THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL SESSIONS CASE NO.60 OF 2017

REPUBLIC

VERSUS

SHIJA S/O SALU @ NYANDA

JUDGEMENT

Date of Last Order: 16.06.2022

Date of Judgement: 24.06.2022

Ebrahim, J.

Shija Salu @ Nyanda **("the accused")** has been arraigned in this court charged with one count of murder **c/s 196 and 197 of the Penal Code, Cap 16, RE 2002**. It is alleged by prosecution that the accused, on 25th December,2016 at Manyanya Village within Chunya District, in Mbeya Region murdered one Shija s/o? **("the deceased")**.

The accused pleaded not guilty to the charge.

The cause of death of the deceased as **per exhibit PE1** and as explained by PW3 is severe head injury and severe bleeding.

To prove their case, prosecution called a total of seven (6) witnesses and tendered four exhibit. The defense side called a total of 2 witnesses including the accused himself and tendered one exhibit.

The event of murder that led to the prosecution of the accused person in this case was narrated by **Mikael Dotto (PW1).** He testified before the court that on 25.12.2016 at around 1700hrs while at home after receiving a phone call from Haruna telling him that Shija Salu has killed Shija, he rushed to the crime scene accompanied with one Paschal Alphonce. At the scene they found the accused person naked, the deceased's body (Shija) lying outside the door with his head "fractured" and his private parts cut off while the accused eating the deceased' brain. They managed to man-handle the accused, tie him and called the police. He described the state of the accused after killing the deceased like a mad-man, crazy though he had never heard that he had mental problems. **PW2, Mr. Johannes Rwelamila Bitegeko**, received a phone call informing him of the murder incident and together with his fellow police namely **Hassan (PW4), Aburhani (PW5), Evodius (PW6)** and the doctor named **Mdoe (PW3)**

went to the crime scene. He said they found the body of the deceased lying down with a fractured head ("alikuwa amepasuliwa kichwa") and his private parts cut off, the accused tied by a rope. He also said that they found the accused in a normal state. Thus, **PW3, DR. Morris Msangola Mdoe,** conducted the postmortem examination of the body of the deceased and made a finding that the cause of death was severe bleeding. He tendered a Report on Post – Mortem examination of the late Shija which was admitted as **"PE 1". PW4, D8471 Sgt Hassan** was another police officer who accompanied **PW2** together with police Aburhani and DC Evolius. He sketched a map of the crime scene which was admitted as exhibit **"PE 2."**

PW5, F.3990 Sgt Aburhani, recorded the cautioned statement of the accused which was admitted as **exhibit PE3** after the court conducted a trial within a trial. The last prosecution witness who also went at the crime scene was **PW6, G9924, Corporal Evodius.** He recorded the statement of one Haruna Athumani and tendered his statement in terms of **Section 34B (1) and (2) (a) to (f) of the Evidence Act, Cap 6 RE 2019** which was admitted as exhibit **PE4".**

All the above mentioned prosecution witnesses testified to have been at the crime scene and seen the dead body of the deceased with his head fractured and private parts cut off. They also testified to have found the accused person at the crime scene tied with a rope and they all recognized him (Salu Shija Nyanda) in the during the trial.

Coming to the accused's defence, he testified as **DW1,** he said on the incident date i.e., 25.12.2016, he went back to the camp after mining together with Shija and Athumani. After eating, he went to the river to take a bath and it was when he was captured by PW1 and his son while naked. They tied his hands and legs telling him that he was involved in killing Shija and eating his brain. He denied to have any involvement in killing Shija as he was his friend and knew him since 2013. He said, the next morning of 26.12.2016 around 1000hrs at Makongolosi Police Station one police wanted to record his statement involving murder. He said he only told the police his name and later taken to Chunya Police Station accused of killing Shija. He challenged the evidence of PW5 being untrue. He admitted being taken to Milembe Institute were doctors were asking him questions. Responding to cross examination questions, he said when PW1 arrested him, he understood everything he was doing and before being arrested, he

remembered everything that happened up to when police arrived. He also remembered to have been taken to Milembe and that answered all the questions correctly and he was in a normal state. Defence side called **DR. Enock Eterego Changarawe,** a Medical Specialist Psychiatrist who testified as **DW2.** He said that upon receiving Shija Salu Nyanda on 18.09.2021 for medical examination and Psychiatric evaluation following the incident of murder; they conduct the examination by observing, asking him questions and going through the records of the statements of other witnesses including the accused himself after the incident. It was when they discovered that the accused had mental issue at the commission of the offence and exhibited symptoms of called "schizophrenia". He described the signs being hearing voices of unseen people talking bad about the person or that something bad is going to happen to the person. Other voices are a person believing that there are people who wants to do bad things to him and witchcraft beliefs. He said a person also becomes very aggressive, high tempered and assaulting people without any justifiable reason. He concluded that those signs happened to the accused when he did the offence as he was extremely "high tempered" and believed that the deceased was a bad person to him. He tendered a report

from Isanga Institution in respect of Shija Salu Nyanda which was admitted as exhibit **"DE1".** Responding to cross examination questions, he said when the accused appeared before him for the first time he admitted to have cut the diseased by using the machete believing the deceased wanted to injure him but he did not write that information in exhibit DW2. He admitted also that the main part of exhibit DE1 is what the accused said to the police and other witnesses' statements; and that what he said in the report is the summary of the evidence and statements from the police file. He also admitted not to have written any observations in the report; and that according to exhibit DE 1, there are no findings of observations reported apart from the summary from police file.

Counsels from both parties made their final submissions. Mr. Baraka, learned State Attorney for the prosecution maintained that they managed to prove that accused person with malice aforethought killed the deceased. They put their reliance on exhibit **PE3 and PE4** as well as the testimony of **PW1**. Prosecution further challenges the reliability of **exhibit DE1** tendered by DW2 as the same is not conclusive, hence does not bind the court and that it lacks observation of the doctors **(Bashiru Rashid Omar V DPP, Criminal Appeal No. 309 of 2017 page 11)**. Prosecution

further urged the court to scrutinize and consider the state of the accused during the trial and the fact that the accused did not testify in his defense that he was insane during the commission of the offence.

The three assessors who sat with me in this case differed in their opinion. The 1st and 2nd assessors were of the opinion that the accused person is guilty of the charged offence on the reason that the accused was found soaked with blood, he admitted that he was in a good state of mind and also the fact that defense depended on the defense of insanity. However, the 3rd assessor had a different opinion that PW1 said the accused was found naked eating the brain of the deceased and DW2 found the accused to have symptoms of mental disease. Hence, the court should find him not guilty.

In light of evidence adduced in court, the two main issues that call for determination by this Court are:

1. *Whether prosecution managed to prove the case beyond reasonable doubt.*
2. *Whether the accused was insane when committing the alleged offence.*

Beginning with the first issue, the sub-issues stemming there-from are whether prosecution evidence managed to prove that it was the accused person who killed the deceased; and if so he committed the killing with malice afore thought.

Abreast of the position of the law, the burden of proof is always on the prosecution and it never shifts (**Section 3(2) of the Evidence Act, CAP 6, R.E. 2002**); and the standard of proof is beyond reasonable doubt. It was held in the case of **Mohamed Matula V Republic** [1995] T.L.R 3, that:

> *"Upon a charge of murder being preferred, the onus is always on the prosecution to prove* ***not only the death but also the link between the said death and the accused;*** *the onus never shifts away from the prosecution* ***and no duty is cast on the appellant to establish his innocence"*** *(*emphasis is added)

Indeed, as the law also provides, in a murder case, prosecution has to establish two things, **actus reus** (tendo) and **mens-rea with malice aforethought**.

In this case there is no dispute that one Shija is dead and he died unnatural death. This fact was evidenced by PW1, PW2, PW3, PW4, PW5 and PW6. All prosecution witnesses testified to have visited the crime

scene and seen the dead body of the deceased. Moreover, exhibit PE1 proves that the post-mortem examination was conducted on the dead body of Shija and it was observed that cause of death was severe head injury and severe bleeding. Therefore, the 1st issue for consideration in looking at the whole prosecution evidence is whether **Actus Reus** was committed by the accused person.

The accused was implicated following the evidence of PW1, exhibit PE3 and exhibit PE4. This court shall also look on the testimony of DW1, DW2 and exhibit DE1.

I shall begin to address the evidential value of exhibit PE3. Counsel for the prosecution submitted before the court that the accused admitted the commission of the offence in his cautioned statement – **exhibit PE3**. As alluded earlier, the accused denied to have recorded his statement neither had he appended any signature and that the contents there in could have come from PW1. However, after conducting trial within a trial, the accused person admitted that all that is written there in concerning his family and his life is true and that PW1 never asked him about that information. More-so, PW1 had not known the accused or his family before and he came to know him when he joined him at Chunya. Moreover, nowhere had the

accused stated that he was forced or tortured to record his statement. Outrightly, I find that the accused recorded his cautioned statement voluntarily as per the law.

I have dispassionately studied the cautioned statement of the accused and discovered that exhibit PE3 contains an admission of killing the deceased but not a confession to murder. My observation comes from our jurisprudential position that for a statement to qualify as a confession, the accused person must incriminate himself and the statement must contain the admission of all ingredients of the offence. I find inspiration by the position of the Court Appeal in the case of **Rhino Migere V Republic**, Criminal Appeal No 122 of 2002, the position that was restated in the case of **Diamon s/o Malekela @ Maunganya V R**, Criminal Appeal No. 205 of 2005 where it was held that;

> *"... for a statement to qualify for a confession it must contain the admission of all ingredients of the offence charged as provided for under section 3(c) of the Evidence Act, 1967..."*

In the instant case, the accused was recorded admitting killing the accused but advanced the defense that Michael s/o Dotto, his boss, has inflicted some witchcraft on him so that he can mine more gold and took him as

"Ndagu-mzimu". He said he disappeared miraculously on 23.12.2016 around 1900hrs and came back at 0000hrs.

Again, before I proceed further, I find it apt to also point out that on 26.11.2018 when this case came for plea taking and preliminary hearing, counsel for the accused, Mr. James Kyando was recorded addressing the court as follows:

"Advocate: On the defense side we not ready for plea taking because ***we intend to raise the defense of insanity of the accused.*** *Therefore, we pray the court to order the accused be medically examined on his mind before he can plead. This prayer is made under section 219(1) of the CPA. After the medical report is ready then we can proceed with plea taking. That is all."*

Thereafter, the court issued an order for the accused to be committed to Isanga Mental Institution to ascertain his mental fitness during and after commission of the offence. The report was received by the court (exhibit DE1) with the conclusion that the accused was INSANE during the commission of the offence. That being the defense relied upon by the defense side, this court shall address the same in the course of determination of both issues.

Coming to the proof as to whether the accused was the one who killed the deceased, PW1 testified that he received a phone call from Haruna telling him that Shija Salu has killed Shija. He testified under oath that when he reached at the crime scene, he found the accused naked, has killed the deceased and eating the brain of the deceased. The fact that PW1 received a phone call informing him that the accused was killing the deceased is supported by the contents of **exhibit PE4**. Exhibit PE4 is a witness statement of one Haruna Athumani which was tendered by PW6 in terms of **section 34B (1) and (2) (a) to (f) of the Evidence Act, Cap 6 RE 2019**. The reason for the prosecution to produce a witness statement was the fact that the said important witness could not be found. They served notice to the defense side together with the letter and telegram from police in Tabora in showing that the police efforts to secure the witness has proven futile. Moreover, the defense side did not object to the tendering of **exhibit PE4.**

In reading page 2 of exhibit PE4, concerning the attack by the accused to the deceased, Haruna Athumani had this to say:

" *...na majira ya 16:00hrs SHIJA s/o SALUM akawa ameondoka kwenda porini mimi nikajua anaenda kujisaidia lakini baadae akaja na fimbo na kuja kwangu na kutaka kunipiga nayo mimi nikaishika fimbo hiyo na kumyang'anya baada ya hapo*

nikamwambia Shija s/o? "marehemu" kwamba ngoja nipande huko juu niombe msaada wa simu nimpigie boss wetu nimtaarifu kwamba Shija s/o Salum anatuletea fujo, ile wakati nataka kuondoka nikamuona Shija s/o Salum anaingia ndani na kuchukua panga akafika kwa Shija s/o? na kumkata panga ya kichwa ndipo SHIJA s/o? akaanguka chini hapo hapo wakati nashuhudia nikamuona SHIJA s/o SALUM anamkata kata kichwa SHIJA s/o? nikashangaa kumuona SHIJA s/o SALUM amebadilika ghafla na kufanya unyama wa namna hiyo..."

From the above statement, coupled with the testimony of PW1, it is clear that Haruna Athuman (exhibit PE4) witnessed the accused attacking the deceased with a machete on the head several times and when he ran and went to call PW1, PW1 found the accused naked eating the brain of the deceased with the deceased body lying down with a fractured head. The fact that the deceased sustained severe head injury was evidenced by PW3 and also reported in exhibit PE1. Moreover, the accused admitted the killing in exhibit PE3.

It is jurisprudential position of our laws that every witness deserves credence unless there are good reasons to question a witness credibility. In looking at the credibility of a witness, it can be evaluated by the coherence of his/her testimony matching with the testimonies of other witnesses or exhibits for that matter. In all four the testimony of PW1 is supported by the statement of Haruna Athumani as revealed in exhibit PE4.

In his submission, Counsel for the accused raised an issue on the discrepancy on names that exhibit PE4 mentions the name as Shija Salum whilst the accused's name is Shija Salu. He argued therefore that exhibit PE4 talks about somebody else. He argued also that PW1 did not see the accused killing the deceased and that exhibit PE4 does not show that Haruna Athumani witnessed the killing.

Beginning with the issue of names, PW1 testified that the accused, Shija Salu Nyanda is his son in law. PW1 showed the accused in the dock as Shija Salu Nyanda. DW1 admitted that PW1 is his father in law. PW6 said when he was recording the statement of Haruna Athumani he was referring to the accused as Shija Salum as well as Shija Salu. Moreover, PW1 mentioned Shija Salu, Shija s/o??? and Haruna Athumani as people who were working for him. The fact is not disputed by the accused and he also stated that he was with Shija s/o??? and Haruna Athumani on the day of the alleged murder incident. Furthermore, PW6 was also present at the crime scene and said that from the crime scene they left with Haruna Athuman and the accused to the police station. It follows therefore that, Haruna Athumani was using the names Shija Salu and Shija Salum interchangeably and both names connote the accused person in the instant

case. As for the issue that neither of the witnesses saw the accused killing the deceased, while it is true Haruna Athumani did not say that when the deceased fell down after being cut by the accused on the head he was already dead, he said he saw the accused cutting the deceased on the head. After that the deceased fell down and the accused continued to give him blows on his head (deceased) by using the machete. Then he ran to call PW1. PW1 said he received a phone call from Haruna Athumani that the accused killed the deceased and when he got there he found the deceased body and the accused eating the brain of the deceased. Exhibit PE1 revealed that the deceased died from severe head injury and severe bleeding. Thus, the fact that it was only the accused who was seen attacking the deceased on the head and those injuries were witnesses by all prosecution witness; and in the absence of any other person who was said to be present at the occurrence of the ordeal, it goes without say that, it was the accused who killed the deceased.

From the coherence on the above sequence of events and corroboration of evidence by prosecution witnesses in respect of **actus reus**, I find prosecution witnesses as credible in terms of the principle held by the Court of Appeal in the case **Patrick Sanga V. R,** Criminal Appeal No. 212

of 2008 where the case of **Goodluck Kyando V. Republic**, Criminal Appeal No. 118 of 2008 was cited with approval. Furthermore, as I would come to address the testimony of DW2 in the due course, while testifying before the court, DW2 pointed at the accused as Shija Salu Nyanda and said that when the accused appeared before him for the first time, he admitted to have cut the deceased by using a machete believing that he wanted to injure him. Again, as alluded earlier on, the defense side informed the court on 26.11.2018 that they intend to raise a defense of insanity, hence all the procedures were followed to the issuance of exhibit DE1. Therefore, I register no doubt that it was the accused who killed the deceased.

Having found that it was the accused who killed the deceased, the next step is to determine as to whether the accused committed the offence with malice afore thought. In addressing this issue, I shall also address the defense of insanity by the accused person.

Mr. Baraka, learned State Attorney in arguing the defense of insanity as raised by the defense, cited the case of **Rutu Qamara @ Qares Vs The Republic**, Criminal Appeal No. 110 of 2018 (CAT – Arusha – Unreported) which cited with authority the Court of Appeal cases of **Enock Kipera Vs**

Republic, Criminal Appeal No. 150 of 1994 (unreported); and **Charles Bode Vs Republic**, Criminal Appeal No. 46 of 2016 (Unreported) on the factors to ascertain malice-afore thought. Referring to the type of weapon used, Mr. Baraka told the court that the accused used machete to attack the deceased on the head which is vulnerable part of the body with a great force causing a fracture in such a way that the brain came out as evidenced by PW1. He added that the accused even chopped the deceased private parts and that proves malice afore thought. He also referred to exhibit PE4 where it was recorded that the accused after attacking the deceased chased Haruna Athumani saying "I want you". He concluded therefore that the actions of the accused proved malice afore thought.

As it has been revealed in this case, the defense raised a defense of insanity. Speaking on the same, Mr. Baraka submitting on the issue referred the court to the case of **Bashiru Rashid Omar Vs DPP**, Criminal Appeal No. 309 of 2017 where it was held that the burden of proving insanity is on the accused on the balance of probability and not merely raising a reasonable doubt. He argued that the accused testifying as DW1 did not tell the court that he was insane nor did he have any challenges to his mental health on the day. Speaking about the testimony of DW2 and

exhibit DE1, referring again to the cited case of **Bashiru Rashid Omar (supra)** on the holding that the court is not bound to accept medical experts evidence, he urged the Court to make observation that the expert did not sufficiently explain the methodology used. He urged the court to implore the wisdom of the Court of Appeal on the defense of insanity and dismiss it and find that the accused with malice aforethought murdered the deceased.

In his submission in support of their defense of insanity, advocate Adam argued that DW1 only remembered to be at the river and apprehended by PW1 and his son. He said according to exhibit PE4, DW1 left the deceased and Haruna Athumani to go to the forest to take bath which shows that indeed the accused went to the river and he was not arrested at the crime scene. He submitted on the issue of insanity that DW2 testified to have examined the accused and found him to have a mental disorder namely schizophrenia. He thus urged the court to consider the testimony of the accused, proof on the commission of the offence and the mental health challenges of the accused and set the accused to liberty.

Certainly, for a normal human being, it is very difficult to read or know the mind of another person. Hence it is not always easy to establish malice.

However, malice can also be inferred by considering other objective acts and, or omission like conducts or circumstances of the case.

Section 200 of the Penal Code, CAP 16, R.E. 2019, stipulate circumstances under which malice aforethought may be inferred. According to the cited law, inference can be made following the proof among other factors of an intention to cause death of or to do grievous harm; knowledge that the act or omission causing death will probably cause the death or grievous harm to some person; an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years. This position of the law has been further expounded by the Court of Appeal decision in the case of **Enock Kipera (supra)** cited in the case of **Rutu Qamara @ Qares (supra)** as cited earlier by Mr. Baraka. I fully subscribe to the holdings of the above cases of our apex Court.

Nevertheless, before tailoring the factors enunciated in the above cited case on the type and size of weapon used, force applied and kind of injuries inflicted on the particular part of the body; I cannot close my eyes and be oblivious of the defense of the accused in this case as a whole in comparison with other pieces of evidence.

As intimated earlier, the defense side before the beginning of the trial informed the court that they intend to rely on the defense of insanity during the commission of the offence. This led to the examination of the accused at Mirembe and Isanga Institution at Dodoma and issuance of exhibit DE1 by DW2 during the trial.

Generally, in a criminal responsibility, every person is presumed sane unless it is proved otherwise. This position is so provided under **section 12 of the Penal Code, Cap 16 RE 2019** where it provides that:"*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".* The presumption is rebuttable. **Section 13 of the Penal Code** recognizes that any disease affecting the mind and the conditions or effects of which meet the full requirements laid out in that section is an exception to criminal responsibility (defense). For the purpose of reference on this applicable law **Section 13 of the Penal Code** provides:

> *"13(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 was 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."

The defense of insanity requires the accused to prove, by clear and convincing evidence, that ***at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts***. It is therefore trite law that the critical and decisive point in time for ascertaining the state of mind of the accused person *is the time when the offence was committed and whether he was in a state of mind as to be entitled to the benefit of section 13 of the Penal Code.* As such, insanity is a question of fact, which can be inferred from the circumstances of the case *and the conduct of the person at the material time*. This was observed by the Court of Appeal of Tanzania in the case of **Hilda Abel v. R (1993) TLR 246**.

"The onus of proof rests upon the accused to make out his plea of insanity; and the standard of proof is on the balance of probabilities and not merely raising a reasonable doubt as to the sanity of the accused". This position was underscored by the Court of Appeal of Tanzania in the cases of **Agnes Doris Liundi v. R (1980) TLR 46**; and **Majuto Samson v. R,** Criminal Appeal No. 61 of 2002 CAT at Mwanza (unreported).

From the above therefore, when the defense of insanity is raised in court the question for determination is *whether the accused, at the time he committed the offence was insane to the extent of being incapable of knowing that what he was doing was wrong or contrary to the law* **(see the cited case of Bashiru Rashid Omar (supra)**.

The Court of Appeal in the above cited case of **Bashiru Rashid Omar (supra)** stated further that: *"Thus, to prove the existence of an unsoundness of mind of a person, a fact relevant as showing the existence of that state of mind must be shown to exist not generally, but in reference to that particular time and the matter in question."*

Coming to the evidence adduced in court in so far as the defense of insanity by the accused person is concerned, I firstly agree with the counsel for the Republic that the accused person did not raise such defense in his testimony. If at all he responded to the counsel for the

Republic that when he was arrested, he knew all that was happening and he was in good state of mind.

On the other hand, when PW1 was adducing evidence, he said when he found the accused he, very different from his normal state. PW1 said;

"On the incident day after killing the deceased, he was like a mad-man, crazy. I have never heard that he had mental problems. Otherwise I would not be working with him. However, on the incident day, he was very different."

In exhibit PE4, Haruna was recorded saying that;

"*nikamuona SHIJA s/o SALUM anamkata kata kichwa SHIJA s/o? nikashangaa kumuona SHIJA s/o SALUM amebadilika ghafla na kufanya unyama wa namna hiyo..."*

Of-course according to the law as observed earlier on, it is the accused who has a duty to prove the same on the balance of probability. Again, as per the principle of the law, the cutting edge in proving the same is *on that particular time of the incident and the matter in question.*

The accused version of the incident on the day was that after eating he went to take bath at the river and later was apprehended by PW1 and his son while naked.

From the accused's point of view, he told the court what he could remember pertaining to the incident that he is accused of. He further even admitted that when the police came he was in good state of mind and could understand all that was going on and responded to all the questions correctly. Further, according to exhibit PE3, as I have discussed earlier on, the accused person did not confess to murder but admitted to have killed the deceased because he was be-witched.

That being said, I am of the concerted views that the evidence of other witness including of the prosecution could also tell the state of the accused when he was committing the act. Both PW1 and Haruna Athuman observed that the accused person was in a weird state of mind.

Coming to the issue of expert opinion, defense called DW2 being a doctor who examined the accused following the order of the court. He said they examined the accused by observing and asking him questions and going through the records of other statements of other witnesses including the accused himself. They discovered that the accused had the symptoms of mental disease called **"Schizophrenia"** at the commission of the offence. He explained the signs being hearing voices of unseen people talking bad about the person or that something bad is about to happen including the

belief that there are people who wants to do ill things to him. Then a person becomes unjustifiably aggressive and assaulting people. DW2 testified that those signs exhibited to the accused when he committed the offence. Responding to cross examination questions, he admitted that he has not written in the report any findings of observation from the examination of the accused apart from summary from police file. He however, prayed to the court to believe his testimony and the report because most people are sent for examination when they are not sick. Therefore, they also go to the records.

Counsel for the Republic in referring to the cited case of **Bashiru Rashid Omar (supra)** and commented that the expert did not sufficiently explain the methodology used. He stated therefore that the trial court has a duty to go through the expert opinion together with other opinion and come to its own conclusion as the court is not bound to accept medical expert's evidence.

In exhibit DE1, DW2 after narrating the sequence of events on the incident day at the part of Psychiatric History, he concluded that the accused was suffering from mental disorder **(Schizorphenia)** hence he was insane during the commission of the alleged offence.

While I agree that DW2 did not state in his report the methodology used, still in my evaluation of prosecution evidence together with the defense of insanity as raised, I find that the facts and circumstances of the cited case of **Bashiru Rashid Omar (supra)** are distinguishable. In **Bashiru's case**, prosecution evidence was to the effect that the accused murdered his son after twelve hours following the quarrel he has had with his girlfriend, mother of the deceased at the house of the said girlfriend. More-so, the doctor who examined the accused in the cited case merely stated that the examination conducted by the psychiatric on 14.04.2016 revealed that the accused had personality disorder emotionally.

In our case, much as DW2 in his report did not write the methodology, he referred to the psychiatric history of the accused on the commission of the offence from the evidence of prosecution witnesses and police report and came to the conclusion that the accused was insane during the commission of the offence. As held by the Court of Appeal in the cited case above that inference to the existence or non-existence of certain matters which cannot be perceived by senses but ascertained by inferences drawn by persons specifically trained in the particular field as in this case, psychiatric cases.

Thus, from the inference drawn from DW2 and in scrutinizing the evidence brought before the court, particularly the testimony of PW1, contents of exhibit PE4 and PE3, the act of the accused person of killing the deceased, chopping off his private parts then sitting down and eat his brain is a fact relevant in showing the existence of the state mind of the accused during the commission of the offence. From that background, I cannot completely ignore the opinion of DW2 on the subject matter as there is material facts to question the sanity of the accused during the commission of the offence following the fact that both PW1 and Haruna Athumani in exhibit PE4 expressed their concern that the accused had never seemed to be with mental issues from the time they knew him; which as per the testimony of PW1 he would never have hired him. As such, after scrutinizing the evidence adduced in court and the exhibits tendered from both sides and the inference drawn by DW2, I find that the defense side has managed to prove on the balance of probability that the accused person was INSANE during the commission of the offence. Hence, the question of proof of malice - afore thought does not arise.

Consequently, I depart with the opinion of the first and second assessors and agree with 3rd assessor and find that the accused person did kill the

deceased, but he was INSANE during the commission of the offence. Therefore, by reason of insanity, I find him not guilty of the offence he is charged with and I accordingly discharge him in terms **of section 219(2) and (3)(b) of the Criminal Procedure Act, Cap 20 RE 2019**.

Accordingly ordered.

R.A. Ebrahim

Judge

Mbeya

24.06.2022

Court: Right of Appeal explained.

R.A. Ebrahim

Judge