IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: KIMARO, J.A. MUGASHA, J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 577 OF 2015

MTWA MICHAEL KATUSA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania

At Mbeya)

(Levira, J.)

Dated 24th day of August, 2015

In

(DC) Criminal Appeal No. 49 of 2014

.....

JUDGMENT OF THE COURT

18th & 20th April 2016

MUGASHA, J.A.:-

In the District Court of Kyela the appellant was arraigned as here under:

> ***"STATEMENT OF OFFENCE:*** *Stealing by agent c/s 273 (b) of the Penal Code Cap. 16 R.E. 2002.*
>
> ***PARTICULARS OF OFFENCE:*** *That MTWA S/O MICHAEL KAFUSA charged on 6th day of October, 2011 at about 18.00 hrs*

at Mwenge area in Kinondoni District and Dar es Salaam Region, unlawfully did steal 10 pieces of cushion coach valued at Tshs. 1,101,599/= to wit he was entrusted by one ***LATON S/O KABAGE*** *to deliver it to one JOSEPH S/O SANGA who is living in KYELA District instead he didn't deliver the said properties as he was entrusted."*

The appellant did not plead guilty. The Prosecution paraded three witnesses who all gave their testimonial account in the presence of the appellant. Following the close of the prosecution, on 22.8.2013 in the presence of the appellant, the trial court decided that, the prosecution had established a prima face case against the appellant. The appellant informed the trial court that, he had two witnesses and the trial court scheduled the defence hearing to commence on 23.9.2013. However, from that date the appellant was at large and on 4.12.2013 the Prosecution prayed for judgment. On 23.12.2013, the trial Court in the absence of the appellant, delivered an ***"EXPARTE JUDGMENT"***, convicted the appellant and sentenced him to imprisonment for ten (10) years. It was also ordered that, the appellant should restore Tshs. 1,101,200/= being the value of the stolen goods.

The record is entirely silent and it is not known as to when the appellant was apprehended and sentence pronounced to him. However,

the record clearly shows that, the appellant unsuccessfully appealed to the High Court where the appeal was dismissed and conviction and sentence were sustained. Still aggrieved, the appellant has appealed to the Court. In the memorandum of appeal he has raised basically one ground namely:

> *That the trial court erred to convict and sentence him without a hearing.*

At the hearing of the appeal, the appellant was unrepresented and Ms. Rhoda Ngole learned State Attorney represented the respondent Republic. The appellant preferred initially to hear the submission of the learned State Attorney reserving a right to reply.

The learned State Attorney supported the appeal. She argued that, the District Court of Kyela lacked territorial jurisdiction to try the appellant because the charge sheet and the respective proceedings show that, the fateful incident occurred at Mwenge area in the District of Kinondoni within Dar es Salaam region. She submitted that, this was contrary to section 181 of the Criminal Procedure Act **[CAP 20 R.E. 2002]**

Addressing the ground of appeal, she argued that, the appellant was convicted and sentenced in *absentia* but it is not known as to when he was arrested and sentenced. She submitted that, section 226 (2) of

the Criminal Procedure Act was contravened because the appellant was not given opportunity to address the trial court if he had sufficient cause for the non-appearance which resulted into his conviction in *absentia*. She argued that, the omission was a procedural irregularity which occasioned injustice on the part of the appellant who was condemned without a hearing. She cited the case of **DANIEL LUCAS VS. REPUBLIC, CRIMINAL APPEAL NO. 328 OF 2009**, and urged the Court to nullify the proceedings of both trial and first appellate court, set aside conviction and sentence and release the appellant. Responding to the question raised by the Court, the learned State counsel replied that it was improper to commence criminal charges against the appellant as the claim is of a civil nature. The appellant had nothing in reply.

The issue for the determination is the validity and propriety of the trial and subsequent proceedings before the first appellate court.

In the matter at hand, we deliberately from the beginning reproduced the charge sheet, which explicitly shows that the offence of stealing by agent is alleged to have been committed at Mwenge area, within the District of Kinondoni in Dar es Salaam Region. However, as earlier intimated, the appellant was charged and tried at the District Court of Kyela. Jurisdiction is the initial issue which any Magistrate or

Judge must initially address before embarking on a trial. Jurisdiction is vested by law which means the authority of court to entertain, hear and determine cases subject to prescribed reference to territorial limits. Under section 40 of the Magistrates' Courts Act **[CAP 11 R.E. 2002],** a district court shall have and exercise original jurisdiction in all proceedings of a criminal nature in respect of which jurisdiction conferred on a district court by any such law for the time being in force. In this regard, in our jurisdiction, Part VI B of Criminal Procedure Act (supra) regulates among other things, place of trial whereby section 181 states:

> *"When a person is accused of the commission of any offence by reason of anything which has been done or of any consequence which has ensued, the offence may be inquired into or tried, as the case may be, by a court* ***within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued."***
>
> *[Emphasis supplied]*

In a nutshell, the trial will take place in a court which is within the local limits of the place where the offence is alleged to have been committed.

