IN THE COURT OF APEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 109 OF 1999

BETWEEN

CHARLES MANYONO..... APPELLANT
AND
THE REPUBLIC..... RESPONDENT

(Appeal from the conviction of the RM's Court of Arusha at Arusha)

(Nyerere, PRM/Extended Jurisdiction)

dated the 18th day of June, 1999
in
Criminal Sessions Case No. 33 of 1999

JUDGMENT OF THE COURT

KAJI, J.A.:

The appellant CHARLES MANYONO and JULIANA d/o MAZIKA now deceased, subject in the first count, were husband and wife respectively. They got married in 1986 under Anglican Church rite. They were blessed with one child who however died.

The marriage life was not a happy one. They used to quarrel from time to time. It was claimed by the appellant that the 1st deceased used to blame him for being of bad character. Eventually they

separated. The 1st deceased went to live with her parents at Mvumi in Dodoma District. The appellant went somewhere to try his luck for wealth. But luck was not on his side. He returned empty handed despite his efforts in using local medicine for wealth from a traditional healer.

Back home from his wealth adventure, he pleaded with his wife, the deceased in the first count, to come back to the matrimonial home. She obliged. By then she had one child out of wedlock. It was the 2nd deceased ANNA CHARLES. The appellant was appointed a cashier of a newly established Anglican Church at Osteti Village in Kiteto District.

Their matrimonial life did not get any better. Quarrels persisted.

On 3.11.94 there was a church committee meeting to deliberate on the progress of purchasing corrugated iron sheets.

After the meeting, the deceased requested the Pastor MOSES MNYAMWARA (PW1) to use the wisdom of the elders who had gathered for the meeting to ask the appellant why he was threatening to kill her. PW1 asked the appellant but the appellant kept mum. The appellant took out the church money and placed it on the table and walked out.

After a short while, the deceased wife got worried about the safety of her daughter, the deceased in the second count, whom she had left at PW1's home. She got worried because the appellant had on some occasions threatened to hide the deceased daughter where she would never be seen again. A preacher, ELIA NYAGALU (PW2) was sent to collect her. He found the appellant already there, carrying the deceased daughter in his hands. The appellant told him to go back to the church and tell the elders that he was taking the child with him, and that the deceased wife should be advised to go back to her parents because he was no longer interested in her. PW2 was convinced. He went back to the church and the appellant left with the deceased child daughter heading towards his home.

After a short distance, the appellant bent down and placed the deceased daughter on the ground. But since there was tall grass at that place, PW2 could not see or know at that time what the appellant did to the deceased.

According to the evidence of PW1, suddenly the appellant came to the church running while armed with a knife, saying "Atakayemzuia mke wangu na mimi nitamchoma kisu" The appellant also declared "Yule ambaye yuko na mke wangu mimi na yeye" according to PW2 (generally translated into English "whoever will withhold my wife I will stab him with a knife"/"He who is with my wife, it will be me with him').

The deceased wife of the appellant realized that her life was in danger. She ran behind the pastor PW1 and clung on him. The appellant furiously attempted thrice to stab PW1 but luckily he dodged. LaterPW1 lost control on the deceased wife of the appellant. The appellant kicked the deceased wife on the legs. She

fell on the ground. The appellant stabbed her with the knife several times. She died on the spot. Meanwhile some women who had gone to collect the deceased in the second count, from where the appellant had dropped her, came yelling while carrying her. She had a cut wound running from her throat to the abdomen with the intestine protruding. She was rushed to hospital where she died later. The appellant was arrested and was charged with the murder of his wife in the first count and the child in the second count contrary to section 196 of the Penal Code Cap 16.

In his defence before the trial court, he admitted the killing but that it was due to "bad luck".

The learned trial magistrate Mrs. Nyerere, Principal Resident Magistrate with Extended Jurisdiction, was satisfied that when the appellant killed the deceased he did so with malice aforethought. The appellant was found guilty as charged and was convicted accordingly. He was sentenced to the mandatory sentence of death.

Before us he was represented by Mr. Loomu - Ojare, learned counsel. Mr. Mulokozi, learned Senior State Attorney, appeared for the respondent Republic.

Mr. Loomu - Ojare raised two grounds of appeal, namely:-

1. That the learned trial Principal Resident Magistrate erred in failing to consider that the appellant may have been temporarily insane so as not to be responsible for his actions when he violently stabbed his wife and daughter to death.

2. That the learned trial Principal Resident Magistrate erred in law in her failure to put the defence of provocation to the gentlemen assessors for their consideration, or to consider it in her judgment.

In the course of hearing the appeal, on 12.9.2001, the Court ordered as follows:-

> "Accordingly, in terms of Rule 34 (1) (b) of the Tanzania Court of Appeal Rules, 1979, it is ordered that upon the appellant being received at Isanga pursuant to the order of the Resident Magistrate Tanga, the Medical Officer thereat shall examine the appellant and send to this Court a report on the appellant's mental condition and an opinion whether he might have been insane at the time of the said killings, in terms of Section 220 (2) of the Criminal Procedure Act, 1985. Upon the report being received, the Court will convene for admission of same in evidence, for consideration of the contents thereof and final disposal of the appeal."

Pursuant to the order the appellant was medically examined as to his state of mind at the time of killing the deceased. A report was supplied. Pursuant to that report Mr. Loomu - Ojare abandoned ground No. 2 and argued ground No. 1. He argued that the evidence of PW1, PW2, PW3 and PW4 should have alerted the trial court to have some suspicion on the mental condition of the

appellant at the time of killing the deceased. The appellant's behaviour at that time was not that of a sane person. Mr. Loomu - Ojare further argued that, to some extent the issue of insanity would appear to have attracted the attention of the court as depicted on pages 7, 10, 14, 15 and 19 of the proceedings. But the court did not take the necessary steps to order the appellant to be medically examined as provided for under section 219 of the Criminal Procedure Act, 1985. Instead the court decided to rely on the evidence of non experts. It was also the learned counsel's submission that the trial court should have considered the defence of insanity even if it was not pleaded by the appellant, and that the medical report would have clarified the true position. Furthermore he said that since there is now a medical report to the effect that at the time of killing the deceased the appellant was insane, a special finding should be made to the effect that the appellant did the act charged but by reason of insanity is not guilty of the offence as provided for under Section 219 (2) of the Criminal Procedure Act, 1985.

On the other hand Mr. Mulokozi, learned Senior State Attorney, replied that, the appellant should have raised the defence of insanity at an appropriate stage instead of raising it after the prosecution had closed their case. The learned Senior State Attorney further replied that, there was nothing which would have prompted the trial court to suspect the mental condition of the appellant at the time of killing the deceased. The learned Senior State Attorney further argued that, had the appellant been insane the church authority would not have appointed him its cashier. However, the learned Senior State Attorney conceded that, under normal circumstances it is not normal for a sane person to behave in the manner the appellant did at a reconciliation meeting before church elders.

We are aware of the difficulties in which the learned trial Principal Resident Magistrate with Extended Jurisdiction was, in failing to direct the assessors and to address her mind on the defence of insanity. Normally, where an accused person intends to raise the defence of insanity at the trial he must raise it at the time when he is called upon to plead. This is provided for under Section

219 (1) of the Criminal Procedure Act, 1985 (hereinafter referred to as the Act) which states:-

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

In the instant case when the appellant was called upon to plead he did not plead insanity, instead he simply said:-

> "I killed by bad luck"

This was not clear enough to make the court assume that the appellant was raising the defence of insanity. It was very unfortunate indeed because the appellant was represented by an advocate.

But during the trial it was apparent that there was probably something wrong with the appellant's mental state at the time of the killings. This can be gathered from the nature of the questions by the assessors who kept on asking the witnesses on the mental condition of the appellant at the time of the killing. It would appear the assessors were doubful whether the appellant was in sound mental condition at the time of killing the deceased, after hearing evidence on how the appellant killed the deceased. It is common knowledge that insanity can be inferred from the circumstances and the conduct of the accused at the material time.

In HILDA ABEL V R (1993) TLR 246 this Court held, *inter alia:-*

> "Insanity within the context of section 13 of the Penal Code is a question of fact which could be irferred from the circumstances of the case and the conduct of the person at the material time."

In the instant case the abrupt furiousness and what followed thereafter would have prompted the learned trial Principal Resident Magistrate to doubt about the appellant's sanity at the time of the killing and would have ordered the appellant to be medically examined on his mental condition at the time of the killing as provided for under Section 220 (1) of the Act which provides:-

> "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 might 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."

The medical report to be supplied under Section 220 (2) of the Act, though not binding, would have shed some light on the mental condition of the appellant.

In summing up to the assessors the learned trial Principal Resident Magistrate touched on insanity remotely where she said:-

> "Coming to the defence case the accused person who was re-elected church cashier, simply admitted to the facts that he killed both his wife and a daughter, and that he was confused after being given medicine by a traditional medicineman in order to become rich."

She did not direct the assessors on the legal position on the defence of insanity. But in their opinion the assessors said that the appellant was not insane at the time of the killing. We do not know what their opinion would be if they were properly directed. In that situation, it is also doubtful what the verdict of the assessors would be.

In her judgment the learned trial Principal Resident Magistrate briskly considered the defence of insanity and said:-

> "The act of the accused person leaving the reconciliation meeting furiously after returning the church money he had as a cashier in my view cannot be said to have affected his mental ability to form the "mens rea" for the murder. I must therefore, with respect, agree with assessors that the accused killed with malice aforethought within the meaning of Section 200 of the Penal Code."

Here we pause and ask: would she come to the same conclusion if she had properly directed the assessors on the defence of insanity or if the appellant had been medically examined on his mental condition at the time of the killings? We do not know whether she would have come to that conclusion.

Lastly, as we have already observed, in the course of hearing the appeal the Court ordered the appellant to be medically examined his mental condition at the time of the killing. The medical report

from the Consultant Psychiatrist Incharge of Isanga Institution, Dodoma, Ref. No. 6956/2004 dated 24th September, 2004 is to the effect that the appellant was insane at the material time when he committed the offences.

It is common knowledge that the Court is not bound by the medical report from Isanga Institution, Dodoma. However, in the circumstances of the case, we find no good ground for not accepting it.

Had the learned trial Principal Resident Magistrate with Extended Jurisdiction ordered under Section 220 (1) of the Act the appellant to be medically examined on his mental condition at the time of the killing, and had she considered the report, we do not think she would have convicted the appellant of murder. Instead, under Sections 220 (2) and 219 (2) of the Act she would have made a special finding that the appellant killed the deceased but by reason of his insanity he was not guilty of the offence.

In the event, and for the reasons stated, we quash the conviction and set aside the sentence, and substitute with a special finding under Section 219 (2) of the Act that the appellant killed the deceased but by reason of his insanity he is not guilty of the offence.

Under section 219 (3) of the Act as amended by Act No. 9 of 2002, it is hereby ordered that the appellant be kept in a mental hospital/prison as a criminal lunatic.

To the extent indicated, the appeal is allowed.

DATED at ARUSHA this 5th day of November, 2004.

D. Z. LUBUVA
JUSTICE OF APPEAL

H. R. NSEKELA
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