IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 188 OF 2010

BETWEEN

AGNES JULIUS..... APPELLANT

AND

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mwanza)

(Nyangarika, J.)

dated the 17th day of March, 2010
in
Criminal Session Case No. 66 of 2009

JUDGMENT OF THE COURT

22nd & 25th May, 2012

KILEO, J. A.:

This is an appeal against a sentence of life imprisonment which was imposed on the appellant Agnes Julius for the manslaughter of her 1½ year old baby. Initially the appellant had been charged with the murder of the child but on 12/3/2010 the Republic accepted her offer of plea of guilty to the lesser charge of manslaughter contrary to section 195 of the Penal

Code. She was accordingly convicted of manslaughter upon her own plea of guilty.

The facts which were admitted by the appellant show that on 28/9/2007 the appellant had gone to Bwiro island with the deceased. On this day she stayed in a guest house where she met other guests among them Tereza d/o Teganisha to whom she revealed that she was taking her deceased child to her sister who was living near Bwiro island. The appellant left with the deceased child for her sister's place but when she returned she had no child. The following day both the appellant and Tereza d/o Teganisha made a visit to another island called Lyamwenge island. It was not revealed what the visit to those islands was for. Three days later, the body of the deceased was found buried in the bush. Postmortem examination report showed that the death of the child was due to 'assault'. The report also revealed that the right palm had been cut off. The appellant told the Bwiro island leaders that she had beaten the deceased to death after he had attempted to damage her mobile phone. She went on further to inform them that she was confused after the death of the deceased and therefore went to bury the body in the bush.

Appearing before us on behalf of the appellant, Mr. Antony Nasimire, learned counsel informed us that they were abandoning the memorandum of appeal filed on 22/3/2012 which contained two grounds and instead they would stick to the memorandum that was filed on 8/5/2012. In this memorandum of appeal there is a single ground:- *that the life imprisonment imposed upon the appellant was excessive in the circumstances of the case.*

The critical issue before us is whether there is any justification for us to interfere with the sentence imposed on the appellant by the learned judge. Mr. Nasimire argued before us that in imposing a life sentence which is the maximum sentence for the offence of which she had been convicted, the trial court failed to appreciate the fact that the appellant was a youthful first offender who had readily pleaded guilty and who had been in remand prison for three years. Mr. Nasmire took us through a number of cases in support of his arguments. One such case is **Bernadeta Paul v. Republic** (1992) TLR 97 (CA). The appellant was sentenced to four years imprisonment. She had pleaded guilty of killing her 8 days old child. . The trial court omitted to take into consideration this factor when he was

considering what sentence would be appropriate in the circumstances of the case. While appreciating 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 on some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive the Court nevertheless intervened in the sentence for the reason that the trial court had failed to take into account the appellant's plea of guilty to the charge.

The learned counsel also made reference to **Gervas Tito and Chrizostom v. Republic**- Criminal Appeal No 26 of 2008. In this case reference was made to **Yohana Balicheko v. Republic** (1994) TLR 5 where this Court held that failure to take into consideration the fact that an accused was a first offender and the fact that he had already spent six years in prison warranted the interference of the sentence by the Court of Appeal. The defense in that case had stated in mitigation that the accused was a first offender and had been in remand custody for six years. In sentencing the appellant the learned judge stated:

"The two accused have been convicted of manslaughter. They have acted recklessly and as a result, a precious human life has been lost. Each accused to serve (8) eight years in prison".

Setting aside the sentence of eight years imprisonment the Court stated, in respect of the time spent in remand custody and being a first offender:

".....the learned judge should have given due consideration that the appellant was a first offender and had already spent six years in custody.....those were legitimate mitigating factors.....".

Mr. Nasmire asked us in the circumstance to allow the appeal and reduce the life sentence imposed on the appellant.

Mr. Pascal Marungu, learned State Attorney who represented the respondent Republic very strongly resisted the appeal. He argued that given the circumstances of the case the sentence imposed was deserving. He especially mentioned the fact that the victim was a 1½ years old child who by the very fact of its infancy could not be expected to be punished for anything and especially considering that it had its full trust and

confidence on its mother. He considered the appellant's actions to have amounted to brutality, particularly considering that after the killing the appellant buried the body of her baby in the bush and went on as if nothing had happened. He further argued that the appellant's action bordered on murder as the learned trial judge had observed and asked us to find that there were no circumstances warranting this Court to interfere with the decision of the trial court. The learned State Attorney further argued that though the sentence might have been severe, this alone could not be a ground for making interference. In support of his arguments Mr. Marungu submitted further that there is no dearth of authorities laying down circumstances under which an appellate court may interfere with a sentence imposed by a trial court. He made reference to: 1. **Patrick Matabaro @ Siima & Another v. Republic**, Criminal Appeal No. 333 of 2007 (unreported). 2. **Medard Karumuna @ Lugosura v. Republic**, Criminal Appeal No. 332 of 2007 (unreported) and 3. **Philipo Pastory & Another v. Republic**, Criminal Appeal No. 331 of 2007 (unreported). The Court in all the above cases made reference to a **Handbook on Sentencing** with a particular reference to Tanzania by Brian Slattery where the learned author made the following observations.

