IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CRIMINAL APPEAL NO. 21 OF 2023

(Arising from Criminal Case No. 12 of 2023 District Court of Missenyi)

ABDIRAHMAN ABDALLAH..... 1ST APPELLANT

ABDULAH ABDI..... 2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

16th and 31st May, 2023

BANZI, J.:

The Appellants who are Somali citizens were arraigned before the District Court of Missenyi charged with two counts to wit; unlawful entry and unlawful presence in the United Republic of Tanzania contrary to section 45(1)(i) (2) of the Immigration Act [Cap. 54 R.E. 2016] ("the Immigration Act"). They pleaded guilty to both counts and after being convicted, each Appellant was sentenced to serve six months imprisonment for each count. The sentences were ordered to run consecutively.

Dissatisfied with the sentence, the Appellants filed petition of appeal containing two grounds. At the hearing, Mr. Fahad Rwamayanga, the learned advocate appeared for the Appellants while Mr. Erick Mabagala, learned State Attorney represented the Respondent Republic. Mr. Rwamayanga

prayed to abandon one ground and proceeded to submit on the remaining ground, which may be crystallised as hereunder:

> *That the trial magistrate erred in law and facts to sentence the Appellants to six months imprisonment without giving them an option to pay fine.*

Submitting on the remaining ground, Mr. Rwamayanga stated that, the provisions of the law under which the Appellants were convicted has three options of sentences; one, a fine of not less than five hundred thousand shillings; two, imprisonment for a term not exceeding three years and three, both fine and imprisonment. Thus, the fact that the Appellants pleaded guilty and being the first offenders, the trial magistrate should have opted to sentence them to pay fine before resorting to custodial sentence unless there was evidence that the offence was grave or rampant. He added that, the trial Magistrate did not consider Tanzania Sentencing Manual for Judicial Officers which aimed at guiding the judicial officers from abuse of power in sentencing the offenders. He further argued that, the conclusion by trial Magistrate that the degree of immigrants in Missenyi is high lacks basis as there was no evidence to that effect. He urged this court to interfere with sentence met to the Appellants on the grounds that; one, it was excessive; two, it was based on wrong principle; three, the trial court overlooked material consideration and four, it was influenced by irrelevant and extraneous factors. To support his submission, he cited the cases of

Benjamini Adidwa @ Sami v. Republic [2022] TZHC 11654 TanzLII and **Abdisalam Mohamed and Another v. Republic** [2023] TZHC 16838 TanzLII. He prayed for the appeal to be allowed considering the time the Appellants had already spent in prison.

In response, Mr. Mabagala who opposed the appeal submitted that, the sentence meted to the Appellants was fair because, as per section 45 (2) of the Immigration Act, the trial court had discretion to award a fine or imprisonment or both depending on the circumstances of the case. Therefore, the sentence of six months for each count that was passed by the trial magistrate was within the ambit of the law considering the aggravating and mitigating factors that were stated by both parties. Since the trial court used its discretion, this court cannot interfere unless there are reasons to do so. He supported his argument by the case of **Issa Ihale v. Republic** [2020] TZCA 291 TanzLII which sets seven grounds upon which the sentence can be interfered. Upon being probed by court on the propriety of consecutive sentences, he was of the view that, in the absence of special circumstances, it was not proper to order sentence to run consecutively. However, he urged the court to dismiss the appeal for lack of merit.

In a brief rejoinder, Mr. Rwamayanga reiterated his submission in chief that the sentence passed did not adhere to the principles issued by the Judiciary in the Tanzania Sentencing Manual for Judicial Officers and the

basis of sentence was not on record. He added that, counsel for the Republic did not mention the reasons for the Appellants not to benefit with fine in lieu of custodian sentence.

Having considered the record of the trial court and the submission of both sides, the issue of determination is whether the sentence imposed by the trial court was proper in the eyes of law.

It is important to underscore that, sentencing is within the discretionary powers of the trial court and thus, an appellate court will only interfere with such discretion on the following grounds:

a) The sentence imposed is manifestly excessive or it is excessive to shock.
b) The impugned sentence is manifestly inadequate.
c) The sentence is based on a wrong principle of sentencing.
d) The trial court failed or overlooked material consideration/factor.
e) The sentence has been based on irrelevant or extraneous matter.
f) The sentence is plainly illegal.
g) The time spent by the appellant in remand prison before conviction and sentencing was not considered.

See the cases of **Shida Joseph v. Republic** [2013] TZCA 429 TanzLII and **Helman Basekana v. Republic** [2018] TZCA 184 TanzLII.

Revering to the case at hand, it is undisputed that, pursuant to section 45 (2) of the Immigration Act, the trial magistrate after entering a conviction had three options of sentences to impose to the Appellants; a fine of not less than five hundred thousand shillings, or imprisonment for a term not exceeding three years or both such fine and imprisonment. However, as a matter of law, where the legislature has given an option of a fine or imprisonment, the court, when imposing a sentence, must ascertain that a sentence of fine should first be imposed and in default of payment of such fine, then a sentence of imprisonment can be given. See the case of **Salum Shabani v. Republic** [1985] TLR 71. In this case, although, the trial magistrate chose to impose sentence of imprisonment, but according to the position of the law, such sentence was supposed be the second choice.

Moreover, it is evident that, the Appellants pleaded guilty to both counts. The prosecutor in the aggravating factors stated that, there were no previous criminal records against the Appellants, which means, they were first offenders. It is settled law that, the first offender should not be punished the same as habitual offenders. In cases where the accused is the first offender and has pleaded guilty to the offence, he deserves a milder sentence. See the case of **Hassan Charles v. Republic** [2018] TZCA 238

TanzLII. Apart from that, the conclusion by trial Magistrate about high degree of immigrants in Missenyi was based on extraneous matter because there was no evidence to that effect and it was not among the aggravating factors stated by the Prosecutor. Therefore, with due respect to the counsel for the Republic, there is justification for this court to interfere with the sentencing discretion of the trial court because of the following grounds; one, it was based on wrong principle by imposing custodial sentence instead of fine; two, the trial court overlooked material factor that as the Appellants pleaded guilty and were first offenders; three, it did not consider that the offence was not grave and four, it was based on extraneous matter.

Reverting to the order of consecutive sentences, it was held in the case of **Elias Joakim v. Republic** [1992] TLR 220 that:

> *It is judicial practice that where in an indictment consisting of several or many counts, that have attracted convictions, the sentence imposed and assigned to each count shall be ordered to run concurrently, if such related offences arose out of a single transaction, or are part and parcel of a single plan.*

Moreover, it is the position of the law that, a trial court should only award consecutive sentences in exceptional circumstances, such as the extreme gravity of a particular offence. See the case of **R v. Kasongo s/o Luhogwa** (1953-1957) 2 TLR (R) 47. In the case at hand, the trial

magistrate did not state any reason or special circumstances to justify the sentence to run consecutively.

Basing on foregoing reasons, I allow the appeal by setting aside the sentence imposed against the Appellants. Since the Appellants have been in jail from 6th February, 2023 up to date, a period of almost four months, I feel that this period of imprisonment they have already served is sufficient and I find no useful purpose to substitute a sentence of fine. As a result, I order their immediate release from custody unless otherwise lawfully held.

It is so ordered.

I. K. BANZI
JUDGE
31/05/2023

Delivered this 31st May, 2023 in the presence of the Appellants, Mr. Fahad Rwamayanga, learned counsel for the Appellants and Mr. Erick Mabagala, learned State attorney for the Respondent. Right of appeal duly explained.

I. K. BANZI
JUDGE
31/05/2023