and PW5 though circumstantial was credible, consistent, and corroborated by the DW1's testimony, and the grudges the Accused had with his brother, the fact that he disappeared after the incident and raised an incredible alibi showed that he was sane and killed the deceased in cold blood. Save for his incapability to understand the trial proceedings as visibly demonstrated by his demeanor during the trial, I found him guilty of the offence charged and convict him as per section 221(1)(b) and 221(4) of the Criminal Procedure Act [Cap 20 R.E 2019]. I thus differ with the assessors who found him not guilty in their opinions.

**DATED** at **KOROGWE** this 10<sup>th</sup> Day of December 2021.



  
**U. J. AGATHO**  
**JUDGE**  
**10/12/2021**

**SENTENCE**

**Kusekwa S/A:** The Accused had no past criminal record.

**Advocate Rwegasira:** The Accused given his state of mind. We pray that he be detained during President's Pleasure.

**Court:** The Accused is sentenced to be detained during the President's Pleasure as per Section 221(1)(b) of the Criminal Procedure Act [Cap 20 R.E. 2019] read together with Section 221(4) of the same Act.



  
**U. J. AGATHO**  
**JUDGE**  
**10/12/2021**

**Date: 10/12/2021**

Coram: Hon. Agatho, J

Accused: Present with his advocate Switbert Rwegasira

Republic: Paul Kusekwa and Sarah Wangwe State Attorneys

B/C: Jumanne

**Court:** Judgment delivered on this 10<sup>th</sup> day of December, 2021 in the presence of the Accused person, his advocate Switbert Rwegasira, and Mr. Paul Kusekwa and Sarah Wangwe prosecution State Attorneys.

**Court:** Right of Appeal fully explained.



**U. J. AGATHO**  
**JUDGE**  
**10/12/2021**

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**U. J. AGATHO**  
**JUDGE**  
**10/12/2021**

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