IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MBAROUK, J.A., MMILLA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 343 OF 2014

NOEL FRANCIS AMLIMA .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

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

(Mackanja, J.)

dated the 20th day of September, 2000

in

Criminal Appeal No. 90 of 1999

....

JUDGMENT OF THE COURT

27th & 31st August, 2015

MBAROUK, J.A.:

In the District Court of Mbinga at Mbinga, the appellant, Noel Francis Amlima was charged and convicted of the offence of rape contrary to sections 130(1)(2)(a) and 131(1) of the Penal Code, Cap 16 as repealed and replaced by section 5 and 6 of the Sexual Offences Special Provisions Act No. 4 of 1998. He was sentenced to thirty (30) years imprisonment with twelve (12) strokes of the cane and ordered to pay T.shs 100,000/= as compensation to the victim. Dissatisfied, his

appeal before the High Court of Tanzania (Mackanja, J.) at Songea was summarily rejected, hence this appeal.

The prosecution's case as it appeared before the trial court was as follows: On 7th February, 1999, Maria Mbena (PW2), a girl aged thirteen (13) years, and a Standard V student was at their house at Amani Makolo at morning time alone. Her parents went to church and her younger sister went to a river to wash clothes. PW2 stayed at their home cooking. The appellant who was staying in the same house with PW2's family was at the house too. After some time, the appellant called PW2 and asked her for a pen which she gave him and she then left. Suddenly, the appellant called PW2 again to collect her pen, but the appellant got hold of her hand and fell her down. According to PW2, the appellant did a bad thing to her. She further testified that **her underwear was torn and the appellant offended her in her private parts.** Then the appellant went out and ran away. PW2 narrated the story to her father that evening, who then informed PW2's mother. Thereafter, PW2's father, Menas Kawonga (PW1) took PW2 to

the office of the Executive Officer and then to police station and later to hospital.

In his defence, the appellant categorically denied any involvement in the commission of the offence of rape charged against him. He claimed that the case was fabricated against him by PW2's father who failed to pay him his wages. He added that, PW2's father as his employer was not happy by his constant demands for payment of money for the work of cultivating his farm land. He said, he was only being given food and accommodation, but no wages.

In this appeal, the appellant appeared in person undefended, whereas the respondent/Republic was represented by Mr. Wilbroad Ndunguru, learned State Attorney.

The appellant preferred a memorandum of appeal containing six (6) grounds of complaint, but in essence, we think they can be conveniently condensed to four grounds, namely:-

1. *That, the **voire dire** was not conducted properly.*
2. *That, PW2's evidence was not corroborated.*
3. *That, the appellant's defence was not considered.*
4. *That, the prosecution failed to prove their case against the appellant beyond reasonable doubt.*

At the hearing, the appellant added three other grounds of complaint, namely:-

1. *That, the requirements of section 240(3) of the Criminal Procedure Act were not complied with when the PF 3 was tendered at the trial court.*

2. *That, the mother of PW2 was not called to testify a part from being the first person to be informed by PW1 about the incident.*

3. *That, the village Executive Officer who received the complainant from PW1 was not called to testify.*

After giving his additional grounds, the appellant opted to allow the learned State Attorney to submit first and if necessary he will give his re-joinder later.

On his part, Mr. Ndunguru indicated from the outset to support the appeal. On the 1st ground of appeal concerning the non-compliance with the mandatory requirements of section 127(2) of the Evidence Act, Mr. Ndunguru out-rightly contended that PW2 who was a child aged thirteen years was required to be examined as to whether she understands the nature of oath and the duty of speaking the truth by conducting a ***voire dire*** test. However, he said, the record shows that such a test was not done.

In his response to the 2nd ground of appeal, the learned State Attorney submitted that as claimed by the appellant, the evidence of PW2 was required to be corroborated, but there is no such corroboration in this case.

As regards the 3rd ground of appeal, concerning the issue that the appellant's defence was not considered, Mr. Ndunguru

submitted that, the High Court Judge was not supposed to summarily dismiss the appeal without considering such an important question.

As for the 4th ground and additional grounds, Mr. Ndnguru had the same argument just as that in the 3rd ground that all the remaining grounds raised were important questions which the first appellate court/Judge was required to have heard the appeal on merit. He said, the High Court Judge was not supposed to summarily dismiss the appeal.

Finally, Mr. Ndunguru urged us to allow the appeal and set free the appellant.

In his rejoinder submission, the appellant prayed for the Court to use its wisdom and reach at a just decision considering that this is a fabricated case and he has already served sixteen years in prison. Having said that, he just left the matter to Court.

We are of the opinion that, at this juncture our main task is to examine whether the learned first appellate judge

justifiably rejected the first appeal summarily. The whole problem arose when Mackanja, J. summarily rejected Criminal Appeal No. 90 of 1999 on 20-9-2000 where he stated as follows:

> **"SUMMARY REJECTION**
>
> **MACKANJA, J:**
>
> I am satisfied, upon perusal of the record that the petition of appeal does not disclose any sufficient ground of complaint. It is summarily rejected:
>
> Signed;
> **J.N. Mackanja, J.**
> 20/9/2000"

In criminal trials, the powers to reject an appeal summarily are derived from section 364 (1)(c) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA) which states as follows:-

> "364(1) On receiving the petition and copy required by section 362, the High Court shall peruse them and:-
>
> (a)..
>
> (b) ....

(c) if the appeal is against conviction and the sentence and the court considers that the evidence before the lower court leaved 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 or the sentence ought to be reduced."

In considering the application of the provisions of section 364(1)(c) of the CPA, this Court in the case of **Iddi Kondo v. Republic,** Criminal Appeal No. 46 of 1998, (unreported), pronounced some guiding principles to be taken into account before considering rejecting an appeal summarily, to which they were gathered after a thorough survey in various cases including from the erstwhile Court of Appeal for Eastern Africa such as **Kopiok s/o Gacholi v. R.,** (1950) 17 EACA 141, **Mulakh Raj Mahan v. R.,** (1954) 21 EACA 383 and **Lighton**

s/o Mundekesye v. R., (1951) EACA 309. The following are those guiding principles which need to be taken into account as stated in the case of **Iddi Kondo** (supra):-

> " *(1) Summary dismissal is an exception to the general principles of Criminal Law and Criminal Jurisprudence and, therefore, the powers have to be exercise sparingly and with great circumspection.*
>
> *(2) The section does not require reasons to be given when dismissing and appeal summarily. However, it is highly desired to do so.*
>
> *(3) It is imperative that before invoking the power of summary dismissal a judge or 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 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 good ground of appeal which does not challenge the weight of evidence or allege that the sentence is successive, the Court

should not summarily dismiss the appeal but should hear it even if that ground appears to have little merit."
(Emphasis added).

In the instant case, we have no doubt in our minds that looking at the evidence in its totality there are a number of important and complicated questions of fact and law which required the attention of the first appellate court to have considered and weigh the evidence at the hearing of the appeal and decide it on merit. For example:-

(a) The question as to whether ***voire dire*** test was properly conducted,

(b) The question as to whether the PF3 was properly admitted.

(c) The question as to whether the appellant's defence was considered.

(d) The question as to whether the evidence of PW2 was corroborated.

Not only that, taking into account that the appellant was charged with an offence which carries a minimum sentence of thirty (30) years imprisonment, the case did not qualify to be summarily rejected. See the decision of this Court in the case of **Christopher Nzunda & Two Others v. Republic.,** Criminal Appeal No. 152 of 2006 (unreported).

Had the first appellate judge considered the guiding principles stated in the case of **Iddi Kondo** (supra) which required him to take into account those guiding principles before he summarily rejected the appeal, we are of the view that the first appellate judge would have arrived at a different conclusion.

Under normal circumstances, we would have ordered a re-trial of the appeal before the High Court, but as the appellant has already served sixteen out of thirty years imprisonment in a case which had weak evidence and as PW2 (victim) who was thirteen years by then is now twenty nine years, and she might be having a family of her own, it will not

be proper to remind her such a traumatic moment she encountered by then, hence we are constrained not to order re-trial. See **Alkard Mahi v. Republic**, Criminal Appeal No. 113 of 2013 (unreported).

In the event, and for the reasons stated herein above, we step into the shoes of the High Court and invoke our revisional powers conferred upon us under section 4(2) of the Appellate Jurisdiction Act and allow the appeal, quash the conviction, set aside the sentence and order for the appellant's immediate release from prison, unless otherwise he is lawfully held for some other cause.

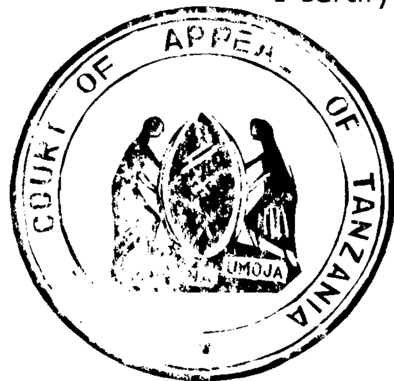
DATED at IRINGA this 29th day of August, 2015.

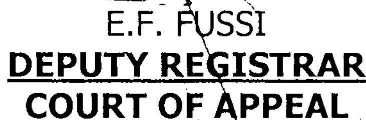
M.S. MBAROUK
JUSTICE OF APPEAL

B.K. MMILLA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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





E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL