

**IN THE HIGH COURT OF TANZANIA
AT DODOMA**

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 26 OF 2016

*(Original Criminal Case No. 31 of 2015 of the District Court
of Singida District at Singida)*

JUMA S/O MAGHEMBE..... APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

17/11 & 08/12/2016

KWARIKO, J;

Formerly, appellant herein stood before the District Court of Singida charged with the offence of Stealing by Agent contrary to *section 265 and 273 (b) of the Penal Code [CAP 16 R.E. 2002]*. The prosecution alleged that between July and September, 2014 at Bio-Sustain Tanzania Limited Office within the District and Region of Singida being agent the appellant did steal cash money Tshs. 13,000,000/= the property of RIYAZ s/o HAIDAR which were entrusted to him by the said RIYAZ s/o HAIDAR for purpose of buying cotton.

After the appellant denied the charge the case proceeded on full trial. However, at the date fixed for trial to commence the appellant was recorded to have jumped bail hence it was ordered for the trial to proceed on 15/10/2015 in his absence as per *section 226 of the Criminal Procedure Act [CAP 20 R.E. 2002]*.

The prosecution case through PW1, SAJAD GULANI HAIDAR, PW2, YEGELA VASINELI and No. F5199 DC PETRO, PW3 evidenced that the appellant entered into agreement to buy cotton for BIO SUSTAIN Company and was given Tshs. 13,000,000/= into four installments but did not buy cotton as agreed. That, the appellant was given Tshs. 2,000,000/= on 29/6/2014, Tshs. 6,000,000/= on 8/7/2014 and Tshs. 2,000,000/= on 17/7/2014 as shown in exhibits P1 and P2 but he did not honour part of his bargain. That, by 17/3/2015 as the appellant had not honoured his promise the matter was reported to police.

At the end of the prosecution case the date for judgment was fixed to be 25/11/2015 while the warrant of arrest against the appellant remained in force.

On 28/10/2015 the matter was called in court where the appellant appeared after his surety who had been remanded in custody and released to look for him, had found him. On that date the appellant was given opportunity to give his defence before judgment was given.

In his defence the appellant said he only received Tshs. 11,000,000/= through vouchers (exhibit D1) from the complainant and bought cotton accordingly.

At the end of the trial the appellant was convicted and sentenced to imprisonment of four years with an order of compensation of Tshs. 13,000,000/= to the company (sic).

Having been aggrieved by the trial court's decision the appellant filed this appeal upon the following four essential grounds of appeal;

- 1. That, the appellant was convicted without being afforded opportunity of properly being heard.*
- 2. That, the trial court Magistrate did not give reasons to reject appellant's exhibits.*
- 3. That, the trial court Magistrate did not properly record appellant's defence evidence.*
- 4. That, the appellant's conviction did not observe standard set in criminal trial that of proof of the case beyond reasonable doubt instead standard of proof on balance of probabilities was used.*

At the hearing of the appeal the appellant adopted his grounds of appeal and left to the respondent's counsel to respond to them. Ms. Taji learned State Attorney appeared to argue the appeal on behalf of the

respondent Republic and opposed this appeal. Her reasons for this stance will be referred in the course of this judgment.

Therefore, this court is required to decide whether the appeal has merit.

As regards the first ground of appeal this court is in full agreement with the appellant that he was not given opportunity of sufficiently being heard. This is so because even if the appellant jumped bail but upon his arrest the trial court ought to have inquired reasons for such absence before any further step. In this case since the prosecution case was heard in the appellant's absence the trial court was duty bound to ensure the appellant knew what that case was all about. Hence, the trial court ought to hear from the appellant on the reasons for abscondment and if it was satisfied that he had sufficient cause for such abscondment it could have given him opportunity to choose if he wanted and desired the prosecution witnesses to be recalled for cross-examination after he was made aware of their evidence.

Or else the trial court upon application by the appellant could have recalled the prosecution witnesses to testify and be cross-examined as per the legal procedures.

Thus, by the trial court keeping quite without informing the appellant that important procedure and deciding the case without appellant being aware of the case against him amounted to denial of opportunity of fair trial. I get support in this view in the case of **MARWA MAHENDE V R**

[1998] T.L.R 249 which interpreted *section 226 (2) of the Criminal Procedure Act* (supra) where accused is convicted in absentia but upon arrest he is entitled to be heard on the reasons of his abscondment and if he has probable defence on merit. The situation is the same in the instant case.

Thus, this omission by the trial court vitiated the proceedings by the trial court and by this court's revision powers the same are hereby declared null and void and are quashed and all orders thereto set aside.

In the normal course of things this court would have remitted the case file to the trial court for retrial but upon consideration of the evidence on record this court has found that this case is more of a civil nature arising out of the agreement reached between the parties and not criminal in nature. Finally, having decided the first ground of appeal in the affirmative other grounds of appeal die naturally. Thus, the appeal is allowed and conviction is quashed and sentence and order of compensation is set aside. It is ordered that the appellant be released from prison unless he is otherwise lawfully held.

Order accordingly.



M.A. KWARIKO

JUDGE

08/12/2016

Judgment delivered in court today in the presence of the Appellant and Ms. Magesa learned State Attorney for the Respondent Republic and Mr. Nyembe Court Clerk.



M.A. KWARIKO

JUDGE

08/12/2016

Court : Right of Appeal Fully Explained.



M.A. KWARIKO

JUDGE

08/12/2016