IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA SUB REGISTRY

AT TABORA

DC CRIMINAL APPEAL NO. 85 0F 2023

(Originating from Urambo District Court in Criminal Case no. 22 of 2020)

IDDY JUMANNE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 19/04/2024

Date of Judgment: 10/05/2024

A.MAMBI, J.

In the District Court of Urambo at Urambo the appellant was charged with two counts namely bulgrary c/s 294(2) and stealing c/s 258 and 265 of the Penal Code Cap 16 [R.E 2019]. The appellant was found guilty and convicted in absentia. Upon being convicted in absentia, the appellant was sentenced to serve 15 years imprisonment for the 1st count and 6 years imprisonment for the 2nd count.

It was alleged that, on 27th day of December 2019, at about 2000 hours, the Appellant and Salmini Yusuph @Hamimu did break the house of Petro S/O Saanane located at Majengo ya Tabora street within Urambo district in Tabora Region and stole one television make Panasonic valued at tshs 260,000/=, one azam decoder valued at tshs 165,000/=, three radio subwoofer make seapiano valued at tshs 510,000/=, one radio make mbao valued at tshs 60,000/=, one bycle make mtumba valued at tshs

300,000/= and one cellular phone make TECNO valued at tshs 45,000/= all tatol valued at tshs 1,490,000/= the property of one PETRO S/O SAANANE.

Being dissatisfied with both conviction and sentence the appellant appealed to this court. Hereunder I reproduce his grounds for appeal.

1. That, the trial court denied the appellant a right to be heard as provided by subsection 2 of section 226 of the Criminal Procedure Act [Cap 20 R.E 2022] and also refer the cases of Hussein Raphael, Seif Hussein and Gideon Barabara V R Criminal Appeal No. 280/2008 Court of Appeal of Tanzania, Marwa Mahende V. R [1998] TLR 249 and Abdallah Hamis V. R Criminal Appeal No 26 of 2005 Court of Appeal of Tanzania.
2. That, the trial Magistrate erred in law by denying the appellant an opportunity to mitigate.

During hearing the Republic/respondent was represented by the learned state attorneys Ms: Eva Msangi and Ms. Annete Makunja while the appellant was unrepresented and he opted to adopt and rely on his grounds of appeal. He further submitted that he was arraigned after being mentioned by someone without any evidence. He also argued that his neighbours were not called to testify and even the victim did not prove the allegations.

The learned state attorney Ms. E. Msangi submitted that the appellant was given the right to be heard but he never appeared albeit of several summons. The learned state attorney further submitted that the trial court complied with section 226 (2) of CPA, Cap 20 [R.E 2022]. She also submitted that the proceedings under page 35 and 36 are clear that the

appellant was brough before the court and given right to be heard. It was her considered view that all the grounds of appeal have no merit and even the cases cited are distinguishable to the case at hand case. She referred the decision in **Adam Mponji vs R, Crimn. Case No.180 of 2018 page 13 and 14**. In rejoinder the Appellant did not agree with the submission of the prosecution.

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. This is due to the fact that the appellant was availed right to be heard as he was summoned for several times but he never appeared. It is on court record that the matter was adjourned several times due to absence of the Appellant. On 12th October 2020 when the case was called for defense hearing, neither the Appellant nor sureties showed up. Hence defense hearing was adjourned to 16th October 2020, 26th October 2020, 19th November 2020, 3rd December 2020 and 17th December 2020 the date which neither the Appellant nor his sureties appeared before the Court again. On 17th December 2020 defense hearing preceded ex-parte against the appellant. On all those dates neither the Appellant nor his sureties appeared before the Court. The Court record further establishes that, the Court was not anyhow informed of the reasons for the Appellant's absence in Court. 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 2022].

There is also no reason to fault the trial Court's decision to set aside the Appellant's conviction. This is due to the fact that the court is empowered

by the law to proceed with the matter ex-parte where it appears the party was summoned but failed to appear without reasons. 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 defense on the merit."*

Reference can also be made to the decision of the court in **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 records reveal that the trial Court heard the Appellant after his arrest. The Court record establishes that, on 20th September 2023 when the Appellant was re-arrested and brought to the trial court the appellant alleged that, he was attending his sick mother at Kilometa arobaini Kaliua district area. He admitted that he had never informed the Court and he prayed for forgiveness. In this regard the trial Court correctly found the appellant had no-good cause for his absence as he knew that he was supposed to defend himself as he had no witness other than himself. The records show that on 21st September 2020 after the Court had ruling on the case to answer the Appellant informed the Court that, he will have no witness and he will defend himself. This means that the Appellant was aware that he was supposed to appear before the Court for his defense but for the reason known to himself, he failed to appear or inform the court his failure to appear. The appellant claim that his mother was sick

has no merit since he raised that claim after his arrest. I am of a considered view that, the trial Court correctly found the allegation to be an afterthought.

With regard to mitigation as per the second ground of appeal it is on the records the appellant was convicted in his absence. This means that the appellant was not availed with right to mitigate even when he was re-arrested. This in my view was contrary to the provision of the law.
Having observed such irregularity which is incurable will it be just to remit the file back for proper procedure? In this regard I will refer Section 388 (1) of *the Criminal Procedure Act*, Cap 20 [R.E.2019] and see what would be the proper order this court can make in the interest of justice. It is a settled law that failure to comply with the mandatory requirement of the law, is fatal and incurable irregularity, which renders the purported judgment incapable of being upheld by the High Court in the exercise of its appellate jurisdiction. In my view an order for remitting the file for pre sentencing hearing would be more just and the interests of justice me to do so. I am of the considered view that, an order for pre sentence hearing will not cause any likely of injustice to the appellant. In this regard I order the file to be remitted to the trial court for pre sentencing hearing. The trial court should give the appellant an opportunity to mitigate.
The trial court should consider this matter as priority and deal with it immediately within a reasonable time to avoid any injustice to the appellant or any party resulting from any delay.

It should be noted that all appeals that are remitted back for retrial or trial de novo need to be dealt expeditiously within a reasonable time. Having observed that the proceedings at the trial court was tainted by irregularities, this matter is remitted to the trial court to rectify the

irregularity observed by this court. This means that the proceedings shall start after appellant being convicted. Where it appears that the trial magistrate has ceased jurisdiction for one reason or another, in terms of section 214 (1) of the CPA another magistrate should be assigned the case to proceed with the matter. The Trial Court should consider this matter as priority and deal with it immediately within a reasonable time to avoid any injustice to the appellant resulting from any delay.

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

A. J. MAMBI

JUDGE

10/05/2024

Judgment delivered in Chambers this 10th day of May, 2024 in presence of both parties.

A. J. MAMBI

JUDGE

10/05/2024

Right of appeal explained.

A. J. MAMBI

JUDGE

10/05/2024