IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: NDIKA, J.A., KITUSI, J.A. And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 151 OF 2019

JOHN ULIRICK SHAO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Sumari, J.)

dated the 17th day of October, 2016

in

Criminal Appeal No. 38 of 2016

.....

JUDGMENT OF THE COURT

27th September & 4th October, 2022

KITUSI, J.A.:

This is a bizarre case of rape of an epileptic girl aged eight or ten years, by one John Ulirick Shao, the appellant who was initially suspected to be of unsound mind. It was the learned trial magistrate who ordered the appellant to submit to a hospital for examination into his mental condition, on observing certain behaviors, but when the medical report was later transmitted to her, showing that the appellant was of sound mind, trial was conducted and a conviction was entered against him.

The issue of the appellant's mental condition was central before the High Court where the first appeal was heard, and before us in this second appeal. Two of the six grounds of appeal at the High Court attacked the decision of the trial court for not observing the procedure of dealing with an accused of unsound mind. Before us, there is one such ground of appeal in the substantive memorandum of appeal and in each of the two supplementary memoranda of appeal.

The above trend, makes the issue of the appellant's mental status to be the only serious inquiry for our determination. More so because in his defence during the trial the appellant dramatically admitted having enjoyed sex with the victim whom he said was of age. So that should the issue of the appellant's mental status be resolved in favour of a finding that he was of sound mind, his guilt may be mounted on his own tacit admission. For as the settled law goes, an accused who confesses to a crime offers the best evidence against himself. See **Hamis Chuma @ Hando Mhoja v. Republic,** Criminal Appeal No. 36 of 2010 and **Jumanne Issa Imani Bisanga v. Republic**, Consolidated Criminal Appeal No. 54 & 55 of 2021 (both unreported).

The brief background of the case is that the appellant was not a stranger to the victim who testified as PW1 and to her father (PW2). He

used to go at PW2's house for paid casual work mostly fetching water. On the fateful day, PW1 who was a scholar in class two, was proceeding to school when she fell down. It is not known whether she fell down as a result of a fit or not, her being epileptic. But the appellant took advantage of the situation by carrying the girl to a nearby farm where he undressed her and had carnal knowledge of her while biting her mouth and stomach.

The appellant's defence was that PW1 was his girl friend and that she was not a minor because he had an easy way into her. He even divulged the fact that he and a friend of his were using bhang.

Ms. Mary Lucas, learned Senior State Attorney who appeared before us for the respondent Republic together with Ms. Nitike Emmanuel, learned State Attorney invited us to make a finding that the appellant was of unsound mind because, she argued, no sane person would admit such damning facts.

We had a long conversation with Ms. Lucas during which we reflected on whether the learned trial magistrate observed the correct procedure and what should be the way forward. Ms. Lucas agreed that despite some inadequacies in PW1's testimony which could be explained considering she was suffering from a brain related illness, rape was,

undoubtedly, committed against her. She urged the Court to invoke section 4(2) of the Appellate Jurisdiction Act Cap 141 (the AJA) to nullify the proceedings, quash the judgments of the trial and High Court and set aside the sentence. She submitted that the justice of the case requires that we order a retrial. The appellant agreed with the submissions of the learned Senior State Attorney.

It is necessary for us to begin by appreciating that insanity is known to be brought up either as a bar to prosecution or as a defence. The former is provided for under sections 216 to 218 of the Criminal Procedure Act, [Cap 20 R.E 2002] (the CPA) while the latter is covered by sections 219 to 220 of the CPA. We therefore associate ourselves with the Court's recent decision in **Thomas Pius v. Republic,** Criminal Appeal No. 145 of 2019 (unreported) where it observed that in the first scenario, the court's concern is the possibility that the accused may not follow the proceedings. In the second scenario, the court's concern is the accused's state of mind at the time of committing the crime.

Sections 216 (1) to (4) of the CPA which cover the first scenario and relevant to our case provide: -

(1). *Where in the course of a trial the court has reason to believe that the accused is of unsound mind and*

consequently incapable of making his defence it shall, before inquiring into the fact of such unsoundness of mind and notwithstanding the fact that the accused may not have notwithstanding the fact that the accused may not have pleaded to the charge, call on the prosecution to give or adduce evidence in support of the charge.

(2). Where at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person the court shall dismiss the charge and acquit the accused person and may then proceed to deal with him under the Mental Health Act.

(3). Where at the close of the evidence in support of the charge it appears to the court that a case has been made out against the accused person, it shall then proceed to inquire into the fact of the unsoundness of mind of the accused and, for this purpose, may order him to be detained in a mental hospital for medical examination or, in case where bail may be granted, may admit him to bail on sufficient security as to his personal safety and that of the public and on condition that he submits himself to medical examination or observation by a medical officer as may be directed by the court.

(4). The medical officer in charge of the mental hospital in which an accused person has been ordered to be detained or a medical officer to whom he has been ordered to submit himself for mental examination or observation pursuant to subsection (3) shall, within forty-two days of such detention or submission, prepare and transmit to the court ordering the detention or submission, a written report on the mental condition of the accused stating whether in his opinion the accused is of unsound mind and consequently incapable of making his defence.

The learned trial magistrate did not observe that procedure to the letter, but we think the steps she took by recording evidence after being assured of the appellant's sanity, are in keeping with the right to a fair trial. In this case the report of the medical officer was that the appellant was of sound mind, but this is opposed by the learned Senior State Attorney. We agree with Ms. Lucas that the appellant's behavior may not have been quite rational because on the one hand, he is said to have had carnal knowledge of his own child too, which is utterly wicked. Yet on the other hand, he was a known paid labourer in the village which shows he was a rational being earning a living, and further that on the fateful day, he had the decency of carrying the victim to a nearby shamba where he ravished her, instead of doing it right at the road

where the girl had fallen. That behaviour speaks of a person who was aware of normal disposition of men.

So, while we agree with Ms. Lucas that the appellant's behavior was odd, and at times his address just abracadabra, for the reasons given above, we are far from persuaded that the appellant is legally insane so as to benefit from the provisions of either sections 216 to 218 or 219 to 220. The medical report stated that the appellant was a masquerader, which the learned High Court Judge accepted when she held: -

> *The appellant in his second and fourth grounds of appeal complained that the trial magistrate erred in law and fact to in failing to determine his mental status. As seen at page 3 in the typed proceedings the trial magistrate after observing the appellant abnormal behavior in court ordered the appellant to be taken to hospital to determine his status. The appellant was taken to Huruma Hospital and the medical report was returned to the trial court stating that the appellant is not mentally ill he is just pretending. I have gone through the said medical report from Huruma Hospital I consider it to be genuine. The appellant then is considered mentally fit.*

We have no material at our disposal upon which we may take a different view from that of the learned High Court Judge. Yes, it takes a very unusual person to behave in the way the appellant behaved as stated by the learned Senior State Attorney, but as the Court stated in **Mwihabi Lumambo v. Republic** [1984] T.L.R 336 when dealing with an appellant like the present: -

" Wonders are many but the greatest of them all is man".

It may be risky to take a guess why the appellant behaved in that weird manner, but insanity has been ruled out. Perhaps the disclosure made by the appellant during the trial that he and his friend were using bhang, is not all too irrelevant. If that is so and we believe it is, then the appellant's state of mind is self-induced. Should the law protect such a person or his victims? We ask. This issue has come up for decision in other jurisdictions. In **R v. Heard** [2007] EWCA Crim 125 *All ER 2007 volume 3 (30/09/2022 01:22pm)* it was held in part: -

> *"...the defendant could not rely upon his voluntary intoxication, including intoxication or otherwise altered state of mind resulting from the voluntary taking of drugs or other substances as negating the necessary intention to touch".*

We are inspired by that position and similarly hold in this case that even if it had not been said that the appellant is a pretender, he cannot, in our view, use the self-induced state of mind as a shield to criminal liability. Therefore, going by the victim's account, which the appellant himself graphically confirmed, he raped her and he was rightly convicted.

On the sentence, the learned judge on first appeal enhanced it from 30 years that had been imposed by the trial court to life imprisonment on the following ground: -

> *"Concerning the age of the victim, PW1, the evidence of the prosecution is very clear on that. The victim, Grace Florence is a girl of 8 years, she is a girl of tender age and the law provides for the sentence of life imprisonment to any person who commits the offence of rape to a girl of less than 10 years of age".*

The appellant's sixth ground of appeal challenges the above finding for being based on contradictory evidence. Ms. Lucas did not address this point, understandably because she was inclined to having the matter retried.

With respect, the evidence on the age of the victim was not clear as held by the learned Judge. This is because the two witnesses who

alluded to the victim's age were the victim herself and PW4. The former said she was 8 but the latter said she was 10 years. The charge sheet referred to the victim's age as 10 years. We agree with the appellant that the evidence on the victim's age was contradictory, so we find merit in the sixth ground of appeal. Consequently, we set aside the order sentencing the appellant to life imprisonment and restore the sentence of 30 years earlier imposed by the District Court.

This appeal is dismissed for want of merit, except for the variation in the sentence.

DATED at **MOSHI** this 3rd day of October, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

This Judgment delivered this 4th day of October, 2022 in the presence for the Appellant in person and Ms. Mary Lucas, learned Senior State Attorney, for the Respondent/Republic, is hereby certified as a true copy of the original.

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL