IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 40 OF 2022

(Arising from Criminal Case No. 31 of 2022 in the Court of the Resident Magistrate Musoma at Musoma)

BETWEEN

ALICE D/O NYAWIRA @ NDUNGU..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

15th & 16th August, 2022.

A. A. MBAGWA J.

This is an appeal against a sentence arising from plea of guilty conviction. The appellant Alice Nyawira Ndungu was arraigned in the Court of the Resident Magistrate of Musoma on a charge of Unlawful Presence within Tanzania contrary to section 45(1)(i) and (2) of the Immigration Act.

The particulars of offence were that Alice d/o Nyawira Ndungu on 27th day of May, 2022 at Kirumi barrier within Rorya district in Mara region, being a citizen of Kenya was found unlawfully present within the United Republic of Tanzania.

Upon arraignment, the appellant readily pleaded guilty to the charge and in addition, admitted all the facts that were adduced by the prosecution. As such, the trial court found the appellant guilty and consequently convicted her.

Following the appellant's conviction, the trial court sentenced her to a prison term of nine (9) months in addition to a fine of Tanzanian shillings five hundred thousand (500,000/=).

The appellant was not happy with the sentence imposed by trial court. She thus knocked the doors of this court to assail it hence this appeal.

When the matter was called on for hearing, the appellant appeared in person through teleconference whereas the Republic was represented by Isihaka Ibrahimu, learned State Attorney.

The appellant's petition of appeal contained several complaints however, on the hearing day, she abandoned the rest and remained with one ground which may be put in the following words;

> ***'The trial court erred in law and facts to impose a sentence of both fine of Tanzanian shillings five hundred thousand (500,000/=) and imprisonment of nine months'***

Submitting in support of her appeal the appellant said that the sentence of fine of Tanzanian shillings five hundred thousand (500,000/=) and imprisonment of nine months imposed on her by the trial magistrate was excessive and unfair. She thus prayed the court's mercy to set aside the sentence and subsequently set her free as she has stayed in jail for almost two months.

Mr. Isihaka Ibrahimu, learned State Attorney, on his part, supported the appeal against sentence. The learned State Attorney said that the offence of which the appellant was convicted had an option of fine. He argued that where the provision of law provides for an option of fine, the court should resort first to a sentence of fine before imprisonment. Mr. Ibrahimu cited the case of **Yeremiah Jonas Tehani vs Republic,** Criminal Appeal No. 100 of 2021, CAT at Dar es Salaam and submited that the Court of Appeal held that imprisonment should not be imposed on first offender save where the offence is particularly grave or widespread. Further, the learned State Attorney referred to the case of **Anania Clavery vs Republic**, Criminal Appeal No. 355 of 2017, CAT at Dar es Salaam at page 25 to bolster his argument.

The learned State Attorney further expounded that section 45(2) of the Immigration Act provides an option of fine and the record shows that the accused/appellant was the first offender. Mr. Ibrahimu was thus opined that the trial magistrate erred in law to impose imprisonment of nine months together and a fine of Tanzanian shillings five hundred thousand (500,000/=) for he ought to have imposed a sentence of fine and in default imprisonment.

In addition, Mr. Ibrahimu submitted that since the appellant has already served almost two months out of nine months, it was neither fair nor just, in the circumstances, to set aside the imprisonment sentence and sustain fine. Instead, Mr. Ibrahimu invited the court to set the appellant free.

From the foregoing submissions and the record of appeal, the issue for determination in this appeal is one namely, whether the sentence imposed by the trial court was proper in the eyes of law.

For sake of convenience, I find it is apposite to reproduce the provision under which the appellant was charged, convicted and sentenced.

Section 45(1) of the Immigration Act provides;

A person who;

(i) Unlawfully enters or is unlawfully within Tanzania in contravention of the provision of this Act shall be guilty of the offence;

(2) Any person who commits an offence under this Act shall, except where any other penalty is specifically provided therefore, be liable on conviction to a fine not less than five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both such fine and imprisonment.

The above provision is clear that a person convicted of being unlawfully present within the country is liable to a fine of not less than five hundred thousand shillings or imprisonment not exceeding three years or both fine and imprisonment.

It is a trite law as rightly submitted that by the learned State Attorney that where a provision of law provides an option of fine, the sentencing court is duty bound to impose a fine first before resorting to imprisonment sentence particularly where the accused is the first offender unless the offence is so grave or widespread. Further it is settled that an offender who readily pleads

guilty deserves a lenient sentence. See **Anania Clavery vs Republic (supra).**

The record in the instant appeal is quite clear that the appellant was the first offender and readily pleads guilty. Besides, there is no record to show that the offence was either grave or widespread to attract such a severe sentence of imprisonment.

As a general rule, the appellate court should not interfere the sentencing discretionary powers of the trial court unless it acted on wrong principle or overlooked some material factors. See the cases of **Njile Samwel @ John vs the Republic**, Criminal Appeal No. 31 of 2018, CAT at Shinyanga and **James s/o Yoram Vs Republic** (1950) 18 EACA 147. In this appeal, it is my considered views that the trial magistrate acted on wrong principle and overlooked some material factors. He imposed both fine and custodial sentence whereas the appellant was a first offender and in addition, she readily pleaded guilty. Indeed, the trial magistrate had no justification to impose such a grave punishment.

In the circumstances, I entirely agree with both the appellant and respondent that the trial magistrate grossly erred in law to impose sentence

of both fine of Tanzanian shillings five hundred thousand (500,000/=) and imprisonment of nine months. In fact, the trial magistrate ought to impose a sentence of fine and default thereof imprisonment. Consequently, I set aside the sentence of both fine of Tanzanian shillings five hundred thousand (500,000/=) and imprisonment of nine months meted out by the trial court.

Since the appellant has already served two and half months in prison, I impose a sentence which results to her immediate release. This appeal is therefore allowed. The appellant should be immediately released unless she is held for other lawful cause.

It is so ordered.

The right of appeal is explained.

A. A. Mbagwa

JUDGE

16/08/2022