THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: RAMADHANI, J.A.; LUBUVA, J.A; And MUNUO, J.A.)

CRIMINAL APPLICATION NO. 2 OF 2005

BETWEEN

D.P.P. ... APPELLANT
AND
SALUM ALI JUMA ... RESPONDENT

(An Application for Revision of the Decision of the High Court of Zanzibar at Zanzibar)

(Mwampashi, SRM (Ext. Jur.))

dated the 15th day of February, 2005
in
Criminal Application No. 2 of 2005
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RULING

RAMADHANI, J.A.:

The respondent, Salum Ali Juma, who was charged with armed robbery c/ss 285 and 286 (2) of the Penal Act, 2004 (Act No. 6 of 2004) in the Regional Court at Vuga, Zanzibar, was refused bail because s.150 (1) of the Criminal Procedure Act, 2004, (Act No 7 of 2004) prohibits bail in cases of armed robbery. So, he went to the High Court where MWAMPASHI, SRM (Ext. Juris.) held that there is no offence of “armed robbery” under the Penal Act, 2004.

Being aggrieved by that holding, the DPP has sought this application for revision and he was represented by Ms. Salma Ali Hassan, while the respondent was in person. As there are legal considerations involved we adjourned the matter and gave a court brief to Mr. Hamidu Mbwezeleni, learned advocate. We directed the learned State Attorney and Mr. Mbwezeleni to come and address us whether this should not have been an appeal instead of an application for revision.

When the matter came up again, the DPP was represented by Mr. Msemo S. Mavare, learned State Attorney, who was assisted by Mr. Mohammed H. Hamad, learned State Attorney. He submitted that the Ruling of MWAMPASHI, SRM, is both appellable and subject to revision. He argued that the ruling was interlocutory and did not determine the matter finally and, so, it is not appellable under s. 5 (2) (d) of the Appellate Jurisdiction Act, 1979, as amended by Act No 17 of 1993, which prohibits appeals against interlocutory decisions. So, he submitted, the only venue open to the DPP was revision.

Mr. Msemo also said that even if it is taken that the decision of MWAMPASHI, SRM, was not interlocutory and, therefore, the remedy was an appeal, the DPP, he argued, is invoking revision *in lieu* of appeal under the authority of Moses J.

Mwakibete v The Editor Uhuru, Shirika la Magazeti ya Chama and National Printing Co. Ltd. [1995] TLR 134, because there is a good and sufficient reason for doing so.

Mr. Mbwezeleni in reply said that the decision of MWAMPASHI, SRM (Ext. Juris) was not interlocutory but that it finally determined the matter. The learned advocate said that when the learned Magistrate ruled that the Penal Act does not provide for an offence of “armed robbery” that was the end of the proceedings. What is now before the Regional Court is another charge of “robbery”. So, Mr. Mbwezeleni submitted, only appeal is open to the DPP and not revision.

It is our well considered opinion that the ruling of MWAMPASHI, SRM (Ext Juris) that the crime of “armed robbery” is not in the statute books of Zanzibar, was not interlocutory but finally determined the matter before him and the Regional Court.

Section 150 (1) of Criminal Procedure Act, 2004, prohibits bail in the following terms:

> When any person, other than a person accused of murder or treason or **armed robbery** or possession of firearms or drug trafficking, is arrested or detained without warrant by an officer in charge of a police station, or appears

> or is brought before a court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail, such person may be admitted to bail. [Emphasis is ours]

That provision prohibits bail where a person is charged with "armed robbery". The Regional Court refused to grant bail because of that provision. It was the duty of MWAMPASHI, SRM (Ext Juris), to determine whether or not there is an offence of "armed robbery" in the penal law of Zanzibar. So, when MWAMPASHI, SRM, decided that there was no such offence then that determined finally the charge against the respondent. So, according to Mwakibete the only remedy for the DPP was that of appeal.

However, in Mwakibete this Court also said

> The Court of Appeal can be moved to use its revisional jurisdiction under s 2(3) of the Appellate Jurisdiction Act 1979 only where there is no right of appeal, or where the right of appeal is there but has been blocked by judicial process, **and lastly, where the right of appeal existed but was not taken, good and sufficient reasons are given for not**

having lodged an appeal; [Emphasis is ours]

So, revision can be resorted to even where there is a right of appeal if there is a good and sufficient reason. Was there such a reason in this case?

Mr. Msemo said that at the time the application was made there was an unprecedented wave of armed robbery in Zanzibar and the DPP was of the opinion that there was a sheer need for a speedy determination of the matter. So, the DPP made this application under a certificate of urgency which was granted by the Honourable the Chief Justice. Mr. Mbwezeleni countered that by saying that the reason advanced is an afterthought as the same is not contained in the affidavit in support of the certificate of urgency.

Admittedly, the affidavit does not contain a paragraph couched so explicitly as what Mr. Msemo articulated in his submission before us. But it is our considered opinion that that submission was required at this stage when the Court has to make a decision whether or not revision is the proper remedy. The propriety or otherwise of revision is not decided by the Hon. Chief Justice. The affidavit was sufficient enough to persuade the C.J. that there was a need for determining the matter urgently and that is all that was required before

him.

We are of the decided opinion that a good and sufficient reason has been given for preferring revision to appeal as the former venue is speedy and that is what was aimed at. So, we agree with the learned State Attorney. However, that speed was not realized because on the day the application was set for hearing in Dar es Salaam, 6 April, 2005, the respondent could not afford the expenses of attending that session, so, the application, was adjourned for six months to this session of October here in Zanzibar.

Now, does the offence of “armed robbery” exist in Zanzibar? Mr. Msemo argued that s. 285 of the Penal Act, 2004, defines the offence of robbery and that s. 286 prescribes punishment for robbery which is made stiffer where “the offender is armed with any dangerous or offensive weapon or instrument”. This coupled with the categorical prohibition of bail in case of armed robbery by s. 150 (1) of the Criminal Procedure Act, 2004, leads to the irresistible inference that there is an offence of “armed robbery” but that it has not been so articulated. He referred us Michael Joseph v R. [1995] TLR 278.

Mr. Mbwezeleni, on the other hand, argued that s. 285 of the Penal Act, 2004, creates the offence of robbery and that s.

286 (2) merely enhances the punishment where arms are used but that does not mean that an offence of “armed robbery” has been created.

It is abundantly clear to us that s. 285 of the Penal Act, 2005, defines robbery and so creates that offence. Then s. 286 (2) enhances the punishment of those convicted of robbery and who in executing their crime were “armed with any dangerous or offensive weapon or instrument”. That cannot be stretched to mean that a new offence of “armed robbery” has been created. It is our considered opinion that those two sections, even when read together, cannot be said to create the offence of “armed robbery”.

Mr. Msemo submitted that s. 162 (3) of the Criminal Procedure Act, 2005, takes care of the situation where the law has not given a specific name to an offence. Mr. Mbwezeleni said that that section is inapplicable.

Section 162 deals with the content of a charge. We better cite all the relevant provisions of that section:

> (1) Every charge under this Act shall state the offence with which the accused is charged with brief particulars of the offence.
>
> 2) If the law which creates the offence gives

it any
specific name, the offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter which he or she is charged.

(4) The charge shall state the law and section of the law against which the offence is said to have been committed.

It is obvious that the Penal Act, 2005, does not give a name of the offence where an accused person was “armed with any dangerous or offensive weapon or instrument” as required by subsection (2). That is why Mr. Msemo sought to apply subsection (3).

Our reading of subsection (3) is that there are three factors:

i) There must be a law creating an offence.

ii) That law does not give a specific name for that offence.

iii) Then, so much of the definition of that offence has to be used in the charge sheet to enable the accused person to know the charges against him.

We have not seen any law which creates the offence of “armed robbery” so the first requirement is absent. Since the

offence has not been created then a name cannot be given to a non entity. The third requirement also is not available. Mr. Msemo was not able to tell us from which law can we get the definition of armed robbery. Section 287 (2) of the Penal Act, 2004, merely provides for enhanced punishment in the case of aggravated robbery. So, we agree with Mr. Mbwezeleni that s. 162 (3) does not apply at all in this case.

This Court in Michael Joseph provided a definition of 'armed robbery' in the following terms:

> Though there is no express and specific definition of what constitutes 'armed robbery' it is clear that if a dangerous or offensive weapon or instrument is used in the course of a robbery such constitutes 'armed robbery' in terms of the law as amended by Act No. 10 of 1989.

This Court was very careful in that it did not say that there is no express and specific definition of the **offence** of 'armed robbery'. But it dealt with what constitutes 'armed robbery' and in terms of Act No 10 of 1989 which is the law that has enhanced punishment for robbery in the case where arms have been used. This law is equivalent of s. 286 (2) of the Penal Act, 2004.

In that appeal this Court was emphatic that "Otherwise, the

basic definition of robbery still remains as provided for under the Penal Code". That is what is provided in s. 285. We do not think that that decision can be taken as an authority for establishing the offence of "armed robbery". In fact s. 286 (2) providing enhanced punishment for aggravated robbery does not at all use the phrase "armed robbery". That phrase is used in s. 150 (2) in refusing bail to that offence which does not exist.

What was before this Court in Michael Joseph was whether a knife is one of such weapons which, if used, would call for sterner punishment for robbery. This Court said at p. 281 "In the instant case, the weapon used was a knife which as already indicated is a dangerous or offensive weapon".

This Court has said in a number of times that the enhanced punishment for aggravated robbery under Act No. 10 of 1989 of Tanzania is only available if the particulars of the offence give details of the weapons used in committing robbery.

To steer clear of problems we advise the DPP to seek to amend the Penal Act, 2005, so that there is specifically an offence of armed robbery and it be defined as such.

We cannot fault the learned SRM (Ext. Juris.) in his finding.

The revision, to that extent, fails.

DATED in ZANZIBAR, this 13th day of December, 2005.

A. S. L. RAMADHANI
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

E. N. MUNUO
JUSTICE OF APPEAL

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

(S. M. RUMANYIKA)
DEPUTY REGISTRAR