IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RAMADHANI, J.A.; MUNUO, J.A.; And NSEKELA, J.A.)

CRIMINAL APPEAL NO 46 OF 1998

BETWEEN

IDD KONDO ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam)

(Bubeshi, J.)

dated the 1st day of September, 1998
in
Criminal Appeal No. 77 of 1998

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JUDGMENT OF THE COURT

RAMADHANI, J.A.:

The appellant, Idd Kondo, was convicted by the District Court of Ilala at Kinondoni, Dar es Salaam, and was sentenced to serve a term of imprisonment of twenty years. His appeal to the High Court of Tanzania was summarily dismissed (BUBESHI, J.) under section 364 (1) (c) of the Criminal Procedure Act, 1985, (Act No. 9 of 1985). He has now come to this Court.

Before the District Court the prosecution adduced a total of four witnesses. Rehema Samatta (PW 1) testified that the appellant was a friend of her uncle called Omary Abdallah. On 3 June, 1997 at about 8.00 pm while PW 1 was alone at home, the appellant appeared and told her that he wanted to perform some charm which would enable her to get married. PW 1 declined that offer saying that she had not yet thought of marriage and she asked him to repeat that offer before her parents when they returned home. There upon the appellant held her by the neck, stepped on her chest with one foot, undressed her and raped her, PW 1's cries for help did not bear fruits. People turned out after she had been ravished and the appellant had escaped. The first person to emerge was her uncle followed by "another woman". She was taken to Police for PF 3 and

The last witness was Omary Abdallah. He said that PW 1 is his niece and that the appellant is his friend. On 5 June, 1997, at 8.00 pm PW 1 went to tell him that the appellant had raped her and she requested him to assist her to arrest the appellant. He managed to locate the appellant on the following day. He tricked the appellant into going to the CCM Branch and from there the appellant was taken to a Police Station.

Again let us soliloquy. The event is said to have taken place on 3 June, 1997. PW 1 was admitted at the Muhimbili Hospital for two weeks and that she was discharged on 17 June, 1997. How could she have gone to PW 4 on 5 June, 1997, to tell him the episode and to ask for his assistance to have the appellant arrested? It also baffles us why the appellant was not arrested earlier if his identity was known? To add on to that, why did PW 4 have to trick the appellant into going to the CCM Branch and then to the Police to be arrested instead of telling the Police to do their work straight away?

The appellant in his defence said that on the fateful day he left work at *Urafiki* at 4.00 pm and went home to pick his wife to go to Vingunguti to visit some relatives and that they returned home at 9.45 pm. Then on 6 June, 1997, while he was at a mosque he met his one time friend, PW 3, and, after some exchange of greetings, he went into the mosque to pray. After prayers his friend told him that he was required at the CCM Branch and from there they went to a Police Station where he was told that he was under arrest. He was locked up at Magomeni Police Station and was taken to the Magomeni Primary Court. The appellant did not know what he had done and why his case was transferred from Magomeni to Kivukoni. He even produced a news paper which reported of the matter having being at Magomeni. That was admitted as Exh. D 1.

The appellant called his wife, Amina Mohammed, DW 2, as his witness. She reiterated the story of having gone to Vingunguti with the appellant on the day

eventually to hospital and that she was admitted at the Muhimbili Medical Centre for two weeks. She answered the appellant that she was discharged on 16 June, 1997.

The second Prosecution Witness was Swaumu Selemani, a girl of the age of 13 years and a younger sister of PW 1. She said that on the material day at 6.00 pm she returned home from school and that the appellant, who was known to her, came in and asked her about Indian and European films. She told him that she was not familiar with films. Then the appellant told her to take off her underpants and skirt. She refused and told him that she was going to report the matter to a tailor who was close to the house and also to her elder sister. The appellant deposited a hundred shillings on the table and left. PW 2 changed her clothes and went out to play. Suddenly at about 8.00 pm she heard some cries coming from their home. So, she rushed back and found a mob gathered outside. Her elder sister was crying but would not say why she was crying.

The third witness was Khadija Abdalla. She claimed that PW 1 is her grand daughter and that she was living three houses away from PW 1. On the fateful day at 8.00 pm she heard some cries coming from PW 1's house. She went there and saw PW 1 crying and complaining that she had been raped by her 'grand father'. The witness did not know the person. She, however, examined PW 1 and saw a lot of sperms on PW 1's private parts. PW 3 did not do anything as she had a patient at home to attend to. So, she left.

It may be not out of place to record our observations here: Would a 'grandmother' leave a young granddaughter, who has just been raped, helpless and go home without doing anything because she has a sick person to attend to at home? We ask: If that was the case why did she care to go there at all in the first place?

he is alleged to have raped PW 1. In cross-examination she said she would not have known if the appellant had passed through the place of PW 1 before he had gone to take her for Vingunguti. She said further that on 7 June, 1997, the appellant went to pray and that he never returned home. When she went to the Police she learnt of the rape story. They were told by the officer in charge to go and settle the matter home but instead it ended up in court.

