IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL No. 162 OF 2020

DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

GIBORE MWITA ..... RESPONDENT

(Originating from Criminal Case No 250/2019 of the District Court of Bunda at Bunda)

JUDGMENT

10th April & 14 th June, 2021

Kahyoza, J:

This is an appeal against sentence. The trial court convicted Gibore Mwita with the offence of grievous harm and sentenced him topay a fine of Tzs. 400,000/- in default to serve four months' imprisonment. Gibore Mwita paid the fine. Aggrieved, the Republic appealed against the sentence.

The issue is whether the sentence is illegal.

The background of this case is that on the 18/10/2019 the Jackson Sabianius encountered an injury. Jackson's account and all the prosecution witnesses, is that the Mwita beat him with a stick twice and hit him with stone. Sabianus told the court that he had previous quarreled with the Mwita. Mwita had marital relationship with his wife Rhobi Ramadhani (Pw3). Sabianus and Mwita settled their misunderstandings. On the material date, Sabianus alleged that he found Mwita inside his shop taking with his wife (Sabianus' wife), Rhobi

Ramadhani (Pw3). He asked him what was he doing with his wife. To quote he asked him "Bado unamfuatafuata mke wangu unataka umalizie na hili duka kama ulivyomaliza la awali?" Mwita replied by asking Sabianius what did he want from him. Mwita had stick and hit Sabianus twice. Sabianus deposed that at that time they were already outside the shop. Rhobi Ramadhani (Pw3) gave contradicting evidence with Sabianus, as she deposed that Mwita hit Sabianus, her husband while they were inside his shop.

Mwita gave his account of event, that on the material day he was at centre near Sabianus' shop drinking soft drink. Sabianus went to that place with a bush knife and attacked him. Sabianus suspected Mwita to have extra-marital relationship with his wife. Mwita testified that he had a stick and used it to defend himself. Mwita added that in the course of scuffle, Sabianus stepped into hole injuring his leg. He denied hitting the Sabianus with a stone. Mwita's two witnesses supported his account of event. The trial court believed the prosecution's case and convicted Mwita. Mwita did not appeal against the conviction and sentence.

Was the sentence lawful?

Mr. Temba learned state attorney who appeared for the Director of Public Prosecutions, contended that the sentence was not lawful on the ground that Mwita was convicted under section 225 of the Penal Code, which has no option to a fine sentence. He prayed this Court to set aside the sentence and impose a proper.

Mwita's learned advocate Mr. Angelo concurred with the learned state attorney that the sentence imposed was not as per the dictates of the law. He submitted that, although, the sentence is not lawful, he

prayed this Court not to interfere with the sentence as there was no evidence to support the conviction.

It is trite law that an appeal court will only alter a sentence imposed by a trial court if it is evident that the said trial court has acted on a wrong principle; overlooked some material factor; or if the sentence so imposed is manifestly excessive in view of the circumstances of the case. An appeal court is not empowered to alter a sentence on the mere ground that if it had been trying the case, it might have passed a somewhat different sentence. See the case of **Yusufu Abdalla Ally v. R** Cr. Appeal no. 300/2009 CAT (unreported), where the Court of Appeal of Tanzania quoted with approval the principle enunciated in **Dingwal V Republic** (1966) Seychelles Law Report, 205, and as quoted with approval in its earlier decision in **Robert Aron Vs Republic**, Criminal Appeal No. 68 of 2007 (unreported). It stated that-

> *"...on this subject which have shown that an appellate court may alter a sentence imposed by a trial where-*
>
> *1. The sentence is manifestly excessive.*
>
> *2. The sentence is manifestly inadequate.*
>
> *3. The sentence is based upon a wrong principle of sentencing or law.*
>
> *4. A trial court overlooked a material factor.*
>
> *5. The sentence is based on irrelevant factors.*
>
> *6. The sentence is plainly illegal.*
>
> *7. The sentence does not take into consideration the long period an appellant spent in remand or police custody*

awaiting trial (see: Nyanzala Madaha Vs Republic Criminal Appeal No. 135 of 2005, unreported).

Sentencing is a domain of the trial court, which however, is subjected to the overriding principle that, it has to exercise such powers judicially. A court handing down a sentence has to consider mitigating, aggravating factors, the circumstances of the case and person circumstances. The court is required to depict how it applied the above facts to impose the sentence. It is not enough to give a generalized statement that it has complied with the mitigation and aggravating factors. It must consider the mitigating and aggravating factors one by one. See the case of **Raphael Peter Mwita Vs Republic**, Criminal Appeal No. 224 of 2016 CAT unreported. Sentencing is a discretion which must be exercised judiciously. Once that discretion has been exercised judiciously the appellate should not interfere. The Court of appeal held in **Raphael Peter Mwita** (supra), thus-

> *"The law required him to consider the mitigating factors of the appellant on one by one basis. See for instance: Bernadeta Paul Vs Republic [1992] TLR 97, Mussa Ally Yusufu Vs Republic, Criminal Appeal No. 72 of 2006 and Raphael Peter Mwita Vs Republic, Criminal Appeal No. 224 of 2016 (both unreported). (supra) that: "Clearly, looking at the above quotation the trial Judge did not mention any antecedents or the mitigating factors which he said to have considered. He just generalized that he, had considered them. As it was rightly pointed out by both learned counsel, this was not a proper consideration of the mitigating factors. In both antecedents and mitigation, for example, it was stated that the appellant had no previous record of conviction or rather he was a first offender as was put by the learned defence counsel. This was in our view, among*

the important legal mitigation to be considered by the trial Judge."

In the present case, the trial court gave a generalized statement that –

> *"I have heard all prayer made by both the prosecution and defence and it is my considered view that the offence of grievous harm is an offence against healthy of a person if not condemned might cause other serious offence like murder."*

It is therefore, clear that the trial court did not exercise its discretion judiciously. It did not consider the mitigation and the aggravating factors one by one. For this and the reason this Court have to consider the trial court's sentence.

I, now, answer the issue whether the sentence was illegal. Mwita was convicted with an offence of grievous harm which has no mandatory sentence. Thus, depending on the circumstances of the offence, the trial court had mandate to pass any sentence from conditional discharge or fine up to seven years depending on its sentencing jurisdiction. As pointed above an appropriate sentence is imposed after considering mitigating and aggravating facts, and circumstances of the case. The trial court was duty bound to give reasons why it thought fine sentence was more appropriate than a custodial sentence. Section 25 of the Penal Code provides list of sentences which a convict court may choose from. Fine is one of the sentences. This Court in the case of **Tabu Fikwa v R. [1988] TLR 44** discussed factors, which the sentencing court must consider before handing down a sentence. It stated-

> ***"Generally speaking, imprisonment is only justified if it is necessary that the criminal be removed from society.*** *Save where the nature of the offence and the circumstances of*

*its commission call for a custodial sentence, or where the nature of the offence and the circumstances of its commission call for a custodial sentence, or where the court has no discretion in the matter because the offence attracts a mandatory sentence of imprisonment under the Minimum Sentences Act, 1972, or under any other legislation, the court should seriously consider alternative punishments before sending an offender to prison, especially if he is a first offender. (**emphasis is added**)*

Given the above excerpt, it is clear that this Court, (Samatta, J as he then was) was of the view that if the convict is a first offender and the offence does not attract a mandatory sentence the court must consider an alternative sentence before sending that person in prison.

Mwita had no criminal record. He was a first offender. Before sending such a person to prison, the trial court had to ask itself if there was an alternative sentence. The Court stated further that-

*"**Every reasonable effort should be made to keep first offenders out of prison.** Where appropriate, however, the court will send a first offender to prison to demonstrate that crime does not pay or to protect genuine and important interests of the community. A fine will not be imposed on an offender, even a first offender, where that punishment is considered by the court, after having paid due weight to each of the relevant factors, including the interests of society, as being inappropriate." (**emphasis added**)*

having considered the fact Mwita, the respondent was the first offender and the fact that the victim was the author of injury by following the Mwita and started the conversion, which commenced the squabbles, the trial court was justified not to incarcerate Mwita, the convict. Mwita was drinking his soft drink and Sabianus started the

quarrels by asking why was he at that place. Mwita violated no law by being at that place at that particular time. Even if, Mwita's act of being at or near Sabianus' shop was a criminal offence, Sabianus ought to have reported it to the authority instead of confronting him (Mwita).

In the end, I find that the sentence was not illegal and it is a reasonable sentence having considered the fact that Mwita, the convict was the first offender, with dependents and the circumstances of this case, which are that Sabianus, the complainant was to blame for igniting the squabbles which resulted to his injuries and there were no aggravating factors. I find no reason to interfere with the trial court's sentence. I uphold the sentence. Consequently, I dismiss the appeal for want of merit in its entirety.

It is ordered accordingly.

J. R. Kahyoza,
Judge
14/6/2021

Court: Judgment delivered in the presence of Mr.Temba, S/A for the appellant and Mr. Angelo James for the respondent. B/C Ms. Tenga present.

THE HIGH COURT OF TANZANIA
MUSOMA

J. R. Kahyoza
JUDGE
14/6/2021