IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 74 OF 2023

(Originating from Criminal Case No. 111 of 2019 of Mwanga District Court)

NICODEMO MESHAKI @ MWAMSOJO.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

21/02/2024 & 14/3/2024

SIMFUKWE, J

The appellant, Nicodemo Meshaki @Mwamsojo was arraigned before the District Court of Mwanga (the trial court) where he was charged with the offence of unlawful trafficking of Narcotic Drugs contrary to **section 15A (1) and (2), (c) of Drugs Control and Enforcement Act,** (Cap 95 R.E 2019). According to the charge sheet, it was alleged that on 23rd day of July 2019 about 16:00hrs at Kileo village within Mwanga District in Kilimanjaro region the appellant was unlawfully found trafficking 5.88

kilograms of narcotic drugs commonly known as mirungi by using a motorcycle with reg. No. MC 585 CFH make Sonoray.

The brief facts leading to this appeal are to the effect that, on the fateful date, while on patrol at Kileo village within Mwanga district, PW1 and PW3, the police officers saw the motorcycle heading to the place where they were. They had to stop the said motorcycle which was driven by the appellant herein and requested to inspect him. They searched him and found a green sulphate bag at the back of the said motorcycle. The alleged bag contained green plants presumed to be narcotic drugs commonly known as *mirungi*. It was later confirmed by the government chemist that the said green plants were indeed khat (mirungi) weighing 5.88 kilograms.

Unfortunately, the appellant did not defend himself as he jumped bail. The trial court found the appellant guilty and convicted him in absentia for trafficking narcotic drugs- unlawfully. He was sentenced to serve 30 years imprisonment. Aggrieved, the appellant preferred the instant appeal on the following grounds:

1. *That the trial magistrate erred in law and facts to rely on uncorroborated evidence of certificate of seizure which*

was not witnessed by credible independent civilian which would allay tears of planting evidence against the appellant.

2. *That the trial magistrate erred in law and facts to convict and sentence the appellant despite the fact that the prosecution failed to abide with the principles governing chain of custody.*
3. *That the prosecution did not summon very essential witnesses to testify before the court.*
4. *That the prosecution case relied on the testimony of police officers alone and that made it unreliable and unsafe to find conviction.*
5. *That the trial Magistrate erred in law and fact to enter conviction and sentence the appellant without consider (sic) that the offence was not proved beyond reasonable doubts.*
6. *That the trial Magistrate erred in law and fact to convict and sentence the appellant on relying on contradictory evidence adduced by the prosecution.*

At the hearing of this appeal which proceeded by filing written submissions, the appellant was represented by Advocate Fay Grace Sadallah whereas the respondent/Republic was represented by Ms. Bora Mfinanga, learned State Attorney.

On the first ground of appeal, Ms. Fay argued that the certificate of seizure was not witnessed by independent witness who would allay tears of planting the evidence against the appellant. She continued to state that it is trite law that during search and seizure there should be an independent witness. The rationale of having independent witness is to clear doubts and have independent testimony which will influence the fair hearing. The learned counsel referred the case of **Shabani Said Kindamba vs Republic**, Criminal Appeal No. 390 of 2019 (Tanzlii) at page 18 and the case of **Said s/o Aman vs Republic**, Criminal Appeal No. 67 of 2021. Ms. Fay condemned the trial court for relying on the certificate of seizure which was not witnessed by independent witness to convict the appellant.

In respect of the second ground of appeal which concerns chain of custody, the learned advocate was of the view that the same was broken. She made reference to the case of **Paulo Maduka and 4**

Others vs Republic, Criminal Appeal No. 110 of 2007 which explained that there should be chronological documentation or paper trail showing the seizure, custody, control, transfer, analysis and disposition evidence, be it physical or electronic.

In the case at hand, Ms. Fay claimed that the chain of custody was broken since there was contradiction of testimonies of the prosecution witnesses, PW1 and PW3 who arrested the accused at the scene. That, at page 11 and 17 of the trial court proceedings the noted witnesses testified to the effect that they arrested the appellant, searched him and found him with green sulphate bag which contained three red bags with green leaves inside. The appellant's counsel explained further that at page 21 and 22 of the trial court proceedings, PW4 G. 6772 PC Graciano, the exhibit keeper testified that he received green sulphate which contained green leaves. However, PW4 did not mention the three bags mentioned by PW1 and PW3. Ms. Fay continued to explain that PW2 G. 6196 DC Lukas who took the exhibit to the government chemist did not mention the three alternative bags.

From the noted contradictions, Ms. Fay opined that, what was seized at the crime scene is different from what was handed over at Mwanga

Police station as testified by PW2 and PW3. Also, the learned advocate noted that what was sent to the government chemist Laboratory in Arusha and what was tendered before the trial court was different from what was seized at the crime scene. She added that, there was no evidence showing how the said exhibits came out from exhibits room and how it was kept by exhibit keeper from the time it was seized from the appellant.

On the third ground of appeal, the prosecution was blamed for failure to call material witness to wit government chemist one NOELA. That, the testimony of PW2 at page 15 of the trial court proceedings, revealed that, one Noela received the exhibit, measured it and found it to be 5.88 kg. Then, she labelled it as NZL 437/2019, then PW2 the Government Chemist signed Form GCLA 01 and Form No. 001. Ms. Fay believed that the said government Chemist was material witness to prove the existence of form GCLA 01 and FORM 01. She commented that absence of a testimony from the government chemist make PW2's evidence valueless in the eyes of law. It was maintained that evidence of the government chemist who concluded that the exhibit received were mirungi was very important to prove the case beyond reasonable doubt.

Apart from that, Ms. Fay submitted that according to our laws, the government chemist was the one to tender the said document which shows the result. In this case, the said exhibit was tendered by PW2 who is a police officer and not expert from Chief government Chemist office. While making reference to the evidence of PW2 as reflected at page 20, Ms. Fay questioned why the said document from the government chemist was tendered in court by a police officer and not by the chemist from Government Chemist Laboratory who signed it. She made reference to **section 70 of the Law of Evidence Act** (CAP 6 R.E 2022] which provides that:

> *"Where the document is required by the law to be attested, it shall not be used as evidence until one attesting it has been called for purpose of proving it."*

Ms. Fay went on to state that the act of the said document to be tendered by PW2 who is a police officer is contrary to the law since there was no notice from the prosecution to tender the documents from the Chief Government Chemist office.

Ms. Fay was aware of the fact that no number of particular witnesses is required to prove the fact as provided for under **section 143 of The**

Evidence Act (supra). However, she was of the view that in the case at hand, the government chemist was essential witness. She suggested that **Section 195(1) of the Criminal Procedure Act** [CAP 20 R.E 2022] which gives room to call material witness could be used by the prosecution side.

Explaining the consequence of failure to call material witnesses, the learned advocate submitted that failure to call material witness who are within reach without sufficient reasons is fatal. She supported her argument with the case of **Aziz Abdallah vs Republic [1991] TLR 71** and the case of **Ahamad Salum Hassan @Chinga vs Republic,** Criminal Appeal No. 386 of 2021 (Tanzlii) in which the Court of Appeal referred the case of **Boniface Kundakira Tarimo vs Republic,** Criminal Appeal No. 350 of 2008 which held that:

> *"It is thus now settled, that where a witness who is in better position to explain some missing links in the party's case, is not called without sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only permissible."*

From the above references, Ms. Fay submitted that the prosecution evidence should not be considered and urged this court to allow this appeal.

As for the fourth ground of appeal, it was asserted that the prosecution relied on the testimony of the police officers alone which was unreliable and unsafe to establish conviction. Going through the prosecution witnesses, Ms. Fay stated that the same come only from Mwanga police station which is doubtful. She gave an example of the evidence adduced by PW1, PW2, PW3 and PW4 which she was of the view that contradict itself specifically on the date when the appellant was arrested, what was seized and what was handed over at the police station. Further, she said the act of the Police Officer to tender exhibits from the Chief government chemist reveals that they had evil mind towards the appellant. Thus, the trial magistrate convicted the appellant on unreliable evidence which is contrary to the law.

On another ground, Ms. Fay submitted that the trial magistrate erred in law and facts to enter conviction and sentence without considering that the offence was not proved beyond reasonable doubts. According to her, the doubts are: failure to call material witness; second, absence of independent witness during search and seizure, third, contradictory

statements of prosecution witnesses. That, the said doubts should benefit the appellant. She insisted that the trial magistrate unfairly entered conviction and sentence since the prosecution did not prove the case beyond reasonable doubts.

The last ground of appeal was in respect of contradiction in prosecution evidence. Ms. Fay noted the following contradictions: The first contradiction was in respect of the date when the appellant was arrested. She revealed that, at page 11 of the court proceedings, PW1 Insp. Daudi Kimashi testified that while accompanied by his fellow police officer namely D/CPL Jovin, Dc Emmanuel, Zephania, Linus, Nico and Joseph as he was in charge of that patrol at Kileo, saw the appellant on 23/07/2023 at 16:00hrs. PW3 H.1281 DC Zephania at page 16 of the trial court proceedings testified that on 23/08/2019 while on patrol with his fellow police officer, he received information from an informer that there was a person with a motor cycle, referring to the appellant.

Another noted contradiction was in respect of what was searched and seized at the crime scene when the appellant was arrested. That, according to prosecution witnesses PW1 and PW3 the appellant was found in possession of khat (mirungi) which was on the motor cycle in the green sulphate bag with three bags "*mifuko mbadala* "in it.

PWI and PW3 who arrested the appellant contradicted themselves in respect of the date of arresting the appellant and what the appellant was found in possession, though both were present during the arrest, search and seizure.

Another contradiction is in respect of what was handed over at Mwanga police station. She explained that according to the evidence adduced by PW4 one G 6772 PC GRASIANO exhibit store keeper at Mwanga police station said that around 20.00hrs inspector Kimashi went to his office and handed over exhibit which was sulphate bag green in color inside there was green leaves suspected to be mirungi and motor cycle. At the same time, PW2 G 6196 DC LUCAS at page 15 testified that he took the exhibit to the government chemist laboratory office at Arusha. The exhibit was a sulphate bag green in colour, which had three bundles of Mirungi. He took it from the exhibit keeper PC Gransiano. This simply means that PW4 the exhibit keeper received the sulphate green in colour and three bundles of mirungi only as per his testimony. That, the other alternative three bags red in colour were only mentioned by PW1 and PW3 but were not handed over to the exhibit keeper at Mwanga police station. Ms. Fay was of the view that this leaves a question on

whom to believe and clear these contradictions occasioned by trained and experienced police officers.

Also, there was a contradiction on the document which was labelled by government chemist. That, according to PW2 who went to Arusha, testified that he was welcomed by NOELA ENOCK who measured the exhibit and labelled it NZL 437/2019. While PW4 stated that PW2 came back from Arusha with exhibit labelled ZNL 437/2019. Thus, it was different exhibits.

Ms. Fay argued that the noted contradictions are not minor as they go to the root of the case and they affect the credibility of the key prosecution witnesses. Thus, the said evidence should not be acted upon to convict the appellant. She supported her contention with the case of **Toyidoto S/O Kosima vs Republic**, Criminal appeal No. 525 of 2021 (Tanzlii)

In her conclusion, the learned advocate submitted that the case which was before the trial court contains various irregularities which led to an unfair sentence and conviction. She summarised her submission by stating that, first, the search and seizure was done without the presence of an independent witness contrary to the law; second, the

contradictions in the testimonies of key witnesses from prosecution side go to the root of the case; third, failure to call material/essential witness like the government chemist from the Government Chemist Laboratory in Arusha who signed the results of the exhibit which were sent to Mwanga police station by PW2; fourth, the act of PW2 to tender exhibits which proved the sample inhibit showing that the leaves which were taken to the government chemist laboratory for analysis were mirungi and presented the report which was signed by the government chemist and official rubber stamp from GCLA which is contrary to the law.

In her final remarks, the learned advocate urged this court to allow the appeal and quash the conviction and set aside the sentence of thirty years imprisonment against the appellant.

Opposing this appeal, on the first ground of appeal, Ms. Bora Mfinanga for the republic reminded this court to refer the statement of PW1 as revealed at page 10 and page 11 of the typed trial court proceedings. She explained further that before PW2 tendered exhibit P1, he laid the foundation that he was on patrol with other police officers and in the course of the said police patrol, they arrested the appellant with green leaves which they presumed to be narcotic drugs commonly known as

Mirungi, whereas the appellant signed the exhibit. Moreover, when PW1 tendered the said exhibit, the appellant did not object it. To strengthen her argument the learned state attorney referred the case of **Song Lei V. The Director of Public Prosecution,** Criminal Appeal No. 16 of 2017 (Tanzlii).

Ms. Bora continued to explain that the allegation by the appellant that there was non-compliance of the law in admitting exhibit P1 was a mere speculation which does not serve any purpose in this appeal. She said that PW1 was a competent witness to tender exhibit P1 and the fact that exhibit P1 was not signed by an independent witness who was a civilian was not fatal as it did not prejudice the appellant's right. To bolster her argument the learned State Attorney referred the case of **Waziri Shabani Mizigo vs Republic,** Criminal Appeal No. 476 of 2019 (Tanzlii) at page 30).

On the second ground, Ms Bora strongly opposed the argument by the learned counsel for the appellant that the trial court erred in law and fact in convicting and sentencing the appellant despite the fact that chain of custody was broken. She submitted that, chain of custody was never broken in this case due to the fact that all four witnesses (PW1,

PW2, PW3 and PW4) proved that the exhibit seized was properly handled in such a way that it eliminated the possibility of it being tempered with or implanted. She agreed with the counsel for the appellant that the famous case of **Paulo Maduka and 4 Others Vs Republic**, (supra), established the principle of chain of custody which can be prooved by way of paper trail. The same may be proved by oral evidence which shows that from the moment of its seizure the chain of custody of the particular exhibit was never broken. Also, Ms Bora asserted that the same principle is applicable in the case at hand when PW1 stated at page 11 of the typed proceedings that the appellant was apprehended on 23th of July, 2019 with the exhibit green leaves that are presumed to be narcotic drug "khat" commonly known as *"mirungi."* In support of that evidence, PW3 admitted at page 16 and 17 of the typed trial court proceedings that the exhibit was submitted to the exhibit keeper on the same date.

Elaborating more on the second ground, Ms Bora continued to explain that, PW2 also testified at page 15 of the typed trial court proceedings that on 2nd of August 2019 he took the exhibit - greed leaves presumed to be narcotic drugs khat commonly known as *"mirungi"* to the government chemist office at Arusha. On the same date, he returned

the exhibit to Mwanga Police Station to the exhibit keeper PW4. She stated further that when PW2 was recalled at page 20 of the typed trial court proceedings, he stated that on 13thOctober 2019 the results from the government chemist office were supplied to him revealing that the exhibit that was seized from the appellant was narcotic drugs commonly known as Mirungi weighing 5.88 kg.

Ms. Bora continued to submit that, PW4 the exhibit keeper at page 21 of the typed trial court proceedings testified that he received the exhibit from PW1 on the same date on 23rd of July 2019. That, when the exhibit was taken from the government chemist office, he destroyed it and continued to tender documents which were handing over certificate, PF 16 and inventory form. All that showed that there was no any loop hole on prosecution evidence that suggest that the exhibit was tempered with. Secondly, since the appellant jumped bail when the case was at the stage of hearing, he waived his right to question the same before the trial court.

On the argument by the appellant that chain of custody was broken since PW1 and PW3 testified that when they arrested the appellant there were three other alternative bags inside which contained green leaves

presumed to be Narcotic Drugs khat commonly known as *Mirungi*. That, PW4 did not mention the said three alternative bags on his testimony before the trial court. Ms. Bora strongly opposed that allegation and submitted that based on the cardinal principle that who alleges must prove, the prosecution managed to prove the charge against the appellant through its four prosecution witnesses who testified that, the green leaves which the appellant was found in possession were Narcotic Drugs commonly known as *Mirungi.* The same leaves were submitted to the Government Chemist laboratory and the report of the Government Chemist shows that the green leaves were Narcotic Drugs khat commonly known as "Mirungi." The same was stated in the certificate of seizure, Government Chemist Report and Inventory form.

Ms Bora continued to argue that the assertion by the appellant that chain of custody was broken lacks merit since the Republic proved their case against the Appellant beyond reasonable doubts. She cited the case of **D.P.P vs Yusuph Mohamed Yusuf,** Criminal Appeal No. 331 of 2014 (Tanzlii) to cement her argument.

Arguing on the third ground, Ms. Bora started by appreciating the appellant's knowledge that under **section 143 of the Evidence Act**

(Cap 6 RE 2022) no particular number of witnesses shall be required to prove any fact. In addition to what she appreciated she cited the case of **Hamisi Juma @ Seleman @ Isaya versus the Republic,** Criminal Appeal No. 63 of 2020 (Tanzlii) at page 12.

On that basis Ms. Bora averred that, the Report from the Government Chemist was tendered before the Court by PW2 who was once the custodian of the said Report as he testifies at page 20 of the typed trial court proceedings that, on 13th October 2019 he was informed that the results of the exhibit he submitted were ready. He went to pick up the said report which showed that the exhibit that he had submitted were Narcotic Drugs khat commonly known as "Mirungi". In support of her argument, she referred the case of **THE DPP vs Mirzai Pirbakhshi @ Hadjii,** Criminal Appeal No. 493 of 2016 (Tanzlii) at page 7. In the cited case, the Court of Appeal stated that, *a person who at one point in time possesses anything, a subject matter of trial, is not only a competent witness to testify but he could also tender the same.*

Basing on the above authority, Ms. Bora stated that PW2 was a competent witness under **section 127 (1) of the Evidence Act** (CAP 6 R.E 2022) to tender the Report from the Government chemist.

On the allegation by the appellant that the Government Chemist should have been called to testify, the counsel for the respondent submitted that the law is clear under **section 205A of the Criminal Procedure Act, CAP 20 R.E 2022** that, the report from the Government analyst shall be admissible as evidence even without formal proof and such evidence shall unless rebutted be conclusive. It was Ms. Bora's Observation that the report provided by PW2 was conclusive proof of the fact that the green leaves seized from the appellant were in fact Narcotic Drugs khat commonly known as "Mirungi."

On the fourth ground of appeal, that the trial court erred in law and fact in convicting and sentencing the Appellant since all four witnesses who were called to testify were police officers. Ms Bora strongly opposed this ground due to the fact that, all witnesses that were called by the prosecution side were competent witnesses and there is no law that prohibits a police officer to appear and give testimony before the court as a competent witness. That, if the Appellant suspected that witnesses paraded by the prosecution had evil mind towards him, he could have shown the said doubt during cross examination but he waived that right when he jumped bail during the trial. In support of her argument, Ms. Bora referred the cases **of Masanja Maliasanga mabunga v. the**

Republic, Criminal Appeal No. 328 of 2021 (Tanzlii), **Splendors (T) Limited v. David Raymond D'Souza & 2 Others,** Civil Appeal No. 7 of 2020 (unreported) and **section 127 of the Evidence Act** (supra). Based on the above authorities, Ms Bora stated that, both case laws and statutory provisions provide that, the competence of a witness is not measured by a position he holds in a trial but his capability of understanding the questions put to him or of giving rational answers to those questions. The learned State Attorney was of the view that the appellant's right was not prejudiced for polices officers to be called as witnesses. She urged this court to dismiss the fourth ground of appeal as it lacks merit.

Replying to the fifth ground of appeal, Ms Bora submitted that the Republic proved the case against the appellant beyond reasonable doubt. Thus, the allegation that the prosecution failed to call material witnesses before the trial and that the witnesses' statements were contradictory were baseless.

Furthermore, evidence against the appellant was watertight and the prosecution was able to prove the case against the Appellant beyond reasonable doubt. Concerning contradiction in respect of dates, Ms. Bora

contended that, page 10 of the typed proceeding shows that PW1 mentioned 23/07/2019 as the date of arrest while at page 16 PW3 it is typed 23/08/2019 when re visit the original handwritten court proceedings the proceedings show that both PW1 and PW3 mentioned the same date of occurrence of the incident. That is 23rd day of July 2019. Thus, the typed trial court proceedings contained a typing error that is curable under **section 388 of the Criminal Procedure Act** (CAP 20 R.E 2022).

Responding to the allegation that PW1 and PW3 statements were contradictory on the fact that PW3 didn't mentioned the alternative bags seized from the appellant, Ms. Bora reiterated by stating that, it is a duty of prosecution side to prove the case beyond reasonable doubt, the prosecution is bound to prove what is laid down on the charge. She said that, what was laid down on the prosecution charge was trafficking of Narcotic Drugs' khat' commonly known as *"Mirungi"* the offence that was proved by all four prosecution witnesses that were called to testify. The learned state attorney continued to submit that the issue of failure to mention the alternative bags doesn't amount to contradiction.

Furthermore, Ms. Bora directed this court at page 15 of typed trial court proceedings where PW2 explained that when submitting the exhibit that was Narcotics Drugs commonly known as *"Mirungi"* the officer Noela Enock weighed the exhibit and marked the sample from each bundle. She took ZNL 437/2019 and the same exhibit was tested and the result revealed that the exhibit was Narcotics Drugs commonly known as *"Mirungi"*. It was her opinion that labeling of exhibit by the government chemist doesn't amount to the change of exhibit.

In conclusion, the counsel for the respondent submitted that during the hearing of this case at the trial court the appellant jumped bail and the trial court had to consider section **226 of the Criminal Procedure Act (CAP 16 R.E 2022)**. According to her, **section 226 (2) of (3) the Criminal Procedure Act** (CAP 16 R.E 2022) was contravened because the appellant was not given opportunity to address the trial court if he had sufficient cause for his non-appearance which resulted into his conviction in absentia. The same was not reflected in the typed proceedings of the trial court at page 26. She continued to state that, the omission was a procedural irregularity which may occasion injustice on part of the Appellant who was condemned without a hearing. To cement her point the learned state attorney cited the case of **Mtwa**

Michael Katusa vs. Republic, Criminal Appeal No. 577 of 2015, (TANZIIL) page 9 and **article 13(6) (a) of the Constitution of the United Republic of Tanzania,** [CAP 2 R.E. 2002]. She said that, the fundamental right was violated that no person shall be condemned without a hearing.

From the foregoing it was the learned state attorney opinion that, the proper remedy for the like situation was discussed in the case of **Norbert Komba versus the Republic,** Criminal Appeal No. 226 of 2008 at page No. 3 (Tanzlii). Ms Bora implored this court to remit this matter to the trial court to comply with the requirement under **section 226 (2) of the Criminal Procedure Act** (supra).

Having gone through the submissions of the parties, on the outset I have noted the concern of the learned State Attorney in respect of non compliance of **section 226 (2) of the CPA**. It is evident from the trial court's records that after apprehension of the appellant on 15/08/2023 and 28/08/2023 when he appeared before the court, he was not accorded an opportunity to state the reasons of his absence. The proceedings of the two noted dates reads:

"DATE: 15/8/2023

CORAM: M. D. MFANGA – PRM

FOR REPUBLIC: INSP BEATUS

COURT CLERK: E. ANDERSON – R/A

ACCUSED: Present

Pross: For judgment ready to proceed.

Order: (1) Judgment on 28/8/2023.

(2) AFRIC

SGD: M. D. MFANGA PRM

15/8/2023

DATE: 28/8/2023

CORAM: M. D. MFANGA – PRM

FOR REPUBLIC: INSP BEATUS

COURT CLERK: E. ANDERSON – R/A

ACCUSED: Present

Pross: Your hon it is for judgment today, the accused person was convicted and sentenced under section 226 (1) of the CPA 20 RE 2019. Pray to read the judgment to him.

Accused: Ready to proceed.

Court: Judgment delivered today in the presence of accused person today on 28/8/2023.

SGD: M. D. MFANGA PRM

31/8/2023."

Thereafter, the appellant was committed to Mwanga Prison to serve a sentence of 30 years which was meted against him in absentia.

With due respect to the learned trial Magistrate, what was done is clear violation of the laid down procedure under **section 226 (1) and (2) of the CPA** and violation of the natural justice of the right to be heard.

Section 226 (1) and (2) of the CPA provides 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 were present; and if the complainant does not appear, the court may dismiss the charge and discharge the accused 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.*** "Emphasis added

According to the wording of **section 226 (2) of the CPA** (supra), I am of considered opinion that it must be reflected in the court proceedings that the accused person was required to show cause that his absence was from causes over which he had no control and that he had a probable defence on merit. Upon being satisfied with the reasons advanced by the accused person, then the trial court may proceed to set aside the conviction and retry the case inter partes. I think, there is no way the trial court can become aware of the reasons of absence of the accused person who has been apprehended, without requiring him to show cause.

In the case of **Tryphone Elias @ Ryphone Elias and Another v. Majaliwa Daudi Mayaya** (Civil Appeal 186 of 2017) [2017] TZCA 200 (7 December 2017) at page 9 and 10, it was held that:

> *"To begin with, we wish to point out that, as submitted by Mr. Nasimire, the Court cannot normally justifiably close its eyes on a glaring illegality in any particular case because it has duty of ensuring proper application of the laws by the subordinate courts - See the case of* ***Marwa Mahende v. Republic [1998] T.L.R. 249****.*

*In **Marwa Mahende's** case {supra), the appellant was tried, convicted and sentenced in absentia. Upon apprehension, the appellant was taken straight to prison to start serving his sentence. He was aggrieved and appealed to the Court."*

At page 10 the Court went on to say that:

"It turned out that arguments centered on the provisions of section

226 (2) of the Criminal Procedure Act No. 85 of 1985. That section was silent on the procedure on how to handle an accused person who was arrested following his conviction in absentia. On the face of it, sub section (2) of that section was capable of being understood to mean that upon his arrest, the accused person was to be taken to prison straight away. The Court construed the subsection to mean that an accused person who was arrested following his conviction and sentence in absentia should be sent before the trial court in order to show cause. Following the doubt which was expressed regarding the propriety of that move by the Court, it held that: -

"We think, however, that there is nothing improper about this. The duty of the Court is to apply and interpret the laws of the country. ***The superior courts have the additional duty of ensuring proper application of the laws by the courts below."*** *[The emphasis is ours]*

Seeking an inspiration from that decision, we are firm that for the interests of justice, the Court has a duty to address a vivid illegality and that it cannot justifiably close its eyes thereof."

Considering the cardinal principle of natural justice of right to be heard, and guided by the above cited authority, I am enjoined to invoke my revisional powers under **section 373 of the CPA** and nullify the proceedings and decision of the trial court. In lieu thereof, I hereby order the matter to be retried afresh before another Magistrate of competent jurisdiction.

Ordered accordingly.

Dated and delivered at Moshi, this 14th day of March, 2024.

THE HIGH COURT OF TANZANIA

S. H. SIMFUKWE

JUDGE

14/03/2024