

Understanding the Constitutional Right to Defense and Trials in Absentia in Criminal Cases in Ethiopia: A Case Based Analysis

Leake Mekonen Tesfay*

Attorney and Consultant of Law; LL.B, LL.M; Formerly, Judge, Federal First Instance Court (June 2016 to October 2018); Public Prosecutor, Ethiopian Revenues Customs Authority (ERCA) (November 2009 to June 2016); Part-time Law Lecturer, Bahir Dar University, Addis Ababa Distance Education Coordination Centre from 2015/16 to 2016/17 (Academic Years)

*Corresponding author: Leake Mekonen Tesfay | Received: 02.02.2019 | Accepted: 11.02.2019 | Published: 22.02.2019
DOI: [10.21276/sijlcj.2019.2.2.1](https://doi.org/10.21276/sijlcj.2019.2.2.1)

Abstract

As exception to the right of persons accused of crime to be tried in their presence, absentia trial is recognized in many jurisdictions. In Ethiopia, absentia trial is possible for crimes which are considered of sever gravity, but the accused has the right to retrial for justifiable reasons. Defining absentia trial has, however, become controversial. Typical to this, the Federal Supreme Court Cassation Division (Cassation Bench) has given decisions in two cases - *Fetiya's case* and *Biniyam's case* - excluding cases where the accused absents after the prosecution witnesses are heard or at sentencing hearing from the domain of absentia trial. It reasoned that in cases where the accused absents after the prosecution witnesses are heard, s/he should be presumed to have waived the right to defense. This case comment examines the appropriateness of these decisions from the perspective of criminal trial process. It is mainly argued that absentia trial includes cases where the court continues trying the case in the absence of the person accused, including cases where the accused absents after the prosecution evidences were heard or even at sentencing hearing. Moreover, as persons accused may absent after the prosecution evidences are heard or even at sentencing hearing for reasons beyond their control, they shall not be denied the right to retrial without regard to the reasons of their absence.

Keywords: The right to defense; presence in trial; trial in absentia; cassation decision; Ethiopia.

Copyright @ 2019: This is an open-access article distributed under the terms of the Creative Commons Attribution license which permits unrestricted use, distribution, and reproduction in any medium for non-commercial use (NonCommercial, or CC-BY-NC) provided the original author and source are credited.

INTRODUCTORY REMARKS: GENERAL CONSIDERATIONS ON TRIAL IN ABSENTIA

The right to defense and the right to be tried in one's presence: the nexus

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) guarantees the right to defense for persons accused. The right to defense subsumes many component rights within it. It, at least, includes the right to know and have full access to all prosecution evidences; to cross-examine prosecution witnesses; to present defense evidences, including witnesses and claim that evidences be presented for their defense upon court order [1].

Undoubtedly, for the accused to be able to exercise this very right, his/her attendance in trial is necessary. In this respect the International Convention on Civil and Political Rights (ICCPR) clearly provides for the right of the accused "[t]o be tried in his

presence" as a minimum guarantee [2]. The FDRE Constitution [3] and the ICCPR [4] taken together imply

² ICCPR, Article 14(3)(d). The American Convention on Human Rights (ACHR) and the European Convention on Human Rights and Fundamental Freedoms (ECHRFF), although they did not provide for it as a mandatory requirement, recognize the right to be present in trial in person. In similar words they provide that a person accused has the right to defend himself personally or through legal assistance. (See, ACHR, Article 8(2)(d), and ECHRFF, Article 6(2)(c)). Moreover, the European Court of Human Rights (ECHR) has made the right to be tried in one's presence as an integral part of the right to a fair trial with its decision in a case *Colozza v. Italy*. (See, Case of *Colozza v. Italy*, ECHR, 7A/1983/63/97, (12 February 1985).

³ FDRE Constitution, Article 20(4) and 13(2). While Article 20(4) provides for the right to defense, Article 13(2) provides that human rights provision embodied in the Constitution are interpreted in line with the international human rights instruments to which Ethiopia is signatory.

¹ Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Article 20(4)

that in Ethiopia the right to be tried in one's presence is constitutionally guaranteed. The Criminal Procedure Code (Cri. P. C.) also provides clearly that the accused is entitled with the right to be tried in his/her presence [5].

However, the accused may fail appearing before the court whereby necessitating trial in absentia [6]. Trial in absentia has two forms. The first is if the accused did not appear at all the trial process [7]. The second is if the accused was present at the beginning of the trial process but absents in later stages [8]. While in the first the accused is not present at any phase of the trial totally (*nunquam praesens*) the accused is considered as semi-present (*semel praesens*) in the second case [9]. Trial in absentia is, therefore, an exception to the rule that persons accused have the right to be tried in their presence.