In the light of the stated position of the law, since the alleged stealing by agent is alleged to have occurred at Mwenge, the appellant ought to have been charged and tried at the District Court of Kinondoni and not the District Court of Kyela. As such, the District Court of Kyela embarked on a nullity to entertain and try Criminal Case No. 5 of 2012. The consequences shall be addressed at the later stage of the judgment.

Pertaining to the ground of appeal, it is the complaint of the appellant that, he was incarcerated before being given opportunity to explain reasons of absence as required under the law. In a criminal trial where the accused does not enter appearance section 226 (1) to (4) states:

> *(1) If at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court in which the order of adjournment was made, it shall be lawful for the court to proceed with the hearing or further hearing as if the accused were present; and if the complainant does not appear, the court may*

dismiss the charge and acquit the accused with or without costs as the court thinks fit.

(2) If the court convicts the accused person in his absence, it may set aside the 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.

(3) Any sentence passed under subsection (1) shall be deemed to commence from the date of apprehension and the person effecting such apprehension, shall endorse the date thereof on the back of the warrant of commitment.

(4) The court, in its discretion, may refrain from convicting the accused in his absence, and in every such case the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court."

The trial court is mandated to convict and sentence the accused in his absence pursuant to section 227 of the CPA which states:

"Where in any case to which section 226 does not apply, an accused being tried by a subordinate court fails to appear on the date fixed for the continuation of the hearing after the

close of the prosecution case or on the date fixed for the passing of sentence, the court may, if it is satisfied that the accused's attendance cannot be secured without undue delay or expense, proceed to dispose of the case in accordance with the provisions of section 231 as if the accused, being present, had failed to make any statement or adduce any evidence or, as the case may be, make any further statement or adduce further evidence in relation to any sentence which the court may pass:

Provided that–

(a) where the accused so fails to appear but his advocate appears, the advocate, subject to the provisions of this Act, be entitled to call any defence witness and to address the court as if the accused had been or is convicted, and the advocate shall be entitled to call any witness and to address the court on matters relevant to any sentence which the court may pass; and

(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 the matter under scrutiny, it is clear that, the appellant was not given an opportunity to explain reason of non-appearance before he was sentenced to imprisonment. In **DANIEL LUCAS VS. REPUBLIC** (supra) the Court reiterated that, the right of the trial court to proceed under section 227, of the CPA must be read synonymously with the right of accused to be heard if convicted in *absentia*. In **FWEDE MWANAJUMA & ANOTHER VS. R, CRIMINAL APPEAL NO. 174 OF 2008** (unreported) the Court when faced with a similar situation, the Court 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 case the end result is that convictions are entered in absentia. We do not see how the prosecution would be prejudiced if the

absconding accused in section 227 would be given an opportunity to be heard"

We subscribe to the above holding. In this regard, we are satisfied that failure to afford the appellant an opportunity to be heard before his incarceration was contrary to the principles of natural justice. This violated a fundamental right that no person shall be condemned without a hearing which is enshrined under article 13(6) (a) of the Constitution of the United Republic of Tanzania, **[CAP 2 R.E. 2002].** This error was raised as a 2nd ground of appeal in the first appellate Court. However, it was not addressed. Since, the appeal before the first appellate Court stemmed on null proceedings, there was no valid appeal before that Court.

We have also seriously considered the propriety of criminal charges filed against the appellant and a subject under scrutiny. The charge sheet and the entire evidence show that, the appellant was entrusted goods by **LATON KABAGE** with instructions to deliver the same to **JOSEPH SANGA.** In our considered view, the entire evidence on record is not in support of a criminal charge. Since it is alleged that the appellant did not deliver the entrusted goods, then the complainant ought to have

commenced a civil action against the appellant to seek specific performance.

In the premises, the trial court embarked on nullity to try a criminal charge against the appellant without requisite territorial jurisdiction. We invoke revisional powers under section 4(2) of the Appellate Jurisdiction Act **[CAP 141 R.E. 2002],** to nullify the entire proceedings of the trial and first appellate courts and quash and set aside the conviction and sentence. We allow the appeal and order the appellant to be released forthwith.

DATED at MBEYA this 19th day of April, 2016.

N. P. KIMARO
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. E. MZIRAY
JUSTICE OF APPEAL

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

E. Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL