IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

CRIMINAL APPEAL NO. 52 OF 2021

(CORAM: MKUYE, J.A., GALEBA, J.A., And MASOUD, J.A.)

SHIJA NDALI @ MATONGO.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Bahati, J.)

Dated the 14th day of December, 2021
in
Criminal Appeal No. 14 of 2020

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JUDGMENT OF THE COURT

21st September & 6th October, 2023

MASOUD, JA.:

This is a second appeal by the appellant Shija Ndali @ Matongo. It arises from the judgment of the High Court of Tanzania (Bahati, J.), sitting at Tabora, in DC. Criminal Appeal No. 14 of 2020. Initially, the appellant appeared before the District Court of Nzega at Nzega where he was charged with, and subsequently convicted of the offence of rape contrary to sections 130 (2) (e) and 131 (1) and (2) of the Penal Code, [Cap. 16

R.E. 2002 now R. E. 2022]. He was convicted and sentenced to the mandatory thirty years in imprison with twelve strokes of a cane. Dissatisfied, he appealed in vain to the High Court where the appeal was dismissed in its entirety. Still aggrieved by the conviction and sentences imposed on him, the appellant has appealed to this Court.

The context of the allegation against the appellant was that on unknown date of May 2018 at Bulunde area within Nzega District, in Tabora Region, the appellant who was staying with the victim's family had carnal knowledge with a girl of 16 years old (hereinafter the victim). The victim had to stop schooling following becoming pregnant.

At the trial before the trial district court, the appellant was said to have jumped bail and failed to enter appearance for quite some time. As a result, and following the prayer by the prosecution side under section 226 of the Criminal Procedure Act, [Cap 20 R.E 2002 now R.E 2019] (the C.P.A) which prayer was granted, the trial was conducted in absentia. The prosecution paraded three witnesses in a bid to prove beyond reasonable doubt the charge laid against the appellant and closed its case on 27th November, 2018.

Subsequent to the closure of the prosecution case, the trial court scheduled the case for judgment on 12th December, 2018. As the appellant was still at large, the trial court marked the arrest warrant, which had previously been issued on 3rd October, 2018 against the appellant, as still in force. However, for reasons that are not clear on the record, the matter was not called on for judgment as scheduled until on 17th January, 2019. The delivery of the judgment was then adjourned to 11th February, 2019 and the arrest warrant continued to be marked as still in force.

When the matter was called on for delivery of the judgment on 11th February, 2019, the appellant was present in person. He told the court that he had travelled and had asked his mother to report in the trial court about his absence. As the trial court was satisfied that there were no good reasons adduced by the appellant, it proceeded to pronounce the judgment as scheduled and convicted the appellant as charged and sentenced him to imprisonment for thirty years with twelve strokes of a cane.

Aggrieved, the appellant preferred his first appeal to the High Court. The High Court, however, upheld the decision of the trial court and dismissed the appeal. Dissatisfied by the decision of the first appellate court, the appellant preferred this second appeal. He raised five grounds of

complaint. However, we think that it is only the first ground which is, in the circumstances, most compelling and worthwhile for our determination. The crux of the complaint is, in our view, that the appellant was not given a fair hearing when he was convicted and sentenced in absentia.

Before us, the appellant appeared in person unrepresented. On the other hand, Mr. Merito Ukongoji and Ms. Grace Lwila, learned Senior State Attorney and learned State Attorney respectively, appeared on behalf of the respondent Republic. When called upon to argue his appeal, the appellant simply adopted the grounds of appeal. He asked us to invite the respondent to reply to his grounds of appeal after which he would make a rejoinder if need arises. On the part of the respondent Republic, Mr. Ukongoji, informed us that they do not support the appeal of which Ms. Lwila, would submit opposing of the appeal.

Initially, Ms. Lwila was, in her submission, firm that the substance of the first ground of appeal was of no avail, since the trial court proceedings were validly and correctly conducted under section 226(1) of C.P.A. following non-appearance of the appellant at the trial.

We then drew the learned State Attorney's attention to the provisions of section 226(2) and 226(4) of the C.P.A. In doing so, we wanted the learned State Attorney to consider such provisions in the light of what transpired at the trial court on 11th January, 2019 as is evident at page 13 of the record of appeal; and in the light of the order of the court refusing to allow the appellant to be heard on his defence on the merit against the charge laid against him; and the reasoning of the trial court behind the said order that the trial court entered after the appellant had explained why he absented himself from the trial.

On reflection, the learned State Attorney quickly, and rightly so in our view, changed her stance. In so far as the learned State Attorney was concerned, the provisions of section 226(2) and (4) of the C.P.A. give the trial court wide discretion in two situations involving absenteeism of an accused person from the court. The first situation involves discretionary power of the court to set aside a conviction entered in absentia upon showing of good cause for absconding and showing of existence of probable defence on merit. The second situation involves discretionary power of the court to refrain from convicting an accused in absentia and instead issue a warrant for the accused to be brought before the court to

explain why he had been absenting himself from the trail before the court may proceed to convict him.

In so far as in this case the trial court was yet to convict the appellant who turned up himself before the judgment was delivered, the learned State Attorney was, increasingly, convinced that the trial court did not exercise its wide discretion properly when it overruled the appellant and proceeded to deliver the judgment as scheduled and thereby convicting the appellant as charged. In her submission, she was convinced that the explanation by the appellant for his absence was not considered by the trial court when it exercised its discretion mindful that the appellant was then yet to be convicted. In line with her submission, the learned State Attorney asked us to find merits on the first ground since it entails the appellant's right to be heard.

As to the way forward, we were invited by the learned State Attorney to make a determination that would allow the appellant to be heard in his defence. In so doing, the learned State Attorney urged us to nullify all the proceedings at the trial court of 11th February, 2019, quash and set aside the conviction and sentences imposed and all the proceedings of the High

Court in Criminal Appeal No. 14 of 2020 and remit the file to the trial court for hearing of the defence.

On his part, the appellant had nothing useful to rejoin. He only prayed to be released. As to the way forward submitted by the learned State Attorney, the appellant chose to leave it to the Court to determine as it deems proper in the circumstances.

We have no doubt in our mind that the first ground of appeal involves application of section 226 of the C.P.A. in so far as it relates to the trial that proceeded under the said provision and the appellant's right to be heard. As is on the record, as very well captured by the learned State Attorney, when the appellant appeared before the trial court on 11th February, 20219 at page 13 of the record of appeal, he was yet to be convicted.

It would seem that his situation could not fit within the plain meaning of the provision of section 226 (2) of the C.P.A. as there was no conviction yet to be set aside upon showing of good cause and showing of existence of probable defence on the merit. There was then only an order for delivery of judgment by the trial court which upon being pronounced,

subsequently, saw the appellant being convicted and sentenced. There is no doubt that the appellant's situation when he appeared and explained about his absence in the trial court was, in our considered view, better off without conviction than the situation envisaged in the plain meaning of the provision of section 226 (2) of the C.P.A. which plainly envisions one who has already been convicted in absentia.

We have had dealt with more or less similar situations involving section 226 of the C.P.A. and underlined what the trial court ought to do in the circumstances where an accused person appears in the trial court after being absent and being convicted in absentia. In dealing with such situations, we considered and clarified the right of an accused person whose trial and conviction proceeded under sections 226 and 227 of the C.P.A., and the duty the law imposes on the trial court to ask one who had absented from his trial whether he had any explanation for his absence and a probable defence on the merit. See, **Marwa s/o Mahende v. Republic** [1998] T.L.R. 249; **Lemoyo Lenuna and Lekitoni Lenuna v. Republic** [1994] T.L.R. 54; and **Norbert Komba v. Republic** (Criminal Appeal No. 226 of 2008) [2014] TZCA 163; **Fweda Mwanajoma and Another v. Republic** (Criminal Appeal No. 174 of 2008) [2010] TZCA 96 and

Magoiga Magutu @ Wansima v. Republic (Criminal Appeal No. 65 of 2015) [2016] TZCA 608.

We gathered from such authorities the principle that an accused person whose trial and/or conviction were conducted in absentia must upon appearing before the trial court, be accorded a right to explain why he had absented himself and whether he had a probable defence on the merit before the trial court may determine whether to set aside the conviction and sentence.

As already pointed out above in passing, when the appellant in the case at hand appeared on 11th February, 2019, there was no conviction to be set aside under section 226(2) of the C.P.A. There was only an order for delivery of the judgment and warrant of arrest issued against the appellant. The record of appeal from page 12 on 27th November, 2018 up to page 13 on 17th January, 2019 is evident that the trial court exercised its discretion under section 226(4) of the C.P.A. having refrained from convicting the appellant in absentia as charged. In so doing, the trial court correctly, in our view, maintained the warrant of apprehension of the appellant previously issued to cause the appellant to be brought before the court.

Guided by the principles emerging from the authorities cited herein above, we are settled that section 226(4) of the C.P.A which empowers the trial court to refrain from convicting an accused person in absentia and causing him to be brought before the court is meant to afford an opportunity to the accused person upon his appearance before the court to explain whether he had good cause for his absence and whether he had a probable defence on the merit before the trial court may determine to proceed to convict him as charged or re-open the proceeding to hear the accused in his defence on the merit.

We have painstakingly looked at the record in the light of what we have stated herein above in relation to what transpired when the appellant appeared before the trial court on 11th February, 2019. We thought it is necessary to satisfy ourselves as to whether the appellant was accorded a right to explain away his absence and showing that he had a probable defence on the merit.

The excerpt of the record of appeal at page 13 shows what happened when the appellant presented himself to the trial court on the day set for the judgment which was on 11th February, 2019 after jumping bail and absconding his trial for about six months. The excerpt reads thus:

***Date**: 11/2/2019*

***Coram**: G. N. Barthy- RM*

***State Attorney**: P. Utafu*

***BC**: D.M. Salaam -RMA*

***Accused**: Present*

***State Attorney**: The case is for judgment. We are ready.*

***Accused**: I travelled and I told my mother to report on my behalf.*

***Court**: The reasons offered by the accused are not valid as he jumped bail for about six months and he never sent any surety to report on his whereabouts until he was arrested on Criminal Case No. 11 of 2019 using different name of Shija Fabian. The court will therefore proceed with delivering the judgment as prepared.*

Sgd

RM

11/2/2019

Previous Criminal records:

No record but I pray for the sentence in accordance with the law.

Mitigation by the Convict:

I did not escape I pray for the lenience of this court

Sentence:

These types of offences are becoming rampant in our society and affect the innocent lives of young girls. I accordingly sentence the convict to serve thirty years jail custody according to the law with twelve strokes of canes. The same to be a lesson to him and others.

Sgd

Resident Magistrate

11/2/2019

We considered the above excerpt. We were guided by what we held in **Magoiga Magutu @ Wansima** (supra) in which we also took into account the position we took in our earlier decisions in relation to applicability of section 226 of the C.P.A. Our scrutiny of the above record shows that the learned trial magistrate did not take the first initiative to address the appellant to account for his absence and demonstrate whether he had a probable defence on the merit. Rather, we only see on the record the appellant saying that he travelled and he asked his mother to report about his absence. It is not clear on the record as to what made the appellant to address the trial court in that manner and to that extent.

We think, the trial magistrate ought to have addressed the appellant about his right to be heard on his defence on the merit and that the trial court had discretion, upon showing of good cause and existence of probable defence on the merit to, in the circumstances, vacate its previous order as to the delivery of the judgment in absentia, and allow the appellant to be heard in his defence on the merit. As already pointed out, from the above excerpt, we only see the appellant striving to explaining why he was absent without being first addressed by the trial magistrate as afore explained.

It is clear from the foregoing that despite the explanation given by the appellant why he absented himself from the trial court and without ascertaining from the prosecution who might have no objection from allowing the appellant to defend himself on the merit, the trial court overruled the appellant. It did not bother to inquire from the appellant in order to know whether and why he travelled and whether there was any proof that he sent his mother to report on his behalf and see whether the court would be satisfied on whether his absence was from causes over which he had no control. As we held in **Christopher Olaisi v. Republic**, Criminal Appeal No. 296 of 2011 (unreported) in a more or less similar

situation, that it is, indeed, ordinarily difficulty for a layperson like the appellant in the instant appeal, to explain his whereabouts without being probed by the court. It is clear on the record of appeal that the trial court did not probe the appellant on the reason advanced.

In its reasoning the trial court did not confine itself to the reason adduced by the appellant. It introduced extraneous matters which were not part of the record and which were not part of what the appellant said. To make things worse, the appellant had no opportunity to be heard on the extraneous matters that emerged from the trial court's order rejecting to allow the appellant to advance his defence on the merits of the case.

In view of what we have discussed and found; we are in agreement with the learned State Attorney that the manner in which the trial court dealt with the appellant when he entered appearance on the day set for delivery of the judgment in absentia was contrary to what was expected of the trial court. More so, the manner in which the court exercised its discretion to refuse allowing the appellant to defend himself on the merit was not entirely based on the reason advanced by the appellant. Rather, it was based on extraneous matters which it ought not to have considered. It did not therefore exercise its discretion judicially and judiciously.

It is unfortunate that the first appellate court did not see merit on this complaint which was raised by the appellant as the first, second and third grounds of appeal. In its reasoning in relation to the complaint from page 58 to page 60 of the record of appeal, the first appellate court was satisfied that the grounds of complaint were not meritorious. It is unfortunate that the first appellate court did not consider whether the trial court properly exercised its discretion when the appellant explained why he was absent.

The first appellate court did not also consider whether the appellant was addressed on his rights in a situation he was facing as mandated by the established position of the law. We are of the view that had the first appellate court inquired into whether the trial court properly exercised its discretion and closely considered the reasons assigned by the trial court in overruling the appellant and whether the appellant was addressed on his rights, it would not have arrived at its finding that the grounds of complaint were not meritorious. In fact, it would have arrived at the conclusion that the trial court improperly exercised its discretion and in so doing it denied the appellant his right to be heard on his defence on the merit.

In view of the foregoing and our finding on the merit of the first ground of appeal which relates to the right to be heard, we do not think that we need to deal with the remaining grounds of complaint.

We have considered what should be the way forward in the circumstances. We considered whether we should order that the case be remitted to the trial court to afford the appellant an opportunity to defend himself on the merit. While mindful of the submission of the learned State Attorney as to the way forward and having looked at the record of the proceedings in the trial court, we were contented with remitting the file to the trial court with a direction that the appellant be heard in his defence on the merit before the trial court which could also compose and deliver its judgment.

For those reasons, we invoke our power of revision under section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2022]. We thus nullify the proceedings of the trial court emanating immediately after the order marking the closure of the prosecution case on 27th November, 2018 at page 12 of the record of appeal and those of the High Court. Consequently, we quash and set aside the judgments of both lower courts and subsequent orders thereto.

In the end, we order that the appellant be heard in his defence on the merit before another magistrate who shall also compose a fresh judgment in accordance with the law.

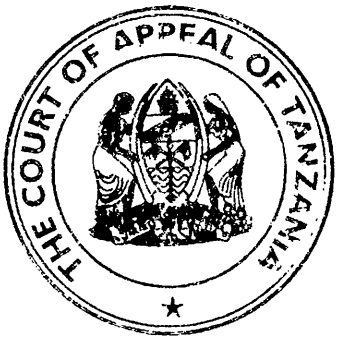
DATED at **TABORA** this 5th day of October, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 6th day of October, 2023 in the presence of the appellant in person and Mr. Magonza Charles, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL