IN THE HIGH COURT OF TANZANIA

AT SONGEA

CRIMINAL APPEAL NO. 9 OF 2007

(ORIGINAL SONGEA DISTRICT COURT CRIMINAL

CASE NO. 181 OF 2006)

SOTELY MWAPINGA .... APPELLANT

VERSUS:

THE REPUBLIC .... RESPONDENT

12/3/2008 HEARING CONCLUDED

19/5/2008 JUDGMENT DELIVERED

RULING:

KAGANDA, J.

The appellant, Sotely Mwapinga was charged of two counts; House breaking and stealing. He was convicted in absence and sentenced to three years imprisonment plus six strokes of the cane. He has appealed against both the judgment and sentence. He has advanced four grounds of appeal among them is the denial of the name Sotely Mwapinga. He claims to have been convicted unheard and that his real name is Shefi Komba. The learned State Attorney; having made a thorough research has objected to the denial of the appellants name. He submitted correctly that, the appellant was prosecuted in the name of Sotely Mwapinga and that what he is trying to do

is just cheat in abuse to the process of the Court. He further argued that since the appellant did not dispute to his name before the trial court, he can't do that at the appellant Court.

I have examined the records of the proceedings before the trial Court and on 20th April 2006, the appellant was called for a plea to the charge. He pleaded not guilty to both counts. The appellant was then released on bail bond, he was bailed out by one Karua Msemakweli. He surrendered a copy of electoral card with his pass-port picture on it which was issued to him on 5/3/1976 at Tunduru. His letter of application to the Court read as follows:-

Mr. Karua Msemakweli,
Box 367 Mfaranyaki,
Songea Ruvuma,

Hakimu,
Mahakama Wilaya Songea,
Box - Songea,
Ruvuma.
24/4/2006

Mh: Hakimu Yahusu Ombi la kudhamini
Ndugu yangu Sotel – Mwapinga
Mw/Kiti – M. Herofwa

Mheshimiwa Hakimu rejea na kichwa cha habari hapo juu naomba kumdhamini ndugu yangu Sotel Mwapinga katika Mahakama yako tukufu ambaye ni ndugu yangu – Nitashukuru iwapo ombi langu litakubaliwa.

Ahsante,

Karua - Msemakweli

That letter is jiris et de jure, that is the truth of it is so described and the trial Magistrate had no cause to doubt that is why he granted bail to the appellant. The courts order was issued on 25th April, 2006 on that "the accused be released on bail bond of Tshs. 100,000/=. On 2nd May when the case was scheduled for mention the appellant reported late but was marked present later. On 2nd June, 2006 the appellant did not appear for hearing and the prosecution proceeded in his absence as provided for under section 227 of the criminal Procedure Act, 1985.

Considering all those facts, I take the learned State Attorneys submissions to be correct and true. The appellant did not dispute of his identity before the trial court and there is no room for that at this stage. The proceedings were legal as provided under section 226(1) of the Criminal Procedure Act, 1985 which states:-

> "If at the time or place to which the 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...."

Abiding to that Law there is no reason for this court to fault the trial court on the procedural Law. The appellants could have opted to put an application for setting aside the exparte decision as provided under section 226 (2). That Law States:-

> "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 appellants remedy could have been achieved by abiding to that Law and not by denying his identity. With those observations I find that the respondents objection have some merit and the appeal is summarily rejected for lack of merit.

S.S. KAGANDA

JUDGE

29/3/2008.