

IN THE HIGH COURT OF TANZANIA

TABORA SUB-REGISTRY

AT TABORA

CRIMINAL APPEAL NO. 9 OF 2023

(Originating from Criminal Case No. 15/2019 of Tabora Resident

Magistrates' Court at Tabora)

GOLANI S/O SALUM ----- APPELLANT

VERSUS

THE REPUBLIC ----- RESPONDENT

JUDGMENT

06/11/2023 & 23/11/2023

MANGO, J:

This is an appeal against the judgment of the Resident Magistrates' Court of Tabora in Criminal Case No. 15 of 2019 in which the Appellant was charged and convicted with the offence of Impregnating a School Girl Contrary to section 60A (3) of the Education Act, [Cap 353 R.E 2002].

The prosecution alleged that on unknown dates between June and late July, 2017 at Malongwe Area, Kizengi Ward within Uyui District, Tabora Region the appellant did impregnate a 16 years old girl named XZY (*real name withheld*) a form two student at Kizengi Secondary School.

The record in the trial case file shows that, the appellant jumped bail when the case was in the middle of hearing of prosecution case therefore the matter proceeded in absentia. After hearing prosecution case, the Appellant was convicted and sentenced to serve 30 years imprisonment. He was later arrested and sent to prison to serve the sentence

Being aggrieved by the decision of the trial Court, the appellant appealed to this Court couched with three grounds of appeal namely;

1. *That the trial Magistrate erred in law and fact by delivering an illegal judgment in the eyes of Law.*
2. *That the trial Magistrate erred both in law and fact by his act to convict and sentence the appellant while absent without regarding the reason of his absence.*
3. *That the trial Magistrate erred both in law and fact by his act to deny right to be heard to the appellant.*

When the appeal was called up for hearing, the appellant appeared in person unrepresented while the respondent was represented by Ms Wivina Rwebangira and Ms Edda Lugakingira learned State Attorneys from the Office of Director of Public Prosecutions.

Submitting in support of the appeal, the appellant stated that he was taken to the trial Court but he never met the victim whom he allegedly impregnated, he also denied the allegation that he jumped bail. The appellant further criticised the prosecution allegations by stating that the victim who is alleged to be a school girl lives in a rented house three villages away from the school.

Finally, the appellant submitted that justice was not done to him because he was not afforded right to be heard, he prayed this Court to consider his grounds of appeal as they appear in the petition of appeal.

Replying against the 1st ground of appeal Ms Rwebangira submitted that, the trial Court's judgment was properly constructed as per section 312 of the Criminal Procedure Act and the six ingredients of writing a proper judgment were keenly adhered to.

Citing the case of ***Abubakari I.H. Kilongo & Another vs Republic*** (Criminal Appeal 230 of 2021) [2022] TZCA 722 (21 November 2022) Ms Rwebangira stated that, the trial Court considered prosecutions

case alone because the appellant jumped bail. Thus, the 1st ground of appeal is meritless.

Submitting on the 2nd and 3rd grounds on right to be heard, Ms Rwebangira acknowledged that the appellant was convicted and sentenced in absentia but the proceedings are silent as to the date he was arrested. She submitted further that, it seems that the Appellant was sent straight into prison without being afforded chance to appear before the magistrate and state the reasons for his absence.

Referring to the the case of ***Magoiga Magutu @ Wansima vs Republic*** (*Criminal Appeal 65 of 2015*) [2016] TZCA 608 (25 May 2016) Ms Rwebangira prayed the matter be returned to the trial Court so that the appellant can be heard on what caused his absence during trial.

In a short rejoinder the appellant prayed this Court to finalise the matter without sending it back to the trial Court because he has been in jail custody since 2021.

I had chance to go through and assess the judgment of the trial Court delivered by Hon. S.B. Nsana and upon my thorough perusal I found nothing offensives in the judgement. As rightly submitted by the learned State Attorney, the trial Court judgment was constructed in conformity to section 312 of the Criminal Procedure Act. Cap 20 R.E 2022. Defence case was not considered since the matter proceeded in absence of the Appellant under section 226(1) of the Criminal Procedure Act. Thus, the first ground of appeal is unmeritorious.

Regarding the 2nd and 3rd grounds on the right to be heard, both parties are in agreement that the Appellant was tried and convicted in absentia. On unknown date in the year 2021, the Appellant was arrested and taken straight to prison without meeting a magistrate. The question

that rises is whether the Appellant's fundamental right of fair hearing was infringed.

I will start with the manner the order to proceed with trial in absentia was issued against the Appellant. Proceedings indicates that, the Appellant was on bail from 12th February 2019 until when he was arrested and sent to prison to serve his sentence. The Appellant and his surety one Juma Abdallah Hussein who introduced himself to be the father of the Appellant executed a bail bond valued Tshs. 1,500,000/-.

The Appellant attended his trial up to 31st December 2019 when PW3 was heard. On a subsequent date, that is, 31st January 2020, record indicates that, the Appellant was absent with notice which means his absence was for a good reason and the Court was properly informed on the reasons for his absence. The Appellant never appeared again before the trial Court. The Appellant's non-appearance on several dates, moved the Court to conclude that he jumped bail and proceeded with the trial under section 226(1) of the Criminal Procedure Act.

The law, section 159(b) of the Criminal Procedure Act requires the Court to ensure that efforts have been done to procure appearance of the accused before proceeding with a trial in his absence. The section reads: -

"159. Where a person absconds while he is on bail or, not being on bail, fails to appear before the court on the date fixed and conceals himself so that a warrant of arrest may not be executed-

(a) N/A

(b) the trial in respect of that person shall continue irrespective of the stage of the trial when the accused

absconds, after sufficient efforts have been made to trace him and compel his attendance. "

In the case at hand, the trial Court issued an arrest warrant on 25th March 2020. Court record indicates that, no feedback was given to the Court as to efforts done to secure appearance of the Appellant via arrest. Apart from issuing an arrest warrant through which the prosecution failed to arrest the Appellant, the Court did not summon the surety who would have easily procured appearance of the Appellant or avail the Court with information as to the whereabouts of the Appellant. The Court would have even forfeited bail bond under section 160 of the Criminal Procedure Act.

In such circumstances, I am of a considered view that no sufficient efforts were invested to procure appearance of the Appellant as required by section 159(b) of the Criminal Procedure Act to warrant the Court to proceed with trial under section 226(1) of the Criminal Procedure Act. Thus, the case was not fairly heard on the part of the Appellant.

Moreover, as conceded by both parties, the Appellant's arrest and detention as a convict contravened the requirements of section 226(2) of the Criminal Procedure Act for failure to ensure Appellants appearance before the trial Magistrate prior to sending him to prison to serve his sentence.

My analysis of legal effects pertaining to the arrest and detention of the Appellant as a convict without appearance before the trial Magistrate will be guided by the decision of the Court of Appeal in **Marwa S.O Mahende vs The Republic** (Criminal Appeal 133 of 1994) [1997] TZCA 95 (12 March 1997) and section 226(1) & (2) of the Criminal Procedure Act Cap 20 R.E 2022 which states that,

"226. (1) 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 shall be lawful for the court to proceed with the hearing or further hearing as if the accused person were present; and if the complainant does not appear, the court may dismiss the charge and discharge the accused person with or without costs as the court thinks fit.

(2) 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."

It is on record that the appellant missed appearance several times during trial that is why the trial magistrate granted the prayer made by the prosecution to proceed in his absence and conviction proceeded thereto. The Court of appeal of Tanzania in ***Marwa Mahende's case (supra)*** faced a similar situation and while interpreting subsection 2 to section 226 of the CPA it held that.

"in our view the sub-section 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 first, and not to be taken straight to prison. For if he is taken straight to prison the trial magistrate can no longer exercise his discretion under the subsection. In other words, once the convict goes into prison and starts serving the sentence, the magistrate is functus officio and he can no longer re-open the case in

order to secure the purpose for which the sub-section is designed"

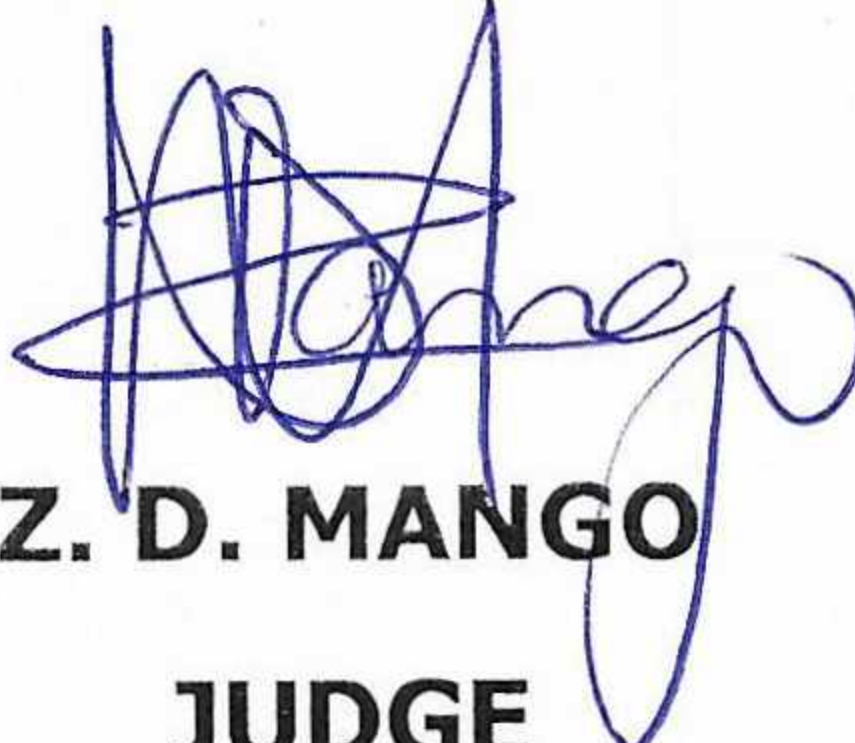
Back to the case at hand, it goes without say that, section 226 of the Criminal Procedure Act was not complied with by the trial Court. The right to be heard being a cornerstone principle of justice, the Appellant should have been afforded opportunity after his arrest, to appear before a trial magistrate and state before him the reason for his absence, failure of that, makes the proceedings subsequent to the appellant arrest a nullity.

For those reasons, I hereby nullify proceedings of the trial Court that were conducted under section 226(1) of the Criminal Procedure Act and order re-trial of the matter to that extent. In case the Appellant will be convicted by the trial Court, the period he served as a convict should be considered. Court's case file be remitted to the trial court for retrial as ordered.

It is so ordered

Dated at Tabora this 23rd day of November 2023




Z. D. MANGO
JUDGE