**IN THE COURT OF APPEAL OF TANZANIA**

**AT ZANZIBAR**

**(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)**

**CRIMINAL APPEAL NO. 309 OF 2017**

**BASHIRU RASHID OMAR.....APPELLANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**(Appeal from the decision of the High Court of Zanzibar, at Vuga)**

**(Mwampashi, J.)**

**dated the 28th day of September, 2016**

**in**

**Criminal Case No. 03 of 2006**

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## JUDGMENT OF THE COURT

28th November & 14th December, 2018

**WAMBALI, J.A.:**

The appellant, Bashiru Rashid Omar appeared before the High Court of Zanzibar at Vuga where he was charged with the offence of murder contrary to section 180 of the Penal Decree, Cap. 13 of the Laws of Zanzibar. The particulars laid by the prosecution were to the effect that on 29th August, 2003 at or

about 10.00 a.m. at Bububu Urban District within the Urban West Region of Unguja with malice aforethought the appellant caused the death of Shadrack Mziray. The High Court heard the evidence from the prosecution witnesses and the appellant who was the sole witness in his defence. At the end of the trial the appellant was found guilty of the offence of murder and was accordingly convicted and sentenced to suffer death by hanging in accordance with section 181 of the Penal Decree Cap. 13 of the Laws of Zanzibar.

Aggrieved, the appellant has appealed to this Court, against both conviction and sentence. The appellant's dissatisfaction with the decision of the High Court is expressed in the following grounds of appeal:

> "1. *That the Honourable trial judge erred in law and fact to hold that appellant has not qualified for defence of insanity despite the existence of sufficient evidence to prove the same.*

2. *That Honourable trial judge erred in law and fact to hold that the appellant failed to prove on the balance of probabilities that he was insane and did not know what he was doing was wrong during the commission of the offence.*

3. *That Honourable trial judge erred in law and fact to hold that the misunderstandings existed between the appellant and PW2 Christina Ernest Mziray prior to the commission of the offence caused the appellant to commit murder without considering the circumstances during and after the commission of the offence ought to decide that he was insane during the commission of offence."*

At the hearing of the appeal, Mr. Uhuru Hemed Khalfan, learned advocate appeared to represent the appellant as he did

during the trial before the High Court. The respondent Director of Public Prosecutions was represented by a team of learned counsel, led by Mr. Ramadhan Ali Nassib, Principal State Attorney assisted by Ms. Ilham Sultan Malick and Ms. Jina Mwinyi Waziri both learned State Attorneys.

Mr. Khalfan learned advocate for the appellant argued grounds 1 and 2 together and ground 3 was argued as presented. It was argued for the appellant in respect of grounds 1 and 2 that as the appellant did not deny to have caused the death of the deceased, but that he did so while insane, it was wrong for the trial judge to reject his defence of insanity while the same was proved on a balance of probabilities as required by law. Mr. Khalfan stated that when the appellant went to the house of Christina Ernest Mziray (PW2), his girl friend and a mother of the deceased, he was much disturbed and confused by the action of Mercy Marko Toflo (PW3) and Farida Othman (PW5) to refuse him access to his son (the deceased). The learned counsel was firm in his submission that as the appellant used to visit and see his son, he felt unusual on that day when he was refused access and thus his mind was

deranged to the extent of committing murder of the son without knowing what he was doing at that particular time.

In this regard, Mr. Khalfan was critical of the failure by the trial judge to consider the defence of insanity which was available and proved by the appellant in view of the evidence in the record of appeal. He also wondered why the trial judge did not accord weight to the medical evidence of Doctor Khamis Othman (CW1) whose report, in his view, left no doubt that the accused was suffering from a disease of mind known as "personality disorder emotionally unstable". While Mr. Khalfan accepted that the court is not bound by the evidence of an expert, but he was of the view that there must be reasons for not accepting the same. In support of his submission he referred us to the decision of this Court in **Hilda Abel v. Republic** [1993] TLR 246 (specifically holding No. 2).

Concluding his argument on the 1 and 2 grounds, Mr. Khalfan argued that in the circumstances of this case, taking into consideration of the evidence of Mercy Marko Toflo (PW3) and

Farida Othman (PW5) who were at the scene, the extra judicial statement of the appellant and his defence, the appellant was supposed to have benefited of the defence of insanity as provided by section 12 (1) of the Penal Decree Cap. 13 of the Laws of Zanzibar. Mr. Khalfan firmly submitted that, insanity was proved to the required standard taking into consideration the circumstances that surrounded the commission of the offence. He thus urged us to allow the appeal on the strength of his arguments in respect of grounds 1 and 2.

With regard to ground 3, the learned advocate for the appellant blamed the learned trial judge for basing his finding in the guilty of the appellant on the misunderstanding between the appellant and PW2. He argued that due to much reliance on the issue of misunderstanding between them he did not pay much attention to the whole evidence and the circumstances which surrounded the commission of the offence during and after the incidence. He was content that had the trial judge taken into consideration the evidence on record and the report of the medical expert (CW1) together with the appellant's extra judicial statement

and his defence, he would have come to a conclusion that at the time the appellant committed the offence, he was insane and therefore he did not know what he was doing was wrong or contrary to the law. He, therefore, urged us to find merit on this ground of appeal.

In the end, he urged us to allow the appeal in its entirety with a finding that the appellant was insane when he committed the offence and invoke section 160 of the Criminal Procedure Decree Cap. 14 of the Laws of Zanzibar and set the appellant at liberty.

Mr. Nassib, learned Principal State Attorney for the respondent Director of Public Prosecutions did not support the appeal of the appellant. He submitted that the evidence tendered by the prosecution shows that the appellant knew what he was doing when he killed the deceased when he went at PW2's house. In his view, the evidence of PW3 and PW5 who were at the scene disclosed that the appellant committed the offence while in sound mind. According to the evidence, the appellant upon arrival at

PW2's house asked to be given his son and went with him inside where he inflicted fatal wound which caused his death and left the place, Mr. Nassib explained. In his view therefore, the appellant went to the scene of crime with full knowledge of what he was going to do.

The learned Principal State Attorney submitted that, there is nothing in the evidence of the prosecution and the appellant's defence to show that on 29/8/2003 he did not know what he was doing was wrong. He stated that when the appellant went at the scene he took the deceased in a room and after killing him he covered him with a blanket and left without saying anything to those (PW3 and PW5) who were there entrusted with the care of the deceased.

In the circumstances, Mr. Nassib argued that the appellant cannot take refuge in the defence of insanity under the provisions of section 12 (1) of Cap. 13 of the Laws of Zanzibar as argued by Mr. Khalfan as he was not insane when he committed the offence of murder. To that end, the learned Principal State Attorney

supported the decision of the trial judge who differed with the opinion expressed by Dr. Khamis Othman (CW1) as there is ample evidence to show that the appellant was sane when he committed the offence of murder. He thus supported the trial judge's reasons for rejecting the medical report on the state of mind of the appellant at the time the offence was committed. To support his submission, he referred us to the decision of this Court in **Hilda Abel** *(supra)* and **Agnes Doris Liundi v. R** [1980] TLR 46. In the circumstances, Mr. Nassib urged us to find no merit with respect to grounds 1 and 2.

Mr. Nassib also urged us to find that the complaint of the appellant in ground 3 on reference of the trial judge to the commission of the offence on the misunderstanding between him and PW2 to have no basis. He argued that there is no dispute that there was misunderstanding between the appellant and PW2 and that on 25/8/2003, the appellant went where PW2 worked and threatened to kill her when he stated, *"Damu yako iko mikononi mwangu".* He was of the view that as the incidence took place on 29/8/2003 there was every indication that the fact of the existence

of a quarrel had to be taken into consideration when the trial judge decided the case. He, therefore, urged us to find no merit in this ground.

In the end, the learned Principal State Attorney urged us to dismiss the appeal in its entirety as the prosecution proved the case beyond reasonable doubt.

At this juncture, we think, it is not out of place, to state that in this case there is no dispute, in view of the evidence in the record of appeal, that one Shadrack Mziray is dead and that it is the appellant who caused his death. The defence of the appellant, however, is that he caused the death of the deceased while insane and therefore entitled to have a benefit of the defence of insanity.

The question for determination by us thus, is whether the appellant, at the time he committed the offence was insane to the extent of being incapable of knowing that what he was doing was wrong or contrary to law.

Before we proceed to consider the arguments of the counsel and the evidence in the record of appeal, we deem it appropriate

to quote the provision of section 12 (1) of the Penal Decree Cap. 13 of the Laws of Zanzibar in which the appellant has premised his defence:

> *"12(1) A person is not criminally responsible for an act, or omission if at the time of doing the act or making omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission."*

It is settled law that the burden of proving insanity is on the accused on a balance of probabilities and not merely to raise a reasonable doubt as to his sanity. This matter was also underscored by this Court in **Agnes Doris Liundi** (supra). Thus to prove the existence of an unsoundness of mind of a person, a fact relevant as showing the existence of that state of mind must be shown to exist not generally, but in reference to that particular time and the matter in question.

In the present case, the appellant on his part, both when he recorded his extra judicial statement (Exhibit P2) and in his defence admitted to have killed the deceased but consistently maintained to have done so while in a confused state of mind to the extent of not knowing what he was doing.

The other piece of evidence in support of the appellant assertion of being of unsound mind is the testimony of Dr. Khamis Othman (CW1) who also tendered a medical examination report which was admitted as CW1. In his testimony in elaboration of his report, CW1 concluded that the appellant suffered from a problem known as "personality disorder emotionally unstable" at the time he committed the offence of murder. He explained further that a person in a state in which the appellant found himself in, cannot control his emotions or anger and that in most cases such a person is selfish and violent and some of them end up committing suicide or murder.

Nevertheless, it is worth to note that the trial judge reviewed the evidence of the prosecution and defence together with the

medical report on the state of mind of the appellant when he committed murder and came to the conclusion that the appellant was of sound mind and therefore he could not benefit from the defence of insanity. The trial judge also considered the opinion of the two gentlemen assessors who assisted him and disregarded the opinion of Doctor Khamis Othman on the state of mind of the appellant. It is this conclusion on the opinion of Dr. Khamis Othman that disturbed Mr. Khalfan for the appellant, who argued that the trial judge did not give sufficient reasons for his decision in this matter. In this regard, we find it appropriate to quote what the trial judge stated in his judgment with regard the opinion of Dr. Khamis Othman thus:

> *"With due respect to CW1 this court finds that the accused person was not in a state of mind amounting to what can in law be termed as insanity. This court finds that there is no good evidence suggesting that the accused person was at the material time suffering from the disease of mind i.e. an impairment of mental functioning. If*

*the misunderstandings with his girl friend (PW2) caused the accused person lack anything in his mind then what he lacked was neither the capability of understanding what he was doing nor the capacity to know that he ought not to do what he did."*

The trial judge proceeded further that:

*"The anti social personality disorder or the abnormally aggressive or irresponsible behaviour as suggested by CWI on the accused person's case are under the circumstances of this case found not to qualify for the accused persons defence of insanity."*

From the above quoted extract of the judgment of the trial court, we are of the respectful opinion that the trial judge stated why he did not attach much weight to the evidence of Doctor Khamis Othman who concluded that the accused was of unsound mind when he committed the offence. It is important to appreciate

that what Doctor Khamis Othman stated was evidence based on an opinion of the expert. Indeed, opinion of the expert evidence is premised on a general rule that there are certain matters which cannot be perceived by the senses. Their existence or non-existence is ascertained by inferences drawn by persons specifically trained in the particular field with which the subject is connected. Nevertheless, the opinion of experts are not ordinarily conclusive and therefore not binding upon the judge. In this regard, the reasons for the opinion evidence must be carefully scrutinised and examined and considered by the trial court along with all other relevant evidence in the record. The trial court therefore cannot surrender its opinion to that of an expert in disregard of the other relevant evidence for both sides of the case. The trial judge is therefore entitled to scrutinize the expert evidence and come to his own conclusion on the facts of the case.

It is instructive to note that in **Hilda Abel** *(supra)* this Court held that *"Courts are not bound to accept medical experts evidence if there are good reasons for not doing so."* Similarly in **Agnes Doris Liundi** *(supra)* this Court quoted with approval the passage

of the extract of part of the trial judge's judgment which referred to the decision of the East Africa Court of Justice in **Nyinge Siwato v. R.**, [1959] EA 974 where Windhalm J.A. (as he then was) emphasised that *"The court is not bound to accept medical testimony if there is good reasons for not doing so: At the end of the day, that is, it remains the duty of the trial court to make a finding and in doing so, it is incumbent upon it to look at, and assess, the totality of the evidence before it, including that of medical experts."*

We also associate ourselves with that position expressed in decided cases of this Court and the defunct East African Court of Appeal.

Moreover, we feel constrained to state that although an expert evidence is not binding on the court, we think, to aid the court to come to a fair conclusion on the issue of insanity, the medical expert must explain thoroughly in his opinion whether the symptoms of the accused he examined commonly show unsoundness of mind, and whether such unsoundness of mind usually rendered the accused incapable of knowing that the nature

of the act which he did is either wrong or contrary to law at the time he did the act.

In this case, having carefully scrutinised the evidence of Dr. Khamis Othman and the report which he tendered, we think, with respect, he did not sufficiently describe how the alleged unsoundness of mind affected the appellant at the time he committed the offence. Taking into consideration the length of time which had elapsed since the offence was committed, that is, 29th August, 2003, to the time when he examined the appellant, that is, on 14/4/2016 there is no sufficient explanation on the methodology which Dr. Khamis Othman used to examine the appellant and came to a conclusion that he was of unsound mind when he committed the offence on 29/8/2003. According to his report he only examined the appellant once (14/4/2016). For purpose of clarity let us reproduce the relevant part of the report of Dr. Khamis Othman which is contained in two letters dated 18/4/2016 and 6/6/2016 respectively:

18/4/2016

*"YAH: BASHIRU RASHID OMAR UMRI MIAKA 40, KABILA MZIGUA*

*Mtajwa hapo juu ahusika.*

*Alifikishwa katika hospitali yetu kwa mara ya kwanza tarehe 18/3/2016 akiwa amesindikizwa na askari wa chuo cha mafunzo. Uchunguzi uliofanywa na daktari wa magonjwa ya akili tarehe 14/4/2016 umeonyesha kuwa ndugu Bashiru anazo akili timamu ila anakabiliwa na tatizo la KIKHULKA lijulikanalo kitaalamu "PERSONALITY DISORDER EMMOTIONALY UNSTABLE."*

*Naomba kuwasilisha.*

*DR, KHAMIS OTHMAN*

*DAKTARI DHAMANA*

*MENTAL HOSPITAL*

*ZANZIBAR*

6/6/2016

*"HAY: BASHIRU RASHID OMAR, UMRI MIAKA 40 KABILA MZIGUA*

*Mtajwa hapo juu ahusika.*

*Tafadhali rejea barua yako ya tarehe 23/5/2016. Aidha barua yangu ya tarehe 18/4/2016 KWA KAMISHINA CHUO CHA MAFUNZO ZANZIBAR, nilimuelezea ndugu Bashiru kuwa anakabiliwa na tatizo la KIKHULKA kwa kitaalamu "PERSOANLITY DISORDER EMOTIONALY UNSTABLE". (Tafadhali angalia maelezo ya tatizo hili kwa Kiswahili). Kwa mujibu wa matatizo ya ndugu Bashiru, siku ya tarehe 29/8/2003 alipatwa na matatizo ya ubinafsi kigeugeu "personality disorder emotionally unstable" na ndipo ilipelekea kutenda kosa hilo bila kuweza kufikiria madhara yake.*

*Naomba kuwasilisha.*

*DR. KHAMIS OTHMAN (PSYCHIATRIST)*

*MENTAL HOSPITAL*

*ZANZIBAR"*

From the above quoted relevant part of the report, nobody can entertain doubt that, Dr. Khamis Othman was supposed to have explained sufficiently how he arrived at his conclusion in the second letter (dated 6/6/2016) which was not stated and slightly different from the conclusion in the first letter (dated 18/4/2016). Indeed, in the letter dated 6/6/2016 there is no indication that he saw the appellant and examined him like what he did on 14/4/2016.

