IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUBUVA, J.A., MROSO, J.A., And MSOFFE, J.A.)

CRIMINAL APPEAL NO. 67 OF 2001

JUMA HAMIDU ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Bubeshi, J.)

dated the 28th day of September, 2000
in
HC. Criminal Appeal No. 45 of 2000

THE JUDGMENT OF THE COURT

20 June & 3 July 2006

LUBUVA, J.A.:

In the District Court of Rufiji at Utete, the appellant, Juma Hamidu, was charged with and convicted of the offence of rape contrary to sections 130 and 131 of the Penal Code. He was sentenced to thirty (30) years imprisonment. Unsuccessfully, he appealed to the High Court where Bubeshi, J. summarily rejected the appeal under the provisions of section 364 (1) (c) of the Criminal procedure Act, 1985. From the decision of the High Court, this appeal has been preferred.

The case for the prosecution may briefly be stated. Ashura Mwangia (PW2), a twenty (20) years old woman was the victim of the alleged rape. Her evidence was to the effect that on 6.11.1999 at about noon, while on her way to the next village, she met the appellant who greeted and ordered her to stop. She stopped and the appellant

dragged her to a nearby bush. Thereupon, the appellant using a razor blade cut her hands in order to subdue her resistance. He undressed and gaged her with her own pair of khanga so that she could not raise an alarm. Then the appellant raped PW2 and let her go with a warning not to raise an alarm.

On arrival at home, she (PW2) told Abdullah Salim (PW3), her husband, what had happened. PW3 accompanied PW2 to Ikwiriri Police Station where she was issued with a PF3 by D 7323 D/Constable James (PW1), the investigating officer. According to PW1, the appellant was arrested and charged in court.

In his defence, the appellant under oath denied any involvement in the alleged rape of PW2. He claimed that the prosecution evidence against him that he had raped PW3 was not true. He further stated that he could not be involved in the alleged rape of PW2 because on 5.11.1999 until 6.11.1999, he was engaged in some celebrations and festivities. However, he admitted to have been arrested on 27.11.1999.

Based on this evidence, the trial magistrate was satisfied that the case against the appellant had been proved to the required standard. Consequently, as already indicated, the appellant was duly convicted and sentenced to a term of thirty years imprisonment.

On first appeal in the High Court, the learned judge was settled in her view that this was not an appropriate case for hearing on merit. The appeal was summarily rejected.

In this appeal, the appellant was not represented by counsel, he appeared in person. From the totality of the grounds of appeal lodged, we think grounds 1 and 2 raise important legal points: they read:-

1. that the appellate judge wrongly rejected the appeal without considering the principles which have to be taken into account when considering summary dismissal under (sic) 364 (1) (c) of the Criminal Procedure Act of 1985 as distilled and laid down in the case of **Iddi Kondo v R,** Criminal Appeal No. 46 of 1998 (unreported) dated 24/11/2003.

2. … the High Court and the lower court both erred in law, to convict the appellant relying on evidence of PW2, which was insufficient to prove the offence alleged beyond all reasonable doubts.

Mr. Magoma, learned Principal State Attorney, appeared for the respondent Republic. At first, he indicated that he was supporting conviction, however, upon reflection, he declined. According to Mr. Magoma, as the conviction was solely based on the evidence of PW2, the victim of the alleged rape, the learned judge on first appeal should

have heard the appeal on merit and not summarily rejecting it. If the appeal was heard on merit, Mr. Magoma submitted, the issues raised in this appeal would be examined, analysed and decided upon. In the circumstances, he maintained that it was improper for the learned judge on first appeal to invoke the provisions of section 36 (1) (c) of the Criminal procedure Act, 1985 to reject the appeal without hearing it.

With respect, we think there is merit in the submission of Mr. Magoma, learned Principal State Attorney. From the evidence as outlined above, there are a number of issues which needed to be addressed in relation to the evidence of PW2 and the medical evidence based on PF3 which was tendered by PW1. For instance, in the PF3 Exh. P1, three cut wounds are shown to have been inflicted by use of a sharp weapon. The wounds are described as dangerous. However, the Doctor who attended PW2 was not called to testify and clarify on the injuries. However, it is to be observed at once that despite the absence of the doctor, it was open for the judge on first appeal to address this issue and come to the conclusion one way or the other. Incidentally, this issue was also raised in the grounds of appeal filed in the High Court.

Furthermore, the circumstances in which the appellant was arrested is yet another aspect which could be gone into in detail if the appeal was heard on merit.

In **Iddi Kondo v The Republic,** Criminal Appeal No. 46 of 1998

(unreported) which was referred to us by the appellant in ground 2 of the memorandum of appeal, the Court among others, underscored the following principles:

> (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.
>
> (1) to (4) .....
>
> (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.

This case, we are satisfied falls within the ambit of principle 5 stated above. Not only were important questions of fact and law raised, but the sentence imposed of thirty (30) years imprisonment is no doubt, severe. For this reason, we think with respect, the learned judge on first appeal, should have heard the appeal on merit. Having heard the appeal on various points raised, it was open for the judge to consider and weigh on scale the evidence and all the circumstances of the case in order for her to make her own findings with a view either to sustain the trial magistrate’s decision or not. As happened in this case,

we are unable to tell whether the learned judge on first appeal would have come to the same conclusion or not had she heard the appeal on merit. We do not think that in the circumstances of the case, this is a fit case for this Court as a second appellate Court could step into the shoes of the High Court by invoking its revisional jurisdiction under section 2 (4) of the Appellate Jurisdiction Act, 1979, as amended.

For these reasons, we agree with Mr. Magoma, learned Principal State Attorney, that the circumstances of the case were such that it was improper for the learned judge to reject the appeal summarily. In our view, Mr. Magoma correctly declined to support the decision of the High Court.

Accordingly, the decision of the High Court of 5.9.2000 is quashed and set aside. It is ordered that the matter be remitted to the High Court with direction to hear the appeal on merit.

DATED at DAR ES SALAAM this 27th day of June, 2006.

D.Z.L LUBUVA
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

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

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR

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CRIMINAL APPEAL NO. 67 OF 2001

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

(Bubeshi, J.)

dated the 28th day of September, 2000
in
HC. Criminal Appeal No. 45 of 2000
Between
The Republic ……. Prosecutor
Versus
Juma Hamidu ……. Accused

In Court this 27th day of June, 2006

Before: The Honourable Mr. Justice D.Z. Lubuva, Justice of Appeal
The Honourable Mr. Justice J.A. Mroso, Justice of Appeal
And The Honourable Mr. Justice J.H. Msoffe, Justice of Appeal

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THIS APPEAL coming for hearing on 20th day of June, 2006 in the presence of the appellant AND UPON HEARING the appellant in person and Mr. W. Magoma, Principal State Attorney for the Respondent/Republic when it was ordered that the appeal do stand for judgment;

AND UPON the same coming for judgment this day:-

IT IS ORDERED that the decision of the High Court of 5.9.2000 is quashed and set aside. IT IS FURTHER ORDERED that the matter be remitted to the High Court with direction to hear the appeal on merit.

GIVEN under my hand and the Seal of the Court this 27th day of June, 2006.

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR

Extracted on 27th June, 2006.