IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(Kigoma District Registry)

AT KIGOMA

CRIMINAL REVISION 40 OF 2019

(Originating from Criminal Case No. 05/2019 of Kigoma District Court

Before E.Y. Baha - RM)

PETRO MASONDA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

17/10/2019 & 22/10/2019

MATUMA, J.

This is a revision by the court "***suo motto***" following some complaints by the applicant to the Criminal Justice Committee during their visit to prison.

The applicant complained about the manner in which he was convicted and sentenced.

Following such complaints, this court in the exercise of its Revision Powers under section 372 of the Criminal Procedure Act, Cap. 20 R.E. 2002 called the original records of the trial court to satisfy itself of the correctness, legality and propriety of the findings, conviction, sentence and proceedings generally.

At the hearing of this Revision the applicant was present in person while the respondent had the service of Mr. Robert Magige learned state attorney.

The applicant had no more than calling the court to assist him because he was convicted in absentia while he was sick at the time of his conviction and sentence. He added that after his conviction, no body arrested him but he personally went to report to police when he was back from his local herbs.

The learned State Attorney was of the view that this matter befits to be returned to the trial court to have the requirements under section 226 of the Criminal Procedure Act, Cap. 20 R.E. 2002 supra complied with.

He submitted that the applicant was present throughout the prosecution case but before he could enter his defence he absconded. The court thus convicted him in absentia and sentenced him to a custodial sentence of seven years but when he was arrested the records does not show that he was brought before the trial magistrate so that he could show cause of his absence in the defence case in which case the trial court would if satisfied with the reasons advanced set aside the conviction and sentence and take a defence or it would reject such reasons if not satisfied with strength in which case it would commit the applicant to prison.

The learned state attorney cited to me the case of **Marwa Mahende v. Republic [1998] TLR 249** in which the court observed the none compliance of section 226 (2) of the CPA supra and ordered the return of the records to the trial court to have the section complied with.

The applicant was charged with the offence of stealing contrary to section 265 of the Penal Code. He was also indicted with an alternative count of found in unlawful possession of stollen property contrary to section 311 of the penal code. The trial court found that the charge of stealing was proved beyond reasonable doubt and convicted the applicant with it. He was not thus convicted with the alternative count.

As rightly submitted by the learned State Attorney, section 226 (2) of the CPA supra was not complied. The remedy available under the circumstances is not limited to the return of the records to the trial court to have the section complied with. The court would do so if every thing on record is equal. If the court finds insufficiency of evidence, fatal procedural irregularities which are not curable and the incurable defective charge, it would not remit the record but would decide the matter on the available facts. See the case of **Norbert Komba v. The Republic, Criminal appeal No. 226 of 2008 (CA).**

In the instant case, despite the none compliance of section 226 (2) of the CPA supra, the alternative count was wrongly charged. In the statement of offence it was stated that;

> ***"Found in unlawful possession of stolen property contrary to section 311 of the Penal Code, Cap. 16 R.E. 2002"***

Section 311 of the Penal Code supra has nothing to do with found in unlawful possession of stolen property but "***receiving property stolen or unlawful obtained"***

While the provisions under which the applicant was charged provides deferent ingredients of the offence thereat such as to "***receive stolen property***", or "***retain"*** the same while

"Knowing or have reasons to believe it to have been stolen" or "unlawful acquired" the wordings in the statement of offence in the instant application suggests to be a charge under the provisions of section 312 (1) (a) or 312 (1) (b) of the Penal Code supra which is the relevant provision for a person who is found in possession of stolen property or unlawful acquired.

The applicant was thus wrongly charged in the alternative count. I am aware that the applicant was not convicted with that count but the same to be put in the charge sheet as an alternative count in such a manner as herein above explained, it was prejudicial to the applicant. If we order him to be taken back to the trial court to show cause of his absence, he may be subjected to a defence over the charge which is defective in case the trial magistrate sets aside the exparte judgment and hear the defence.

