

TANZANIA / JUDGMENT

# JUDGMENT The Republic v

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19 May 2023

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA SONGEA  
SUB-REGISTRY AT SONGEA ORIGINAL JURISDICTION CRIMINAL SESSIONS CASE NO. 16696 OF  
2024 THE REPUBLIC VERSUS SELEMANI SAID KALWANYA .....  
ACCUSED

## JUDGMENT

Dated: 20th & 27th February, 2025 KAWISHE, J.: The accused person, Selemani Said Kalwanya, stands charged with the offence of murder contrary to section 196 and 197 of the Penal Code (Cap. 16, R.E. 2022). It is alleged by the prosecution that on the 19th day of May, 2023 at Mtonya Village within Namtumbo District and Ruvuma Region, the accused unlawfully did murder Elias Charles Robert (the deceased). 1 When the accused person was arraigned before this court on the 21st day of August, 2024 for plea taking it was discovered that, the accused person was unable to follow up the procedures due to his mental condition. Then Mr. Lazaro Simba, defence counsel, informed this court that, the defence would rely on the defence of insanity. He also prayed for this court to be pleased to order the accused person to be referred at Isanga Institution for examination of his mental state at the time he committed the offence. His prayer was made under the provisions of section 220 (1) of the Criminal Procedure Act (Cap. 20, R.E. 2022). The prayer was supported by prosecution. As a matter of law, when such a prayer is raised and no dispute, the court is duty bound to make the necessary orders. Consequently, this court referred the accused person to Isanga Mental Health Institution and it was ordered further that, the report be submitted in court within forty-two days in terms of section 220(1) of the Criminal Procedure Act (supra). After examination of the accused person, Isanga Institution, Mirembe National Mental Health Hospital submitted a report on the mental status of the accused person as it was at the time he committed the offence. The report 2 was authored by Doctor Enock E. Changarawe, who examined the accused person. Upon receiving the report, the accused person was brought before this court for plea taking and hearing. When the information was read over and explained to the accused person in the language he understands, which is Kiswahili, he was unable to respond thereto and he was smiling and moving in and out of the court dock stating that “nakubali kusimama”. All the time he was uttering words irrelevant to what he was asked. The court entered a plea of not guilty. Thereafter, the prosecution read the facts constituting the offence and when the accused person was asked to respond on them, responded on extraneous and irrelevant matters as compared to what he was required to answer. Also, he was moving from

the dock to the bench, standing, stretching and yawning loudly in court. Following the accused person's inability to understand and follow the proceedings, Mr. Lazaro Simba, learned defence counsel, reiterated his prayer that, they would rely on the defence of insanity as the report on the accused's mental status has been submitted to the court. This was not contested by the prosecution as they acknowledged that, they have been 3 served with a copy of the report from Isanga Institution, Mirembe National Mental Health Hospital on the mental status of the accused person. Having attained that consensus, the prosecution was given an opportunity to prove the allegation raised against the accused person. To discharge its duty, the prosecution paraded one witness. Also, three exhibits were tendered which are the sketch map of the scene of crime (exhibit P1), post mortem examination report (exhibit P2) and the accused's cautioned statement (exhibit P3). Assistant Inspector Yesaya Mwakalebela was the sole prosecution witness. He testified as PW1. He told this court that, he was the investigator of this case. He added that on 20th May, 2023 in the afternoon, while at Namtumbo Police Station he was informed that at Mtonya Village, within Namtumbo District, there was a child murdered. He immediately went to Mtonya Village together with other police officers and they were also accompanied by Doctor Charles Pata. PW1 told this court that at the scene of crime they met the deceased's grandmother, one Hadija Selemani Lwanda who narrated the history of the terrible act. She told them that on 19th May, 2023 in the evening, she was at home in the kitchen together with her grandchild called Elias Charles Robert. That the accused, Selemani 4 Said Kalwanya, took the child and banged his head on the floor. She raised alarm for help however, her neighbours came later. The child was injured and she took him to Mtonya Dispensary where he was referred to Namtumbo Hospital. While at Namtumbo under treatment, the child passed on. That the deceased's body was sent back to Mtonya Village Dispensary. PW1 testified that, the deceased's body was identified to them whereby Doctor Charles Pata examined it and established the cause of death. That, he discovered the cause of death to be injuries sustained on the head of the child and he prepared a report in respect to those findings. PW1 testified further that, at the scene of crime they arrested the accused person, draw the sketch map of the scene of crime which was at the home of the accused's parents. Thereafter, they took the accused person to Namtumbo Police Station where the accused was interrogated by G. 1615 Detective Corporal Boniphace and confessed to have committed the offence. PW1 added that, despite the fact that the accused person confessed to have committed the offence, while he was interrogated, sometimes he was responding to extraneous matters indicating that he was not mentally fit. He testified that, when he interrogated the accused's mother, Hadija Selemani Lwanda and other people at the scene of crime, 5 he was also informed that the accused was mentally ill for a long time and he was on medication. That the accused's mental stability depended on medication but due to financial constraints they stopped medication as a result, the mental problem recurred and banged the child to death. PW1 identified the sketch map of the scene of crime, the post mortem examination report and the accused's cautioned statement which were admitted in court and marked as exhibits P1, P2 and P3 sequentially. Having testified and tendered those exhibits, the prosecution closed its case. Following the closure of the prosecution case, Mr. Lazaro Simba, learned defence counsel informed this court that, on 29th July, 2024 they notified this court that they would rely on the defence of insanity. He reiterated his position prior to the commencement

of the prosecution case. The learned defence counsel insisted that they still bank on the defence of insanity considering the testimony of PW1 which has shown clearly that the accused was insane at the time of commission of the offence. In addition to that, the accused's behavior before this court indicates the same. He went on submitting that, the accused was referred to Isanga Institution, Mirembe National Mental Health Hospital for special finding and the 6 medical report issued on 21st November, 2024 among other things states that, the accused was insane at the time he committed the offence he stands charged with and he did not know the nature of the offence he committed. That he is suffering from mental illness known as Schizophrenia. Mr. Simba prayed for the report to be admitted as part of the accused's defence in this case in accordance with section 13 of the Penal Code (supra) and find that, the accused person is not criminally responsible for the offence he had committed. There was no objection from the prosecution. Hence, the report was admitted and marked as exhibit D1. The defence case was closed hence giving this court an ample time to make analysis and its decision accordingly. Having heard the prosecution case and the defence raised, it is undisputed that, Elias Charles Robert is dead, that he died of unnatural death as per exhibit P2 and that the cause of death was severe head injury. According to the prosecution testimony, the head injuries were a result of the deceased's head being banged on the floor by the accused person. These matters are deemed to have been proved under section 192(4) of the Criminal Procedure Act (supra). In view of all the above, it is clear 7 and I am convinced that, the deceased, Elias Charles Robert is dead. He encountered unnatural death caused by head injuries caused by the accused person. The sole question that arises in this case is whether the accused was insane at the time of the commission of the act within the terms envisaged under section 13 of the Penal Code (supra). This matter was first raised on the 29th day of July, 2024, during plea taking. As the defence of insanity was raised, the court under the provisions of section 220(1) of the Criminal Procedure Act (supra) sought from the medical officer in charge of Isanga Institution, a medical report from the examination of the mental condition of the accused and an opinion whether at the time when the offence was committed, he was insane so as not to be responsible for his actions. The report prepared by that institution was admitted as exhibit D1 during the hearing of this case on 20th February, 2025. Its contents and conclusions are appreciated by the parties. As a result, it was absolutely banked upon by both sides. This court was beseeched to accept its findings and conclusions. Certainly, the medical report on the status of the accused dated 21st November, 2024, File No. 11893/2024 prepared by Dr. Enock E. 8 Changarawe, Specialist Psychiatrist at Isanga Institution provides an encompassing and detailed account of the medical examination conducted on the accused and offers opinions on the question posed by this court. The medical report is premised on key witnesses' statements in this case, clinical interviews and medical examination as well as past public life history of the accused. The medical condition of the accused was diagnosed and was found to be or had been in the following state:

1. The accused was an epileptic patient and he started being mentally ill in 2015.

2. The accused was taking medication but before the incidence he was not taking any medication which led him to start behaving abnormally and later committed the alleged offence.
3. The accused reported chasing and beating people without apparent reasons.
4. While at Isanga Forensic Section the accused was talking irrelevantly.
5. Had poor eye contact and his level of concentration was poor.
6. Had poor judgment and was not oriented to time, place and person. Medical assessment states that the accused person, Selemani Said Kalwanya is currently not mentally stable and he did endorse symptoms of mental illness at the time of the commission of the alleged offence. That 9 clinical diagnosis shows that he is suffering from schizophrenia, that he is insane. The medical report, exhibit D1 together with the evidence adduced by PW1 confirm that the accused was insane at the time of the commission of the offence he stands charged with. PW1 has stated that, the accused before and after the commission of the offence was suffering from mental illness. He added that, when the accused person was interrogated, he confessed to have committed the offence he stands charged with although he stated other irrelevant matters. This shows clearly that, the accused portrayed uncommon conduct expected from a reasonable person. As I stated earlier, the procedure laid down under the provisions of section 216 of the Criminal Procedure Act (supra) was followed. The accused was referred to Isanga Institution and the report thereon was tendered as exhibit D1. Therefore, that being the case, this court is required to consider the position of the law where it is found that the accused was insane when committing the offence charged with. The way forward is crystal clear under the provisions of section 13 of the Penal Code (supra). The section states that: 10 “(1) A person shall not be criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind-
  - (a) incapable of understanding what he is doing;
  - (b) incapable of appreciating that he ought not to do the act or omission; or
  - (c) does not have control of the act or omission.” It is a settled law that, where an accused person or the defence counsel raises a defence of insanity, it will be the duty of the defence to prove, by clear and convincing evidence, that at the time of the commission of the act constituting the offence, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his act. According to the evidence available, during the commission of the offence, the accused was suffering from mental illness even before the fateful day. After the commission of the offence and during plea taking and hearing of this case, the accused’s conduct far apart from that of a normal human being. Taking into consideration of all those circumstances, I find the question of insanity is proved in terms of section 13 of the Penal Code (supra). 11 From the findings hereinabove, since the offence the accused was charged with involves physical violence

which would have qualified the accused to be sentence into death by hanging. The subsequent remedies to this finding are set out under the provisions of section 219(3)(a) of the Criminal Procedure Act (supra). The section provides: “When a special finding pursuant to subsection (2) is made by the court it shall:

- (a) where the person against whom a special finding is made was charged with an offence under the Penal Code involving physical violence or damage to property for which, but for his insanity, at the time of doing the act or making the omission he would on conviction be liable to sentence of death or to suffer imprisonment for a term not less than seven years, order the person to be kept in a mental hospital, prison or other suitable place of custody as a mentally disordered offender; “ From the provisions cited above, since the accused person was charged with the offence of murder upon which on conviction, he would have been subjected to death by hanging, this court order that the accused Selemani Said Kalwanya, be kept in a Mental Institution as a mentally disordered offender and be dealt with in accordance to the provision of section 219
- (4) of the Criminal Procedure Act (supra). It is so ordered. 12 DATED and DELIVERED at SONGEA this 27th day of February, 2025. E. L. KAWISHE JUDGE 27/02/2025 COURT: Judgement delivered in the presence of Ms. Lusia Richard Bukuku learned State Attorney for the Republic and in the presence of Mr. Lazaro Simba, defence counsel and in the presence of the accused. Right of appeal explained. E. L. KAWISHE JUDGE 27/02/2025 13

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