

- A that the facts of this case are such that they do not suggest any possibility of the accused killed the deceased in provocation. I make this finding while fully conscious of the fact that our law does not impose any burden on an accused person to establish a defence of provocation.
- B Whenever the facts of a case suggest, albeit remotely, that the alleged killing might have been done in provocation, then it is for the prosecution to prove the absence of such possibility.

- C Both two gentlemen assessors were of the unanimous opinion that the accused is guilty. They out rightly dismissed the accused's plea that he killed the deceased in provocation. With respect, I am of the same opinion. I am satisfied that the charge of murder preferred against the accused has been proved beyond reasonable doubt. I accordingly
- D find him guilty and convict him of the same.

- E Accused has been convicted of one of the most heinous offences known in our law murder. There is only one mandatory sentence which this court is required to impose. Accused is sentenced to suffer death by hanging.

F **YASINI MIKWANGA v. REPUBLIC**

G **HIGH COURT OF TANZANIA**
AT MTWARA
(Msumi, J.)

H **CRIMINAL APPEAL No. 15 of 1982**

(From the District Court of Kilwa District at Kilwa, in Criminal Case No. 33 of 1981, T.B. Mutakyawa, Esq., District Magistrate)

I *Criminal Law – Contempt of Court – Refusal to answer a question after the court has ruled that it should be answered – Whether an act of contempt.*

Criminal Practice and Procedure – Summary conviction – Whether the trial magistrate must frame formal charge before conviction A

Criminal Practice and Procedure – Testimony by accused person – Accused person refusing to answer question – Whether accused person who opts to testify may refuse to answer question B

Criminal Practice and Procedure – Sentencing – Sentence for Contempt of Court – Whether a sentence of six months' imprisonment is legal.

C The appellant and three others were charged with shop breaking and stealing before the Kilwa District Court. During cross examination by a co-accused, the appellant refused to answer a question put to him, contending that it was irrelevant. The trial magistrate ordered the appellant to answer the question but the appellant still refused, whereupon the trial magistrate summarily convicted him of Contempt of Court. On appeal to the High Court the main issue was whether that refusal amounted to Contempt of Court. D

E **Held:** (i) The cardinal purpose of creating the offence of Contempt of Court is to arrest all whose conduct is reasonably feared to be interfering with the proper administration of justice

(ii) Once the Court Rules that a witness should answer a question then the witness ought to comply, otherwise he will be liable for Contempt of Court, except where the witness is impaired by physical infirmity. F

(iii) The refusal of the appellant to comply with the trial magistrate's order to answer the question contravened the provisions of section 114(1)(b) of the Penal Code; upon opting to testify in the witness box the appellant automatically subjected himself to all rules governing witnesses. G

(iv) In summary proceedings the magistrate should frame the charge before entering conviction. H

(v) There are no set rules to comply with in drafting a charge under summary proceedings but explaining the gist of the offensive conduct, the particulars of the law it contravenes, and finally availing an opportunity to make a reply to the charge are things that should be done, and all these were complied with before the appellant was convicted; the conviction, therefore, complied with section 114(1)(b) of the Penal Code. I

A (vi) According to section 114(2) of the Penal Code the maximum sentence for Contempt of Court is a fine of TZS. 400 or one month's imprisonment in default where there has been a summary conviction; the sentence of 6 months' imprisonment in this case was illegal.

B *Appeal against conviction dismissed; appeal against sentence allowed*

Cases referred to:

(1) *Odhengo s/o Ogongo v. R* (1954) 21 E.A.C.A. 302

C (2) *AG v. Butterworths* [1963] 1 Q.B. 696

Mr Mchora for the Appellant

D JUDGMENT

(Dated 27 March 1985)

E **MSUMI, J.:** Appellant was summarily convicted of Contempt of Court contrary to section 114(1)(b) of the Penal Code. He was sentenced to six months imprisonment.

F What happened is that the appellant and three other persons were charged with shop breaking and stealing contrary to sections 296(1) and 265 of the Penal Code. In his defence the appellant opted to testify on affirmation. And while he was being cross examined by one of his co-accused, the appellant refused to answer one of the questions put to him contending that the same was irrelevant. It would appear that the alleged question concerned a case in which the appellant was previously convicted. The learned trial district magistrate overruled the objection and ordered the appellant to answer the question. But the appellant stood his ground; he refused to answer the question. It was then that the learned trial magistrate decided to take cognizance of the alleged contemptuous conduct and summarily convicted him under the provisions of section 114(2) of the Penal Code.

I The learned defence counsel, Mr Mchora, submitted as his first ground of appeal that the alleged offensive conduct of the appellant

did not amount to a Contempt of Court. This view was emphatically shared by the learned Senior State Attorney on behalf of the Republic. With respect, I am of the contrary opinion. The appellant's conduct clearly contravenes subsection 1(b) of section 114. It appears both learned counsels have in their minds either subsection 1(a) or 1(1) of section 114. Otherwise it is incomprehensible how the conduct of the appellant can be excluded from being contemptuous under subsection 1(b). Perhaps I may do service to the learned counsel if I quote the said subsection:

114(1) Any person who:

(a) ...

(b) having been called upon to give evidence in a judicial proceeding, fails to attend or, having attended, refuses to be sworn or to make an affirmation or, *having been sworn or affirmed, refuses without lawful excuse to answer a question* or remains in the room in which such proceeding is being heard or taken, after the witnesses have been ordered to leave such room; is guilty of a misdemeanor, and is liable to imprisonment for six months or to a fine not exceeding TZS 500 (five hundred). [emphasis supplied]

F It is true that as an accused, the appellant was not a compellable witness hence it cannot be said that he was called to give evidence. But once the appellant had opted to testify in the witness box he automatically subjected himself to all rules governing witnesses. For example, like other witnesses, he was required either to affirm or swear and he was subject to cross examination. In this case when the appellant refused to comply with the trial magistrate's order that he should answer the question, he was clearly contravening the provisions of subsection 1(b) of section 114. In *Joseph Odhengo s/o Ogongo v. R.* (1) the appellant was summarily convicted of Contempt of Court contrary to section 116(1)(b) of the Kenya Penal Code, which is in *pari materia* with section 114 1(b) of our Penal Code. In principle the Court of Appeal for Eastern Africa agreed with the trial judge that the appellant's refusal to answer questions put to him as a witness was contemptuous.

A Perhaps one of the questions which may arise at this juncture is whether the appellant had lawful excuse not to answer the question, notwithstanding the court's order that he should do so. I am of the view that except where the witness is impaired by physical infirmity
 B or otherwise, in every case once the Court Rules out that the witness should answer the question then he ought to comply, otherwise he will be liable for contempt. The trial court's order might be legally wrong; for example where the magistrate allows a question which
 C has the effect of extracting some inadmissible evidence such as a previous conviction, as in this case. All the same, that order must be obeyed. Any contrary view will have the undesired effect of creating an *impasse* in the conduct of the trial. The cardinal aim of creating the offence of Contempt of Court is to arrest all conduct aimed, or
 D reasonably feared to be aimed, at interfering with the proper administration of justice.

As pointed out by Lord Donovan in *AG v. Butterworth* (2) that:

E The question to be decided ... in all cases of alleged Contempt of Court, is whether the action complained of is calculated to interfere with the proper administration of justice. There is more than one way of so interfering.
 F No doubt that one of the essential conditions for proper administration of justice is that there should prevail discipline in court throughout any trial. This condition will definitely be undermined if any party in the trial was to be allowed with impunity to defy an order of the court on the ground that the said order is illegal or otherwise improper.
 G I don't think that the legislature meant to tolerate such condition when it impliedly exempted a witness, under section 114(1)(b), from answering a question by giving lawful excuse. Any statutory provision which directly or indirectly purports to strip off the courts' inherent
 H power of maintaining law and order in the course of a trial must be viewed with circumspection.

I In his second ground of appeal, the learned defence counsel submitted that the trial magistrate ought to have framed a charge which should have contained the gist of the purported contemptuous conduct. The

learned counsel is of the opinion that the trial magistrate failed to do so hence there resulted a failure of justice. Again the learned Senior State Attorney found this argument irresistible. With respect, I am again unfortunate in finding myself holding a different view. I admit that section 114(2) under which courts are allowed to take cognizance of certain contemptuous conduct and convict a person summarily has seen repeatedly interpreted by this court, and courts above, as requiring the magistrate to frame a charge before a summary conviction is entered. Thus when dealing with a similar provision in the Penal Code of Kenya in *Odhengo s/o Ogongo v. R* (1) the Court of Appeal for Eastern Africa said:

D The observation which we wish to make on this is that, when a court takes cognizance of an offence under the provision of section 116(2), it is in fact assuming and exercising a jurisdiction to deal summarily with the offence and that in every such case, it is essential that the court should frame and record the substance of a charge, call upon the person accused to show cause why he should not be convicted on that charge, and give
 E him a fair opportunity to reply.

F I am of the opinion that this requirement is sufficiently complied with where a magistrate adopts any procedure which has the practical effect of notifying the accused the gist of his offensive conduct and affording him an opportunity to reply. Unlike a formal criminal charge, there are no set rules which a magistrate is required to comply with in drafting such a charge under summary proceeding. In determining whether the provisions of subsection (2) of section 114 have been
 G complied with, the question should be whether the court took the necessary steps in explaining to the accused the gist of his offensive conduct, the particular provision of the law which it contravenes and, lastly, give him an opportunity to make a reply. There is no
 H magic formula for attaining these ends. Thus in *Ogongo's* case (1) the Court of Appeal was of the opinion that these ends have been adequately attained by the trial judge when he recorded:

I

A A, charged with refusing without lawful excuse to answer a question contrary to section 116(b) Penal Code. Court takes cognizance of offence under section 116(2) and sentences A ...

B Of course in that case, the Court of Appeal was also influenced by the fact that the trial court's record showed that appellant had been persistently warned by the court to answer questions but in vain. In the present case, before convicting the appellant the learned trial magistrate recorded:

C Court: This accused witness has been repeatedly warned by the court to answer questions put to him by his co-accused but he has deliberately refused to answer. This is, in my view a disrespect to the court and as such the accused witness has committed the offence of Contempt of Court contrary to section 114(1)(b) of the Penal Code Chapter 16.

D The accused witness is therefore asked to state his reasons as to why he should not be punished for Contempt of Court.

E Accused witness states: I have refused to answer the questions put to me by the co-accused (number 3) because they are irrelevant to this instant case except that they are relevant to the previous case (Criminal Civil Number 30 of 1981) which has already been determined by this court on 26 June 1981. I repeat that I am not going to answer the accused's question in this cross-examination.

F And after the appellant's reply, the learned trial magistrate summarily convicted the appellant. With respect, I am quite convinced that from the court record as quoted above the learned trial magistrate slavishly complied with the provisions of subsection (2) of section 114. The learned defence counsel's argument, which unfortunately was not challenged by the learned Senior State Attorney, is dismissed.

H However, I totally agree with both learned counsel that the sentence of six months imprisonment imposed on the appellant is illegal. According to section 114(2) under which the summary conviction was entered, the maximum sentence which a court is empowered to impose is a fine of TZS. 400 (four hundred) or one month imprisonment in default.

I It is only where the accused has been convicted through normal indictment

A that the court is empowered to impose a maximum sentence of six months or a fine not exceeding 500 (five hundred) TZS.

B In conclusion, the appeal against conviction is dismissed. But on the ground of illegality, the appeal against sentence is allowed. Hence the sentence of six months imprisonment is set aside and in substitute the appellant is sentenced to imprisonment for one month. This alteration of sentence is of no beneficial value to the appellant as he has already completed serving the said illegal sentence. It is, however, important for record purposes.

D MWANAHAWA HEMEDI v. RASHIDI KULOMBA

E IN THE HIGH COURT OF TANZANIA

AT MTWARA

(Kyando, J.)

F (PC) MATRIMONIAL CIVIL APPEAL No. 2 OF 1983

(From the decision of the District Court of Newala at Newala in Civil Appeal No. 9 of 1982 Original Chilangala Civil Case No. 36 of 1981)

G *Family Law – Divorce – Grounds for the court to grant divorce – Whether willful neglect is a sufficient ground for granting divorce.*

H *Family Law – Petition for divorce – Attendance before the Marriage Conciliation Board before petitioning for divorce – Party failing or refusing to attend before the Board – Effect thereof – Section 101 of the Law of Marriage Act 1971.*

I The appellant had petitioned the Primary Court for a Decree of Divorce due to conflicts in her marriage with the respondent. The Primary Court unanimously granted the petition and dissolved the marriage. The respondent successfully appealed to the District Court. The appellant appealed further to the High Court.