Hon Wambura - SDR

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: SAMATTA, C.J., MROSO, J.A., and MUNUO, J.A.)

CRIMINAL APPEAL NO.53 OF 2001

BETWEEN

HAMISI RAJABU DIBAGULA.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT
(Appeal from the decision of the High
Court of Tanzania at Dar es Salaam)

(Chipeta, J.)

dated the 24th day of August, 2001

in

H/C Criminal Revision Cause No. 19 of 2001

JUDGMENT OF THE COURT

SAMATTA, C.J. :

This is an appeal from a decision of the High Court (Chipeta, J., as he then was) affirming, while exercising revisional jurisdiction, a conviction for uttering words with the intent to wound religious feelings. The appellant, Hamisi Rajabu Dibagula,

had been convicted of that offence by the District Court of Morogoro, which sentenced him to 18 months' imprisonment. The learned Judge set aside that sentence and substituted therefor such sentence as was to result in the immediate release of the appellant from custody. The appeal raises one or two questions of considerable public importance concerning the limits, if any, of the right to freedom of religion, guaranteed under Article 19 of the Constitution of the United Republic of Tanzania, 1977, hereinafter referred to as "the Constitution."

It is necessary, before we embark upon the task of examining the merits or otherwise of the appeal, to state the facts of the case. They are, happily, uncomplicated. They may, we think, be outlined as follows. In the afternoon of March 16, 2000, the appellant, a member of an Islamic organisation known as Almallid, and some of his colleagues organised a religious public meeting at Chamwino in Morogoro town. They had secured a "permit", issued by the Police Officer Commanding District, to organise the meeting. Acting on some information he had received from a member of the public, the Regional C.I.D. Officer of Morogoro Region proceeded to the place where the meeting was taking place. He found the appellant addressing the meeting. At that point in time the appellant was saying **"Yesu si Mwana wa Mungu, ni jina la mtu kama mtu mwingine tu."**

The C.I.D. Officer had no doubt that the utterance constituted a criminal offence under section 129 of the Penal Code. He proceeded to arrest the appellant (his colleagues took to their heels and vanished into thin air) and took him to a police station. Four days later the appellant was taken before the District Court where a charge under the aforementioned section was laid at his door. It was alleged in the particulars of offence that the appellant –

> "on the 16th day of March 2000 at about 18.00 hrs at Chamwino area within the Municipality, District and Region of Morogoro, with deliberate intention did utter words to wit **YESU** si mwana wa **MUNGU** bali ni jina, words which are wounding (sic) the religious feelings of christian worshippers".

Section 129 of the Penal Code provides:

> "129. Any person who, with the deliberate intention of wounding the religious feelings of any person, utters any word, or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, is guilty of a misdemeanour, and is liable to imprisonment for one year."

The appellant protested his innocence. He denied to have preached "against the Christian religion." One Athuman Abdallah, his only

witness, told the trial magistrate that the appellant had urged non-muslims to embrace Islamic faith and pronounce that Jesus Christ is not the Son of God. At the end of the trial the learned magistrate entertained no doubt of reasonable kind that the evidence laid before her proved the appellant's alleged guilt. After entering a conviction, as already pointed out, she sentenced the appellant to 18 months' imprisonment. The High Court, upon becoming aware of the decision, and in exercise of its powers under section 372 of the Criminal Procedure Act, 1985, hereinafter referred to as "the Act", called for the record of the case for the purpose of satisfying itself as to the correctness of the decision. The Court later proceeded to conduct a revisional proceeding in respect of the case. Only the Director of Public Prosecutions was given opportunity to be heard at that proceeding. At the end of it the learned Judge was satisfied that the appellant has been rightly convicted. He was, however, of the opinion, a correct one in our view, that the sentence of eighteen months' imprisonment was illegal because it exceeded the maximum sentence of twelve months' imprisonment fixed by law for the offence. He set it aside and, as already stated, substituted therefor such sentence as was to result in the appellant's immediate release from custody. Consequently, the appellant regained his personal liberty. He

believed, however, that the learned Judge's decision did not constitute a complete triumph for justice. Hence the instant appeal.