The totality of the above evidence left us in great doubts whether this was really a case fit for summary rejection of appeal. However, one question taxed our minds: what is this Court to do in an appeal from a summary rejection of an appeal by the High Court? Can this Court step into the shoes of the High Court and determine the appeal or does this Court remit the appeal back to the High Court to be heard on merit?

When pondering this one of us remembered to have been on a panel of this Court which was confronted with the same issue of summary rejection of appeal and that it was decided to remit the matter back to the High Court. We decided to put the matter to the parties. Unfortunately, the appellant was not represented so he could not contribute anything to the legal issue. Mr. George Masaju, learned Senior State Attorney, opined that this Court could resort to its powers of revision under section 4 of the Appellate Jurisdiction Act, 1979, as amended.

We have not been able to lay our hands on the decision of this Court which one of us talked about. However, it would appear that this Court did not even hear the appeal but ordered the matter to go back to the High Court before another judge to be heard on merit first. We have a different view and, we depart from that decision.

Section 364 (1) (c) of the CPA provides as follows:

> 1) On receiving the petition and copy required by section 362, the High Court shall peruse the same and -
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> a) ...
>
> b) ...
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> c) If the appeal is against conviction and sentence and the court considers that the evidence before the lower court leaves no reasonable doubt as to the accused's guilt and that the appeal is frivolous or is without substance and that there is no material in the judgment for which the sentence ought to be reduced,
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> the court may forthwith summarily reject the appeal by an order certifying that upon perusing the record, the court is satisfied that the appeal has been lodged without any sufficient ground of complaint.

This power of summary dismissal under this provision is akin to that which was provided under section 421 of the Code of Criminal Procedure, 1898 (V of 1898) of India and now section 384 of the Code of Criminal Procedure, 1973 (Act II of 1974). In The Code of Criminal Procedure (V of 1898) 6th (1965) Ed., D. V. Chitaley and S. Appu Rao state at page 2760 that the provision

> is an exception to the general principles of Criminal law and Criminal Jurisprudence and gives an appellate Court a summary power of dismissing an appeal ...

Therefore, the powers under the provision have to be exercised sparingly and with great circumspection. This Court, too, has to be equally careful, when the matter comes to it on appeal.

Section 362 of our CPA requires all criminal appeals to the High Court to be by petition in writing accompanied with a copy of the judgment or order appealed against, unless the High Court orders otherwise. Then under section 364 a judge may peruse such petition and "may forthwith summarily reject the appeal". It has been held in India that a court, exercising the powers of summary dismissal, need not give any reasons **[Allah Bakhsh v. Emp. (1931) 53 All. 797].** But it is advisable to give reasons just in case such an order is challenged in revision **(Mushtak Hussein, AIR 1953 SC 282).** However, where important or

complicated questions of fact and law are involved, it has been held that the court should hear an appeal and should not summarily dismiss it [Dagadu, 1981 Cri LJ 724 (SC)].

At home here in East Africa a couple of appeals reached the Court of Appeal for Eastern African. In **Karioko s/o Gachohi v. Rex, (1950) 17 EACA 141** the Supreme Court of Kenya summarily dismissed the appeal under section 352 (2) of the Criminal Procedure Code. (The Court of Appeal said that the court

> ... can only do so in cases where an appeal is brought on the ground that the conviction is against the weight of evidence or that the sentence is excessive ...

The Court observed that the memorandum of appeal included a ground that the learned Magistrate wrongly construed the appellant's plea of guilty. So, the Court said

> However little merit there may, or may not, be in this ground of appeal, it is not one of the two grounds on which a Judge can dismiss an appeal summarily.

The Court quashed the order and remitted the appeal to the Supreme Court of Kenya for a hearing..

Then there was **Lighton *alias* Morgege s/o Mundekesye v. Rex, (1951) 18 EACA 309** a magistrate convicted the appellant with theft. He had two grounds of appeal: one was against the weight of the evidence but the other was a complaint that he was convicted on account of his previous criminal record. The High Court summarily dismissed the appeal. The Court of Appeal observed that the High Court overlooked the second ground because a sub-inspector of Police gave evidence which indicated the appellant's bad character. The Court found that evidence to have been inadmissible and said at page 310

> ... we cannot but be left with a feeling of uncertainty as to whether the Magistrate's mind may not have been affected by the evidence which should never have been before him, and

> that but for this evidence it is possible that he might have come to a different conclusion as to the appellant's guilt.

The Court quashed the conviction and set aside the sentence and let the appellant at liberty forthwith.

A third case was **Mulakh Raj Mahan v. Reginam (1954) 21 EACA 383.** The Court held that

> An appeal may only be summarily dismissed where it is limited to the grounds that the conviction is against the weight of the evidence or that the sentence is excessive.

The Court observed that

> ... the memorandum of appeal contained at least three other points rising matters which, if points of substance, would vitiate conviction.

The case was remitted to the Supreme Court of Kenya with instructions to admit the appeal for hearing.

From the authorities referred to, both of India and of the East Africa, we can distil the following principles which have to be taken into account when considering summary dismissal under section 364 of the Criminal Procedure Act:

1) Summary dismissal is an exception to the general principles of Criminal law and Criminal Jurisprudence and, therefore, the powers have to be exercised sparingly and with great circumspection.

2) The section does not require reasons to be given when dismissing an appeal summarily. However, it is highly advisable to do so.

3) It is imperative that before invoking the powers of summary dismissal a Judge or a Magistrate should read thoroughly the record of appeal and the memorandum of appeal and should indicate that he/she has done so in the order summarily dismissing the appeal.

4) An appeal may only be summarily dismissed if the grounds are that the conviction is against the weight of the evidence or that the sentence is excessive.

5) Where important or complicated questions of fact and/or law are involved or where the sentence is severe the court should not summarily dismiss an appeal but should hear it.

6) Where there is a ground of appeal, which does not challenge the weight of evidence or allege that the sentence is excessive, the court should not summarily dismiss the appeal but should hear it even if that ground appears to have little merit.

As for this Court the general rule is to send back the appeal to the High Court to be admitted for hearing if this Court is satisfied that the power of summary dismissal was improperly used. However, in some deserving cases the Court may step into the shoes of the lower court and determine the appeal conclusively. This is so especially where there is a glaring irregularity or a miscarriage of justice and that the appeal ought to have been allowed and the appellant be discharged. This could be done by exercising the powers of revision under section 4 (2) of the Appellate Jurisdiction Act, 1979, which provides as follows:

> For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall, in addition to any other power, authority and jurisdiction conferred by this Act, have the power of revision and the power, authority and jurisdiction vested in the court from which the appeal is brought.

In this appeal before us the learned judge gave the following order:

> After a careful study of the appeal filed, this Court is of the view that the same has been filed without sufficient grounds of complaint. The evidence on record does justify the conviction and sentence meted out.

The memorandum of appeal contained five grounds three of them were not challenging the weight of evidence or complaining that the sentence was excessive. One ground raised the issue of *alibi* of the appellant which was not at all discussed by the District Magistrate. Then there was the admission of PF 3 which was tendered by the PW 1 herself while the author was not made available for cross-examination. Lastly, the appellant complained that the learned District Magistrate did not warn himself against the danger of making a conviction on uncorroborated evidence of a single witness who happened to be the complainant in a sex case.

The appellant appeared in person and pointed out the contradiction within the evidence of PW 1 that she was hospitalized for two weeks and yet two days after admission she went to complain to PW 4. He also said, *albeit* from the dock, that at Magomeni the charge was malicious destruction of property and not rape.

Apart from what we have said above, rape is a serious one offence and the punishment of imprisonment of a term of twenty years that was given is undoubtedly stiff. So, even for these two reasons the learned judge should have declined to dismiss summarily the appeal.

Mr. Masaju did not support the conviction and we are also satisfied that the evidence in the lower court raises more questions than answers, as we have pointed out. We are of the decided opinion that had the learned judge on the first appeal properly exercised her mind on the lines we have prescribed above, she would have discharged the appellant. Courts hate to have an innocent man languish in imprison even for one second. So, we allow the appeal. We quash the conviction, set aside the sentence and order the immediate release of the appellant unless his continued incarceration is otherwise lawful.

For the avoidance of doubt we are aware that the authorities quoted in this appeal were given at the time when summary dismissal of appeal was under section 317 of Cap 20 and that now we have section 364 of Act No. 9 of 1985. However, we are satisfied that there is no material difference in the two provisions. There is a slight one in sub-section (1) (c) but does not render the authorities inapplicable.

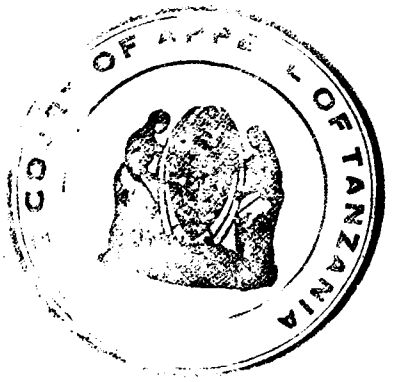
DATED in DAR ES SALAAM this 24th day of November, 2003.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

E. N. MUNUO
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

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



(F.L.K. WAMBALI)
DEPUTY REGISTRAR