IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 39 OF 2022

(Arising from Criminal Case No. 33 of 2022 in the Court of the Resident Magistrate Musoma at Musoma)

BETWEEN

ELIAS S/O NDIKUMANA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

15th & 16th August, 2022.

A. A. MBAGWA, J.:

This is an appeal against a sentence which was meted out following a conviction on plea of guilty. The appellant Elias s/o Ndikumana was arraigned in the Court of the Resident Magistrate of Musoma and charged with Unlawful Presence within Tanzania contrary to section 45(1)(i) and (2) of the Immigration Act.

The particulars of the charge alleged that Elias Ndikumana on the 27th day of May, 2022 at Kirumi barrier within Rorya district in Mara region, being a citizen of Burundi was found unlawfully present within the United Republic of Tanzania.

Upon arraignment, the appellant readily pleaded guilty to the charge and subsequently admitted all the facts that were adduced by the prosecution. As such, the trial court found the appellant guilty and accordingly convicted him. Consequently, the trial court sentenced the appellant to a prison term of seven (7) months

The appellant was not amused with the sentence imposed by trial court. He thus came before this court to assail it hence the present appeal.

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

The appellant had filed a petition of appeal containing several complaints however, on the hearing day, he 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 on the appellant a sentence of seven (7) month prison term'***

The appellant argued that the sentence of seven (7) month prison term imposed on him by the trial magistrate was excessive and unfair. He thus

prayed the court's mercy to set aside the sentence and subsequently set him free as he has already served almost two months.

Mr. Isihaka Ibrahimu, learned State Attorney, on his part, was in full support of 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 submit 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 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 a sentence of imprisonment of

seven (7) months for he ought to impose 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 seven months, it was neither fair nor just, in the circumstances, to set aside the imprisonment sentence and substitute it for fine. Instead, Mr. Ibrahimu beseeched 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 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 sentence of fine first before resorting to imprisonment sentence. This is 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 pleaded guilty. Besides, there is no record to show that

the offence of which he was convicted was either grave or widespread to attract such an imprisonment sentence.

As a general rule, the appellate court should not interfere the sentencing discretionary powers of the trial court unless the lower court 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, the trial magistrate acted on wrong principle and overlooked some material factors. The trial magistrate erroneously imposed custodial sentence whereas the appellant was a first offender and in addition, he readily pleaded guilty. There is no any reason on record to justify custodial sentence.

In the circumstances, I entirely agree with both the appellant and respondent that the trial magistrate grossly erred in law to impose sentence of seven-month imprisonment. In fact, the trial magistrate ought to impose a sentence of fine and in default thereof imprisonment. The sentence of seven month imprisonment was therefore improper. Consequently, I set

aside the sentence of imprisonment for seven months meted out by the trial court.

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

It is so ordered.

The right of appeal is explained.

A. A. Mbagwa

JUDGE

16/08/2022