IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA SUB-REGISTRY

AT MWANZA

PC. CRIMINAL APPEAL NO. 30 OF 2021

(From the decision of the District Court of Ukerewe at Nansio

In Criminal Appeal No. 20 of 2021, original Primary Court

Nansio Criminal Case No. 122 of 2021)

ASHA D/O BEGA ..... APPELLANT

VERSUS

SHABANI S/O HUGO .....RESPONDENT

JUDGMENT

Sept.20th & 27th, 2022

Morris, J.

Aggrieved by the decision of the Ukerewe District Court, which varied the sentence of the trial Nansio Primary Court, the appellant herein invites this court to allow her appeal on the basis of two grounds. The first ground is that the first appellate court erred in law by interfering with the sentence imposed by the trial court. The other ground is that the first appellate court erred in law by imposing an illegal sentence to the respondent.

The brief account of what transpired in the Primary and District courts is worth summarizing. In the former court, the respondent was charged and convicted of assault occasioning actual bodily harm under section 241 of the

Penal Code, Cap. 16 (then, R.E. 2019). Consequently, he was sentenced to serve a one-year imprisonment term and payment of TZS 50,000/- fine to the appellant.

The respondent was dissatisfied. He appealed to the District Court (1st appellate court). He was challenging both conviction and sentence. The 1st appellate court partly allowed the appeal by confirming the trial court's conviction but varying the sentence thereof. The respondent was, henceforth, to serve a six-month conditional discharge and pay the fine of TZS 50,000/- to the appellant. The 1st appellate court's decision is now being challenged by the appellant, as stated above.

In pursuit of this appeal, the appellant was unrepresented. The respondent enjoyed the legal services of Mr. Emmanuel John, learned counsel. Submitting in support of the two grounds of appeal collectively, the appellant was very brief. She argued that the 1st appellate court wrongly revised the trial court's sentence which was, according to her, just in the circumstances surrounding this appeal. The appellant insisted that in defending the impugned appeal, she suffered loss both financially and in terms of time. Consequently, she invited this court to allow the appeal by quashing and

setting aside the District Court's decision thereby confirming the trial Primary Court's decision.

The appellant's submissions did not pass unopposed. The respondent's counsel, before praying for dismissal of the appeal, argued that the 1st appellate court did not err. To him, the District Court of Ukerewe was the first appellate court with legal mandate to see into it that the decision of the trial Primary Court was legally arrived at. He submitted further that before interfering with the subject sentence, the 1st appellate court was only required to adhere to certain legal principles: One, where the sentence imposed by the trial court is illegal. Two, if the trial Primary Court imposed sentence contrary to the law. Three, where the sentence imposed by the trial court is too excessive or too lenient. To buttress his argument, the learned counsel referred the court to the Court of Appeal case of **Manoni Masele v Republic**, Criminal Appeal No. 344/2016 (unreported); especially at page 4 of the typed judgment.

Further, the respondent's counsel argued that the trial court should also consider the mitigating factors of the convicted person before sentencing him. He faulted the Nansio Primary Court for not considering the mitigating

factors of the respondent. Subsequently, it passed the maximum sentence for the offence while such kind of sentence is, in his view, reserved for serious offences only. According to him, the offence subject of this appeal was not one of such offences.

Therefore, he argued, that the respondent being the first offender deserved a lesser punishment. He cited the High Court case of **DPP v. Gibore Mwita**, Criminal Appeal No. 162 of 2020 (unreported, at p.5) where it was restated a principle that 1st offenders, subject to reasonable considerations, should be kept out of prison. Hence, the respondent reiterated that the District Court of Ukerewe did not err in law or fact, or at all.

Mindful of the above rivalry submissions from parties, this court finds that the matter calling for its attention is two-fold: the legality of the District Court to interfere with the trial court's sentence; and the adequacy of the sentence substituted by the appellate District Court. It is important to underscore, from the outset, that legally courts enjoy different sentencing-jurisdiction levels. Related to the offence subject to this appeal, pursuant to rule 2(1) of the **Primary Courts Criminal Procedure Code**, the primary court has jurisdiction to pass various sentences including imprisonment for a term not

exceeding twelve months; a fine not exceeding five hundred thousand shillings; and corporal punishment not exceeding twelve strokes. Out of these, the primary court sentenced the respondent to serve the custodial term of twelve months and payment of fine totaling TZS 50,000/-. The 1st appellate court, however, revised the subject custodial sentence to conditional discharge.

The foregoing impugned revisal lands us to the first limb of the matter to be determined in this appeal, namely, whether the appellate District Court had any legal mandate to interfere with the sentence given by the trial primary court. The law is strictly preventive regarding appellate courts to interfere with trial courts' findings of guiltiness or innocence of accused [see, for instance, **Edwin Mhando v. R** [1993] TLR 174; **R v Hassan bin Said** (1942) 9 E.A.C.A 62; **Maluqus Chiboni @ Silvester Chiboni and John Simon v. R** Crim. Appeal No.8 of 2011(Unreported)].

However, as for trial courts sentencing, there is a bit of legal relaxation whereby appellate courts may sparingly intervene. This flexibility is nevertheless subject to conditions. The most common conditions are when the subject sentence has been based on wrong principle of law; or if it is

inadequate or manifestly excessive. This position is also recapitulated in, for instance, **Benadeta Paul v R**, (CAT-Arusha) Crim. App. No. 49 of 1992 (unreported); and **R v Mohd Ally Jamal** (1948) 15 EACA 126.

Applying the conditions stated above to the present appeal, it is evident that the Nansio Primary Court overstepped the basic principles by sentencing the respondent to the maximum jail term of 12 months. That is, the subject sentence was passed in total disregard of two basic factors: that the offence was not very serious to warrant the maximum sentence under the primary court's mandate for such offence [See, **Juma Mniko Muhere v R** Criminal Appeal No. 211 of 2014; **Regina v Mayera** (1952) SR 253; **Xavier Sequeira v R**, Crim. Revision 4 of 1993 (unreported)]; and that the respondent was the first offender. In **Anania Clavery Betela v R**, Crim. Appeal No. 355 of 2017, it was held that:

> '*Taking account of the fact that the appellant was a first offender ...the justice of the case militated against the appellant being sentenced to both fine and imprisonment... Instead, as a first offender he should have been given the opportunity to pay the fine and that the applicable custodial penalty should have been imposed as an alternative in default.*'

On the basis of a well settled legal principle that efforts should be made by sentencing courts to keep first offenders out of prison, the trial Primary Court in this case was not justified to sentence the respondent to a twelve-months imprisonment. According to the trial court's proceedings, the offence was committed without use of any weapon nor did its nature cause temporary disability or deformity to the appellant. Consequently, the seriousness of the offence committed can be categorized at a low-level range. On reasonable analysis of the circumstances, the corresponding sentence falls within the range of conditional discharge, fine, community service to a 1-year incarceration.

It is, thus, the firm view of this court that the first appellate court was justified in law to intervene, as it did, against the trial court's sentence. The intercession was more relevant as the respondent had also been sentenced by the trial court to pay TZS 50,000/- in addition to the maximum custodial sentence, his mitigating factors notwithstanding. Law enjoins sentencing courts to pay due regard to mitigating factors advanced by the convicted person. The Court of Appeal has been alive to this principle in cases such as **Issa Ihale v R,** Crim. Appeal No. 352 of 2016; **Shehe Ramadhan @ Idd v R,** Crim. Appeal No. 82 of 2020; **Benard Kapojosye v R**, Crim. Appeal

No. 411 of 2013 (unreported); and **Willy Walosha v Republic**, Crim. Appeal No. 7 of 2002.

As regard the second limb – the adequacy of the revised punishment by the District Court; this court will basically agree with the first appellate court save for the amount of fine payable to the appellant. Having varied the one-year custodial sentence to the six-month conditional discharge, in my considered opinion, the first appellate court should have adjusted the fine payable to the appellant upwards.

The reasons for the foregoing view are that; One, according to section 241 of the **Penal Code**, Cap 16 (R.E. 2022) the offence committed by the respondent attracts a maximum of five (5) years imprisonment. The relevant provision is categorical that;

> *'Any person who commits an assault occasioning actual bodily harm is guilty of an offence and liable to imprisonment for five years.'*

Hence, due and fair regard having been paid towards exoneration of the respondent from serving his sentence as an inmate; and thus, ordering him to serve a conditional discharge instead, the first appellate court should have

intensified the other part of the sentence – fine. Two, the respondent according to the trial and first appellate courts' records, is able to pay. Pursuant to the trial court's proceedings, the respondent is a religious leader (Sheikh) at Namalebe-Nansio, Ukerewe a position which by implication depicts a person a stable status.

Three, the testimony of SM1 (the appellant) at the trial court reveals that the respondent, at different occasions offered the appellant food stuffs and cash amounting to TZS 20,000/- as enticement towards creation of intimacy relationship between the two. Such testimony was not controverted by the defence side. Consequently, this court considers such gesture as an indicator of the respondent's capacity to have some sort of earnings from which to pay for intimacy motions. According to law, in determining the amount of fine payable by the convict, the court should consider, among other factors, such person's ability to pay the imposed fine. This legal position is also found in the case of **Stephen Makone and Mara Corp. Union Ltd. v R** (1987) TLR 36. The High Court in this case held that "a fine must bear reasonable relation to the accused power to pay."

In line with what is stated above, this court considers, as it hereby does, that the respondent should be ordered to pay a higher amount of fine than that pronounced by the first appellate court. Accordingly, the punishment of both courts below regarding fine is enhanced to TZS 100,000/-.

In the fine tune, therefore, the appeal succeeds partly. The first appellate court's sentence of conditional discharge is upheld. However, while the order of payment of fine by the subject court is also confirmed, the amount of fine payable is adjusted upwards to TZS 100,000/-.

Accordingly ordered.

C.K.K. Morris

Judge

September, 27th 2022

Court: Judgement delivered in the presence of Asha Bega, appellant and in the absence of the Respondent.

C.K.K. Morris

Judge

September, 27th 2022