IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MUSSA, J.A., LILA, J.A., And WAMBAILI, J.A)

CRIMINAL APPEAL NO. 426 OF 2016

COSMAS KUMBURU ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of

Tanzania at Songea)

(Manento, J)

Dated 19th April, 2004

In

DC. Criminal Appeal No. 2 of 2004

JUDGMENT OF THE COURT

3rd & 8th May, 2019

MUSSA, J.A.:

In the District Court of Mbinga, the appellant was arraigned for rape contrary to section 130(e) and 131(1) of the Penal Code, Chapter 16 of the Laws (the Code). It is noteworthy that the alleged victim was a child aged 11 years and, to disguise her identity, we shall henceforth refer to her if need be, in the prefix letters "XYZ".

The particulars of the charge sheet were that on the 24th November, 2002 at Kihaha street, Mbinga Township, within Ruvuma Region, the appellant had sexual intercourse with XYZ who was then aged 11.

The appellant refuted the accusation, whereupon the prosecution featured two witnesses and a PF3 in support of it. On his part, the appellant gave sworn evidence in denial of the prosecution accusation and fortified his testimony by calling, as a witness, his brother, namely, Nesphor Kumburu (DW2).

From the account given by XYZ (PW1), the case for the prosecution was to the effect that, on the fateful day, the alleged victim was sent by her mother, namely, Angelina Tilia (PW2) on an errand of fetching wild brooms at a nearby valley. Down the valley, PW1 was confronted by the appellant whom she knew quite well by the name of *"shooter"*. Immediately, the appellant cautioned PW1 not to shout lest he would finish her. He then pushed, and fell her to the ground. Next, the appellant drew out his manhood and inserted it into PW1's vagina. Moments later, PW2 abruptly emerged at the scene, following which the appellant re-dressed himself and started to run clear of the scene. PW2 followed the appellant in hot pursuit but, soon after, she gave up letting him disappear beyond

reach. The witness had earlier told the trial court that she knew the appellant thoroughly well as their neighbor.

According to her, she reported the despicable occurrence to her husband and later the Police Station where PW1 was given a PF3 into which the medical examination results of the alleged victim were posted. None of the prosecution witnesses gave an account as to when exactly the appellant was arrested but, going by the latter's account, he was apprehended a good deal later on the 28th February, 2003. His account augurs well with the arraignment and commencement of the trial against the appellant which was on the 3rd March, 2003. This detail concludes the prosecution version as unfolded by the prosecution during the trial.

In his sworn reply, the appellant completely refuted the prosecution's accusation. He did not, however, refute the detail about him and PW2 being neighbours. His witness, DW2 told the trial court that, in the aftermath of the alleged occurrence, the alleged victim was interviewed and refuted before several persons, the allegation of being raped.

At the height of the trial, the presiding District Magistrate (B.M. Mattaka) was impressed by the version told by the two prosecution

witnesses which, she said, was materially corroborated by the PF3. In the upshot, the appellant was found guilty, convicted and sentenced to thirty (30) years imprisonment. He was additionally ordered to compensate the victim a sum of shs 50,000/=. He was aggrieved and preferred an appeal to the High Court but when the appeal was placed before Manento, J., (as he then was), it was ordered thus:-

> *"There is nothing to deal with in appeal other than dismissing it. The appeal is therefore summarily rejected for lack of merits."*

The appellant presently seeks to impugn the foregoing extracted Order upon a memorandum of appeal which goes thus:-

> 1. *THAT, Your Hon. Justices the court erred in law and fact for upheld (sic) the finding by relying upon nullity evidence adduced by PW1 hence S. 127 of TEA [cap 6 R.E. 2002] not complied. The error arose is untenable, and the upshot of it is the whole proceeding (sic) is nullity.*
> 2. *THAT, Your Hon. Justice the lower court misdirected in law and fact for convicted me by relying upon uncorroborated, (sic) it is very dangerous in law and fact for convicted to*

convicted by relying on the evidence from one family which it is simple to fabricate so as to fulfill their interest.

3. *THAT, Your Hon. Justices the lower court never complied with s. 192 of CPA. [Cap 20, R.E. 2002].*
4. *THAT, Your Hon. Justices, though there is higher possibility of remit (sic) the matter to the district court due to the reasonable grounds enlisted herein above but I pray to release me free as I halted in prison (sic) for longtime".*

At the hearing before us, the appellant entered appearance in person, unrepresented, whereas the respondent Republic had the services of Ms. Tulibuke Juntwa and Mr. Emmanuel Barigila, both learned State Attorneys. When we asked him to address us on his grounds of appeal, the appellant opted to permit the respondent to submit first while he deferred his right to rejoin, if need be, to a later stage after the submissions of the respondent.

Ms. Juntwa, who was the first to take the floor, declined to support the appellant's conviction and sentence on account that the summary rejection of the appeal by the High Court did not live to the established

conditions. The learned State Attorney contended that the offence of rape to which the appellant stood arraigned is serious, just as its sentence, upon conviction, is undoubtedly stiff. Under the circumstances, she charged, the first appellate Judge should have refrained from issuing the summary rejection order. To buttress her contentions, Ms. Juntwa sought reliance in the case of **Iddi Kondo v. The Republic** [2004] TLR 362.

Mr. Barigila then took over and submitted that, upon being satisfied that the power of summary rejection of an appeal was improperly used, the general rule is for the Court to remit the appeal back to the High Court for it to properly attend it. Nevertheless, he further contended, where the case giving rise to the appeal is fraught with glaring irregularities to such an extent that the appeal ought to have been allowed, the Court may invoked its powers of revision, step into the shoes of the High Court and conclusively determine the appeal. To support the latter stance, the learned State Attorney, again, referred us to the case of **Idd Kondo** (supra).

In this regard, Mr. Baragila contended that the case giving rise to the rejected appeal was undermined by several disquieting irregularities. To

begin with, he said, it is not palpably apparent from the trial proceedings that the presiding Magistrate conducted a *voire dire* examination, which was then imperative, ahead of the reception of the evidence of XYZ. The omission, he further submitted, was fatal to an extent that the evidence of the alleged rape victim ought to have been discounted. To fortify his stance, the learned State Attorney referred us to the unreported Criminal Appeal No. 300 of 2011 **Kimbute Otiniel v. The Republic** where the full bench *inter alia,* observed:-

> *"....Where there is a complete omission by the trial court to correctly and properly address itself on sections 127(1) and 127(2) governing the competency of a child of tender years the resulting testimony is to be discounted."*

Thus, the learned State Attorney, urged us to discount the evidence of XYZ and if done, he said, the evidence of her mother (PW2) falls short of sustaining the conviction.

Furthermore, Mr. Barigila deplored the trial court for improperly accepting the PF 3 being adduced into evidence. As it turned out, the PF 3 was adduced into evidence at the preliminary hearing stage. The learned

State Attorney faulted the trial court for not according the appellant an opportunity to express whether or not he would need the attendance of the medical officer for examination as imperatively required by section 240(3) of the Criminal Procedure Act, Chapter 20 of the Laws (the CPA).

Finally, Mr. Barigila contended that the charge sheet was also defective for making reference to a non-existent section 130(e), of the Code in the statement of the offence, instead of the appropriate section 130 (1) (2) (e)

In sum, on account of the foregoing alleged irregularities, the learned State Attorney urged us to quash the appellant's convictions and set aside the sentence by invoking the provisions of section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the Laws (the AJA).

Upon putting to him the submissions of the two learned State Attorneys, the appellant who, as intimated, was unrepresented, could not materially contribute to the legal issues which were raised. He, however, supported their submissions and urged us to quash the conviction and sentence and set him at liberty.

On our part, we propose to commence our determination of the issues of contention by extracting the relevant portions of the provisions of section 364(1) (c) of the CPA which vests the High Court with the power of the summary rejection of an appeal which goes thus:-

> *"On receiving the petition and copy required by section 362, the High Court shall peruse the same and*
>
> *(a)..... NA*
>
> *(b) ..... NA*
>
> *(c) If the appeal is against conviction and sentence and the court considers 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, 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."*

In the referred case of **Idd Kondo** (supra), upon a parity of authorities the Court made the following observations:-

"(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 had 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 appear to have little merit."

With respect to the case under its consideration which, incidentally, involved the offence of rape, the Court further observed:-

"Apart from what we have said above, rape is a serious 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."

We are minded to take the same position in the case under our consideration and, in agreement with the advise extended to us by Ms. Juntwa, we will, at once, quash the summary rejection order issued by the High Court. The vexing issue is as to what needs doing in the aftermath.

Under ordinary circumstances we would have remitted the appeal back to the High Court for it to hear and determine it on the merits. But, as we have already intimated, Mr. Barigila has advised us to refrain from

taking the usual course as the case giving rise to the appeal under our consideration was fraught by material irregularities. We note that such a disinclination is permissible and was, at least, endorsed by the Court in **Idd Kondo** (supra) in the following words:-

> *"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 miscarriage of justice and that the appeal ought to have been allowed and the appellant discharged. This could be done by exercising the powers of revision under section 4(2) of the Appellate Jurisdiction Act 1979..."*

As we have, again, already intimated, the learned State Attorney pointed out three shortcomings which, he thinks, undermined the appellant's conviction. These relate to omission to conduct a *voire dire* examination ahead of the reception of the testimony of XYZ; the improper

reception of the PF3 into evidence; and the defectiveness of the charge sheet on account of the misdescription of the offence of rape in the statement of offence.

We propose to single out, for a start, the alleged shortcoming relating to the omission to conduct a *voire dire* examination. True, as pointed out by Mr. Barigila, the record of the trial court does not reflect the details of the examination, that is, if it was done at all. The presiding Magistrate simply remarked *"voire dire c/w"* after recording the name, age and religion of XYZ. Having made the remark, the learned trial Magistrate straight away proceeded to swear and record the evidence of XYZ. To the extent that the reception of her evidence was not preceded with details of the examination, it becomes difficult for, say, an appellate court to ascertain whether or not the examination was conducted at all.

As we entirely subscribe to Mr. Barigila's view that, as the law then stood, such an omission invalidated the testimony of XYZ, we will, in the result, proceed to expunge the evidence of XYZ from the record. Having done so, the case for the prosecution considerably depreciates as XYZ's

detail about being penetrated does not feature in the remaining evidence. To say the least, this shortcoming alone suffices to dispose of the appeal in favour of the appellant and, for that matter, we need not belabor on the other shortcomings referred by the learned State Attorney.

All said, we take a decided position that had the first appellate judge properly addressed his mind on the foregoing irregularity, he would have allowed the appeal and discharged the appellant. Stepping into his shoes we, accordingly, allow the appeal, quash the conviction and sentence and order the immediate release of the appellant from prison custody unless if he is held for some other lawful cause. It is so ordered.

DATED at **IRINGA** this 7th day of May, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL