**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB- REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 31 OF 2022**

**PATRIZIO SALVATI ..... APPELLANT**

***VERSUS***

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Criminal Case No. 196 of 2021)**

# JUDGMENT

29th and 29th April, 2022

## KISANYA, J.:

In the Resident Magistrate's Court of Dar es Salaam at Kisutu, the appellant, Partizio Salvati was charged with an offence of unlawful presence in the United Republic of Tanzania, contrary to section 45(1)(i) and (2) of the Immigration Act, Cap. 54, R.E. 2016. It was alleged that, on 1st November, 2021, at Mbezi Luis near Magufuli Bus Terminal area in Ubungo District within Dar es Salaam Region, the appellant, a citizen of "the Republic of Italiana" was found living in the United Republic of Tanzania without having a valid visa or any other document authorizing him to do so.

The appellant pleaded guilty to the charge thereby inclining the prosecution to read the facts of the case. The facts were to the effect that the

appellant is a citizen of Italia who holds a passport with number YA328734. It was further stated that he was issued with a holiday visa which expired on 13th June, 2020. The prosecution alleged that the appellant continued to stay in the United Republic of Tanzania unlawful and without legalizing his presence. As a result, he was arrested on 1st November, 2021, at Mbezi Luis near Magufuli Bus Terminal in Ubungo District, Dar es Salaam Region and taken to Ubungo Immigration Offices where he admitted to have been unlawfully present in Tanzania.

As the appellant admitted that the facts were corrected, he was convicted of the foresaid offence. The prosecuting attorney informed the trial court that the prosecution had no previous record of offences committed by the appellant. However, the trial court was urged to impose a severe sentence which would serve as a lesson to the appellant and other illegal immigrants.

On his part, the appellant prayed for a lenient sentence as follows:-

> "*Your honour, this is my first offence. Your honour, I did not go back to Italy because the COVID-19 situation was worse there but I am sorry for not applying for extension of time of stay after the given time had expired. I forgot.*"

After considering the aggravating and mitigating factors, the trial court sentenced the appellant to pay fine of Tshs. 500,000 and serve a jail term of 3

years. Let the record of the trial court speaks for itself on how the said sentence was arrived at:-

> *"I have given due consideration to the antecedents and mitigation above, and the following is my reservation prior to the sentence. I have heard the accused telling this court that he forgot to extend time of stay after the given time had expired. That statement by the accused person demonstrates that the accused is not respectful to the laws of this country and he decided to violate the law intentionally. The facts has it that his visa expired on 13/06/2020 but he continued to stay unlawfully until when he was arrested on 01/11/2021 almost one and a half.*
>
> *It does not click and sense that the accused was in forgetfulness for almost 18 months. What can be concluded from his behavior and conduct is that the accused was and has been violating the law intentionally in a very gross disrespect. From these circumstances, I will sentence the accused severally as I hereby do by sentencing the accused to pay fine of Tshs. 500,000 and serve a jail term of 3 years so that it can serve a lesson to the accused for showing gross disrespect to the laws of this Country."*

Not amused, the appellant appealed to this Court. His appeal was premised on the grounds that:

1. *The learned Senior Resident Magistrate erred in law and fact by sentencing the appellant to a severe punishment of paying fine of Tsh 500,000 and serve (sic) a jail term of three years while the appellant was the first offender who had pleaded guilty.*
2. *The learned Senior Resident Magistrate erred in law and fact by convicting the Appellant on an equivocal plea.*
3. *The learned Senior Resident Magistrate erred in law and fact by convicting the appellant basing on the proceedings which denied him an interpreter to interpret the charge and facts to enable him understanding the charge laid against him.*

When the appeal came up for hearing, the appellant enjoyed the legal services of Mr. Fredrick Charles, learned advocate. On the other side, Ms. Angelina Nchalla, learned Senior State Attorney appeared for the respondent.

Mr. Charles commenced his submission by praying to drop the second and third grounds of appeal. Submitting on the first ground of appeal, the learned counsel argued that the punishment of the offence laid against the appellant as per section 45(2) of the Immigration Act (supra) is fine of not less than Tshs. 500,000/= or jail term not exceeding three years. He went on to submit that the sentence imposed by the trial court is severe and that it did not consider the mitigation factors.

Mr. Charles further submitted that the trial court was required to sentence the appellant to pay fine in lieu of imprisonment because he was a first offender. To bolster his argument, the learned counsel cited the cases of **Joseph Komanya vs R**, Criminal Appeal No. 56 of 2021, HCT at Mwanza and **Ezekia Kibungo vs R**, Criminal Appeal No. 48 of 2019, HCT at Mwanza.

The learned counsel further contended that the learned trial magistrate imposed a maximum sentence set by the law while there was no aggravating factors. Citing the case of **Paul vs R** [1992] TLR 97, he also argued that the learned trial magistrate erred by failing to consider the mitigation factors.

The learned counsel went on argue that the appellant was entitled to a lenient sentence on the account that he pleaded guilty to the offence. This time, he referred me to the case of **Francis Chilemba vs R** [1968] HCD 510. Other case relied upon by the appellant's counsel is **Bakari Hamis vs R** [1969] HCD No. 311 in which it was held that where the law provides for fine or imprisonment, the fine must be imposed instead of imprisonment.

On the said reasons, Mr. Charles prayed that the appeal be allowed and the sentence imposed on the appellant be set aside. He also urged me to set the appellant at liberty on the ground that he had already served four months imprisonment.

In her submission in reply, Ms. Nchalla supported the conviction and sentence. With regard to the sentence meted on the appellant, the learned Senior State Attorney argued that it is provided for under section 45(2) of the Immigration Act. She further submitted that the sentence was not severe. Making reference to the Tanzania Sentencing Manual for Judicial Officers (henceforth "the Sentencing Manual"), Ms. Nchalla submitted that there are mandatory and discretionary sentences. She argued that the trial magistrate exercised his discretion to impose the sentence set out by the law. She also contended that trial magistrate considered that the appellant had committed the offence intentionally after failing to extend the visa and report himself to the relevant authorities. That said, the learned Senior State Attorney urged me to dismiss the appeal for want of merit.

In his brief rejoinder, Mr. Charles reiterated his submission that the trial court did not consider the sentencing principles and the Tanzania Sentencing Manual for Judicial Officers.

I have dispassionately considered the submissions for and against the appeal. The sole issue for determination is whether this Court can interfere with the sentence of fine of Tshs. 500,000 and imprisonment for three years.

As rightly observed by the learned counsel for the appellant and respondent, the sentence for the offence laid against the appellant is fine not less than five hundred shillings or imprisonment for a term not exceeding three years or both. This is pursuant section 45(2) of the Immigration Act. That being the case, the trial court has discretion to impose sentence within the range set out by the law.

However, the law is settled that where the penal provision provides for an option of fine or imprisonment, the trial court must, first give the appellant an option fine or custodial sentence in case of default. Apart from the case of **Bakari Hamis vs R** (supra) cited by Mr. Charles, this position was stated in the case of **Njile Samwel @John vs R**, Criminal Appeal No. 31 of 2018 (unreported).

In order to impose an appropriate sentence, the trial court is required to balance the aggravating factors which attracts increase of the sentence awardable and mitigating factors which tend towards exercising leniency. This stance was stated by the Court of Appeal in the case of **Bernard Kapojosye vs R**, Criminal Appeal No. 411 of 2013 (unreported).

Since it is the trial court which is vested with mandate to impose sentence on the accused person, case law has set out factors on which an appellate court

may interfere with a sentence imposed. One of them is the case of **Shida Joseph vs R.**, Criminal Appeal No. 293 of 2012 (Unreported) in which the Court of Appeal underlined the following factors:-

***(a)*** *The sentence imposed is manifestly excessive or it is so excessive to shock.*

***(b)*** *The impugned sentence is manifestly inadequate.*

***(c)*** *The sentence is based on a wrong principle of sentencing.*

***(d)*** *The trial court overlooked a material factor.*

***(e)*** *The sentence has been based on irrelevant considerations.*

***(f)*** *The sentence is plainly illegal.*

***(g)*** *The time spent by the appellant in remand prison before conviction and sentencing was not considered.*

In terms of the record reproduced earlier, the appellant advanced a mitigation factor that he was a first offender. That factor was confirmed by the prosecution. Apart from being a first offender, the appellant pleaded guilty to the offence. He therefore saved time and costs of determining the suit if the case had proceeded on full trial. Further to this, the facts read by the prosecution indicated that the appellant was cooperative to the investigation organ. He admitted to have committed the offence. In fact, the prosecution did not raise any aggravating factor.

However, as rightly observed by Mr. Charles, the learned trial magistrate did not consider any of the mitigation factors. For instance, the factor that the

appellant had pleaded guilty to the offence was not taken into account at all. In terms of the settled law, such factor requires the trial court to impose a lenient sentence. See the case of **Bernadetta Paul vs R.**, [1992] TLR 97 where it was held that:-

> *"...had the learned judge taken into account appellant's plea of guilty to the offence with which she was charged the judge would no doubt have found that the appellant was entitled to a much more lenient sentence..."*

Apart from the settled law, consideration of a plea of guilty is one of the steps in the sentencing process as provided for under paragraph 6.8 of the Tanzania Sentencing Manual for Judicial Officer which provides:

> *"Judges and magistrates must explicitly state that a guilty plea has been taken into account and failure to do so may be taken as indicating that the plea was not considered at all or was given insufficient weight and the appellate court will definitely interfere.*
>
> *Where no discount is given for this, the sentencing court must give cogent reasons for not doing so. For example, the courts have held that the fact the offender is not a first-time offender is a reason for not applying a discount*
>
> *It is good practice for the court to state the sentence that would have been given if the accused had been found guilty after a contested trial. The court should then state the*

*amount of a reduction that has been given from this sentence because of the guilty plea."*

The sentencing Manual further provides that where a plea of guilty is indicated at the first stage of the proceedings, the maximum level of reduction in sentence for a guilty plea is one-third from the sentence that would have been given if the case had proceeded to a contested trial. Since this was not done, the sentence herein is also in breach of the Sentencing Manual.

Furthermore, the trial magistrate did not consider the fact that the appellant was a first offender. In the case of **Tabu Fikwa vs R** [1988] TLR 48, this Court (Samata, J, as he then was) held, among others, that every reasonable step should be taken to keep the first offenders out of prison. Also, paragraph 6.3 of the Sentencing Manual is to the effect that "previous good conduct" of accused is one of the mitigation factors which must be considered in the sentencing process. However, it was underlined in **Tabu Fikwa** (supra) that, where appropriate, a first offender may be sent to prison to show that crime does not pay or to protect interest of the community.

As indicated earlier, the learned trial magistrate considered the mitigation factor, when the appellant stated that he forgot to renew the visa. Considering that fact, he concluded that the appellant was and had been "violating the law intentionally in a very gross disrespect." It is my considered view that such

consideration was extraneous. As shown herein, the record is clear that the appellant was a first offender. The appellant also stated that he failed to return to his country due to COVID 19 pandemic. The facts narrated by the prosecution do not suggest that the appellant was duly informed orally or in writing that his presence would be unlawful upon expiry of his visa. Therefore, one cannot conclude that he was breaching the law intentionally. This when it is considered that the prosecution did not state whether he was reminded of extending his visa.

At this juncture, it is apparent there was no aggravating factor which would have influenced the trial court to impose the maximum sentence of three years imprisonment. In that regard, I am of the view that the sentence imposed on the appellant was manifestly excessive. In view of the settled law, the first priority ought to have been fine because the penal provision provides for the fine or jail sentence. [See the case of **Ezekia Oscar @ Kibugo** (supra)].

In the final analysis, this appeal stands allowed. Considering that the appellant has spent five months and twenty four (24) days jail term serving a sentence which did not consider the mitigation factors, I quash and set aside the sentence imposed on him by the trial court. In lieu thereof, I would impose a sentence that renders the appellant released from prison. Thus, unless the

appellant is confined in prison for other lawful cause, he should be released immediately.

DATED at DAR ES SALAAM this 29th day of April, 2022.

S.E. Kisanya
JUDGE

Court: Judgment delivered this 29th day of April, 2022 in the presence of the appellant, his counsel Mr. Fredrick Charles and Ms. Angelina Nchalla, learned Senior State Attorney for the respondent.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY

S.E. Kisanya
JUDGE
29/04/2022