IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NYALALI, C.J., MAKAME, J.A., And KISANGA, J.A.)

CRIMINAL APPEAL NO. 133 OF 1994

BETWEEN

MARWA s/o MAHENDE. . . . . APPELLANT

AND

THE REPUBLIC. . . . . RESPONDENT

(Appeal from the conviction of the
High Court of Tanzania at Mwanza)

(Masanche, J.)

dated the 2nd day of May, 1994

in

Criminal Appeal No. 17 of 1994

JUDGEMENT OF THE COURT

KISANGA, J.A.:

The appellant and three other persons were jointly charged in the District Court at Tarime with the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code. The appellant alone was convicted as charged and sentenced to 30 years' imprisonment plus 12 strokes of the cane. The appellant who had apparently jumped bail was so convicted and sentenced in absentia. The other three persons were acquitted. The appellant's appeal to the High Court was partly successful to the extent that his sentence was reduced to one of 15 years' imprisonment. He has now appealed further to this Court where he is represented by Mr. Nasimire, learned advocate while Mr. Mwambegele, learned State Attorney, appears for the respondent Republic.

Mr. Nasimire filed three grounds of appeal but at the hearing he abandoned grounds 2 and 3 and argued the first ground only. That ground alleges,

"That the learned appellate judge erred in failing to address his mind to the fact that the doctrine of autrefois acquit applied to the circumstances of the present case."

Elaborating on this ground Mr. Nasimire referred us to the appellant's memorandum of appeal to the High Court. In ground one of that memorandum the appellant strongly criticised the trial magistrate for convicting him in absentia on the basis that he had jumped bail. He asserted that he did not attend the court because the court had discharged him on the present charge and therefore he no longer had cause to attend the court. He filed an order made under Tarime District Court Criminal Case No. 224 of 1992 which shows that the appellant was 'ischarged.

Mr. Mwambegele submitted, and Mr. Nasimire conceded, that even if the appellant's allegations are accepted as true, they do not disclose an acquittal which would entitle the appellant to the defence of autrefois acquit. The point could not be pursuaded further, however, because the record of the alleged Criminal Case No. 224 of 1992 of Tarime District Court was not available for examination; all that was available was what appeared to be an extracted court order discharging the appellant.

In the course of the hearing, however, the Court raised the issue of the correct procedure applicable when the court convicts an accused person in absentia. The record of the proceedings of the trial court shows that the appellant was convicted and sentenced in absentia. Nothing further is shown after that, and the inference to be drawn is that the appellant was apprehended and taken straight to prison to start serving his sentence. The question is whether this was in accordance

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with the procedure laid down by law. The relevant provision is Section 226(1) and (2) of the Criminal Procedure Act which says:-

> "226(1) If at the time or place to which the hearing or further hearing shall be adjourned the accused person shall not appear before the court which shall have made the order of adjournment it shall be lawful for such court to proceed with the hearing or further hearing as if the accused were present and if the complainant shall not appear, the court may dismiss the charge and acquit the accused with or without costs as the court shall think fit.
>
> (2) If the court convicts the accused person in his absence it may set aside such conviction upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on the merit."

The appellant was absent when the case came up for hearing on 16/9/92 and he continued to be so absent right through the time all the prosecution evidence was received to the time of his conviction and sentence in absentia. This was, therefore, a fit case which called for the exercise of the magistrate's discretion under Sub-section (2) of Section 226 quoted above.

It is noted that the Sub-section is silent on the procedure of how to handle an accused person who is arrested following his conviction and sentence in absentia. On the face of it the sub-section is capable of being understood to mean that upon his arrest, the accused person is taken straight to prison to start serving his jail term. However, we think that on a true construction of the sub-section it does not mean that. Such construction would defeat the whole purpose of the sub-section.

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In our view the sub-section is to be construed to mean that an accused person who is arrested following his conviction and sentence in absentia should be brought before the trial court first, and not to be taken straight to prison. For, if he is taken straight to prison the trial magistrate can no longer exercise his discretion under the sub-section. In other words once the convict goes into prison and starts serving the sentence, the magistrate is functus oficio and he can no longer re-open the case in order to secure the purpose for which the sub-section is designed.

A similar situation arose in the case of Olonyo Lemuna And Another v. R. Criminal Appeal No. 123 of 1993 (unreported) involving somewhat similar facts. In that case this Court held that when a court convicts and sentences an accused person in absentia the Court should exercise the discretion under Section 226(2) of the Criminal Procedure Act in order to afford the accused person the opportunity to be heard on why he was absent and on whether he had probable deference on the merit. The need to observe this procedure assumes even greater importance bearing in mind that by and large accused persons of our community are laymen not learned in the law, and are often not represented by Counsel. They are not aware of the right to be heard which they have under the sub-section. It is, therefore, imperative that the law enforcement agencies make it possible for the accused person to exercise this right by ensuring that the accused, upon his arrest, is brought before the Court, which convicted and sentenced him, to be dealt with under the sub-section.

As stated before, the issue of the trial magistrate not exercising his discretion under the sub-section was not a ground of appeal but was only raised by the Court in the course of the hearing. Doubt was expressed as to the propriety of this move by the Court. We think, however, that there is nothing improper about this. The duty of the courts is to apply and interpret the laws of the country. The superior courts have the additional duty of ensuring proper application of the laws by the Courts below. In the instant case this Court is pointing out that the correct procedure as sanctioned by law i.e. Section 226(2), as construed hereinbefore, was not followed, and that this should be put right. We think that it was not only proper for this Court to adopt such a course, but that the Court had a duty to do so, provided that in carrying out that duty it affords adequate opportunity to both parties or their counsel to be heard on the matter as indeed was done in this case.

Again the view was expressed that since it was conceded that on the appellant's own assertion the defence of autrefois acquit was not available, then even if the trial magistrate were to exercise his discretion under the sub-section there was nothing to satisfy him that the appellant's absence was from causes over which he had no control. But as stated earlier, the extent of the appellant's assertion could not be pursued or investigated adequately or at all by this Court because the relevant court case file was not available. If it were available it might show that the appellant had reasonable grounds for believing that he was not obliged to attend the Court. Furthermore during the hearing before us it was not possible to be satisfied, in terms of the sub-section, whether or not the appellart had a probable defence on the merit; that could only be done by the trial Court.

In the final analysis we hold that failure to take the appellant before the trial magistrate to exercise his discretion under the sub-section was fatal in as much as it thereby denied the appellant his fundamertal right to be heard. Such failure vitiated the proceedings subsequent thereto. In order to put the matter right, therefore, we set aside the proceedings and judgement of the High Court, and remit the case to the trial Court with the direction that the appellant be brought before the magistrate to be dealt with in accordance with the provisions of Section 226 (2) of the Criminal Procedure Act. The appeal is therefore allowed to this limited extent.

Dated at DAR ES SALAAM this 12th day of March, 1997.

F.L. NYALALI
CHIEF JUSTICE

L.M. MAKAME
JUSTICE OF APPEAL

R.H. KISANGA
JUSTICE OF APPEAL

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

(M.S. SHANGALI)
DEPUTY REGISTRAR