IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MBAROUK, J.A., LUANDA, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 273 OF 2015

MOHAMED ABUBAKAR.....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Moshi)

(Munuo, J.)

Dated 12th day of May, 1998

in

Vide DC Criminal Appeal No. 77 of 1997

JUDGMENT OF THE COURT

9th & 15th February, 2016

LUANDA, J.A.:

The appellant was convicted in absentia and sentenced by the District Court of Moshi to 5 years and 3 years imprisonment for burglary and stealing respectively. The sentences were ordered to run concurrently. The evidence implicating the appellant with his two colleagues, one was also convicted in absentia, was that it was the appellant who had shown to

police two doors to have been stolen following the breakage. That finding and sentences were sustained by the High Court. Aggrieved, the appellant has preferred this appeal in this Court.

Mr. Oscar Ngole, learned counsel who appeared for the appellant argued that the prosecution case was built on the recovery of those two doors allegedly the appellant to have been shown to the police. Mr. Ngole submitted that the doors were not subject matter of the charge sheet. He went on, even PW1 did not mention them at all to have been stolen. The charge sheet and evidence on record are at variance. He submitted that the prosecution failed to prove its case. He cited no authorities to back up his proposition.

Mr. Hassan Nkya, learned Senior State Attorney who represented the respondent/Republic joined hands with Mr. Ngole's position. He went further and said the one who was found with the alleged doors one Paul Mtui was not called. It is doubtful if at all the doors were sent there by the appellant. He supported the appeal lodged by the appellant.

The charge sheet indicates what items were stolen after the house was broken. It shows water heaters, wash basin and flash system; nowhere is shown the doors to have also been stolen. It is clear therefore that the charge sheet and the evidence on record are at variance. Indeed, if the doors were also stolen, then the trial Court was duly bound to cause the charge sheet be amended as is provided under s. 234 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 so as to enable the accused person be aware as to the nature of the charge he was going to face also with a view to preparing for his defence. In **Isidori Patrice v. R.,** Criminal Appeal No. 224 of 2007 (unreported) the Court emphasized the need for a charge sheet to disclose not only the statement of the offence but also the particulars of the offence. The Court said:-

> *"It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. It is now trite law that the particulars of the charge shall disclose*

the essential elements or ingredients of the offence. This requirements hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the ***actus reus*** *of the offence with the necessary* ***mens rea****. Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law."*

In this case the Charge Sheet and evidence on record are at variance. Obviously the prosecution did not prove the charge they had preferred against the appellant. The prosecution had failed to prove its case. The conviction cannot stand. We entirely agree with both learned counsel.

Before we pen off we wish to make one observation in passing. The learned trial Resident Magistrate appeared to have not grasped the procedure as to how to deal with a convict who is arrested following his conviction and sentenced in absentia as is provided under s. 226(2) of the CPA. The section reads 226(2):-

> *226(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*

In this case when the appellant was arrested and appeared in Court, the trial learned Magistrate did not ask the appellant as to why he did not enter appearance. She rushed and called the appellant to give his defence. That was not correct. The appellant in terms of s. 226(2) of the CPA ought to have been given opportunity to be heard on why he absented himself. (See **Marwa Mahende V R.** [1998] TLR 249).

That said, the appeal is allowed. The conviction is quashed and sentence set aside. The appellant to be released from prison forthwith unless he is detained in connection with another matter.

Order accordingly.

DATED at **ARUSHA** this 11th day of February, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL