IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 8 OF 2002

BETWEEN

LUCAS JOHN.....
APPELLANT

AND

THE REPUBLIC.....
RESPONDENT

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

(Lukelelwa, J.)

dated the 19th day of October, 2001
in
Criminal Sessions Case No. 53 of 2000

JUDGMENT OF THE COURT

KAJI, J.A.:

The appellant LUCAS JOHN was initially charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 of the laws of Tanzania. But later the charge of murder was substituted with that of manslaughter contrary to section 195 of the Penal Code Cap 16. He pleaded guilty. He was convicted accordingly. He was sentenced to 30 years imprisonment.

Briefly, the facts of the case were that on 31st October 1998, at about 8.00 p.m., at Nyamtengela Village, in Kahama District, within Shinyanga Region, the appellant stabbed the deceased MACHIBYA S/O MASELE with a knife for no

apparent reason. The deceased died on the spot. According to the autopsy report the cause of death was severe haemorrhage as a result of the stabbing.

In mitigation the appellant through his advocate Mr. Kaunda stated that he was a first offender, married with two children aged nine and seven years respectively who depended on him. He had been in remand for about three years. He was 26 years old, and that the killing occurred when the appellant and the deceased were trying to show each other as to who was stronger than the other, which is a normal challenge among young men.

In sentencing the appellant the learned trial judge had this to say:

> "I have taken into consideration that the accused is a first offender. I have also taken into consideration of all of what Mr. Kaunda learned counsel for the accused has said in mitigation. I have also taken into consideration what the accused has said in mitigation. This is a borderline case between murder and manslaughter. The accused killed the deceased on account of youth hooliganism. He stabbed the deceased with a knife on the neck, a very vulnerable part of the body, simply

> because the deceased had challenged him that he would do nothing. This is a deplorable act, and only legal technicalities had reduced this otherwise murder to manslaughter. I hereby sentence the accused to serve thirty (30) years imprisonment".

The appellant was aggrieved by the sentence; hence this appeal. Before us in this appeal the appellant was represented by Mr. Kahangwa learned advocate. Mr. Rwabuhanga learned State Attorney appeared for the respondent Republic.

Mr. Kahangwa raised the following two grounds of appeal:

1. That the honourable trial judge erred in failing to consider that the appellant readily pleaded guilty to the offence.

2. That in the circumstances of the case the sentence of 30 years imprisonment is manifestly excessive.

In elaboration Mr. Kahangwa urged that although the learned judge had recorded that he had taken into

consideration the appellant's mitigation, yet the sentence he meted out on the appellant was manifestly excessive, appearing as if he had not considered at all the appellant's mitigating factor. Mr. Kahangwa further urged that the learned trial judge considered more seriously the nature of the offence which he said bordered on murder and failed to give due attention to the appellant's mitigation. Mr. Kahangwa said that the appellant was a first offender who had readily pleaded guilty to the offence. He said that where an accused pleads guilty to the offence, it is a sign of remorse and should be treated leniently.

Mr. Kahangwa further argued that although the discretion on sentence is entirely on the trial court, yet there are occasions where an appellate court can interfere, such as where the sentence is manifestly excessive. He cited the case of BERNADETA d/o PAUL V R (1992) TLR 97 where this Court held, *inter alia,* "that an appellate court should not interfere with the discretion exercised by a trial judge as to sentence except in such cases where it appears that in assessing sentence the judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive". It was the learned advocate's submission that the sentence in the instant case is manifestly excessive and should be reduced.

Mr. Rwabuhanga, learned State Attorney, conceded that the sentence was manifestly excessive. He said that the circumstances of this case show that the appellant regretted

for what he had done, and that is why he even did not run away from the scene of crime, and pleaded guilty to the offence.

The question whether an appellate court can interfere with the discretion exercised by a trial judge as to sentence has been dealt with by courts for many years. In the case of R v. MOHAMED ALI JAMAL (1948) 15 E.A.C.A. 126, the Court of Appeal for Eastern Africa had this to say:-

> "An appellate court should not interfere with the discretion exercised by a trial judge as to sentence except in such cases where it appears that in assessing sentence the judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive"

In a later case – JAMES YORAM V R (1951) 18 E.A.C.A. 147 the same Court also said:-

> "A Court of Appeal will not ordinarily interfere with the discretion exercised by a trial judge in a matter of sentence unless it is evident that he has acted upon some wrong principle or over-looked some material facts"

This principle was further expanded in the cases of FRANCIS CHILEMA and BERNADETA PAUL (supra) where the accused had pleaded guilty to the offences charged. According to these last two cases a plea of guilty to the offence was held to be an important factor to be considered when assessing sentence and that a trial judge must take it into consideration when assessing sentence.

In the instant case the learned trial judge had recorded that he had considered all the appellant's mitigation. But unfortunately neither the appellant nor his advocate had raised the issue pertaining to the plea of guilty in mitigation. We think when the learned trial judge remarked when assessing the sentence that he had considered the appellant's mitigation he meant the mitigating factors which were listed there, which did not include the plea of guilty. In fact it would appear that the learned judge did not consider it at all because he did not record anywhere that he considered it. Even if it was not raised in mitigation, it was the duty of the learned judge to consider it when assessing the sentence.

We are satisfied that had the learned judge considered the fact that the appellant had pleaded guilty to manslaughter he would have imposed a lesser sentence

Since the learned trial judge overlooked a material factor, we are satisfied that we can legitimately interfere with his sentencing discretion in this case.

In the circumstances we agree with the appellant's advocate Mr. Kahangwa and Mr. Rwabuhanga, learned State Attorney that in the circumstances of this case where the appellant had pleaded guilty, was a first offender and had been in remand prison for about three (3) years, a sentence of thirty (30) years imprisonment was manifestly excessive. We therefore set it aside and substitute thereof a sentence of twelve (12) years imprisonment. Appeal allowed to that extent.

DATED at DAR ES SALAAM this 16th 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