

TANZANIA / JUDGMENT

republic vs ayubu rashidi mshahara

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IN THE HIGH COURT OF TANZANIA AT TANGA IvO • & THE REPUBLIC VERSUS AYUBU RASHIDI
@ MSHAHARA Date of last order: 23/7/2010 Date of Judgment: 5/10/2010

JUDGMENT

Teemba, 3; The accused AYUBU s/o RASHID @ MSHAHARA, stands charged of Murder contrary to sections 196 and 197 of the Penal Cod, Cap.16 [R.E. 2002]. It is alleged that on or about the 26th day of May 2006, at Ngugui village within the District of Lushoto in Tanga Region, he murdered one YUSUFU s/o NURU. The accused pleaded not guilty to the charge. I find it important to mention a few things by way of preface and thereafter to resume to the evidence adduced in this case. One, this case came up for preliminary hearing on 9th October

2008. The learned defence counsel, Mr. Sangawe made a request and obtained a court order that the accused be submitted to Isanga Mental Institution at Dodoma whereupon his mental condition would be ascertained as provided under the provisions of section 220 of the Criminal Procedure Act, Cap.20 [R.E. 2002]. 'Two, the Republic/prosecution was led by mr. Marandu assisted by mr. Mfinanga, both learned State'Attonreys. Three, that Mr. Sangawe, learned advocate, advocated for the accused person from the beginning to the end of this case. Four, that the deceased was a young boy five years old and was living with his parents while the accused was their village-mate and neighbour. Let me now go back to the evidence adduced during trial. The prosecution called four witnesses to prove their case against the accused. PW.1, Mwanaidi Yusufu, was the deceased's mother. She was inside her house while the deceased and other children were playing outside. Subira Yusufu PW.2, a standard VII pupil of Ndugui Primary school was on the . material date returning home from school. As she arrived home, she saw the accused hacking the deceased child on the head with a panga. The boy fell down and died. PW.2 cried loudly and rushed to inform the deceased's mother PW.1, who was inside the house. PW.1 hurriedly ran outside and found the boy on the ground dead. PW.1 also saw the accused who was, by then approaching his house. That the accused was carrying a panga. PW.1 and PW.2 raised alarm and many people gathered at the scene. Yahaya Iddi Mswaki, PW.3, was among the villagers who responded to the raised alarm. He went to the scene and like other villagers, he found the boy dead. PW.3 was accompanied by the Village Executive officer (VEO). PW.3 testified that

the boy was wounded on the 2 head and the brain had fallen on the ground. The body was covered by the VEO using clothes and then the incident was reported to Ndugui police post. Thereafter, the police Lushoto was informed about the murder. The villagers and PW.3 went to arrest the accused. As they arrived at the accused place, they found the door locked. They failed to convince the accused to open the door. They finally broke the window and got inside. PW.3 testified that they found the accused standing and he was not violent. He seemed/appeared to be confused and he was wearing old torn out clothes and was almost half naked. It is further on evidence, that the villagers were angry and they wanted to kill the accused when he was taken to the village chairman. PW.3 managed to trick the villagers and eventually rescued the accused from the intended mob-justice. He took the accused to the bush and guarded him for the whole night and on the following morning he took him to police at Bumbuli post. It is also on record that when PW.3 was cross examined, he said that the accused was his class-mate and was mentally fit until they completed their primary school. But after about two months, the accused got confused and at times he was seen wearing torn out clothes as it was the case on the date of the instant murder. Another piece of evidence came from D.4690 S/Sgt Josephat, 4 # • PW.4. He investigated this case. Accompanied by other detectives, he visited the scene of crime on, 27th May 2006. PW.4 testified that there was 3 a pool of blood at the scene and the deceased was hacked at the head. He drew the sketch-map [Exh.P.1] of the scene of crime. That, in his team, there was a doctor who conducted the 'autopsy on the deceased's body. The postmortem report [Exh.P.2] reveals that the death was due to 0 "haemorrhagic shock as a result of severe bleeding following deep cut wound at the head." PW.4 further testified that he took the deceased's clothes, that is, the short and T-shirt, he was wearing on the date of this incident. PW.4 also received the panga which was allegedly taken from the accused's house. This panga was also allegedly used by the accused when committing the offence. All these items [Exh.P.4] were sealed and taken/sent to the Government Chief Chemist's Laboratory for further examination. The report sent back to police was admitted as Exh.P.3. The same revealed that the panga had blood stains of a human being while the clothes had blood group 'A' of a human being. As an investigating officer, PW.4 interviewed the accused at police station before he charged him in court. The evidence says that the accused was confused and was not in a position to answer the .questions put to him. However, before the closure of the prosecution's case, the learned State Attorneys produced the Medical report from Isanga Mental Institution which was admitted as Exh. P.5. The report was admitted under the provisions of section 291(1) of the Criminal Procedure Act, 4 Cap.20 R.E. 2002. A report, dated 7th January 2010, reveals that the accused "has normal mental state and therefore he was SANE during the time o f commission." The accused was affirmed before he gave his defence evidence. Led by his defence counsel, Mr. Sangawe, the accused denied to have killed the deceased. He said he was arrested outside his house and accused of killing the boy but he did not see him. He admitted to know PW.3 as his class-mate and that he once suffered from Malaria. During the cross examination, the accused denied any involvement in the crime. He also denied to have the panga on the date of the incident and said it was just planted. The accused also

denied to have been sent to hospital for mental examination. In essence, the foregoing is the evidence adduced by both sides. Let me now bring up the arguments of both learned counsel in support of their respective stances. Mr. Marandu, learned State Attorney submitted that: One, that PW.1 and PW.2 were eye witnesses who saw the accused committing the offence and their evidence is very strong to support the conviction. The State Attorney cited the case of Waziri Amani V.R.

[1980] T.L.R. 250 to support his submission that the accused was clearly identified by PW.1 and PW.2. 5 Two, that the cause of death was the severe loss of blood as a result of the wound inflicted by the accused - by hacking the deceased's head. Three, that the accused is sane and he knew what he was doing on the material day he committed the offence. The learned State Attorney cited the case of Hilda Abel V.R. [1993] T.L.R. 246 arguing that although PW.3 and PW.4 testified that the accused was mentally disturbed, the evidence shows that he knew that he had committed a wrongful act and he can not be covered by section 13 of the Penal Code. To conclude, the prosecution submitted that the accused had malice afore thought when he killed the deceased. Reference was made to section 200(a) and (b) of the Penal Code, Cap. 16 [R.E. 2002]. On the other hand, the defence submitted that: One, the prosecution did not prove the offence beyond reasonable doubt. Two, that there are two issues in this case which are: 1st, who killed the deceased? The learned advocate submitted that in this case it is not in dispute that the accused killed the deceased. The second issue is, did the accused intend to kill or was he mentally fit to understand what he was doing? Mr. Sangawe submitted that the accused was not mentally fit and the prosecution witnesses confirmed it. Three, that the doctor's report (Exh.P.6) from Isanga Mental Institution is not precise as it was prepared four years after the incident. The learned counsel cited the case of R.V/Agness Doris Liundi (1980) T.L.R. 38, 6 arguing that taking into account the lapse of time, the court has discretion either to consider or not to consider the opinion of the expert: The learned counsel maintained that the accused has just a light duty to prove the insanity on the balance of probability. It was his assertion that the accused and the prosecution witnesses have proved that the accused was not of sound mind at the time he committed the offence. Four, that the demeanor of the accused has to be also taken into consideration. The defence counsel submitted that, the fact that the accused was wearing rags/torn out clothes is an indication that he was not normal. Fifth, that the prosecution witnesses testified that the accused had no any grudges with any of them and thus, there was no any motive behind for the accused to kill a child of five years. Last but not least, the defence submitted that although the accused gave a weak defence evidence, the court shall consider the evidence in its totality and if the accused is convicted, then it has to be on the strength of the prosecution's evidence and not on the weakness of his defence. Mr. Sangawe referred this court to the case of 'Longinus Komba V.R.

[1973] L.R.T. No.39. My duty now is to evaluate the evidence and decide whether or not the accused is guilty. There is no dispute that Yusufu Nuru was killed by the accused person. It is -also a common fact that his death was caused by the severe bleeding as shown in the postmortem report (Exh.P.2). The witnesses, PW.1 and PW.2 saw the accused at the scene of crime. PW.2 saw him when hacking the deceased with a machete while PW.1 saw him leaving the scene towards his house. In addition, the panga used in committing the crime was recovered in the accused's house. The evidence reveals that it was smeared with blood stains and, after examination by the Government Chief Chemist, the blood was confirmed to be of a human being. The evidence received in the trial shows that the deceased was a young boy - five years old. There is no reason whatsoever given to justify his murder. Neither the prosecution witnesses nor the defence gave any clue as to the reason behind the murder. The boy was innocent when attacked by the accused. As earlier stated, the learned defence counsel, Mr. Sangawe submitted that there is no dispute that the accused killed the deceased. Thus, although the accused denied to have killed the deceased, his defence counsel submitted that the evidence adduced in court clearly shows that the boy was killed by the accused. The only issue which is contentious in this case is related to the accused's mental status at the time he committed the offence. The prosecution strongly submitted that the accused can not be availed the defence of insanity because there is no evidence to prove that he was insane when he murdered the deceased. Section 13(1) of the Penal Code states the conditions under which an insane person shall not be criminally liable for his acts or omission. This provision states: "(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." The learned counsel had no quarrel on the position of law as far as those three conditions are concerned. Each side had different and very strong views on the existing evidence to connect the accused with the defence of insanity. Mr. Marandu, learned State Attorney cited section 13(2) of the same Penal Code, saying that even if the person is insane, he will still be criminally liable if at the time of committing the offence he was capable of * understanding what he was doing. Subsection 2 of section 13 reads: "(2) A person may be criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects referred to in subsection (1) to that act or omission." The learned State Attorney was of strong views that, the accused was sane for the following reasons. '9 One, as he heard people shouting and crying he left the scene of crime and locked himself in his room. Two, the accused refused to open the door until when the villagers broke the window. Three, the accused remembered (during his defence) what he did before the incident - that he was a business partner of the deceased's father; that on the material date he was wearing old torn out clothes and that, he was coming from another

house nearby and passed through the alleged scene of crime. All these, according to the State Attorney, show that the accused was mentally fit and he therefore, knew what he did was wrong. He supported his argument by referring to the case of Hilda Abel V.R. [1993] T.L.R. 246 where it was held inter alia that: "— though the appellant was mentally disturbed at the time, still she was sane within the meaning of section 13 of the Penal Code—" It was correctly submitted by Mr. Sangawe, learned counsel, that the prosecution witnesses testified* that the accused had 'fever' from time to time. This evidence was given by PW.1 and PW.2. PW.1 revealed that information when she was cross examined by the defence counsel and she repeated the same in the re-examination by the learned State Attorney. She was recorded saying: "The accused had a fever of staying inside the house and only goes out when there is sun-shine—" 10 To corroborate the above evidence, PW.3 supported other witnesses that the accused was not mentally fit. This witness had a history about the accused. In the cross examination he testified as follows: " I know the accused very well because we grew up together and we were in the same class. When we completed our Std. VII he hardly had two months when he was confused. He changed suddenly and was wearing old and torn out clothes. When this incident occurred, he was also in a state of wearing the torn out clothes and I also took him to police wearing the same clothes—" PW.4 who investigated the case said that in the course of his investigation, he recorded the statements of villagers who confirmed to him that the accused was mentally disturbed. During the cross- examination PW.4 was recorded as follows: 7 investigated the case and I got information that the accused is mentally sick. The villagers interviewed said that he is mentally disturbed. Also when recording his statement, he was not mentally fit." In the re-examination PW.4 added that: "The society around know the accused and because they see him *and observe his behaviour, they said he was mentally sick." 11 There is no doubt that from the above pieces of evidence, the accused was known by other village-mates that he was mentally disturbed. The question for determination is, whether the accused was incapable of understanding what he was doing at the time he killed the deceased as per section 13(1) of the Penal Code. An accused person may rely on a defence of insanity if he raises such defence as an issue. However, it is an established principle that insanity can be justified upon referring the accused person to a mental hospital so that evidence of his insanity be given. The decision of the Court of Appeal in Mwihambi Lumambo V.R.

[1984] T.L.R. 336 is to that effect. I have indicated above, that the defence counsel applied for and granted an order that the accused be sent to Isanga Mental Institution for examination of his mental status. The report [Exh.P.5] reads as follows: "—At Isanga Institution, he was examined and found to be fairly dean and kept He was reasoning properly and he responds appropriately during the interview. He was observed to be attentive and his concentration was good according to the serial three tests. He judges correctly and his memory was good during the time of assessment He denied history of mental illness and he neither use alcohol nor cannabis. CONCLUSION: Mr. Ayubu Rashid has normal mental state and therefore he was SANE during the time of commission." 12 While the prosecution relied on this report to dismiss the defence of insanity, the learned advocate

urged the Court to exercise its discretion when considering the report which is an expert opinion. In the case of R.V. Agnes Doris Liundi [1980] T.L.R. 38 and later in Hilda Abel V.R. [1993] T.L.R. 246, it was held: "Courts are not bound to accept medical experts evidence if there are good reasons for not doing so." In the case of Hilda Abel, the court rejected the expert's opinion which was to the effect that the appellant was insane at the time she committed murder. The court considered the conduct of the appellant after the tragic incident [cleaning the weapon used, hid the weapon, went hiding herself in a nearby village and her cautioned statement] and rejected the doctor's opinion. The court held also 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 instant case, there is sufficient evidence to establish that the accused was not mentally fit. The evidence covers the period before the tragic incident as well as during and after the commission of this murder. It is on evidence that the accused just walked to his house after the incident and the machete allegedly used in the murder was just found in his room. The fact that he did not run away and he went straight to his house and remained there, as he used to be prior to the incident, can not alone be concluded that he ran away from the villagers. The doctor's report that the accused was SANE was also challenged by the learned advocate on the ground that it was prepared four years after the incident. It is the defence argument that the doctors' report is not precise because there is a possibility that the accused had recovered when he was examined. In the case of Kabande w/o Kihigwe VS Rex [1948] EAP.135 the court held: "that as the crime was committed on 2nd March and the appellant was first examined on 12th May, and a few occasions thereafter, by the medical officer, he was not in a position to give any evidence as to the appellant's mental condition at the time of her admission to prison, or an opinion as to her state of mind based on observation of her during the whole period of her remand." Having considered the above decision and the actual facts of this present case, I do agree with the learned advocate as well as the Honourable lady and gentlemen assessors that this Court has justification not to consider the doctor's report as regards the mental status of the accused at the time he committed this offence. For this reason, the report [Exh.P.5] is disregarded. Mr. Sangawe cited the case of Longinus Komba V.R. [1973] L.R.T. NO.39, where the court held: "In a criminal case, the burden of proof is on the prosecution to establish their case beyond all reasonable doubts. An accused person ought to be convicted on the strength of the prosecution and not on the weakness of the defence." The evidence adduced in this case has created doubt as to the mental status of the accused. The prosecution witnesses and defence conceded that the accused had mental problem at the time he committed the offence. The accused's burden of proof on this aspect is not as heavy as that of the prosecution. It was laid down in the old case of Kachinga Vs Rex [1946] EA at p.135 that: "the burden of proof resting upon an accused to prove insanity is not as heavy as the burden of proof resting upon the prosecution to prove beyond reasonable doubt... it is sufficient if he produces such a preponderance of evidence as to show that the conclusion that he was insane at the time of the offence is substantially the most probable of possible views of the facts." 15 In the instant case, I am

of settled views that, the accused was supported by the prosecution witnesses in discharging his obligation in a way to establish his insanity at the time he committed the offence. For the foregoing reasons, I am satisfied that the accused killed the deceased but at that time he was suffering from a disease affecting his mind and was incapable of understanding what he was doing. It is therefore a finding of this court that the accused did murder the deceased Yusufu s/o Nuru but by reason of his insanity, he is not guilty of the offence. Having made this special finding, I also make an order that the accused be kept in prison as a criminal lunatic and reports to be prepared and sent to the Minister according to the provisions of section 219 of the Criminal Procedure Act, Cap 20 [R.E. 2002]. It is so decided. R.A. TEEMBA, 3. 05/10/2010 5/10/2010 CORAM - R.A. TEEMBA, J. Mr. Marandu - S/Attorney for Republic Mr. Sangawe - Counsel for Accused Accused:- present C/C Kombo Court:- The Judgment is delivered today in open court in the presence of all parties. R.A. TEEMBA, 3. ■ 05/10/2010 16 Court:- Right of appeal explained. R.A. TEEMBA, X 05/10/2010 17

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