

TANZANIA / JUDGMENT

silvelius deogratius vs republic

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IRINGA SUB REGISTRY) AT
IRINGA RM CRIMINAL APPEAL NO. 55 OF 2018 (Original Criminal Case No. 228/2016 of the
Resident Magistrate Court of Njombe before Hon. J.P. Kapokoio, RM.) SILVELIUS
DEOGRATIUS APPELLANT VERSUS REPUBLIC
RESPONDENT

JUDGMENT

2dh July & 11th August, 2023 I.C MUGETA, J: Under section 369(1) of the Criminal Procedure Act [Cap. 20 R.E 2022] this court ordered taking of additional evidence by referring the appellant to Mirembe Mental Hospital for examination of his mental state. The order was made on 20/6/2020 by my brother Kente, J (as he then was). The appellant had been convicted of unnatural offence contrary to section 154(l)(a) and (2) of the Penal Code [Cap. 16 R.E 2002] for, allegedly, having sodomized a boy of 10 years. Additional evidence was necessary because the trial court completely ignored the appellant's defence that he is insane and the procedure under part VI D of CPA relating to insane criminals was not observed. It appears to me that the trial court was oblivious of the procedure in case of insanity claim because Page 1 of 11 during trial, on 3/4/2017 to be specific, the father of the appellant informed the court vide a letter, which is on record, that the appellant is of unsound mind. By that time the prosecution had not even closed its case. The prosecution also did not assist the court because on record is their letter informing the appellant's parents that their request to have the appellant's mental state examined should be directed to the court. In Charles Manyono v. Republic, Criminal Application No. 109 of 1999, Court of Appeal - Arusha (unreported), the Court of Appeal adopted a similar procedure after finding that the trial High Court did not observe rules of procedure in a trial where it could be inferred that the accused who pleaded guilty to the information of murder was of unsound mind. It ordered the appellant's mental state to be examined and proceeded to determine the appeal taking into account the report filed at appeal stage. The victim (PW4) testified that he was carnally known by the appellant in his (appellant) room at his residence after holding him hostage while on his way from school. He said after the appellant forcefully inserted his penis into his anus, he commanded him (the victim) to defecate and, thereafter, ordered him to eat those faeces. The ordeal continued by the appellant forcing him (victim) to lick his (appellant's)

anus. Finally, the Page 2 of 11 victim testified, the assailant urinated into the victim's mouth. The victim's evidence is supported by his mother (PW2), his uncle (PW3) and his aunt (PW5). All of them said that they examined the victim and found his mouth full of faeces. PW5 was categorical that on examining the victim he saw sperms in the anus. The victim told them it is the appellant who did that to him. The victim mentioned his name (Silvelius) and he showed PW3 the house where it all happened. The clinical officer (PW1) examined the victim and found that his anus was bruised. He tendered the report of his examination in the PF3 as exhibit P1. This evidence supports that the victim was, indeed, sodomized. The then ten cell leader of Kitisi street where the incident occurred, Mr. John Flano Sanga, testified as PW6. He said he got the information about the sodomy on 14/10/2016 but the appellant was arrested on 15/10/2016. On being questioned he responded: "ni kwe/i nilimlawiti mtoto. Thereafter, the appellant allegedly escaped on the assistance of his father (DW2). On that account the father was detained until when the appellant was brought to the police station by his mother (DW1). On 17/10/2016, the appellant recorded a caution statement before the Page 3 of 11 policeman who testified as PW7. He admitted the offence and the caution statement was admitted as exhibit P2 without objection from the appellant. In his defence, the appellant denied generally to have sodomized the victim. He, however, admitted that he was at home on 13/10/2016. He said nothing about his mental state. His mother and father who testified as DW2 and DW3 respectively said he is not mentally fine. The learned trial magistrate neither referred to this defence nor discussed it. It forms the first ground of appeal. The petition of appeal has a total of eleven (11) grounds of appeal. Some of them are incapable of being assigned any meaning. Nevertheless, the main complaint is that the offence was not proved because: i). The caution statement was admitted without holding an inquiry. ii). The appellant's defence of insanity which was capable of raising doubts in the prosecution's case was not considered. At the hearing of the appeal, the appellant said he has nothing to add on his petition of appeal. Jackline Nungu, learned State Attorney, resisted the appeal. She said the caution statement was admitted without subsection and on his insanity, the defence is an afterthought because Page 4 of 11 was not raised in the manner stipulated by section 219(1) of the CPA and the expert opinion says he is sane. She concluded that the prosecution case was proved and the appellant was properly identified. In rejoinder the appellant complained that his statement was recorded under threat of being beaten up. This was preceded by reading to him the report from Mirembe hospital which reads: "... the accused (Siiveiius Deogratius) had no features pointing to a certain mental disorder which led him to commit such a crime". This notwithstanding, the appellant's conduct in court remained unusual for looking gloomy, stone faced and making inconsistent statements. When I sat down to write the judgment, I was convinced that it may not be fair to decide this case on the expert opinion of the Mirembe Hospital. I formed this opinion because the evidence of how the assailant treated the victim is inconsistent with what a person of sound mind can do. Forcing the victim to eat faeces, licking his anus and urinating into the victim's mouth are disgusting acts of unimaginable humiliation. I resubmitted the parties to consult them more. Herbert Ishengoma learned State Attorney and A/ Insp. Ndawa, prison warden who attends the appellant conceded that the conducts of the appellant are abnormal. We Page 5 of 11 agreed to take additional evidence regarding the appellant's conduct while in prison and from his neighbours at home. In order to get more

independent opinion, I directed the community service officer to file a social inquiry report profiling the life of the appellant. The report which was filed by H.A. Jengela concluded: "... Silvelius Deogratus is a mental disorder offender who need be (sic) psychologically assisted". The witnesses who appered in court to give additional evidence are Godlove Elia Kitundu, Elewada Lesan Mahimbi who are the current ten cell leader and neighbours of the appellant at Kitisi street, Makambako area respectively. A prison warden (B. 6712 Sgt Jafari) at Iringa prison who has taken care of the appellant since 2017 also appeared to testify on his conduct from the prison officer's point of view. Their general evidence is that the appellant is abnormal. He did not complete primary school education for failure to follow studies and he prefers to stay in isolation because in a group he cannot match others. The prison warden was categorical that besides his preference to stay in isolation and inconsistent speeches, he wets his clothes regularly. Page 6 of 11 In my view, from the evidence of the appellant's parents at the trial court, the social inquiry report and the additional evidence from court witnesses, the conclusion that the appellant is of unsound mind is inevitable. I, regretfully, ignore the Mirembe hospital report to the effect that the appellant is of sound mind. I consider it as an expert report which is not binding. I have held that the evidence on record proves that the charged offence was committed against the victim. I have also held that the appellant is a person of unsound mind. The remaining issue for determination is, who committed the offence? From the facts of the case the appellant was not arrested at the scene of crime. However, in his evidence the victim said he knows the appellant by his name as Silvelius and on arriving at home after the incident he told his mother that Silvelius had sodomized him. His mother gave similar evidence. Therefore, the victim named the appellant at the earliest possible opportunity which is an assurance of his reliability. This position of the law was stated in Jaribu Abdallah v. Republic [2003] TLR 271 and Marwa Wangiti Mwita & Another v. Republic [2002] TLR Page 7 of 11 The appellant has all along denied responsibility. His caution statement was admitted as exhibit P2 without objection. He complains that it was recorded under duress. However, this cannot be true because it was recorded in the presence of his father. Besides this fact, the caution statement is illegal evidence because it was recorded out of the prescribed time. The learned State Attorney did not address this aspect. The appellant was taken into custody on 15/10/2016. The statement was recorded on 17/10/2016. This violated section 50(l)(a) of the CPA. I expunge exhibit P2 from the evidence on record for being illegal. His complaint that it was admitted without holding inquiry has no merits because he did not object to its admission. Its illegality is only due to the fact that it was recorded out of the prescribed time. The incident took place at day time. The victim said the appellant took hold of him, ordered him not to yell for help lest him get killed and led him to his place of residence where the appellant sodomized him in his room. Even if the victim did not say how long the process took, definitely they spent together a considerable time from when the victim was held hostage to the time he was sodomized. The time the victim of a crime and the culprit spend together is another factor to consider when deciding whether the victim made unmmistaken identification. I hold that the time they spent together at day time provided sufficient environment for a clear identification. The victim testified that there was nobody in the house when they arrived. The whereabouts of the appellants mother at that time is unknown but the father (DW2) admitted he was not at home. This evidence corroborates the victim that there was

nobody at home when the appellant sodomized him. Theo Jacob Fute (PW3) testified that the victim showed him the house where sodomy took place. There is no evidence to refute that the appellant is domiciled there. Jacob (PW3) did not state if they found anybody thereat. However, the appellant's mother (DW2) testified that, indeed, a group of people came looking for the appellant who was not there. Even if he (PW3) did not testify on how the appellant was arrested, he said upon being arrested the appellant confessed to have sodomized the victim. That the confession was made before the ten cell leader who is John Flano Sanga (PW6). PW6 also testified that the appellant confessed to have sodomized the child. An oral confession made before an independent and credible witness is a good evidence against an accused, [see Posolo Page 9 of 11 Wilson @ Mwalyego v. Republic, Criminal Appeal No. 613 of 2015, Court of Appeal Mbeya (unreported) at page 7]. The appellant's mother (DW2) testified that the appellant confessed because those who arrested him threatened to beat him. That when they came they had clubs. This is likely and possible, therefore, the voluntariness of the confession is questionable. But still, I hold that the victim did not mistakenly identify him as there is no evidence in rebuttal of the fact that in the house which the victim identified as the scene of crime, there is Silvelius other than the appellant. I hold that the appellant was properly identified. I further hold that he is the one who sodomized the victim (PW1). There are contradictions in the prosecution's evidence which I must address. The victim, his mother and uncle are recorded to have said they did not know the appellant before he committed the offence. This cannot be true because if they were not familiar with him, particularly the victim, he would not have mentioned him by name. My review of the evidence on record associate this mishap with translation of Kiswahili and English. I consider the contradiction as minor due to human error in evidence recording involving language translation. Page 10 of 11 For the foregoing, I find that the appellant was properly convicted. He committed the offence charged but under section 219(2) and 220 (2) of the CPA, I make a special finding that the appellant sodomized the victim but by reason of his insanity he was not guilty of the offence. Under section 219(3) of the CPA I order that the appellant be kept in a mental hospital as a criminal lunatic. To the extent indicated, the appeal is allowed. V- I.C MUGETA JUDGE 11/8/2023 Court: Judgment delivered in chambers in the presence of the appellant in person and Sauli Makori, learned State Attorney for the respondent. Sgd. I.C. MUGETA JUDGE 11/8/2023 Page 11 of 11

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