IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 10 OF 2002

BETWEEN

RAMADHANI IBRAHIM.....
APPELLANT

AND

THE REPUBLIC.....
RESPONDENT

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

(Lukelelwa, J.)

dated the 23rd day of October, 2001
in
Criminal Sessions Case No. 28 of 2001

J U D G M E N T

MROSO, J.A.:

On 1st July, 2004 when we heard the appeal against a sentence of 15 years imprisonment for manslaughter, we allowed it by setting aside that sentence and substituting thereof such sentence as would result in the immediate release of the appellant from prison. We reserved our reasons, which we now give.

The appellant was convicted on the 23rd October, 2001 on his own plea of guilty to manslaughter, by the High Court of Tanzania sitting at Tabora (Lukelelwa, J.). Before the court passed sentence on him his advocate then, Mr. Kaunda,

pleaded on his behalf the following mitigating circumstances:-

> That the appellant was a first offender; was aged twenty one years; he had by then spent two years in remand custody; when he did the killing, he was in Form Three in a secondary school; after he was arrested his education was interrupted; the deceased had contributed to his own death when he alleged, wrongly, that the appellant was a madman.

The appellant himself in response to an allocutus said he was contrite and that he had learned a lot while in remand custody, presumably meaning that he had learned that crime does not pay.

The court said it had taken into consideration all those mitigating circumstances but that what the appellant had done was “youth hooliganism” and that it “exceeded sane boundaries”;, and that appellant had stabbed the deceased in the abdomen, a vulnerable part of the body. It then passed a sentence of 15 years imprisonment on the appellant, which sentence caused dissatisfaction to him and he has appealed against it.

Mr. Banturaki, learned advocate, has filed on behalf of the appellant one ground of appeal to this Court. He complains that the learned High Court Judge had erred in law and fact by imposing “a very excessive sentence in view of the circumstances of the case”.

When arguing the appeal Mr. Banturaki submitted that although the learned judge said he had taken into consideration the mitigating factors which had been pleaded, the sentence which he eventually gave to the appellant did not reflect that he had in fact done so. He said that an extrajudicial statement made by the appellant, which was before the court, was not considered. Mr. Banturaki concluded that had the trial judge properly considered the mitigating factors and all the facts before him, he would not have imposed a sentence which was excessive. He cited the case of **Francis Titus Mwacha v. Republic,** [1990] TLR 88 in support of an argument that even in a case in which the court found that an appellant had caused death because of overreaction, this Court reduced a twenty year imprisonment sentence to one of three years imprisonment. He prayed that we interfere with the sentence in this appeal.

An appellate court will not normally interfere with the discretion exercised by the trial judge in assessing sentence unless it is evident that the judge acted upon some wrong principle, or overlooked some material factor. See **James**

s/o Yoram v. R (1950) 18 EACA 147. It is also an accepted principle that although an appellate court can interfere with a sentence which was imposed by a lower court, it is a power which it does not exercise lightly, and will not alter a sentence merely because, had it been the trial court, it might have passed a different sentence – See **Ogalo s/o Owoura v. R** (1954) 21 EACA 270. That is especially so in the case of a second appeal or where there was a full trial in which the trial court had the advantage of seeing and hearing witnesses. It is said, however, that where an accused person pleaded guilty and sentencing followed straight from it so that no evidence was adduced to give the trial court an advantage in assessing sentence, an appellate court may be in as good a position as the trial court in assessing the appropriate sentence. See **Nuttall** (1908) 1 Cr. App. R. 180.

Generally, an appellate court will alter a sentence if it is evident that it is manifestly excessive. What is implied here is that the appellate court will not interfere with a sentence assessed by a trial court merely because it appears to be severe. It will only interfere if it is plainly excessive in the circumstances of the case.

In the case under appeal, at the time the appellant committed the offence, he was of the age of 19 years. According to an extra-judicial statement of the appellant

which was before the sentencing judge, the appellant had cracked a joke about the deceased. Apparently, the deceased took exception to the joke and approached the appellant menacingly so that the latter took to flight. Eventually he reached home. The following words by the appellant are quite revealing about what transpired just before he stabbed the deceased to death –

> "Nilipofika mlangoni ndipo marehemu alinyanyuka na kunifuata hapo nje na kuanza kunipiga usoni na teke la ubavuni mkono wa kushoto. Nami nilitoka nje kukimbia lakini aliniwahi na nilirudi salon na ndipo nilishika mkasi nikwa (sic) ninamtishia ukija hapa nitakuchoma lakini alikuja kwa kasi na kunisukumia kwenye ukuta na mkazi (sic) niliokuwa nao nilimchoma sehemu ya tumbo mkono wa kushoto …"

It was in those circumstances that the appellant killed the deceased.

We think that had the High Court judge properly considered those circumstances he would not have found it necessary or desirable to refer to the incident as youth hooliganism which exceeded sane boundaries, when

referring to the appellant. If anyone at all had exceeded "sane boundaries", it was the deceased, so that, as pointed out by Mr. Banturaki, the deceased had authored his own death by so relentlessly pursuing the appellant when the latter had retreated so much. The deceased had turned into an aggressor.

When those circumstances are considered along with the youth of the appellant at the time he caused the death of the deceased, his sense of remorse, the fact that he readily pleaded guilty and was a first offender, it becomes patently clear that the trial judge had failed to take into consideration material factors, justifying interference by this Court.

It was for the above reasons that we immediately allowed the appeal and reduced the sentence to the extent explained above.

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 APPEA

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

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