IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUNUO, J.A., NSEKELA, J.A And MANDIA, J.A.)

CRIMINAL APPEAL NO. 41 OF 2008

VENANTI APORNARY ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania, at Bukoba)

(Mussa, J.)

dated the 5th day of December, 2007
in
Criminal Session No. 30 of 2000

JUDGMENT OF THE COURT

10th & 16th November, 2011

MUNUO, J.A.:

In Criminal Sessions Case No. 30 of 2000 in the High Court of Tanzania at Bukoba, Kipenka Mussa, J. convicted the appellant, Venanti Apolinary of 2 criminal counts of murder namely:-

> Count 1: Murder c/s 196 of the Penal Code in that on the 27th August, 1995 at Kagure – Rugera in Karagwe within Kagera Region, the appellant murdered one Vedasto s/o Rubakule.

Count 2: Murder c/s 196 (c) of the Penal Code, in that on the same date and place, the appellant murdered one Vilida d/o Vedasto.

The late Vedasto Rudasto Rubakule and his daughter Vilida d/o Vedasto died unnaturally as evidenced by their postmortem examination reports, Exhibit P1 and P2. The postmortem examination report of Vedasto Rubakule was tendered at the preliminary hearing without objection as Exhibit P1. The cause of the death of the late Vedasto Rubakule was severe haemorrhage from multiple sharp cut wounds on the occipital region exposing the brain. Vilida Vedasto's postmortem examination report, Exhibit P2, shows that she died due to severe haemorrhage and brain damage from two sharp cut wounds on the temporal region and on the cheek. There is no doubt, therefore, that the deceased persons died violently on the 27th August, 1995 at their village.

The killer of the deceased confessed, and we quote from his extra judicial statement, Exhibit P5 at page 5 where he stated:-

"..... Nilijificha katika eneo la nyumba yangu na usiku niliona marehemu Vedasto akiwa na ..watu wengine hadi saa 10.00 usiku ndipo wakaondoka. Mimi nilibaki hapo kichakani. Saa 2.30 asubuhi nilimwona marehemu Vedasto anapita na mtoto wake marehemu Vilida. Nilimtupia marehemu mkuki ukampita na alikimbilia kwa jirani aitwaye Evarista. Alipofika hapo alianguka chini na nilimkuta nikamkata na panga mara tatu kichwani mara mbili na kwenye mkono. Alifia hapo hapo. Wakati natoka nilikutana na mtoto wake amekuja kumwangalia na nilipomwona akili zangu zilikuwa zimekwisha haribika nilimkata panga moja la kichwani.

The appellant further narrated the killing thus:-

"Nilikimbilia nyumbani kwangu ili ninywe sumu lakini niliacha nikaona nije katika kituo cha polisi kujiripoti...."

We find no speck of doubt on who the killer was. The appellant was the killer, he confessed the killing as stated above. Was the killing with malice aforethought?

The record shows that on the 27th June, 2005, Mr. Rweyemamu, then counsel of the appellant applied for a court order to commit the appellant to Isanga Institution for medical examination under section 220 (1) of the Criminal Procedure Act, Cap 20 R. E. 2002. The learned judge, Luanda, J. as he then was, issued the order as follows:-

"Order: Under s. 220 of the CPA, 1985 the accused is hereby committed to Isanga Institution for medical examination.

B. M. Luanda
JUDGE
27/6/2005."

Consequent to the scheduled medical examination, the Consultant Psychiatrist In Charge of Isanga Institution, Dodoma compiled his report under the provisions of section 220 (1) of the Criminal Procedure Act, Cap 20 R.E. 2002. He concluded the report by stating and we quote the last paragraph on page 3:

> "The accused planned to kill his victim Vedasto Ruvakule due to the grudges they had before and in the due course also killed his daughter who was accompanying him to church. During admission and throughout his stay at the Isanga Institution he remained mentally normal. He was therefore **SANE** at material time when he committed the alleged offence. He is fit to enter plea."

Subsequently, the appellant stood trial. He gave a sworn defence complaining bitterly that the late Vedasto put kerosene oil in his local brew thereby contaminating the brew which was for sale. The appellant arrested him and lodged his complainant in their village office where upon the late Vedasto was ordered to paysh. 10,000/= which he paid to the

appellant. According to the appellant, at a later date the deceased Vedasto pelted stones at him . That was when the appellant ran into a neighbour's house, picked up a *machete* and pursued the deceased. As the latter was running, he stumbled into a ditch so the appellant caught up with him and slashed him with a *machete*. The daughter of the deceased rushed to check his father, the appellant also hacked her fatally giving rise to this murder case. Thereafter, the appellant surrendered himself and the *machete* at Kayanga police station.

The learned trial judge agreed with the unanimous assessors' opinion that the killing was premeditated, intentional and revengeful. He convicted the appellant and sentenced him to death by hanging with a rope.

Aggrieved by the conviction of murder, the appellant through the services of his counsel lodged the present appeal. Mr. Salum Magongo, learned advocate for the appellant, preferred only one ground of appeal:

> "1. That considering the evidence as a whole and in particular that of insanity in prosecution Exhibit P5 coupled with the failure by the trial court to inform

> the appellant of his rights under section 291 (3) of the Criminal Procedure Act, the trial court erred in law and fact to hold that "he was in no way (of) unsound mind" and that the case has been proved beyond reasonable doubt."

The gist of learned counsel for the appellant is that the appellant was of unsound mind when he butchered the deceased father and daughter. He faulted the learned trial judge for failing to comply with the provisions of Section 291 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2002, which omission, counsel for the appellant contended, occasioned a failure of justice to the appellant. Mr. Magongo cited the case of **Dawido Qumunga Versus Republic** (1993) TLR 120 at pg. 121 wherein the Court held that

> "The provisions of Section 291 of the Criminal Procedure Act are mandatory and require that the accused must be informed about his right to have the doctor who performed the postmortem called to

testify in order to enable him to decide whether or not he wants the doctor to be called".

Since the learned trial judge did not comply with the mandatory provisions of Section 291 (3) of the Criminal Procedure Act, Cap. 20, counsel for the appellant urged us to expunge the psychiatrist's report from the evidence and find the defence of insanity probable.

Mr. Pius Hilla, learned State Attorney, supported the conviction for murder. He pointed out that the psychiatrist's report was prepared at the instance of the defence counsel at that time, Mr. Rweyemamu, learned advocate, to check the mental state of the appellant when he committed the offences. The psychiatrist complied with the Court's medical examination order and submitted his report under the provisions of Section 220 (1) of the Criminal Procedure Act in which he stated that the appellant was **sane** when he killed the deceased persons. Hence, the court proceeded with the trial in the normal way. In those circumstances the provisions of Section 291 (3) of the Criminal Procedure Code would not apply to the appellant for they relate to a medical or surgical matters. Matters relating to insanity, the learned State Attorney submitted, are provided for under Sections 216 to

221 of the Criminal Procedure Act. The present case fell into that category because the defence indicated at the beginning of the trial that the appellant should be examined under Section 220 (1) of the Criminal Procedure Act. As Sections 291 and 220 of the Criminal Procedure Act, Cap. 20 are independent and designed to provide for different matters, the learned State Attorney urged us to dismiss the appeal for it is lacking in merit, citing the case of **Hilda Abel Versus Republic (1993) TLR 346** as authority.

The issue is whether the learned trial judge failed to comply with the mandatory provisions of Section 291 (3) of the Criminal Procedure Act.

We are mindful of the provisions of Section 216 to 221 of the Criminal Procedure Act, Cap. 20 which set out the procedure in the case of the insanity or incapacity of an accused person. The defence wanted the procedure to apply to the appellant so he was committed to Isanga Psychiatric Institution under Section 220 (1) of the Criminal Procedure Act. However, after medical examination, the consultant psychiatrist was satisfied that the appellant was sane. He then stood trial just like any other sane person would. That being the case, and because the

psychiatrist's report on the sanity of the appellant was not challenged by the defence, there was no dispute over the soundness of the appellant's mind when he killed the deceased persons.

In the case of **Hilda Abel Versus Republic (1993) TLR 346** the Court held that:-

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

In the present case the psychiatrist's report Exhibit P5, certified that that the appellant was sane and fit to stand trial. The learned judge then conducted the trial in accordance with the law. Had the psychiatrist's report been negative on the sanity of the appellant, the learned judge would have proceeded under the provisions of Section 221 of the Criminal Procedure Act.

We wish to point out that when the defence applied for an order to subject the appellant to medical examination by a psychiatrist, it was the soundness of the appellant's mind which was at issue, not medical or surgical evidence stipulated under the provisions of Section 291 (3) of the Criminal Procedure Act which relate to medical evidence like postmortem examination reports, PF3's or surgical evidence. The trial proceeded properly in accordance with the law. The learned judge had no cause to import section 291 (3) into the trial.

With the above in mind, we are satisfied that the appeal is lacking in merit. We accordingly dismiss the appeal.

DATED at MWANZA this 11th day of November, 2011

E. N. MUNUO
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL