IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: KILEO, J.A., MJASIRI, J.A. And MASSATI, J.A.)

CRIMINAL APPEAL NO. 417 OF 2013

CREDO SIWALE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Mackanja, J.)

dated the 27th day of April, 2000
in
Criminal Appeal No. 18 of 2000

JUDGMENT OF THE COURT

20th & 22nd October, 2014

MASSATI, J.A.:

The appellant and two others were charged with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code (Cap. 16 – R.E. 2002) as amended. The District Court of Mbozi, acquitted the other two, convicted this appellant and sentenced him to 30 years imprisonment and 6 strokes of the cane. His appeal in the High Court was summarily rejected by Mackanja, J. on 27/4/2000. After obtaining an extension of time, he lodged this appeal.

The brief facts leading to this appeal may be stated as follows:

According to Nkwabi Muga (PW1) on 16/6/1999 he was grazing cattle in a bush. The herd had a count of over 150. At about 4 p.m. he was ambushed by three youths with one of them brandishinga gun, and the other two had machetes and clubs. They cowed him down and gunned off part of his ear. He fell down unconscious, and when he came to,all the cattle and the thugs were gone. Later that evening PW2 Muge Geneya, the owner of the cattle was informed of the robbery by PW1 and together they reported the matter to Kamisamba police station. A few cattle were recovered from Vwawa and Tunduma. PW3 D/CPL Mashaka was assigned to investigate the case, while PW4 SGT Cyprian took down and tendered the cautioned statements of the 1st and 2nd accused persons. After investigation, the trio were first charged with robbing 100 herds of cattle on 16/6/1999 when they first appeared in court on 2/7/99. However on 24/11/99 the charge was substituted. It was now alleged that they robbed 100 herds of cattle on 10/6/1999. This is the charge with which the appellant was convicted. In its judgment, the trial court after according due weight to the defence of alibi raised by the accused persons which did not comply with the provisions of Section 194(4) of the Criminal Procedure Act (CPA), was nevertheless satisfied that the appellant was sufficiently identified by PW1 at the scene of crime, hence the conviction.

On first appeal, the High Court made the following order: -

"SUMMARY REJECTION

MACKANJA, J.

I am satisfied, after perusing the record of the trial court, that the appeal raised no sufficient ground of complaint. It is summarily rejected"

J. M. MACKANJA

JUDGE

27.4.2000"

Against that Order, the appellant, who was unrepresented, raised 11 grounds of appeal, chief of which was that the High Court erred in summarily rejecting his appeal without considering the severity of the sentence imposed upon the appellant. The other major ground is that the prosecution case against him was not proved beyond reasonable doubt. At the hearing of the appeal the appellant adopted his memorandum of appeal and opted to let the respondent to start and reserved his right to reply.

On her part, Miss Catherine Gwaltu, learned State Attorney, who represented the respondent/Republic, did not support the conviction and sentence. She had two reasons. First, there was a variance between the

amended charge, and the evidence as to the date of the comission of the offence. She submitted that whereas the charge sheet refers to 10/6/99 as the date the offence was committed; the prosecution witnesses, PW1, PW2 refer to 16/6/99 as the date of the robbery. Secondly, it was also her view that, apart from dock identification, the appellant was not identified by PW1 at the scene of crime; to the requisite standards. In support of her position, she referred to us, the decisions of **SANKE DONALD @ SHAPANGA v R**, Criminal Appeal No. 408 of 2013 (unreported) and **A. 9249 WRD KALOLI SYLVESTER @ MGENZI AND 2 OTHERS v R**, Criminal Appeal No. 157 of 2006 (unreported). For those reasons, the learned counsel asked us to allow the appeal and set aside the order of summary rejection, step into the shoes of the High Court, look at the merits of the appeal and quash the conviction and sentence.

The first issue in this appeal is whether the High Court properly exercised its powers of summary rejection?

The powers of the High Court to summarily reject appeals, are set out in section 364(1) of the CPA. That section provides as follows:

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(1) On receiving the petition and copy required by section 362, the High Court shall peruse them and –

(a) If the appeal is against sentence and is brought on the grounds that the sentence is excessive and it appears to the court that there is no material in the circumstances of the case which could lead it to consider that the sentence ought to be reduced;

(b) If the appeal is against conviction 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; or

(c) If the appeal is against conviction and the sentence and the court considers that the evidence before 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.

the court may forthwith summarily reject the appeal by an order certifying that that upon perusing the record, the court is satisfied that the appeal has been lodged without any sufficient ground of complaint."

The section therefore gives discretion to the High Court to reject an appeal subject to it being guided by the conditions set out in subsection 1 (a) (b) and (c) of the above provision. Can this Court now interfere with the exercise of that discretion by the High Court?

There are principles upon which an appellate Court can interfere with the exercise of discretion of an inferior court or tribunal. These general principles were set out in the decision of the Eastern African Court of Appeal in **MBOGO AND ANOTHER v SHAH** (1968) EA 93. And these are-

> *(i) if the inferior Court misdirected itself; or*
> *(ii) it has acted on matters on which it should not have acted; or*
> *(iii) it has failed to take into consideration matters which it should have taken into consideration,*

and in so doing, arrived at a wrong conclusion. Other jurisdictions have put it as "abuse of discretion" and that an abuse of discretion occurs when the decision in question was not based on fact, logic, and reason, but was arbitrary, unreasonable, or unconscionable (See **PINKSTAFF v BLACK & DECKTZ** (US) Inc; 211 S.W. 361 (Mo. Court of Appeal 2009). We find this statement persuasive.

Coming closer home, this Court has already set a number of principles to be considered when the High Court is about to exercise its powers of summary rejection under section 364(1) of the CPA. This, it did in **IDD KONDO v R** (2004) TLR 362 at 369-370, where it held: -

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."

(See also **JUMA HAMIDU v R**, Criminal Appeal No. 67 of 2001 and **CHRISTOPHER NZUNDA and 2 OTHERS v R**, Criminal Appeal No. 152 of 2006 (both unreported).

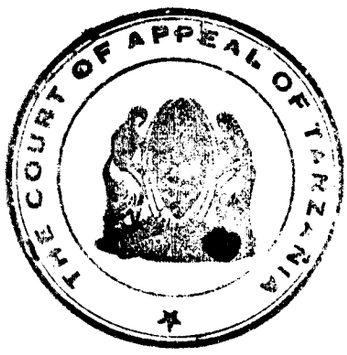
In the present case, although in his order of summary rejection, the learned judge claims to have perused the record of the trial court, and found to have no sufficient ground of complaint, a careful scrutiny of the record shows that he did not. If he did, he would not for, instance have missed the patent variance between the dates shown in the amended charge and that given by PW1 and PW2 on the date on which the robbery was committed. If he had perused the record, he would not have missed the fact that the identification of the appellant was not more than dock identification, and that an identification parade was wanting. If he had perused the record, he would have discovered that the conviction of the appellant was partly based on Exh. PIA, a permit for transportation of cattle issued to Davies Siwale (and not CREDO SIWALE/which was found

with the 2nd accused (while the appellant was the third accused in the trial court) and there was no evidence that DAVIES SIWALE and CREDO SIWALE wereone and the same person. The issues of the discrepancy between the charge sheet and the evidence as to the date of the commission of the offence, and that of identification were taken up in the appellant's memorandum of appeal. If he had perused the record and fullyadverted to the provisions of section 364(1) of the CPA and the severity of the sentence imposed on the appellant he would not have given that order. In so doing, the learned judge had misdirected himself on the facts and had failed to take into consideration, matters which he should have taken into account.So, on the principles set out above and in the circumstances of this case, it was all wrong for the High Court to have dismissed the appellant's appeal summarily.

The next issue is, what is to be done in the circumstances? Ordinarily, once the Court is satisfied that the power of summary rejection has been improperly exercised, the appeal would be restored and sent back to the High Court for it to be admitted for hearing on merit. But in some deserving cases, the Court may step into the shoes of the lower court and determine the appeal conclusively. (See **IDDI KONDO v R** (supra).

We agree with Ms GWALTU, that this is one such deserving case. The irregularity in convicting the appellant on a charge which carries particulars diametrically opposed to the evidence on record alone, is so glaring that it has resulted into a miscarriage of justice. (See **SANKE DONALD @ SHAPENGA v R** (supra). This was a clear case of abuse of discretion. So, in exercise of our powers under section 4(2) of the Appellate Jurisdiction Act we step into the shoes of the High Court, and proceed to allow the appeal. The conviction is quashed and the sentence set aside. We order his immediate release from prison, unless he is held there for some other lawful cause.

DATED at **MBEYA** this 21st day of October, 2014.



E. A.KILEO
JUSTICE OF APPEAL

S.MJASIRI
JUSTICE OF APPEAL

S.A.AMASSATI
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL