

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA SUB-REGISTRY
AT MBEYA
ORIGINAL JURISDICTION
CRIMINAL SESSION CASE NO. 44 OF 2021
THE REPUBLIC
VERSUS
FEDA D/O JASON MWAMBENE

JUDGEMENT

19th & 21st September, 2023

NDUNGURU, J.

The accused person one Feda d/o Jason Mwambene stand charged with the offence of murder contrary to section 196 and 197 of the Penal Code (Cap 16 RE 2002). It is alleged by the prosecution that on 26th day February, 2021 at Isoko village, within Ileje District Songwe Region the accused murdered one Atupokile d/o Mwakina Mtawa.

When the case was called upon for plea taking and preliminary hearing. (on 19/08/2021), Mr. Luka Ngogo who appeared as a defence counsel raised the defence of insanity to be relied by the defence side. In her reply to that,

Ms. Prosista Paul, the learned State Attorney prayed the court to invoke the provisions of section 220 (1) of the Criminal Procedure Act (herein referred as the Act) to commit the accused person to Isanga Institute of Mental Health so that the accused mental state be inquired.

Following the prayer, on 19/08/2021 the court referred the accused person to Isanga so as to determine his saneness at the time of committing the charged offence in terms of section 220 (1) of the Act. The court further ordered the report be submitted to this court within forty-two (42) days in terms of section 220 (1) of the Act.

The accused person being examined and observed for the required period of 42 days, on 14th November, 2021 the Institute transmitted to this court a written report on the mental status of the accused person during and at the time of commission of the offence charged with. The report was duly signed by Dr. Enock Chagarawe who made it.

Upon the receipt of the medical report prosecution was availed with the opportunity to testify in order to establish the charge laid against the accused person. In proving the charge against the accused, the prosecution paraded only two witnesses.

Asajile Kibona Asulumenye testified as PW1. His testimony was that he is living at Isoko village. The deceased is his biological mother who also was living at Isoko. He told the court that the deceased died of beatings. PW1 went on telling the court that on 26/2/2021 at about 21.00 hours as he was heading to his home from his business passed through the home of the deceased to greet her and wish her a good night. He said he used to do that because the deceased was living alone. He said having arrived there he met the door of the kitchen ajar something which was abnormal. That having entered the kitchen he met the deceased lying down while breathing with difficulties. When he asked her what was wrong she replied that Nambene, the accused has beaten her. PW1 went on telling the court that he hired the motor vehicle and took the deceased at Isoko hospital. That the deceased died while undergoing treatment. He said the matter was reported to the village authority then to the Police. The witness said that upon arrest while at the village office, the accused kept on shouting that *"nafanya usafi wa kuua wachawi wote nitaendelea. Nimemuua kwa sababu ameuua watoto wake"*. on 27/2/2021 the police officers visited the hospital and the body was examined by the medical officer then was handed to him for burial processes. The witness identified the accused person as she is known as

Mwambene. When cross examined the witness said he did not meet the accused at the deceased home. He cannot tell anything on the accused mental status.

PW2 was Dr.Mashaka Andendisye Shibanda. He is a medical officer working at Isoko hospital. His testimony was to the effect that he has a long experience (over 20 years) in heathy field. He is the one who attended the deceased on 26/2/2021. He said the deceased was highly bleeding on the head. The head was swollen. He said while attending her, she lost life (passed away). That the body was sent to the mortuary. The witness went on telling the court that on 27/2/2021 he was assigned to conduct post mortem examination of the body. The witness went on telling the court that having conducted examination he revealed that the cause of death was due to **severe bleeding**. The witness tendered post mortem examination report as exhibit P1. He went on telling the court that he as well has been attending the accused person as she is suffering from schizophrenia. That she has been attending treatment and clinic at Isoko hospital for a long time. That the accused is known to have mental illness or disorder.

When cross examined, PW2 told the court that he knows the accused on the dock. That he with other medical officers have been attending her for

a long time as she is suffering from schizophrenia (mental illness). He further said that the effects of mental disorder are that the person sometimes becomes very aggressive and dangerous

When the defence side was given an opportunity to defend the case, Mr. Kiliwa, the defence counsel brought to the attention of the court the fact that during plea taking and preliminary hearing, the defence side, upon taking into account the mental state of the accused person, raised the defence of insanity that during the commission of an offence he was insane. It was his submission that the defence of insanity having been raised the court referred the accused person to Isanga Institute of Mental Health for inquiry of the mental status of the accused person during or at the time he committed the charged offence. He told the court that the medical report dated 14th day of November, 2021 duly signed by the specialist one Dr Enock Changarawe which was submitted to this court provides that the accused was insane during or at the time he committed the offence.

Mr. Kiliwa was of the further contention that yet the accused is not able to defend himself due to the mental disorder he has up to now. He urged the court to base on the medical report transmitted to take insanity

as the defence of the accused person and make special finding as the law dictates.

Before I land to the findings which I wish to arrive at herein below, I find it pertinent to state at this juncture that insanity is a statutory defence. Section 219 (1) and 220 of the Criminal Procedure Act (Cap 20 RE 2022) provide for and govern the defence of "insanity". For easy of reference to feel indebted to reproduce the provisions as hereunder:

S. 219(1) "Where any act or omission is charged against any person an offence and it is intended at the trial of that person to raise defence of insanity, that defence shall be raised at the time when the person is called upon to plead.

S. 220(1) Where any act omission is charged against any person as an offence and it appears to the court during the trial of such person for that offence that such person may have been insane so as not to be responsible for his action at the time when the act was done or omission made, a court may, notwithstanding that no evidence has been adduced or given of such insanity, adjourn the proceedings and order the accused person to be detained in a mental hospital for medical examination.

S. 220(2) A medical officer in charge of the mental hospital in which an accused person has been ordered to be detained

pursuant to section (1) shall, within forth two days of the detention prepare and transmit to the court ordering the detention a written report on the mental condition of the accused setting out whether, in position, at the time when the offence was committed the accused was insane so as not to be responsible for his action and such written report purporting to be signed by the medical officer who prepared it may be admitted as evidence unless it is proved that the medical officer purporting to sign it did not in fact sign it.

S. 220(3) Where the court admit a medical report signed by the medical officer in charge of the mental hospital where the accused was detained the accused and the prosecution shall be entitled to adduce such evidence relevant to the issue of insanity as they may consider fit.

S. 220(4) If, on the evidence on record, it appears to the court that the accused did the act or made the omission charged but was insane so as not to be responsible for his action at the time when the act was done or omission made, the court shall make a special finding in accordance with the provisions of subsection (2) of section 219 and all provisions of section 219 shall apply to every such case."

The procedure to be followed where the accused intends to rely on insanity as a defence at the time of commission of the offence was

elaborated in the case of **MT. 81071 PTE Yusuph and Another Vs. Republic**, Criminal Appeal No. 168 of 2015 CAT (unreported) thus:

"First, where it is desired to raise the defence of insanity at the trial, such defence should best be raised when the accused is called upon to plead. Second, upon being raised the trial court is enjoined to adjourn the proceedings and order the detention of the accused in a mental hospital for medical examination. Third, after receipt of the medical report the case proceeds the normal way with the prosecution leading evidence to establish the charge laid and then closes its case. Fourth, upon the closure of prosecution case, the defence leads evidence as against laid, including medical evidence to establish insanity at the commission of the alleged act. And fifth, the court then decides on the evidence, whether or not the defence of insanity had proved on a balance of probabilities. If such enquiry be determined in the affirmative, the court will then make a special finding in accordance with Section 219 (2) and 220 (4) of the Act and proceed in accordance with enumerated consequential orders"

See also **Mwale Mwansanu V. Director of Public Prosecutions, Criminal Appeal No. 105 of 2018** CAT (unreported).

Having scrutinized the relevant provisions and gone through case law, I am of the firm view that the first, second, third and fourth procedures as reproduced herein above have been adhered to. Meaning that the defence of insanity was raised when the accused was called upon to plead. Secondly, upon being raised the court adjourned the proceedings and ordered the detention of the accused in a mental hospital for medical examination.

Further, after receipt of the medical report, prosecution gave evidence to establish the charge laid and then closed its case. Upon closure of the prosecution case, the defence side was availed with opportunity to give evidence against charge laid to establish insanity at the commission of the alleged murder.

At this point, the ball is rolling to the court to determine on whether or not the defence of insanity has been proved on a balance of probabilities. It is a practise that before the case of this kind is called upon before the court, it must be for plea taking and preliminary hearing the assigned defence counsel has the duty to consult the accused. The reason is only that the accused has the right to know his counsel and further that the two may share

important and relevant information related to the case which will enable the counsel to make a full representation.

On 19/08/2021, when case was called up for plea taking and preliminary hearing, the defence counsel submitted to the court that, as he had consulted and talked with the accused on that morning, he appeared insane and mostly was insane at the time of committing the offence. Thus, by so doing the defence side raised the defence of insanity. Further PW1 told the court that having arrested the accused person, while at the village office, the accused aggressively agreed to have killed the deceased. That she further gave the account as to why she killed the deceased.

Further, when called upon to give defence, the accused could not manage due to the mental state she has. From the court's observation, the posture, acts and behaviour of the accused like standing and sitting responding when the witnesses were testifying etc. while in court, any reasonable person could arrive into opinion that the accused person was not aware as to whether he was in court or not, and know what was transpiring therein. The defence counsel further prayed the court to rely on the medical report.

On the basis of the evidence laid down before this court, and as stated earlier, there was indication from the defence side as suggested that the accused was insane during or at the time he killed the deceased; and relying on the report on medical examination which was transmitted to this court and made part of the court record; it is my firm view that the defence of insanity has been proved of the balance of probability.

The report on medical examination is that the accused person one Fedra d/o Jason Mwambene was suffering from mental disorder, known as **Schizo-affective disorder**. She was therefore **INSANE**, during the time she committed the alleged offence.

SPECIAL FINDINGS

Taking into account the evidence available to me and medical report from Isanga Institute of Mental Health, I am of the special finding that the accused person killed one Atupokile d/o Mwakina Mtawa. In other words, she murdered one Atupokile d/o Mwakina Mtawa. But when committing the charged offence, he was insane so as not to be responsible for her action.

I further make findings that the accused did kill the deceased, the offence which she is so charged. But for the reason of her insanity is not guilty of an offence.

Under the provisions of **Section 219 (2) (b) of the Act**, I hereby order the accused person one **Feda d/o Jason Mwambene** be kept in a Mental Hospital as a mentally disorder offender.

It is so ordered.




D.B. NDUNGURU
JUDGE
21/09/2023