**IN THE COURT OF APPEAL OF TANZANIA**

**AT TABORA**

**(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A. AND MASSATI, J.A.)**

**CRIMINAL APPEAL NO. 15 OF 2008**

**KATINDA SIMBILA @ NG'WANINANA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania at Tabora)**

**(Kihio, J.)**

**Dated the 22nd day of October, 2007**
**in**
**Criminal Sessions Case No. 3 of 2004**

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# JUDGMENT OF THE COURT

14 & 17 JUNE, 2010

**RUTAKANGWA, J.A.:**

The appellant, prior to his arraignment, was a resident of Utwigu village, in Nzega District, Tabora Region. On 18th October, 2002, in the afternoon, he went to one of that Village's local pombe shop to while away time drinking a locally brewed "pombe". He was in the company of Maganga Simbila, Kiwale Sayi, Mabula Heneriko

(henceforth the deceased) and Wande Mihambo. At about 8.00 p.m. they all dispersed, but the appellant and Wande headed for the latter's home. The appellant did not stay long there and soon left for his home.

On arriving home, the appellant found the deceased having sexual intercourse with his wife. In the heat of passion, he physically assaulted the deceased by hitting him with a stick until the latter fainted. Not satisfied with that assault, the appellant went to call his brothers, namely Shambi and Maganga.

When the trio arrived at the appellant's home the deceased was still around. Jointly and together, they beat him unconscious. They then took the deceased to a nearby forest. The facts of the case do not show if the deceased was still alive or not by then. But what is clear is that they burnt the deceased's legs and genitals and abandoned him there.

The investigations carried out by the police led to the arrest of the appellant. On being interrogated, the appellant confessed having killed the deceased. He was then arraigned for the murder of the deceased.

On 22nd October, 2007, five clear years after the unlawful killing, the appellant appeared before the High Court at Tabora (Kihio, J.) for the taking of his plea and preliminary hearing. When the information for murder was read out to him, he readily pleaded guilty to the lesser offence of manslaughter contrary to section 195 of the Penal Code. The plea was accepted and he was convicted accordingly.

Before the appellant was sentenced, Mr. Mkoba, learned State Attorney for the respondent Republic, told the learned trial judge that the appellant was a first offender. He also mentioned in passing that "*though the accused person met the deceased while making love with his wife but the force he used .... was excessive*". He did not

suggest to the court the type of punishment which in his opinion would have been appropriate in the circumstances of the case.

Mr. Method Kabuguzi, learned advocate for the accused, came up with a lucid impassioned plea for leniency. He urged the learned trial judge to impose a lenient sentence on the accused, now appellant. This was predicated upon these facts:-

(i) The accused was a first offender;

(ii) The accused had been in remand for five years and regretted for his acts;

(iii) The accused had a wife, three children and an aged mother, and

(iv) The deceased had contributed to his own death.

In sentencing the appellant, the learned sentencing judge is on record as having "*taken into consideration the mitigating factors.*" He was alive to the fact that the deceased had incensed the appellant by going to the latter's home and committing adultery there. However, he was of the firm view that the appellant and

his brothers had used "*very excessive force*" and "*the act of burning him is brutality.*" He, therefore, sentenced the appellant to eighteen years imprisonment.

The appellant was aggrieved by the sentence imposed. He believes it is manifestly excessive. He is accordingly challenging it in this appeal, in which he is represented by the same Mr. Kabuguzi.

Mr. Kabuguzi filed and argued before us two grounds of appeal against the sentence imposed. In the first ground of complaint he is reproaching the learned sentencing judge for failing to consider the five years the appellant had already spent in remand before his trial. This omission, he stressed, offended the principle of law on sentencing enunciated by this Court in the case of **NYANZALA MADAHA v. R,** Criminal Appeal No. 135 of 2005 (unreported). He accordingly urged us to take into account this period and reduce the sentence passed by the High Court.

In his second ground of appeal, the appellant is complaining that the sentence imposed on him was "*manifestly excessive*." Elaborating on this point, Mr. Kabuguzi tried to impress upon us, that since the appellant was a first offender who had readily pleaded guilty to an offence he had been forced to commit by the deceased's grievous misconduct, the learned trial judge ought to have found this to be a fit case to impose a lenient sentence.

For the above reasons, Mr. Kabuguzi pressed us to allow the appeal by quashing the long custodial sentence imposed on the appellant. In substitution therefor, he prayed that we impose a sentence which will result in the immediate release from prison of the appellant.

The respondent Republic was represented before us by Mr. Jackson Bulashi, learned Senior State Attorney. In his brief submission, he urged us to dismiss the appeal as the sentence

imposed was meant to send a deterrent message to the general public.

In determining this contested appeal, we shall remain alive to the fact that the appellant, at the time of being sentenced was a first offender who had pleaded guilty to the charge. Not only that; indeed the appellant had been admitting responsibility for the death of the deceased right from the investigation stages. To us, this was a manifest external sign of his remorse for the crime he had committed. That the deceased was partly the author of his own death does not fail to find purchase with us. We are aware, however, that it was instrumental in reducing the offence from murder to manslaughter. It should, therefore, not be over pressed in the sentencing process, although it cannot be ignored altogether.

Admittedly, the sentencing process is one of, if not the most, intractable and delicate tasks in the administration of justice, especially where the law has not fixed a minimum

sentence. This is where ingenuity and wisdom work together in order to lead us to substantial justice as no two cases are identical in all circumstances. This is all because there is no common yardstick or denominator for measuring the sentence which will match every crime. That is why, where the sentencing judge is found to have exercised his discretion judicially, the appellate court will be loath to interfere with it. See, for instance, **R v. MOHAMED ALI JAMAL, (**1948) 15 EACA 126**, JAMES s/o YARAM v R** (1951) 18 EACA, 147, **SILVANUS LEONARD NGURUWE v. R** [1982] T.L.R. 66 and **NYANZALA MADAHA v. R** (supra).

In **JAMES s/o YARAM** (supra), which was followed by this Court in **BERNADETA PAULO v. R** [1992] T.L.R. 97, the Eastern African Court of Appeal 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 principal (sic) or over-looked some material factor."*

In the case before us, there is no claim that the learned trial judge applied a wrong principle of law while sentencing the appellant. All the same, it is being claimed that he over looked one material factor. This is that he did not specifically address himself on the period of five clear years the appellant had been in remand prison pending his trial. It must not be forgotten, that for all this period the appellant was not disputing unlawfully killing the deceased. This factor came under scrutiny in the case of **NYANZALA MADAHA** (supra).

After directing itself to the six principles enumerated in **SWALEHE NDUNGAJILUNGU v. R**, Criminal Appeal No. 84 of 2002 (unreported), which would move an appellate court to interfere with a sentence imposed by a lower court, the Court found it apt to add a seventh principle. It said:-

*"Admittedly, the fact that the appellant had been in custody for eight years was brought to the attention of the trial judge but we are a shade unsure whether it was given the weight it deserved as properly contended by Mr. Kayaga.*

*Eight years in custody is a long period of time to await trial. We are aware that there are instances of greater periods of time than this but that should not be a justifying factor. The period of time spent in custody is a result of problems with the administration of justice in this country. So, it is our considered opinion that that period should not be loaded on the accused persons who are helpless and cannot do anything about it. Trial courts should take such periods into account and if that is not evident appellate courts should interfere."*

This tells it all. Indeed, "*a Daniel had come to judgment*", if we may be allowed to borrow a leaf from Shakespeare's **MERCHANT OF VENICE.**

In this case, the appellant had already wasted five good years in custody awaiting trial. The problem is further compounded by the naked fact that the appellant had all along been admitting the offence. Why then should we unduly punish a remorseful accused person on account of the weaknesses in our criminal justice system? That would be totally unfair. In so holding the Court should be thought of introducing a dangerous or inconvenient precedent in our jurisprudence. Indeed, this seventh principle had already been given Constitutional recognition in the neighbouring country of Uganda which is a Partner State in the East African Community (E.A.C.).

It is succinctly provided in Article 23(8) of the Uganda Constitution that:-

> *"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."*

So, the Court's decision in **NYANZALA's** case is a great leap forward towards the harmonization of the laws of the E.A.C. member states.

For the reasons we have given above, since it is not evident from the record of proceedings that the learned trial judge took this five-year period into account, we find ourselves constrained to interfere and deduct this period from the sentence imposed on the appellant. The first ground of appeal, therefore, succeeds.

Coming to the second ground of appeal, having considered what the appellant and his brothers did to the deceased, we are compelled to hold that the sentence imposed in the circumstances of this case was not manifestly excessive. It fitted the justice of the case. We shall, therefore, dismiss this ground of appeal.

All said, we partly allow this appeal. We deduct five years from the 18- year jail term. The appellant shall accordingly serve a prison sentence of thirteen (13) years from 22nd October, 2007.

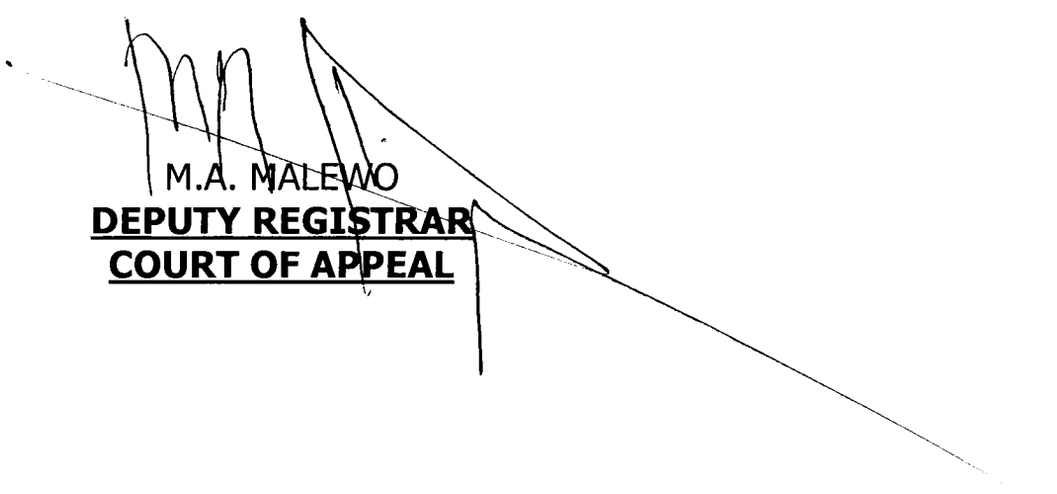
DATED at TABORA this 16th day of June, 2010.

E.M.K. RUTAKANGWA
**JUSTICE OF APPEAL**

M.S. MBAROUK
**JUSTICE OF APPEAL**

S.A. MASSATI
**JUSTICE OF APPEAL**

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



M.A. MALEWO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**