IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., MASSATI, J.A. And ORIYO, J.A.)

CRIMINAL APPEAL NO. 174 OF 2008

1. FWEDA MWANAJOMA
2. JOHN DANIEL } **.....APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal for the Decision of the High Court of Tanzania at Dodoma)

(Masanche, J.)

dated the 12th day of December, 2006
in
Criminal Appeal No. 48 c/f 24 of 2006

JUDGMENT OF THE COURT

18th & 23rd March, 2010

MASSATI, J.A.

The Appellants were charged with the offence of armed robbery contrary to Sections 285 and 286 of the Penal Code (Cap 16 – RE 2002). After the close of the prosecution case and for some reasons which are not clear from the record, the trial court proceeded to write a judgment and convicted the Appellants and their colleagues in absentia under section 227

of the Criminal Procedure Act. They were all sentenced to 30 years imprisonment on 27/2/2001.

The 1st appellant was arrested and brought to the trial court on 19/3/2001. The second appellant was brought before the trial court on 21/3/2001. They started serving their sentences on the respective dates. In the meanwhile they were advised to apply for extension of time within which to appeal. Their application was dismissed by Masanche, J. (as he then was) on 12/12/2007. Aggrieved, they have preferred the present appeal.

Before us, the Appellants who were unrepresented, complained that the learned High Court judge erred in finding that their application disclosed no sufficient reason for delay and also erred in deciding that their intended appeal had "no chances of success"; given the doubtful evidence of identification adduced at the trial against them. They urged us to allow the appeal.

The Republic/Respondent in this appeal which was represented by Ms. Neema Mwanda, learned Senior State Attorney, did not oppose the appeal. She submitted that the affidavit filed by the first appellant in support of the application for extension of time (particularly paragraphs 3 and 4) disclosed sufficient cause for extension of time. She also agreed with the Appellants that it was wrong for the High Court to have discussed and decided the merits of the appeal in the application. She also pointed out several irregularities in the conduct of the trial court, after convicting the Appellants in absentia. Basically, she felt that on their appearance before the trial court after their arrest, the Appellants should have been given a chance to explain their absence and plead in mitigation before sentencing. She asked us to use our revisional powers under section 4 (2) of the Appellate Jurisdiction Act (Cap 141-RE 2002) and quash the proceedings in the two lower courts and order a retrial.

In their rejoinder submissions, the Appellants did not have much to say except to repeat that they were not given a chance to defend themselves after their arrests and before being sentenced.

We agree that this appeal has merit and Ms. Mwanda was right in supporting it. In the first place, according to paragraphs 3 and 4 of the affidavit of the 1st Appellant, Fweda Mwanajoma, it is apparent that the Appellants had prepared their petition in Kiswahili which was rejected by the District Registrar demanding that it be in English. Then they allege that there was a shortage of stationery at Manyoni Prison, with which to prepare their memorandum of appeal. There was no counter affidavit to oppose these allegations. Therefore they remained unchallenged. But what is worse they were not even considered during the hearing of the application. All that was argued and decided upon was whether the appeal had any chances of success. To that question the judge categorically determined that the appeal,..."stands no chance of success". On that ground, the Appellants were not even given a chance to react to.

An application for extension of time to appeal is founded on section 361 (2) of the Criminal Procedure Act which reads:

> (2)"The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation preserved in this section has elapsed."

In **R v YONA KAPANDA AND 9 OTHERS** (1988) TLR. 84, this Court held that:

> "In deciding whether or not to allow an application to appeal out of time, the court has to consider whether of not there are sufficient reasons not only for delay but also" sufficient reasons"
> for extending time during which to entertain the appeal."

As is clear, that section gives discretion to the High Court to extend time. The power has to be exercised judiciously; not capriciously or arbitrarily. This entails the court hearing the parties in full and giving reasons for rejecting their reasons. In this case, the High Court did not consider any of the reasons advanced by the Appellants for extending time

and did not afford them an opportunity to be heard on the reasons advanced by the state for opposing their application. That was patently wrong and is enough to nullify the ruling and orders of the High Court. But what is worse in this case was that the Appellants had advanced their reasons by way of affidavit. This was not opposed by any counter affidavit as should have been the case, but from the bar by the state attorney furnishing different reasons altogether. The High Court judge fell into the trap and made the fatal error that is now justifiably being complained against.

The above would have been sufficient to dispose of the appeal. But there are things that the Court and the learned Senior State Attorney have noted in the record which cannot be left without a word even if such points were not raised in this appeal. As the Court observed in "**9532 CPL EDWED MALINA v R** Criminal Appeal to 15 of 1985 (Unreported)

> ".....it is an elementary law that an appellate court is duty bound to take judicial notice of matters of law relevant to the case even if such matters are

> not raised in the notice of appeal or in the memorandum of appeal. This is so because such court is a court of law and not court of parties"

(See also **ELIKAS KAMAGI v R** (CAT) Mwanza Criminal Appeal No. 118 of (1992) (unreported)

After going through the record of the trial court we have noticed two glaring irregularities. The first is that the case was first heard by C.A. Komba, PDM. He took down all the prosecution case. Then E. E. M. Mwantemi DM took over and composed the judgment. Although section 214 (1) of the Criminal Procedure Act allows such a course, we think that on a proper construction of the section it requires that the reason for such action be on record which should also reflect that the successor magistrate had fully addressed himself on whether or not there was need to recall any witnesses. This was not done by the trial court. But this would have been rectified by the High Court when the matter came before it, had it adverted its mind to section 214 (2) of the Act. The section provides:

> "214 (2). Whenever the provision of subsection (1) apply, the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction was had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial"

This was not considered by the High Court.

In convicting the appellants in absentia in this case, the trial court was asked to do so under section 227 of the Criminal Procedure Act. Section 227 applies in situations where the accused does not show up after the close of the prosecution case. It has been held that where the accused absconds after the close of the prosecution case, section 226 (2) of the Criminal Procedure Act does not apply. (See **OLONYO LEMUNA AND LEKITONI LEMUNA v R** (1994) TLR 54. There is no provision similar to section 226 (2) under section 227, that affords an absconding accused to be heard as to the reasons for his absence or if he had a

probable defence on the merits of the case. The furthest that it could go is section 227 (b)

> "(b) where the accused appears on any subsequent date to which the proceedings may have been adjourned the proceedings under this section on the day or days on which the accused was absent shall not be invalid by reason only of his absence."

In our view this provision is obscure and intricate. Literally it means that if there was a conviction in absentia it is not invalid only by reason of the accused's absence. Unlike section 226 (2) of that Act where the absentee convict's rights to explain to the trial court why he was absent are clearly set out, no such rights are set out under section 227. In **MOSES MAYUNGA v R** (1993) TLR 115, the High Court held that an accused person convicted under section 227 (1) is estopped from complaining that he was not given a chance to defend himself. In our view this is a very unsatisfactory legal set up and we strongly recommend that

this obscurity be redressed immediately to bring the provision in line with the Constitution.

Article 13 (6) (a) of the Constitution of the United Republic of Tanzania enjoins the state to ensure that there is in a place a system whereby any person is afforded a fair hearing and the right of appeal against any decision on his rights. Let the Kiswahili version of the Constitution take us through:

> "(6) kwa madhumuni ya kuhakikisha usawa mbele ya sheria, Mamlaka ya Nchi, itaweka taratibu zinazofaa au zinazozingatia misingi kwamba wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kinginecho kinachohusika basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu na pia haki ya kukata rufaa au kupata nafuu nyingine ya kisheria kutokana na maamuzi ya mahakama au chombo kinginecho kinachohusika."

The official translation of the Article is:

> "(6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles namely:
> (a) When the rights and duties of any person are being determined by the court or any other agency, the 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."

The right to be heard fully is therefore protected under the Constitution and that right must be read into section 227 of the Criminal Procedure Act, in the absence of a provision as clear as section 226 (2).

But there is also a rule of statutory interpretation that if any section is intricate, obscure or doubtful the proper mode of discovering its true meaning is by comparing it with other sections, and finding out the sense of one clause by the words or obvious intent of another. (**STOWELL v ZOUCH (PLOWD)** 363 referred to in **BROOM's LEGAL MAXIMS** 10th edition at P 395). Reading sections 226 and 227 of the Criminal Procedure Act together we do not think that different intentions could be attributed to the legislature. This aspect was not considered and decided upon by the Court in **OLONYO LEMUNA's** case (supra) or by the High Court in **MOSES MAYUNGA's** case. We do not therefore think that the legislature could have intended to deprive an absentee accused under section 227, not to be heard upon arrest, as his colleague in section 226, because in both cases the end result is that convictions are entered in absentia. We do not also see how the prosecution would be prejudiced if the absconding accused in section 227 would be given an opportunity to be heard. In view of the above, we think then that as in the case of section 226 of the Criminal Procedure Act, where an accused is convicted in absentia after the close of the prosecution case, he shall have the same right as the one convicted under section 226 to be heard as to why he failed to appear, and

as to whether he has a probable defence on merit. Likewise we think the trial magistrate or judge shall have the same powers to set aside any exparte convictions so entered and if satisfied on the reasons for the absence, to proceed to hear him out on his defence.

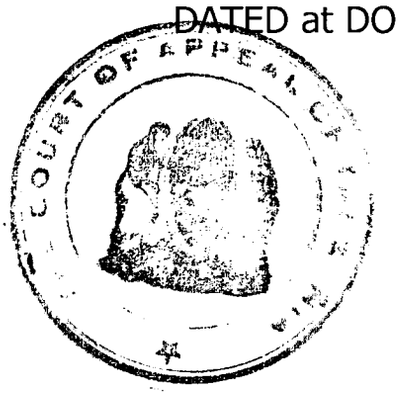
It follows therefore in our view that in this appeal, upon arrest the Appellants should have been asked to explain why they did not appear on the days the case had been adjourned and as to whether they had probable defences on merit. If the trial court and the High Court had carefully studied the record, they would have discovered that between the date the applicants had been advised of their rights to enter their defence and the date of judgment, the case had been adjourned 18 times, and in all but 3 occasions, the accused persons were invariably present or absent for explained reasons. Since section 227 of the Criminal Procedure Act confers discretionary powers to the trial court, it is doubtful whether such powers had been judiciously exercised in the circumstances.

In view of all the serious irregularities pointed out above, we agree with Ms. Mwanda, learned Senior State Attorney, that this is a fit case in

which to invoke the Court's revisional powers under section 4 (2) of the Appellate Jurisdiction Act. We therefore revise all the proceedings and ruling and order of the High Court, and quash them. We also quash all the proceedings, judgment and convictions and set aside the sentences imposed by the trial court. Considering the serious nature of the offence with which the Appellants are charged, we think it would be in the interests of justice if we order that the Appellants be retried denovo before another magistrate of competent jurisdiction.

We order accordingly.

DATED at DODOMA this 23rd day of March, 2010



E. A. KILLEO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR