DIRECTOR OF PUBLIC PROSECUTIONS

v.

OMARI JABILI

COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(Kisanga, Mfalila and Lubuva, JJ.A.)

CRIMINAL APPEAL No. 210 OF 1992

(From the decision of the High Court of Tanzania at Morogoro, Mkwawa, J., dated 4 November 1992, in Criminal Sessions Case No. 52 of 1990)

Criminal Law – Murder – Defence of Insanity – Medical evidence of insanity – Utility of doctor's evidence of insanity

Criminal Law – Insanity – Test of the defence of insanity

Criminal Law – Murder – Diminished responsibility – Whether diminished responsibility is recognized as a defence under the law of Tanzania

The appellant was convicted of manslaughter and sentenced to 15 years' imprisonment. He had slashed to death his own 6 year old son without any apparent reason or motive. His defence at the trial was that he was an epileptic patient, though not insane, and that he killed the deceased at a time when he was under an epileptic fit. On appeal it was argued by the appellant that once the trial judge rejected the defence of insanity it was not open to him to record a conviction for manslaughter but a conviction for murder. The Court of Appeal considered the issue whether the accused was sane at the time of committing the offence.

Held:

Majority Judgment –

(i) On the issue of insanity, the court is not bound to accept the doctor's opinion if there is good reason for not accepting it; however, the doctor's

A evidence, being expert evidence, must be considered very carefully and the court should not dismiss or reject it lightly;

(ii) The mental defect or disease which the respondent was suffering from at the material time was such as would bring him within the ambit of diminished responsibility. However, diminished responsibility is not recognized as a defence in our law as it stands today, although repeated calls have been made for the amendment of the law in that area.

C

Dissenting Judgment –

(iii) The construction that, over the years, has been put on the provision on insanity, i.e. section 13 of the Penal Code, is completely out of date; with the advance of medical knowledge in psychiatry, the McNaughten rules on which that provision is based are not free from difficulty and progressive opinion has been prepared to include actions done in situations of irresistible impulse within the framework of the McNaughten rules;

(iv) There is nothing under section 13 of the Penal Code which expressly excludes the defence of insane impulses, and a sound legal basis for not recognizing irresistible impulse as a defence cannot be found to have been laid anywhere;

(v) This court can change the situation by adopting a more progressive interpretation of the relevant provisions so that the law does not lag behind current advances in medical science;

(iv) On the evidence on record the defence of insanity was available to the respondent because at the time when he did the act which resulted in the killing of his son, he appears to have been acting under an irresistible impulse.

Appeal allowed

H

Cases referred to:

(1)Nyinge Suwatu v. R [1959] E.A. 974

(2)R. v. Agnes Doris Liundi [1980] T.L.R. 38

I *(3)Ebrahim Weraga Wamala v. R* (1943) 10 E.A.C.A. 48

(4)Agnes Doris Liundi v. R [1980] T.L.R. 46

(5)Davis Case [1881] 14 Cox 563
(6)R v. Magata Kachehakana [1957] E.A. 330

Mr. *Mwengela*, for the Republic
Mr. *Mkongwa*, for the Respondent

JUDGMENT OF THE COURT

(Dated 30 May 1996)

Kisanga, J.A.: This is an appeal by the Director of Public Prosecutions against the judgment of the High Court in which Mkwawa, J., convicted the respondent of manslaughter and sentenced him to 15 years' imprisonment.

The facts of the case may be summarized briefly as follows. The respondent is the father of the deceased, a boy of about 6 years of age. The deceased was born out of wedlock, and his mother never married the respondent. Neither did the respondent take care of the deceased. The deceased was being taken care of by his grandmother, i.e. the respondent's mother who was living separately from the respondent. On the day of the incident the deceased was playing with other children not far from the respondent's house. Then the respondent came round and promised the children to buy them sweets. However, he bought sweets for the deceased only. He then took the children to his house where he promised to make toy cars for them. He asked the deceased to fetch a panga for him, which he did, after which he took the deceased and went away carrying the panga with him and leaving the other children there. Shortly afterwards he returned to the place and threw bricks to the children chasing them away.

As the deceased went missing that day, a search was mounted by the villagers which went on until the small hours, but the deceased could not be found. On the first day of the search the respondent looked unconcerned and did not take part in the search; however, he told the searchers that it was quite probable that the deceased had been

kidnapped. When the search was resumed on the following morning the respondent led the search party to a spot in the banana plantation where the dead body of the deceased was hidden. The respondent stated that he had accidentally slashed the deceased with a panga and produced the panga. The panga had no blood stains on it, but the respondent stated that he had cleaned it after the incident.

The respondent's defence at the trial was two pronged. First, he denied killing the deceased. He claimed that it is his own relatives who had killed the deceased and that the charge against him was a mere fabrication. In the alternative, he asserted that he is an epileptic patient, though not insane, so that if he killed the deceased at all he did so at a time when he was under an epileptic fit. The trial judge, sitting with his two assessors, rejected the respondent's defence. However, while the assessors found the respondent guilty of murder, the presiding judge, as stated before, convicted him of manslaughter and sentenced him to 15 years' imprisonment.

In this appeal the Republic is represented by Mr. Mwengela, learned State Attorney and the respondent is advocated by Mr Mkongwa. Mr. Mwengela filed four grounds of appeal altogether. In these grounds Counsel essentially contends that once the trial judge found the respondent to be not insane at the time of killing the deceased, it was not open to him to record a conviction for manslaughter; he had to convict for murder.

In response to that submission Mr. Mkongwa sought to dispute the trial court's finding that the respondent was sane at the time of committing the offence. But when it was pointed out to him that he could not properly do so, as he had not appealed against that finding, he invited us to deal with the matter under the revisionary powers of this Court, and we agreed to do so.

First of all, Mr. Mkongwa rightly conceded that the trial judge, having rejected the respondent's defence of insanity, wrongly proceeded to find the respondent guilty of manslaughter. As clearly intimated, we agree entirely with Counsel for both sides on this point. In the

circumstances of this case the correct verdict, after rejecting the defence of insanity, was either murder or acquittal; there was no half way house. However, Mr. Mkongwa submitted that the defence of insanity was available on the basis that the respondent has a history of epilepsy, and that at the material time he might have been under an epileptic fit which might have made him unable to know that what he was doing was wrong. It was contended that the respondent came to know that what he did was wrong only after the killing, but that at the time of the killing he did not. In support of this proposition, Counsel pointed out that the deceased was the respondent's own child and that the killing was unprovoked, without motive and indeed senseless. Learned Counsel contended that such factors go to show that it was more likely than not that the respondent did not know what he was doing or that what he was doing was wrong. This submission was also advanced at the trial where, as already stated, the trial judge and his assessors rejected it.

In rejecting that defence the learned judge specifically considered the respondent's claim that he is an epileptic patient. That defence was duly supported by the respondent's mother (PW.1) who testified that the respondent was not insane but had a history of epilepsy, and that he used to complain of dizziness. It is further supported by the respondent's brother (PW.5) who said that at times the respondent behaved abnormally. On one occasion, for instance, the respondent, without any provocation, violently attacked his sister. The evidence that the respondent is given to violence at times is again supported by the respondent's uncle (DW.2) who said that on one occasion the respondent assaulted one Jamu and broke his jaw. As against that set of evidence, however, the learned judge also considered the documentary and oral evidence of the psychiatrist specialist who had attended the respondent at Isanga Institution where the respondent was committed for observation. Both in his written report (Exh. P.4) and in his oral testimony court the specialist (PW.6) testified that the respondent was never insane at any time. In fact according to the witness, the respondent denied to have any mental history. The witness

A said that the respondent was under his observation for a period of a little over five months but the respondent showed no signs of any mental illness. On the basis of the witnesses' statements, and on the basis of the respondent's own statement including the doctor's own observation
B of the respondent, the doctor found no trace of insanity in the respondent, and he equally ruled out the possibility of epilepsy.

There is no dispute on the issue of insanity as such because even the respondent himself denied having any history of insanity. However, a
C controversy appears to arise in relation to the issue of epilepsy. For, the respondent claims that he is an epileptic patient while the doctor ruled it out. The issue is one depending largely on the credibility of the respondent. The respondent raised the issue of epilepsy for the first
D time in his defence at the trial. He made no mention of it at all in his cautioned statement to the Police (Exh. P.3), nor did he disclose it to the specialist doctor (PW.6) to whom he had been committed for mental observation. If there is any grain of truth in the allegation that the
E respondent was an epileptic patient, would the respondent have failed to disclose this important defence on these crucial or strategic occasions? Secondly, the respondent was in the custody of the doctor specialist (PW.6) for a period of a little over five months during the observation
F as to his mental condition, but the doctor noticed no epileptic fits in him. If the respondent is an epileptic patient, as he claimed in Court, what prevented such fits from recurring during that period? Not only that. The respondent was in remand from the time he was arrested
G following the commission of the offence in January 1989 until October 1992 when he gave evidence in his defence at the trial. That was a period of over three and half years. Now, if the respondent claims that
H he is an epileptic patient, why did he not call any of his inmates to support that claim? More so, especially, as the burden of proving insanity, though on a balance of probability, was on him.

In these circumstances, it is increasingly apparent that the
I respondent's claim that he is an epileptic patient was an afterthought on his part, while his mother and brother who supported that allegation did

so out of their desire to save a relative from trouble. The learned trial judge, therefore, was perfectly entitled to accept the doctor's evidence which ruled out any possibility of the respondent being an epileptic patient.

According to the doctor the respondent's account of the incident shows that at the material time the respondent had some mental abnormality. He was irritable and impulsive and he had lost social inhibitions. The trial judge duly considered this aspect of the evidence but took the view that such mental defect as the respondent was suffering from did not amount to legal insanity. This view is amply demonstrated by that part of his summing to the assessors where he said:

> I have to explain to you what in law amounts to insanity, ... In law, for a person to be held to be insane he does not have to be raving mad. On the other hand not every person who has some mental trouble is necessarily legally insane. A person is insane if, as a result of the disease of the mind, at the time he does something he does not know that what he is doing is wrong.

And later on, in his judgment, he said:

> The evidence of these witnesses substantially was to the effect that the accused had a history of ... some mental trouble.... I must say that I believe the evidence of the accused's mother (PW.1) which was amply corroborated by PW.5 and DW.2 that the accused had suffered mental bouts which was (*sic*) characterized by violence and aggressiveness and giddiness. It is in the evidence of these witnesses that they sent the accused to the traditional healer who treated him with traditional medicine.
>
> The main question is whether such ailments described by the afore stated witnesses amount to legal insanity. Dr Farahani was of the view that they do not amount to insanity. I am also of the same view. The lucid account given by the accused after the event now in question show (*sic*) clearly that he had a full understanding of what he did and that it was wrong. I would therefore dismiss the defence of insanity.

A In accepting the doctor's opinion on the matter the trial judge properly directed himself in terms of the rule in *Nyinge Suwatu v. R* (1) followed in the case of *R v. Agnes Doris Liundi* (2) that the Court is not bound to accept the doctor's opinion if there is good reason for not doing so.
B For the sake of completeness, we should add to this that the doctor's evidence, being expert evidence, must be considered very carefully and the Court should not dismiss or reject it lightly. Guided by these principles the trial judge decided to accept the doctor's opinion ruling out insanity,
C and we are unable to say that he erred in so doing.

The respondent's account of the incident immediately before and after the killing, as contained in his cautioned statement (Exh. P.3), clearly shows that he knew what he was doing. For instance, he clearly said
D that he slashed the deceased, mentioning the instrument, i.e. the panga, which he used, and the part or parts of the body which he slashed. His conduct immediately after the killing, for example, hiding the dead body in the banana plantation and cleaning the panga to remove blood on it
E were designed to avoid detection, which clearly go to show that he knew that what he had done was wrong. His attempt to avoid detection is further demonstrated by his misleading statement made to the search
F party that the deceased had most probably been kidnapped. He knew this to be untrue because he was aware that the deceased was dead and, indeed, he showed witnesses the place where the dead body was hidden. Such conduct clearly shows that the respondent knew that he
G had don wrong and was now trying to prevent detection of his crime.

Like the learned trial judge we are satisfied that the respondent was at the time of the killing suffering from some mental defect which, however, was not epilepsy and was not of the magnitude which amounted
H to legal insanity within the meaning of section 13 of the Penal Code. For instance, although in the doctor's opinion the respondent was impulsive, this does not avail the respondent because in *Ebrahim Weraga v. R.* (3) the Court of Appeal for Eastern Africa held that the
I prisoner's irresistible impulse is no defence. It seems that the mental defect or disease which the respondent was suffering from at the material

time was such as would bring him within the ambit of diminished responsibility. However, diminished responsibility is not recognized as a defence in our law as it stands today, although repeated calls have been made for the amendment of the law in that area.

Once we hold, as we do, that the defence of insanity was not available to the respondent, we could find no other defences or circumstances which would reduce the offence to manslaughter. In the final analysis, therefore, we are satisfied that the learned trial judge, having rightly rejected the respondent's defence of insanity, erred in failing to convict the respondent for murder as charged and to sentence him to suffer death by hanging which we hereby do, setting aside the conviction for manslaughter and the sentence of 15 years' imprisonment. The appeal by the Republic is, therefore, allowed although we should point out that in our view this is a fit case to recommend to the Executive for the exercise of Presidential clemency.

DISSENTING JUDGMENT

(Dated 22 July 1996)

Mfalila, J.A.: I have read in draft the judgment of the Court prepared by my brother Kisanga, J.A. Having done so, I found myself unable to reach the same conclusion on the respondent's criminal responsibility in the circumstances of this case. I am clearly of the view that on the evidence on record and on the finding of the learned trial judge, the respondent was, at the time of the commission of the offence, suffering from a mental disease which resulted in his being propelled to act irresistibly in a certain way, and that apart from the interpretation of section 13 of the Penal Code by the courts over the years, there is nothing in the section itself which says that this defence is not available to accused persons in relevant circumstances. I also do not intend to restate the facts, as they have been fully set out in the Court judgment.

The respondent Omari Jabili was charged with murder but at the end of the trial the learned trial judge found that, due to what he called

A the mental ailment from which the respondent was suffering, he was incapable of forming any specific intent; therefore, he found him guilty of the lesser offence of manslaughter and sentenced him to 15 years imprisonment. Against this decision the Director of Public Prosecutions
B appealed, complaining that the learned trial judge misdirected himself by not finding the respondent guilty of murder as charged against his own finding that the respondent was sane when he committed the offence, and also that the learned trial judge grossly misdirected himself when
C he based his decision on the mental history of the respondent instead of the mental aspect of the respondent at the time of the commission of the offence. The Director of Public Prosecutions also complained against the sentence that it is highly and manifestly inadequate.

D In the course of his judgement, the learned trial judge made two fundamental findings of fact with which I entirely agree. Firstly, that the respondent voluntarily made the cautioned statement contained in Exh. P3 and that its contents are true. Secondly, that it is the appellant who
E killed the deceased. On these findings, therefore, the trial court rightly rejected the respondent's denials that he killed his son. The only remaining question for resolution was the respondent's criminal responsibility raised on his behalf as an alternative defence. Learned
F Counsel for the defence argued at the trial that the defence of insanity was available to the accused on the following grounds:

G (a) That the burden on the balance of probability had been discharged.

(b) That the conduct of the accused after the killing was not consistent with a sane mind, i.e. that he did not run away (to indicate guilt and knowledge).

H (c) That the evidence of PW.1, PW.5 and DW 2 clearly showed that the accused had a history of mental illness; this, he said, explains why nobody thought of involving the accused in the hunt for the deceased.

I (d) That there is evidence to the effect that the killing took place soon

after the accused was discharged from his treatment for mental disorder by a local medicineman.

On these grounds, learned defence Counsel urged the trial Court to reject the doctor's opinion (PW. 6) that the accused was sane at the time of the commission of the offence, and that therefore it should acquit him. This prayer was, of course, misguided because nobody can be acquitted on the ground of insanity. But it is the main and the only question of dispute in this appeal, namely, the criminal responsibility of the respondent who, apparently without any reason or motive, brutally killed his own son the deceased boy, Chenga Omari, aged about seven years at the time of his death. According to the available evidence, the respondent killed his son by hacking him with a panga on the head, spilling out the brain matter. However, at the trial, it was argued on behalf of the republic that the defence of insanity under S.13 of the Penal Code was not available to the accused because:

(a) The actions of the accused subsequent to the killing were consistent with a sane mind.

(b) It cannot be concluded from the evidence of P.W.1 and P.W.5 that the accused was suffering from insanity when it was decided to send him to a local medicineman for treatment.

(c) The evidence of the accused's uncle, D.W.2, on the accused's alleged insanity is unreliable because it contradicts that of PW.1, PW.3 and PW.5 in that the evidence of P.W.1 and P.W.5, did not give details of the accused's acts of violence; in his submission, the evidence of DW.2 must have been tutored to help the accused out of his predicament, and that in any case irresistible impulse is not a defence recognized by our law.

As indicated earlier, the learned trial judge failed completely to resolve the question of the respondent's insanity because he gave conflicting

A decisions. In an earlier part of his judgment, the judge said that he agreed with the doctor that the appellant was sane when he committed the act and dismissed the defence of insanity in the following words:

B > ...the lucid account given by the accused after the event now in question showed clearly that he had a full understanding of what he did and that it was wrong, *I would therefore dismiss the defence of insanity.*

C At the end of the judgment, the learned judge arrived at the opposite decision on the question of the respondent's mental capacity and his criminal responsibility. He concluded his judgment in the following words:

D > I now turn to the question whether at the time of the killing the accused had malice aforethought. Here the mental state of mind of the accused is relevant. The evidence showed that the accused had no previous ill will against the deceased. There was nothing in the deceased's conduct to provoke him that day. There was no motive for the killing .... Why then did the accused behave in such recklessness (sic) and senseless manner? The Accused's behaviour subsequent to the killing justifies me in my view that *he was not all aware of the act he had done.*
>
> Having regard to the foregoing, buttressed with a chain of evidence of mental ill health and history of bhang smoking, I am inclined to believe that the accused was not, at the material moment, capable of forming the necessary intent to kill within the meaning of Section 200 of the Penal Code.

Thus, with this conclusion, the learned judge fell into the obvious error H of confusing and mistaking one for the other, the defences under Section 12 and 200 of the Penal Code. These two sections provide for two different situations which should not, and indeed cannot, be mistaken one for the other. Section 13 provides for criminal responsibility of I insane persons whereas Section 200 is a specific provision defining malice aforethought in homicide cases. But the learned trial judge is

not entirely to blame for falling into such confusion. The real culprit is the present state of the law on insanity. The construction that has been put over the years on the relevant provision in the Penal Code, i.e. Section 13, is completely out of date. As every student of Criminal Law knows, Section 13 of the Penal Code is based on the answer to the third question supplied by the High Court Judges to the House of Lords in the M'Naghten Case, the answers to which came to be known as the M'Naghten *Rules*. With the advance of medical knowledge in Psychiatry, these rules are currently not free from difficulty and it is on this basis that this Court lamented in *Agnes Doris Liundi v. Republic* (4) at page 50:

> It is possible, indeed likely that our law on the issue of insanity is antiquated and out of date. Dr. Haule in evidence said that in modern psychiatry, the distinction between insanity and diminished responsibility is under controversy because it is imprecise. Parliament in its wisdom may wish to amend this particular branch of the law and bring it into line with modern medical knowledge on the subject. Other jurisdictions including one at least in East Africa have done so. But as the law now stands, we are of the opinion that the trial judge has come at the right conclusion.

I have asked myself whether it is necessary to wait for parliament to bring our law into line with modern medical knowledge. Is there anything specific in Section 13 which prevents us from recognizing as a valid defence irresistible impulse as a species or variation of insanity? This Section provides as follows:

> s. 13. A Person is not criminally responsible for an act or ommission if at the time of doing the act or making the 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;
>
> But a person may be criminally responsible for an act or omission

A although his mind is attacked by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.

B Over the years, the East African Courts have interpreted this and other similar provisions in the region, within the framework of the M'Naghten rules, which as I have indicated, are not free from difficulty in the light of current knowledge produced by the advance in the medical field since C they were promulgated over 150 years ago. Writing on insane impulse in his book *"History of Criminal Law"* – 2nd Edition, Stephen states:

D The McNaughten rules do not provide for such volitional and emotional factors in mental disorders. They are concerned solely with defects of cognition or intelligence and do not expressly consider defects of emotion or of commotion (or will). By **implication,** however, since they purport to E state exhaustively the rules relating to insanity as a defence, they deny the relevance of insane impulse. This is in fact the position adopted by English Courts and by most Courts in the Commonwealth and the United States ...."

F The line between insane automatism (which creates irresponsibility) and insane impulse (which does not) is this: if the accused has totally forgotten the mischievous act, there will be a tendency to say that it was committed in a dream state, and he will be excused on the ground of G insanity. If he remembers it (and tries to cover it up) it will be accounted insane impulse and he will probably be convicted. Yet the amnesia in the first case might be due to repression and not to the fact that the act left no trace in the memory. In any event the question of memory afterwards H seems to be irrelevant to the question whether the accused could help his conduct at the time.

I Although this was the trend, i.e. to deny or to put outside the ambit of the M'Naghten rules insane automatism and impulse, yet hardly forty years after their promulgation, legal opinion began to emerge which

favoured the recognition of these conditions as defence within the frame work of the rules. Lord Hewert probably broke the ice when he declared:

> It seems true to say that in cases where there is evidence of real mental disease antecedent to the commission of the alleged crime, and there is no evidence of a motive which might influence a sane person, juries have no difficulty in finding either that the prisoner did not appreciate the nature of his act or that he did not know that it was wrong.

By 1881 some English judges manifested or went to extreme lengths to justify and follow this point of view as in the *Davis Case* (5), Stephen J. held:

> Even though the accused knew his act to be legally wrong, as shown by the fact that he surrendered himself to the police [in the present case he hid the body and cleaned the weapon], he may be held not to have appreciated the wrongness sufficiently to satisfy the word "know."

And in 1925 Lord Atkin concluded:

> The illustration of the law is very much more generally liberal than would be the case if it were carried out in strict accordance with the letter. In practice, the judge, the counsel, the jury, the witnesses and all concerned are desirous in cases of ***uncontrollable impulse*** to acquit the accused on the ground of insanity – (1925) 159 ..T. Newsp 436.

Another author, McNiven, in "*Mental Abnormality and the Crime,*" states at page 66:

> An act done in a blind frenzy will come within the McNaughten rules for every mental expert would unhesitatingly say that the accused in such cases did not know the nature of his act or that it was wrong. *Motiveless*

A attacks by schizophrenics are regularly held to be covered by the insanity defence.

The same author suggests that current literature provides some evidence
B of a practice in England whereby Crown Prosecutors did not argue that the accused fell outside the M'Naghten rules if there was substantial evidence of an insane *irresistible impulse* even before the change in the law was effected. He suggests further that the problem started with
C the decision in the M'Naghten *Case* itself because M'Naghten's own acquittal seems to have been not in accord with the answer to the third question. M'Naghten who put up the defence of insanity in the case in which he was charged with the offence of murdering the Private Secretary
D to Sir Robert Peel, the Prime Minister, his delusion that he was being persecuted was not "as to a fact that, if true would have been a defence;" consequently, it appears that his acquittal on the ground of insanity cannot be reconciled with the judge's answer to the third question.

E In the light of these progressive attitudes in interpreting the law within the framework of the M'Naghten rules, what has been the attitude of the East African Courts? In a case in which the killing clearly amounted to murder as it was carried out either to punish or to revenge, the Uganda
F High Court nevertheless seemed by implication to recognize the defence of sudden irresistible impulse because of the suddenness of the action. The Ugandan provision on insanity contained in Section 12 of the Penal Code, is exactly worded as the Tanzanian provision in Section 13. In
G that case *R. v. Magata Kachehakana* (6) the accused killed his father as they were returning home from a funeral. The killing was brutal and sudden, carried out with a panga. The accused explained before the local Chief as well as in his cautioned statement that he killed his father
H because he had bewitched his entire family. At the trial, he pleaded insanity in the alternative. After stating that Section 12 must be read and construed together with the rules in the M'Naghten case and decisions following that case, the learned judge continued:

I

This case is not free from difficulty. I have considered the words "disease

> of the mind" in Section 12 of the Penal Code, I am of the opinion 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 a disease of the mind. Here the killing is unexplained and, in my opinion, inexplicable except upon the basis that the accused did not know what he was doing.

After discussing the burden of proof in such cases the learned judge concluded:

> 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 had established the reasonable probability that this was the accused's state of mind at the relevant time, and on 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.

It should be recalled that just as in the present case, the doctor who examined the accused's mental state, stated that the accused was sane at the time of committing the offence.

I have already quoted the lamentations of this Court with regard to the outdatedness of our Section 13 and the law of insanity generally.

As I have tried to show by tracing the history surrounding the application and interpretation of the M'Naghten rules for the last 100 years, progressive opinion has been prepared to include actions done in situations of irresistible impulse within the framework of the M'Naghten rules. This attitude has been reinforced by advances in modern medicine which have discredited the old notion on which the M'Naghten rules were based, that the human mind is made up of independent compartments such that one part can be diseased while

the other compartments are healthy and sound. In the Ugandan case already quoted, although there was a clear explanation of the killing, i.e. punishment or revenge for the deceased having killed the accused's children and wife by witchcraft, the trial judge, albeit for racially derogatory reasons, was willing to find the accused afflicted with a disease of the mind because the act was so sudden that the killing was "unexplained" and in his opinion "inexplicable except upon the basis that the accused did not know what he was doing." Since, as I have tried to show, there was a motive and the reason for the killing given by no less a person than the accused himself, the basis of the judge's finding and excusing the accused, must have been irresistible impulse which seized the accused at the time when he committed the offence.

There is nothing in Section 13 of the Penal Code which expressly excludes the defence of insane impulses except by the attitudes of mind fashioned by the interpretations of the M'Naghten rules on which it is based. If the Court in the *Magata Kachehakana* case was prepared to extend the principle to a person who killed for known motives, what rational reason would there be to deny the defence to a helpless father who without any reason and suddenly hacks his son to death and declares later than he did not know what he had done for two days?

Professor Glanville Williams in his book *Criminal Law*, 2nd Edition, at page 507, paragraph 162, states:

> Most Psychiatrists recognize the existence of morbid impulses that are almost or quite uncontrollable. These are found for example in epilepsy and maniac – depressive pychoses. The paranoiac may kill in the hope of obtaining relief from his fear and worry. Sometimes the impulse is of the "provocation" type where the sufferer is moved to anger by circumstances that would not affect the normal person.

Throughout the decided cases, it cannot be found anywhere where a sound legal basis is laid why irresistible impulse should not be recognized as a defence. As the author of *History of Criminal Law,* referred to earlier, observes:

Usually judges make no effort to justify the exclusion of the defence, they simply affirm that it is not recognized by law. A

Since there is nothing express in the statutory law against the adoption of the defence, the current state of the law excluding the defence is only based on the judicial interpretation of the relevant statutory provisions, interpretations which are themselves based on the outdated M'Naghten rules. There is therefore no reason for the Courts to wait for Parliamentary intervention as suggested by this Court in the *Agnes Doris Liundi* case (4). The Courts, particularly this Court, can change the situation by adopting a more progressive interpretation of the relevant provisions so that the law does not lag behind current advances in medical science. B C D

Awaiting Parliamentary intervention in a situation of our own making, would continue to place in jeopardy the rights of accused persons like the one in the present case who are denied the right to the defence of insanity for acts they committed in circumstances which are beyond their control. Indeed the predicament in which the learned trial judge in the present case found himself would not arise. E

I will now turn to the case in hand. As stated by the learned trial judge, the act of the respondent so brutally killing his own son was, to borrow the words of the judge in the *Magata Kachehakana* case (6), "unexplained and wholly in-explicable." It is therefore necessary, as did the learned trial judge, to examine the evidence to see whether it points or reveals anything which can show that this killing is unexplained and inexplicable except upon the basis that at the time, the respondent did not know what he was doing. What was the respondent's mental condition before and after the killing? Three witnesses gave evidence on the respondent's mental history before the killing. These were his mother, Sinawema PW.1, his elder brother, Hassan (PW.5), and his uncle, Kindamba (DW.2). The mother (PW.1) said that the respondent is her son, and that although he is not insane, he has a history of epilepsy, that she had him under treatment for two years. In this state, she added, F G H I

A he once fell into a well and then she sent him to undergo treatment by a local medicineman. In the light of this evidence, C.9041 D/C Wangwa (PW.2) could not have been telling the truth when he said in his evidence:

B

> I interrogated her (the mother of the respondent); she told me that the accused was a habitual bhang smoker. She did not tell me his (sic) son was bewitched nor did she tell me that the accused was attending clinics of a local medicineman.

C

There is no reason in the world why a mother should disclose criminal conduct by her son already in trouble with the law. Unfortunately this was the statement on which the Psychiatrist based his opinion on the

D respondent's bhang smoking and its effect on him. The learned trial judge also fell into the same error.

Hassan (PW.5) had this to say on the respondent's mental history:

E

> I know that in 1984 the accused was ill. He was taken to the aforementioned medicineman, I mean to say Lundelundelu's home. He had shown signs of sadness. I have even heard that at times he would

F defacate and play with his faeces. I also recall an incident when he unprovekedly (sic) violently attacked our sister. That was in 1988. The matter was reported to the police.

G

Lastly the uncle, Kindamba Saidi (DW.2), had the following to say on the respondent's mental history:

H

> He started to exhibit signs of unsoundness of mind when his son the deceased was three years old. He developed very aggressive behaviour. The family advised his concubine, the deceased's child's mother to leave the accused and return to her parents.

I

> His violent behaviour continued to the extent that he started assaulting people. In the course of one such assault, he broke Jamu's

jaw. He also assaulted his sister. He earned himself the nick-name "Peter Botha" for his aggressive behaviour.

The family meeting decided to send him to a local medicineman for treatment. The respondent did not improve. He would strip naked and play with his faeces. After his violent assault on his sister, he was convicted and sent to Kidete Prison as a Criminal Lunatic.

As to the respondent's mental state during and after the killing, the following evidence introduced at the trial by the prosecution is relevant. The first was given by the deceased's playmate Farashani Nyange (PW.3). This boy stated in the relevant part of his evidence.

After being given the panga by the deceased and leaving with him, the accused returned shortly afterwards and started driving us away by hurling stones at us.

This behaviour is hardly consistent with the sane mind of a person who had, only a short while ago, promised the children to buy them sweets and make them toy cars.

Then there is the cautioned statement of the respondent himself, the statement which was accepted by the Court to be true. In the relevant part the respondent stated:

Niliingia ndani, nikachukua upanga kwa madhumuni ya kukata miti ya Mikuyu; nilitoka ndani na mwanangu Chenga Omari ambaye ni marehemu; tulienda hadi kwenye mwembe kuokota embe sindano na kuanza kula, kasha tulienda kwenye mwembe dodo, hapo nilishtukia namkata panga mtoto wangu sehemu za shingoni na kasha kichwani, alianguka, hakuwahi hata kupiga kelele....

...sikuwa na ugomvi wowote na mwanangu kwa muda wote wa maisha yake, tangu mdogo hadi alipokufa akiwa na umri wa miaka saba. Wala mimi sijawahi kuugua ugonjwa wa akili. Tangu nilimpiga panga sikuwa na fahamu hadi siku ya pili ndipo nilijisikia huzuni ya kuua mtoto wangu.

All this evidence on the respondent's mental state, before, during and after the killing remained uncontroverted. The evidence of the Psychiatrist is therefore the more surprising. In his evidence the Specialist Psychiatrist, Dr. Farahani, to whom the respondent was referred for observation stated:

> I have personally observed the accused. I spent several hours talking to him in each session. He did not show any sign of mental illness. He denied having a mental history. Patients do admit if they have had any mental history. The accused did not have any degree of mental insanity. In my report I have mentioned that one of his brothers had stated in his statement that the accused did not have a mental history. I found that in his statement. I did not interview any of the accused's relatives. I cannot rule out a possibility of any of his relatives stating the contrary.
>
> The cautioned statement of the accused does not appear to be consistent with a sane mind. The conduct of the accused subsequent to the death of the deceased namely, being indifferent, can be explained by labouring under the influence of alcohol or bhang. What the accused did is consistent with the mind of a habitual bhang smoker. The accused told me that he killed the child accidentally. He did not tell me that he had punished the deceased. I admit that it takes time to know whether a person is insane or not.
>
> I observed the accused and ruled out other ailments. I did not examine the accused subsequent to the killing incident. I cannot therefore say that he was labouring under the influence of drugs or alcohol.
>
> The statement made by the accused to the police shows that he was at the moment impulsive. The accused must have lost social inhibitions, I mean he was impulsive, not normal, and irritable. He denied having smoked bhang. I had read the statement of the accused's mother. I rule out the possibility of epilepsy. A person who smokes bhang can retain the state of drug effect for more than three days.

I do not think any Court should take the evidence of this doctor with

any degree of seriousness. For one thing it is full of contradictions and inaccuracies. For instance the doctor says that after examining the respondent he found him to have no signs of mental illness and that he did not have any degree of mental insanity. He goes on to state that in his report he mentioned that one of the respondent's brothers had stated in his statement that the accused did not have any mental history. No doubt he formed his opinion that the respondent was sane at the time he committed this offence on this basis. This view contradicts the evidence of the respondent's own brother (PW.5) who narrated the respondent's troubled mental history. Indeed the doctor admits that he did not interview any of the respondent's relatives and that therefore he cannot rule out the possibility of any of them stating the contrary. The question then is whether the doctor would have given or arrived at the same conclusion if he had interviewed the respondent's relatives such as PW.1, PW.5 and DW.2, who indeed stated the contrary that the respondent has a mental history.

With regard to the respondent's alleged habit of bhang smoking, I am surprised this information, based on hearsay statement, found favour with both the doctor and the trial judge. There is absolutely no substance in this allegation. The doctor then made a startling remark in his evidence to the effect that after reading the statement by the respondent's mother, he ruled out the possibility of epilepsy. It is startling because there is absolutely no basis to reject PW.1's evidence that her son, the respondent, suffers from epilepsy. It is also startling because whereas the doctor was prepared to accept PW.2's unsubstantiated statement that the respondent was a habitual bhang smoker, he was not prepared to accept the evidence of a witness who directly testified on the question of epilepsy.

I am therefore satisfied that since there is no other rational explanation for the respondent's callous act of hacking his own son to death, and taking into account his mental history whereby during these seizures he *would suddenly become violent* and attack people as is evidenced by his violent attack on his sister for which, according to DW.2, he was

imprisoned as a criminal lunatic, the respondent must have attacked his son when in such a condition, whereby he had no ability to control his actions. In his police statement the respondent stated that he did not realize what he had done until two days later when he became extremely remorseful for having killed his own son. The respondent was prone to the bouts of insane irresistible impulse due to mental disease after which he would become as normal as anyone. This is why Dr. Farashani was misled into believing that the respondent was sane and rational at all material times although he admitted, in contradiction to his earlier statement, that the respondent's police statement does not appear to be consistent with a sane mind. Indeed I believe this is what the learned trial judge intended to say although, unwittingly, he became caught up in the web of the M'Naghten rules.

In the circumstances, and on the evidence in the record, the defence of insanity was available to the respondent because at the time when he did the act which resulted in the killing of his son, he appears to have been acting under an irresistible impulse, and this would explain his attempts to cover up the crime. But he never actually attempted any escape.

I would for these reasons dismiss the appeal and, using the revisional jurisdiction of this Court, I would set aside the order of the High Court and enter a special finding under Section 219(2) of the Criminal Procedure Act that the respondent committed the offence charged but, by reason of his insanity, he is not guilty of the offence. I would also order that the record of these proceedings or a certified copy thereof be submitted to the Minister of Justice and Constitutional Affairs, and would further order that the respondent be kept in custody as a criminal lunatic.

However, as mine is a lone voice, the order of the Court shall be in terms contained in the majority judgment.