IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 24 OF 2021

(Arising from original RM Criminal Case No. 15 of 2019 of Bukoba Resident Magistrate's Court dated on 28th of April, 2020 and thereafter was granted leave to file a Notice of Appeal and appeal out of time in Misc. Criminal Application No. 93 of 2020 dated on 11th day of February, 2021, before Hon. F. H. Mtulya)

KABITO SARAPION.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

30.03.2022 &14.04.2022

NGIGWANA, J.

The Appellant Kabito Sarapion was charged in the Resident Magistrate Court of Bukoba at Bukoba with the offence of Trafficking in narcotic drugs contrary to section 15A (1) and (2) (c) of the Drugs Control Act as amended by section 9 of the Written Laws (Miscellaneous Amendments) Act No. 15 of 2017.

It was adduced in the charge sheet that on 08/01/2019 during 15:30hours at TRA Barrier Kyaka area within Misenyi District in Kagera Region, the appellant was found trafficking 5119 grams of narcotic drugs namely Khat edulis commonly known as "**mirungi**". The appellant denied the charge. Before the commencement of the hearing, the appellant jumped bail,

therefore, the hearing proceeded under section 226 (1) of the Criminal Procedural Act, Cap. 20 R: E 2019. In that respect, the prosecution side called three (3) witnesses and tendered six (6) exhibits. On 28/04/2019, upon the close of the prosecution case, the trial court was convinced that the case against the appellant was proved beyond reasonable doubt therefore, the appellant was convicted and sentenced absentia to thirty (30) years imprisonment with direction that the sentence shall commence on the date of the apprehension of the appellant.

On 13/07/2020, the appellant was arrested and taken to court where the judgment was read over to the appellant. The Magistrate indicated that section 226(3) of the Criminal Procedure Act Cap. 20 R: E 2019 complied with.

The decision did not amuse the appellant thus, he has come to this court to challenge the trial court's decision. In his petition of appeal, he has raised five (5) grounds of appeal.

(1) *That exhibit P1 to wit; certificate of seizure was not read to the appellant contrary to the law.*
(2) *That exhibit P2 was not recorded in statutory basic period of four hours, and was not read to the appellant.*
(3) *That the Chief Chemist Report was inadequate and un-procedurally admitted*
(4) *That exhibit P6 was received in contravention of the law since it was not read to the appellant, and was not tendered by the author or custodian of the same.*

(5) *That no Weight Measures Agency Report was brought to support the charge.*

Wherefore, the appellant prays that the appeal be allowed, conviction quashed and sentence of 30 years be set aside.

When the matter came up for hearing, the appellant appeared in person and unrepresented while the respondent enjoyed the legal services of Mr. Grey Uhagile, learned State Attorney.

Exercising his right to begin to amplify the grounds of appeal, the appellant who is a layperson simply adopted the grounds of appeal and urged the court to consider them and set him free. Reading the grounds of appeal between the lines, they can be summarized into one ground;

That the trial Magistrate erred in law by admitting six (6) exhibits contrary to the law.

On his part, initially Mr. Uhagile expressed his firm position that the respondent is not opposing the appeal. Submitting on the grounds of appeal, Mr. Uhagile argued that he has gone through the trial court proceedings and judgment and found that all six (6) exhibits to wit; certificate of seizure (Exh P1), Appellant's cautioned statement (Exh.P2), Weight Measure Agency Report (Exh.P3), Inventory form (Exh.P4), One bag alleged to have been used to keep the drugs(Exh. P5) and the Government Chemist report (Exh.P6) were unprocedurally admitted as the appellant was not afforded an opportunity to object the same before being admitted. The learned counsel referred this court to the case of **EX-D 8656**

CPL Senga Iddi Nyembo and 7 Others versus Republic, Criminal appeal No. 16 of 2018 where the Court of Tanzania insisted the right for the party to be given the right to be heard before adverse action is taken against him or her. Mr. Uhagile further argued that, all six exhibits which were un procedurally admitted deserve to be expunged from the record, and that, after expunging all six exhibits, there will be no evidence in support of the charge. He ended his submission urging the court to allow this appeal, quash the conviction and set aside the sentence of thirty (30) years imprisonment imposed against the appellant. The appellant had nothing to add. Having heard the submissions by both parties, I would like to state that it is trite that, even where the Appeal has not been opposed by the respondent/Republic, an appellate court is not exonerated from performing its duty as the first appellate court.

In the matter at hand, the record revealed that on 23/03/2019 the appellant was granted bail, and went on attending to the court until 04.02.2019. From there, the appellant jumped bail. On 23/03/2020 the prosecution side prayed to the court to proceeded with the hearing under section 226(1) of the CPA on the ground that the appellant was nowhere to be seen. The prayer was granted. Since the matter proceed in absence of the appellant in other words, the appellant was not there so as to be afforded an opportunity to object the admission of the exhibit or otherwise, before being admitted as exhibit, thus the grounds of appeal raised do not appear to have emanated from the trial court proceedings and the judgment.

However, upon careful perusal of the trial proceedings, I discovered the existence of procedural irregularities in relation to compliance of section 226

of the CPA. In that respect, I re- opened the proceedings and invited the parties to address me as whether section 226 of the CPA was duly complied with before and after being invoked. Mr. Uhagile on his side submitted that, having carefully gone through the trial court proceedings, he discovered that the said provision was prematurely invoked, however, after the apprehension of the appellant, the provision of section 226 (2) of the CPA was not complied with as the appellant was not afforded the right to be heard thus the remedy is to nullify the proceedings and order retrial. To support the position, the learned State Attorney referred me to the case of **Adam Angelius mpondi versus the Republic,** Criminal Appeal No.180 of 2018 CAT (Unreported).

On his side, the appellant said, when the Predecessor Magistrate was transferred, he was not informed as to who was the Successor, and he made follow- ups but he was informed that the case file was misplaced, hence he was allowed to go home on instructions that, when the case file is found, he would be informed personally through telephone number or through his sureties. He added that, he was not informed until when he was re-arrested, taken to court and finally sent to prison without being given opportunity to explain why he was absent.

Having heard submission by both parties, the issue for determination is to whether section 226 was complied with or otherwise, before and after being invoked.

Section 226(1) of the Criminal Procedural Act, Cap. 20 R: E 2019 provides;

*"**Where at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court in which the order of adjournment was made, it will be be lawful for the court to proceed with the hearing as if the accused were present;** and if the complainant does not appear, the court may dismiss the charge and discharge the accused with or without costs as the court things fit"*

In the matter at hand, the trial court was satisfied that the appellant jumped bail, therefore allowed the hearing to proceed under section 226 (1) of the CAP and finally, the appellant was convicted and sentenced absentia.

226(2) of the CPA states that;

*"Where 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 the matter at hand, when the Appellant was brought before the trial Magistrate, he was not properly heard as required under section 226 (2) of the CPA. The trial Magistrate did not allow the prosecution side to reply on what has been submitted by the Appellant. What the trial Magistrate did was to read the judgment to the appellant.

The wordings of Section 226 (2) of the CPA require the court to hear the appellant and properly record the reasons as why the appellant/accused did

not enter appearance. The trial Magistrate must also hear and properly record the reply from the adverse party, thereafter, enter a ruling on whether the reasons given are sufficient or not. See the case of **Olonyo Lomuna and Another versus Republic** [1994] TLR 54.

Indeed, the appellant who was convicted and sentenced absentia, upon his appearance in court, had the right to be heard on why he has been absent and the court must rule out on whether such reasons were sufficient or not and as to whether he had a probable defense on the merit cause. See the case of **Abdala Hamisi versus Republic**, Civil Appeal No. 26 of 2005 CAT (unreported). It is unfortunately that, the record does not reflect that section 226 (1) CPA was complied with. The discretion was not judiciously exercised. In the case of **Adam Mpondi (Supra**), the Court of Appeal had this to say;

"This court has repeatedly emphasized on the need of the trial Magistrate or judge to exercise a discretionary power enshrined under section 226 (2) of the CPA by affording a right to be heard to the re-arrested accused person who was convicted and sentenced absentia. This accords the accused person a chance to explain away the reason of his absence and for the trial court to assess whether the absence was due to causes beyond the control of the accused and he had a probable defense on the merit"

It goes without saying that failure by the trial court to exercise the discretion under section 226 (2) of the CPA, was fatal as it denied the appellant his fundamental right to be heard and hence vitiated the proceedings.

It is also worth noting that the discretion to proceed in the absence of the accused must be exercised with caution. The court must satisfy itself that there are sufficient grounds to conclude that that person has absconded and is unwilling to participate in the trial. Possible measures to secure the attendance of the accused must have taken.

In the case at hand, the trial court declared that the appellant jumped bail on 03/03/2020, whereas Warrant of arrest was issued on 23/03/2020, and on the same date the hearing commenced under section 226 (1) of the CPA. The appellant's sureties were never called to show cause as to why legal action should not be taken against them. In that respect, it is apparent that the trial court did not take possible measures to secure the attendance of the appellant before invoking section 226(1) of the CPA. In my view, taking into consideration of the nature of the offence, sentence in case of conviction, and the right to be heard as one of the major ingredients of a fair trial, it was not justifiable for the trial court to proceed under section 226 (1) of the CPA without first taking all reasonable measures to secure attendance of the appellant, and having proceeded, it was not proper, upon apprehension of the appellant to proceed reading the judgment to him without affording him the right to be heard pursuant to section 226 (1) of the CPA.

The Court of Appeal has in numerous decisions emphasized that courts should not decide matters affecting rights of the parties without according them an opportunity to be heard because it is a cardinal principle of natural justice that a person should not be condemned unheard. See **D.P.P. v. Sabina Tesha & Others [1992] TLR 237**, **Transport**

Equipment v. Devram Valambhia [1998] TLR 89 and **Mbeya-Rukwa Autoparts and Transport Limited v. Jestina George Mwakyoma [2003] TLR 251, ECO-TECH (Zanzibar) Limited v. Government of Zanzibar, ZNZ Civil Application No. 1 of 2007** (unreported), just to mention a few.

The right to be heard is one of the fundamental Constitutional rights as it was stated in the case of **Mbeya-Rukwa** (supra) at page 265 thus:

In this country, natural justice is not merely a principle of the common law, it has become a fundamental constitutional right Article 13(6)(a) includes the right to be heard among the attributes of equality before the law and declares in part:

> *(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu."*

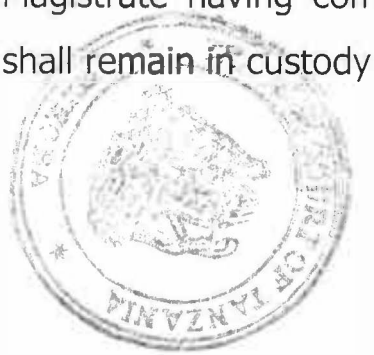
The right of a party to be heard was similarly discussed in the case of **Abbas Sherally & Another v. Abdul Sultan Haji Mohamed FazaIboy**, Civil Application No. 33 of 2002 (unreported) in which the Court among other things observed as follows:

"The right o fa party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been

reached had the party been heard, because the violation is considered to be a breach of natural justice."

Under the circumstances of this case, the only remaining option is to nullify the proceedings and the judgment and set aside the sentence of 30 years mated against the appellant as I do. The proceedings of the trial court from 12/11/2019 (Page 9 of the typed proceedings) up to 25/03/2020 (Page 19 of the typed proceedings, the judgment delivered on 28/04/2020 absentia and read to the appellant on 13/07/2020, are hereby nullified, the appellant's conviction is hereby quashed, and the sentence of thirty (30) years meted against him is set aside.

For the interest of justice, I order an expedited retrial before another Magistrate having competent jurisdiction. In the meantime, the appellant shall remain in custody pending trial. It is so ordered.

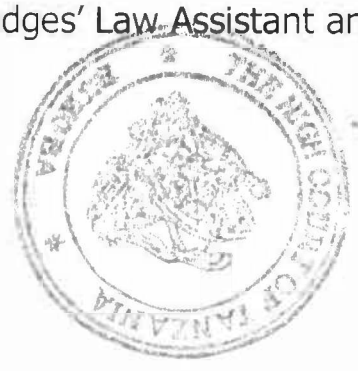


E. L. NGIGWANA

JUDGE

14/04/2022

Judgment delivered this 14th day of April, 2022 in the presence of the appellant, Mr. Uhagile Gerey, learned State attorney, Mr. E.M. Kamaleki, Judges' Law Assistant and Ms. Tumaini Hamidu, B/C.



E. L. NGIGWANA

JUDGE

14/04/2022