IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MROSO, J. A., NSEKELA, J. A. AND MSOFFE, J. A.)

CRIMINAL APPEAL NO. 26 OF 2004

BETWEEN

AMANI NWANGUNULE..... APPELLANT

AND

THE REPUBLIC..... RESPONDENT

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

(Mackanja, J.)

dated the 27th day of October, 2003

in

DC Criminal Appeal No. 121 of 2003

J U D G M E N T O F T H E C O U R T
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NSEKELA, J. A.:

In the District Court of Chunya District, the appellant Amani Mwangunule was charged with and convicted of the offence of using

abusive language c/s 89 (1) (a) of the Penal Code. He was sentenced to two years imprisonment. Aggrieved by both conviction and sentence, the appellant lodged an appeal to the High Court where it was summarily rejected, hence this appeal to this Court. Mr. Mwakolo, learned advocate for the appellant, filed a memorandum of appeal which contained four grounds of appeal including the undermentioned –

> "1. That the learned High Court Judge erred in points of law when he summarily rejected the appeal by the appellant which was a breach of the principles of natural justice which denied the appellant an opportunity to be heard.
>
> 4. That the learned High Court Judge erred in law when he summarily rejected the appeal without taking into consideration the sentence of 2 years imprisonment for the offence of

abusive language contrary to Section 89 (1) (a) of the Penal Code was excessive."

In arguing the appeal, Mr. Mwakolo abandoned two grounds of appeal and pursued the above – mentioned. The learned advocate submitted that the appellate judge (Mackanja, J.) in invoking Section 364 (1) of the Criminal Procedure Act, 1985, denied the appellant of the right to be heard. Unfortunately, he did not elaborate on the applicability of the principle of the right to be heard in the context of Section 364 (1) of the Criminal Procedure Act. In addition , Mr. Mwakolo submitted that one of the grounds of appeal to the High Court was a complaint against the sentence which was meted out to the appellant. He contended that the appellate judge appeared to have overlooked that the maximum sentence prescribed under Section 89 (1) (a) of the Penal Code was six months imprisonment.

On his part, Mr. Boniface, learned State Attorney, was of the view that there was no breach of the principles of natural justice in that the appellant was not denied of his right to be heard. However,

he submitted that the appellate judge wrongly invoked Section 364 (1) (c). According to him, the District Court had imposed upon the appellant an unlawful sentence of two years imprisonment. It was therefore wrong for the appellate judge to summarily reject the appeal. On another front, Mr. Boniface added that the appellant had not committed any offence under Section 89 (1) (a) of the Penal Code since there was no breach of the peace established.

The key witness for the prosecution was PW1, Pendo Shomari, the wife of PW2, Msafiri Alani Shomari. The appellant was their neighbour, and apparently a good neighbour until the 21.2.2003 when the appellant while outside his office and within the hearing range of PW1 who was passing nearby, uttered the following words –

> "Ninyi, njoo mkamwone Miss Valentine, wagombanao, Malaya anapita".

She was offended by these words and informed her husband, PW2 immediately and then reported the matter to the police.

Pausing here for a moment, PW1 did not give evidence to the effect that there were other people who heard the appellant's outbursts and their reaction to them. The evidence of PW2 did not add anything of substance save that PW1 narrated to PW2 what the appellant had said. It was on the strength of this evidence that the appellant was convicted of the offence of using abusive language. The essence of the offence is that the words uttered by the appellant were likely to cause a breach of the peace. As correctly submitted by Mr. Boniface, learned State Attorney, the evidence of PW1 did not by any stretch of imagination establish the offence with which the appellant was convicted. Mackanja, J. in his Order stated thus –

> "I am satisfied, upon perusing the record of the proceedings, that the conviction is sound and the sentence fair. The appeal, therefore, raises no sufficient ground of complaint. It is summarily rejected."

It is an indispensable ingredient of the offence that the abusive language uttered by the appellant was likely to cause a breach of the peace. There was no evidence to that effect. We are not told that there were listeners who heard the abusive language and hence likely to cause a breach of the peace. PW2 did not hear those words. They were narrated to him by his wife, PW1. It is obvious that there was no offence committed by the appellant. As stated before, the appellant was sentenced to two years imprisonment. This was clearly an unlawful sentence. With all due respect to the appellate judge, this, to us, does not indicate that he had read Section 89 (1) (a) of the Penal Code, let alone the proceedings so as to reach the conclusion "that the conviction is sound and the sentence fair". On the very inadequate evidence of PW1 and PW2, the appellant did not commit the offence he was convicted of, and yet for this non – existent offence, an innocent citizen was given a prison term of two years, which was in itself, unlawful.

Having reached this conclusion, what are the options that are open to us? The learned State Attorney was of the view that we

should remit the appeal to the High Court for determination on its merits. On the face of it, it is an attractive idea, but on the facts of this case, there has been a miscarriage of justice. An innocent man has been unlawfully imprisoned! On the other hand, Mr. Mwakolo rather faintly, suggested that we should invoke our revisional jurisdiction, although earlier, he had submitted that the case be remitted to the High Court.

Only recently, this Court had occasion to consider the applicability of Section 364 (1) (c) of the Criminal Procedure Act, 1985 in the case of **Idd Kondo v. R., Criminal Appeal No. 46 of 1998** ***(unreported).*** After making a survey of decided cases from India on an identical provision and decisions of the defunct Court of Appeal for Eastern Africa including **Karioki s/o Gachohi v. R. (1950) 17 EACA 141; Lighton s/o Mundekesye v. R. (1951) EACA 309 and Mulakh Raj Mahan v. R. (1954) 21 EACA 383**, the Court distilled the following principles which have to be taken into account when considering summary rejection under Section 364 (1) of the Criminal Procedure Act, 1985 –

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 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/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 summarily dismiss the appeal but should hear it even if that ground appears to have little merit.

We entertain no doubts in our minds that in this particular appeal, there was a travesty of justice. If the appellate judge had carefully read the record of the proceedings as he claims to have done, and also had read Section 89 (1) (a) of the Penal Code, he would have realized that there was a miscarriage of justice and that the appeal ought to have been allowed. As we have hopefully amply explained above, the appellant ought not to have been convicted in the first place.

In the event, in the exercise of our revisional jurisdiction under Section 4 (2) of the Appellate Jurisdiction Act, 1979, we allow the appeal, quash the conviction, set aside the sentence and order his immediate release unless otherwise lawfully detained for some other case.

DATED at MBEYA this day of , 2004.

JUSTICE OF APPEAL

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