IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MSOFFE, J.A., LUANDA, J.A. And MANDIA, J.A.)

CRIMINAL APPEAL NO. 328 OF 2009

DANIEL LUCAS .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tanga)

(Mussa, J.)

dated the 28th day of August, 2009
in
Criminal Appeal No. 81 of 2008

JUDGMENT OF THE COURT

8 & 8 April 2011

MANDIA, J.A.:

The appellant appeared before the District Court of Pangani at Pangani to face a charge of malicious damage to property c/s 326 of the Penal Code as amended by Act No. 12 of 1998. The trial District Court took the appellant's plea on 27/7/2001 after which the public prosecutor moved the court for an adjournment because investigations were not complete. The court ordered the appellant to

be remanded in custody. On 23/8/2001 the court granted bail to the appellant but trial failed to take off until 19/12/2001 when four witnesses testified for the prosecution. On the same date 19/12/2001 the prosecution closed its case and the court made a ruling that the appellant had a case to answer. Hearing of the case for the defence was adjourned to 9/1/2002.

On 9/1/2002 the appellant defaulted and a Warrant of Arrest was issued against him. There followed a spate of adjournments until 5/3/2002 when the trial Principal District Magistrate invoked Section 227 of the Criminal Procedure Act, 1985 and proceeded to write judgment in the absence of the appellant. On 27/3/2002 the trial Principal District Magistrate pronounced judgment in which she found the appellant guilty as charged, convicted him and sentenced him to twenty years in jail. A Warrant of Arrest was issued by the trial court which ordered that the appellant should commence his sentence on arrest. The trial court record does not show the date on which the appellant was arrested but the memorandum of appeal lodged by the appellant shows that the appellant applied for a copy

of the judgment of the trial court on 29/2/2008; and received the copy of judgment on 16/4/2008. This court had to call for the original record which, on examination, showed that there is on record a Warrant of Commitment on a Sentence of Imprisonment dated 27/3/2002, but there is no corresponding Warrant of Arrest for 27/3/2002 as ordered by the trial court. There is also no prison receipt to show that the appellant was received in prison. The exact date on which the appellant commenced serving his prison sentence cannot be determined. This date is important in determining limitation in the first appeal to the High Court, since there was a gap of eight years between conviction in the trial court and the appeal to the High Court. If the dates shown above are correct, the appeal from the trial court to the High Court was obviously out of time since there is no extension of time sought within which to file the appeal.

The appellant's appeal to the High Court was dismissed in its entirety. He filed this appeal in which raised two grounds, namely:-

(1) ***that*** *exhibits tendered in court in proof of the prosecution case were wrongly admitted and acted upon, and*

(2) ***that*** *the trial court erred in procedure in pronouncing judgment in absentia and entering a conviction without affording the appellant an opportunity to be heard.*

During the hearing of this appeal the appellant appeared in person, while the respondent/Republic was represented by Mr. Faraja Nchimbi, learned State Attorney.

We will tackle the first point on procedure. It is patently clear that the appellant was not afforded an opportunity to be heard before he was sent to prison. This Court has held in **FWEDE MWANAJUMA & ANOTHER vR,** Criminal Appeal No. 174 of 2008, (unreported), that the right of the trial court to proceed under Section 227 of the Criminal Procedure Act must be read synonymously with the right to give the accused so proceeded against the right to be heard in case of arrest after the conviction in

absentia. This is clearly stated in the **FWEDE MWANAJUMA's** case (supra) which said:-

> *"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."*

We are satisfied that the failure to afford an opportunity to the appellant to be heard after arrest is an error in procedure. This error was not addressed by the first appellate court, which did not also consider the question of limitation for a conviction entered on 27/3/2002 and appealed from six years later without there being an extension of time. We are therefore satisfied that there was no valid appeal before the High Court. Invoking our revisional jurisdiction we quash the proceedings of the High Court on appeal using our

revisional powers under Section 4 (2) of the Appellate Jurisdiction Act, Chapter 141 of the Laws. We also vacate the proceedings of the trial court which entered judgment in absentia. The case is remitted to the trial court for the court to proceed from the point it decided to put the appellant on his defence.

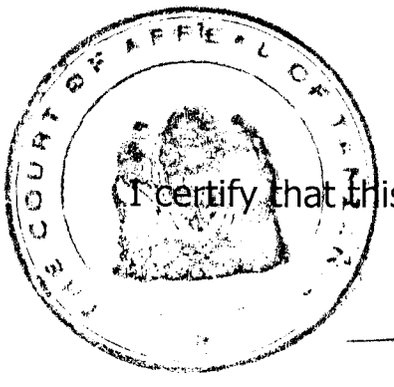
In view of this finding we do not see the need to deal with ground one in the memorandum of appeal as it relates to the merits of the appeal. This ground should be raised at the opportune moment.

DATED at TANGA this 8th day of April, 2011.

J.H. MSOFFE
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL



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

(E.Y. Mkwizu)
DEPUTY REGISTRAR