

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM**

CRIMINAL APPEAL NO. 181 OF 2017

STANLEY PIUS.....1ST APPELLANT
AHMED SALUM2ND APPELLANT
VERSUS
THE REPUBLICRESPONDENT

JUDGMENT

MURUKE, J.

The appellants were charged and convicted with the offence of conspiracy and stealing contrary to section 384 and 265 both of the Penal Code Cap 16, R.E. 2002 and they were sentenced for seven (7) years imprisonment. Being dissatisfied with the decision of the district court, they appealed to this court advancing seven (8) grounds as listed in the petition of appeal

During hearing, upon the appellants' request, their grounds of appeal were admitted by the court as their submission in support of the appeal. The Learned State Attorney, Sabrina Joshi gave her observation on the appeal that;

The trial magistrate did not comply with section 226 and 227 of the Criminal Procedure Act, Cap 20, R.E.2002 for not giving to the

first appellant the right to be heard. When PW4 DC Danny was testifying the first appellant was not present in court. When he come back he was not afforded the right to be heard as to why he was absent. The remedy to this irregularity is to quash the proceedings and the judgment and order retrial. This can be done only when the court is convinced there is enough evidence to ground conviction.

Learned State Attorney, submitted that the conviction in this case is grounded on the caution statements P1 and P3 which were admitted without inquiry while they were objected. Exhibit P3 being confession of 6th accused person who admitted to have committed the offence together with the appellant has to be expunged from the record because it was admitted without following procedure. Thus court cannot order for retrial, therefore supported the appeal.

Looking at the record it is clear at page 40 of the typed of proceedings on 16th November, 2016 that defence case was heard in absence of 2nd accused and there is nowhere in record showing that was informed of his rights under Section 226(2) to explain his absence. Also he was not asked whether he had a probable defence to the charge or not. The above principal of

the law was explained in the case of **Christopher Olaisi v. Republic** Criminal Appeal No. 296 of 2011 CAT (unreported)

"In the absence of evidence on record to satisfy the Court that the appellant was informed of his rights under Section 226(2) to explain his absence and properly probed on whether he had a probable defence to the charge or not, it would be unfair to the appellant if the Court were to assume that the trial court complied with the dictates of Section 226(2) of the Criminal Procedure Act. The failure by the trial court to comply fully with Section 226(2), denied the appellant his fundamental right to be heard. This failure on the part of the trial court vitiated the proceedings".

As clearly stated by learned state Attorney, Sabrina Joshi, failure to follow procedure as directed under section 226 of the Criminal Procedure Act (supra) attracts orders for retrials. In the case of **Fweda Mwanajoma and Another v. Republic** Criminal Appeal No. 174 of 2008 cited by the State Attorney, at page 14 having satisfied that, section 226 of the Criminal Procedure Act (supra) was not complied with, court ordered a trial de novo as hereunder;

We also quash all the proceedings, judgment and convictions and set aside the sentences imposed by the trial court. Considering the serious nature of the offence with which the

appellant are charged we think it would be in the interests of justice if we order that the appellants be retried denovo before another magistrate of competent jurisdiction.

In the circumstances of this case, trial *de-novo* cannot be afforded because the only evidence which can be relied upon to ground of conviction is exhibit P3, the caution statement of 6th accused person, which exhibit is expunged on the court records. There is no evidence left on the court records to ground conviction.

Therefore, from the above premises, I decline to order trial *de novo* for lack of evidence. Instead I quash conviction, set aside the sentence and the appellants are set at liberty, unless otherwise they are withheld with other offences.

It is so ordered.



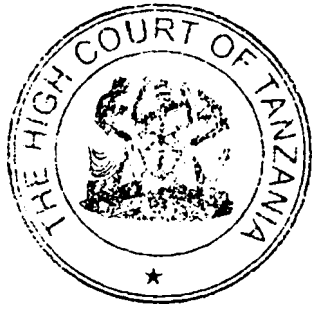
A handwritten signature in black ink, appearing to read "Z. G. Muruke".

Z. G. Muruke

JUDGE

24/04/2018

Judgment delivered in the presence of appellants in person, and
Christine Joan for the respondent



Z. G. Muruke

Z. G. Muruke
JUDGE
24/04/2018