IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT TARIME

CRIMINAL SESSIONS CASE NO. 44 OF 2021

THE REPUBLIC

VERSUS

OTIENO S/O RATENG OGOLA SINJU

JUDGMENT

08th November, 2022

F. H. Mahimbali, J.:

Mr. Otieno Rateng Sinju stands charged before this court for an offence of murder against Fransisca w/o Audi which is contrary to section 196 of the penal code.

It has been alleged by the prosecution that on the 25th April 2020 at Luanda village within Rorya District in Mara Region, the said Otieno Rateng Ogola Sinju murdered Fransisca w/o Audi by cutting her head (rear part), left chick and left shoulder by using his panga which he had carried with him.

Accused person pleaded not guilty, to the charge, whereby the prosecution summoned a total of six witnesses to establish the allegations of murder against the accused person.

It was the direct evidence of PW1, PW2 na PW3 who established how the accused person attacked the deceased using his panga he had held and used it against the deceased on her head(rear part), left chick and left shoulder which led to the severe cut wounds.

The deceased was then rushed to the Hospital as per testimony of PW3. The deceased died on 8th May 2020 while on the way to Bugando Hospital. PW4 (Dr. Jabai Donald Jumbo, Medical Doctor) testified how on 13/5/2020 he conducted Post Mortem examination over the dead body of the deceased while at Utegi Health Centre. In his report (PE1 exhibit), he established that the cut wounds on the head (rear part), left chick and left shoulder, were so deep and that resulted to over breeding and thus led to her death.

On her part, PW5 testified how on 27th April, 2020 while being with Detective Consteble Latifa, she had gone to Shirati Hospital. There she met the deceased and recorded her statement under section 34B 2C of the Tanzania Evidence Act. In the said interrogation, the deceased who was

rested on bed, explained to her how on 25/4/2020 while at her home (day time) as she was rebuking the accused person from harassing the children (PW1 and PW2) by using panga as it was bad, she wondered when the accused Otieno Rateng Ogula Sinju stabbed on her face, head (rear head), left chick and left shoulder using his panga. The said statement by the deceased was admitted as PE2 exhibit.

PW6- D/C Latifa testified how she was assigned investigation of the said case file with **IR 477 of 2020** by her superior (OC-CID). Amongst other things she did, was to draw the sketch map plan of the scene of crime exhibit PE3.

The accused person was then under section 293 (2) of the CPA found to have a case to answer. In his defense, he admitted to know the deceased, PW1, PW2 and PW3. And that he admitted to know the said Fransisca Audi who is now dead. Nevertheless, he denied to be responsible of the said murder/killing as he never took part of it. He criticised the testimony of PW1, PW2 and PW3 (eye witnesses) being nothing but fabricated story against him. He further challenged the earlier court's order which sent him to be examined on his mental faculty saying it was not

proper as he is fit mentally and physically. He therefore prayed for court's acquittal as he is not responsible of the said murder of Fransisca Audi.

Upon closure of the prosecution as well as the defense case, I invited the both learned counsel to make their final submissions to court on the guilty and innocence of the accused person as far as the available evidence in record is concerned.

For defense, it was submitted that as per available evidence via PW1, PW2, PW3, PW4 and exhibits PE1, the prosecution side have been able to establish that the said Francisca Audi is dead and that she died of unnatural death. As who is responsible of the said murder, Ms Pilly Otaigo is of the view that there is no tangible evidence by the prosecution linking the accused person and the charge. That digesting the testimony of the prosecution case via the testimony of PW1 to PW3, there is no reliable evidence connecting the accused person and the alleged murder as charged. She emphasized that, this being murder case, all the principles of establishing criminal charge do apply. The law provides that a standard of proof in a criminal charge is proof beyond reasonable doubt. And that an accused person is only convicted on the strength of the prosecution case and not on the weakness of the defense testimony. On this, she made

reliance to the case of **John Makolebela, Kulwa Makolebela and Erick Juma @ Tanganyika Vs. Republic**, [2002] TLR 296 submitted Ms Pilly Otaigo.

That in digest of the all-prosecution witnesses especially those claiming to be eye witnesses, legally speaking have failed to establish that the accused person is responsible of the said murder based on the following grounds.

First, that the prosecution evidence is contradictory on material evidence. What PW1 testified and linking with the testimony of PW3, Ms Pilly Otaigo challenged that the duo spoke two different things which then form material contradiction. Whereas PW1 testified that when Babu Sinju was harassing them and they went out leaving Babu Sinju there. On the other hand, she submitted that PW3 stated how she saw Babu Sinju then attacking the deceased by using panga.

Secondly, the contradiction is established between the testimony of PW1 and PW2 who claimed to have passed through Bibi Fransisca (deceased) for purposes of drinking water, the deceased herself in her recorded statement (Exhibit PE2), does not state this fact but just

wondered what they followed there. However, she acknowledges that the said PW1 and PW2 had visited her home.

Thirdly, the manner the accused person was arrested brings another confusion. Whereas PW3 says the accused was arrested on the same date after the commission of the said offence, police were informed and arrested him while at his home. However, PW6 (Police officer), tells a different story on the mode of his arrest. That the accused person had escaped and that he was arrested in another village where he took hide.

With these pointed contradictions as stated by Ms Pilly Otaigo, she is of the view that the accused person must be given benefit of doubt as the prosecution evidence is full of contradictions, thus unworthy of credence and the same should not be accorded any pinch of respect. She referred this Court to the case of **Mohamed Said Matula Vs Rep**, (1995) TLR 03. That considering the accused person's defense on regard to the date of arrest, it appears the testimony of PW1 and that of the accused person do not coincide. She therefore prayed that considering the position of the case of **Goodluck Kyando Vs Rep**, [2006], TLR 203, that witnesses must be given credence unless there are cogent reasons of not doing so.

Lastly, she urged this Court to consider as per the testimony of PW1, PW2 and PW3, the soundness of the accused person be given a special finding by this Court despite the medical report from Isanga Institution opining that the accused person was sane during the commission of the offence and still sane today. That by the conduct of the accused person at his home village prior to the commission of the said offence and after the commission of the said offence, his post conduct here in Court, it is hardly believable that the accused person was sane during the commission of offence and that is still so today. That finding though medical, but this Court by virtue of section 219 (2) of the CPA read together with section 220(4) of the CPA, can make its own findings on that fact and deal with it as per law.

In totality of all this, Ms Pilly Otaigo prayed that this Court to acquit the accused person.

On his part, Mr. Davis learned state attorney for the Republic, submitted that considering the testimony of PW1, PW2 and PW3, it is clear that the said criminal incident took stage on day time with broad sunlight. There was no fog, cloud or rain. It was a clear day event. He was of the considered view that there was no any impediment by the said witnesses

to fail recognizing properly the accused person. So, in any way, there was no any possibility of mistaken of identity. He invited this Court to consider the position set in the cases of **Waziri Amani Vs. Republic**, [1980] TLR 250, Raymond Francis V. R, [1994] TLR 2.

He added that, considering the legal position in section 203 and 205 of the Penal Code, since it is the accused person who inflicted the said injuries to the deceased and that the deceased then died because of the said injuries, then the law is, the inflictor of those injuries is responsible of the said death. Since the PE2 exhibit is clear on the causation of the deceased's death and that PW1, PW2 and PW3 confirm seeing the accused attacking the deceased by panga on her head (rear part), left shoulder and left chick, it is openly clear that the accused person is responsible of the said murder as charged. As per bigness of the said wounds, suggest the force used by the doer to inflict the said wounds was so high.

On the defense of alibi in which the accused tried to raise in his defense, Mr. Davis countered it as it did not comply with the issuance of notice as per law. On this, he invited this Court to be inspired by the decision in the case of **Marwa Wangiti Mwita & Others Vs. Rep** (2002) TLR 39 where it was insisted that for one to rely on the defense of alibi,

first has to give notice and secondly give evidence on the fact of the said alibi. In any how, in this case there is neither notice nor evidence to that effect.

On the issue of insanity of the accused person, the Republic have blasted it as being baseless. There is neither medical evidence on that nor direct evidence from the accused person's relatives. This court therefore cannot make assumption that the accused person is insane by speculating other facts which are not in court. Relying on the medical report from Isanga Institution with Ref No. 11155/2022, the fact of insanity has been disapproved.

Whether the accused had malice aforethought, Mr. Davis submitted that, where a reason of death is by unlawful conduct, then the motive to commit the offence has been established. He said this relying in the case of **Fadhila Gumbo & Others Vs. Rep** [2006] TLR 50. A similar view was also reiterated in the case Tununtu Nyasule V. Rep, (1980) TLR 204, where it was held that the type of weapon, size of injury and accused person's conduct can establish malice of the accused person against the deceased. As to the case at hand, since the type of weapon used is panga, injuries

caused are cut wounds directed on head (rear part), shoulder, and face. To him, that amounted to malice aforethought.

On the alleged contradictions, he countered them as being of no material contradictions in record as per prosecution witnesses. However, relying in the case of **EX G. 2434 George V. Rep,** Criminal Appeal No. 8 of 2018, CAT at Moshi (at page 11), insisted that it is not expected that witnesses on a similar fact to state the same way the other witnesses have said as this is not a poet or fiction work. What then is important is whether what is being stated is credible.

He concluded his submission by saying that via prosecution witnesses PW1, PW2, PW3 and exhibits PE1 and PE2, the prosecution case not only has established beyond reasonable doubt that murder of Francisca has been committed, but also have been able to connect the said murder and the accused person in the same standard of proof beyond reasonable doubt. He urged this Court to enter conviction against the accused person as charged.

Having heard the evidence of both sides and the submissions thereof, issues for consideration are three: firstly, whether there is murder in this case. Secondly, whether the accused committed the offence charged as

per prosecution evidence gathered. Thirdly, if the second issue is answered in affirmative, whether the medical report on the mental status of the accused person as received from Isanga Institution accurately describes the accused person as per facts available (Is it reliable?).

The offence *"Murder"* as defined in Wikipedia, means an unlawful killing of another human without justification or valid excuse, especially the unlawful killing of another human with malice aforethought. It is unjustified killing of one person by another, usually distinguished from the crime of manslaughter by the element of malice aforethought" (See the case of **Alex vs Republic**, Criminal Appeal No 185 of 2017, CAT at Dar es Salaam). What constitutes malice aforethought or intention to kill is well defined by laws, literature and decided cases. According to the Black's Law Dictionary, malice aforethought is defined as *"a pre determination to commit an act without legal justification or excuse ... An intent wilfully to act the consequences to human life. But "malice aforethought" does not necessarily imply any ill will spite or hatred towards individual killed".*

The central issue in this case in which I am called to determine for consideration is whether given the evidence by the prosecution, the case has been proved beyond reasonable doubt? In the case of **Magendo Paul**

and Another Vs Republic [1993] T.L.R 219 (CAT), it was held inter alia that;

> *"..for a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave only a remote possibility in his favour which can easily be dismissed"*

This was held in line with the philosophy enshrined in the case of **A. Chandrankat Ioshubhai Patel Vs the Republic,** Criminal Appeal No. 13 of 1998 (CAT - DSM) in which it was held that;

> "*Remote possibilities in favour of the Accused person cannot be allowed to benefit him. Fanciful possibilities are limitless and it would be disastrous for the administration of Criminal Justice if they were permitted to displace solid evidence or dislodge irresistible inferences"*

The offence of murder encompasses unlawful killing of another person (human being) with malice aforethought. In law, the killing becomes unlawful if the act or omission causing the death cannot be justified. On the other hand, the killing is with malice aforethought if the person who killed another intended to cause death or grievous bodily harm. Circumstances to be considered in establishing malice aforethought are well stated in section 200 of the Penal, Code Cap. 16 of the R.E. 2019.

The duty to prove the case at hand lies on the prosecution and the standard is beyond reasonable doubt (**see section 3(2)a of the Evidence Act, Cap 6)**. It is well established also that the accused cannot be convicted relying on the weakness of his defence, inability to defend himself or because of lies. The law requires he be convicted relying on the strength of the evidence adduced by credible prosecution witness (es).

PW4 – Dr Jabal relying on exhibit PE1, testified that the deceased Francisca died of unnatural death due to severe cut wounds on her head, face and left shoulder which led into the death due to severe bleeding. With this uncontested evidence, it is suggestive that the deceased died of unnatural death. As who caused the said severe injuries, the testimony of PW1, PW2 and PW3 comes into play.

In this case, it is the testimony of PW1, PW2 and PW3 who actually told this court how on that date and place they saw the accused person who approached the deceased, attacked her by panga on her head (rear part), left chick and left shoulder. The deceased suddenly fell down, where then PW3 cried for help, people gathered and sent her to hospital for medication. About two weeks later, the deceased met her demise while on her way to Bugando Hospital. In their testimony PW1 and PW2 could not

intervene minors as they are. They were just puzzled and terrified with the manner the said grandmother (deceased) was being attacked by the accused person. On her part, PW3 who was co-wife to the deceased was much confused. She being just a woman, and unarmed, she feared that her intervention could also be responded by being attacked by the accused person. They thus feared of being endangered of their lives as well. The three witnesses thoroughly described the culprit very well while at the scene of crime. They had been able to identify the culprit because of the short distance they stood from the scene, familiarity with the culprit, it was day time with broad sunlight.

Thus, the issue of accused person being identified at the scene is undisputed. In the case of **Goodluck Kyando Vs. Republic**, [2006] T.L.R 363, it was held that it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness. On this stance, another relevant case is that of **Mathias Bundala Vs. Rep**, Criminal Appeal No. 62 of 2004, Court of Appeal at Mwanza and section 146(2) of Tanzania Evidence Act, Cap 6. By this analogue, I am of the considered view that as

per available evidence, the first issue whether the killing was unlawful or not endorsed or certified by the law is answered in the affirmative.

I am aware that this incidence happened at day time. However, courts of law are warned while dealing with the issue of reliability of visual identification of suspects to consider the mode of identification. In the case of **Patrick Nabiswa v Republic,** Criminal Appeal No.80 of 1997 (unreported) the Court of Appeal of Kenya stated that:-

> *" This case reveals the problems posed by visual identification of suspects. This mode of identification is unreliable for the following reasons which are discussed in BLACKSTONE'S CRIMINAL PRACTICE, 1997, Section F.18*
>
> *(a) Some person may have difficulty in distinguishing between different persons of only moderately similar appearance, and many witnesses to crime are able to see the perpetrators only fleetingly, often in very stressful circumstances;*
>
> *(b) Visual memory may fade with the passage of time; and*
>
> *(c) As is in the process of unconscious transference, a witness may confuse a face he recognized from the scene of the crime (it may be of an innocent person) with that of the offender."*

In dealing with such glitches, a court of law needs to scrutinize and analyse with greatest care the evidence tendered on the issue to

exclude the possibility of mistaken identification of a suspect. The factors affecting accurate of facial recognition includes:-

1. Shorter duration to the culprit

2. Relatively longer retention interval between the crime and the identification / the earliest opportunity to name the culprit

In the instant case, the following criteria need to be applied when admitting eye witness testimony: -

1. Degree to which the eye witnesses paid attention to the culprit– PW1, PW2 and PW3 testified that they saw the accused and his at the deceased's home and after some exchange of words, he headed to the deceased, and stabbed her by panga. They were closer.

2. Length of time on observation. This incidence appears to have survived for short period. Though not clearly stated its duration, but as per narration of facts by PW1, PW2 and PW3 it survived for a certain period (some minutes). Thus, sufficient time for one to make a good recollection.

3. Length of time between the occurrence of the crime and the reporting. It hardly passed 30 minutes between the occurrence and reporting of the incidence. PW3 cried for help, people gathered and rescued the deceased by taking her to hospital and instantly reported the incidence to Police who immediately responded and arrested the accused person.

4. The eyewitness identification certainty how certain that it was the accused. As per PW1, PW2 and PW3 their testimonies looked certain, steady and credible. Their demeanour could not suggest anything implanted or cooked and that it was day time and that they are familiar with the accused as a close family member.

5. The quality of the view the eye witnesses had.... i.e. broad day time with no clouds, fogs, rainy, thus, nothing impeding.

Based on the fore mentioned criteria, I'm confident that the visual identification had not been impedimental to the seeing witnesses who identified this accused person called Otieno Rateng Ogola Sinju @ Babu Sinju. The favourable conditions existing in this case, do materially

differ with what existed in the case of **Riziki Method Myumbo v R,** 2007, the first appellate judge held that:-

> "*Visual identification is a class of evidence that is vulnerable to mistake, particularly in the conditions of darkness. Courts must, as a rule of prudence, exercise caution in relying on such evidence. It may result in a substantial miscarriage of justice.*"

In fact, I'm aware that for the criminal incidences happening at nights, courts should be very clear with the aiding factors favouring correct visual identification of the culprits in clearing danger of mistake of identity (See **Waziri Amani v. Republic** [1980] TLR 250; **Michael Godwin & Another v. Republic**, CAT-Criminal Appeal No. 66 of 2002; and **Florence Athanas @ Baba Ali v. Republic**, CAT-Criminal Appeal No. 438 of 2016 all unreported). With this incidence, I am satisfied that there are no impediments in the current situation to affect the visual identification of the accused person as per the circumstances of this case which happened at a broad day light.

The argument by the accused person that he was not there and that had not committed the said offence as charged, it is defeated by the testimony of the strong evidence by the prosecution. As there is no

reasonable doubt casted by the defense against the testimony of the material prosecution witnesses; PW1, PW2 and PW3 on how they saw the accused attacking the deceased, that he is not aware of it is laughable. By the way, an accused person's story needs not be believed but it should just point out reasonable doubts against the prosecution case. In this case, there is none of that evidence.

Another argument by defense counsel during final submission is the issue of contradiction between the testimony of PW1, PW2 and that of exhibit PE2 (Deceased statement). In PE exhibit, the deceased is recorded to have stated the following:

> *"....Nakumbuka mnamo tarehe 25/4/2020 muda was aa 10.00hrs nikiwa nyumbani na mke mwenzangu Ada w/o Audi, nikiwa hapo nyumbani nilikua naendelea na shughuli za kupika chai na wengine walikua wanasomba mabanzi kwa ajili ya kujengea nyumba. Nikiwa hapo niliona wajukuu wangu wawili wakiwa wamekuja hapa nyumbani japo sikujua walifuata nini kwa wakati huo kwani walikua wanasomba mabanzi: Elizabeth Musa @ Pamela na Rosemarry Adenda. Nikiwa jikoni nilisikia* ***Otieno Rateng @ Ogola @ Sinju*** *akiwakaripia wajukuu hao kuwa atawakata na panga ndipo nilitoka nje kufuata kuni. Nikamueleza* ***Otieno Rateng @ Ogola @ Sinju*** *kuwa Watoto hawapigwi na panga hata kama wanakosea watandike na kiboko ndipo alinijibu kuwa mimi naongea na Watoto na wewe unaingilia ndipo alisogea*

nilipokuwa mimi na kunishika mkono na kunikata kwa panga kichwani upande wa nyuma kisogoni ambapo nilianguka chini na kuzimia na kujikuta nikiwa hapa hospitali ya KMT Shirati nikipata matibabu ambapo nilijikuta na majeraha sehemu ya shingoni na shavuni....."

It is true that PW1 and PW2's testimony is to the effect that on the 25th day of April 2020 they were carrying timber logs to the home of Francisca for a house building. In the course, they felt thirsty, they went to their grandmother to drink water. While there, they met the accused. The accused rebuked them as to why they were laughing at him. He wanted to slap them by surface of a panga. This astonished their grandmother and then talked to their grandfather – the accused that it was bad to slap children by panga. He better used a stick. No sooner had the grandmother said this, than when Babu Sinju held her and stabbed her by panga on her head, shoulder and chick as she went out to fetch fire wood for tea making. Then Babu Sinju escaped to his house, leaving Francisca there down unaided. Then cry for help was called where police came and arrested him.

With me this is not a material contradiction. Feeling thirsty is something that is personal. As they know where water was kept in that home, it was not necessary that she should have been told why they went

there by that time instead of continuing carrying timber logs. The only notable contradiction is one: when was Babu Sinju arrested? On the date of the incident or on other dates as alleged by PW6. With me, I consider the testimony of PW3 to be more credible and relevant than that of PW6 on this fact which fact also does not create material contradiction on the relevancy of the material evidence but that of arrest of the accused person. So long as this was not a contested issue, it cannot be taken as a reasonable doubt that affects the prosecution's case. Otherwise, I agree with Mr. Davis, learned state attorney that on determining whether or not witnesses are reliable, we are not oblivious to the fact of life that two or more people who witness an event, may not later tell it in exactly the same way. I shall therefore bear in mind that not every contradiction and inconsistencies are fatal to the case [**Dickson Elia Nsamba Shapwata &Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported)]. And that minor contradictions are a healthy indication that the witnesses did not have a rehearsed script of what to testify in court. [**Onesmo Laurent @Saiikoki v. Republic**, Criminal Appeal No. 458 of 2018 (unreported)].

The next question for consideration is whether the killer had malice aforethought as per law. In the case of **Enock Kipela v Republic**, (supra) has discussed what entails malice aforethought, when the Court of Appeal held that:-

> *"Usually an attacker will not declare to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following:-*
>
> *(1) the type and size of the weapon if any used in the attack;*
>
> *(2) the amount of force applied in the assault;*
>
> *(3) the part or parts of the body the blows were directed at or inflicted on;*
>
> *(4) the number of blows, although one blow may, depending upon the facts of the particular case be sufficient for this purpose;*
>
> *(5) The kind of injuries inflicted.*
>
> *(6) The attacker's utterances if any; made before, during or after the killing and the conduct of the attacker before and after the killing.*
>
> *(7) The conduct of the attacker before and after the killing.*

With all this, it is clear that the accused person used a panga weapon against the deceased. And that by that panga, the deceased sustained

severe injuries, and eventually led to the cause of death of the deceased. In the case of **Republic V. Yohana Musa Makubi**, Criminal Session Case No. 97 of 2012, HCT at Mwanza, it was held that for an offence of murder to be established, prosecution side are duty charged to have established the following ingredients: one, there is a human being who died of unnatural death second, that the said death has been a result of an unlawful act by the accused persons and third that the death or at least serious bodily harm was intended by the accused person when doing that unlawful act. Since murder is killing with malice aforethought, the cause of death is essential ingredient to be established. The law under section 203 of the Penal Code, Cap 16, defines various situations of causing of death as hereunder:

A person is deemed to have caused the death of another person, although his act is not the immediate or sole cause of death, in any of the following cases-

> *(a)* ***if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death; in which case it is immaterial whether the treatment was proper or mistaken if it knowledge and skill;*** *but the person inflicting the injury is not deemed to have caused the death if the treatment which was its*

immediate cause was not employed in good faith or was so employed without common knowledge or skill;

(b) ***if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living****;*

(c) if by actual or threatened violence he causes that other person to perform an act which causes the death of that person, the act being a means of avoiding the violence which in the circumstances would appear natural to the person whose death is so caused;

(d) if by any act or omission he hastens the death of a person suffering under any disease or injury which, apart from that act or omission, would have caused death;

(e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of another person.

Squaring the facts of the case as established by PW1, PW2, PW3 and PW4, it is clear that the deceased wouldn't have died had the accused person not inflicted the said injuries by the use of the said panga. Therefore, as per law, the accused person committed that offence.

The important question now is one, is he responsible of the said murder? During the hearing of the testimony of PW1, PW2 and PW3, they suggested that accused person's mode of life is not normal. He was a

person of bad mood and that he always misbehaved by chasing children whenever he met them and that he could just be talking all alone. PW3 further testified in cross examination that the accused person the accused person was being taken of his elder son who is now deceased by sending him to hospital for medication whenever he started misbehaving. About being abnormal, all the prosecution witnesses had common stand that the accused person was not mentally well. This Court was persuaded to know whether his mental faculty was well at the time of commission of the offence and what is his mental status at the moment. The accused person was then sent to Isanga Institution for that mental check. The medical report received established that Otieno Rateng Ogola sinju was not suffering from any mental disorder and he was therefore **SANE** during the time he probably committed the alleged crime. The accused person has made a good defense during his testimony denying each and everything testified by the prosecution side.

All assessors were of the unanimous position that the accused person is guilty of murder as charged. This is because the prosecution witnesses: PW1, PW2, PW3 and PW4 made it all clear. On whether the accused person might have been insane, they had nothing material to submit. I

concur with them that as per available evidence by the prosecution, it is undoubted that the accused person murdered the deceased. Is he then responsible as per criminal law?

I have had sufficient moment of observing the accused person in this case during his trial. It has been very clear that the manner he was behaving in court it was not normal to healthy person mentally. Meaning that he could sometimes behave like a person understanding everything going in Court but sometimes there is a loose of network, thus not knowing anything that was going on in Court. He could even fall a-sleep in the midst of the trial, and utter unknown words in Court. It has been hard moments to have a clear way forward to deal with this accused person. Of course, I know, that insanity or sanity is a question of fact. Since every person is criminally presumed sane, the accused person ought to have been considered so also (section 12 of the Penal Code). However, as per description of the abnormal conducts of the accused person by PW1, PW2 and PW3, I was then tempted under section 220 (1) of the CPA to inquire for his mental examination. With what report I have received from Isanga Mental Institution, I may say without hesitation that it has not been helpful. It has not been elaborative how the said accused was mentally

examined. Since the Court is not bound by expert opinion (this medical report on the real mental status of the accused person) as there is abundant evidence in record on the conduct of the accused person during court proceedings, at his home (via the testimony of PW1, PW2 and PW3) that the accused person is mentally not very well, I must make a special finding on that. Combining both, the accused person's conduct during trial and the manner PW3, PW1 and PW2 described him and the manner the accused person not knowing anything that transpired on that 25th April 2020, I thought he was fooling, but I am confident that the accused person was sick of the deceased of the mind by that time and he might still be so today. On that finding, I now make a special finding under section 219(2) of the CPA and also getting inspiration in the case of **Charles Manyono V. Republic**, Criminal Appeal No. 109 of 1999, CAT at Arusha, that since insanity or sanity is a question of fact, in this case, I am satisfied on balance of probability that the accused person was insane and is still so today as per his behaviour in Court. On that finding, by virtue of section 13 of the Penal Code, Cap 16, a person can not be criminally liable if by the time he committed the offence, he is through any disease affecting his mind thus incapable of understanding what he is doing; incapable of

appreciating that he ought not to do the act or omission; or does not have control of the act or omission. Therefore, it is my finding under section 219(2) of the CPA that the accused person killed the deceased, but by reason of his insanity he is not guilty of the offence. Now, under section 219 (3) a of the CPA, it is hereby ordered that the accused person Otieno Rateng Ogola Sinju be kept in a mental hospital/prison as a criminal lunatic.

DATED at TARIME this 8th day of November, 2022.

F.H. Mahimbali

Judge

Court: Judgment delivered today the 8th of August, 2022 in the presence of Mr. Peter Ilole and Davis learned state attorneys, from NPS office, Tarime, Pilly Otaigo learned advocate for defense, accused himself and Mr. Mugoa, RMA.

F.H. Mahimbali

Judge