IN THE HIGH COURT OF TANZANIA

AT TANGA

CRIMINAL APPEAL NO. 47 OF 2012

(Originating from Criminal Case No. 255 of 2011 of the District Court of Handeni at Handeni)

HAMISI YAHAYA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Rugazia, J.

The appellant was charged with two counts namely Attempted rape c/s 132(1) (2) of the *Penal Code Cap. 16 R.E. 2002* it being alleged that the appellant, on the 7th day of September, 2011 at night in Vibaoni Village within Handeni District, Tanga Region did attempt to have unlawful carnal knowledge of one Amina Hassani a woman of 80 years of age. In the second count the appellant stands charged with Indecent Assault c/s 135(1) of the Penal Code. Particulars of offence are that the appellant on the same date, time and place did indecent assault *(sic)* one Amina Hassani by touching her vagina.

When the charge was read over to him the appellant pleaded guilty to the charge and he was accordingly convicted and sentenced to serve a prison term of 12 years for the first count and 3 years for the second count sentences to run concurrently.

Notwithstanding his plea of guilty, the appellant still felt aggrieved and decided to file an appeal. In his memorandum of appeal, he faulted his conviction claiming that his plea was not proved beyond reasonable doubt whatever that means. Secondly, he raised a defence of insanity claiming that the trial magistrate should have made a proper assessment on the appellant's intelligence because there was a possibility that he was of unsound mind at the time of the commission of the offence.

When the appeal came for hearing, Mr. Marandu learned State Attorney who appeared for the Republic declined to support the conviction. It was his contention that the appellant appears insane so it is possible that he was insane when he committed the offence. He was of the view that the fact that the appellant pleaded guilty to such a serious offence is strange and doubtful which is proof of what he (Mr. Mrandu) suspects.

Counsel asserted that the trial magistrate had to satisfy himself on the appellant's intelligence u/s 220(1) of the *Criminal Procedure Act, Cap. 20 R.E. 2002.* Since this was not done, it was prayed that this being a court of record, it has to see to it that an inquiry into accused's state of mind is carried out. He prayed that the appeal be allowed and appellant be committed to an asylum.

As it appears from the trial court record, the issue of insanity did not arise at all. This being the case, I do not see how the trial magistrate can be faulted for not proceeding to deal with the appellant as suggested by Mr. Marandu. The defence of insanity being raised on appeal would appear to be contra to the dictates of section 220(1) of the Criminal Procedure Act. The said section provides:

> ***220 (1) – Where any act or omission is charged against any person as an offence and it appears to the court during the trial of such person for that offence that such person may have been insane so as not to be responsible for his action at the time when the act was done or omission***

made, a court may, notwithstanding that no evidence has been adduced or given of such insanity, adjourn the proceedings and order the accused person to be detained in a mental hospital for medical examination".

In line with the above legal provision the Court of Appeal of Tanzania had this to say:

"From the provisions of this section, our understanding is that in a criminal charge the court has the discretion to adjourn the proceedings and order the accused person to be examined in a mental hospital. However in exercising the discretion it is necessary first to lay ground upon which the court could find that the accused person may have been insane at the time the offence was committed" – see ***Majuto Samson vs R.*** Criminal Appeal No. 61 of 2002 CAT MZA unreported.

In the instant case, there was no indication that the accused may have been insane at the commission of the offence because the accused did not raise it during trial and I doubt if it came to the attention of the trial magistrate that the appellant may have been insane. In **Mwihambi Lumambo vs R.** (1984) TLR 338 – CAT – the court stated:

- **The evidence available did not make it appear to the trial court that the appellant may have been insane**
- **In the circumstances we are not entitled to fault the fact that it did not appear to the trial court that the appellant may have been insane"**

In view of the foregoing, it is apparent that the appellant cannot be permitted to raise the defence of insanity at the appellate stage having failed to raise it in the trial court.

Having so found, however, I am not ending there. Much as it was not raised on appeal, I have serious misgivings on the way appellant's plea was recorded and the resultant conviction. From the charge sheet it is

alleged that the appellant attempted to rape an old lady of 80 years of age who is his grandmother. However, when it came to narration of the facts the prosecution simply stated that he entered into her house stood at her bed and "*attempted to rape her.*" She raised an alarm and appellant took to his heels fleeing from the scene. This fact, bare as it is, does not tell anything on what exactly the appellant did as an attempt to commit the alleged offence. The prosecution had a duty to go further and adduce facts demonstrating the accused's intention.

In the absence of such important facts, it cannot be said that the appellant pleaded guilty to the offence because the facts did not come out clearly on the alleged offence. In the second count for example, it is alleged that he indecently assaulted the old lady by touching her vagina. Nowhere in the facts is this particular mentioned.

These were very serious omissions which cannot let the conviction stand. That said, I now proceed to quash all the proceedings of the trial court. Appellant is to be set free unless held on some other lawful cause.

It is ordered further that the case be re-commenced before another magistrate of competent jurisdiction.

P. A. RUGAZIA, J.
29/08/2013

Judgment delivered. Mr. Majigo State Attorney for Republic. Appellant in person.

P. A. RUGAZIA, J.
29/08/2013