IN THE HIGH COURT OF TANZANIA

AT DODOMA

APPELLATE JURISDICTION

DC CRIMINAL APPEAL NO. 10 OF 2010

(ORIGINAL SINGIDA DISTRICT COURT AT SINGIDA

CRIMINAL CASE NO. 108 OF 2009 –

BEFORE:- C.M. TENGWA, ESQ. RESIDENT MAGISTRATE)

JUSTIN JOSEPH ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

27/04/2010 & 28/06/2010

REASONS FOR JUDGEMENT

HON. MADAM, SHANGALI, J.

The appellant **JUSTIN JOSEPH** was charged before the Singida District Court with two counts in Criminal Case No. 180 of 2009. The first count was failing to keep record of the driver contrary to section 79 and 113 (1) of the Road Traffic Act Cap. 168 and the second count was Permitting a Motor Vehicle to be driven while not in good mechanical repair

contrary to sections 39 (1) and 5 of the Road Traffic Act Cap. 168.

When the charges were read over and explained to the appellant before the trial District Court, the appellant pleaded guilty to both counts. He was convicted there and then. On the first count he was sentenced to serve four (4) months imprisonment and on the second count he was sentenced to serve three (3) years imprisonment.

The appellant was aggrieved by the harsh sentence imposed against him hence this appeal on the severity of sentence. In his memorandum of appeal the appellant raised about four grounds of appeal which revolve on one complaint that the sentence imposed against him was harsh, excessive and against the law.

During the hearing of this appeal the appellant insisted that having pleaded guilty, he expected the trial Resident Magistrate to consider his mitigating factors including the fact that he is a first offender. He wondered as to why the trial Resident Magistrate decided to imprison him instead of giving him an alternative sentence of fine as provided in law.

Mr. Nchimbi, learned State Attorney who appeared for the respondent/Republic at first supported the conviction against the appellant and submitted that the appellant's plea

was unequivocal. However, Mr. Nchimbi refused to support the sentences imposed by the trial Resident Magistrate and supported the appellants complaints that the sentences were harsh and excessive. The learned State Attorney submitted that, in sentencing the appellant the trial Resident Magistrate should have taken into consideration the fact that the appellant pleaded guilty; he is a first offender; his mitigating factors and plea for lenient sentence together with the nature and circumstances of the offences. Mr. Nchimbi argued that both section 79, 113 and 39 (1) (5) of the Road Traffic Act under which the appellant was booked and sentenced provide for an alternative sentence of fine. Therefore the appellant being a first offender should have been sentenced to pay fine.

In the cause of his submission, Mr. Nchimbi discovered and submitted that even the facts narrated by the prosecution did not constitute the second count of permitting a motor vehicle to be driven while in mechanical defect. In other words the conviction and sentence on this count was bad in law.

I totally and completely agree with both the learned State Attorney and the appellant that the sentences imposed are excessive and unjustifiable. In view of the decision in the cases of **SILVANUS LEONARD NGURUWE VS R. (1981)**

TLR 66: BERNADETA PAU VS. R (1992) TLR 97 and **RASHIDI KANIKI VS. R (1993) TLR 258**, this court is entitled to interfere with such an excessive sentence. I am convinced that had the trial Resident Magistrate judiciously considered the facts that the appellant is a first offender who opted to plead guilty and prayed for a lesser sentence he should have imposed a lesser sentence and possibly a fine because the law provide for such an alternative sentence. Instead the trial Resident Magistrate decided to impose the maximum sentence of 3 years on the second count. We have been cautioned by the Court of Appeal in the case of **G.N. MAPUNDA VS. R (1982) TLR 318** that the maximum sentence should rarely be imposed for a first offender as that will leave no margin for punishment for a subsequent or a particular grave and serious offence.

Regarding to the alternative sentence, it has been our practice that where the section which creates an offence specifically empowers the court to levy a fine as an alternative to prison sentence, the court should not normally impose a prison sentence unless the circumstances of the case warrant it. (see **LUKATARIA Vs R (1971) HCD 39**).

In conclusion therefore, the trial Resident Magistrate was wrong to sentence the appellant to an excessive sentence of

three (3) years imprisonment on the second count and without giving him an option to pay fine. The trial Resident Magistrate was equally wrong to sentence the appellant to four months imprisonment on the first count without giving him an option to pay fine.

That would have been the end of the matter if all were right, but there is another issue which was also conceded by the Learned State Attorney. That is, the facts submitted by the prosecution and admitted by the appellant do not constitute the second count of permitting the defective motor vehicle to be driven on the public road. There is nothing in the facts to suggest that the appellant did permit his driver **CHRISTOPHER JAMES** to drive a mechanically defective motor vehicle on the Public Road. The fact that **CHRISTOPHER** was the appellant's driver does not mean and conclude that the appellant permitted him to drive a defective motor vehicle. It was upon the prosecution to reveal and establish clearly that it was the appellant who permitted his driver to drive the defective motor vehicle on the alleged day and time. Therefore the plea of guilty on the second count was equivocal. The appellant was wrongly convicted and sentenced on that count.

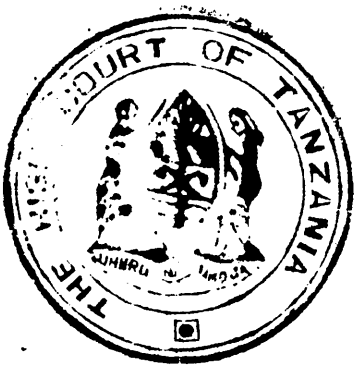
It was for those reasons that on 27/04/2010 when this matter was called for hearing that I decided to allow this appeal, quash the conviction and sentence of three years imprisonment imposed on the second count. Since the appellant had already been in custody for nearly four months, I reduced his sentence of four months imprisonment on the first count to an immediate release from prison and set him free unless held on another matter. I also reserved reasons for that decision which are now apparent in this judgement.

M.S. SHANGALI

JUDGE

28/06/2010

Judgement delivered todate 28th June, 2010 in the presence of Ms. Shio, Learned State Attorney for the respondent/Republic and the appellant in person.



M.S. SHANGALI

JUDGE

28/06/2010