

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 3 OF 2022

(Originating from Misungwi District Court Criminal Case No. 72 of 2020 before Hon. E.A. Marick, RM.)

HAPPY D/O JOSEPH @ SENGU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

23rd & 30th May, 2022

DYANSOBERA, J.:

The appellant was convicted by the District Court of Misungwi on her plea of guilty to the offence of cruelty to children c/s 169A (1) and (2) of the Penal Code [Cap 16 R.E.2019], she having been alleged to have ill-treated Holo d/o Kitakakula, a child of five (5) years old by beating on her buttocks, back and leg causing her to suffer injuries. She was sentenced to six years term of imprisonment.

Aggrieved, she has appealed to this court challenging the trial court's sentence on the following three grounds:-

1. That, the trial Magistrate did not consider the mitigating factor that the appellant suffered from TB
2. That, the trial Magistrate did not consider that the appellant is a first offender and has pleaded guilty which is an absolute contrition.
3. That the trial Magistrate erred in law and fact to sentence the appellant excessive sentence without considering material which normally entitle an offence (appellant) who was the first offender pleaded guilty to the charge and would sentenced leniently.

With these grounds of appeal, the appellant prays to be set at liberty in that the period she has spent in prison has been a good lesson.

Before determining the appeal, a brief background is apposite. The victim is the daughter of the young sister of appellant's mother. When the appellant had gone to visit the elder sister of her mother, she asked the

young sister of her (appellant's) mother to give her that child so that she assisted her at home.

The appellant then abused the victim by beating her on various parts of the body, burning her finger with fire and forcing her to eat sand and chili peppers. The hounds of justice was informed, the victim taken to the hospital and treated and the appellant was arrested and had a cautioned statement recorded before WP 7974 D/C Anna. Later she was arraigned before the trial court and convicted on her own plea. She was accordingly sentenced.

At the hearing of this appeal, the appellant appeared in person while the respondent was represented by Ms. Margareth Mwaseba, learned Senior State Attorney.

When invited to argue her appeal, the appellant informed this court that she had filed a total of three grounds of appeal challenging the sentence which she argued was excessive and prayed for leniency.

Replying to the petition of appeal, the learned Senior State Attorney noted that the appellant who was convicted on her plea was barred from appealing against conviction; save on the legality of sentence as stipulated

under section 360 (1) of the Criminal Procedure Act. With regard to the sentence meted out to the appellant, it was argued on part of the respondent that under section 170 (1) of the said Act, a Resident Magistrate being not a Senior Resident Magistrate was supposed to pass a sentence not exceeding twelve months term of imprisonment unless that sentence was confirmed by the High Court. Ms Mwaseba argued that the sentence of six years term of imprisonment which the trial court imposed was illegal as the Magistrate had no power to pass such a sentence. This court was called upon to intervene.

The appellant re-joined by insisting on leniency.

The record of the trial court is clear that the appellant was convicted on her plea of guilty to the offence of cruelty to the children, an offence in contravention of section 169 A (1) and (2) of the Penal Code.

Under section 360 (1) of the Criminal Procedure Act, it is provided thus:-

"(1)- No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been

convicted on such plea by a subordinate court except as to the extent or legality of the sentence”.

As rightly pointed out by the learned State Attorney, the appeal against conviction is statutorily barred. The appellant, being aware of these legal provisions, she has not appealed against conviction, rather she is challenging the sentence.

Having perused the trial court’s proceedings, I am in no doubt that the appellant’s plea was unequivocal and the conviction was, therefore, sound. Section 169 A (1) of the Code enacts thus: -

‘169A.

- (1) Any person who, having the custody, charge or care of any person under eighteen years of age, ill-treats, neglects or abandons that person or causes female genital mutilation or carries or causes to be carried out female genital mutilation or procures that person to be assaulted. ill-treated, neglected or abandoned in a manner likely to cause him suffering or injury to health, including injury to, or loss of, sight or hearing, or limb or organ of the body or any mental derangement, commits the offence of cruelty to children’

In the case under consideration, the facts were clear that the victim who was under the appellant's custody and care was ill-treated in a manner which was likely to cause injury to her health.

As far as the present appeal is concerned, I agree that the sentence was not only excessive but also illegal. Sub-section (2) of Section 169A above stipulates as hereunder:-

“(2) Any person who commits the offence of cruelty to children is liable on conviction to imprisonment for a term of not less than five years and not exceeding fifteen years or to a fine not exceeding three hundred thousand shillings or to both the fine and imprisonment, an shall be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for the injuries caused to that person”.

In this case, the appellant pleaded guilty to the offence and she was a first offender. In her mitigation, she told the court that she was suffering from Tuberculosis. There was nothing showing that a manifestly excessive sentence was the only option available.

In **Evance Richard @ Mtaboyelwa v. R.**, Criminal Appeal No. 145 of 2012, the Court of Appeal, speaking through His Lordship Msoffe, J.A. at

pp. 3 and 4 made the following pertinent observation on sentencing principles, and I quote: -

“The law on sentencing is settled in our jurisdiction. In **Charles Mashimba v. Republic**, Criminal Appeal No. 86 of 2002 (unreported) we cited with approval the following passage from Brian Slattery in his **Handbook on Sentencing** at page 14

"The grounds on which an appeal court will alter a sentence are relatively few, but and actually more numerous than is generally realised or stated in the cases. Perhaps the most common ground is that a sentence is "manifestly excessive", or as it is sometimes put, so excessive to shock. It should be emphasized that manifestly" is not mere decoration and a court will not alter a sentence on appeal simply because it thinks it severe. A closely related ground is when a sentence is "manifestly inadequate". A sentence will also be overturned when it is based upon a wrong principle of sentencing. An appeal Court will also alter a sentence when the trial court overlooked a material factor. Such as that the accused is a first offender, or that he has committed the offence while under the influence of drink. In the same way it will quash a sentence which was

obviously based on irrelevant considerations. Finally an appeal Court will alter a sentence which is plainly illegal, as when corporal punishment is imposed for the offence of receiving stolen property."

In the instant case, the sentencing by the trial court was in violation of section 170 (1) of The Criminal Procedure Act [Cap.20 R.E 2019] as the offence charged was not scheduled under the Minimum Sentences Act [Cap 90 R.E. 2002] The sentencing powers by subordinate courts are enshrined under section 170 (1) (a) and (c) of the Criminal Procedure Act which provides as hereunder: -

(1) A subordinate court may, in the cases in which such sentences are authorised by law, pass any of the following sentences—

- (a) imprisonment for a term not exceeding five years; save that where a court convicts a person of an offence specified in any of the Schedules to the Minimum Sentences Act which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment;
- (b) a fine not exceeding twenty million shillings;

(c) subject to the provisions of the Corporal Punishment Act corporal punishment;

(2) Notwithstanding the provisions of subsection (1)–

(a) a sentence of imprisonment: -

(i) for a scheduled offence (as defined in subsection (5), which exceeds the minimum term of imprisonment prescribed in respect of it by the Minimum Sentences Act;

(ii) for any other offence, which exceeds twelve months;

(b) a sentence of corporal punishment which exceeds twelve strokes;

(c) a sentence of a fine or for the payment of money (other than payment of compensation under the Minimum Sentences Act, which exceeds six thousand shillings,

shall not be carried into effect, executed or levied until the record of the case, or a certified copy of it, has been transmitted to the High Court and the sentence or order has been confirmed by a Judge:

Provided that this section shall not apply in respect of any sentence passed by a Senior Resident Magistrate of any grade or rank.

These irregularities which vitiated the sentencing process and are incurable under the law.

For the reasons stated above, I am satisfied that the sentence of six years term of imprisonment imposed by the learned Resident Magistrate was, in the circumstances of the case, manifestly excessive and illegal. It cannot be sustained.

Accordingly, the appellant's appeal against the sentence is allowed, the sentence of six (6) years term of imprisonment is substituted with such sentence as will result in the appellant's release from prison.

However, for the interest of justice and in putting into effect of the provisions of sub-section (2) of Section 169A of the Penal Code, the trial court's record should be dispatched to the trial court so that an appropriate compensation order against the appellant is made to the victim, one **Holo d/o Kitakula**. Both the appellant and the said victim shall be summoned to attend during the determination of the proper amount of compensation.

The appellant to provide both her physical, personal and postal address to the Registry.



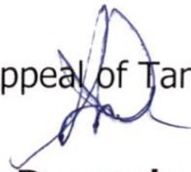
W.P. Dyansobera

JUDGE

30.5.2022

This judgment is delivered under my hand and the seal of this Court on this 30th day of May, 2022 in the presence of the appellant and Ms Margareth Mwaseba, learned Senior State Attorney for the respondent.

Rights of appeal to the Court of Appeal of Tanzania explained.



W.P. Dyansobera

JUDGE

30.5.2022

