

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA SUB REGISTRY

AT TABORA

DC CRIMINAL APPEAL NO. 84 OF 2023

*(Originating from Urambo District Court in Criminal Case no. 23 of
2020)*

IDDY JUMANNE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 12/02/2024

Date of Delivery: 07/03/2024

MANGO, J.

Iddy Jumanne, the Appellant herein and Salmini Hamimu were arraigned before the District Court of Urambo, charged with two offences to wit; burglary contrary to section 294(1)(a)(2) of the Penal Code [Cap. 16, R.E 2002] and stealing contrary to section 258 and 265 of the Penal Code [Cap. 16, R.E 2002]. It was alleged that, on 21st day of January 2020, at night hours, the Appellant and Salmini did break the house of Katuga S/O Charles located at Imalanakoye village within Urambo district in Tabora Region and stole one solar inventor, one radio(seapiano), one solar battery (sundar), one flash disc, one cellular phone make Samsung, and cash money, Tshs. 90,000/- the properties of Katuga Charles.

During defence hearing, the Appellant jumped bail and his sureties were nowhere to be found. The trial Court proceeded with trial in absentia in respect of the Appellant by hearing the remaining accused person, Salmini Hamimu. On 27th January 2021, the Court convicted Salmini Hamimu for the offence of being found in possession of goods suspected of being stolen and sentenced him to serve six months imprisonment or pay fine of Tshs. 100,000/-. Taking into account time that Salmin Hamimu spent in remand custody, the court unconditionally discharged him.

The Appellant was convicted for all two counts and sentenced in absentia to serve 15 years imprisonment for the first count and 6 years imprisonment for the second count. The two sentences were ordered to run concurrently. On 20th September 2023, the Appellant was arrested. The trial Court found the reasons advanced by him in accounting for his absence to be incapable of moving the Court to set aside his conviction and allow him to enter his defence. The Court proceeded to order the Appellant to serve the sentence.

Dissatisfied with both conviction and sentence, the appellant preferred this appeal with three grounds of appeal that;

1. The trial court denied the Appellant a right to be heard as provided by sub section 2 of section 226 of the Criminal Procedure Act [Cap 20 R.E 2022].
2. The trial Magistrate erred in law by denying the Appellant the right to mitigate

3. The trial Magistrate erred in law and facts for sentencing the appellant without conviction.

During hearing of this appeal, the Appellant appeared in person whereas the Republic was represented by Mr Dickson Swai learned State Attorney. When the Court invited the Appellant to submit in respect of the grounds of appeal, he had nothing to add than a prayer to adopt his grounds of appeal for consideration by the Court.

Responding to the first ground of appeal, Mr. Swai submitted that the trial Court was right to conduct a trial in absence of the Appellant. He argued that, the Appellant attended all dates the matter was scheduled for hearing of the Prosecution's case. After closure of prosecution's case, he jumped bail, therefore he denied himself his right to be heard. Mr Swai further stated that after 3 years, the Appellant was arrested and caused to appear before the trial Court. The court did not find sufficient reasons to set aside conviction, he concluded that the first ground is meritless.

On the second ground of appeal Mr. Swai was of the view that despite the fact that court record does not show mitigation part, this could not affect conviction entered by court against the appellant because it only reduces the sentence imposed, therefore he prayed the matter be returned to the trial court for pre-sentencing hearing and sentencing.

On the third ground of appeal Mr Swai contended that the allegations are not borne by the court record because at page 4 of the judgment the trial court convicted the appellant accordingly.

In rejoinder the Appellant briefly stated that, he obeyed court schedules until when his mother fell sick. He then started attending his sick mother who is suffering from stroke to date and his two sureties used to inform the court the reasons for his absence. He prayed his appeal be allowed as he was denied a chance to address the court and he was convicted and sentenced without being heard.

Having heard the parties for and against this appeal and gone through the records of the trial court, I find that the first ground of appeal has no merit. Court record indicates that the matter was adjourned several times due to absence of the Appellant. On 5th October 2020 when the case was called for defence hearing, the Appellant was not feeling well hence hearing was adjourned to 12th October 2020 the date which neither the Appellant nor his sureties appeared before the Court.

The matter was scheduled again for defence hearing on 16th October 2020, 26th October 2020, 5th November 2020, 19th November 2020, 3rd December 2020, 17th December 2020, and 30th December 2020 when the case was heard in absence of the Appellant. On all those dates neither the Appellant nor his sureties appeared before the Court. Court record establishes further that, the Court was not anyhow informed of the reasons for the Appellant's absence in Court proceedings. In such circumstances, I find no reason to fault the Trial Court decision to proceed with the trial in absentia against the Appellant under section 226(1) of the Criminal Procedure Code [Cap. 20 R.E 2019].

There is also no reason to fault the trial Court's decision not to set aside the Appellant's conviction. The law section 226(2) of the Criminal Procedure Code which empowers the Court to set aside conviction made in absentia provides 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."

The necessity of hearing the accused person who has been convicted and sentenced in absentia was also emphasized by the Court of Appeal of Tanzania in the case of **Adam Angelius Mpondi vs Republic** (Criminal Appeal 180 of 2018) [2020] TZCA 1821 (19 October 2020). The reason for affording the accused the right to be heard is to assess whether the reasons for his absence during trial was beyond his control.

The trial Court heard the Appellant after his arrest. Court record establishes that, on 20th September 2023 when the Appellant was arrested and brought to the trial court, he alleged that, he was attending his sick mother at Kilometa arobaini area, Kaliua. He admitted that he had never informed the Court and he prayed for forgiveness. The trial Court correctly found the reason advanced to be meritless because the Appellant knew that he is supposed to defend himself and he had no witness other than himself. I hold so because, on 21st September 2020 after the Courts ruling in which the Appellant and his co-accused were found with a case to answer, the Appellant notified the Court that, he will have no witness and he will

defend himself on oath. This means the Appellant was aware that he was supposed to appear before the Court for his defence. Despite that, he decided not to appear nor to notify the Court on the reasons for his absence.

The alleged sickness of the Appellant's mother was raised after his arrest which took place two years after his conviction in absentia. In such circumstances, I am of a considered view that, the trial Court correctly found the allegation to be an afterthought.

Coming to the second ground of appeal, I agree with the parties that court record does not reveal that the Appellant was given opportunity to mitigate. Given the fact that, the offences which the Appellant was convicted with do not attract mandatory sentences, I find it necessary for the trial Court to take into account mitigating factors if any. For that reason, the case file is returned to the trial Court for pre-sentencing hearing only.

Appeal is partly allowed to the extent explained in this judgement.

Dated at Tabora this 7th day of March 2024



A handwritten signature in blue ink, appearing to read "Z. D. Mango", is written over a set of horizontal dashed lines.

Z. D. MANGO
JUDGE

Right of Appeal explained