MWITA WAMBURA KITILO *v.* S.M.Z.

COURT OF APPEAL OF TANZANIA AT ZANZIBAR

(Lubuva, Mroso and Msoffe, JJ.A.)

CRIMINAL APPEAL No. 61 OF 2003

(From the judgment of the High Court of Zanzibar at Vuga, M. A. Bakari, J., dated 9 January 2003 in Criminal Appeal No. 10 of 2002)

Criminal Practice and Procedure – Appeal – Summary dismissal of appeal – Whether the High Court has power to summarily dismiss an appeal.

Criminal Practice and Procedure – Appeal – Power of the High Court to summarily dismiss an appeal – Whether the court may dismiss an appeal summarily after it has allowed the parties to argue the appeal on merit – Section 328 of the Criminal Procedure Decree.

The appellant appealed to the High Court against conviction and sentence by the Regional Magistrate's Court at Vuga for unlawful possession of dangerous drugs contrary to sections 23 and 32 of the Pharmaceuticals and Dangerous Drugs Act 1986 as amended by Act Number 6 of 1991, and Legal Notice Number 17 of 1991. The High Court, after having heard both the appellant and the respondent dismissed the appeal summarily. The appellant further appealed to the Court of Appeal.

Held: (i) The High Court can dismiss summarily an appeal only where after receiving the petition of appeal and copy of the judgment from which the appeal is being lodged, it peruses it and finds that it is completely without merit;

(ii) Where the High Court allows the appellant or his Advocate to argue on the merit of the appeal before it, it has to deliver a Judgment in which the reason for allowing or dismissing the appeal will be given.

Order or summary dismissal quashed

Case referred to:

(1) *Robert Mgire v. R.* [1994] T.L.R. 174

Statutory provisions referred to:

(1) Pharmaceuticals and Dangerous Drugs Act 1986, sections 23, 32

(2) Legal Notice of 1991

(3) Criminal Procedure Decree (Zanzibar), section 328

Mr Miskry, for the Respondent

JUDGMENT

(Dated 26 November 2004)

Mroso, J.A.: The appellant was convicted of unlawful possession of dangerous drugs contrary to section 23 and 32(1) of the Pharmaceuticals and Dangerous Drug Act Number 6 of 1986, as amended by Act Number 6 of 1991 and Legal Notice Number 17 of 1991, by the Regional Court of Zanzibar at Vuga. He was aggrieved by both the conviction and the sentence and appealed to High Court of Zanzibar. The High Court, Mshibe A. Bakari, J. heard both the appellant and State Attorney for the Revolutionary Government of Zanzibar and dismissed it summarily. Still feeling aggrieved, he appealed to this court, filling six grounds of appeal. At the hearing of the appeal, the appellant sought and obtained leave of the court to argue additional ground of the appeal. What were meant to be additional grounds of appeal turned out to be inappropriate because they were raised for the first time in this court, as they were not raised in the High Court and therefore, were not considered by the first appellate court.

In his petition of appeal, appellant complained in the first ground of appeal that the prosecution side at the trial failed to show evidence, such as an air ticket, that he had arrived from overseas and had also failed to prove that he had been arrested at the airport. In the second ground of appeal he complained that although the prosecution claimed that he had passed out from his stomach alleged dangerous drugs, no independent witness confirm such an incident.

A In the third ground, he pointed out an apparent contradiction in the evidence, but this ground of appeal was based on a typing error. The typed proceedings that he had been taken to hospital to be x-rayed to establish that he had swallowed a quantity of dangerous
B drugs on the date which was earlier than the date he was arrested. The typed proceedings showed that he was taken to hospital on 12 October 2000 whereas he was arrested on 1 October 2000. When we checked the handwritten notes of the proceeding it was found
C that he was taken to hospital on the same date he was arrested, which was on 21 October 2000. Therefore, there was no contradiction in the evidence on that point. Ground number 4 seems to be repetition of the first ground of appeal although it was put in different words.
D The complaint is that there was no evidence that he had arrived by air from overseas. Ground number 5 is in substance a repetition of the third ground of appeal. In ground six the appellant is harping on the complaint that he was not arrested at the airport.

E Mr Miskry, learned Principal State Attorney, for the Revolutionary Government of Zanzibar, contended that the grounds of appeal in which it was being disputed that the appellant was arrested at the airport were not helpful to appellant because what matters was not
F whether the appellant was arrested at the airport or at Darajani (as claimed by the appellant), but whether he was found to have swallowed 62 capsules or tablets of heroin, which is a dangerous drug. He said that the evidence which was adduced by the prosecution at the trial
G showed without doubt that the appellant had been arrested on suspicion that he had swallowed and stored in his stomach a quantity of drug capsules or tablets. He was x-rayed and the x-ray films showed there were suspicious substances in the stomach. The bowels were induced to empty and "*pipi*" tablets or capsules were passed out and were
H witnessed by two police officers. The tablets are listed in a ministerial order, given under section 16 of the Pharmaceuticals and Dangerous Drugs Act 1986, published in Legal Notice Number 17 of 1991, as a dangerous drug.

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The court of its own motion raised the question whether it was appropriate for High Court which had heard the parties to proceed to dismiss the appeal summarily. Obviously the appellant who was a lay person and unpresented would not have been able to submit on that legal point. Mr Miskry conceded that the judge should not have dismissed the appeal summarily after having heard the parties. Even so, he asked the court to dismiss the appeal in entirety.

Section 328 of the Criminal Procedure Decree Chapter 14 of the Laws of Zanzibar reads:

(as relevant):

328(1) On receiving the petition and copy (of the judgment) ... the High Court shall peruse same, and, if it considers that there is no sufficient grounds for interfering, it may dismiss the appeal summarily.

Provided that no appeal shall be dismissed summarily except in the case mentioned in subsection (2) unless the appellant or his advocate has had an opportunity of being heard in support of the same.

(2) Where an appeal is brought on the ground that the conviction is against the weight of the evidence or the sentence is excessive, and it appears to the court that the evidence is sufficient to support the conviction and there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead it to consider that the sentence ought to be reduced, the appeal may, without being set down for hearing; be summarily dismissed by an order of the court certifying that it has perused the record and is satisfied that the appeal has has been lodged without any sufficient grounds of complaints.

(3) Whenever an appeal is summarily dismissed, notice of the same shall forthwith be given to the Attorney General.

It seems to us that the High Court can dismiss summarily an appeal against conviction and sentence, like the appellant's appeal to the

A High Court, only where, on receiving the petition of appeal and copy of the judgment from which the appeal is being lodged, it peruses it and finds that it is completely without merit and, therefore, that there is no need to allow it to be fixed for the hearing of the appellant.
B But once the High Court allows the appellant or his advocate to argue the merit of the appeal before it, it has to deliver a judgment in which the reasons for allowing or dismissing the appeal, as the case may be, will be given.

C In the present appeal the High Court heard both the appellant and the respondent. That approach implied that the High Court had found that it was not appropriate to dismiss the appeal summarily. It could not in the same breath, purport to dismiss it summarily but
D should have written a judgment.

Not only did the High Court faulter on the procedure. We also think that this was not at any rate a proper case for summary dismissal. Although the ground of appeal to the High Court were inelegantly
E drafted, it is discernible at any rate that the appellant was calling upon the High Court to consider critically the evidence which suggested that he had been found with the dangerous drugs. He put to question the reliance by the trial court on x-ray pictures, which were not admitted
F as Exhibits at the trial. There was also the question of the charge sheet, which did not specify the dangerous drug the appellant allegedly possessed, whether it disclosed an offence.

In the case of *Robert Mgire v. Republic* (1), originating from
G mainland Tanzania, this court allowed the appeal of the appellant because the High Court wrongly dismissed the appeal summarily instead of re-appraising the evidence. The court had found that there was a reasonable doubt as to the appellant's guilt. In the present
H appeal we think that it should be heard *de novo* or the High Court to re-appraise the evidence and decide it on merit. In the result, we quash the order of summary dismissal of the appeal and direct that it be re-heard before another judge of the High Court.

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