IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANAYRA

AT BABATI

HC. CRIMINAL APPEAL NO. 6 OF 2023

(Originating from Economic Case No. 20/2021 in the District Court of Babati at Babati)

ELIUS LOIRUCK LOIBANGUTI @ LEKOLO.....APPELLANT

VERUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

21st February & 3rdth March, 2023

Kahyoza, J.:

Elius Loiruck Loibanguti @ Lekolo, (the appellant) was charged and convicted with two counts of unlawful possession of government trophies. He was tried, convicted and sentenced *in absentia*. The trial court imposed a 20 years' imprisonment sentence for each count and ordered the sentence to run concurrently. Aggrieved, the appellant appealed against the conviction and sentence.

The appellant charged with the offence of unlawful possession of government trophies contrary to section 86(1) and (2) (b) of the Wildlife Conservation Act 5/2009 read together with paragraph 14(d) of the First

Schedule to and section 57(1) and 60(2) of the Economic and Organized Crime Control Act Cap. 200 [R.E. 2019]. The appellant pleaded not guilty. He was admitted on bail. After trial court conducted the preliminary hearing, the appellant absconded. Thus, the trial court tried the case from 10.5.2022 to 7.6.2022 in his absence. The trial court delivered the judgment on the 10.6. 2022 when it convicted and sentenced the appellant in absence.

Later, the police apprehended the appellant and brought him to Court on 29.6.2022. The trial court read the sentence to the appellant and let him to go to prison to serve the sentence. The appellant, appealed against the conviction and sentence by adducing five grounds of appeal that-

1) That, the learned trial Magistrate grossly erred both in law and in fact to convict and sentence the appellant 20 years imprisonment after failing to note that the charge sheet which was tendered in court and convict the appellant, are differ, since in the charge sheet it read criminal case No. 20/2021 and, in the proceeding, and judgments it read Economic Case No. 20 of 2021.
2) That, the learned trial magistrate grossly erred both in law and fact to convict and sentence the appellant after failing to comply with Mandatory provision of Section Na, 192 CPA 1985 R. E. 2002, also

there was no clear evidence to prove whether the appellant Absconded the court and the action was taken against sureties.

3) That, the learned trial magistrate grossly erred both in law and in fact to convict and sentence the appellant without considering my defense which I was not given time.

4) That, the learned trial magistrate grossly erred both in law and fact to convict and sentence the appellant by believing on the prosecution side that the appellant absconded the court and yet the court new that the appellant was sick, therefore the sureties were to be summons before the case starts, but the matter proceeded which is against the law.

5) That, the learned trial magistrate grossly erred both in law and fact to convict and sentence the appellant and in fact failed to comply with mandatory provision of section 312(2) of the CPA the trial magistrate failed to specify the section of the law under which the appellant was convicted in both coots.

The appellant submitted briefly regarding his grounds of appeal literary reproducing his grounds of appeal in Kiswahili. Mr. Peter Otafu, learned State Attorney, who represented respondent, the Republic supported the appellant's third ground of appeal. He submitted that after the appellant

jumped bail, the Court tried him in absence under S.226 (1) of the Criminal Procedure Act, [Cap. 20 R.E. 2022] (the **CPA**). After trial, the court convicted and sentenced the appellant in the absence. He added that upon the appellant's arrest, the record does not show that the trial court complied with sub-section (2) of section 226 of the **CPA**.

The learned state attorney was emphatic that the trial court was required, upon the appellant's arrest, to comply with s.226 of the Criminal Procedure Act, [Cap. 20 R.E. 2022] (the **CPA**) by affording him an opportunity to account for his absent during trial. He submitted after hearing the appellant the trial court was bound to make a finding whether the appellant accounted for his absence. Upon being satisfied that the appellant was absent for good cause, the trial court would have heard the appellant.

He submitted that fair comply with sub-section (2) of section 226 of the CPA for is this Court to uphold the appeal and order the trial court to hear the appellant. To support his contention, the Learned State Attorney cited the case of **Hussein Raphael, Seif Hussein, and Gideon Barabara v. R.**, Criminal Appeal No. 280 of 2008 (CAT- Unreported).

Undisputedly, the appellant was tried, convicted and sentenced in *absentia*. He jumped bail after the trial court conducted the preliminary

hearing. The record shows that upon his arrest, the appellant was produced before the trial court on 29.6.2022. The trial court read the sentence to the appellant and ordered him to serve his sentence.

I am in total agreement with the State Attorney's submission that the law requires that upon apprehension of a person convicted and sentenced in *absentia,* he should not be taken straight to serve his sentence but must be brought before the trial court to enable the court to exercise the discretion to set aside he conviction or not. This position was taken in the case of **Marwa Mahende vs R.,**[1998] TLR 249, cited by the Learned State Attorney. For the sake of clarity, I wish to reproduce section 226(2) of the CPA. It provides that: -

> *S. 226.-(1).....*
>
> *(2) If 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.*

The effect of ***section 226(2) of the CPA*** is that, the accused person convicted in *absentia*, has a right upon his arrest to appear before the court to give reasons for his absence. If, the accused person offers sounding reasons, the court has to set aside the conviction and sentence and afford

him an opportunity to defend himself. In **Marwa Mahende v. R.,** (supra) the Court of Appeal construed S. 226 (2) of the CPA had the following to say-

> *"In our view the subsection is to be construed to mean that an accused person who is arrested following his conviction and sentence in absentia, should be brought before the trial court ... The need to observe this procedure assumes even greater importance bearing in mind that by and large accused persons of our community are laymen not learned in the law, and are not often represented by counsel. They are not aware of the right to be heard which they have under the sub-section, it is, therefore, imperative that the law enforcement agencies make it possible for the accused person to exercise this right by ensuring that the accused, upon his arrest, is brought before the court, which convicted and sentenced him, to be dealt with under..."*

The remedy of the trial court's failure to comply with the procedure laid down in **Marwa Mahende** (supra) may be either to render the proceedings from the day the accused was absent and the subsequent judgment, a nullity as per the Court of Appeal's decision in **Abdallah Hamis vs R., CAT** Criminal Appeal No. 26 of 2005 or to remit the case to the trial court with the direction to deal with the appellant in accordance with the

provisions of section 226(2) of the **CPA** as held in the case of **Hussein Raphael, Seif Hussein, and Gideon Barabara v. R.**, (supra).

The Court of Appeal held in **Abdallah Hamis vs R.,** that-

> *".... Failure by the learned trial magistrate to exercise his discretion under the subsection (226(2) of the CPA) was fatal in as much as it thereby denied the appellant his fundamental right to be heard. Such failure vitiated the proceedings subsequent thereto..."*

Whereas in the in the case of **Hussein Raphael, Seif Hussein, and Gideon Barabara V. R.**, (supra), the Court of Appeal held that-

> *"In the interest of justice and in order to uphold the 2nd appellant's fundamental right to a fair trial under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 the right to be heard being paramount, we hereby set aside the proceedings and judgment of the High Court and remit the case to the trial court with a direction that the second appellant be brought before the magistrate to be dealt with in accordance with the provisions of Section 226(2) of the Criminal Procedure Act. The appeal in respect of the second appellant is therefore allowed to this limited extent".*

Given the above position of the law, I uphold the appeal that the trial court denied the appellant a right to be heard as provided by sub-section (2) of section 226 of the CPA. A right to be heard is the basic rights a person should not be denied. For that reason, I remit the case file with a direction

for the trial court to dealt with the appellant in accordance with sub-section (2) of section 226 of the CPA and to so immediately.

Appeal allowed to the limited extent as demonstrated. I order accordingly.

J.R. Kahyoza
JUDGE
3rd March, 2023

Court: Judgment delivered in the presence of the appellant and Ms Grace Mgaya for Respondent. B/C Ms Dora Mollel present.

J.R. Kahyoza
JUDGE
3rd March, 2023