The learned Judge's decision is impugned on the following five grounds:

1. The revising Judge erred in law and in fact by holding that the prosecution in [the] Lower Court did prove its case beyond reasonable doubt.
2. The revising Judge erred in law by agreeing with the submission of the State Attorney that the Prosecution in the trial Court proved the case beyond reasonable doubt without valuating the evidence tendered in the lower court and assigning reasons therefor.
3. The revising Judge erred in law by not considering the fact that the nature of the offence the Appellant was convicted of presupposes the existence of a person who was directly wounded by the words uttered by the Appellant or that the prosecution should be able to prove who and how a person would have his feelings injured.
4. The revising Judge erred in law in embarking on revisional proceedings in the presence of the Republic but in the absence of the accused person whose legal interests were being looked into by the court.

5. The court erred in law by holding that there was a judgment of the trial Court while in fact the so-called judgment was in law not judgment.

Speaking through his advocate, Mr. Taslima, who was assisted by Prof. Safari, the appellant has strongly urged us to quash his conviction. Mr. Mlipano, State Attorney, declined to support it.

Is Jesus Christ the Son of God? Millions of persons would sharply disagree as to the correct answer to this question. Some would entertain no doubt whatsoever that an answer in the affirmative is the correct one; to others, "No" would, without the slightest doubt, be the correct answer. Whichever is the correct answer, the question is a purely religious one and, therefore, cannot fall for determination by a court of law. It is not, therefore, one of the questions which the instant appeal can possibly answer. The pivotal issue before us is whether merely making an utterance in the hearing of another person that Jesus Christ is not the Son of God constitutes a criminal offence under section 129 of the Penal Code.

Before we proceed to examine the merits or otherwise of the arguments addressed to us by the learned advocates, we deem it useful to state some of the general principles governing the enjoyment of the freedom of religion in this country. The right to

that freedom is guaranteed under Article 19 of the Constitution, which reads:

> "19. – (1) Every person has the right to the freedom of thought or conscience, belief or faith, and choice in matters of religion, including the freedom to change his religion or faith.
>
> (2) Without prejudice to the relevant laws of the United Republic the profession of religion, worship and propagation of religion shall be free and a private affair of an individual; and the affairs and management of religious bodies shall not be part of the activities of the state authority.
>
> (3) In this Article reference to the word "religion" shall be construed as including reference to religious denominations, and cognate expressions shall be construed accordingly."

The freedom enshrined in this Article includes the right to profess, practise and propagate religion. Since profession, practice or propagation of religious faith, belief or worship is also a form or manifestation of a person's expression, it must be correct to say, as we do, that freedom of religion is also impliedly guaranteed under Article 18(1) of the Constitution. That freedom, like other freedoms, is not an absolute right. The exercise of it, just as the

exercise of other freedoms, is subject to the requirements of public peace, morality and good order, which are requisites of the common good of society. As was pointed out by the Supreme Court of India in The Chairman, Railway Board and Others v Mrs. Chandrima Das and Others, 1 S.C.R. 480, at pp. 501 – 502, primacy of the interest of the nation and security of State must be read into every provision dealing with fundamental rights. The freedom to transmit or spread one's religion or to proselytize has to be exercised reasonably, that is to say, in a manner which recognises the rights, including religious rights, of other persons. It must be exercised in a manner which demonstrates respect for the freedoms of persons belonging to other religions, atheists and agnostics. In a human society, rights may be in conflict; they must, therefore, be subject to law. As far as human rights and freedoms are concerned, this legal position is succinctly stated in Article 30(1) of the Constitution, which provides:

> "30. – (1) The human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest."

Having stated these principles, we propose now to deal with the arguments addressed to us. But before we do so, we desire to

observe that the charge which was laid at the door of the appellant in this case was not a model of accuracy or elegance in charge drafting. Some vital words of section 129 of the Penal Code concerning mens rea were omitted from the particulars of offence. It leaps to the eye that the words "of wounding the religious feelings of any person" are missing there. Did this omission occasion any miscarriage of justice? We think not. First, the wording of the statement of offence, section and law in the charge reasonably informed the appellant of the requisite mens rea of the offence he was charged with. Secondly, judging from the tenor of his defence during cross-examination of the Regional C.I.D. Officer and P.W.4, D/Cpl. Zeno, and his own testimony, it is patently clear that the appellant was aware that it was the case against him that, in uttering the alleged words, his intention, a deliberate one, was to wound the religious feelings of those hearing him. Rightly, his counsel before this Court did not appear to think that any arguable point arose from the omission.

Having made that observation, we proceed to deal with the first ground of appeal. It was forcefully contended by Mr. Taslima that the learned Judge erred in law because, as the learned advocate put it, he did not direct himself on the vital question of mens rea in the case. The learned advocate went on to submit that even the learned trial magistrate did not address her mind to that issue. Mr.

Taslima drew our attention to Surah 19 : 88 – 91 of the Qur'an, and then proceeded to submit that when he told his audience that Jesus Christ is not the Son of God the appellant was doing no more than preaching his religion. The four verses read as follows:

"88. They say: "The Most Gracious
Has betaken a son!
89. Indeed ye have put forth
A thing monstrous!
90. At it the skies are about
To burst, the earth
To split asunder, and
The mountains to fall down
In utter ruin,
91. That they attributed
A son to The Most Gracious."

With respect to the learned Judge, we are clearly of the opinion that Mr. Taslima's criticisms are unanswerable. No offence is committed under section 129 of the Penal Code where the deliberate intention of the perpetrator of the alleged misconduct was other than wounding the religious feelings of those on the scene. Neither the learned trial magistrate nor the learned Judge appears to have addressed her/his mind to the question of mens rea

in this case. In the course of her judgment the learned trial magistrate said:

> "In this case [there is] no dispute that the accused person was at Chamwino preaching Islamic religion. The questions in this case are:-
>
> 1. Whether the accused got permit to preach.
> 2. Whether the accused used abusive words to abuse (sic) another religion.

Nowhere in the judgment is there evidence which shows that the learned trial magistrate was aware that the prosecution had the onus to prove that the appellant had the deliberate intention to wound the religious feelings of those within the hearing range. The issues she posed were clearly irrelevant. She made no attempt to consider, among other things, whether, in making the utterance complained against, the appellant did more than exercise his constitutional right to freedom of religion. The learned Judge, on his part, discussed the validity or otherwise of the conviction only in three sentences, two of which are fairly short, when he said:

> "I now turn to the case at hand. I respectfully agree with the learned state attorney that the prosecution's evidence proved the offence against the accused beyond reasonable doubt. The conviction, therefore was justified."

The learned Judge's attention was apparently not drawn to the need for him to be satisfied that the requisite mens rea was proved in the case. We have examined the record of the case with great care and have found neither direct nor circumstantial evidence to justify the conclusion or inference that the deliberate intention of the appellant when he uttered the words in question was to wound the religious feelings of those who were to hear him. On the contrary, the evidence clearly demonstrates, in our opinion, that the appellant was, at the material time, on a mission to propagate his religion, Islam. At the time the Regional C.I.D. Officer arrived at the public meeting the appellant was merely repeating what the Qur'an unequivocally states in several surahs, including Surah19, which we have already quoted from, and Surah 5, which, again, Mr. Taslima drew our attention to. Verse 75 of that Surah reads:

"75. Christ the son of Mary
Was no more than
A Messenger: many were
The Messenger that passed away
Before him..."

It is neither possible nor desirable to list all situations which may manifest the deliberate intention of wounding religious feelings. That intention may be manifested by the speaker declaring it in so many words, or by the circumstances surrounding the making of

the utterance, sound or gesture. If, for example, a non-christian were to preach in church grounds that Jesus Christ is not the Son of God, or if he were to interrupt a christian ceremony, function or meeting by making such a declaration, it could be inferred that his deliberate intention in so doing was to wound the religious feelings of those christians hearing him. In the instant case the place where, and circumstances under which, the appellant made the utterance, and the nature of the meeting, had, among other things, to be taken into account in determining what the appellant's deliberate intention was.

The provisions of section 129 of the Penal Code were not intended to, and do not, frown upon sober or temperate criticisms of other persons' religions even if those criticisms are made in a strong or powerful language. It should always be remembered that what is regarded as truth in one religion may not be so regarded in another. Even if some sections of society consider the spreading of certain religious messages, in an area where those messages are taken to be unwanted, as being an irresponsible, insensitive or provocative action it would not constitute a violation of section 129 of the Penal Code to spread those messages there if the deliberate intention of the speaker was to propagate his religion or religious views, and not to wound the religious feelings of those hearing him. The enactment of the provision was not intended to

license an unreasonable abridgment or restriction of the right to propagate one's religion or religious views. It was primarily intended to safeguard public order. Freedom of religion is not so wide as to authorise the outrage of religious feelings of others, with a deliberate intention.

For the reasons we have given, we agree with Mr. Taslima that in this case the prosecution failed to prove the requisite mens rea. Consequently, we find merit in the first ground of appeal. These findings are sufficient to dispose of the appeal, but, bearing in mind the novelty and importance of the case, we deem it useful to deal with the other grounds of appeal, albeit briefly in each case.

We proceed, therefore, to examine the merits or otherwise of the second ground of appeal. It was the contention of Mr. Taslima here that the learned Judge erred in law in not evaluating the evidence laid in the scales at the trial and assigning reasons for agreeing with the findings arrived at by the learned trial magistrate. We have no doubt that this complaint has merit. We have already pointed out, when dealing with the first ground of appeal, that the learned Judge, when he turned to a consideration of the validity or otherwise of the appellant's conviction, merely said that he agreed with the learned state attorney's submission that the prosecution had proved their case beyond reasonable doubt. He made no attempt to consider how the evidence proved each ingredient of the

offence the appellant was convicted of, and he gave no reasons for holding that the learned state attorney's submission was well-founded. The necessity for courts to give reasons cannot be over-emphasized. It exists for many reasons, including the need for the courts to demonstrate their recognition of the fact that litigants and accused persons are rational beings and have the right to be aggrieved. And as was pointed out by M.K. Mukherjee, J., in Rupan Deol Bajaj and An. v Kanwar Pal Singh Gill and An. [1995] Supp. 4 S.C.R. 237, at p. 258,

> "Reasons introduce clarity and minimise chances of arbitrariness."

Nowhere in his judgment in the instant case does the learned Judge appear to have noted that not only did the learned trial magistrate frame irrelevant issues but she also made no attempt to discuss those issues. Bearing in mind what we have said, we are driven to the conclusion that the complaint in the second ground of appeal has merit. That conclusion brings us face to face with the third ground of appeal.

This ground of appeal can, we hasten to think, be dealt with very briefly. It was Mr. Taslima's submission that to prove a charge under section 129 of the Penal Code the prosecution must adduce evidence from someone whose religious feelings were wounded by the alleged utterance, sound or gesture, to the effect

that his said feelings were wounded. We can find no warrant for thinking that there is merit in this contention. It would be doing great violence to the language of the section to hold that such proof is required. It is enough if it is proved that the accused's deliberate intention was to wound someone's religious feelings. Of course, if a witness testifies that his religious feelings were wounded, and eventually the charge is proved beyond a reasonable doubt, the proof of wounding may be relevant in the assessment of sentence to be imposed on the accused. The offence is complete once the utterance is made. It follows that, in our opinion, Mr. Taslima's argument is misconceived in law.

We turn now to the fourth ground of appeal. As will be recalled, the criticism here is that the learned Judge denied the appellant the opportunity to be heard when the revisional proceeding was conducted. It was contended by Prof. Safari, on behalf of the appellant, that the omission to give him that opportunity violated the provisions of Article 13(6)(a) of the Constitution and section 373(2) of the Criminal Procedure Act, 1985. The constitutional provision reads as follows:

> "(6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles:

(a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned;

(b) ...

(c) ...

(d) ...

(e) ..."

In order to grasp fully what is prohibited by subsection (2) of section 373 of the Act, it is necessary, we think, to quote the preceding subsection of the section also. This is how the two sub-sections read:

"373. – (1) In the case of any proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may-

(a) in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse such order, save that for the purposes of this paragraph a special finding under sub-section (1) of section 219 of this Act shall be deemed not to be an order of acquittal.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence; save that an order reversing an order of a magistrate made under section 129 shall be deemed not to have been made to the prejudice of an accused person within the meaning of this sub-section."

In the instant case it is not in dispute that the learned Judge conducted the revisional proceeding in the absence of the appellant, who was given no opportunity to be heard in his own defence. There can be no doubt whatsoever that the omission to provide that opportunity to the appellant was a very serious error. It offended the provisions of sub-section (2) of section 373 of the Act we have quoted a short while ago. The decision of the learned Judge affirming the conviction did in the circumstances prejudice

the appellant. Very rightly, Mr. Mlipano, the learned State Attorney, conceded before us that the learned Judge's error is fatal to his decision. The importance of the right to be heard has been commented upon by many eminent judges over the centuries. Nearly three centuries ago, in R v University of Cambridge, 1723, 1 Stra. 557, cited with approval by Megarry, J., in John v Rees and others, [1969] 2 All E.R. 274, Vortescue, J., used the following celebrated words to emphasize the importance:

> **"The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion that even God himself did not pass sentence upon Adam before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."**

We are satisfied, for the reasons we have given, that there is merit in the complaint in the fourth ground of appeal.

Finally, we proceed to deal with the fifth ground of appeal. It was submitted on behalf of the appellant that no judgment was in law delivered by the learned magistrate in this case. It is common

ground that although she framed two issues in the case, she dealt with only one of them, and the one which was considered was dealt with perfunctorily. Another criticism leveled at the learned trial magistrate's judgment is that it scarcely contained any reasons justifying the final conclusions arrived at on the case. We have already discussed the importance of giving reasons in decision making. We will not revert to that point. We will confine ourselves at this stage to determining whether the learned trial magistrate fully complied with the requirements of section 312(1) of the Act, which reads:

> "312. – (1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by, or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by such presiding officer as of the date on which it is pronounced in open court."

While we are hesitant to travel the whole distance with counsel for the appellant and say that the judgment delivered by the trial court

in this case is no judgment in law, we have no hesitation in holding, as we do, that the said judgment did not sufficiently meet the requirements of the subsection we have just quoted. We wish to draw attention to what this Court said in Lutter Symphorian Nelson v (i) The Hon. Attorney General. (2) Ibrahim Said Msabaha, Civil Appeal No. 24 of 1999 (unreported) on what a judgment should contain:

> "...A judgment must convey some indication that the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored. In Amirali Ismail v Regina, 1 T.L.R. 370, Abernethy, J., made some observations on the requirements of judgment. He said:
>
> > 'A good judgment is clear, systematic and straightforward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported; and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable a

Court of Appeal to know what facts are found and how.'"

The failure to comply with the relevant statutory provisions as to the preparation of a judgment will be fatal to a conviction where there is insufficient material on the record to enable the appeal court to consider the appeal on its merits: see Wily John v R., (1956) 23 E.A.C.A. 509. In the instant case the learned Judge erred, in our opinion, in not holding that the learned trial magistrate's judgment fell short of meeting the requirements of section 312(1) of the Act.

We have clearly demonstrated, we think, that the learned Judge should not have affirmed the appellant's conviction and that, therefore, this appeal must succeed. We desire, before we make resultant orders, to make two observations.

The first one concerns revisional powers. No one can doubt the usefulness of these powers, but they should be exercised in appropriate cases. Save in cases where justice requires an obviously improper conviction, or illegal sentence to be at once quashed or rectified, revisional powers should not be exercised before inquiry has been made whether an appeal has been or is likely to be lodged: see (T) Lobozi s/o Katabaro v R., (1956) 23 E.A.C.A. 583. In the instant case the revisional proceeding was conducted before the expiry of the period within which an appeal

against the district court's decision could be lodged. On August 6, 2001, the appellant had, through the Officer-in-Charge of Morogoro Prison, given a notice of appeal. No inquiry appears to have been made as to whether an appeal was likely to be lodged. This should have been done.

The second matter we desire to comment upon is religious intolerance. Religions can, and should, be a solid foundation of peace. In countries where they have not been given a chance to play that vital role, they have launched many wars, caused endless streams of blood and rolling of thousands of heads. Religious intolerance is a vice which must not be permitted to find a place in the hearts of our people. It must be repressed by every lawful method. When a person embracing a religious faith or view is told by another person, whose religious faith or view is different, something concerning religion which he considers to be untrue, he should be able to answer him by echoing the wise words of Voltaire, the 18th century French philosopher:

> **"I disagree profoundly with every word that you say but I shall defend unto the death your right to say it."**

In the holy books of almost all major religions in the world one finds passages directly or indirectly exhorting people to religious

tolerance. In the Qur'an, for example, there are the following verses, in Surah 109:

1. Say (O Muhamad to these Mushrikun and Kafirun): 'O Al-Kafirun (disbelievers in Allah, in His Oneness, in His Angels, in His Books, in His Messengers, in the Day of Resurrection, and in Al-Qadar)!
2. I worship not that which you worship,
3. Nor will you worship that which I worship.
4. And I shall not worship that which you are worshipping.
5. Nor will you worship that which I worship.
6. To you be your religion, and to me my religion."

The Constitution of the United Republic of Tanzania and other relevant laws oblige the people of this country to live together with mutual respect and tolerance. It is one of the principal obligations of good citizenship.

For the reasons we have given, we allow the appeal, quash the conviction and set aside the sentence imposed thereon.

DATED at DAR ES SALAAM this 14th day of March, 2003.

B. A. SAMATTA
CHIEF JUSTICE

J. A. MROSO
JUSTICE OF APPEAL

E. N. MUNUO
JUSTICE OF APPEAL

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

F. L. K. Wambali
DEPUTY REGISTRAR