THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO 668 OF 2014

TIRWOMWE JAMES}..... APPELLANT

VERSUS

UGANDA}..... RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kabale before His Lordship Mr. Justice J.W. Kwesiga in High Court Criminal Session No. HCT – 11 – CR – CSC – 0032 of 2012 delivered on 29th May, 2013)

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE CHRISTOPHER IZAMA MADRAMA, JA

JUDGMENT OF THE COURT

The appellant was charged with murder contrary to sections 188 and 189 of the Penal Code Act and was tried, found guilty, convicted and sentenced to life imprisonment on the 29th of May 2013. The facts are that the appellant was living with Moses Tirwomwe his son at Kigugo Cell, Buhara Parish, and Buhara Sub County in Kabale District. The mother of Moses Tirwomwe was not at home and had separated with the appellant. On the 21st of June 2011 at around 10.00 am, the deceased and the appellant were at their home. The appellant picked a panga and hacked the deceased on the head. He proceeded to burn the deceased on a pile of firewood. The appellant was later found lying near the body that had been burnt beyond recognition. He maintained that he had burned an evil spirit. He was arrested, charged and tried for the offence of murder, convicted and sentenced to life imprisonment. He appeals against conviction and in the alternative against sentence. The grounds of the appeal are that:

1. The learned trial judge erred in law when he convicted the appellant on the basis of the evidence on his mental fitness as adduced by PW 4 yet the cause and effect of the abnormality was not inquired into thereby occasioning a miscarriage of justice to the appellant.

2. The learned trial judge erred in law when he imposed the sentence of life imprisonment that was harsh and manifestly excessive in the circumstances of this case.

At the hearing of the appeal, counsel Barbara Kawuma, Principal State Attorney represented the respondent while learned counsel Peter Kabagambe represented the appellant. With leave of court, the court was addressed in written submissions which were filed subsequently.

The first ground of appeal is against conviction while the second ground which is deemed to be in the alternative is against sentence. We shall consider the first ground of appeal first and if it fails, will then consider the second ground of appeal.

The facts as contained in the written submissions of the appellants counsel are that Moses Tirwomwe (also referred to as the deceased) was at the time of his death aged 3 years and a son of the appellant. On 21st of June 2011 at around 10 AM, the deceased and the appellant were at their home, whereupon the appellant hacked the deceased with a panga and thereafter set the deceased's body on fire. Neighbours found the appellant lying next to the fire and when they inquired from the appellant as to what happened to the deceased, he replied that he had killed an evil spirit and burned him because he used to turn into a supernatural human being during the night and he was an evil spirit. The appellant was arrested immediately. He was charged, tried and convicted as charged.

On the first ground of appeal, learned counsel for the appellant drew the attention of the court to the record where the learned trial judge evaluated the evidence of the psychiatric officer who tested the appellant and testified as PW 4. The passage reads as follows:

> "The psychiatric officer stated in his report that he had established the accused person was insane immediately after the arrest and presentation to him for examination. The conduct of the accused person after the communication of the offence has been considered. He remained at the scene where he was burning the body of the deceased unbothered and he told whoever asked him what had happened. He said he had killed a beast or evil spirit and burnt it. It pointed to the fact that he was under influence of what he had consumed, the drugs. The defence of insanity was not raised at the time of starting the trial, his mental

fitness for the purposes of the trial was not raised and the court could not make any order for fresh medical examination. At the time there was no issue raised as to the accused person's fitness to stand the trial. My observation is that the accused person was attentive throughout the trial and followed the proceedings normally. Section 194 (2) of the Penal Code Act provides that on a charge of murder, it shall be the defence to prove the person charged was suffering from such abnormality. There is evidence that the accused person behaved abnormally when he was found lying down next to the deceased's body which he had set on fire but this does not prove that he was not aware that what he had done was wrong. The psychiatrist PW2 told court that despite the effect of the Narcotics' substance, the accused appeared he knew what he was doing."

Counsel Peter Kabagambe submitted that the learned trial judge erred in law when he relied on section 194 (2) of the Penal Code Act, to find that considering that the appellant had not led evidence of his abnormality at the trial, the abnormality of the appellant at the time of the commission of the offence was not proved. He submitted that section 194 (2) of the Penal Code Act, applies to a situation where a person had been found guilty of murder. In the appellant's case, the applicable law or section 48 (1) of the Trial on Indictment Act Cap 23 Laws of Uganda (hereinafter referred to as the TIA) provides that where any act or omission is charged against any person as an offence and it is given in evidence on the trial of that person for the offence that he or she was insane so as not to be responsible for his or her action, even if it appears to court that the person did the act or made the omission charged but was insane at the time when he or she did the act or made the omission, the court shall make a special finding to the effect that the accused is not guilty of the act or omission charged by reason of insanity.

The psychiatrist who testified as PW 4 confirmed that the appellant was insane at the time he examined him after he had been arrested a few hours after committing the offence. He testified that the mental disorder was due to substance abuse which did not affect the ability of the appellant to know that he was committing a crime. The learned trial judge relied on that evidence to convict the appellant of murder. The appellant's counsel submitted that PW 4 did not testify or identify which substance had caused the mental disorder to the appellant. The medical report made by PW4 was made on 22nd of June 2011 and was admitted as exhibit PE1. In the report and the psychiatrist did not mention anything about the substances allegedly taken by the appellant but nonetheless concluded that the appellant was insane.

Counsel submitted that the learned trial judge misdirected himself on the provisions of section 48 (1) of the TIA when he failed to rely on the evidence of insanity of the appellant purportedly because the appellant had not adduced any evidence in that regard. He submitted that section 48 (1) of the TIA clearly provides that if evidence is led at the trial whether by the prosecution or the defence, the trial court must make an enquiry as to whether the appellant was insane so as not to be responsible for his or her action.

Counsel cited the case of **Bagatenda Peter v Uganda SCCA No 10 of 2006** where the Supreme Court of Uganda held that the conclusion as to the state of mind of the accused person may be discerned from the evidence on record, be it from the prosecution side or a statement made by the accused person to the police as was held in **R v Magata s/o Kachehakane (1957) EA 330**. The Supreme Court further upheld the decision of the court of appeal that the behaviour of the appellant therein after the commission of the offence was not consistent with the behaviour of a person who would be suffering from insanity.

In the appellant's case, learned trial judge acknowledged the fact that the appellant was insane at the time and after the commission of the offence, but subsequently held that the appellant knew what he was doing purportedly because of the drugs he had consumed did not affect him in that regard.

Learned counsel for the appellant submitted that the trial judge's failure to inquire into the particulars of the drug purportedly consumed by the appellant before relying on it in the evidence of PW 4 was an error in law. In the case of **Kamani v Republic (2000) 2 EA 417**, the Court of Appeal of Kenya held that since the appellant had raised a reasonable probability that she might have been mentally ill at the time she hacked her own daughter to death, the burden then shifted to the prosecution to dislodge and do so beyond any reasonable doubt that the appellant was in fact sane when she killed her daughter. The Court of Appeal proceeded to set aside the conviction for murder and the sentence and substitute the conviction with a special finding under section 166 (1) of the Criminal Procedure Code, of Kenya which provision is the equivalent of section 48 (1) of the Trial on Indictment Act of Uganda.

In the premises learned counsel for the appellant prayed that the court finds that the appellant was not guilty as provided for under section **48** of the TIA and that the conviction be quashed and sentence set aside.

In reply, the respondents counsel opposed ground 1 of the appeal and submitted that section **194 (2)** of **the Penal Code Act** does not only apply to situations where one has already been found guilty of murder and has been convicted. The section reads that: *"on a charge of murder, it shall be for the defence to prove that the person charged was suffering from such abnormality of mind as is mentioned in **194 (1)** above."* The premises it does not only apply to convicts. Before reference to section **194** the learned trial judge had referred to **section 11 of the Penal Code Act** which provides that *a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he or she is though any disease affecting his or her mind incapable of understanding what he or she is doing or of knowing that he or she ought not to do that act.* However a person may be held criminally responsible although his or her mind is affected by diseases if that disease does not in fact produce upon his or her mind one of the effects mentioned in the section.

Counsel submitted that the above section is in line with the findings of PW4, the psychiatrist Doctor. The issue before the trial court was whether the appellant at the commission of the crime knew that he was killing a person. On the other hand the respondents counsel submitted that section 48 (1) of the Trial on Indictment Act was misapplied by the appellant's counsel. Counsel submitted that the medical examination on record is to the effect that the appellant's mental faculties were found to be normal, not reduced or increased. With reference to the decision of the Supreme Court in **Bagatenda Peter v Uganda** (supra), the defence of insanity was never raised by the appellant or anyone else either at the time of his arrest or at the trial. Had it been raised at the time of his arrest, he would have been subjected to a medical examination. The accused did not in any way indicate that he had been mentally sick. Furthermore it was held that the point at which his mental state would have been brought up was at the trial. The accused chose to make an unsworn statement to court also denying the offence. The respondent's counsel submitted that this is exactly what happened in the appellant's case because the appellant chose to give evidence and not on oath. With reference to the case of **R v Magata s/o Kachehakana** (supra), the essence of the McNaughton rules is that the essence of the defence of insanity is that the accused did not know what he was doing or if he did know what he was doing, he did not know that it was wrong. In the case before the court, the appellant had been found to have known what he was doing and therefore was responsible for his actions. The ruling of the court in **Bagatenda Peter v Uganda** (supra) that the state of mind of the accused person may be discerned from the evidence on record, be it from the prosecution side or a

statement made by the person to the police was not material. In this particular case, there is no evidence on record upon which a conclusion of insanity can be reached. The learned trial judge examined the record, the 'charge and caution' statement, the evidence of prosecution witnesses and established that what the appellant said was a lie that he believed the deceased went with his mother. He further found that the appellant did not testify on being mentally impaired and merely denied killing the deceased. The trial judge further observed that the appellant was attentive throughout the trial and followed the proceedings normally. This supports the fact that the trial judge did not find it necessary to order for an enquiry into the mental health status of the appellant.

Furthermore, learned counsel for the appellant misapplied the case of **Kikonyogo v Uganda** (supra). The submission that there was failure to name the drug purportedly consumed by the appellant and that this was fatal. When the learned justices of the Supreme Court said in that case was that they asked counsel for the appellant for the name of the drug that his client had taken and whether it was disclosed to the trial judge but learned counsel could not name the drug.

The evidence clearly shows that the appellant claims to have swallowed drugs that intoxicated him and made him incapable of forming an intention to commit a crime. The onus is still on the claimant to bring the evidence forward to the trial judge. Furthermore, the case of **Kimani v Republic** (supra) is distinguishable from the present case in the sense that in the former case the consultant psychiatrist had found that the appellant was suffering from "affective disorder" and not in a position to know that what she was doing was wrong. In the case before this court in the psychiatrist found that the appellant knew what he was doing at the time he cut up and killed his son.

We have carefully considered the submissions of counsel for the appellant and for the respondent, the authorities cited, the law as well as the evidence on record. The duty of this court under **Rule 30 (1)** of **the Judicature (Court of Appeal Rules) Directions** on any appeal from a decision of the High Court in the exercise of its original jurisdiction, is to reappraise the evidence and draw inferences of fact. What is reappraisal of evidence? According to the East African Court of Appeal decision in **Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123**, per Sir Clement De Lestang V-P, the conduct of an appeal from the High Court in the exercise of original jurisdiction to the Court of Appeal may be by way of a retrial on matters of fact. In this regard, the Court of Appeal is not bound to follow the findings of fact of the trial judge but will review the evidence and may reach its own conclusion:

"Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally"

In the appellant's case, there is no controversy on matters of fact. We shall therefore reappraise the evidence and establish whether the learned trial judge erred in law not to make a finding under section 48 (1) of the Trial on Indictment Act on the issue of whether the appellant, as a matter of fact, was insane at the time of commission of the offence. While it is a question of fact whether the applicant was insane at the time of commission of the offence, the record clearly establishes through the testimony of PW4, and the finding of the learned trial judge that the appellant was insane at the time of commission of the offence and immediately thereafter.

We have accordingly reappraised the evidence on the issue of whether the appellant was insane at the time of commission of the offence and considered the applicable law and precedents.

Starting with the law, we have firstly considered the provisions of the Penal Code Act cited and the case law. Insanity is the subject of sections 10 and 11 of the Penal Code Act which provide that:

"10. Presumption of sanity.

Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.

11. Insanity.

A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he or she is through any disease affecting his or her mind incapable of understanding what he or she is doing or of knowing that he or she ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his or her mind is affected by disease, if that disease does not in fact produce upon his or

her mind one or other of the effects mentioned in this section in reference to that act or omission."

Section 10 of the Penal Code Act is very clear that every person is presumed to be of sound mind until the contrary is proved. The question therefore becomes who has the burden of proof that the accused was at the time of commission of the offence of unsound mind? The question arises from a reading of the decision of the Supreme Court referred to by the appellant's counsel in **Bagatenda Peter v Uganda** (supra) and the passage that the evidence may be from the prosecution or the defence. We will further consider the issue after examining the provisions of law relating to insanity. Insanity is a defence under section 11 of the Penal Code Act. It stipulates that a person is not criminally responsible for an act or omission if at the time of doing act or making the omission he or she is through any disease affecting his or her mind incapable of understanding what he or she is doing or of knowing that he or she ought not to do the act on make the omission. The key factor for consideration is whether the accused was incapable of understanding what he or she was doing or of knowing that he or she ought not to do the act or omission. That is the crux of the provision and it does not require case law to interpret it. Was the accused incapable of understanding what he or she was doing? Secondly, and in the alternative, even if he or she knew what he or she was doing, did he or she know that she ought not to do the act or make the omission?

Learned counsel for the respondent submitted that PW4 the psychiatrist Dr established that the accused/appellant knew that he was killing the person. That is not the test. The test is whether he or she knew that she ought not to do the act or the omission. The test is one of responsibility for the act or omission for which the appellant was charged. The material time for consideration, is the time of the commission of the offence or the omission. The question remains as to whether in the circumstances of the case, the duty was on the appellant to raise the defence of insanity and if he or she did not raise it, it ought not to be considered. In this particular case, it is the prosecution witness PW4 who raised the question of insanity. He is the one who established that the accused suffered from hallucinations. His report speaks in graphic detail about what the appellant was suffering from.

We have considered the submissions of the respondents counsel on the burden of proof. The clear problem with that submission is that the prosecution volunteered the information. This would amount to an admission of the state of mind of the accused person. Secondly we have considered the question of intoxication as a result of a

narcotic drugs or any drug. The key element in section 11 is the fact of insanity. Insanity can be induced by a disease or substance abuse and the issue of whatever caused the insanity would not be material. What is material is whether the appellant was labouring under a disease of the mind and that is what the evidence establishes. Intoxication is provided for by section 12 of the Penal Code Act. The provision in the substance reproduces the element of whether the person charged at the time of the act or omission complained of did not know that the act or omission was wrong or did not know what he or she was doing. That is essence of the defence of insanity. We shall set out section 12 of the Penal Code Act for ease of reference:

> **"12. Intoxication.**
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> (1) Except as provided in this section, intoxication shall not constitute a defence to any criminal charge.
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> (2) Intoxication shall be a defence to any criminal charge if by reason of the intoxication the person charged at the time of the act or omission complained of did not know that the act or omission was wrong or did not know what he or she was doing and—
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> (a) the state of intoxication was caused without his or her consent by the malicious or negligent act of another person; or
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> (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
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> (3) Where the defence under subsection (2) is established, then in a case falling under subsection (2)(a) the accused person shall be discharged; and in a case falling under subsection (2)(b), the provisions of the Magistrates Court Act relating to insanity shall apply.
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> (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he or she would not be guilty of the offence.
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> (5) For the purposes of this section, "intoxication" shall be deemed to include a state produced by narcotics or drugs.

The evidence establishes that the hallucinations experienced by the appellant could have been induced by substance abuse. However, it is a question of fact, that at the time

of commission of the offence or the omission, the appellant suffered from hallucinations and also did not conceal what he was doing. He lay near the deceased after burning the body. The remarks of the appellant to the witnesses of the prosecution who found him lying next to the body of the deceased speaks volumes about his state of mind at the time of commission of the offence.

The question of law is whether evidence has been given at the trial of the appellant that he was insane so as not to be responsible for his or her action at the time when the act was done or omission made. We have further deemed it necessary, from the testimony on record to establish whether the learned trial judge duly established whether the appellant was responsible for his actions at the time of commission of the offence and whether he duly complied with the law in that regard.

The finding of a court as to the sanity of the accused is based on evidence. On the burden of proof we have considered the case of **Bagatenda Peter v Uganda, Supreme Court Civil Appeal No 10 of 2006**. The brief facts in that appeal were that the appellant emerged from a bush, cut of the head of one Pauline Nasiwa with a panga and run off with the head of the deceased. The appellant was subsequently arrested and indicted for the offence of murder. He was convicted by the High Court and sentenced to suffer death. His appeal to the Court of Appeal was dismissed and he further appealed to the Supreme Court. As far as is relevant to the issue before us, the first ground of appeal was that:

> "The learned justices of Court of Appeal erred in law and fact in finding that the appellant was not suffering from mental disorder at the time of commission of the offence."

The appellant's counsel had argued that the appellant was not properly guided on the evidence in relation to his mental state at the time it was alleged that he killed the deceased. This was based on the horrific nature of the crime and the contention that no sane person could have committed such a crime in the manner the appellant did. The respondent submitted that the court was correct not to make any finding on the mental faculties of the appellant. While agreeing with the learned Senior State Attorney, the Supreme Court held that the defence of insanity was never raised by the appellant or anyone else whether at the time of his arrest or at his trial. Had he raised it at the time of his arrest, he would have been subjected to medical/mental examination. Secondly, the issue of the mental states should have been brought up at the trial. The essence of

the defence of insanity is that the accused person did not know what he was doing, or if he did, he did not know that it was wrong. This is based on the McNaughton Rules applied in Uganda in **R v Magata s/o Kachehakana [1957] EA 330**. Secondly the provisions of sections 10, 11 and 194 of the Penal Code and on the issue of presumption of sanity: the defence of insanity, and findings of diminished responsibility in murder cases. The state of mind of the accused person may be discerned from the evidence on record, from the prosecution side or the statement made by the accused person to the police. The behaviour of the appellant after commission of the offence was not consistent with the behaviour of a person who could be suffering from insanity.

We have further considered the case of **R v Magata s/o Kachehakana [1957] 1 EA 330** The accused was charged of killing his father by one blow with a panga and it was proved and admitted that the accused killed his father because he believed that his father was Satan and had bewitched him. There was no apparent motive for the killing other than the belief of the accused that his father had bewitched him. Lyon J considered the definition of insanity under the then section 12 of the Penal Code Act which is now section 11 set out above and said:

> "That section must be read and construed together with the rules in McNaughton's Case (2) ((1843), 4 State Tr. N.S. 847), and decisions following that case (Archbold (33rd Edn.), p. 16 et seq.). Dr. Murphy testified that when he examined the accused on June 3, 1957, he appeared to be mentally normal. Other prosecution witnesses testified that accused never complained that his father had bewitched him, nor did they believe that accused had been bewitched nor that his family or that his animals had been bewitched. But it does not follow that accused did not think so.
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> ...
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> This case is not free from difficulty. I have considered the words "disease of the mind" in s. 12 of the Penal Code. I am of the opinion that an African living far away in the bush may become so obsessed with the idea that he is being bewitched that the balance of his mind may be disturbed to such an extent that it may be described as disease of the mind. Here the killing is unexplained, and in my opinion inexplicable; except upon the basis that accused did not know what he was doing. I have directed myself along the lines of the decision in Godiyano

Barongo s/o Rugwire v. R. (3), 19 E.A.C.A. 229. The head note in that case is identical with the note of the learned editors of Archbold (33rd Edn.), p. 20:

Page 332 of [1957] 1 EA 330 (HCU)

"The burden of proof which rests upon the prisoner to establish the defence of insanity is not as heavy as that which rests upon the prosecution. . . . It may be stated as not being higher than the burden which rests on the plaintiff or defendant in civil proceedings and may be discharged by evidence satisfying the jury of the probability of that which the prisoner is called on to establish."

I have also considered para. 27 in the Eleventh Cumulative Supplement of May 25, 1957.

I have come to the conclusion, mainly upon the evidence adduced by the prosecution but also upon the accused's statement to the police, that when this accused killed his father he did not know what he was doing and he did not know that he ought not to have done the act. In my opinion the evidence as a whole has established the reasonable probability that this was the accused's state of mind at the relevant time; and in this finding I am in agreement with the second assessor.

For all these reasons I find the accused guilty of the act charged but insane at the time. (Jama Warsama v. R. (4), 17 E.A.C.A. 122.)"

In this case the evidence came from the prosecution witnesses. The law is clear that if evidence is given at the trial "... that person for that offence that he or she was insane so as not to be responsible for his or her action at the time when the act was done or omission made, then if it appears to the High Court that that person did the act or made the omission charged but was insane as aforesaid at the time when he or she did the act or made the omission, the court shall make a special finding to the effect that the accused is not guilty of the act or omission charged by reason of insanity"

In this case the evidence of PW4 appears at pages 13 and 14 of the record. Apollo Twinebahi 52 years old testified that he is a Psychiatric Officer with a decree in community psychology, a diploma in clinical psychology and a diploma in psychiatric nursing from Butabika hospital. He ordinarily handled mental patients and sometimes suspects of crime and examines them for mental assessment. He examined the appellant and put his findings on Police Form 24. He filled the form on 22nd May, 2011. He

testified that the appellant was 37 years old and had a small wound on his face, he was mentally disorderly due to abuse of substances. The police form was admitted in evidence. In cross examination, he testified that if the substance was withdrawn, the condition would subside. However, the substance abuser would know what he was doing. He further testified that the patient on substance abuse loses self-control. He testified that the cause was substances taken and the appellant knew he was killing a person. The police form notes indicated that the appellant

> *"presented with paranoid delusions with reference of persecutory delusions as he says that his wife has sent ghosts to kill him after her disappearance".*

Furthermore, he had:

> *"perceptual disorders such as visual and auditory hallucinations by hearing some voices, commanding him to kill his child".*

He had

> *"visual hallucinations of seeing ghosts".*

At page 2 of the judgement the learned trial judge evaluated the evidence of PW 4 and indicated that he told the court that the accused person had a mental disorder due to abuse of substances. That people on substance abuse lose control of their mental capacity but they know what they are doing and the accused had the capacity to know that he was killing a person. (See page 36 – 38 of the record).

We think that there was an error of direction on the issue of assessment of evidence because even if the appellant knew he was killing a person that does not answer the real question as to whether he was responsible for what he knew he was doing. For instance makes provision for a person of "knowing that he or she ought not to do the act or made the omission". Did the appellant know that he ought not to do the act of killing the deceased? That is the crux of this case. He suffered from hallucinations and the witnesses confirmed that he was insane at the time they found him lying next to the deceased body. PW1 Bahokweise of 70 years of age testified that the appellant is his stepson. He found a body which had been burnt and the appellant was lying in the soil next to body. When he inquired from the appellant what it was, the appellant said he had burnt spirits. PW2 Rukyera Elidard over 80 years of age testified that the appellant said he had burnt a beast. PW3 Julius Abe 45 years old testified that he went to the scene where the appellant had been arrested and detained by the villagers. He asked

the appellant and the testimony of PW3 recorded is that: "he told me he had killed a beast and had burnt it." In cross examination he repeated the same information about what the appellant had told him.

When it came to PW4, his testimony is very sketchy. He testified that he examined the appellant and the report was admitted as exhibit PE1. In cross examination he testified that his condition would subside if he is withdrawn from the substances abused. In re-examination his brief testimony was that the cause was substances taken. Secondly he knew that he was killing the person. The only substantial evidence is the report exhibit PE1 that we have examined above. It confirms unequivocally that the appellant was suffering from hallucinations. He was therefore insane in the sense that he did not understand that the deceased was his own child or a human being at all. As far as his demented mind was concerned he was killing a spirit or beast that was tormenting him. His condition falls within the definition in section 11 of the Penal Code Act. This is that: *"he or she is through any disease affecting his or her mind incapable of understanding what he or she is doing or of knowing that he or she ought not to do the act or make the omission."* This is what the evidence presented by the Prosecution proved. Had the prosecution evidence been evaluated in light of the law, the appellant would not have been put to his defence and there would be no need to submit about the burden of proof. The prosecution evidence showed that the appellant was insane. It is the evidence of the prosecution which would lead to this conclusion. In fact section 57 of the Evidence Act provides that admitted facts need not be proved and a submission could have been made of no case to answer. Finally section 194 (2) only provides that on a charge of murder it shall be for the defence to prove that the person charged was suffering from such abnormality of mind as mentioned in subsection (1), Section 194 (1) only applies where a person has been found guilty of murder. The court is required to make a finding of guilt but with diminished responsibility on account of abnormality of mind due to retarded development of mind or inherent causes or causes induced by disease or injury. The issue of diminished responsibility is raised by the defence. In this case there is a case of whether the appellant was responsible at all based on section 11 of the Penal Code Act so as to make a finding of acquittal and not diminished responsibility as indicated under section 194 of the Penal Code Act. In the premises section 194 (1) (supra) is inapplicable to the appellant's situation. Insanity as defined in section 11 of the Penal Code Act excuses crime and the insane person has not criminal responsibility.

Finally we have considered section 48 (1) of the TIA which provides for the procedure on matters of insanity at the time of commission of the offence:

> "48. Special finding of not guilty by reason of insanity.
>
> (1) Where any act or omission is charged against any person as an offence, and it is given in evidence on the trial of that person for that offence that he or she was insane so as not to be responsible for his or her action at the time when the act was done or omission made, then if it appears to the High Court that that person did the act or made the omission charged but was insane as aforesaid at the time when he or she did the Act or made the omission, the court shall make a special finding to the effect that the accused is not guilty of the act or omission charged by reason of insanity.

We agree with the appellant's counsel that the above provision only applies where the court finds that the accused was insane at the time of the act or omission charged. In this case the judge did not make a finding of insanity and there was no need for him to apply the provisions of section 48 of the Trial on Indictment Act. The error of law is in not finding as a matter of fact that the appellant was insane at the time of commission of the offence. In the premises, we find that the appellant was insane at the time of commission of the offence in terms of section 11 of the Penal Code Act. Secondly, having found that the appellant was insane, we set aside the conviction of the appellant for the offence of murder and instead make a special finding under section 48 (1) of the Trial on Indictment Act that the appellant was not guilty by reason of insanity at the time of commission of the offence. Secondly, this case should be reported to the Minister under section 48 (2) of the Trial on indictment Act.

In the meantime, the appellant shall be kept in custody by the prisons authorities pending evaluation of his mental condition and report to the Minister so that the he or she exercises powers to have him released, if he is no longer mentally infirm or a threat to the society.

Because ground 1 of the appeal has been allowed, there is no need for us to consider ground two which deals with sentence.

Dated at MBARARA the 2nd day of ~~September~~ October 2018

HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE CHRISTOPHER IZAMA MADRAMA, JA