IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL No.44 of 2021

(Arising from District Court at Shinyanga Criminal Case no. 63/2021.)

SARA D/0 JAMES @ SARAH MAJUTA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

1st April, 2022

A. MATUMA, J.

In the District Court of Shinyanga, the appellant was charged and convicted of two counts namely; impersonation and obtaining money by false pretences. In the first count she was alleged to have impersonated herself as Doctor Sara James @Sara Majuta from the Ministry of Healthy sent at Kolandoto Medical College to supervise examinations of the clinical officers students.

In the second count she was alleged to have obtained Tshs. 1,000,000/= from Kolandoto Medical College as her due payment for the supervision/ nights purporting to be Doctor Sarah dully assigned such duty by the Ministry of Healthy.

The appellant was convicted on her own plea of guilty in both counts. She was sentenced to serve five years in each count. The trial

court did not however issue an order specifying whether the two sentences should run concurrently or consecutively. When she reached into the prison in execution of her sentences, she was informed by the prison authorities that in the absence of the trial court's order specifying the manner in which the sentences should run, she was to serve both sentences separately which is nothing but consecutive running of the sentences. She was therefore admitted into the prison to serve the two sentences consecutively. The appellant in that regard became aggrieved hence this appeal in which the notice of appeal and the grounds of appeal indicated that she is challenging both the conviction and sentence.

At the hearing of this appeal, the appellant appeared in person while the respondent had the services of Mr. Jukael Jairo, learned state Attorney.

The appellant started to address the court tending to establish that her plea was equivocal as she was solicited by the prosecutor to plea on what was termed as "plea bargaining" she thus pleaded guilty knowing that she would only be ordered to refund the Tshs. 1,000,000/= which she obtained fraudulently from Kolandoto Health College. Unfortunately, she found that it was not a plea bargaining. In the course of further submission, the appellant decided to abandone her grounds relating to her plea and conviction. She thus prayed that her appeal be determined only on the exclusiveness of the sentences and the lacking of an order as to whether they should run concurrently or consecutively;

> *"I don't in fact deny the conviction because it is truly, I impersonated Doctor Sara James Matuja and obtained Tshs. 1,000,000 from Kolandoto College's.*

About the sentence, she submitted that she was sentenced to five years in each count but the trial magistrate did not order the sentences to run either concurrently or consecutively. As a result, the prison authorities have admitted her to serve ten years. She finally prayed to be released as she has already learnt a lot during her stay in prison which is a year.

The learned state attorney on his part, argued that since the appellant has wilfully withdrawn her complaints against her conviction, her complaint against sentences should be rejected because each of the offences she was convicted has maximum sentence of seven years. The trial court in sentencing her five years in each count reduced the sentence and she was thus sentenced within the ambit of the law.

The learned state attorney was of the view that in the circumstances that the appellant was not a first offender on similar offences she deserved to be sentenced to the maximum sentence of seven years in each count. He thus asked this court to enhance the two sentences to its maximum level citing to me the case of ***Tafifu Hassan @ Gumbe v. Republic, Criminal Appeal no. 436 of 2017 (CAT).***

He also argued that although the trial court did not order the sentences to run either concurrently or consecutively, this court in the exercise of its powers under section 388 (1) of the criminal procedure Act, Cap. 20 R.E. 2019, can put the relevant order between the two. To him such relevant order is **"the sentences should run consecutively"** because the appellant was once convicted on a similar offences in the Resident Magistrate Court of Mtwara

In rejoinder the appellant argued that she does not deserve a consecutive order of the sentences as she pleaded guilty and have dependants.

Having heard both parties for and against the appeal, the matter for determination before me is:-

i) Whether to increase or decrease the sentence in each counts.

ii) Whether I should order the two sentences to run concurrently or consecutively.

Starting with the first issue, I don't see any tangible reason from both parties for reducing the five years in each count or increasing them to the maximum sentence of seven years in each count.

I have no justification to increase the sentences because in first premises, the prosecution did not appeal against the sentence and therefore they do not have a formal ground before me. In that respect, the appellant was not made aweness that the prosecution would pray for the sentence to be increased so that she prepare herself thoroughly to counter argue the prayer.

I cannot allow her to be ambushed for adverse prayers while the law is very clear on what should a party to the case do when aggrieved by either the conviction, sentence or both.

Since the prosecution did not appeal or cross appeal against the sentence meted to the appellant, in law they are presumed to have been satisfied with such sentences and estopped from derying the truth of such presumption. This is in accordance to section 123 of the Evidence Act , Cap 6 R.E 2019 and as it was held in the case of ***The Director of Public Prosecutions versus Peter Philipo Mandage & others,***

consolidated (DC) Criminal Appeals no. 34838 of 2021 (HC) at Kigoma page 6. But also, the maximum sentence in each count is seven years. The appellant was sentenced to five years is each count. Five years are nearly seven as it is 71% of the maximum sentence. Sentencing is a discretional power of the trial court and the appellate court is not entitled to alter or vary the sentence imposed by the trial court merely because had it been the court exercising sentencing discretion, it would have imposed a different sentence see, ***Rajabu Dausi v. The Republic Criminal appeal no 206 of 2012 (CAT).***

In that case, the court of appeal stated the criterias upon which the appellate court can interfere with the sentence to be;

i) Manifestly excessive.
ii) Based upon a wrong principle.
iii) Manifestly is inadequate.
iv) Plainly illegal
v) Where the trial court failed or overlooked a material consideration.
vi) Where it allowed an irrelevant or extraneous matter to affect the sentencing decision.

Out of those criteria's I don't see any befitting in this case. On the side of the appellant that the sentences should be reduced from five years in each count, I find that the circumstances of this case does not call for any reduction. The appellant as herein above reflected is not a first offender. He was convicted and sentenced for the same offences of impersonation, obtaining money by false pretences among the counts in criminal case no. 144 of 2015 in the Resident Magistrate court of Mtwara.

Being not a first offender on offences of similar nature, she deserves no lenience and therefore the five years meted against her in each count are justified.

I now turn on the last issue as to whether I should order the two sentences to run concurrently or consecutively.

In the case of ***Festo Domician versus Republic, Criminal appeal no. 447 of 2019,*** the court of Appeal of Tanzania made a reference to decision of the court of Appeal of kenya in ***Peter Mbugua Kabui vesus Republic Criminal appeal no. 66 of 2015*** where it was held;

> *"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 or transaction a concurrent sentence should be given"*

In that respect, the sentencing court should order the sentences to run concurrently when the convict is sentenced to several custodial sentences in respect of several counts upon which he has been convicted.

If the sentencing court is of the view that a consecutive sentence is an appropriate order to issue, the legal requirement is for the sentencing court to reason out justifying such order. See, ***Mohamed Abdallah Tupa v. Republic , Criminal Appeal no. 95 of 2019*** High Court at Arusha by Y.B Masara , Judge

In the instant appeal, the trial magistrate did not issue any order as to whether the two sentences should run concurrently or consecutively. It was an omission which occasioned miscarriage of justice because the prison authority was necessitated to make its own interpretation on how the sentences should run. To them, the sentences were to run

consecutively because the appellant was convicted in both two count and was sentenced in each Count so, to carry on the sentence, the appellant should serve each sentence. The prison authority was right in its interpretation although it might have been not the intention of the trial magistrate. Her omission to specify in the order as to whether such sentence should run concurrently or consecutively is what brought all the problems for uncertainity of how should the meted sentence run.

As the first appellate Court, I am duty bound to enter into the shoes of the trial Court and pronounce the appropriate order in respect of the sentences against the appellant whether they should run concurrently or consecutively.

Mr. Jukael Jairo, learned State Attorney argued that, I should order the sentences to run consecutively because the appellant is not a first offender on offences of similar nature. He referred me to the previous conviction of the appellant in Criminal case no. 144 of 2015 in the Resident Magistrate Court of Mtwara dated 22/09/2016. On her party the Appellant argued that she deserves lenience of the Court as she has learnt alot;

"Nimejifunza kutengeneza sabuni, kushona mazuria kazi ambazo nitaenda kufanya. Naomba Serikali inihurumie, sitarudia."

She added that, although it is true that she was convicted at Mtwara, such conviction should not be used against her because she might have not changed by then but currently, she has changed a lot.

I agree with the appellant that although she was previously convicted at Mtwara, the circumstances in such previous conviction and the current one are different. At Mtwara she did not plead guilty. The

matter went to a full trial until her conviction. But in the instant matter she pleaded guilty in the trial court and repeated the same before me.

It has been the Court practice that a plea of guilty by an accused person shows his remorsefulness. In that regard, I have no doubt that the appellant is running to positive changes of her behavior. She should benefit. It is from the herein observation I entertain no doubt that had the trial magistrate fixed the order, she would have fixed the order for concurrent sentence and not consecutive. As the five years meted against the appellant in each count are within the ambit of the charging provisions, I don't see anything material to interfere with such sentence.

I therefore uphold the sentences meted against the appellant by the trial court serve that I order the sentence to run concurrently from the date of her original conviction and sentence.

Serve for imposition of the order for the sentences to run concurrently, this appeal stands dismissed. Right of further appeal is explained.

It is so ordered.

A. MATUMA
Judge
01/04/2022