Not only that but also, the trial court meted to the applicant an illegal sentence. The offence of stealing under section 265 of the Penal Code, has a maximum penalty of seven years. The principles of sentencing requires the convict to benefit the minimum sentence. He cannot therefore be sentenced to the maximum sentence unless some good reasons are advanced on record as to why he did not deserve the minimum sentence.

In the instant case, the trial magistrate sentenced the applicant to the maximum penalty without stating the grounds thereof.

Furthermore, under section 170 (1) (a) of the CPA supra the trial court has no jurisdiction to pass a sentence which exceeds five years imprisonment term unless the offence under which he has been convicted is specified in the schedules of the minimum sentence. Act and the subordinate court has powers to hear such

an offence. **See Mwanzo Wilson @ Bunga v. The Republic, Criminal Appeal No. 267 of 2016 (CA).**

I have further taken note of the complaint of the applicant that upon his arrest he was subjected to torture and sustained severe injuries which necessitated him to seak for local herbs. Such complaint was affirmed by PW5 H. 8232 D/C Michael Mnyamba who was necessitated to take the applicant to Mlela Health Center where he was admitted for the seriousness of the injuries he sustained.

On record there is a PF3 of the applicant which indicates the various injuries sustained.

That means the applicant was unjustifiable and illegally punished by the alleged citizens including the property owners which was allegedly stolen. So he was taken to police for him to be dealt and punished for the second time.

It is my view that once, criminals who assaults suspects of criminal offences on the pretexts of "mob justice" are not arrested and charged for the assault, such assault should be taken into consideration by the court in sentencing when the offence so convicted is not scheduled in the minimum sentence.

In the instant application the applicant suffered a lot even before his conviction and sentence and I would take that into account.

Lastly the applicant's cautioned statement exhibit A2 was produced in Evidence by PW5 supra. At page 24 of the proceedings, such statement was read loudly in court before it was cleared for admission and actually be admitted. That was contrary to the legal requirements as it was decided in the case of **Robinson Mwajisi and 3 others v. Republic (2003) TLR**

218. In the circumstances, even if we decide the case to be remitted back to the trial court, such statement has already been contaminated as such and has already become with no evidencial value.

With all the above discrepancies and defects together with the time which the applicant has already stayed in prison, I quash his conviction and set aside the sentence. I order his immediate release unless otherwise held for some other lawful cause.

I have further noted that the trial magistrate convicted one Elizabeth d/o Ally Masesa who stood as surety of the applicant. She was sentenced to pay Tshs. 2,000,000/= or to serve 18 months imprisonment term.

The learned state attorney conceded that the procedure followed by the trial magistrate to convict and sentence the applicant's surety was illegal. He submitted that there was no evidence to show that the surety received a summons to show cause before she could be condemned.

Without dwelling much on this, I agree with the observations of the learned State Attorney that the procedures to deal with the surety under section 160 of the CPA with all its subsections were not completely adhered. The sentence meted to the surety of 18 months is not provided under the law as the maximum sentence the court could pass is Six months.

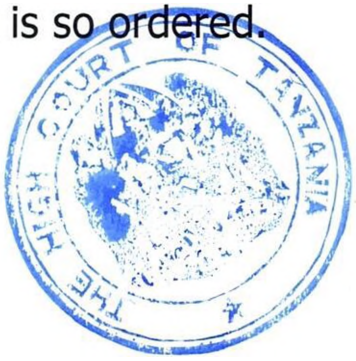
In the case of **Republic v. Omari Kibwana (1986). TLR 16** this court had held;

> ***"Where the accused fails to appear on the appointed date it is preferable not to forfeit the bond of the surety too quickly, it is best to adjourn and allow the***

surety time to find the accused if he thinks he can get him"

In the circumstances, the conviction of Elizabeth d/o Ally Masesa is as well quashed and sentence set aside. She should be released forthwith if held in custody unless held for some other lawful cause.

It is so ordered.



A. Matuma,

Judge,

22/10/2019