IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MROSO, J.A., KIMARO, J.A. And LUANDA, J.A.)

CRIMINAL APPEAL NO. 53 OF 2007

HAMIS JOSEPH ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tanga)

(Shayo, J.)

dated the 30th day of January, 2007
in
Criminal Appeal No. 40 of 2005

ORDER OF THE COURT

23 & 30 June, 2008

MROSO, J.A.:

The appellant was prosecuted in the District Court of Tanga for the offence of rape contrary to sections 130(1) and (2)(e) and 131 (1) of the Penal Code, Cap 16 of the Laws as amended by the Sexual Offences Special Provisions Act, No. 4 of 1998. He was alleged to have raped a girl of the age of 17 years. The trial court convicted

him as charged on what was recorded as a plea of guilty. The conviction was founded on facts which were given in court by the prosecution, which the appellant accepted as correct. In those facts it was alleged that the appellant had sexual intercourse with a girl called Selina Francis who was in standard VII at Kichangani Primary School. The age of the girl was not mentioned in those facts but it was mentioned in the particulars of the offence in the charge sheet when the charge was read over to the appellant.

After convicting the appellant as charged, the District Court sentenced him to a term of thirty years imprisonment. The appellant sought to appeal to the High Court at Tanga against conviction, even though he was convicted following what the District Court found to be a plea of guilty. He also appealed against sentence. The crux of the appeal to the High Court and also to this Court is that it was not ascertained that the girl was aged 17 years.

The High Court summarily dismissed the appeal on the grounds that the appellant had pleaded guilty unequivocally and the sentence of 30 years imprisonment was mandatory under the law.

Undaunted, the appellant has come to this Court on a second appeal. In his six grounds of appeal to this Court, as mentioned earlier, the gravamen of his complaint is that there was no proof that the girl was aged 17 years. According to him, the girl was a grown up person ***"who knew good and bad things"***, presumably meaning that she was of the age of consent, which would be 18 years and above.

Mr. Oswald H. Tibabyekomya, the learned State Attorney for the respondent Republic, did not choose to reply to the complaints in the memorandum of appeal but went straight to the propriety of the course which was taken by the High Court in dealing with the appellant's appeal to it. He argued that considering the borderline age of 17 years of the complainant and the gravity of the charge and the consequential sentence, it was not proper for the High Court to dismiss the appeal summarily but should have heard it. That would have given the Director of Public Prosecutions opportunity to be heard. He cited three decisions of this Court in support of his argument that it was inappropriate for the High Court to dismiss the appeal summarily, and on what a plea of guilty implies. The cases

are – **Amani Mwangunule** v **Republic,** Criminal Appeal No. 26 of 2004 (unreported); **Edwin Urio** v **DPP**, Criminal Appeal No. 105 of 2002 (unreported) and **Anastasia Patrice** v **Republic**, Criminal Appeal No. 36 of 2000, (also unreported).

In **Amani Mwangunule** for example, the appellant was charged with and convicted for the offence of using abusive language contrary to section 89 (1)(a) of the Penal Code. He was sentenced to two years imprisonment. His appeal to the High Court was summarily rejected. He further appealed to the Court of Appeal. One of his grounds of appeal was that the learned High Court Judge erred in law in summarily rejecting the appeal, arguing that he was denied the right to be heard which was a breach of the principles of natural justice.

Mr. Boniface, the learned State Attorney who represented the DPP in that appeal, submitted that the High Court judge wrongly invoked his powers to reject the appeal summarily under section 364 (1) of the Criminal Procedure Act, 1985. He said the judge had overlooked the fact that the two year sentence for the offence was

illegal. Furthermore, on the facts, no offence under section 89 (1)(a) of the Penal Code had been committed. There was no evidence that a breach of the peace was likely.

Arising from the submission by Mr. Boniface, this Court listed down principles to be considered before resorting to summary rejection of an appeal. The principles are:-

1 - ***That summary dismissal is an exception to the general principles of Criminal Law and Criminal Jurisprudence. So, the powers have to be exercised sparingly and with great circumspection.***

2 - ***Section 364 of the Criminal Procedure Act, 1985 does not require that reasons be given when dismissing an appeal summarily. Even so, it is highly desirable 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 or 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 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 dismiss the appeal summarily but should hear it, even if

that ground appears to have little merit.

We think that although on the face of it there was a plea of guilty and the sentence appeared to be lawful, if it is assumed that the girl was below the age of 18 years, yet a careful reading of the facts which were read out by the prosecutor may cast doubt on whether there was in fact an unequivocal plea of guilty. Also, considering that the age of the girl was given as mere opinion, that did not preclude arguments that she might also have crossed the threshold to the age of consent. That might affect the verdict of guilty or not guilty. All this means that the learned judge should not have rejected the appeal summarily but should have heard both the appellant and the State Attorney. That would have placed the judge on firmer ground to either dismiss the appeal or perhaps find reason to allow it.

Mr. Tibabyekomya suggested that this Court invokes our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, 1979 to step into the shoes of the High Court and hear the appellant's appeal. We decline the invitation because we think it is

not opportune for us to do so. In the **Mwangunule** case this Court invoked the provisions of section 4 (2) of the Appellate Jurisdiction Act, 1979 because it was obvious the conviction for the offence charged was erroneous because no offence under section 89 (1)(a) of the Penal Code had been committed and the sentence was illegal. It is not so in the present appeal. If the High Court hears the appeal it may or may not quash the conviction. We think, therefore, the course to take is to quash the order of summary rejection of the appeal and to order the High Court to hear the appeal and decide it after hearing the parties. We so order.

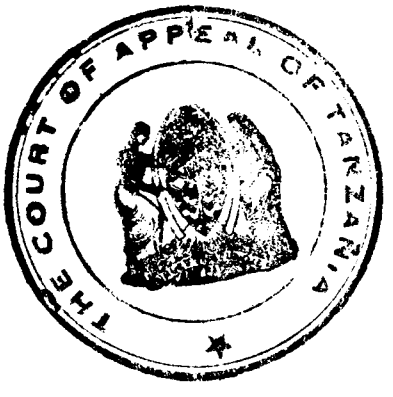
DATED at TANGA this 25th day of June, 2008.

J. A. MROSO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

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



(W. E. LEMA)
DEPUTY REGISTRAR