IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A., And KAJI, J.A.)

CRIMINAL APPEAL NO. 61 OF 2002

BETWEEN

MAJUTO SAMSON..... APPELLANT

AND

THE REPUBLIC..... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Tabora)

(Masanche, J.)

dated the 9th day of June, 2000
in
Criminal Sessions Case No. 17 of 1997

JUDGMENT OF THE COURT

LUBUVA, J.A.:

The appellant, Majuto Samson, was charged with and convicted of the murder of the deceased, Magreth d/o Zakayo. From the time the preliminary hearing was held, it was not disputed that the appellant killed the deceased. What was in dispute was whether the killing was accidental as the appellant claimed.

The undisputed facts giving rise to the case are straight forward. Briefly stated they are as follows: The appellant and the

deceased were neighbours living in the village of Nkorongwe Basanza, Uvinza area, within Kigoma Rural District. On 27.7.1995, at about 8.30 a.m. when the deceased together with her daughter Violet Johnson (PW1), were seated outside their grass thatched house and her daughter in law, Hadija Mutwe (PW2), was inside the house, the appellant came carrying a hoe and axe. Upon his arrival, the appellant greeted the deceased and her daughter, (PW1) 'jamani salama'. Then the appellant asked for a box of matches apparently for lighting a cigarette. However, the appellant took out a match box and set on fire a stack of maize which was stored within the compound of the house. The house went a blaze as well. The appellant struck the deceased with the hoe on the back of the head, she died instantly. PW1 and PW2 were chased by the appellant. They raised alarm in response to which Venance Jackson, a relative and neighbour of the deceased, came to the scene, he was also chased by the appellant who ran away with the axe. He was later arrested in Uvinza.

As already indicated, it was not disputed that the appellant killed the deceased. What was disputed was whether the appellant intended to kill the deceased. During the trial, the appellant through his defence counsel Mr. Kayaga, maintained throughout that the killing was accidental while the respondent Republic, strongly contended that the appellant caused the death of the deceased intentionally.

According to the appellant, on the day of incident, when he heard shouts from the direction of the house of the deceased, he rushed there and found the deceased's maize on fire. In assisting to put off the fire, he got hold of a hoe which he found around the area and used it in order to salvage the maize from fire. In the process, as the deceased was stooping over the maize, she was accidentally cut with the hoe at the back of the head. He denied going to the scene with an axe or hoe, instead, he claimed that he was attacked with an axe by the people who were there including one Venance. He got frightened and ran away with the axe. Thereafter, he

proceeded to the Police Station at Uvinza to report. He was arrested on the way and later charged in court.

The learned trial judge found the prosecution witnesses PW1 and PW2, credible. On the basis of their evidence, the appellant's defence of accidental killing of the deceased was rejected. The learned judge was satisfied that the appellant killed the deceased with malice aforethought, consequently he was convicted of the murder of the deceased. From this decision, this appeal has been preferred.

Before us in this appeal, the appellant was represented by Mr. Byabusha, learned counsel, and Mr. Mbago, learned Principal State Attorney, appeared for the respondent Republic. Mr. Byabusha argued two grounds of appeal. In the first ground he sought to fault the trial judge in not considering the defence of insanity. According to him, the fact that there was no motive established for the killing of the deceased and the good relationship between the appellant and the deceased as well as the unprovoked violent behaviour of the

appellant, were indicative of an unusual mental condition on the part of the appellant. He said it was inexplicable that a sane person would without provocation set the maize and house on fire, hack the deceased to death and chase away PW1 and PW2. In the light of such unusual behaviour on the part of the appellant, the court should have carried out an enquiry and order for the appellant to be medically examined in order to establish his mental condition at the time of the incident, Mr. Byabusha urged.

Mr. Mbago, learned Principal State Attorney, for the respondent/Republic, strongly resisted the appeal. First, he said the defence of insanity was being raised for the first time on appeal. That though the appellant was ably represented at the trial by counsel, it was not contended that the appellant was not of sound mind when he killed the deceased. Secondly, the defence of insanity not having featured at the trial, the issue was not put to the assessors when the judge summed up the case to them. Consequently, Mr. Mbago concluded, on the basis of the evidence of PW1 and PW2 who were found to be truthful by the trial judge, the

appellant's claim that the deceased was killed accidentally was properly rejected.

Since the only issue which is seriously contended in this appeal by Mr. Byabusha is that at the time of the incident the appellant was insane, it is desirable to examine this aspect closely. From the evidence of PW1 and PW2, the appellant came to the house of the deceased with an axe and a hoe, he asked for a match box. Before he was given any match box, the appellant set the maize and house on fire, he hacked the deceased to death. He also chased PW1 and PW2 who are known to him as neighbours. The appellant appeared to them (PW1, PW2) normal and had no known history of insanity.

In this appeal, it is apparent that Mr. Byabusha is no longer pursuing the defence of accidental killing of the deceased. Instead, he vigorously attacked the decision of the trial judge on the new ground that he failed to enquire into the state of the appellant's mind at the time the deceased was killed. As said before, he is raising the defence of insanity.

As amply shown, throughout the trial, the issue of insanity did not feature at all, the appellant's defence was accidental killing of the deceased. In that situation, we pose to consider whether there is any legal basis upon which the defence of insanity is being raised at this stage on first appeal. At this juncture, it is desirable to examine closely the position of the law regarding the defence of insanity as provided for under section 220 (1) of the Criminal Procedure Act, 1985. The pertinent issue to address relates to the circumstances where the defence of insanity can be invoked. First, we shall set out the provisions of section 220 (1) of the Criminal Procedure Act, 1985:

> 220 (1) – Where any act or 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 (emphasis supplied)

From the provisions of this section, our understanding is that in a criminal charge the court has the discretion to adjourn the proceedings and order the accused person to be examined in a mental hospital. However in exercising the discretion it is necessary first to lay ground upon which the court could find that the accused person may have been insane at the time the offence was committed. In this case, were the circumstances such as to warrant the provisions of section 220 (1) of the Criminal Procedure Act, 1985 to be invoked as urged by Mr. Byabusha?

On the basis of the evidence laid before the trial court, and as stated earlier, there was no indication from the defence that suggested that the appellant was insane at the time he killed the

deceased. If the circumstances were such that it did not appear to the trial court that the appellant may have been insane such as to warrant the provisions of section 220 (1) to be invoked, then the judge cannot be faulted for not considering the defence of insanity. In the case of **Dastan Anthony Luamba V. Republic,** (1990) TLR 4, the Court had occasion to consider the application of section 220 (1) and the circumstances where the defence of insanity can be invoked. In that case, the appellant was convicted of the offence of murder. The appellant was alleged to have poisoned the deceased, he was convicted of murder by the trial High Court. On appeal to the Court, it was contended that the trial judge should have invoked the provisions of section 220 (1) of the Criminal Procedure Act, 1985 namely to order the appellant to be detained at a mental hospital for medical examination. The Court *inter alia* held:

> Before section 220 (1) of the Criminal Procedure Act, 1985 can be brought into play there must be some material which could reasonably make it appear to the court that

the accused person might have been insane when he committed the offence.

In the instant case, we do not think that there was any evidence or such circumstance as would make it appear to the court that the appellant might have been insane at the time of the offence. In the circumstances, we find Mr. Byabusha's complaint that the trial judge should have enquired into the mental condition of the appellant without merit, we reject it.

We may go even further. The legal position regarding insanity is also provided under the provisions of Section 12 of the Penal Code. That is that a 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. On the facts as presented in this case, we are unable to find that the contrary had been proved. In regard to insanity, it is settled law that the burden of proving insanity is on the accused on a balance of probabilities and not merely to raise a reasonable doubt as to the sanity of the accused. This principle was reiterated by the Court of Appeal for Eastern Africa in **Nyinge s/o**

Suwatu V. R (1959) EA 974 and **Mbelukie V. R** (1971) EA 479: This Court also underscored this principle in **Agnes Doris Liundi V. Republic** (1980) TLR 46. In the instant case on the evidence laid before the trial court, on a balance of probabilities, no reasonable doubt as to the sanity of the appellant had been shown.

Furthermore, it is also common knowledge that a person is taken to intend the natural consequences of his action. In the case before us, in the absence of any proof to the contrary, as regards the appellant's sanity, it was proper for the trial court to take it that the appellant intended the natural consequences of the vicious attack on the deceased. Admittedly, and as already indicated, the attack on the deceased by the appellant was unprovoked. This however, with respect to Mr. Byabusha, does not automatically lead to the conclusion that the appellant was insane at the time he killed the deceased.

At any rate, it is common knowledge that motive is not necessary in establishing the offence of murder. The intention to

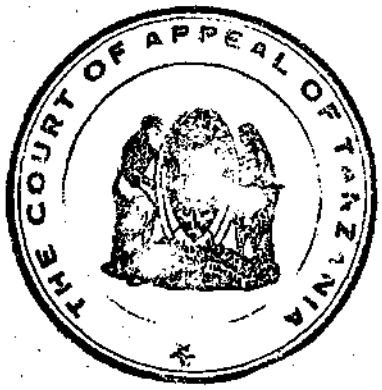
cause death may not be manifested in words or utterances to that effect, it can be inferred from the action of the accused, the appellant in this case. That the appellant was in his normal senses and not insane at the time of the offence is apparent from the evidence of Hadija Mutwe (PW2). In her evidence, she had stated that after hacking the deceased to death the appellant chased her, she ran away carrying a newly born baby on her back, she fell down. The appellant came near to her saying "siwezi kuua malaika". This, to us is indicative of the fact that the appellant was aware of what he was doing at that time. Else, if he was insane, it is highly unlikely that he would be in a position to appreciate that PW2 was carrying an innocent baby on her back. Not only that the appellant realized that PW2 was carrying a baby but he also conscientiously felt constrained not to kill the innocent baby. As said before, we think such conduct on the part of the appellant, was indicative of a sane person at the time of the offence contrary to what Mr. Byabusha urged the Court to believe.

All in all therefore, we are satisfied that the defence of insanity raised by Mr. Byabusha at this stage on appeal is not supported by

the evidence on record. The trial judge was justified in not considering the defence of insanity, there was no basis for doing so.

In the event and for the foregoing reasons, we find no merit in the appeal which is dismissed in its entirety.

DATED at DAR ES SALAAM this 6th day of August, 2004.



D.Z. LUBUVA
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR