IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KIMARO, J.A., LUANDA, J.A., And MANDIA, J.A.:)

CRIMINAL APPEAL NO. 120 OF 2007

FORTUNATUS FRUGENCE..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Bukoba)

(Sambo, J.)

dated the 27th day of February, 2007
in
Criminal Session Case No. 17/2006

JUDGMENT OF THE COURT

1st October & 8th October, 2010

MANDIA, J.A.:

The appellant was arraigned for Murder c/s 196 of the Penal Code in the High Court of Tanzania sitting at Bukoba. He offered a lesser plea of Manslaughter c/s 195 of the Penal Code, pleaded guilty, and was duly

convicted. At the High Court level, the appellant was represented by Mr. M. Rweyemamu, learned advocate, while the respondent was represented by Mr. Ndjike, learned State Attorney.

The brief facts outlined in the High Court showed that on Christmas day, 2003, the appellant arranged a Christmas party with his family consisting of seven children, two from a previous marriage and five from his marriage with the deceased. The appellant supplied the party with the illicit drink "gongo" which he also drank from 3 p.m. to 4 p.m. At 4 p.m. the appellant became drunk and violent and fought everybody around him, including his wife, who is deceased, and another person he had invited to the party called Suleiman. In beating his wife the appellant used a stick, then a sandal, then fist and also kicks. The blows and kicks by appellant on his wife, the deceased, left her with a cranial (skull) depression and a distended abdomen which led to death.

After conviction, the Court was informed that the appellant was a first offender who has left behind a total of seven children who had no care because of the death of their mother, and that the appellant was

remorseful of the events which led to the death of his wife and his subsequent appearance in Court.

In sentencing the appellant, the trial Court only acknowledged the fact that the appellant was a first offender, and sentenced him to fifteen years imprisonment.

Mr. Banturaki, learned advocate appearing for the appellant in this appeal, argued that the sentence was excessive taking into account the appellant's plea and the fact that the appellant, a first offender, has left behind a family of seven children uncared for.

Mr. Luoga, learned Senior State Attorney representing the respondent/Republic, argued that the sentence was not excessive, bearing in mind that the penalty for manslaughter is imprisonment for life. Mr. Luoga also argued that the appellant hit his deceased wife at a sensitive place, the head, so this factor should count in sentencing.

We are mindful of the position this Court took in ROBERT ARON versus THE REPUBLIC, Criminal Appeal No. 68 of 2007, amongst other authorities, that an appellate Court should not alter a sentence imposed by

a trial Court on the mere ground that if it were sitting as a trial Court it would have imposed a different sentence. This position emanates from the well settled principle of law that sentencing is a function best left in the discretion of the trial Court. We have also taken into account that in sentencing, the trial Court's principal duty is to look into and assess the **aggravating factors** surrounding the commission of the offence which may push the sentence upwards, and the **mitigating factors** which may tend to push the sentence downwards. In the particular circumstances of this case both the prosecution and the defence agree that there is a preponderance of mitigating factors over aggravating factors. This means the Court should have been moved towards a lenient sentence, rather than a stiff sentence. **In ABDALLAH ABDALLAH NJUGU Versus REPUBLIC**, Criminal Appeal No. 495 of 2007 (Iringa Registry – unreported) this Court held that, if the circumstances of a particular case permit, a Court should consider the welfare of a child/children left behind. The situation is similar here. The appellant has caused the death of his wife as a result of a drunken binge on his part which led to him staying in remand custody for three years before conviction. He has been in jail for some three years now

after conviction. We are of the opinion that had the trial Court considered the welfare of the children it would have arrived at a different conclusion. On our part we take into account this factor.

We therefore allow the appeal. The sentence of imprisonment is set aside. Taking into account the fact that the appellant has been in custody for a little bit over six years since his arrest, we impose a sentence that would result in his immediate release from prison.

DATED at MWANZA this 5th day of October, 2010.

N. P. KIMARO
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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

W. P. Bampikya
SENIOR DEPUTY REGISTRAR