

**IN THE HIGH COURT OF TANZANIA
BUKOB A DISTRICT REGISTRY
AT BUKOB A**

CRIMINAL APPEAL No. 20 OF 2023

(Originating from Criminal Case No. 04 of 2023 in the District Court of Missenyi at Missenyi)

1. ABDISALAM MOHAMED

2. ABDUL MOHAMED APPELLANTS

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

21st & 25th April 2023

OTARU, J.:

The Appellants, Abdisalam Mohamed and Abdul Mohamed are Somali citizens who were charged and convicted for unlawful presence in the United Republic of Tanzania contrary to Sections 45(1)(i) and (2) of the **Immigration Act** [Cap. 54 R.E. 2016]. Both appellants pleaded guilty to the charge and each was sentenced to six months imprisonment. Aggrieved, the Appellants filed this Appeal.

The Petition of Appeal contained two grounds of appeal. At the hearing, Mr. Fahad, learned Advocate representing the Appellants prayed to abandon one ground and proceeded to argue the remaining ground on the sentence. The ground may be paraphrased as;-

'The trial magistrate erred both in law and fact to sentence the Appellants to six months imprisonment without giving them the option of payment of fine.'

M. Othman

for such an option. He also agreed that the Appellants were first offenders who pleaded guilty to the charge, thus deserved a lenient sentence.

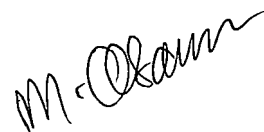
From the ground of appeal and the above submissions, the issue for determination in this Appeal is *whether the sentence meted on the Appellants by the trial court was proper in law.*

It is not in dispute that the Appellants were unlawfully present in the United Republic of Tanzania. As per the charge, the Appellants were arrested by the immigration officers on 5th January 2023 at Kyaka area within Missenyi District in Kagera Region. They had neither valid passports nor any other legal document that allowed them to stay in the country. Section 45 (1)(i) and (2) of the **Immigration Act** (supra), under which the Appellants were charged, reads as follows;-

S. 45.-(1) Any person who:

(i) unlawfully enters or is unlawfully within Tanzania in contravention of the provision of this Act, shall be guilty of the offence.

(2) Any person who commits an offence under this Act shall, except where any other penalty is specifically provided therefore, be liable on conviction to a fine not less than five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both such fine and imprisonment.



He substituted the same for two and half months. As submitted by both counsel, it is trite law that where the law provides for alternative sentences, the court should resort to non-custodial sentence first [also see the case of **Yeremiah Jonas Tehani v Republic**, Criminal Appeal No. 100 of 2021, (CAT Dsm) (unreported)]. In addition, non-custodial sentence should be considered for first offenders unless the offence is grave or widespread, see the case of **Anania Clavery v Republic**, Criminal Appeal No 355 of 2017 (CAT Dsm) (unreported). The record indicates that both Appellants are first offenders and they pleaded guilty to the charge. There is no evidence of the offence being grave or widespread.

- (i) *the sentence is manifestly excessive*
- (ii) *the sentence is based upon a wrong principle,*

- (iii) *the sentence is manifestly inadequate or illegal,*
- (iv) *a trial court overlooked a material consideration; or*
- (v) *the sentence allowed an irrelevant or extraneous matter to affect the sentencing decision.*
- (vi) *the trial court did not consider the time spent in remand by an accused person.*

Overlooking a material consideration', had been discussed in the case of **Shabani Ismail v Republic**, Criminal Appeal No. 102 of 2012, which held that this may include *failure by the sentencing court to consider the fact that the accused pleaded guilty to the offence.*

In the case at hand, the trial court;-

1. *based on wrong principle* of meting a custodial sentence instead of the alternative fine,
2. *overlooked a material consideration* of the Appellants being first offenders and pleading guilty to the offence,
3. *did not consider that the offence was neither grave nor excessive,* and
4. *did not take into consideration that the Appellants were in custody for thirty-two days prior to conviction.*

From the foregoing, the issue whether *the sentence meted on the Appellants by the trial court was proper in law*, is answered in the negative. As such, I find that this court is entitled to interfere with the sentence imposed by the trial court as submitted by both counsel.



I am also invited by the Appellants to consider substituting the sentence bearing in mind the time they already spent in prison, their pleas of guilty as well as their being first offenders. I am doing that gladly. As a result, the appeal is allowed. The sentence of 6 months imprisonment in respect of each Appellant is hereby quashed and set aside. As the Appellants have been in custody for a period of over three and half months, the quashed sentence is substituted with that of three and half months, which would result in their immediate release from prison, unless they are otherwise lawfully held. The order for repatriation remains.

It is so ordered.

DATED at **BUKOB** this 25th day of April, 2023.



M. P. Otaru
M.P. Otaru
JUDGE

Court: Judgment delivered in chambers, in the presence of the Appellants in person, Mr. Fahad their legal counsel, and Mr. Amani Kilua, State Attorney for the Respondents.

The right of appeal is explained.



M. P. Otaru
M.P. Otaru
Judge
25/04/2023