IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A., And KAJI, J.A.)

CRIMINAL APPEAL NO. 9 OF 2002

BETWEEN

MASUMBUKO HERMAN..... APPELLANT
AND
THE REPUBLIC..... RESPONDENT

(Appeal from the Sentence of the High Court of Tanzania at Tabora)

(Lukelelwa, J.)

dated the 17th day of October, 2001
in
Criminal Sessions Case No. 21 of 2000

JUDGMENT OF THE COURT

LUBUVA, J.A.:

The appellant, Masumbuko Herman, was charged with the murder of one Lucas s/o Mayeshi contrary to section 196 of the Penal Code. He was convicted of manslaughter on his own plea of guilty and sentenced to twenty five (25) years imprisonment. He has appealed to this Court against sentence on the ground that the sentence was manifestly excessive.

Before us in this appeal, the appellant was represented by Mr. Magongo, learned counsel. He forcefully contended that although in sentencing the appellant the learned trial

judge indicated that he had taken into account all the circumstances advanced in favour of the appellant in mitigation, unfortunately, the sentence of 25 years imprisonment imposed does not reflect that the learned judge actually considered the following circumstances: First, the state of mind of the appellant at the time he committed the offence was that he was drunk. Second, that there was an ensuing fight between the appellant and the deceased. It was the submission of Mr. Magongo that if the learned judge had taken into account these factors together with the rest of the circumstances of the case, he would have found that the appellant deserved a less severe sentence. He further stated that having regard to all the circumstances of the case, the sentence of 25 years imprisonment was manifestly excessive.

Mr. Mwampoma, learned Senior State Attorney, for the respondent Republic, firmly submitted that the learned trial judge cannot be faulted in the sentence imposed. First, he said the learned judge had taken into account all the relevant circumstances of the case in favour of the appellant in mitigation. Second, while the sentence imposed may well be stiff, the sentence was not so manifestly excessive as to warrant the interference by the Court on appeal. Thirdly, it has not been shown either that the trial judge had ignored to

consider an important factor or circumstance in imposing the sentence which he ought to have considered or that a wrong principle was invoked in imposing the sentence.

With respect, we agree with Mr. Mwampoma, learned Senior State Attorney, that this Court as an appellate court does not interfere with a lawful sentence imposed by the High Court or subordinate court exercising extended jurisdiction on grounds based on mere sentiments that if it were sitting as a trial court, it would have imposed a different sentence. This view was expressed 50 years ago by then the Court of Appeal for Eastern Africa in **Ogalo s/o Owoura v. R** (1954) 21 E.A.C.A. 270. Similar view was expressed by this Court in the case of **Silvanus Leonard Nguruwe v. Republic,** (1981) TLR 66 to which decision our attention was called by Mr. Magongo. The Court, *inter alia,* stated:

> Before the Court can interfere with the trial High Court's sentence, it must be satisfied either, that the sentence imposed was manifestly excessive, or that the trial judge in passing sentence ignored to consider an important matter or circumstance which he ought to have considered, or that the sentence

imposed was wrong in principle.

In the instant case, we wish to observe at once that from our perusal of the record, and as correctly conceded by Magongo, we are satisfied that no wrong principle was invoked by the learned judge imposing the sentence. However, we have also gone further to consider the circumstances which the judge ought to have considered as alleged by Mr. Magongo. It is common knowledge that from the facts as stated by the State Attorney at the trial, the incident took place at a pombe club. Furthermore, counsel for the appellant at the trial in offering a plea of guilty to manslaughter also owned that the appellant was drunk when he committed the offence. So, it is apparent that among others, drunkenness on the part of the appellant was one of the factors which accounted for reducing the charge of murder to the lesser offence of manslaughter.

We shall first briefly deal with Mr. Magongo's complaint that the judge did not consider the state mind of the appellant when the offence was committed, that is that the appellant was drunk. In support of this submission the Court was referred to the writing of the distinguished author Brian Slattery in his Handbook on Sentencing at page 14. Among other things, the learned author stated:

> An appellate court will also alter a sentence when the trial court overlooked a material factor such as that the accused is a youthful first offender, or that he committed the offence while under the influence of drink.

A cursory glance through the record shows that Mr. Magongo's claim is supported by the record. This is evident from what the State Attorney stated when outlining the facts before a plea of guilty to manslaughter was entered. The State Attorney had stated that the incident took place at a pombe shop and the counsel for the appellant at the trial also owned that the appellant was drunk when he committed the offence. So, it is apparent from the record that among the various circumstances placed before the learned judge when sentencing the appellant was the fact that the incident took place at a pombe shop and that the appellant was drunk. Likewise, the fact that fighting ensued between the appellant and the deceased was also drawn to the attention of the learned trial judge. On the basis of these facts laid before the learned trial judge, he observed to the effect that a fight had ensued between the appellant and the deceased which was thereafter quelled.

With these facts and circumstances relevant to the offence laid before the learned trial judge when imposing the sentence against the appellant, the question is whether the judge actually took into account these factors. Although the learned judge stated in clear terms that all the circumstances had been considered, we do not think that that was infact done. From the sentence imposed, it seems highly doubtful to us that the circumstances advanced as grounds for imposing a less severe sentence were considered. The circumstances advanced which the learned judge purported to have considered were: that the appellant was a first offender, had readily pleaded guilty to manslaughter thereby showing remorse, a fight had ensued in a pombe shop where the appellant was drinking and the appellant had been in remand custody for three years.

In our view, the learned judge's pronouncement that he had considered all these factors sounds rather more of a lip service. In this case, unlike the situation discussed in Brian Slattery's Handbook, the position is perhaps worse in that not only one factor was overlooked but it seems that the entire set of factors or circumstances were not in fact, considered. There was only a declaration by the judge that they had been considered. Had these factors been duly and properly considered, the learned judge would have found

that the appellant was entitled to a less severe sentence. For this reason, upon the judge's failure to consider the circumstances when sentencing the appellant, we are inclined to accept Mr. Magongo's submission that the sentence was, manifestly excessive. Consequently, we are satisfied that this is a fit case in which the Court is entitled to interfere with the sentence imposed.

In the event, and for the foregoing reasons, the appeal is allowed, the sentence of twenty five years (25) imprisonment is set aside and in substitution thereof a sentence of ten years (10) imprisonment is imposed.

DATED at DAR ES SALAAM this 13th day of July, 2004.

D.Z. LUBUVA
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR