IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MSOFFE, J. A.. RUTAKANGWA, J.A.. and MBAROUK, J.A.)

CRIMINAL APPEAL NO. 214 OF 2004

(Appeal from sentence of the High Court of Tanzania at Bukoba)
(Rugazia, J.)

Dated 28th day of September, 2004
In
Criminal Sessions Case No. 13 of 2004

JUDGMENT OF THE COURT

15TH & 22ND April, 2008

MBAROUK, J.A;

The appellant Malwanile Nyamukama is appealing against the sentence of ten years imprisonment imposed by the High Court (Rugazia, J.) sitting at Bukoba upon a conviction of the offence of manslaughter, contrary to section 195 of the Penal Code Cap. 16 R.E. 2002.

Briefly stated, the facts giving rise to this case are to the effect that, the appellant and deceased were husband and wife living together and had children On 18th day of August, 2001 at Nyakatunguru/Kivuruma village within Biharamulo District in Kagera Region they went together to drink "gongo". On the way back home the deceased, who was too drunk and was carrying a baby, could not even walk. She fell down several times. The appellant decided to carry the baby but this did not help. The appellant decided to carry the baby but this did not help. The deceased was kicked by the appellant to make her walk, but all was in vain. People intervene and the appellant was held back. Upon reaching home the appellant applied first aid to the deceased but she died on the next day. A post-mortem examination was performed which showed that internal hemorrhage was the cause of death. The appellant was arrested and charged.

At the trial the appellant specifically pleaded, "It is true that I killed her unintentionally", and the court entered a plea of guilty. He was accordingly

convicted and sentenced to a term of ten years imprisonment. Aggrieved by the sentence, the appellant lodged this appeal.

In sentencing the appellant, the trial judge stated:-

> "I take note of the mitigating factors which are truly commendable but also take a serious view on the age-long habit of senseless wife beating leading to deaths like in this case. Loss of life is always tragic".

In this appeal, the appellant was represented by Mr. Pauline Rugaimukamu, learned counsel, while the respondent republic was represented by Mr.,. Emily Kiria, learned State Attorney.

In faulting the decision of the High Court, the appellant has brought a three – point memorandum of appeal on the following grounds:

1. That the Prosecutor having submitted nothing on "the aged long wife beating leading to death," trial judge erred in considering the taking into account in sentencing the appellant to 10 years imprisonment, extraneous matters.

2. That the trial judge having taken a note of the defense mitigation "as being truly commendable" the trial judge erred in law when he failed to take a note also the period the appellant had stayed in remand before he was sentenced.

3. That the sentence imposed was excessive in the circumstances and be vacated.

At the hearing of the appeal Mr. Rugaimukamu argued the three grounds of appeal together. He submitted that it was not proper for the trial High court judge to impose a ten years sentence to the appellant basing on extraneous matters. The learned counsel further submitted that there was no evidence on record to establish "senseless wife beating, " a matter which was considered by the learned judge in sentencing the appellant. Basing his decision upon extraneous matters was improper, Mr. Rugaimukamu observed. On this point he referred us to the case of **Silvanus Leonard Nguruwe v. Republic** [1981] T.L.R. 66.

Furthermore, the learned counsel for the appellant was of the view that, the trial judge having rightly found the defence mitigation "as being truly commendable", erred in not considering the same when sentencing the appellant.

Lastly, Mr. Rugaimukamu urged us to reduce the sentence, taking into consideration the fact that the appellant had stayed in remand prison for three years before he was sentenced, and that so far he has already served four years out of the ten years he was sentenced.

On his part, Mr. Kiria, strongly argued against the appeal. Initially, he was of the considered view that facts concerning "age-long senseless wife beating" were on record. However, when the Court asked him to look at the record more closely, he conceded that the facts in the case did not disclose the alleged habit of age-long senseless wife beating.

As to the second ground of appeal, Mr. Kiria submitted that the maximum sentence upon a conviction of manslaughter is life imprisonment. For that reason, he was of the view that the trial High court judge correctly exercised his discretion in sentencing the appellant to ten years imprisonment.

In his response to the submission by Mr. Rugaimukamu that the sentence imposed is excessive, Mr. Kiria submitted that, taking into consideration the fact that the cause of the deceased's death was due to the beating inflicted by the appellant, the sentence was not excessive. Finally, he urged us to sustain the sentence.

Basing on the facts in this case we totally agree with the learned counsel that there is nothing on record adduced on the issue of "the age-long wife beating." Hence, as correctly submitted by Mr.; Rugaimukamu, the trial court judge erred in considering and taking into account extraneous matters in sentencing the appellant to ten years. Even Mr. Kiria conceded that much, as already observed. This Court in the case of **Silvanus Leonard Nguruwe V Republic** (supra) held that:

> "Prevalence of an offence is a factor which a trial Court should always take into account when assessing sentence, **but it would be contrary to principle to consider this factor either as the predominant or the only factor that must guide the court in its consideration of sentence."**
>
> (Emphasis added)

It is clear, in the instant case, that the trial High court judge overzealously considered the alleged prevalent habit of wife-beating in the society which, as already shown above, was not an issue in the case. Surely this was an extraneous matter which was improperly considered. For that reason, we find merit in the first ground of appeal.

Taking note of the appellant's mitigating factors to which the trial judge found to be truly commendable," and basing on the circumstances of this case, and the principle that one of the main objects of punishment is the reformation of an offender, we are of the considered view that the appellant de3served a lenient sentence. This court in the case of **Bernadeta Paul V Republic** [1992] TLR 97 stated:

> "…had the learned judge taken into account appellant's plea of guilty to the offence with which she was charged she would no doubt have found that the appellant was entitled to a much more lenient sentence….."

Taking into account the cumulative effect of the mitigating factors and the surrounding circumstances of the case, we are satisfied that the appellant is entitled to a lenient sentence. He pleaded guilty to the charge to show how remorseful he was, he was in remand prison for three years before the sentence, and he has now served four years out of the ten years term of imprisonment.

Numerous decisions of this Court have emphasized that there have to be good grounds upon which this court could interfere with a sentence passed by a trial court. See, for instance, the cases of **Silvanus Leonard Nguruwe V.R. (**Supra), Bernadeta Paul V. r. [1992] **TLR 97, RASHID s. KANIKI** V.R [1993] TLR 258, and Yohana Balicheko V. r. [1994] TLR 5, to mention a few.

In the instant case, we think, we ought to interfere with the sentence passed by the trial High court because of the reasons we have stated above.

In the event, we accordingly allow the appeal and reduce the sentence of ten years to such term as will lead to the appellant's release from prison unless he is lawfully held therein. We so order.

DATED at MWANZA this 19th day of April, 2008.

J.H. MSOFFE
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

MBAROUK
JUSTICE OF APPEAL

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

S.M. RUMANYIKA
DEPUTY REGISTRAR