IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 99 OF 2021

(Arising from Criminal Case No. 35 of 2021 Bukoba Resident Magistrates Court (D. P. Nyamkerya- SRM)

MERCHARDES MGISHAGWE.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

26/07/2022 & 02/09/2022

E. L. NGIGWANA, J.

"Freedom of religion is a complex issue and requires delicate balance since it protects the rights to freedom of conscience both of believers and non-believers and those whose religious beliefs differ from the beliefs which are being observed by the majority. In other words, a fair balance must be struck between the rights of the individual and the rights of others, between the right to believe and manifest a religion and the right to education" See ***Seventh Day Adventist Church (East Africa) Limited versus Minister of Education & 3 Others (2017)*** *eKLR.*

Upbringing children on proper freedom of religion and development on secular education are two inseparable wings which fly together; in other words, faith and reason are like two wings on which human spirits rises to the contemplation of truth. **See John Paul II, 1994, Fides et**

Ratio, Encyclical Letter on the relationship between Faith and Reason.www.vatican.va

The Appellant herein and his wife Agripina Pius Maganja who is not a party to this appeal profess a religious belief which is against secular education, the belief which had threatened their children's right to education. The prosecution alleged the duo failed to comply with parental duty and responsibility of enrolling their children to school and providing education to them, as a result, they were arraigned before the Resident Magistrates' Court of Bukoba with 8 counts. The counts and their particulars as per trial court record were as follows;

1st count, failure to comply with parental duty and responsibility Contrary to Section 9 (1) and Section 14 of the Child Act, [Cap. 13 R.E 201]. It was alleged in the trial court that on diverse dates between January 2015 and January 2021 at Kasarani area within Bukoba District in Kagera Region being parents failed to comply with parental duty and responsibility of providing education to their child namely Joseline d/o Marchades aged 13 years old.

2nd count, failure to comply with parental duty and responsibility Contrary to Section 9 (1) and Section 14 of the Child Act, [Cap. 13 R.E 2019]. It was alleged that the two accused on diverse dates between January 2015 and January 2021 at Kasarani area within Bukoba District in Kagera Region being parents failed to comply with parental duty and responsibility of providing education to their child namely Joshua s/o Marchades aged 9 years old.

3rd count, failure to comply with parental duty and responsibility Contrary to Section 9 (1) and Section 14 of the Child Act [Cap. 13 R.E 2019]. It was alleged that the duo on diverse dates between January

2015 and January 2021 Kasarani area within Bukoba District in Kagera Region being parents failed to comply with parental duty and responsibility of providing education to their child namely Anna d/o Marchades aged five years old.

4th count, failure to enrol a child to Primary School Contrary to Rule 7 of the Public Primary School (compulsory enrolment and attendance) order made Under Section 35 (4) of the Education Act, [Cap. 353 R.E 2002]. It was alleged that, the duo in January 2021 at Kasarani are within Bukoba District in Kagera Region being parents of Joseline d/o Marchades aged 13 years did fail to enrole (sic) her to public Primary School.

5th count, failure to enrol a child to Primary School Contrary to Rule 7 of the public Primary School (Compulsory Enrolment and Attendance) order made Under Section 35 (4) at the Education Act, [Cap. 353 R.E 2002].It was alleged that the duo in January 2021 at Kasarani within Bukoba District in Kagera Region being parents of Joshua s/o Marchades aged 9 years did fail to enrol him to public Primary School.

6th count, failure to enrol a child to Primary School Contrary to Rule 7 of the Public Primary School (Compulsory Enrolment and Attendance) order made Under Section 35 (4) of the Education Act, [Cap. 353 R.E 2002]; that the two accused in January 2021 at Kasarani area within Bukoba District in Kagera Region being parents of Anna d/o Merchades aged 5 years old did fail to enrol her to public Primary School.

7th count, allowing meetings of unlawful society to be held at Occupiers premise contrary to section 27 (1) the Societies Act, [Cap. 337 R.E 2002]. It was alleged that the Appellant and one Agripina d/o Pius Maganja on diverse dates between the year 2010 and 2021 at Kasarani

area within Bukoba District in Kagera Region, knowingly, allowed meetings of unlawful Society to wit; **"Kanisa la Kristu"** to be held their premises.

8th count, acting as members of Unlawful Society contrary to section 26 of the Societies Act, [Cap 337 R.E 2002]. It was alleged that the Appellant and one Agrippina d/o Pius Maganja on diverse dates between the year 2010 and 2021 at Kasarani area within Bukoba District in Kagera Region, knowingly, acted as members of the said unlawful Society

The duo denied the allegations. After a full trial, the trial court was convinced that the 1st, 2nd, 3rd, 4th, 5th and 6th counts had been proved beyond reasonable doubt therefore, were convicted and sentenced as follows; as regards the 1st, 2nd , and 3rd counts; the appellant was sentenced to serve six (6) months consecutively and pay a fine of **Tshs.1,000,000/=** on each count while Agripina Pius Maganja, was discharged under section 38 (3) of the Penal Code on each count, that is to say; the 1st, 2nd and 3rd counts on the condition that she should commit no criminal offence within the period of one year.

As regards the 7th and 8th counts, they were acquitted owing to the reason that the trial court was satisfied that the counts were not proved beyond reasonable doubt.

The appellant was disheartened by the trial court decision and therefore, has appealed in this court challenging both the conviction and sentence with 8 grounds of appeal. Since the appellant's counsel abandoned the 8th ground of appeal before the commencement of the hearing of this appeal, I opt to reproduce the remaining 7 grounds only.

1. *That, the trial magistrate erred in fact and law to convict the appellant where the prosecution failed to prove its case beyond any reasonable doubt.*

2. *That, the trial magistrate erred both in fact and law to sentence the appellant to serve a greater and severe punishment without considering the fact that the appellants is a first offender.*

3. *That, the trial court erred both in law and fact for failure to conduct the case in camera since the witnesses involved were minors against the procedure.*

4. *That, the trial court erred both in law and fact for convicting the appellant on non-existing offences and for failure to take cognizance of the important defense witness.*

5. *That, the trial court erred both in law and fact for convicting the appellant on six counts contrary to the charge sheet but passed sentence on three counts only.*

6. *That, the trial court erred both in law and fact for convicting the appellant under influence and pressure and for failure to accord the appellant fair hearing.*

7. *That, the trial court erred in fact and law for failure to properly record the defence case and witness and improper evaluation of the evidence.*

When the matter came for hearing, Advocate Assey for the appellant opted to argue grounds 1, 4, 6 and 7 together as they are related and converge on one point that the case was not proved beyond reasonable doubt, and also planned to argue ground 2 and 5 as they do attack on sentence meted out by the trial court.

Stating with the issue of sentence, the learned counsel submitted that the Law of the Child Act, [Cap 13 R.E 2019] provides for punishment for a term not exceeding 6 months or a fine not exceeding 500,000/= or both. Mr. Assey further argued that, since the appellant was the first offender it was not justifiable for the trial magistrate to pass a fine and a custodial sentence together. That the appellant deserved a lenient sentence notably to pay a fine only. He referred the court to the case of **Elias Johachim versus Republic** [1992] TLR 220 Katiti J (as he then was) insisted that sentences of offences arising from a single transaction should be ordered to served concurrently. He went on that in **Rubanga Senga Versus Republic** [1992] TLR 357 it was held that; sentence is not supposed to be so mechanical or industrial process.

As regard the 1st, 4th, 6th, and 7th ground, Mr. Assey submitted that the case was not proved beyond reasonable doubt. He added that the prosecution paraded six witnesses upon which their evidence was hearsay evidence and the trial court did not warn itself before basing on its conviction on the evidence of PW1, PW2, PW3 and PW4 since there was no **voire dire** test done.

Mr. Assey, added that there was biasness though the same was not reflected in the proceedings. He finally prayed that the conviction and sentence be set aside and quashed. He prayed for the court to be guided by the case of **Kiwanga Mwikajo versus Republic,** Criminal Appeal No. 217 of 2014 (CAT).

In his riposte, Mr. Uhagile, learned State Attorney uprightly submitted that they do not support the appeal. He added that the sentence was not excessive as it was legal one save that the court did not impose a sentence on the 4th, 5th and 6th counts. It was Mr. Uhagile's further

submission that the court has power to pass both a fine and custodial sentence. Mr. Uhagile added that, the fact that the appellant was the first offender was not raised by the appellant as one of the mitigating factors when given chance to mitigate therefore, the trial court had the right to proceed as it did.

Reacting on the ground that the case was not proved beyond reasonable doubt as required in criminal cases, he responded that, the same is baseless and unfounded because the evidence given was not purely hearsay evidence.

He contended that the victims were PW2, PW3 and PW4 who all testified that they were not taken to school. Mr. Uhagile added that their evidence was supplemented by the evidence of (PW1), PW5 and PW6.

On the response to the blame put forward by Mr. Assey, that the court did not conduct "voire dire" test, Mr. Uhagile responded that it is unfortunate that the appellant's advocate is not aware that "voire dire test" is no longer a legal requirement, what is required is for the witness of tender age to promise to tell the truth and that they did so in the trial court. He further submitted that, it was clear that the appellant did not take the children to school. He finally prayed to this court to convict the appellant on the 4th, 5th and 6th counts.

In rejoinder, the learned counsel for appellant reiterated that the sentence was excessive and the order that they should run consecutively was not justifiable.

From the grounds and submissions advanced by the appellant's counsel and the response retaliated by the State Attorney for the Republic, I have grasped that what is being faulted in this judgment is the standard

of proof and the sentences passed and the principles of sentencing thereon.

I have passed through evidence tendered at the trial court as well as the testimonies of the witnesses who testified and the analysis thereon, I am convinced that the appellant was legally convicted in respect of the 1st, 2nd, 4th and 5th counts after the prosecution had proved the case beyond reasonable doubt as rightly submitted by the Mr. Uhagile.

I say so due to the number of reasons: **One,** PW2 and PW3 were victims of the offences who directly testified before the court that they were not taken to school by their parents on religious beliefs which were not acceptable defence. **Two,** their evidences were corroborated and complimented by PW1 (A Ward Education Officer), PW5 (Street Chairman) and PW6 (A teacher at Buyekera Primary School) upon which all of them testified that the appellant and his wife one Agrippina d/o Pius Maganja refused to take their children to school. **Three,** throughout the entire trial, the appellant did not deny to have committed the offence but his entire defence rested on religious faith where he stated that he refused to take his children to school because it was against his faith. Without doubt, denying a right to secular education to the child under the camouflage of faith like what the appellant did in this case, is not at all acceptable.

It is common knowledge that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including; the nature of the right or fundamental freedom, the importance of the purpose of the

limitation, the nature and extent of the limitation, and the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.

Tanzania as a Secular State guarantees the right to freedom of conscience and religion embodied in Article 19 (1) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time. However, that right is not absolute. In the case of **Julius Ishengoma Francis Ndyanabo versus Attorney General** [2004] TLR 14, it was stated that;

"Fundamental rights are subject to limitation. To treat them as being absolute is to invite anarchy in society. Those rights can be limited, but the limitation must not be arbitrary, unreasonable and disproportionate to any claim of the State Interest" See also ***Zakaria Kamwela and 126 others versus Minister of Education and Another,*** *Civil Appeal No.2 of 2012 CAT. (Unreported)*

It should be noted that right to education is one of the most important fundamental rights that a child is entitled to. The Constitution of the United Republic of Tanzania, 1977 as amended from time to time, recognizes this right under Article 11 which falls under the heading **"Fundamental Objectives and Directive Principles of State Policy".** Article 11 (3) states as follows; I quote;

(3) Serikali itafanya jitihada kuhakikisha kwamba watu wote wanapata fursa sawa na za kutosha kuwawezesha kupata elimu na mafunzo ya ufundi katika ngazi zote za shule na vyuo vinginnevyo vya mafunzo."

In one of Indian case; **Unni Krishnan v. State of Andhra Pradesh and others** (1993) AIR 2178, the purpose of education was stated as follows;

"The fundamental purpose of education is the same at all times and all places. It is to transfigure the human personality into a pattern of perfection through a synthetic process of the development of the body, the enrichment of the mind, the sublimation of the emotions and the illumination of the spirit."

Consistently, the importance of education was emphasized by the first century Indian Philosopher Bhaktruhain in in his book "the Neethishakam" quoted in the herein above Indian case as follows;

"Education is the special manifestation of man; Education is the treasure which can be preserved without fear of loss; Education secures material pleasures, happiness and fame; Education is the teacher of the teacher: education in God incarnate; Education secures honour at the hands of the state not money."

Following the importance of education to every child, Tanzania has a specific law termed; the Education Act, [Cap 353 R: E 2002] which regulates education matters. Section 35 (1) of the Act prescribes 7 years as the compulsory age for enrolment in public primary schools. In other words, the Act guarantees compulsory Primary education for every child who has attained the age seven (7) years irrespective of race, gender, ethnic or social origin, or religion.

Section 35 (1) and (2) of the Education Act, Cap 353 R: 2002 provides;

(1) *It shall be compulsory for every child who has reached the age of seven years to be enrolled for primary school education.*

(2) The parents or parents of every child compulsorily enrolled for primary school education shall ensure that the child regularly attends the primary school at which he is enrolled until he completes primary education.

However, in ensuring the child's right to education, the Parliament in 2009 amended section 35 of the Education Act through the Law of the Child Act, by authorizing enrolment above seven (7) years.

Section 35 (4) of the Education Act empowers the responsible Minister to make rules for the better carrying out of the purposes of section 35 of the Act . In that respect, the Public Primary Schools (Compulsory Enrolment and Attendance) Order, G.N. No.150 of 1977 was issued.

Rule 4 and 6 of the Public Primary Schools (Compulsory Enrolment and Attendance) order, G.N.No.150 of 1977 provide as follows:

Rule 4

"A parent of every child to whom this Order applies shall, unless such child has been exempted, ensure that the child is enrolled in, regularly attends a primary school"

Rule 6

"The parent of every child enrolled at a public primary school shall ensure that such child attends school and he has completed primary education"

Therefore, parents of a child of compulsory age, commits a criminal offence if they fail to enrol in the child in a school. It is also a criminal offence if the parents fail to provide education to their child

Rule 7 (1) and (2) of the Public Primary Schools (Compulsory Enrolment and Attendance) order, G.N.No.150 of 1977 provides that;

(1) Any parent of a child to whom this Order applies and who fails to ensure or who fails to take reasonable steps to ensure that his child is enrolled in a public primary school as required by paragraph 3, ***commits an offence.***

(2) Any parent of a child to whom this Order applies who fails to ensure or who fails to take reasonable steps to ensure that his child regularly attends the school at which he has been enrolled until such time as he completes primary education, commits an offence.

On the other hand, the law of the Child imposes a primary duty and responsibility to the parents to provide education for their child. Section 9 (1) of the Law of the Child Act, 2009 provides;

"A child shall have the right to life, dignity, respect, leisure, liberty, health, ***education*** *and shelter* ***from his parents"***

Section 14 of the Law of the Child Act, 2009 provides;

"Any person who contravenes any provisions of this Part, ***commits an offence...."***

Reading the herein above provisions of law, it is apparent that the appellant was rightly convicted on the 1st, 2nd , 4th and 5th counts but was wrongly charged with 3rd and 6th counts owing to the reason that his third child was aged five (5) years old therefore, he could not be condemned for not enrolling in school the said child, or for failure to provide education to her.

It is on that ground that I agree with Mr. Assey learned advocate for the appellant that the 3rd and 6th counts were not proved beyond reasonable doubt, therefore, he was wrongly convicted on those counts.

With regard to the issue of sentencing in relation to six counts upon which the appellant was convicted, I see no proper sentence was passed. As regard the 1st, 2nd and 3rd counts, the appellant was charged under the provisions of section 9 (1) and section 14 all under the Law of the Child Cap. 13 (R:E 2019) where each count concerned each child (each victim) whereas the 4th, 5th and 6th counts were charged under Rule 7 of the Public Primary Schools (Compulsory Enrolment and Attendance) Order made under section 35 of the Education Act concerning failure to enrol the child but to the contrary, the appellant was sentenced on 1st, 2nd and 3rd counts.

Mr. Uhagile for the Republic had the stand that with that flaw which was committed by the sentencing Magistrate implies that the appellant was sentenced on the 1st ,2nd and 3rd counts only and the 4th ,5th and 6th counts, he was not sentenced. He therefore prayed for this appellate court to sentence on the remaining three counts. It is common knowledge that when an accused is convicted of two or more offences, separate sentences must be imposed for each count. It is on that note I agree with the appellant's counsel that the appellant was improperly sentenced.

In that respect, I find myself indebted to discuss though briefly, the issue of sentencing. It is very important to note at the outset that, sentencing process is not a one man show (i.e. the Judge or Magistrate alone). It involves other stake holders, especially, prosecutors, accused and their counsel (if any). It is therefore trite that since public

prosecutors or State Attorneys, represent public interests, they have an important responsibility to assist the court in its decision on the appropriate sentence. The same applies to the defense counsel and even probation officers depending on the nature of each case.

Indeed, the justice process starts upon arraignment of an accused person; therefore, sentencing being the process by which a court imposes a penal sanction once an accused person has pleaded guilty or has been convicted of an offence following a trial, is the end tail of the justice process. The Court of Appeal of Tanzania in the case **of Ilole Shija Versus Republic,** Criminal Appeal No. 357 of 2013 (Unreported) emphasized that;

"It is a principle that sentencing is an important aspect in the administration of criminal justice and falls within the discretion of the sentencing court but, that such discretion must be exercised reasonably or judicially."

The court of Appeal went on pointing out that sentencing is a delicate and intractable task, therefore, administrators of justice have to be extra careful and conscious on the existing penal laws principles of sentencing. In the case of **Katinda Simbila V.R**, Criminal Appeal No.15 of 2008 (Unreported) the Court held that;

"Admittedly, sentencing process is, if not the most intractable and delicate tasks in the administration of justice, especially where the law has not fixed a minimum sentence. This is where ingenuity and wisdom work together in order to lead us to substantial justice as no two cases are identical in all circumstances. This is all because there is no common yard stick or denominator for measuring the sentence which will match every crime."

The same court addressing the question of sentencing in the case of **Fortunatus Fulgence Versus Republic**, Criminal Appeal No. 120 of 2007 (Unreported) held that;

"The trial Court's principal duty is to look into and assess the aggravating factors surrounding the commission of the offence which may push the sentence upwards, and the mitigating factors which may tend to push the sentence downwards."

Generally, it can be said that, sentencing is a judicial function which should not be executed mechanically. It should be carried out judicially balancing many competing factors, mainly the legislative requirement, principles derived from case law, public interest and interests of the parties. Such a function therefore, needs to be judicially exercised bearing in mind the well-established principle that sentencing remains pre-eminently within the discretion of the sentencing court. However, it must be noted that, where there is a prescribed mandatory minimum sentence, the normal sentencing discretion of a judicial officer to decide an appropriate level of sentence basing upon the particular circumstances of the offence and the offender and various mitigating factors are no longer individualized, as he/she cannot impose a sentence which is below the minimum sentence provided by the law. See the case of **Stuart Erasto Yakobo versus Republic**, Criminal Appeal No.202 of 2004 –CAT (Unreported).

Sentences are generally imposed to meet the following objectives; **One**, retribution: meaning; to punish the offender for his/her criminal conduct in a just manner. **Two**, deterrence: meaning; to deter the offender from committing a similar offence subsequent as well as to discourage other people from committing similar offences. **Three,** rehabilitation:

meaning; to enable the offender reform from his criminal disposition and become a law abiding person. **Four,** restorative justice: meaning; to address the need arising from the criminal conduct. **Five,** community protection: meaning; to protect the community by incapacitating the offender. And **Six,** denunciation: meaning; to communicate the Community's condemnation of the criminal conduct.

In the case at hand, the appellant was charged under Section 9 (1) and Section 14 of the Child Act [Cap. 13 R.E 2019] in respect of the 1st, 2nd, and 3rd counts. Section 14 of the Law of the Child Act, [Cap.13 R.E 2019] provides;

"Any person who contravenes any provisions of this Part, commits an offence and shall on conviction be ***liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding six months or both".***

Upon conviction, the appellant was sentenced to serve six (6) months consecutively and pay a fine of **Tshs.1, 000,000/=** on each count, that is to say; the 1st, 2nd and 3rd counts.

The issue here is whether it was proper for the trial Magistrate to impose a sentence of fine and custodial sentence to the appellant who was a first offender?.

There is no doubt that, when a statute provides an option of fine, such option should be laid at the disposal of the accused, as a first option. In the case of **Njile Samwel@John versus Republic,** Criminal Appeal No.31 of 2018 (Unreported) the Court of Appeal of Tanzania had this to say;

"Since in the present matter the penal provision has an option of fine or imprisonment, firstly, the trial court ought to have given the appellant an option to pay fine or in case of default custodial sentence. Secondly, considering that the appellant was a first offender, he was entitled to leniency....."

In **Uganda V. Katumba [1974] HCB117,** the High Court of Uganda observed that;

"There is a judicial practice of treating first offenders with leniency by granting them the option to pay a fine rather than imposing a custodial sentence in the exercise of the judicial discretion."

Discussing the same issue, **Bryan Slattery** in his book titled **"A Hand Book on Sentencing** stated that;

"Where the statutory provision creating an offence explicitly mentions both imprisonment and fine as the methods of punishment, this indicate that fine has been envisaged by the legislature as the principal mode of punishment and imprisonment should not normally be awarded."

Addressing the same matter the High Court of Zimbabwe in the case of **State Versus Lameck Tshuma (2016)** at page 3 held that,

"It is trite that where the statute lays down a monetary penalty as well as period of imprisonment, the court must give consideration to the imposition of a fine. It would normally reserve imprisonment for bad cases.....In statutory offences permitting the imposition of a fine, the normal sentence for a first offender is a fine unless the offence is particularly serious or prevalent or there would be serious consequences if the deterrent of imprisonment is not used."

From the herein above cited authorities from our country and other jurisdictions, it goes without saying that, where a statute provides for a sentence of fine or imprisonment, the court must first give effect to a fine, but in this case the trial Magistrate did the contrary by imposing both fine and imprisonment to first offender. However there are instances where the fine and custodial sentence can go together if the sentencing magistrate or Judge poses reasons for doing so.

The question is whether the trial Magistrate gave reasons for such sentence?

The giving of reasons for sentence is an integral part of sentencing process. Judicial officers have the duty to give reasons for their sentencing decision because offenders are entitled to know the reasons for the sentence imposed on them but also the public has an equal interest in knowing. I am persuaded by the holding outside our jurisdiction where the duty to give reasons was well stated by the Court of Appeal of South Africa in **State versus Calittz en 'n Ander 2003 (1) SACR116, when** addressing among other things the principles of sentencing that;

"*The trial Magistrate had the duty to give reasons for the sentence as without it, sound criminal justice is hampered.*"

In the case at hand, the reasons given by the trial Magistrate to justify such sentence are that; the appellant's mitigation was defensive and that the offence committed was sensitive.

In my view, the reasons given, when looked in the eye of the law and principles of sentencing, they fell far short of justifying both fine and custodial sentence to a first offender. The sensitivity and seriousness of

the offence is always determined by the statutory sentence prescribed in the provision of the law charged and not assumed. Had the trial Magistrate directed his mind properly to the law, case law and the principles of sentencing, the situation would have been different. It must be noted that sentence should not be passed in anger or pity. It should be passed with the aim of doing justice.

It follows therefore that, as general rule, an appellate Court has no automatic mandate to interfere with a discretion which has been judicially and properly exercised. However, as commonly known, every general rule has its own exceptions, meaning, an appellate court will interfere with the sentencing discretion of the court where it appears that in assessing sentence the judge or magistrate; (a) has acted upon some wrong principle, or (b) has imposed a sentence which is either patently inadequate, or (c) has imposed a sentence which is manifestly excessive, or (d) has imposed a sentence which is plainly illegal, or (e) has failed to take into account a material consideration, or (f) has overlooked to take into account a material consideration or (g) has allowed irrelevant matters to influence him, or (h) has allowed extraneous matters to influence to influence him, or (i) has failed to assign sufficient reasons to justify the imposition of a particular sentence.

This area is very rich as far as case laws are concern. I find myself indebted to mention few cases; **R V. Mohamed Alli Jamal,** [1948]15 E.A. C.A, Bernadeta, **Paul V. R (1992)** TLR 97, **Rashid S. Kaniki V R** (1993) TLR 258, **Yohana Balicheko V. R** (1994) TLR 5 and **Ogola s/o Awuor V. R** [1954] E.A.C.A 270.

Another flaw complained by the appellant that the sentences passed should have been ordered to run concurrently and not consecutively since they were committed on the same transaction and the appellant was the first offender. It is trite that the discretion to impose concurrent or consecutive sentences lies in the court, but the discretion must always be exercised judiciously. Travelling to other jurisdictions, in the case of **Peter Mbugua Kabui versus Republic [2016] eKLR** the Court of Appeal of Kenya stated as follows:

"As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

In **Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97, the Court of** Appeal for Eastern Africa considered the issue of a consecutive as opposed to a concurrent sentence and expressed the view that it was still good practice to impose concurrent sentences where a person commits more than one offence at the same time and in the same transaction save in very exceptional circumstances. **See also R v Kasongo s/o Luhogwa** (1953-1957) 2 TLR (R) 47, **Laurean Anacleti and another v R.** 1973 LRT No.34; **Baguani Mhina Jumbe versus Republic,** Criminal Appeal 120 of 1993 (unreported) and **Yassin Omari and another versus R**epublic, Criminal Appeal No. 212 of 1992.

In the case at hand, the sentences were ordered to run consecutively. The principle is that, where separate offences are charged together each

must receive a separate sentence, but if they all form part of the same criminal action, the sentence will be concurrent.

Coming to our jurisdiction, it should be noted that where a term of imprisonment in default of fine is ordered, it run concurrently with a sentence of imprisonment imposed at the same time. See **Stanley Murithi Mwaura versus the Republic,** Criminal Appeal No. 144 of 2019 and **Emmanuel Lyabonga versus Republic,** Criminal Appeal No.257 of 2019 CAT (both Unreported). In the instant case, since the offences committed form part of the same criminal action, the trial court should have exercised its discretion judiciously to order custodial sentence to run concurrently.

I am alive that the position is different in other jurisdictions for instance, the Supreme Court of India in **Dumya@Lakhan @ Inamdar versus State of Maharashtra,** criminal Appeal Nos. of 2021.818-820 stressed that default sentence for non-payment of the sentenced fine cannot be ordered to run concurrently with the substantive sentence. However we should not forget that such a decision is only persuasive/not binding.

It is also common knowledge that **fines imposed on different counts at the same trial are to be cumulative. In other words, they must run consecutively.**

Another question which need to and be dressed in this appeal is whether conviction without sentence is acceptable in law?

Rule 7 (3) of the Public Primary Schools (Compulsory Enrolment and Attendance) Order, G.N. No.150 of 1977 under which the appellant was charged in respect of the 4th, 5th and 6th counts, stipulates that; any person who contravenes Rule 7, upon conviction, shall be liable to **a**

fine not exceeding Tshs. 500, 000/=or to a term not exceeding six months or both.

It is very unfortunate that, the trial court did not discharge it duty as required by the law because, upon conviction, no sentence was imposed by the trial Magistrate on those counts. It is trite law that every conviction must carry a sentence, it follows therefore that, upon the conviction of the accused, the trial Magistrate or Judge is duty bound to impose sentence on each count. See **Mulingande Zyedi versus Uganda** [2021] UGCA.

It is common understanding that when the court finds that the sentenced passed by the trial court is contrary to the law, the appellate court may reverse it and pass an appropriate sentence. The punishment for the first two offences upon which the appellant was convicted is provided for under section 14 of Cap. 13 which reads.

"A person who contravenes any provision of this Part, commits an offence and shall on conviction be liable to ***a fine not exceeding five million shillings or to imprisonment for a term not exceeding six months or to both."***

As earlier stated, the sentences passed by the trial court on the 1st and 2nd counts was contrary law, therefore, the sentences are hereby quashed and set aside, and I substitute on each count (1st & 2nd), a fine of **Tshs. 1,000,000/=** or six (6) months imprisonment in default of fine. Custodial sentences should run concurrently while fines should run consecutively.

The appellant was not sentenced in respect of the 4th and 5th count. Considering the nature of this case, it is my considered view that it is

not in the interest of justice to remit the case file to the trial court for sentencing. Since, the appellant was convicted, and this court has confirmed the conviction, and since I have heard the appellant and the respondent in this case, I proceed to sentence the appellant accordingly.

The punishment for the remaining two counts to wit; 4 and 5th counts which the appellant was convicted is provided for under Rule 7 (3) of The Public Primary Schools (Compulsory Enrolment and Attendance) Order made under section 35 of the Education Act, [Cap.353 R.E 2002] which is to the effect that any person who contravenes Rule 7, upon conviction, shall be liable to **a fine not exceeding Tshs. 500, 000/=or to a term not exceeding six months or both.**

In that respect, the appellant is hereby sentenced on each count (4th & 5th) to pay a fine **Tshs. 300,000/=** or three (3) months imprisonment in default of fine. Custodial sentences should run concurrently while fines should run consecutively.

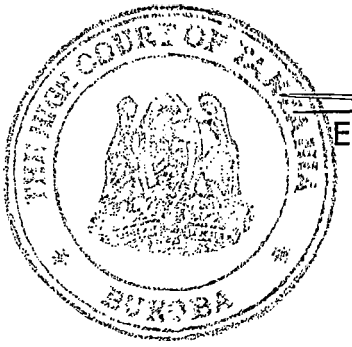
As stated earlier, the appellant was wrongly convicted and sentenced on 3rd count, therefore, I allow the appeal against conviction and sentence in respect of the said count. In the event, conviction and sentence imposed against the appellant on the 3rd count is quashed and set aside. Since the conviction entered against him on the 6th count was improper, I allow appeal against conviction in respect of the said count. Consequently, the conviction is hereby quashed and set aside.

The sentence order of this court should commence or start running from 27/082021, the date in which the appellant was convicted by the trial court. Since the appellant had already served his custodial sentence, there is no way he can neither be ordered to pay a fine nor be sent in prison as doing so will be to subject him to double jeopardy.

In the upshot, this appeal succeeds to that extent as afore explained.

Order accordingly.

Dated at Bukoba this 2nd day of September, 2022

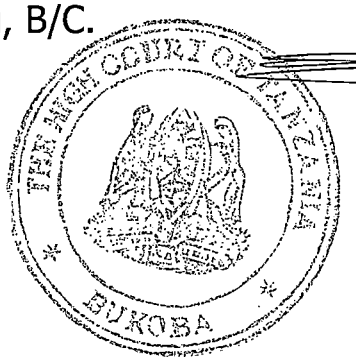


E. L. NGIGWANA

JUDGE

02/09/2022

Court: Judgment delivered this 2nd day of September, 2022 in the presence of the appellant in person, Mr. Amani Kilua, learned State Attorney, Hon. E M. Kamaleki, Judges' Law Assistant and Ms. Tumain Hamidu, B/C.



E. L. NGIGWANA

JUDGE

02/09/2022