IN THE HIGH COURT OF TANZANIA

IN THEDISTRICT REGISTRY

AT MWANZA

HC. CRIMINAL APPEAL No. 02 OF 2020

(Original Criminal Case No. 227 of 2018 of Kwimba District Court)

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

NEEMA FRANK.....RESPONDENT

JUDGMENT

19th April, & 28th April, 2021.

TIGANGA, J.

The respondent herein Neema Frank stood charged before the District Court of Kwimba, at Ngudu, with the offence of stealing contrary to section 265 of the Penal Code [Cap 16 R.E 2002] now [R.E 2019].

The particulars of the offence were that, on the 30th day of October, 2018, at about 06:30hrs, at Safari Club Bar which is in Ngudu township, within Kwimba District in Mwanza Region, the accused person, now respondent, wilfully and unlawfully did steal two flat screens make Samsung valued at Tshs. 1,800,000/=, two laptop computers make Dell valued at Tshs. 3,700,000/= the properties of one Joseph Mageni.

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On arraignment she pleaded not guilty to the offence, but after full trial, the trial court was satisfied that the prosecution had proved the case against the accused, now the respondent, beyond reasonable doubt; it found her guilty, convicted her as charged and consequently sentenced her to pay fine of Tshs. 100,000/= (one hundred thousands) or four months imprisonment, in the alternative.

Dissatisfied by the sentence that was imposed against the respondent; the appellant is now before this court appealing against it with two grounds of appeal namely;

1. That, the trial Magistrate erred in fact and law by sentencing the accused person without considering the value of stolen properties or subject matter.
2. That, the trial Magistrate erred in fact and law by stating her own mitigation fact of pregnancy which did not stated(sic) by the accused person during mitigation.

After filing this appeal, the respondent was not found to be served with the appeal. It was after it was proved to the court that physical service was not possible, the appellant prayed and the court ordered that the respondent be served through

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publication. However, even after publication, the respondent did not appear and as a result this appeal was heard in the absence of the respondent.

During hearing, the appellant while represented by Miss Mwaseba, learned State Attorney, and supported the appeal. In such endeavour, she argued the two grounds of appeal simultaneously. In such submission, she strongly submitted that, the trial magistrate erred in law by sentencing the accused to pay the fine of Tshs. 100,000/= while the law under section 265 of the Penal Code (supra) does not give an option for fine in theft offences. Her contention is that the sentence was not proper as the same was inadequate.

Further to that, she said the trial magistrate based on extraneous matters in determining the sentence, as the information that the accused was five months pregnant, never formed part of the records of the court.

According to her, any sentence to be passed by the court must be in accordance with the law. In cementing her contention, she cited the case of **Abdallah M. Njugu versus Republic**, Criminal Appeal No. 465 of 2005 (unreported) and

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prayed that the accused be sentenced in accordance with the law.

From what has been submitted by the counsel for the appellant, the question that requires consideration at this point is, whether the sentence imposed by the trial court was inadequate thus requiring interference by this court. It has to be pointed out first that, this court's powers to interfere the sentence imposed by the lower court are limited.

The circumstances in which the court can interfere with the sentence imposed by the lower court have been stipulated in a number of case laws one of them being **Mohamed Ratibu Saidi versus Republic**, Criminal Appeal No. 11 of 2004 (unreported), in which the Court of Appeal stated that;

> *"it is a principle of sentencing that an appellate court should not interfere with a sentence of the of the trial court merely because had an appellate court been the trial court it would impose a different sentence. In other words, an appellate court can only interfere with a sentence of a trial court if it is obvious that the trial court has impose*

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an illegal sentence or had acted on a wrong principle or had imposed a sentence which in the circumstances of the case was manifestly excessive or clearly inadequate."

Undoubtedly, it has not been argued by the counsel that the sentence was illegal, resulted from a wrong principle, or that the same was excessive. What was argued is that the sentence was inadequate.

In principle, it should also be noted that, the sentencing judge or magistrate, apart from the law, needs to consider either mitigating or aggravating factors when sentencing.

In the case at hand, the law under which the accused, now the respondent, was convicted is section 265 of the Penal Code (supra) which provides;

"Any person who steals anything capable of being stolen commits an offence of theft, and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen, some other punishment is provided, to imprisonment for seven years."

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It is clear from the above provision that the same provides for seven years imprisonment, however, a sentencing magistrate is allowed and in fact could, depending on the circumstances of the theft and the nature of the thing stolen, impose some other punishment. I therefore do not share the same view with the learned State Attorney that the law mandatorily requires that only a seven years imprisonment sentence should be imposed.

Further to that, the provision of section 27(2) of the Penal Code (supra) further gives a relaxing principle, in cases which are not under the Minimum Sentence Act, as it provides that;

> *"(2) A person liable to imprisonment may be sentenced to pay a fine in addition to, or instead of, imprisonment, or where the court so determines under the Community Service Act, to community service under a community service order."*

Now from what has already been pointed out, that what needs to be considered is the law and either mitigating or aggravating factors. It is plain, looking at the judgment of the trial court, that the magistrate did consider the mitigating factor

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that the accused was a first offender. Even if the magistrate never considered the factor that the accused was five months pregnant, the fact which though never formed part of the court's records, was perhaps so obvious to him, still I am of the strong view that being the first offender, the accused deserved leniency and that the trial magistrate was right in imposing the sentence as he did; and for that, I find nothing to fault in the sentence so imposed.

However, I could not help eyeing the fact that although the trial magistrate was satisfied that the accused had committed the offence and found her guilty and convicted her as charged, the magistrate only ordered the return of one television make Samsung 32 inches which was found in possession of the accused person leaving behind the other properties which were also stolen but not found, to wit one television make Samsung and two laptop make Dell. Having noted that fault, I find that to be an error worthy to be corrected, therefore, under section 30(1) of the Magistrates Courts Act, [Cap.11 R.E 2019] I revise and correct that error. In so doing, I hereby order that the victim be compensated of the remaining items which were not found. I hold so because the respondent was found guilty of theft of all

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items, and did not appeal against the conviction and sentence, she is deemed to have accepted the liability, and since she so accepted, she is ordered to compensate the victims of the unrecovered items as well, at the value indicated in the charge sheet.

It is so ordered.

DATED at **MWANZA** this 28th day of April, 2021

J.C. Tiganga

Judge

28/04/2021

Judgment delivered in the presence of the appellant on line via audio conference and Miss Mbuya learned Senior State Attorney for the respondent. Right of Appeal explained and guaranteed.

J.C. TIGANGA

JUDGE

28/04/2021

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