IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO.56 OF 2021

(Originating from the Judgment in Traffic Case No. 56 of 2020 at the Resident Magistrate's Court of Geita dated 8th February, 2021 before Hon. A.E Katemana)

JOSEPH S/O KOMANYA ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

Date of last Order: 15.06.2021

Date of Judgment: 16.06.2021

A.Z.MGEYEKWA, J

The appellant has lodged the instant appeal against a sentence that was issued by the District Court of Geita in Traffic Case No.56 of 2020. The appellant was charged for an offence of causing death through careless driving of a motor vehicle on the public road contrary to sections 41 and

63 (2) (b) of the Traffic Act, Cap.168 [R.E 2019]. A brief background of this case relevant to the instant appeal goes as: - on 26th April, 2020 at Mwatulole area along Geita Kasamwa road where the appellant was driving a motor vehicle with registration No. T 540 DPJ, make Toyota Noah. The appellant was alleged to have driven the vehicle carelessly as a result he knocked down one pedestrian known as Emmanuel Clavery and caused the death of the said Emmanuel Clavery. The matter was reported to the Police Station at Geita. The Police Officers prepared a Sketch Map and Officer interrogated the appellant, he denied the allegations.

Later, the appellant was arraigned before the District Court of Geita whereas he denied the charges and during Preliminary Hearing the appellant pleaded guilty. Thereafter, the Magistrate proceeded with hearing and pronounced the sentence. The appellant was convicted and sentenced to serve three years imprisonment. The trial Magistrate canceled the appellant's driving licence for a period of four years and the appellant was disqualified from obtaining any driving licence for a period of four years.

Undeterred, the appellant lodged the instant appeal against the sentence. He has filed four grounds of appeal as follows:-

1. *That, the Trial Magistrate grossly erred in law and fact in excessively sentencing the appellant, who is the first-time offender, to serve three and half years jail term, while the underlying punishment section for the charged offence provides for an option of paying a monetary fine.*
2. *That, the Trial Magistrate grossly erred in law by not convicting the appellant after finding him guilty, contrary to mandatory provisions of the law.*
3. *That, the Trial Magistrate grossly erred in law and fact by not taking into consideration the Appellant's mitigating factors in sentencing him.*
4. *That, the trial Magistrate erred in law by not stating/recording the reasons for the charge of Magistrates.*

When the matter was called for hearing on 16th June, 2021, the appellant enjoyed the legal service of Mr. Laurent Bugoti, learned counsel whereas the respondent was represented by Mr. Masambu, learned State Attorney.

Mr. Bugoti was the first to kick the ball rolling. He opted to abandon the second and third grounds of appeal and argue the first and third ground because they are intertwined. The learned counsel for the

appellant submitted that the appellant was charged for causing death through careless driving contrary to sections 41 and 63 (2) (b) of the Road Traffic Act, Cap.168 [R.E 2019]. He went on to state that section 63 (2) (b) of the Road Traffic Act, Cap.168 [R.E 2019] provides for two types of sentences, the first being a fine not less than Tshs. 15,000/= and not exceeding Tshs. 50,000/=, the second sentence is imprisonment not less than two years not exceeding five years.

Mr. Bugoti went on to state that in accordance with section 63 (2) (b) of the Traffic Act, Cap.168 [R.E 2019], a fine is an alternative to imprisonment. He valiantly argued that thus the Magistrate could have exercised his power and consider a fine as an alternative to imprisonment given the fact that the appellant was a first offender, he pleaded guilty and had no any criminal records. He went on to state that in determining a sentence the magnitude must be regarded. To bolster his submission he seeks refuge in the case of **Tabu Fikwa v Republic** [1988] TLR 88 and referred this court to the *Book of Fauz Twahib and Daudi P. Kinywafu, titled: Criminal Procedure Practice in Tanzania, A case Digest, 2019*.

The learned counsel for the appellant did not end there, he contended that in sentencing, the trial Magistrate did not take to account the mitigation factors. To cement his argument, Mr. Bugoti invited this court

to read the trial court typed proceedings particularly on pages 10 and 11. To substantiate his submission he also referred this court to the case of **John Mbua v Republic**, Criminal Appeal No. 257 of 2006. Stressing he argued that, the Magistrate was required to consider the purpose of sentencing, which is aimed to reform the offender. In his view, a fine could suffice. He urged this court to interfere with the sentence imposed on the appellant by the trial court since the sentence is excessive.

On the strength of the above submission, Mr. Bugoti beckoned upon this court to allow the appeal, set aside the sentence, and order the appellant to be sentenced to pay a fine according to the law.

On his part, Mr. Masambu, State Attorney from the outset, did not support the appeal. He stated that the sentence imposed on him was in accordance with the law. He contended that the appellant pleaded guilty and the penalty was in accordance with section 63 (3) (b) of the Traffic Act Cap.168 [R.E 2019] which provides for two types of sentences, fine and imprisonment. He added that section 63 (2) (b) of the Traffic Act, Cap.168 [R.E 2019] states that a sentence of imprisonment is not less than two years and not exceeding five years and a fine not less than Tshs. 15,000/=and not exceeding 50,000/=. He invited this court to observe sentencing principles as stated in the case of **Hassan Charles v**

Republic, Criminal Appeal No. 329 of 2016 where the Court of Appeal of Tanzania stated that the appellate court may interfere with a sentence if it is excessive as to shock, manifestly inadequate, based on the wrong principle of sentencing, overlocked a material factor etc.

It was Mr. Masambu's further submission that the District Court of Geita sentenced the appellant to serve three years imprisonment and the same was within the law. He went on to submit that the Court of Appeal of Tanzania in the case of **Hassan** (supra) cited with approval the case of **Francis Chilema v Republic** [1968] HCD 510 where the Court issued a milder sentence. In his view, a milder sentence is not below two years and not exceeding five years. He went on to submit that the trial Magistrate in his Judgement said that he believed that in order to do away with the vice of the accident in our society an imprisonment sentence will suffice.

On the strength of the above submission, the learned State Attorney beckoned upon this court to uphold the sentence issued by the District Court of Geita and dismiss the appeal.

Rejoining, the learned counsel for the appellant reiterated his submission in chief. He referred this court to the case of **Hassan** (supra) and urged that an appellate court can interfere with a lower court

sentence. He stated that the District Court sentence is based upon a wrong principle of sentencing. He went on to state that the principles of sentencing were not followed since the appellant was the first offender, pleaded guilty, and had no any records of criminality. He urged this court to interfere since the sentencing principles were not adhered to. Mr. Bugoti continued to state that the purpose of sentencing is to reform the offender, thus a milder sentence that is not severe is to pay a fine.

In conclusion, he urged this court to aside the said sentence and allow the appeal.

I have earnestly gone through the lower courts' records and considered both learned counsel and learned State Attorney submissions. I now turn to confront the grounds of appeal. It is trite law that courts have the discretion to impose sentences on the convicts but such discretion must be exercised judicially. That, since the sentences impose on the appellant are arbitrary to the principle of sentencing. The learned counsel for the appellant urged this court to interfere with the sentence imposed on the appellant and reduce them accordingly. In determining this appeal I will determine the issue *whether the sentence of three years imprisonment imposed on the appellant is an excessive punishment or not.*

In the instant appeal, the appellant was charged for causing death through careless driving of a motor vehicle on a public road contrary to sections 41 and 63 (2) (b) of the Traffic Act, Cap.168 [R.E 2019]. For ease of reference I produce both sections as hereunder:-

> *"41. Any person who, on any road– (a) recklessly drives a motor vehicle or trailer; or (b) drives a motor vehicle or trailer at a speed which, having regard to all the circumstances of the case, is or might be dangerous to the public or to any person; or (c) drives a motor vehicle or trailer in a manner which, having regard to all the circumstances of the case, is or might be dangerous to the public or to any person, shall be guilty of an offence.*

And section 63 (2) (b) of the Traffic Act, Cap.168 [R.E 2019] provides that:-

> *63.(2) Any person who is convicted of-*
>
> *(b) an offence under 41, 42, or 44 shall be liable to a fine of not less than fifteen thousand shillings but not exceeding fifty thousand shillings or to a term of imprisonment of not less than two years but not exceeding five years."*

It is a laid guiding principle at law that an appellate court including the Court of Appeal, must not interfere with the sentence which has been

assessed by a trial court. Unless such sentence is illegal or the sentencing court followed a wrong principle or failed to take into account important mitigation factors such as that the convicted person is the first offender, the period he spent in custody before being convicted and sentenced, his age, and health and other meritorious extenuating circumstances like the fact that, the convicted person readily pleaded guilty to the offence and thereby demonstrating remorse.

It is trite law that a sentence that is manifestly excessive or patently inadequate may be altered on appeal. However, an appellate 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. The same was observed in the case of **Yusufu Abdalla Ally v R** Criminal Appeal No. 300/2009 CAT (unreported), the Court of Appeal of Tanzania quoted with approval the principle enunciated in the case of **Dingwal v Republic** (1966) *Seychelles Law Report, 205*, and as quoted with approval in its earlier decision in **Robert Aron v 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."*

I am aware that sentencing is a discretion that must be exercised judiciously. Once that discretion has been exercised judiciously the appellate should not interfere. The Court of Appeal of Tanzania in the case of **Raphael Peter Mwita** (supra), held that:-

> *"The law required him to consider the mitigating factors of the appellant on one by one basis."*

Similarly, the Court of Appeal of Tanzania in the case of **Bernadeta Paul v Republic** [1992] TLR 97, **Mussa Ally Yusufu v Republic**, Criminal Appeal No. 72 of 2006, and **Raphael Peter Mwita v Republic**, Criminal Appeal No. 224 of 2016 (all unreported). In the case of **Raphael Peter Mwita** (supra) the Court of Appeal of Tanzania held 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 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 the 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."*** *[Emphasis added].*

Guided by the above authority, it is clear that 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.

Applying the above authorities in the present case, it is clear that the trial court gave its own opinion without considering the appellant's mitigation and aggravating factors. He did not even mention if he considered the mitigation and aggravating factors thus, the same was

not a proper consideration of the mitigating factors. Therefore, due to the absence of his criminality record, there is no doubt that the appellant was a first offender.

In his mitigation prayers, the appellant also told the court that, he was driving 50 km per hour and there was another vehicle that knocked down the pedestrian and he fell on his vehicle bonnet, then, the appellant, himself called the Police Officer. This by itself shows his recklessness was contributed by another vehicle that knocked down the pedestrian. The prosecution on its side stated that the appellant was the first offender, he had no any previous record and they urged the Magistrate to issue a severe punishment to serve as a lesson to the people with like behaviours.

All these were not taken into account by the convicting and sentencing Magistrate. Had the Magistrate considered the mitigation and aggravating factors he could have issued a lesser penalty considering that section 63 (2) (b) of the Traffic Act, Cap.168 [R.E 2019] provides for an alternative sentence. In my respectful view, the alternative sentence of fine is imposed to circumstances of the case like the one at hand and to offenders like the appellant who is the first offender and has pleaded guilty to the offence, he did not disturb the court nor the prosecution side.

It is, therefore, clear that the trial court did not exercise its discretion judiciously. I have read the trial court ruling, it did not consider the mitigation and the aggravating factors one by one. For this and the reason, I find that the sentence of three years imprisonment is extremely excessive. It therefore ought to be interfered with by this court and altered.

It is cardinal principle that, when the convict is the first offender to the offence he is convicted and has no previous record of criminality, and when the law for the offence he is convicted gives alternative punishments for fine or jail sentence, the convict shall be ordered to pay fine so far as that is his priority at law.

Guided by the Court of Appeal of Tanzania in the case of **Robert Aron** (supra). I find that the sentence imposed by the District Court of Geita because the sentence is manifestly excessive and the trial court overlooked a material factor.

Based on the foregoing and all said and done, I do hereby alter the sentence of three years imprisonment imposed on the appellant, I quash and set aside the order of the District Court of Geita. The fine is mandatory thus, it is left unshaken. Therefore, I proceed to substitute the sentence of three years imprisonment with a fine of Tshs.15,000/=. The appellant

shall therefore pay a fine of Tshs. 15,000/= or two years imprisonment in default. I further order the restoration of his driving license and set aside the order of his disqualification from obtaining another driving license.

Order accordingly.

DATED at Mwanza this 16th June, 2021.

A.Z.MGEYEKWA

JUDGE

16.06.2021

Judgment delivered on 16th June, 2021 vide audio teleconference whereas Mr. Bugoti, learned counsel for the appellant and Mr. Masambu, learned State Attorney for the respondent were remotely present.

A.Z.MGEYEKWA

JUDGE

16.06.2021

Right to appeal fully explained.