

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU0022 of 2013
(High Court Case No. HAC 265 of 2010)

BETWEEN : **TIMOCI MAGITINIGUSUNA**

Appellant

AND : **THE STATE**

Respondent

BEFORE : **Lecamwasam, JA**

COUNSEL : **Appellant in Person**

Mr. M. Korovou for the Respondent

DATE OF HEARING : **09 May 2014**

DATE OF RULING : **28 May 2014**

RULING

- [1] In this case the appellant had pleaded guilty to one count of aggravated robbery and convicted on his own plea and sentenced on the 22nd of October 2013 to 6 years imprisonment with non-parole period of 4 years imprisonment.
- [2] Being dissatisfied with the above sentence the appellant filed his appeal 4 months after the appealable period.
- [3] In his appeal he has stated that the punishment imposed on him by the Learned Magistrate is harsh and excessive and therefore moves for enlargement of time.
- [4] He had initially relied on eight (8) grounds of appeal and subsequently few more grounds of appeal have been appended to the initial grounds, I find that subsequent addition also revolves around the initial grounds of appeal put forward by the appellant and hence amounts to repetition.
- [5] For convenience I will deal with all the grounds of appeal together.
- [6] I have considered the written submissions of both parties prior to arriving at the decision.
- [7] Facts of the main case are that the accused appellant together with two others had hired a taxi to go to Caubati to buy beer and from there to Sukanaivalu Road.
- [8] Along Tovata Road the driver (Complainant, victim) had to stop the taxi due to a tyre puncture.

- [9] Whilst the victim was engaged in changing the tyre, the appellant and his travel companions had accosted the complainant and demanded money and as a result they robbed the victim of two mobile phones, bracelet, taxi meter and cash to the value of \$1,420.00.
- [10] When the accused appellant was arrested and produced before the Magistrate the accused appellant had pleaded guilty upon which the learned magistrate had imposed the term of 6 years imprisonment with a non parole period of 4 years.
- [11] This appeal is against the above sentence imposed by the Learned Magistrate.
- [12] The grounds of appeal advanced by the appellant are :
- i. *That the sentence of 6 years with non parole period of 4 years is manifestly harsh and excessive in all circumstances of the case.*
 - ii. *That the learned sentencing Magistrate erred by not allowing separate discount for guilty plea.*
 - iii. *That the Learned sentencing Magistrate erred in law by failing to allow adequate discount for guilty plea which as a matter of law and practice would have generally attracted and reduce the sentence by anything between a quarter and a third.*
 - iv. *That the learned sentencing magistrate erred by failing as a matter of law and practice to allow adequate discount for the mitigation factors separately from the end sentence.*
 - v. *That the starting point adopted by the learned sentencing magistrate was wrong in principle in all the circumstances of the case, for the reasons being that the guide line authorities the sentencer took into account as a starting point tariff far differs in nature and gravity of the current matter (offences) at hand.*

- vi. *That the sentence is harsh in a sense that compared to other similar nature of offences with far greater aggravated features being committed by other accused/offenders.*
- vii. *That the sentence offends the provision Section 4 (2) of the sentencing and penalties decree 2009.*
- viii. *That the learned sentencing magistrate took irrelevant aggravating factors in articulating the starting point of the sentence.*

On these grounds the appellant prays:

- (i) *That leave to appeal out of time be granted, as a result the Notice of Appeal be extended to 21st of March 2013.*
- (ii) *That the grounds of appeal against the sentence be allowed to be determined by the Full Court of Appeal.*

[13] In the amended grounds of appeal the appellant had advanced more or less the same grounds stated above.

[14] The appellant has taken up the position that the sentence of six years with non parole period of four years is manifestly harsh and excessive in all the circumstances of the case. The alleged offence in this case is an offence of aggravated robbery and the appellant has pleaded guilty. The appellant has a record of several previous convictions. Given this background, it is not even remotely probable to expect a Magistrate to turn a blind eye to the previous convictions and the gravity of offence committed.

[15] The appellate court has expressed the view that they have a duty to protect public services drivers from assault and robbery and looks down upon group offending.

- [16] Even though the appellant alleges that the Learned Magistrate has erred by not allowing separate discount for the guilty plea, it is evident from the order of the Magistrate that he had taken into consideration not only the guilty plea but also such other factors as the period of remand and mitigation. Having picked seven years imprisonment as the starting point he had reduced the sentence by two years and increased the sentence by one year for aggravating factors and imposed a term of six years imprisonment. Hence it is abundantly clear that the learned Magistrate had considered and discounted for early plea of guilty although he had not given the exact period separately under each factor. Therefore I hold that the failure to provide a breakdown of final sentence imposed is merely a lapse on the part of the Magistrate and does not by any means detract from him having given his full consideration to all pertinent factors which would have contributed to the mitigation of the sentence together. If he had not considered these factors at all then the position would have been different.
- [17] Considering the nature of the offence committed namely viz: Aggravated robbery and the number of previous convictions one can rely upon the benevolence of this court up to a certain extent only. Hence it is a futile exercise to expect the further mitigation of sentence from this court.
- [18] The tariff for aggravated robbery is between 8 to 14 years as held in **Naikелекелеvesi v State**; AAU 61/2007 and it is noteworthy that the Learned Magistrate had fixed the initial sentence at 7 years which is less than the lowest tariff as propounded in the above case. Though the appellant attempts to paint this as a 'not so serious offence' and taken place 'on the spur of the moment', I cannot be unmindful of the charge leveled against the accused, ie. One of aggravated robbery, merely because one pleads guilty at the very outset one cannot ask for all the concessions.

[19] According to the facts of this case the appellant is lucky that he was able to get only a term of 6 years with 4 years non-parole. Therefore I cannot but disagree with the appellant on the ground that the sentence is too excessive and harsh.

[20] In view of the general tariff for robbery with violence being 8 to 14 years, the sentence imposed on the appellant is not harsh and excessive especially in the circumstances of the case and this cannot be judged in the light of the sentence imposed in the case of Mataiasi Bulivou Susu v State ; HAC 54/55/56; Criminal Appeal No. AAU 0045 of 2010 where the accused was given a term of three years imprisonment with a non-parole period of 2 years. However this case has no bearing on the current case and there exists factual disparities between the two cases.

[21] Explaining his failure to come within the appealable period the appellant in his hand written submission at 1.6 says:

"that he is not familiar with criminal justice system and has never before had reason to file any appeals etc. before the Appellate Court..."

[22] This court cannot overlook the fact that the appellant is a person with at least eight (8) previous convictions for offences committed within the last ten (10) years and who had served terms of imprisonment previously. It is a reasonable deduction to surmise that such a person would be reasonably familiar with the basic rules pertaining to bail and appeals and therefore the failure to lodge the notice of appeal within the appealable period cannot be excused. The appellant had cited the case of Sinu v State; Criminal Appeal No. CAV 0001/10 wherein His Lordship, Chief Justice Anthony Gates sets the following guidelines in relation to special leave to appeal namely:

- (i) *The reason for the failure to file within time;*
- (ii) *The length of the delay;*
- (iii) *Whether there is a ground of merit justifying the appellate court's consideration;*

- (iv) *Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed;*
- (v) *If the time is enlarged, will the Respondent be unfairly prejudiced?*

[23] In this regard a perusal of a hand written notice filed by the appellant leads to reasonable presumption that the appellant had a fair knowledge about the provisions of law applicable in a matter of this nature. Even if the appellant had sought the assistance of other inmates in the prison as he had stated in his submission to court there exists no reason for the appeal to have been delayed by 4 months. A delay of 4 months is a substantial time period which has not been explained with sufficient adequacy to sway this Court. Had there existed a plausible reason, the appellant has failed to explain it to the satisfaction of this court.

[24] Having regard to the circumstances of the present appeal, I do not see a ground of appeal that will probably succeed and therefore this application is frivolous and I do not consider that the appellant has raised an arguable point in respect of any of his proposed grounds of appeal. Therefore I dismiss the appellant's application for leave to appeal against the sentence under Section 35(2) of the Court of Appeal Rules.



D. S. Lecamwasam
.....

D. S. LECAMWASAM

JUSTICE OF APPEAL