In the circumstances, as the appellant was examined almost after 13 years since the offence was committed, and taking into consideration of what Dr. Khamis Othman stated, the trial judge was justified to evaluate the conclusion contained in that medical opinion along with other evidence in the record and came to his own conclusion.

We are also of the settled view that the evidence in the record, especially that of PW3 and PW5 who were at the scene of the crime on the fateful day, demonstrated without doubt that the appellant was sane when he committed the offence of murder.

In the event, we do not, with respect, agree with the submission of Mr. Khalfan learned advocate for the appellant that there was no sufficient reasons to disregard the evidence of Dr. Khamis on the appellant's state of mind. We agree with the conclusion of the trial judge which was based in the evidence in the record as supported by the learned Principal State Attorney for the respondent Director of Public Prosecutions. We do not, therefore, find merits in grounds 1 and 2 of the appeal which were forceful argued in support of appeal.

As to ground 3, we think the complaint is not justified. We agree with the learned Principal State Attorney for the respondent Director of Public Prosecutions that the trial judge was entitled to consider the misunderstanding between Christina Ernest Mziray (PW2) and the appellant in deciding his state of mind and the

circumstances that surrounded the commission of the offence prior and during the commission of the offence.

It is important to emphasise that in this matter the trial judge did not only base his decision on the misunderstanding between the appellant and PW2, but he also considered other evidence in the record to come to his conclusion that the appellant was sane when he committed the offence. To appreciate what the trial judge stated on the issue, we better quote the relevant part thus:

> *"It is an observation of this court that from the evidence on record and as it has been found by the two gentlemen assessors, it cannot be said that what had happened between the accused person and PW2 the evening before the fateful day did make him so deranged to the extent of lacking capacity to know what he was doing at the time he committed the murder in question. I am of this view bearing in mind that about 12 solid hours had passed from the time he had a*

*fight with PW2 to the time he committed the murder. I find this period of time more than enough for the accused person to cool down and regain his normal mental state from whatever state of mind of mind he could have been in the evening he had a fight with PW2.*

*The fact that after the murder the accused person went into the hiding for two days is also negating the suggestion that at the time of committing murder the accused person was so deranged to the extent of not being capable of understanding what he was doing. This conduct by him suggests that the accused person was capable of distinguishing right from wrong otherwise he could have decided to run away and hid himself. The accused person knew that what he had done was criminally wrong and that it is why he went into hiding for two days."*

It is clear from the above reasoning of the trial judge that he did not only consider the misunderstanding between PW2 and the appellant, but also other circumstances during and after the commission of the offence to arrive to the conclusion that the appellant was not insane at the material time when he committed murder. We do not, therefore, with respect, accept the submission of the learned advocate for the appellant on this complaint. We entirely agree with the learned Principal State Attorney who supported the decision of the trial High Court.

Overall, we think in the circumstances of this case, considering the totality of the evidence for the prosecution and the defence with respect to the state of mind of the appellant, before, during and after the commission of the offence, there is no justification for granting the benefit of doubt that the appellant was insane when he committed the offence of murder to enable him take refuge in the defence of insanity under section 12(1) of the Penal Decree, Cap. 13 of the Laws of Zanzibar, to escape liability. He was thus legally convicted and sentenced of the offence of murder by the trial High Court.

In conclusion, we are satisfied that this appeal has no merits as the case against the appellant was proved by the prosecution to the required standard. We therefore dismiss the appeal in its entirety.

**DATED** at **ZANZIBAR** this 13th day of December, 2018.

M. S. MBAROUK
**JUSTICE OF APPEAL**

R. K. MKUYE
**JUSTICE OF APPEAL**

F. L. K. WAMBALI
**JUSTICE OF APPEAL**

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


B. A. MPEPO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**