"The grounds on which an appeal court will alter a sentence are relatively few, but are actually more numerous than is generally realized or stated in the cases. Perhaps the most common ground is that a sentence is "manifestly excessive" or as is sometimes put, so excessive as to shock. It should be emphasized that that "manifestly" is not mere decoration, and a court will not alter a sentence on appeal simply because it thinks it severe. A closely related ground is when a sentence is manifestly "inadequate". A sentence will also be overturned when it is based upon a wrong principle of sentencing.....An appeal court will also overturn a sentence when the trial court overlooked a factor, such as that the accused is a ...first offender, or that he has committed the offence while under the influence of drink. In the same way, it will quash a sentence which has obviously been based on irrelevant considerations....Finally an appeal court will alter a sentence which is plainly illegal, as when corporal punishment is imposed for the offence of receiving stolen property."

Mr. Marungu urged us not to interfere with the sentence as it was not manifestly excessive nor was it illegal. He also argued that the trial judge did not overlook any material factor and he considered all relevant factors before he imposed the life sentence on the appellant.

The crucial issue which we posed from the beginning is whether there is justification in the circumstances of this case to interfere with the sentence that was imposed by the trial court. The guidelines which the Court has laid down over the years upon which it may interfere with a sentence of a lower court is not exhaustive. Each case must be determined on its own merit. For example in **Abdallah Abdallah Njugu v. Republic** -Criminal Appeal No. 495 of 2007 (unreported) this Court considered the welfare of the child to be a material factor in sentencing. The appellant in this case had been convicted of the manslaughter of his wife. There was a misunderstanding between the appellant and his first wife when he decided to take the child he had begot with the deceased to a luncheon prepared by his second wife. In the course of the misunderstanding a fight broke out and the appellant applied kicks and blows which resulted into internal injuries from which the deceased met her death. One of the mitigating

factors advanced during consideration of sentence was the fact the appellant had a family of four people depending on him one of them being a child that he had begot with the deceased. The Court made the following observation when considering whether or not to intervene in the sentence:

> *"Now that the mother of the child is dead, the father is serving a long prison sentence, who is looking after the interests of this unfortunate kid? In thus sentencing the appellant, the learned trial judge failed to consider this material factor: the welfare of the child."*

Quashing the prison sentence the Court held:

> *"We are convinced that for the interests of this child, we have to intervene and quash the prison sentence....."*

We have made reference to the above case to underscore the fact that the circumstances under which an appellate court may interfere with a sentence imposed by a lower court are not exhaustive. We must however again hasten to say that each case must be determined on its own merit. For example it may not be in the interest of the child to give a non-custodial sentence to a family man of proven cruelty to the members of his family.

Coming back to the present case, the learned trial judge observed that this was a borderline case to murder. We do not have cause to disagree with him. We also think that considering that the victim in this case was the appellant's own child it would have been unsafe in the circumstances, without a social inquiry report to impose a non- custodial sentence as it would be difficult to determine that it would be in the best interest of the other child.

Pleading guilty, as the appellant did in this case, is one of the grounds to be considered when the determination of a sentence is in issue. Mostly when an accused pleads guilty it shows that he is remorseful and is prepared to take responsibility for his actions. A court would normally take that factor into account when sentencing, especially considering that its time has not been wasted. The learned trial judge had the following to say in respect of the plea of guilty which was offered by the appellant:

> *"In my view taking the mitigation of **Pleading Guilty** to the offence depend on each circumstances of each particular case because in some cases, the accused may have no alternative but to **Plead***

Guilty *depending on the facts available. Therefore this factor alone cannot form the basis of leniency by this court."*

We are of the settled mind that the learned judge's approach to the plea of guilty was not proper. We say so because accused persons are never forced to plead guilty and it is not proper to say, as the learned judge thought, that in some cases the accused may have no alternative but to plead guilty. An accused may always plead not guilty and it is the prosecution which will have no alternative but to establish his guilt.

Further still in our perusal of the learned judge's decision we did not see any mention of the fact that the appellant had been in remand custody for a period of three years. The time that an accused has spent in custody should be taken into account, more so when an accused has pleaded guilty from the very beginning, as was the case in this matter. This Court, in **Katinda Simila @ Ng'waninana v. Republic**, Criminal Appeal No. 15 of 2008 (unreported) making reference to **Nyanzala Madaha v. R**, Criminal Appeal No. 135 of 2005 stated that failure to take into account the time that an accused (who has all along been admitting his offence) has spent

in remand custody would amount to unduly punishing a remorseful accused on account of the weaknesses in our criminal justice system. The Court noted that this principle had already been given constitutional recognition in the neighboring country of Uganda. Article 23 (8) of the Uganda Constitution was cited. It provides:

> **"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."**

Considering that the learned judge did not properly address himself to the fact that the appellant had readily pleaded guilty, and also the fact that the learned judge did not take into account the period of three years that the appellant had spent in custody, we are constrained to interfere with the life sentence that was imposed on the appellant. In so doing we shall nevertheless not lose track of the fact that the circumstances and the offence of which the appellant was convicted were grave.

We in the circumstances set aside the sentence of life imprisonment imposed on the appellant by the trial court and substitute thereof a sentence of twenty years imprisonment.

DATED at **MWANZA** this 24th day of May 2012.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR