IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC CRIMINAL APPEAL NO. 55 OF 2021

(Original Criminal Case No. 07 of 2020 of the District Court of Geita District at Geita)

FRANCIS S/O GOZBERT @ RWEKATALE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

12/08/2021 & 28/09/2021

W. R. MASHAURI, J;

In the Resident Magistrates' court of Mwanza at Mwanza, the appellant Francis Gozberth @ Rwakatale was charged, tried and convicted for two counts in the charge sheet namely: -

1st count: Causing bodily injury through careless driving of a motor vehicle on the Public Road c/s 41 and 63(2)(b) of the Road Traffic Act Cap. 168 R.E. of the Laws of Tanzania and

2nd count: Causing bodily injuries through careless driving of a motor vehicle on the Public Road c/s 41 and 63(2) (b) of the Road Traffic Act, Cap. 168 R.E of the Law of Tanzania. He was sentenced to suffer four years imprisonment on each count, the sentences of which were ordered to run concurrently. He was also sentenced to pay fine of shs. 40,000/= on each count.

Being aggrieved with both conviction and sentence, the appellant now appeals to this court on the following grounds of appeal: -

1. That, the trial court erred in law and fact to convict the appellant and passing on him illegal sentences of paying fine and four years' imprisonment for each count contrary to the law.
2. That, the trial court erred in law and fact to convict the appellant on a belief that the plea of guilty was unequivocal.
3. That, the trial magistrate erred in law when he failed to address the appellant to respond to the facts consisting all ingredients of the charged offence.
4. That, the trial court erred in law and fact to sentence the appellant without considering the extent of bodily injuries and the mitigating factors.

The appellant is represented by Mr. Dutu Faustine Chebwa learned counsel and the respondent by Mr. Hemed Senior State Attorney.

when the matter was called in court for hearing, Mr. Dutu counsel for the appellant argued the 1st and 4th grounds of appeal separately and the 2nd and 3rd grounds of appeal in consolidation.

In support of the 1st ground of appeal, Mr. Dutu Faustine Chebwa counsel for the appellant submitted that as shown in the charge sheet, the appellant was charged with two counts under section 41of the Road Traffic Act Cap. 168 and punished under section 63(2)(b) of the Road Traffic Act Cap. 168.

That, if a person is found guilty for the offence charged under section 41 of the Road Traffic Act, shall be punished under section 63(2) (b) of the Act and such person shall pay fine of shs. 15,000/= and not exceeding shs. 50,000/= or imprisonment of not less than two years but not exceeding five years. And if convicted under section 41 where only bodily injury was caused and such injury did not amount to grievous harm within the meaning of that expression in the Penal Code, fine not less than shs. 10,000/= but not

exceeding 30,000/= or imprisonment not less than 12 months and not exceeding five years.

That, in this matter the trial magistrate sentenced the appellant to pay fine of shs. 40,000/= on each count and imprisonment of four years jail on each count. the sentences of which are bad in law as they amount to double punishment. The trial magistrate was duty bound to take an option of fine or jail sentence in so for as the appellant was and is first offender, and the allegation by trial magistrate that fine sentences promotes instead of discouraging the commission of such offences is a failure by the trial magistrate to judicially exercise his discretional mercy in assessing sentences. That on imposing such punishments to the appellant, the trial magistrate ultra-vires the statutory sentences put on by the legislature and has no power to amend such sentences and that the trial magistrate is refrained at law to pronounce such an illegal sentence which ought to be set aside. That, since the appellant has executed his sentence by paying fine, on 30/3/2021 he prayed the court to allow his appeal and release him from prison custody forthwith.

In support of the 2nd and 3rd grounds of appeal that the plea of guilty by the appellant was unequivocal. The appellant's advocate said the plea

was equivocal as the same is in three words. *"It is true"* which in law is equivocal.

That, where a person pleads guilty to the offence he is charged with, the court is duty bound to exercise great care and make sure that the accused gives clear admission to the offence. A mere admission that *"It is true"* is not satisfactory to show that the accused did commit the alleged offence.

Secondly, after the appellant offered a plea of guilty, the facts of the offence were not read over to him in the language he understands nor was he given an opportunity to dispute the same and his answer was not as nearly recorded in his own words as indicated at page 3 of the trial courts typed proceedings.

The learned counsel for the appellant then referred this court to the case of **DPP Vs. Salumu Madito** Criminal Appeal No. 108 of 2019 CAT Dodoma Registry (unreported) in which the court of Appeal held that: -

> *"The respondent did read the facts but was not recorded in the nearest possible words. The record is silent whether or not the respondent was accorded an opportunity to dispute or explain the party or add any relevant facts. And since the facts were not read*

and the accused was not asked to dispute the facts, the plea therefore was equivocal."

For the 4th ground of appeal that, the trial magistrate erred to sentence the appellant without assessing the extent of injury, and the given mitigation factors as shown at page 8 of the typed judgment, and the actual injury is not shown in the charge sheet, failure by the trial magistrate to consider the injury was fatal. The trial magistrate erred at law to pass jail sentence upon the appellant who was 1st offender other than sentencing him to pay fine. He prayed the court to release the appellant from custody.

In reply, Mr. Hemed Senior State Attorney for the Republic submitted that, under section 360(I) of the CPA Cap. 20 R.E. 2019, there is no appeal against a plea of guilty. That, in a plea of guilty, there are things to be challenged namely: -

1. if the plea was equivocal.
2. if the plea was actuated by threat.
3. by apprehension.

That, in this appeal the appellant was tried and found guilty for two counts. Causing bodily injury through careless driving. He conceded that the plea of guilty entered by the applicant was equivocal because during a plea

taking the appellant pleaded guilty in three words in the words "*it is true*" and the trial magistrate proceeded to enter a plea of guilty without taking great care to the accused person's admission of the charge as a mere plea of the words "*it is true*" is not satisfactory to show that the accused did clearly admit to have committed the alleged offence.

That, even when the appellant pleaded guilty as shown above, the trial magistrate did not read the facts of the case to the accused nor did he give the appellant an opportunity to dispute the facts or not. He also cited the **DPP v/s Salum Madito's** case cited by counsel for the appellant to back up his submission.

Briefly in respect of the ground that the plea entered by the appellant was equivocal, the learned State Attorney for the republic supported the appellant's appeal as well as the appellant's counsel submission in support thereof.

For the 2nd and 3rd grounds of appeal the learned Senor State attorney submitted that, since the appellant's plea of guilty was equivocal, the only remedy to be ordered by this court is to nullify the whole proceedings of the

trial court and order for re-trial of the case by the trial court. He also supported the sentence's imposed upon the appellant to be illegal.

In rejoinder, Mr. Dutu counsel for the appellant submitted that, the prayer by learned state for the Republic to order a trial de-novo of the case is illegal and unfair because all the proceedings and the remaining procedure carried by the trial court is not illegal but the sentences were illegal and the remedy where sentence is illegal, a re-trial of the mater de-novo is justifiable. But, since the learned counsel for the appellant did not address the court on this issue and the appellant has served part of his punishment for more than six months, it should be prudent and justiciable if the court orders the appellant to be released from custody forthwith as the order for re-trial is prejudicial to the appellant as the same amounts to punish the appellant twice. He therefore prayed the court to release the appellant from prison custody.

The issue is whether the sentences imposed on the appellant are lawful in law.

Secondly whether under the circumstances of this case the order for re-trial of the case is lawful.

It is cardinal principle at law that, in imposing a sentence to a person found guilty of any offence, the gravity of the offence he is found guilty should be weighed according to the inherent gravity of the assault or unlawful act itself, and in traffic offences punishments are by and large fines.

In the first count of the charge sheet in this case the appellant Francis s/o Gozbert @ Rwakatale was charged with the offence of causing bodily injury through careless driving of a motor vehicle on the Public road c/s 41 and 63(2) of the Road Traffic Act Cap. 168 R.E. 2002.

It is stated in the particulars of offence that, on 15/12/2020 at Mlimani village along Chato – Muganza road within the District of Chato and Region of Geita, being the driver of the motor vehicle with registration number T. 177 DCE make Toyota coaster, the appellant Francis Gozibert Rwakatale did drive the said motor vehicle on the public road carelessly to wit: -, while driving the said motor vehicle, he made a turn to the right side of the road without taking care of other users of the road as a result, he knocked down one Kulwa s/o Amos who was driving a motor cycle with registration No. MC 548 CSJ and caused him to suffer bodily injury.

In respect of the particulars of offence in count number two, he also drove the same motor vehicle along the same road, District and Region and place and knocked the same Kulwa a cyclist and caused injuries to one Hior @ Mango a passenger on the said motorcycle. The appellant entered a plea of guilty in the words. *"It is true"* and as it appears in the proceedings of the trial court, upon pleaded guilty in the words *"it is true"* the facts were narrated but the accused was not asked by the trial magistrate as to the correctness and truth of the facts. This is contrary to the procedure to be taken when a person's pleadings guilty. On my part, it is a correct procedure that, where the accused person who had pleaded guilty in a charge and upon facts of the case narrated to him must be asked by a trial magistrate of the correctness and truth of the facts, and when he added additional facts purported to make a defence the court must make an inquiry for this purpose in which the accused must be given an opportunity of being heard. And if the accused person does not agree with the statement of facts or asserts additional facts, which if true might raise a question as to his guilty the trial magistrate should record a change of plea to not guilty. If the accused does not deny the alleged facts in any material facts, the trial magistrate shall

record a conviction and proceed to hear any other facts relevant to sentence and the accused reply must off course be recorded.

Since the trial magistrate, upon recording a plea of the accused in the words *"it is true"* and upon narrating facts failed to ask the accused as to the correctness and truth of the facts, the magistrate should not enter a conviction as the plea was equivocal. At law, a plea of guilty in the words *"it is true"* is an equivocal plea and therefore bad in law.

I therefore agree with the appellant's counsel that, the plea entered by the appellant in this matter was equivocal.

In respect of the sentences of five years jail and fine sentences passed by the trial court against the appellant. I am of considered opinion that the sentences of fine and jail sentences imposed by the trial court against the appellant are not only that they are illegal sentences but also are excessive sentences.

It must be noted that, the purpose of punishing the offence is always that of rehabilitating the offender. In this matter, in sentencing the accused to suffer four years imprisonment and to pay fine of shs. 40,000/= on each

count is illegal and the same is contrary to the provisions of those sections of the Act the accused was charged with.

In both two counts of the charge sheet whereby section 63(2)(b) of the Act also provides thus: -

63 penalties under part IV

(2) Any person who is convicted of

(b) Any offence under section 41,42 or 44 shall be liable to a fine not less than fifteen thousand shs but not exceeding shs. 50,000/= or to a term of imprisonment of not less than, two years but not exceeding five years.

As I have said above, the sentences of four years imprisonment and fine of shs. 40,000/= imposed on the appellant were therefore illegal sentences and/or punishments. This court therefore ought to interfere with the said sentences in so far as the principle of sentencing is concerned, the guiding principle is that,

> *"an appellate court including the Court of Appeal must not interfere with a 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 mitigating factors such as*

that the convicted person is first offender, the period he spent in custody before being convicted and sentenced."

The accused person in this matter was charged on 15/12/2020 and was convicted and sentenced on 30/03/2021. Although he was released on bail on conditions for all the time, he was all the time under restraint executing bail conditions.

Following the above established principle on illegal sentences and bearing in mind that the appellant was under restraint from 13/12/2020 and when he was convicted and sentenced on 30/03/2021 which is almost a lapse of 15 months, I reduce the imprisonment of 4 years on each count to that of 12 months on each count, and the said sentenced to run concurrently. The fine sentence of shs 40,000/= on each count is reduced to Tshs. 15,000/=, on each count. And since the appellant has served part of his jail sentence for 15 months from when he was incarcerated on 30/03/2021. So the order for retrial if ordered by this court will prejudice the appellant.

In general, a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up the gap in its evidence at the first trial, even when a

conviction and sentence is vitiated by mistake of the trial court for which the prosecution is not to blame. It does not necessarily follow that, a re-trial should be ordered, each case must depend on its particular facts and circumstances and an order for re-trial should only be made where interest of justice require it. It should not be ordered where it is likely to cause an injustice to the accused person. So much so, the order for re-trial sought by the learned Senior State Attorney is discarded.

From the look of events, the appellant's appeal against sentence is allowed. The jail sentence of four years' imprisonment on each count and a fine of shs. 40,000/= on each count is set aside and substituted thereof a sentence of 12 months' imprisonment on each count and fine of shs. 15,000/= on each count, jail sentence to run concurrently. The appellant shall therefore be released from prison custody forthwith unless otherwise his continued incarceration is lawful. It is so ordered.

W. R. MASHAURI

JUDGE

28/09/2021

Date: 28/09/2021

Coram: Hon. W.R. Mashauri, J

Appellant:

Respondent: Miss Lilian, State Attorney

B/c: Elizabeth

Court: Judgment delivered in court in presence of the appellant and Miss. Lilian, State Attorney for the Republic this 28/09/2021. Right of appeal explained.

W. R. MASHAURI

JUDGE

28/09/2021