IN THE COURT OF APPEAL OF TANZANIA AT MBEYA CRIMINAL APPEAL NO. 152/2006 MUNUO, J.A	CHRISTOPHER NZUNDA & 2 OTHERS VS THE REPUBLIC (Appeal from the summary rejection by Hon Machanja, J. in Criminal Appeal No 1 of 2000	Summary rejection of the appeal under S.36(1)(c) of the CPA, 1985. The case of Iddi Kondo VS. Republic, which discussed the following principle:- 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. Further, where important or complicated questions of fact or law are involved or where the sentence is severe, the court should not dismiss an appeal but should hear it.

IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MUNUO, J.A., LUANDA, J.A. And MJASIRI, J.A:)

CRIMINAL APPEAL NO. 152 OF 2006

CHRISTOPHER NZUNDA & 2 OTHERS.....APPELLANTS
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the SUMMARY REJECTION of
Hon. Mr. Justice Mackanja)

Dated 8th day of February, 2000
In
(DC) Criminal Appeal No. 1 of 2000
.....

JUDGMENT OF THE COURT

12th & 21st July, 2010

MUNUO, J.A.:

The co-appellants were jointly charged with the offence of armed robbery c/ss 285 and 286 of the Penal Code, Cap. 16 R.E. 2002. The prosecution alleged that on the 20th April, 1998 at about midnight at Hasanga Village in Mbozi District within Mbeya Region, the appellants jointly and together stole cash Sh. 20,000/= the property of Milson

Chamba and during the stealing shot one bullet into the left knee of Tuponile Ndile in order to obtain and retain the stolen money. The co-appellants denied the charge.

On the material midnight, PW1 Tuponile Ndile, and her husband, P.W. 5 Milson Chamba, were asleep in their house. Their hurricane lamp was burning so there was light in their room. P.W.5 heard movements outside their room. He peeped through the window and as there was moonlight, he saw bandits locking the door of the children's room from outside. He then awakened his wife. As the latter sat on the bed, the bandits broke into their bedroom whereupon the 1st appellant, Christopher Nzunda, shot her into the knee causing serious injuries. The bandits confronted P. W. 5. They demanded money. He threatened to cut them with a panga so they retreated into the sitting room but still demanded money whereupon PW5 threw Sh. 20,000/= at them which cash the 3rd appellant seized. The bandits shot several bullets at the scene of crime and then disappeared.

After the bandits had left, neighbours converged at P.W. 5's house and by using a stretcher they carried P.W.1 to the hospital. She tendered her P.F.3 form as Exh. P1. She stated that she identified the 1st appellant, Christopher Nzunda, who shot into her knee for he was a co-villager and he stammers so she could not mistake his identify for he was a familiar character. She did not, however, identify the other co-appellants. She knew the name of the 1st appellant so she gave his name to the neighbours who responded to the alarm after the bandits had vanished. The co-appellants were traced and arrested at dawn on the same night.

P.W. 3 Luka Mbukwa, the Village Chairman at Ichenjesya Hasanga confirmed that he heard 5 gun shots at about midnight on the material night. He heard an alarm for help at the house of Milson Chamba. He gathered neighbours and together with them, proceeded to the house of P.W. 5. Upon finding P.W. 1 wounded in the left knee, P.W. 3 mobilized some villagers to carry her to the hospital. PW.5 named the appellants so the villagers went to arrest them on the same night whereafter they turned them over to the police.

P.W.4 John Ngomale was among the villagers who went to the house of the 1st appellant where they found and arrested the co-appellants who had been identified by names by the victims of the robbery, to wit P.W. 5 and his wife, P.W.1. P.W. 4 was also present when the 2nd appellant led the police to recover the shotgun the appellants had used in the armed robbery for they had hidden it in a brick kiln.

The complainant, Milson Chamba, testified as P.W.5 corroborating the testimony of P.W.1. He stated that the villagers carried P.W.1 on a stretcher to the police and then to the hospital. He deposed, furthermore, that he identified the co-appellants when they entered his room because the hurricane lamp was burning. He identified the co-appellants as co-villagers noting that the 2nd appellant, Sijaona, was a mason. He further observed that the 3rd appellant Robert Mwaipopo, picked up the cash Sh 20,000/= which P.W.5 threw at the bandits apparently to get rid of them. In cross-examination, P.W. 5 told the third co-appellant that he frequently bought meat at P.W. 5's butchery so he knew him well before the robbery.

The co-appellants defended themselves on oath admitting that they were found and arrested at the house of the 1st appellant. They, however, categorically denied being parties to the armed robbery at P.W. 5's house.

The District Court found the co-appellants guilty of the offence charged. Subsequently, they lodged Criminal Appeal No. 1 of 2000 in the High Court at Mbeya. Their appeal was summarily rejected by Mackanja, J. as he then was. Aggrieved, the appellants lodged this second appeal.

In their respective memorandum of appeal, the appellants faulted the learned judge for summarily rejecting their appeal instead of hearing the appeal and writing a reasoned judgement as stipulated under the provisions of section 312 (1) of the criminal procedure Act, Cap. 20 R. E. 2002. Referring to the case of **Lighton @Morgege S/o Mundekesye versus Rex (1951) 18 E.A.C.A.** 309 the 1st appellant stressed that:-

> "It is imperative that before invoking the power of summary dismissal the judge or magistrate should read thoroughly the record of appeal and the memorandum of appeal and should indicate that he or she has done so in the order summarily dismissing the appeal."

The co-appellants challenged their identification saying that there was no evidence to establish their guilt beyond all reasonable doubt save that they were implicated because they were found in the same room. The first appellant cited the case of **Chilonyi versus Republic** Criminal Appeal No. 101/2003 (CA) (unreported) in which the Court held that if the suspects were identified on a moony night as was the case here, then identification would be doubtful due to poor visibility. The appellants also complained that they were not given a chance to object to the tendering of the exhibits because the trial magistrate just admitted them. The 1st Appellant complained that he was convicted on the weakness of his defence contrary to the decision in the case of **Ally Kailu versus Republic (1960)?** TLR 170 wherein it was held that:-

"An accused should not be convicted on the weakness of his defence..."

In his memorandum of appeal, the 2nd appellant, Sijaona Anangisye complained that the prosecution did not prove their case at the required standard of proof. He denied that he led the police to the discovery of the gun used in the armed robbery. Like the 1st appellant, the 2nd co-appellant claimed that the conditions of identification on the material night were difficult and unfavourable because the bandits had a torch so their identification was not watertight. The 2nd appellant further contended that P.W.1's PF3, Exhibit P1, should not be accorded weight because the doctor who prepared it did not testify in court. The trial magistrate, he complained, did not comply with the provisions of section 240 (3) of the Criminal Procedure Act, Cap. 20 which require the trial court to inform the accused his right to require the doctor who prepared the PF 3 to appear in court.

Like his co-appellants, the third appellant, Robert Mwaipopo, complained that the prosecution evidence was not concrete so they should not have been convicted because the conditions of identification were unfavourable.

Mr. Kashozi, learned Senior State Attorney, supported the conviction and sentence. He submitted that there was moonlight which enabled P.W. 1 and P.W.5 to see the co-appellants locking the door of the children's room from outside. Moreover, the bandits broke into the bedroom which was lit by a hurricane lamp so the conditions of identification were favourable. The 2nd appellant, Sijaona Anangisye led the police to recover the gun in a brick kiln so he was properly convicted by the trial count, the learned Senior State Attorney observed. The respondent Republic contended that the High Court Appeal was rightly summarily dismissed under section 364 (1) of the Criminal Procedure Act, Cap, 20 R.E. 2002.

The issue before us is whether the learned judge justifiably summarily dismissed the first appeal.

It is pertinent to state here that the High Court has power to summarily reject appeals under the provisions of section 364 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002. In this case, Mackanja J, as he then was, summarily dismissed Criminal Appeal 1 of 2000 on the 8th February, 2000 by stating; and we quote:-

> "Mackanja, J.
>
> I am satisfied, upon reading the proceedings and judgment of trial court, that the appeal raised no sufficient ground of complaint. It is, accordingly rejected.
>
> Signed
>
> J.N. Mackanja, J
>
> 6/2/2000"

We are of the settled mind that the learned judge invoked summary rejection powers under the provisions of sections 364 (1) (c) of the Criminal Procedure Act, 1985 Cap 20 R. E. 2002 which state; *inter-alia:*

364. (1) On receiving the petition of appeal and copy of judgement 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 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 second, the court is satisfied that the appeal has been lodged without any sufficient ground of complaint.

The court had an opportunity to consider the application of section 364 (1) (c) in the case of **Iddi Kondo versus The Republic,** Criminal Appeal No. 46 of 1998 (unreported) wherein the appellant faulted the learned judge for wrongly involving summary rejection powers. In that case the Court underscored the following principles before summarily rejecting an appeal namely:-

> "(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) to 4.... not applicable
>
> (5) Where important or complicated questions of fact and or law are involved or where the sentence is severe the Court should not dismiss an appeal but should hear it.

The Court held that the circumstances of the case were such that it was improper for the learned judge to reject the appeal summarily. The summary rejection order was quashed and set side. The Court ordered that the appeal be remitted to the High Court with the direction to hear the appeal on merit. The Court followed the same path in the case of **Juma Hamidu versus Republic**, Criminal Appeal No. 67 of 2001 (CA) (unreported).

In this case, we are satisfied that the charge of armed robbery s/c 285 and 286 which carries a minimum statutory sentence of thirty years imprisonment, would not qualify for summary rejection. Accordingly we quash and set aside the summary rejection order of the High Court. We order that the matter be remitted to the High Court for hearing on merit. It is so ordered.

Dated at Mbeya this 13th day of July, 2010.

JUSTICE OF APPEAL

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

I. P. Kitusi
SENIOR DEPUTY REGISTRAR