IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 76 OF 2023

(Originating from the decision of the Resident Magistrate Court of Manyara at Babati in Criminal Case No. 29 of 2021)

OMARI ELIA KULANGA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

7th December, 2023 & 16th February, 2024

Kahyoza, J.:

Omary Elia Kulanga, (the appellant) was charged with an offence of rape, before the court of the Resident Magistrate Manyara at Babati. He was tried, convicted, and sentenced to 30 years' imprisonment in *absentia*.

Aggrieved, **Omary Elia Kulanga**, appealed to complaining that the trial court denied him the right to be heard. The respondent vehemently opposed the appeal contending that the appellant forfeited a right to be heard after jumping bail.

The issue is whether the appellant was denied his right to be heard.

A brief background relevant to the appellant's complaint is that the appellant appeared before the trial court on 17.5.2021. After several

adjournments, the prosecution's case commenced on 9.8.2021 when two witnesses testified. The court adjourned the case for want of witness until 23.09.2021 when a third prosecution witness appeared and testified. On that day, the court admitted the appellant on bail.

After the court admitted the appellant on bail, he disappeared. The appellant's surety informed the court the appellant was sick. The court adjourned the case to another date. The surety appeared and requested the court to give him time to trace the appellant. The trial court granted the surety time he required and directed that if he failed to trace the accused person, he will forfeit to the Republic the bail bond and the court will proceed to try the appellant in *absentia*. The court adjourned the case for hearing to 2.02.2022.

On 02.02.2022, neither the appellant nor his surety appeared in court. The court ordered the prosecution's case to proceed under section 226 of the **Criminal Procedure Act**, [Cap 20 R.E 2019, Now 2022] (the **CPA**). Following the trial court's order to proceed *absentia*, three prosecution witnesses testified. The prosecution concluded its case in the absence of the appellant. The trial court delivered the judgment on 30.5.2022 in the absence of the appellant. It convicted and sentenced the appellant to serve 30 years imprisonment upon his apprehension.

On 29/08/2022 the accused was apprehended and brought before the trial court. The trial magistrate committed him to serve the sentence forthwith. Aggrieved, the appellant lodged in this court, Criminal Appeal No. 7 of 2022. At the end of hearing the appeal, the appellate court remitted the

record to the trial court with the direction that the appellant be brought before it and dealt with in accordance to the dictates of section 226(2) of the **CPA**.

The trial court heard the appellant to find out whether he was absent from causes over which he had no control and whether he had a probable defence on the merit. The trial court was not satisfied that the appellant had sufficient reason for his absence. It upheld its conviction and sentenced him to serve the sentence it had previously imposed of thirty years imprisonment.

It is from the above background, the appellant preferred this appeal, with five grounds of appeal. During the hearing, Mr. Kelvin Kagirwa, the appellant's advocate abandoned the fourth ground of appeal, thus, he remained with four grounds of appeal, namely-

> *1. That, the trial court erred in law and fact, when trial magistrate refused to entertain the reasons that were adduced by the appellant on 21/03/2023; in that this absence was of good cause; consequently thereto, the trial Magistrate reached to an erroneous conclusion by directing and committed the appellant to proceed to serve his jail sentence of 30 years in prison.*
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> *2. That, the trial court Magistrate failed to exercise properly his discretionary power under section. 226(2) of the Criminal Procedure Act; and consequently, thereto denied the appellant's right of fair trial by not exercising his right of cross examination to prosecution witnesses namely PW4, PW5 and PW6 while the records shows that*

the appellant's absence after he [obtained] bail on 23/09/2021 was for good cause.

3. That, the trial court Magistrate erred in law and in facts for his refusal to entertain the appellant's explanation adduced on 21/03/2023 that he [was] sick, suffering from HIV, TB and "Mkanda wa jeshi" and he has been undergoing medical treatment for such health problems.

4. That, the trial court erred in law and fact to convict and sentence the appellant to serve thirty (30) years term of imprisonment while the record is silent as to whether before passing such conviction and sentence on 30/05/2022, the court did issue any arrest warrant to the appellant.

The appellant enjoyed the services of Mr. Kelvin Kagirwa, Advocate, while the respondent was represented by Ms. Malima, State Attorney, who argued the appeal orally. The appeal raised one issue whether the appellant was denied a right to be heard.

Was the appellant denied a right to be heard?

Mr. Kagirwa, expounding on the grounds of appeal No. 1, 2 and 3, at a go, submitted briefly that the appellant fell sick and his surety reported the same to the trial court, as depicted at page 23 of the typed proceedings. It was a misdirection on the part of the trial court to hold that it was an afterthought. That the trial court denied the appellant the right to cross examine, citing **Salim Joseph @ Tito & 2 others vrs. R**, Criminal Appeal No. 131. 2006 at page 10 to support his contention. In a serious offence,

like the one at hand, the accused ought to be given an opportunity to defend himself. That the duty imposed to the appellant, to bring medical treatment documents so as to prove his health status, was heavy. That the trial court considered extraneous matters to make a ruling, as the trial court made a finding that the appellant returned at Magugu on 27/10/2021. As to the 5th ground of appeal, is that the record does not feature anywhere that an arrest warrant was issued following the appellant's truancy. Therefore, the court failed to exercise its discretion judiciously. He requested the appeal to be allowed, as against the order issued on 21/3/2023, and the appellant be set free.

Ms. Malima, the state attorney submitted in rebuttal, that the trial court complied with this court's order as per section 226(2) of the CPA, as the appellant was heard and the trial court found that the appellant had adduced no sufficient ground to justify his absence from the trial, and consequently confirming its prior conviction and sentence meted out. She concluded that the appellant waived his right to cross-examine PW4, PW5 and PW6 for absconding the trial. To support her contention, she cited **Tagara Makongoro & 2 Others vrs. R.,** [2019] TZCA 506 tanzlii page 13.

In a brief rejoinder, Mr. Kelvi submitted that, the State Attorney cited authorities without supplying him a copy and prayed the same to be disregarded. He added that the respondent's state attorney did not oppose the fact the appellant was sick.

Having heard rival submissions, I opted to deal with the second ground of appeal, as it is capable of terminating this appeal. The second ground of

appeal raised the issue whether the trial magistrate failed to exercise discretionary powers under section 226(2) of the CPA.

It is settled, that, when a person absconds trial may be tried in *absentia* under the purview of section 226(1) of the **CPA**. If the person is convicted and sentence in *absentia*, upon being apprehended, he must be brought to the trial court, afforded a chance to present his reasons as to his absence. The court is duty bound to make findings as to whether it is satisfied that the accused person's absence was from causes over which he had no control and that he had a probable defence on the merit. Section 226(2) of the **CPA** reads-

> *"(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."*

Though these powers are discretionary, the same must be exercised judiciously. Taking all the considerations on board, also as to the fact that the "satisfaction" is neither established by testimonies nor affidavits, rather on submissions, I am satisfied that what was stated by the appellant was sufficient for the trial court to form an existential inference that the appellant's absence from trial was from causes over which he had no control of. Sickness is a sufficient reason as explained by the Court of Appeal of Tanzania in the case of **John David Kashekya Vs The Attorney General**, Civil Application No. 1 of 2012 (Unreported-CAT) when it said-

> *"..sickness is a condition which is experienced by the person who is sick. It is not a shared experience. Except for children who are not*

yet in a position to express their feelings, it is the sick person who can express his or her condition whether he or she has strength to move, work and do whatever kind of work he is required to do. In this regard, it is the applicant who says he was sick and he produced medical chits to show that he reported to a doctor for check up for one year. There is no evidence from the respondent to show that after that period, his condition immediately became better and he was able to come to Court and pursue his case. Under such circumstances, I do not see reasons for doubting his health condition. I find the reason of sickness given by the applicant to be sufficient reason for granting the application for extension of time to file..."

By producing copies of cards on HIV and TB treatment, that was enough. The appellant's duty was to raise reasonable doubt but not to prove the allegation that he was sick beyond reasonable doubt. Since the appellant was in prison custody when producing the said documents, I see no pressing urge to fault his claim that he was sick for quite some time, a fact that neither the respondent nor the trial magistrate can fault the appellant. In **Magoiga Magutu Wansima vs R.,** (Criminal Appeal No 65 of 2015) 2016 TZCA 608 (25 May 2016) 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."

I find the appellant advanced good reason for his absence. The trial court ought to have set aside the conviction and sentence, and heard him. I uphold the second ground of appeal that trial court failed to exercise its discretionary powers judiciously under section 226(2) of the CPA. I set aside the trial court's findings that the appellant did not adduce good cause for his absence. For the same reasons, I quash the proceedings before the trial court and set aside the conviction and sentence. The appellant's advocate prayed his client to be released from prison, given the nature of the offence

allegedly committed by the appellant, the interests of justice demand that I order a retrial.

In the end, I quash the proceedings, set aside conviction and sentence, order the appellant to be tried before another magistrate. Should the court convict the appellant, it shall take into consideration, the time the appellant spent in custody both as inmate and prisoner.

It is ordered accordingly.

Dated at Babati this 16th day of**February**, 2024.

J. R. Kahyoza

Judge

Court: Judgment delivered in the presence of the appellant and Ms. Rose Kayumbo, State Attorney for the Respondent. B/C Ms. Fatina Haymale (RMA) present.

J. R. Kahyoza
Judge
16/2/2024

Court: Right of appeal explained.

J. R. Kahyoza
Judge
16/2/2024