

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

**IN THE SUB-REGISTRY OF MANYARA**

**AT BABATI**

**CRIMINAL APPEAL NO. 67 OF 2023**

*(Originating from Criminal Case No.15/2021 in the court of the Resident Magistrates of Manyara at Babati)*

**MWAJUMA KHAMIS .....APPELLANT**

**VERUS**

**THE REPUBLIC .....RESPONDENT**

**JUDGMENT**

*11<sup>th</sup> & 20<sup>th</sup> October, 2023*

***Kahyoza, J.:***

**Mwajuma Khamis**, (the appellant) was arraigned to court with the offence of offence of trafficking narcotic drugs. The court tried, convicted, and sentenced her *in absentia* with the offence of trafficking narcotic drugs. Later, the police arrested and submitted **Mwajuma Khamis** to the trial court.

Upon **Mwajuma Khamis'** appearance before the trial court, the trial court informed her the sentence it had previously imposed in her absence and ordered her to serve her sentence. Aggrieved, **Mwajuma Khamis** appealed against the conviction and sentence, raising five grounds of

complaint. For reasons, that will soon be apparent, I elected not to reproduce the grounds of appeal or issues springing from the grounds of appeal.

Before, we heard the appeal I discerned while going through the record that there was a likelihood that sections 226(2) and 214 of the **Criminal Procedure Act**, [Cap. 20 R.E. 2022] (the **CPA**) were not complied with. I invited the appellant and Mr. Kapera, the learned stated Attorney who appeared for the respondent to address me on the issue.

The factual background is that; the Republic arraigned **Mwajuma Khamis**, (the appellant) before the court of the resident magistrate charged 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). After the court admitted **Mwajuma Khamis** on bail, she absconded. The court tried, convicted, and sentenced her *in absentia*. Two different magistrates conducted the trial. The first magistrate heard four witnesses. Whereas, the second magistrate heard the evidence of the last prosecution witness and wrote the judgment convicting **Mwajuma Khamis**, she was not absent to make her defence.

Later, the police arrested **Mwajuma Khamis**, and brought her to court. She appeared before the first magistrate who asked her to show cause why she had absconded. The appellant replied I quote-

*"**Accused:** I did not abscond, I had family problems, my mother passe[d] away."*

The learned resident magistrate responded I quote-

*"**Court:** The trial magistrate is on leave but still the charging section is clear on the punishment hence, sentence is read over to the accused person and right of appeal is explained."*

It is from the above background, I am bound to consider whether the trial court complied with sections 226(2) and 214 of the **CPA**. I refer to the parties' submissions while deciding the issues raised *suo mottu*. For that reason, I refrain from reproducing the submissions at this stage.

### **Did the trial court comply with section of 226(2) of the CPA?**

Given the above facts, the issue is whether the trial court complied with section 226(2) of the **CPA**. Since issue subject to consideration is legal one, I heard first the learned state attorney followed by the appellant. Mr. Kapera submitted that, the trial court did not comply with section 226(2) of the **CPA** as it failed to call upon the appellant to account for her absence and make a determination. He added that if, the trial court after listening to

the appellant, formed an opinion that her absence was a good cause, set aside the sentence and conviction, and hear the appellant's defence. To support his contention, Mr. Kapera cited the Court of Appeal decision in **Adam Angelius Mpondi v. R.** Criminal Appeal no. 180 of 2018.

In addition, Mr. Kapera submitted that the record depicted not only that section 226(2) of the **CPA** was not complied with but also that, the appellant did not appear before the trial magistrate as the law requires. He appeared before another magistrate. He prayed this Court to remit the file to the trial court to comply with section 226(2) of the **CPA**.

The appellant had nothing substantive to reply to the legal issue. She is a layperson. I expected nothing than to let the Court decided the issue.

I wish to stated that as the record and facts stated above depict, the appellant absconded before her trial commenced. Thus, the she was tried, convicted and sentence *in absentia*. Upon her arrested, the police produced her before the trial court. The prosecution asked the court that the appellant was duty bound to account for her absence. The appellant accounted for absence. Unfortunately, the resident magistrate after hearing the appellant ignored to consider the appellant's ground of absence and making a determination whether she was absent for good cause or not. The resident

magistrate read the sentence to the appellant and sent her to serve the sentence.

Plainly, the learned Magistrate did not abide with the provisions of section 226(2) of the **CPA as** Mr. Kapera, learned state attorney, submitted. It is trite law that if the accused person is convicted in absentia, upon his arrest, the court should afford him a chance to explain away the reasons for his absence; the trial court should assess whether the absence was due to causes beyond the control of the accused and that had a probable defence on the merit. (See the cases of **Adam Angelius Mpondi v. R.** (supra) **Olonyo Lenuma and Lekitoni Lenuna v. R.**, [1994] TLR. 54, **Marwa Mahende v. R.**, [1998] TLR. 249. In the **Olonyo Lenuma and Lekitoni Lenuna v. R.**, (supra) the Court of Appeal had the following-

*"In our view the subsection [i.e. section 226-(2) of CPA] 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 subsection, 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 sub-section."*

It is plain, as depicted above, that the trial court did not comply with section 226(2) of the **CPA**. The Court of Appeal had an opportunity consider the consequences of failure to comply with section 226(2) of the **CPA**. In **Adam Angelius Mpondi v. R.** (supra) and **Abdallah Hamis v. R.**, Criminal Appeal No. 26 of 2005, the Court of Appeal held that failure to comply with section 226(2) of the **CPA** vitiates the proceedings of the trial court, which was conducted in his or her absence. Another position is that when section 226(2) of the **CPA** is not complied with the remedy is to remit the case to the trial court with a direction that the appellant be brought before the magistrate to be dealt with in accordance with the provisions of section 226(2) of the **CPA**. The Court of Appeal held in **Hussein Raphael and 2 Others v R.**, Criminal Appeal No. 280 of 2008.

Given the fact that there are two conflicting positions of the Court of Appeal, I will follow the latter, that failure of comply with section 226(2) of the **CPA** vitiates the proceedings of the trial court, which was conducted

in his or her absence. I have selected to take that position for two reasons; **one**, the appellant disclosed that she entered into an agreement to pay the Government and paid certain amount before she disappeared; **two**, the record shows that the successor magistrate did not comply with section 214 of the **CPA**.

In the end, I quash the proceedings conducted in the absence of the appellant, set aside the judgment and sentence, and order the trial court to re-hear the case from the date the appellant was absent.

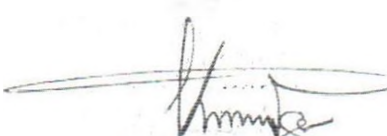
It is ordered accordingly.

Dated at **Babati** this **20<sup>th</sup>** day of **October**, 2023.



  
**John R. Kahyoza.**  
**Judge**

**Court:** Judgment delivered in the appellant and Mr. Raphael Rwezahula, learned stated Attorney for the Republic. B/C Ms. Fatina present. (RMA) present.



**John R. Kahyoza.**  
**Judge**  
**20.10.2023**