

**IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA**

(CORAM: LUBUVA, J.A., MBAROUK, J.A., And OTHMAN, J.A.)

CRIMINAL APPEAL NO. 210 OF 2007

**MRISHO NGUVILA APPELLANT
VERSUS
THE REPUBLIC RESPONDENT**

**(Appeal from the decision of the High Court
of Tanzania at Iringa)**

(Werema, J.)

**dated the 4th day of April, 2007
in
Criminal Sessions No. 101 of 2006**

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JUDGMENT OF THE COURT**

10 & 14 July 2008

MBAROUK, J.A.:

The appellant, Mrisho s/o Nguvula, was convicted of murdering Ailon Nguvula Njombe, his brother c/s 196 of the Penal Code, Cap. 16 R.E. 2002. He was sentenced by the High Court (Werema, J.) to suffer death. Dissatisfied by the decision, he has now appealed to this Court.

In order to appreciate the matter before us, we have opted briefly to state the facts leading to this case. It is said that the deceased and the appellant were brothers sharing the same father but with different mothers. Their deceased father left behind substantial wealth for inheritance, including land, dwelling houses and cattle. There seems to have existed differences between the appellant and the deceased (his brother) on the distribution of inheritance properties.

According to the appellant's version as indicated in his caution statement tendered and admitted at the trial court as Exhibit P3, on or about 11th February, 2003 the appellant followed the deceased at Majegeje Village where he was attending the duty of grazing cattle. He entered into the hut where the deceased was sleeping and found him asleep. Thereafter, he flashed his torch at the face of the deceased and woke him up. Bearing in mind their differences, the appellant hit the deceased with three quick fists and the deceased fell down in pain. He further used an axe handle to hit the deceased on

the head, body, arms and legs. The appellant attacked the deceased until he was satisfied that he was dead.

Thereafter, the appellant removed the body of the deceased from the hut, wrapped it with a blanket and covered it with a dried cow-skin. He dragged the body and dumped it into the river.

The appellant took the whole group of cattle grazed by the deceased to Kikondo Village. He was arrested on suspicion of cattle theft. However, when asked about how he came by the animals, the appellant revealed that after he killed the deceased he acquired the cattle. From that shocking information, a homicide police case was opened against the appellant.

In this appeal, the appellant had the services of Mr. Onesmo Francis, learned advocate, and Mr. Ntwina, learned Senior State Attorney represented the respondent Republic.

Mr. Francis, preferred only one ground of appeal, namely:-

1. That the Honourable Judge erred in law and fact in not taking into consideration the evidence showing background of insanity on the part of the Appellant herein.

At the hearing of the appeal, the learned advocate for the appellant forcefully argued that, from the outset the trial judge was supposed to order the appellant to be detained in a mental hospital for medical examination after he pleaded to be insane.

Mr. Francis further pointed out that, his client has pleaded insanity on two instances. One, at the time when his caution statement (Exh. P3) was taken before C. 2190 Sgt. Said (PW3). Two, at the time when his plea was taken before the trial judge. However, he said that the trial judge failed to direct himself in accordance with what the law stipulates. He cited section 220 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 which states that:

"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 the evidence has been adduced or given such insanity, adjourn the proceedings and order the accused person to be detained in a mental hospital for medical examination."

(emphasis added)

In those circumstances, Mr. Francis added that the appellant as from 15.2.2003 when he was arrested to date, has been in custody as a prisoner in which he could not have gone to the hospital for medical examination as regards his sanity at the time he committed the offence.

It was Mr. Francis's further contention that as far as the learned trial judge failed to comply with section 220 (1) of the Criminal Procedure Act, he prayed for the order of retrial to be issued.

On his part, Mr. Ntwina, learned Senior State Attorney supported the conviction. He said that it is not proper and fair for the learned advocate for the appellant to complain that the trial judge did not take into consideration the evidence showing the background of insanity of the appellant. This is for the reason that, the trial judge had extensively engaged himself in his judgment and finally satisfied himself that, there is no reason to invoke the provisions of section 220 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002, Mr. Ntwina said.

Mr. Ntwina further pointed out that the trial judge took considerable time addressing this issue. He gave the example when the trial judge directed himself on sections 12 and 13 of the Penal Code. Also when he discussed the case of **R.v. Phillip** (1970) HCD

244, cited by the learned advocate for the appellant and later came to the conclusion that **Phillipo's case** (supra) is distinguishable from the present case. Finally, Mr. Ntwina submitted that the trial judge reached the conclusion that the appellant had premeditated his action.

After all that, Mr. Ntwina further stated, the trial judge cannot be faulted, because after considering all the circumstances of the case he was satisfied that the appellant was not insane at the time the offence was committed.

We on our part, are of the considered opinion that the learned trial judge cannot be faulted that he had not directed himself on the claim that the appellant was insane at the time he committed the offence. This is because, the record is very clear that he took much time and extensively directed himself on the alleged insanity on the side of the appellant.

Looking at the trial judge's judgment, it is clear that from the beginning he clearly addressed himself on the provisions of section 220 (1) of the Criminal Procedure Act, Cap. 20, R.E. 2002 by stating that:

"The third and last defence is insanity. This was raised in Exh. P3 and Exh. P4 and slightly in court. At the commencement of the trial during dock briefs, the defence hinted to me that they were contemplating to request me to invoke section 220 (1) of the Criminal Procedure Act We proceed with the trial and the opportunity did not arise or present itself before me to invoke those provisions."

This clearly shows that the trial judge fully addressed himself on the issue of insanity raised by the appellant. However, at the end he came to the following conclusion:

"In respect to the conduct of the accused after the event, I am afraid that I cannot subscribe to insinuations that they do infer that the accused was insane".

As regards the case of **R.v. Phillip** (supra) referred by Mr. Francis, learned advocate for the appellant, we think the learned trial judge properly distinguished it from this case. This is for the reason that the accused in the case of **R.v. Phillip** (supra) acted instantaneously on irritation. Whereas in this case the appellant walked six kilometers to torment the deceased. Hence the trial judge correctly concluded that the appellant was prepared and premeditated his action.

In the event, and for the foregoing reasons, we have no doubt that the trial judge fully addressed himself and took much of his time in considering the evidence as a whole concerning the background of the appellant's alleged insanity and reached the conclusion that section 220 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 could not be invoked in this case.

For the reasons stated above, we find no merit in this appeal,
which is accordingly dismissed in its entirety.

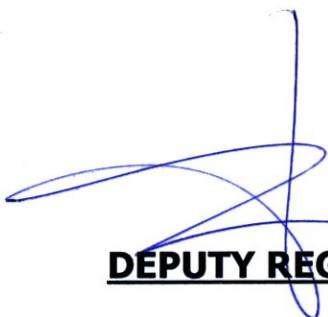
DATED at MBEYA this 14th day of July, 2008.

D.Z. LUBUVA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

M.C. OTHMAN
JUSTICE OF APPEAL

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



DEPUTY REGISTRAR