

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA**

**IN THE SUB-REGISTRY OF MANYARA
AT BABATI**

CRIMINAL APPEAL NO. 20 OF 2023

(Originating from Criminal Case No. 124/2021 in the District Court of Babati at Babati)

BRUNO CHISOTI.....APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

20th & 27th July, 2023

Kahyoza, J.:

Bruno Chisoti, (the appellant) was charged and convicted with the offence of trafficking narcotic drugs contrary to Section 15A (1) and (2)(c) of **the Drugs Control and Enforcement Act**, [Cap 95 R.E 2019] (the DECA). The appellant pleaded not guilty to the charge. After full trial, the trial court believed the prosecution's case and convicted the appellant. The appellant did not make a defence as the trial court found that he jumped bail.

Aggrieved, the appellant appealed against the conviction and sentence, raising five grounds of complaint. The appeal raises five issues as follows-

1. Was prosecution relied upon contradictory and weak evidence?
2. Did the prosecution prove the case beyond reasonable doubt?
3. Was the appellant denied the right to be heard?
4. Did the trial court transgress the law by not inviting the surety to show cause?
5. Did the trial court err to allow a witness not listed during the preliminary hearing to testify.

The prosecution arraigned the appellant with the charge of pleaded trafficking narcotic drugs contrary to Section 15A (1) and (2)(c) of **DECA**. He pleaded not guilty to the charge and the full trial ensued. The prosecution summoned a total of six witnesses. Five testified in the presence of the appellant and one, last witness testified in the absence of the appellant. The record shows that after the trial court heard the fifth witness on 5.12.2023, fixed another hearing date on 13.12.2023.

On 13.12.2022, when the matter was scheduled for further hearing, the appellant did not appear. Thus, the trial court proceeded with the trial under Section 226(1) of **the Criminal Procedure Act**, [Cap 20 R.E 2022] (the CPA). On that day, the trial court heard a testimony of the prosecution's last witness, E. 4441 Sgt. Elias (**Pw6**) and the prosecution prayed to close its case. Following the closure of the prosecution's case, the trial court scheduled the judgment date on 21.12.2022. On the date fixed for judgment, the

appellant entered appearance. When called upon to account why he did not appear on 13.12.2022, the appellant stated that he misheard the date. He argued that he heard that the case had been adjourned to 15.12.2022 and not 13.12.2023. He told the court that he entered appearance on 15.12.2023 when the court clerk informed him that the case was fixed for judgment on 21.12.2022, and that is why he appeared on the judgment date.

After hearing the appellant's account for his non-appearance, the trial court found no merit in his explanation. It proceeded to deliver its judgment without affording him an opportunity to give his defence.

At the hearing, Mr. Chami, learned advocate appeared for appellant and Ms. Blandina, learned state attorney appeared for the respondent, the Republic. The appeal was heard orally. As shown above the appellant raised five grounds of appeal, which culminated to five issues. For reason which will unveil itself, I chose to commence with the third ground of appeal, whether the appellant was denied the right to be heard.

Was the appellant denied the right to be heard?

The appellant complained in the third ground of appeal that the trial court erred in law for not asking him if he wished to defend himself under oath and to call witnesses. Mr. Chami, the appellant's advocate,

submitted briefly that, the trial court did not afford the appellant who had no representation, neither the right to defend himself nor to call witness, if he so wished. For that reason, the trial court contravened the clear provision of the law which is Section 231 of the CPA.

On her part, Ms. Blandina Msawa, the State Attorney, supported the appeal on the ground that the trial court did not follow the procedure under Section 226(2) of the CPA. She submitted that trial court did not give the appellant an opportunity to defend himself. That the error committed was fatal, she argued. She prayed the proceedings to be remitted to the trial court under Section 388 of the CPA to the appellant to defend himself.

I concur/agree with the learned advocate and state attorney, that indeed the trial court infringed the appellant's rights to be heard and the right to fair trial. Indisputably, the appellant did not defend himself as he defaulted to enter appearance on the date when the case was fixed to with proceed hearing of the prosecution's case. As he was absent, the trial court ordered the trial to proceed under Section 226(1) of the CPA. The trial court acted within the ambient of the law.

The hiccup featured when the appellant appeared before the trial

court on the judgment date. It is on record that when the appellant appeared, the trial court called upon him to account for his absence. I contemplate that the trial court acted under Section 226(2) of the CPA. The appellant told the court that he misheard the trial court that the hearing will proceed on 15.12.2023 and not on 13.12.2023. He went further that, on 15.12.2023, he entered appearance and the court clerk told him to appear on 21.12.2023 which happened to be the judgment date.

The trial court found no merit in the appellant's account. It made the following observation before it delivered its judgment. It stated-

*"COURT: The records of the case is read clear. **The matter is adjourned for hearing on 13/12/2022 and not 15/12/2022. The accused do not have anything new rather than to asked for the forgiveness.** The court proceed to pronounce judgement as fixed today.*

*Sgd: V.J Kimario – SRM
21/12/2022"*

I had time to consider the appellant's account for not appearing before the court on 13.12.2023. To say the least, the appellant's explanation was plausible. The appellant stated that he heard wrongly that the case was fixed for hearing on 15. 12. 2022 and not on

13.12.2022. He appeared on 15.12.2022. It is unfortunate that the court clerk told him to come on 21.12.2022 without consulting the trial magistrate. Without hesitation or fear for the court's wrath for his non-appearance, the appellant appeared as informed by the court clerk. Had the appellant jumped bail on 13.12.2022, he would not have appeared before the trial court on 15.12.2022 or on the judgment date. Thus, the trial court ought to have found the appellant's absence was from causes over which he had no control.

I am aware that powers of the court under section 226(2) of the CPA are discretionary. It is trite law that discretion powers how wide it may be must be exercised judiciously, thus, a person exercising discretion must give reasons for his decision. In the present the case, the trial court decided not to give the appellant's weight that he misheard the date without giving reason(s). Once it is shown that, while exercising its discretion, the trial court acted upon a wrong principle or erred both in law and factual analysis leading, superior court may interfere with that court's exercise of its discretion. Since, the trial court did not give reason for not considering the appellant's explanation, which was plausible, this Court may interfere.

I make a finding that the appellant gave a plausible account for his absence, thus, his absence was for cause which he had no control of. Not only that but also, the trial court failed to address the appellant as to his rights under Section 226(2) of the CPA. In the end, I find as submitted by learned friends that, the trial court denied the appellant his right to be heard as provided under Section 226(2) of the CPA. I find refuge in **Magoiga Magutu Wansima vs Republic** (Criminal Appeal No 65 of 2015) 2016 TZCA 608 (25 May 2016) where it was observed that-

"It seems to us the phrase "he had a probable defence on the merit" in section 226 (2) of the CPA bear a special duty which trial magistrates have towards the lay accused persons who missed out the chance to testify in their own defence. Here, the law impliedly expected the learned trial magistrate to specifically make a finding whether even from the perspectives of the evidence of PW1, PW2 and PW3; the trial court can glean out some semblance of probable defence for the benefit of the lay accused person. The lay appellant should have been informed that the trial court had discretion to set aside the appellant's conviction in absentia if the appellant showed that his absence from the hearing was from causes over which he had no control and that he had a probable defence on the merit. It was intimidating to the appellant for the learned trial magistrate to allow the public prosecutor to first

furnish in detail how the appellant had jumped from the prison van whilst on transit to prison.

The failure of the trial magistrate, to properly address the lay accused person (the appellant) on his right to be heard under section 226 (2) of the CPA, coupled with the confusion arising from the charging the appellant with unlawful possession of Government trophy under section 86 (2) (c) of the WCA, 2009 instead of preferring the charge under section 70 (2) (c) (iii) of the WCA, 1974; we find merit in this appeal.”

Having found that the trial court denied the appellant right to be heard, the next question is what are the consequences? It is settled that failure to accord a right to be heard vitiates the proceedings. I find the proceedings from 15.12.2022 a nullity and quash them. I also set aside the judgment and sentence meted out against the appellant. Consequently, I order the trial magistrate to re-hear the last prosecution witness and give the appellant an opportunity to defend himself and call witness, if he so wishes. In the event that the appellant is convicted, the trial court shall take into consideration the period of his incarceration.

It is ordered accordingly.

Dated at **Babati** this 27th day of July, 2023.



J. R. Kahyoza.

Judge.

Court: Judgment delivered virtually in the presence of the appellant and Ms. Blandina learned state attorney for the Respondent. Ms. Fatina Haymale (RMA) present.



J. R. Kahyoza.

Judge.

27. 07. 2023