Absentia Trial in Different Jurisdictions

Different jurisdictions have different approaches to absentia trial. In the common law countries, absentia trial is impossible, but exceptionally [10]. In the United Kingdom, the accused is required to be present throughout the trial process in cases of serious offences [11]. In Federal cases in USA while the accused is required to be present in trial process and sentencing, s/he is assumed to have waived the right to be present if "voluntarily" absents [12]. Courts are,

however, required to question whether the absence of the accused is voluntary to the extent that the defense counsel of the accused should be allowed to raise reasonable doubts that the accused absents voluntarily [13]. While sentencing is not part of trial rather a post-conviction procedure in USA [14], the right to be present at sentencing is guaranteed, and if the accused absents at the sentencing hearing "voluntarily" the court sentences him/her in absentia [15].

In the civil law countries, trial in absentia is possible, but in Germany and Spain [16]. In Switzerland, a person tried in absentia has the right for a retrial, but only if s/he satisfies the court that his/her absence was for good cause [17]. In France trial in absentia is possible for charges of serious crimes with the accused having the right to retrial [18].

One learns from these experiences that if the accused, duly summoned, absents it is assumed that s/he waives his/her right to be present in trial and defense [19]. While this presumption is expressly provided in some jurisdictions, example in the USA, it is developed through practice in others. However, courts are cautious in applying this presumption. These cautious measures are taken either before proceeding to absentia trial or after it, pursuant to the specific legal systems. For example in the USA district courts examine whether the accused is absent voluntarily by letting the defense counsel [20] to explain the possible reasons for the defendant's absence to see if there are reasons to adjourn trial or sentencing hearing before deciding to try or sentence the accused in absentia. On the other side, in Switzerland and France, the accused has the right to retrial if s/he satisfied the court that s/he was absent for reasons beyond his/her control, whereby allowing the accused to rebut the presumption that his/her absence was with an intention to waive his/her right to defense.

⁴ ICCPR, Article, 14(3)(d). This provides for the right to be tried in one's presence.

⁵ Criminal Procedure Code of Ethiopia, Proclamation No. 185 of 1961, Article 27(1).

⁶ Absentia trial has underlying policy objectives which this case comment did not handle in detail. It is believed, impossibility to hold an absentia trial can paralyze the criminal justice system in the sense that through the lapse of time evidences may be dispersed and that the time-limit to institute a criminal case may lapse. See, *Colozza v. Italy*, supra note 2; Committee of Experts on the Operation of the European Union in the Penal Field, "Judgment in Absentia", Strasbourg, 3 March 1998, p. 10.

⁷ Starygin & Selth (2005), cited in Anne Klerks (June 2008), *Trials in absentia in international (criminal) law*, Master's Thesis, Tilburg University, p. 10.

⁸ Ibid

⁹ Schwarz, A. (2016). The legacy of the Kenyatta case: Trials in absentia at the International Criminal Court and their compatibility with human rights. *African Human Rights Law Journal*, 16(1), 99-116.

¹⁰ Ibid. The exceptions are if the accused personally summoned failed to appear or abscond, where the accused, according to law, requests for the trial to be held in his/her absence, and if the court orders due to misconduct of the accused.

¹¹ Starygin & Selth, supra note 7, p. 10.

¹² Ibid. See also Rule 43(c) of the Federal Rules of Criminal Procedure.

¹³ *United States v. Achbani*, 507 F. 3d 598, 601 (7th Cir. 2007); *United States v. Watkins*, 983 F. 2d 1413, 1419 (7th Cir. 1993)

¹⁴ *Betterman v. Montana*, 578 U.S., (2016); Rule 32_{ff} of the Federal Rules of Criminal Procedure

¹⁵ *United States v. Ornelas*, D.C. No. 3: 13-cr-03313-JAH-3 (9th Cir. 2016); Rule 43(a)(3) & 43(c)(2) of the Federal Rules of Criminal Procedure.

¹⁶ Committee of Experts, supra note 6

¹⁷ *Medenica v. Switzerland*, cited in Jeremy McBride, (2009), *Human rights and criminal procedure: the case law of the European Court of Human Rights* (Council of Europe Publishing) pp. 288-89.

¹⁸ Starygin & Selth, supra note 7, p. 10.

¹⁹ Ibid

²⁰ While that is not the practice in Ethiopia, in other jurisdictions with developed justice system in cases courts proceed to absentia trial a state funded defense counsel is assigned for the accused, if the accused did not chose one.

Absentia trial in Ethiopia

In Ethiopia, absentia trial is possible for crimes which are considered of severe gravity, i.e., in cases where the crime the accused is charged with is punishable with rigorous imprisonment of “not less than twelve years” or is a crime against government revenue punishable with “rigorous imprisonment or fine exceeding five thousand” Ethiopian Birr [21], with possibility for retrial if the accused was not duly summoned or hindered to appear by a cause beyond his/her control [22]. Accordingly, the court decides to go on the trial in absentia if the accused absents without good cause, “on the date fixed for trial” [23]. What is absentia trial, however, has been subject to controversy. Examples for this are decisions of the Cassation Bench in two cases: *W/ro Fetiya Awel v. Federal Public Prosecutor* [24] and *Attorney General v. Binyam Mulugeta* [25]. Before going to reviewing these decisions, it is important to see what circumstances constitute absentia trial.

The definition to absentia trial begins from the provision “Where the accused does not appear *on the date fixed for the trial ...*” [26]. According to this, to understand what absentia trial is, understanding the meaning of trial is a prerequisite. A criminal trial has phases which come one after the other. Moreover, although the trial date seems to be a single day [27] repeated adjournments are given before trial is finalized [28]. Hence, the definition to absentia trial should be understood in these perspectives.

²¹ Cri. P. C. Article. 161(2).

²² Id., Article 197-202.

²³ Id., Article 160(2) & (3). If any representative of the accused appears and explains that the accused has good cause to absent, the court is required to adjourn the case for another day. Id., Article 94(2)(a). It is also to be noted that before the court goes to considering issuance of arrest warrant and proceeding on the trial in absentia, it is required to make sure that the accused is duly summoned. In criminal cases, as opposed to civil cases in which constructive summons and litigation through agent is possible, the accused is required to appear in person hence need to be summoned in person. Compare article 58, 63 and 94-110 of the Civil Procedure Code with article 123, 125 and 127(1) of the Cri. P. C.

²⁴ *W/ro Fetiya Awel v. Federal Public Prosecutor*, (Federal Supreme Court: Federal Supreme Court Cassation Decisions, Vol. 13, 305-307, Ginbot 10, 2004 E.C.), (hereinafter called *Fetiya's case*).

²⁵ *Federal Attorney General v. Binyam Mulugeta*, Federal Supreme Court Cassation Division, File No. 137209, Hidar 27, 2010 E.C., Unpublished, (hereinafter called *Binyam's case*).

²⁶ Cri. P. C., Article 160(2), emphasis added.

²⁷ Id., 123, 124 (1) & (2) and 160(2)

²⁸ For the reasons of adjournment, see Id., Article 94

Phases of a Criminal Trial

Pursuant to the relevant provisions of the Criminal Procedure Code, trials [29] in most criminal cases in courts of preliminary hearing pass through four phases. In each phase, there are fundamental constitutional rights of the accused which the court is required to duly observe and make sure that they are respected [30]. Subject to the circumstances of the case, however, a trial may not necessarily pass through all these phases. There are possibilities that a case comes to end either at the first, second or third phase without necessarily proceeding to the next phase.

a) First Phase: Summons and Appearance of the Accused

After the public prosecutor institutes a charge and the case is presented before court, the court fixes the trial date, and summons the accused [31]. When the accused is present and his/her identity is verified [32], the charge is readout for his/her [33]. If the accused did not understand the language of the court, s/he has the right to have an interpreter, and the court assigns a competent interpreter from persons who are neither relatives of the accused nor that of the prosecutor nor are witnesses in the case, to help the accused understand the charge against him [34].

²⁹ Id., Article 123-149. It should be noted, however, that the issues and procedures regarding trial in absentia are not applicable to cases of private prosecution. *Id.*, Article 150-153 and 165 & 166

³⁰ This is not to limit the application of some rights to only one phase of the trial process. There are rights which are significant even beginning from the time of arrest through police investigation and throughout the whole process of trial. The right to get an interpreter, the right to presumption of innocence, the right to counsel, the right to speedy decision, and the right to due process of law are examples. However, some rights are exploited at some phase of the trial process. For example, the right to cross-examine the prosecution witnesses is relevant to the second phase – the time of hearing and examination of the prosecution evidences. Similarly, the right to present defense evidences is relevant to the third phase – i.e., if there is a case found for prosecution and the court orders for the accused to begin hi/her defense after the prosecution evidences are heard and examined.

³¹ Cri. P. C., Article 123.

³² Id., Article 127(1) and 128.

³³ Id., Article 129. This day, i.e., the first day in which the charge is readout to the accused should not be confused as if it is the only date of trial. Rather, it is important to note that all the later days in which the case continues adjournment and hearing are considered dates of trial.

³⁴ Id., Article 126(2). The right to have an interpreter is also applicable to police arrest and the whole trial process. See, FDRE Constitution, Article 19(1) and 20(7).

The other fundamental constitutional rights of the accused the court is required to duly observe at this stage are the right to remain silent and the right to protection from self-incrimination [35]. To this effect, if the accused remains silent, or admits the facts of the charge reserving his/her innocence, the court is required to record plea of not-guilty [36]. The court can also order for the prosecution evidences to be heard after it has recorded plea of guilty, or even it can withdraw the plea of guilty, set aside any conviction, and record plea of not-guilty anew [37]. Moreover, the court is required to record the plea “as nearly as possible in the words of the accused” [38]. These provisions empower the court to respect the right of the accused on the one hand and prohibit it from forcing him/her to confess and from taking his/her words and “approximating” them to confession on the other. In other words, for the court to enter plea of guilty the words of the accused should be clear enough admitting all the ingredients of the charge without any reservation showing the court that the legal, material and mental elements of the crime stated in the charge are met and enabling it to convict the accused accordingly [39].

Trial may end in this phase in two scenarios. The first is if the accused raised issues in preliminary objections against the charge and the court accepted such objections [40]. In like cases the trial ends even without needing the accused to plead guilty or not-guilty. The second is if the accused pleads guilty of the charge [41]. In like cases the court convicts the accused immediately [42], and it proceeds to sentencing [43]. This

ends the trial process without need to hearing the prosecution evidences.

B) Second Phase: Hearing and Examination of the Prosecution Evidences

Hearing the prosecution evidences [44] is required if the accused pleaded not-guilty or if the court, as already stated earlier, orders for the prosecution evidences to be heard even after plea of guilty is recorded. After the prosecution witnesses are heard [45] the accused has constitutional right to cross-examine them [46]. The accused is also entitled to address opinion to challenge the evidentiary value of documents and exhibits presented by the prosecutor [47]. After the prosecution evidences and additional evidences presented upon request by the prosecutor or court’s motion [48], if any, are examined, the court rules whether to acquit the accused or order him/her to adduce defense evidences.

Trial may end in this phase in two circumstances. The first is if the evidences do not establish a case against the accused and the court acquits him/her without need to defense evidences [49]. The second is even where the evidences show a case against the accused and the court orders for the accused to begin his/her defense [50], if the accused admits to the court that s/he does not have any defense evidence to avail. If the accused did not present defense evidences,

sentencing. However, it is natural that sentencing follows conviction and the procedures of sentencing provide in article 149 (3)-(5) apply to conviction upon plea of guilty.

⁴⁴ The provisions of the Cri. P. C. governing the hearing and examination of prosecution evidences cover from article 136-141 of the Code. The provisions as to examination-in-chief, cross-examination, re-examination and examination by the court provided in article 136, 137 and 139 of the Cri. P. C. also apply to defense witnesses.

⁴⁵ Id., Article 136, 137(1) & (2).

⁴⁶ Id., Article 137(3). See also FDRE Constitution, Article 20(4).

⁴⁷ Article 137(3) of the Cri. P. C. provides only about the right to cross-examine the prosecution witnesses. However, the first paragraph of article 20(4) of the FDRE Constitution provides that “Accused persons have the right to full access of any evidence presented against them...” Article 124(2) of the Cri. P. C. also provides that exhibit evidences should be presented at the date of trial. These entitle the accused to have access (to know) what documents and exhibits have been presented by the prosecutor against him. The very purpose of this is to enable the accused to examine them, to criticize their contents and to present his/her view, if any, to disapprove of them.

⁴⁸ Cri. P. C., Article 143 (1) & (2)

⁴⁹ Id., Article 141.

⁵⁰ Id., Article 142(1).

³⁵ Article 19(1) & (2) of the Constitution seem to provide that the right to remain silent and the protection against self-incrimination are applicable in times of arrest. However, pursuant to article 13(2) of the FDRE Constitution, human rights provisions are instruments interpreted in conformity with the international human rights covenants to which Ethiopia is party. Similarly, article 14(3)(g) of the ICCPR provides that a person accused of a criminal offence has the right “Not to be compelled to testify against himself or to confess guilt.” The joint reading of these provisions implies that the right to remain silent and the right to protection against forced confession apply in the hearing of a criminal charge in court.

³⁶ Cri. P. C., Article 133(1) & (2).

³⁷ Id., Article 134(2) and 135(1) & (2).

³⁸ Id., Article 132(3).

³⁹ Id., Article 134(1). Read this jointly with Article 23(2) of Proclamation No. 414/2004, The Criminal Code of the Federal Democratic Republic of Ethiopia (FDRE Criminal Code).

⁴⁰ For the grounds of preliminary objections and their settlement, see, Id., Article 130 and 131.

⁴¹ Cri. P. C., Article 134(1).

⁴² Ibid.

⁴³ Article 134(1) of the Cri. P. C. provides about immediate conviction, but says nothing about

the court proceeds to giving a judgment convicting the accused pursuant to the prosecution evidences [51].

c) Third Phase: Hearing and Examination of Defense Evidences, And Judgment

This phase commences where the court orders for the accused to begin his/her defense and if the accused has defense evidences [52]. At this phase the accused can give his/her testimony in defense of the charge, if s/he wishes so, and the defense witnesses are heard next [53]. The accused also has the right to avail documents and exhibits as defense [54]. After the court finalizes hearing all the defense evidences, the prosecutor and the accused may give their opinion as a final address as to the issues of law and material facts of the case [55]. Oftentimes, final addresses are used as forums in which both the prosecutor and accused try to persuade the court as to the weight and interpretation of evidences and issues of law to their side.

After the parties address their final words, if they opt to, the court gives its judgment [56]. If the accused is found not-guilty, the court orders for her/his acquittal and release from custody, if the accused was in custody denied bail pending trial [57]. The court also gives appropriate order regarding the bail bond [58].

⁵¹ There is no provision in the Cri. P. C. to this effect. However, it is familiar for courts to record the words of the accused if s/he declares that s/he does not have defense evidences, and proceed to convicting him/her. This trend seems to have developed from a view that the right to defend one's self against the charge is the right of the accused, not a duty, and that the accused can waive his/her right, if s/he wishes. This does not have a problem so long as the accused has expressly told the court that s/he did not have defense evidences.

⁵² Cri. P. C., Article 142(1).

⁵³ *Id.*, Article 142(2) & (3). The provisions as to examination-in-chief, cross-examination, re-examination and examination of witnesses by the court provided in article 136, 137 and 139 of the Cri. P. C. also apply to the phase of hearing and examination of defense witnesses. See, foot note 44 above.

⁵⁴ Article 124(2) of the Cri. P. C. provides about exhibit evidences. However, article 20(4) of the FDRE Constitution provides that persons accused have the right "... to adduce or to have evidence produced in their own defence..." This entitles the accused with the right to present defense evidences, including any documents, the admissibility and relevance of which the court examines and rules upon pursuant to article 146 of the Cri. P. C.

⁵⁵ Cri. P. C., Article 148(1) & (2).

⁵⁶ *Id.*, Article 149(1).

⁵⁷ *Id.*, Article 149(2).

⁵⁸ Normally, in cases the accused is acquitted courts order for the release or discharge of the bail bond. This trend seems to have developed from the constructive application of article 71(1) of the Cri. P. C. which

This becomes the end of the trial process. It is only if the accused is found guilty that the court proceeds to the fourth phase - sentencing.

d) Fourth Phase: Sentencing

Sentencing is the finale of the trial process. Before the court passes sentence, it holds a sentencing hearing whereby it accepts the views of prosecutor and the accused. The prosecutor may state grounds of aggravation and mitigation [59]. If the prosecutor mentioned previous convictions of the accused [60] or other cases as ground of aggravation and the accused denies that, the prosecutor is required to present witnesses or other evidences to prove that [61]. The accused (convicted) also has the right to reply to and challenge what the prosecutor has presented as grounds of aggravation [62]. S/he is also entitled to submit to the court what general and personal circumstances should be taken in mitigation of the penalty and to present evidences to prove them [63].

Generally, according to this author's understanding, the constitutional right to defense is not limited to the pre-conviction phases of trial. The right to defense at the post-conviction sentencing hearing is as big as the former. If the accused is not given the opportunity to use this right, the court will not be able to consider the personal circumstance of the accused as required by the law [64]. This in turn will lead to disproportionately exaggerated and unjust punishments.

What Absentia Trial Is, Then

Pursuant to the phases of a criminal trial and the reasons for which a case can be adjourned, therefore, a case can be considered to have been tried in absentia, full or in part, if the court proceeds without the accused being present, at least, in one of the following circumstances.

First phase

- If the accused did not appear to the court at all.
- If the accused appears at the first date, but absents when the case was adjourned for the accused to come up with sufficient understanding of the charge [65] or having an advocate; or for the

provides that "Where the charge against the person released on bail is withdrawn the court shall discharge the bail bond."

⁵⁹ *Id.*, Article 149(3) & (4).

⁶⁰ *Id.*, Article 138.

⁶¹ *Id.*, Article 149(3) & (4). The grounds of aggravation the prosecutor are not only previous characters of the accused. See, FDRE Criminal Code, Article 84, 85 and 86.

⁶² Cri. P. C., Article 149(3) & (4).

⁶³ Read Article 82, 83 and 86 of the FDRE Criminal Code jointly with article 149(4) of the Cri. P. C.

⁶⁴ FDRE Criminal Code, Article 88.

⁶⁵ Cri. P. C., Article 94(2)(g).

prosecutor to come up with amended indictment, if ordered or allowed on request; or for the court to rule on preliminary objections, if any, provided that the preliminary objections did not lead to the dismissal of the charge [66].

Second Phase

- If the accused absents when the case was adjourned for the prosecution witnesses to be heard.

Third Phase

- If the accused absents when the case was adjourned for the court to rule whether to acquit the accused or that a case was established against the accused, provided that the acquitted is not acquitted [67].
- If the accused absents when the case was adjourned for the defense witnesses to be heard or additional evidences to be presented from third party, if any for the accused.

Fourth Phase

- If the accused absents when the case was adjourned for a sentencing hearing. This happens if the accused absents when the case was adjourned for the court to give a judgment, provided that the accused was convicted [68]. In like cases what many courts do is that they pronounce the judgment; accept the opinion of the prosecutor as to sentencing; issue arrest warrant and order for the accused or his/her guarantors to show reasons, if any for the bail bond not to be forfeited, and adjourn the case for the accused to present opinions as to sentencing [69]. If the accused absents in the next day, they proceed to sentencing him/her in absentia.

In a nutshell, absentia trial means a case where the court precedes in his/her absence if the accused absents totally or after the prosecution evidences were heard or even after the accused was ordered to adduce defense evidences. This includes cases where the accused absents from the sentencing hearing and is

⁶⁶ *Id.*, Article 131(3) and 94(2)(1). If the charge is dismissed, as in the example of double jeopardy objection, whether the accused is present at the date the court gives its ruling dismissing the charge does not make a difference.

⁶⁷ *Id.*, Article 141. If the accused is acquitted, whether s/he is present at the date the court pronounces its ruling acquitting him/her does not make a difference.

⁶⁸ If the court discharges the accused by its judgment, there will no need to sentencing hearing and whether the accused absents on the date the court gives its judgment acquitting him does not make a difference.

⁶⁹ The author in his experience as public prosecutor and judge has experienced that this trend is not uniformly applied in courts. This trend is, however, in line with the provisions of the Cri. P. C. See, *Id.*, Article 149(4), 125 and 76(1) and 79.

sentenced in absentia. What needs to be noted once again is, however, that the court cannot proceed to try or sentence the accused in absentia unless the crimes with which the accused is charged can be tried in absentia [70]. However, the Cassation Bench has given decisions in which it distinguishes between cases that are considered to have been tried in absentia from that are not. The next part presents the facts of these cases.

THE CASE STUDIES

A) *W/ro Fetiya Awel v. Federal Public Prosecutor* [71]

W/ro Fetiya Awel was charged with a crime in violation of article 18(2) of Private Employment Agency Proclamation [72], for she received Birr 7800 (seven thousand eight hundred) promising to send the victim [73] to Kuwait, but she finally sent her to Dubai. Having appeared before the Federal High Court (FHC) where the case was tried first, she pleaded not-guilty. The FHC heard the prosecution evidences and her defense evidences in her presence. Finally, when the case was adjourned for the FHC to render verdict on Sene 07, 2003 E.C., she absents. The FHC then orders for the case to be proceeded in absentia, and it convicted her and imposed a ten months imprisonment against her on Hamle 28, 2003 E.C.

After that, she petitioned the FHC to set aside the decision given in her absence. The FHC rejected her petition. She appealed to the Federal Supreme Court (FSC). The FSC confirms the decision of the FHC. Trying to exhaust her last option, she petitioned the Cassation Bench. She claimed that on the date when the case was adjourned for the FHC to pass its judgment, she was abroad and her journey coming in was delayed because of the illness of her child. She added that the FHC have rendered a decision letting her advocate not to appear and address his opinion as to sentence pursuant to article 149(4) of the Cri. P. C. Hence this is a decision passed in her absence, and the lower courts erred in rejecting her petition to set the absentia decision aside. The Federal Public Prosecutor replied that all the litigation was made and all evidences were heard in her presence, hence this cannot be said a decision in absentia.

⁷⁰ See the note in foot note 21 above.

⁷¹ *W/ro Fetiya Awel v. Federal Public Prosecutor*, supra note 24.

⁷² Private Employment Agency Proclamation, Proc. No. 140/1998, Federal Negarit Gazetta, 4th Year, No. 28, Article 18(2) (now repealed) This was punishable “with imprisonment up to two years or a fine up to Birr 10,000 (ten thousand Birr).” So, this cannot be tried the absence of the accused pursuant to the Cri. P. C.

⁷³ The name of the victim is not mentioned in the judgment. This, however, does not hinder us from understanding the case well for the purpose of this case comment.

The Cassation Bench confirming the decisions of the lower courts reasoned that since the accused was present at the time the charge was heard and she pleaded not-guilty, the prosecution witnesses were heard in her presence and she used her right to cross-examine them, and she presented her defense evidences her absence when the court gives its judgment does not mean that the case was decided without her using her right to defense pursuant to article 20(4) of the FDRE Constitution. It added, her claim that her right to address an opinion regarding sentencing have been violated is not in line with the provision and spirit of article 20(4) of the FDRE Constitution and article 149(1) & (4) of the Cri. P. C. It also added that her claim is not in line with the provisions of the Cri. P. C. governing default proceeding (from article 161-164) and the procedure of setting aside absentia decisions (from article 197-202).

B) Federal Attorney General v. Biniyam Mulugeta [74]

Biniyam was accused of the crime of grave willful injury pursuant to article 555(c) of the FDRE Criminal Code [75]. After the prosecution evidences were heard and the court ordered for him to present his defense evidences, he absents. The Federal First Instance (FFIC), which heard the case in its preliminary jurisdiction, discontinued the case reserving the prosecutor's power to continue it when the accused is found. The Federal Attorney General (FAG) appealed to the FHC. The FHC gives a similar order.

The FAG petitioned the Cassation Bench. The FAG claimed that the lower courts have failed to recognize that the right to defense can be passed-over if the accused did not want to use it. The Cassation Bench reversed the decisions of the lower courts and remanded the case to the FFIC to decide on the subject matter of the case having passed-over his right to defense [76]. It reasoned that the provisions for default proceeding in article 161 and 163 of the Cri. P. C. are not applicable to cases where the accused absents after the prosecution evidences were heard and the case was adjourned for the accused to present his/her defense evidences. It added that in cases the accused was present at the time

the prosecution witnesses were heard and used his/her right to cross-examine them pursuant to article 20(4) of the FDRE Constitution, but absents after s/he was ordered to present his/her defense evidences this does not bar courts from examining the evidences and give decision. Particularly, it said that if the accused did not want to use his right to defense, courts should give decision having passed-over his/her right to defense.

Needless to say, as the Cassation Bench's interpretations of law is binding to all federal and state courts of all levels except itself [77], countless cases are being decided in similar way. According to this author's view the Cassation Bench's stance in both the above decisions is erroneous. The following part states some of the comments on the decisions.

ANALYSIS AND COMMENT

The connection that the Cassation Bench establishes between absentia trial and the right to defense is agreeable. However, it erred in defining absentia trial, because it rushes to defining absentia trial and failed to Understand, in the first place, what trial is in the perspective of the phases which trial comprises. It seems to be misled by the provisions in Cri. P. C. regarding the procedure of absentia trial and the applications to set aside absentia judgment.

With respect to criminal charges specified to be tried in absentia, it is provided that cases of absentia trial continue as in cases tried in the presence of the accused [78]. Particularly, it is provided that "*The prosecution witnesses shall be heard and the public prosecutor shall make his final submissions*" [79]. This provides about cases in which the accused absents totally or was present in the first day but absents in the next day if the case is adjourned before the prosecution witnesses are heard. According to the author, this applies *mutatis mutandis* to cases where the accused absents after the prosecution witnesses are heard and if a case was found against him/her. In like cases, the prosecution witnesses cannot be heard again, but the court jumps to give judgment without hearing the defense evidences. Similarly, the Cri. P. C. provides about applications to set aside absentia judgments, but is silent about sentences passed in absentia [80]. The author believes that these apply *mutatis mutandis* to cases where the accused was absent in sentencing hearing for reasons beyond control. However, the Cassation Bench erred in concluding from these provisions that cases in which the accused absents after the prosecution witnesses are heard and sentences passed without the accused being present in the

⁷⁴ Federal Attorney General v. Biniyam Mulugeta, supra note 25.

⁷⁵ FDRE Criminal Code, Article 555. This is "punishable according to the circumstances of the case and the gravity of the injury, with rigorous imprisonment not exceeding fifteen years, or with simple imprisonment for not less than one year." So, this cannot be tried in absentia pursuant to the Cri. P. C.

⁷⁶ Obvious, the FFIC will convict the accused according to the charges. Because, once a case was found against him and an ordered was given for him to present his defense evidences, there is no room to acquit him without him having presented defense evidences.

⁷⁷ See, Federal Courts Proclamation Reamendment Proclamation No. 454/2005, Federal Negarit Gazeta, 11th Year, No. 42, Art. 2(1)

⁷⁸ Cri. P. C., Article 163(1).

⁷⁹ Id., Article 163(2), emphasis added.

⁸⁰ Id., Article 164 and 197-202.

sentencing hearing are not included in the definition of absentia trial and that in like cases the accused should be presumed to have waived his/her right to defense.

By so ruling, the Cassation Bench establishes a precedent whereby criminal charges which the Cri. P. C. did not prescribe to be tried in absentia, as in *Fetiya's case* and *Biniyam's case*, are tried in the absence of the accused. More injurious to persons accused is that while in *Biniyam's case* the Cassation Bench restates [⁸¹] the presumption, in *Fetiya's case* it shows that the presumption is not-rebuttable by rejecting Fetiya's petition without consideration to her reason to absent. If these decisions continue binding [⁸²], more complex problems are to come yet. As already stated earlier, the Cri. P. C. has provisions regarding applications to set aside absentia judgments and the right to retrial which are applicable to cases that are specified to be decided in absentia [⁸³]. Pursuant to these decisions, however, accused persons who absent after the prosecution witnesses are heard even because of reasons beyond their control will not have this right. This amounts to conviction and punishment without being given the opportunity to defense and judicial denial of legally guaranteed rights [⁸⁴].

In *Fetiya's case*, this author agrees with the Cassation Bench's ruling that the judgment was not given in absentia. Because, since she was present at the time the prosecution evidences were heard and moreover she has presented her defense evidences, the judgment cannot be said absentia judgment. However, the Cassation Bench seems forgetful of the right of the accused to defense at the sentencing hearing. As already stated earlier, a person accused has the right to defend the prosecutor's statements and evidences regarding aggravation of sentence and at the same time to present grounds for mitigating the sentence together with evidences to prove them [⁸⁵]. While Fetiya was not given the opportunity to use this right, it was not proper for the Cassation Bench to confirm the lower court's decisions to sentence her in her absence.

However, if the Cassation Bench was not able to reverse the absentia sentencing as absentia trial, it should have examined the case in light of the rules of

adjournment provided in the Cri. P. C. In this regard, it has recorded in its decision that Fetiya, in her cassation petition has complained against the FHC saying: "while the lower court's conviction and sentencing decision letting my advocate not to be present and give sentencing opinion according to article 149(4) of the Cri. P. C. is a judgment rendered in my absence the rejection of my application to set aside it is basic error of law" [⁸⁶]. From this statement, it seems possible to understand that when the FHC gives its verdict in *Fetiya's case* her advocate appeared but the FHC did not allow him to stand for her and opine on her behalf [⁸⁷]. If that was the case, the FHC was required to accept the advocate's views to see if there were reasons sufficient to adjourn the sentencing hearing before deciding to sentence Fetiya in her absence [⁸⁸]. Therefore, the Cassation Bench should have examined the case to see if the FHC erred in this perspective. This might have enabled the Cassation Bench to accept Fetiya's claim in another way while reserving the issue whether the absence of the accused in sentencing hearing is to be considered trial in absentia.

CONCLUDING REMARKS

Although persons accused, as an integral part of the right to defense, have the right to be tried in their presence, trial in absentia is possible as determined by law. In Ethiopia absentia trial is possible only in crimes punishable with rigorous imprisonment of twelve years and above or in crimes against government revenue punishable with rigorous imprisonment or fine exceeding five thousand Ethiopian Birr, with possibility of retrial for accepted reasons. The definition to absentia trial, however, has been subject to controversy. Particularly, the Cassation Bench has decided that cases where the accused failed to appear after the prosecution witnesses are heard or at sentencing hearing are not included in the meaning of absentia trial and that in like cases the accused is irrefutably presumed to have waived the right to be present and defense.

⁸⁶ *Fetiya's case*, supra note 24. Fetiya seems to have resorted to the procedure of setting aside absentia judgments because of the absence of clear provisions in the Cri. P. C. with respect to setting aside absentia sentences.

⁸⁷ Practice show that if the accused did not appear at the date the court gives its judgment but the advocate appears, many courts reject to record the attendance of the advocate and did not allow the advocate to say thing on behalf of the accused. This seems to be the result of the courts' understanding that since the accused is required to appear personally (Cri. P. C., Article 127(1)) the appearance of the advocate alone is not accepted on the one hand, and from an assumption by courts that the accused, having seen all litigation and evidences, have evaded justice assuming that s/he will be convicted.

⁸⁸ See, Cri. P. C., Article 94(2)(a), 149(3) & (4) and 160(2).

⁸¹ While so reasoning the Cassation Bench has made a reference to its former decision on similar subject matter in file number 127313. This case comment did not try to include that decision for sameness of idea.

⁸² The Cassation Bench has the power to change its precedents. See, Federal Courts Proclamation Reamendment Proclamation No. 454/2005, supra note 76.

⁸³ Cri. P. C., Article 161(2), 164 and 197-202.

⁸⁴ Cri. P. C. Article 199(b) and 202(1) and FDRE Constitution, Article 20(4).

⁸⁵ Cri. P. C., Article 149(3) & (4) and FDRE Constitution, Article 20(4).

According to this author absentia trial should be understood in light of the phases of criminal trial. A criminal trial passes through four phases. The first phase includes the processes from summoning the accused to deciding preliminary objections. The second phase covers the hearing and examination of the prosecution evidences to ruling to acquit the accused in cases the prosecution evidences did not show proof of the charge. The third phase extends from hearing and examination of defense evidences to acquitting the accused by judgment, if the defense evidences surpass the prosecutor's. And the fourth phase is about holding sentencing hearing and determining the sentence.

Therefore, absentia trial includes cases where the accused, duly summoned, absents in either of these phases and the court proceeds in his/her absence. This includes cases where the accused absents after the prosecution witnesses are heard and even at the sentencing hearing. What has to be noted particularly is that the right to defense is not limited to the pre-conviction phases of the trial process. The right of the accused to defense i.e., to present grounds for the court to mitigate the sentence at post-conviction sentencing hearing is equally important. According to this, the Cassation Bench's definition makes crimes which are not specified in the Cri. P. C. to be tried in absentia to indirectly be tried in the absence of the accused. Moreover, as persons accused may absent after the prosecution witnesses are heard or at sentencing hearing because of reasons beyond their control, this denies them the right to retrial in total disregard to the reasons for their absence.