

TANZANIA / JUDGMENT

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30 September 2008

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iff THE COURT OF APPEAL OF TANZANIA ATTABORA (CORAM: RAMADHANI, C.], MROSO, J.A. And MUNUO, J.A.) CRIMINAL APPEAL NO. 134 OF 2005 SALEHE IIASHENENE•• APPELLANT VERSUS THE REPUBLIC•..... RESPONDENT (Appeal from the conviction of the High Court of Tanzania atTabora) (Mwita,J.) 131h day of June, 2005 dated the in HC Criminal Sessions Case No. 50 of 1992 JUDGMENT OF THE COURT 17 & 30 September, 2008 MROSO, J.A.: The appellant who was facing a murder charge was committed for trial by the High Court. He first appeared before Mr. G. C. Kajeri, Principal Resident Magistrate with Extended Jurisdiction, who took the plea. The appellant denied the charge leading to a plea of not guilty being entered against him. On.the same day, Mr. Kajeri, PRM

- 2. (Extended Jurisdiction), held a preliminary hearing under section 192 of the Criminal Procedure Act, 1985. In the course of the Preliminary Hearing a Postmortem Report was admitted without objection and marked Exhibit P.1. Also, among the matters which are contained in a memorandum of undisputed facts are the following:-
- That the accused (now appellant) stabbed the deceased on the neck before he stabbed their I child on its buttocks.
- That the accused (now appellant) stabbed himself on the neck but upon his failure to take away his life, he attempted alternative of drowning himself in a pond. Mr. Kajeri then listed down the intended prosecution witnesses and indicated that the appellant did not intend to call any defence witnesses. On a subsequent date and, thereafter up to the end of the trial, the appellant appeared before a judge of the High Court. On one of the appellant's appearances before a judge, he- uttered words which. were irrelevant to his case. Those words attracted the attention of 3 the p residing judge. After the defence counsel had a talk with the appellant, and the appellant again talked unintelligibly, counsel said to the court:- "We cannot proceed with the trial. I therefore, my Lord, apply that the accused be sent to Dodoma Mental Hospital for medical examination.") The learned State Attorney who was prosecuting the case said:- "I hope these. are not delaying tactics. The accused seems to be mentally sound and I do not know why he is behaving like this. Again, for the information of the court, one of my

- vital witnesses, an old man of 60 years was * yesterday attached (sic) by unknown people. He was cut on the arm and is now having a bandage. I hope there is no connection between the cutting and the behaviour of the accused. I have no objection." The presiding judge (then Masanche, 3.) immediately made an order in terms of section 220 (1) of the Criminal Procedure Act, 1985, to the effect that the appellant be 'sent to Dodoma' The Medical Officer incharge of the Dodoma Mental Hospital (Isanga Institution?) was to comply with s. 220(2) of the Criminal Procedure Act, 1985".... Five years later, the appellant appeared before another High Court Judge, Mwita, J. The Judge took the appellant's plea. The appellant said of the charge of murder - 1:) "It is true" The Judge entered a plea of "Guilty" to the charge. Mr. Kayaga, learned advocate, who was then appearing for the appellant (previously, it was a Mr. Kaunda, advocate), informed the court as follows:- "We have not yet been furnished with Report from Isanga Institution. We pray for adjournment to enable us study the report." The case was adjourned for hearing to another date. 5 On ótle of the dates to which the case was adjourned a plea was aain taken and the appellant is recorded as having said about the charge:- "It was by bad luck." Aplea of not guilty was entered against the appellant. Mr. Kayaga then referred to a Medical Report (apparently the Report from the Isanga Institution) and said that it was to the effect that the appellant "was insane when he committed the offence' Mr. Mulwarnbo, a State Attorney who was appearing in the case for the Republic, said he was disputing the medical report and that a trial should proceed. The learned judge, Mwita, 3, immediately proceeded to write a ruling on the question of the alleged insanity of the appellant. In the ruling he cited section 13 of the Penal Code, Cap. 16 R.E. 2002 on insanity. He also referred to a Medical Report from the Isanga Institution to which the appellant had been. referred in 1999. The 6 report said the appellant was insane at the time he committed the offence. Apart from the Medical Report, the .judge also referred to a caution statement the appellant made to the police in which he explained the circumstances which led to his stabbing his wife, killing her. The learned judge reached a decision that the appellant was not insane within the meaning of section 13 of the Penal Code. He then ordered that the trial should proceed. It will be noted that neither the prosecuting counsel nor the .defence counsel were given opportunity to address the court on the question of insanity before the judge reached the decision that the appellant was of sane mind at the time he committed the offence. Curiously, subsequent to the ruling about the state of mind of the appellant at the time he killed the deceased, the court again took the plea of the appellant who said:- "It is true I killed by bad luck." 14 7 A plea of not guilty was entered and the trial commenced. After all the evidence had been taken counsel for both sides made submissions. The learned State Attorney' made a brief reference to the question of sanity of the appellant. He said:- "In Hilda Abel v. Republic [1993] TLR 246 it was held that conduct of the accused at the material time is looked at in determining whether the accused was insane. It was also
- -. held that courts are not bound to accept medical experts evidence if there are grounds for doing so. In the instant case there are

- ' grounds for the Court not to be bound by , medical expert witness regarding the sanity of the accused." Mr. Kayaga did not at all advert to the question of the sanity of the appellant. He must have realized that it was futile to argue that the appellant was insane because the Court had already decided on the issue. Instead he pursued the defence of provocation only. In summing up to the assessors the Judge referred to section 13 of the Penal Code on insanity and said:- 8 "Lady and gentlemen assessors, having heard the evidence adduced by the prosecution and the defence, do you think that the accused did not .know what he was doing when he stabbed the deceased and that he did not know that it was wrong to do so." (Our emphasis). Apparently, the judge was putting the question of the sanity or otherwise of the appellant to the assessors. But he had already answered that question and no evidence had in fact been adduced by the parties on insanity. The assessors, rightly, expressed. no .opinion on the question of insanity regarding the appellant In his judgment the judge discussed the question of insanity and, inter alia, said:- "On a trial for murder, where the defence is insanity, the accused person, to exempt himself from criminal responsibility, must satisfy the court that he was insane in the legal sense at the time of committing the act. 61, * The burden of proof resting upon the Accused to prove insanity is not as heavy as the burden of proof resting upon the prosecution- to prove its case beyond a reasonable doubt." In the end he reached the same conclusion as he had done earlier that the defence of insanity was not available to the appellant.
- In the, memorandum of appeal for the appellant the following grounds were raised:- 1 - That the proceedings and the decision before the High Court are null and void.
- 2— That the honourable Trial Judge erred in
- law in holding that there was no provocation. 3 - That the Honourable Trial Judge erred in law in his ruling dated 28/9/2004 to rely upon the appellant's cautioned statement before it was tendered and admitted as exhibit in the proceedings. - ICI 4 - The Honourable Trial Judge erred in law in holding that the appellant was not insane at the time the offence was committed. For reasons which will be apparent later, we will deal with grounds 1 and 3 and 4 only. The first ground of appeal is premised on the argument that since Mr. Kajeri, Principal Resident Magistrate (PRM) with Extended Jurisdiction had no jurisdiction to sit in the High Court and there is no indication the case had been transferred to him when he took the plea and also held a preliminary hearing under section 192 of the Criminal Procedure Act, 1985, henceforth the Act, those proceedings before him were null and void for want of jurisdiction, the rest of the proceedings which were before judges of the High Court including the eventual judgment were equally null and void. The rationale as explained by Mr. Kayaga is that one could not sever the proceedings before Kajeri, PRM (Extended Jurisdiction) from those before the -judges of the High. Court and that by the time the High Court took over, the case was already a nullity. - 11 ¼ Mr. Kayaga cited several decisions of this Court to support his argument, such as - Khamis Ramadhani @ Rupindira v. Republic, Criminal Appeal No. 157 of 2003; Henry Kagoli and. Another v. Republic, Criminal Appeal No. 49 of 1993 and Majaliwa Guzuye v. Republic, Criminal Appeal No. 213 of 2004, all

unreported. While Mr. Rweyongeza, learned State Attorney for the respondent Republic, conceded that the proceedings before Mr. Kajeri, PRM with Extended Jurisdiction, were null and void for, the reasons which were given by Mr. Kayaga, he parted company with him regarding the proceedings, that is the trial, before Mwita, Judge. He thinks the null and void proceedings before Mr. Kajeri could be severed from the rest of the proceedings before the judges of the High Court. On that reasoning, Mr. Rweyongeza submitted that the trial before Mwita, J. was valid in law. He cited the case of Samwel Nikolai V. The Republic, Criminal Appeal No. 59 of 1993, a decision of this Court (unreported) as additional authority that the proceedings before Kajeri PRM (Extended Jurisdiction) are null and void for want of jurisdiction. We agree. So, the legal question is - 12- whether the clearly null and void proceedings before Kajeri, PRM (Extended Jurisdiction), can be severed from the rest of the proceedings in the case. We think they can, and will be severed. The rest of the proceedings properly before the High Court remain intact and valid. We will try to explain. First, we begin with the reason why the proceedings before Kajeri, PRM (Extended Jurisdiction) are null and void. The reasons are now familiar in legal circles in the country. A resident magistrate with extended jurisdiction does not *de facto* assume jurisdiction over High Court cases, which are normally within the domain of High Court Judges. Such resident magistrate will assume jurisdiction over, say criminal cases triable by the High Court, only if the High Court, acting under section 256A (1) of the Criminal Procedure Act, 1985, Cap. 20 of the Revised Edition of 2002, transfers the case to him or her and directs that he or she takes the plea and tries the case. 13 After the case has been transferred, and with the direction as stated in the section cited above, the resident magistrate with extended jurisdiction will ensure that the case is given a case number from a special register of the Court of Resident Magistrate with extended jurisdiction. The resident magistrate with extended jurisdiction will then take cognizance of the case by taking the plea and trying it in his or her court - Court of Resident Magistrate. Such resident magistrate has no jurisdiction to sit in the High Court because he or she is not a judge of the High Court. However, the court of resident magistrate with extended jurisdiction in which a High Court case is tried is deemed to be the High Court and the presiding magistrate is deemed to be a judge of the High Court. See section 173 (3) of the Act. The "deeming" means that the court is not in fact the High Court and that the magistrate is not in fact a judge of the High Court. All the aforesaid is the import of the cases already cited by counsel, that is to say, Samwel Nikolai v. The Republic and Henry Kagoli and Kasamuka Daniel v. The Republic, to cite only a few of such cases. We now intend to explain why we think that the nullified proceedings before Mr. Kajeri, 'PRM (Extended Jurisdiction) did not affect the validity of the proceedings before the High Court judges, in particular, before Mwita, J. We wish to acknowledge the fact that there are decisions of this Court to the effect that a preliminary hearing is an integral and essential part of the trial of a case. One such case which can be readily cited is Khamis Ramadhani @ Rupindira v. The Republic, Criminal Appeal No. 157 of 2003. In that case, Principal Resident Magistrate with Extended Jurisdiction to whom, a High Court case had not been transferred, wrongly sat in the High Court, took a plea and presided over a preliminary hearing of the case. Subsequently, a High Court judge took over the case and tried it without himself

conducting a preliminary hearing. Clearly, the proceedings before the Principal Resident Magistrate with extended jurisdiction were a nullity for want of jurisdiction. This Court not only nullified those proceedings, it proceeded to nullify even those proceedings before the judge of the High Court. The Court said:-

- ∴ 15 . the ensuing proceedings in this case though duly 'heard by a judge of the High
- Court, B. N. Mrnilla, J. was based on invalid preliminary hearing. The provisions of section 192 (1), (2), (3) and (4) (of the Criminal
- Procedure Act) were not complied with. This Court has in a number of cases held that „where the provisions of this section which are mandatory are not complied with, the
- proceedings are vitiated.....In this case, the situation is even worse, with invalid preliminary hearing, it means that the
- proceedings in the case were not complete, the essential part involving preliminary hearing missing. That is the part of the proceedings which was presided over by A.C. Lyamuya, PRM Extended Jurisdiction, which as we pointed out was a nullity". The Court proceeded:- "It hardly needs to be over emphasized (sic) that the provisions of section 192 of the Criminal Procedure' Act, 1985 are of fundamental importance." (Our emphasis). 16 Finally, the Court said - "In the upshot, the mandatory provisions of section 192 of the Criminal Procedure Act, 1985 having not been complied with, the subsequent proceedings in the case were a nullity". That position was also adopted In several other decisions of this Court in, for example, the case of Juma Lyamwiwe v. The Republic, Criminal Appeal No. 42 of 2001. With all due respect, we wish to depart from that position regarding what was said to be the 'fundamental importance' of a preliminary hearing under section 192 of the Act. Section 192 of the Act appears under a sub-title - "Accelerated Trial and Disposal of cases." We shall for convenience quote subsection (1) of the section which goes. as under:- "192 (1) Notwithstanding the provisions of section 229, if an accused person pleads not guilty the court shall as soon as is convenient, 17 hold a preliminary hearing in open court in the presence of the accused or his advocate (if he is represented by an advocate) and the public prosecutor to consider such matters, as are not in dispute between the parties and which. will promote a fair and expeditious trial". Subsection (2), (3) and (4) of the section explain what takes place during the preliminary hearing. There is no doubt that the main purpose of section 192 of the Act is to promote expeditious and cost-effective disposal of criminal cases in the courts. Those attributes are highly desirable in any credible justice system, but not of fundamental importance. That is to say, the holding of a preliminary hearing is not the essence of a criminal trial. A fair criminal trial in which no preliminary hearing is held is possible. Indeed, section 192 of the Act as it now reads is a recent inclusion into the Act. It was introduced in 1985, by Act No. 9 of that year in an effort to find a means to achieve a faster and cheaper disposal of criminal cases in our courts. It by no means meant that prior to 1985 criminal trials were unfair or a nullity because there were no preliminary hearings.
- c. In the present case, Mwita, 3., and even Mchome, J. and Masanche, 3. who had previously

handled the case after Mr. Kajeri, PRM, did not hold a preliminary hearing. But, since, in our considered opinion and for the reasons we have attempted to give, a preliminary hearing the proceedings before the learned judges up to judgment were not vitiated by the mere absence of a preliminary hearing. We are constrained, therefore, to have to depart from the decision in *Khamis Ramadhani © Rupindira v. The Republic*, and hold that the proceedings in the High Court subsequent to the nullified proceedings before Mr. Kajeri, PRM (Extended Jurisdiction) were valid and, in effect, we uphold Mr. Rweyongeza, learned State Attorney, and dismiss the first ground of appeal. We now wish to deal quickly with grounds 3 and 4 together. From the summary of the case as we gave earlier in this judgment, it must be obvious that the learned trial judge misapprehended and mishandled the issue of insanity in the case before him. In the first place, he appeared to have treated the issue of insanity as if it was a question whether the appellant was incapable of standing trial 19 S because of unsoundness of mind - see sections 216 to 218 of the Criminal Procedure Act, 1985.

- Second, he started to deal with the defence of insanity (section 219 of the Act) and decided it before hearing evidence and hearing fully submissions by counsel for both the prosecution and the defence regarding it. He pre-empted them and prematurely decided the issue. We think that whatever may have been the merits of that defence of insanity, there was a mistrial. It was a futile exercise by the, Stated Attbrhey to address the court, though apparently only in • passing, in his final submissions, and the court to address the assessors briefly in its summing up to the assessors on the defence of insanity. A decision had already been taken by the Court and it would not have been open for the judge to revisit his decision. We think the -appellant was prejudiced by the approach which the trial judge adopted by pre-empting his defence of insanity. Although we heard full arguments on his other defence of provocation, we consider that, in the circumstances, the whole of the proceedings before Mwita, J. had been vitiated by the mistrial and the best way out is to quash all those proceedings and order a fresh trial before, a different judge. For that reason, we refrain from expressing our opinion on the guilt or otherwise of the appellant. GIVEN at TABORA this 30th day of September, 2008. A.S.L. RAMADHANI CHIEF JUSTICE .J.A.MROSO JUSTICE OF'APPEAL E. N. MUNUO JUSTICE OFAPPEAL I certify that this is a true copy of the original. ; :

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Prepared on 14 October 2026 · Esheria