IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MSOFFE, J.A., KILEO, J.A., AND KIMARO, J.A.)

CRIMINAL APPEAL NO. 130 OF 2012

GERALD MATEI ..... APPELLANTS

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court at Dodoma)

(Mzuna, PRM. Ext. Jurisdiction)

Dated 28th day of March, 2012
In
Criminal Appeal No. 71 of 2006

JUDGMENT OF THE COURT

20 & 23 September, 2013

MSOFFE, J.A.:

The appellant was convicted by the Resident Magistrate's Court of Dodoma (Mzuna, PRM Ext. J., as he then was) of manslaughter contrary to section 195 of the Penal Code, Cap 16 of the Laws, on his own plea of guilty. He was sentenced to life imprisonment. He has been aggrieved by the sentence which he considers to be manifestly excessive and through his learned advocate, Mrs. Mary Munissi, has appealed to this Court.

At the hearing of the appeal, Mrs. Munissi pointed out that the learned Principal Resident Magistrate with extended jurisdiction did not take into account the mitigating factors to wit, the appellant was a first offender who readily pleaded guilty to show how remorseful he was, he was aged 37 years with a family of five children, and he had been in remand custody for a period of three years. Mrs. Munissi was also of the view that in passing the sentence the learned Magistrate took into account irrelevant considerations like the "case lie at border – line to murder". The facts of the case show that this was a clear case of manslaughter and not a "border – line" one, Mrs. Munissi emphasized.

Ms. Chivanenda Luwongo, learned State Attorney, appeared before us on behalf of the respondent Republic. She argued in support of the appeal. Like Mrs. Munissi she too was of the affirmative view that the learned Magistrate did not take into account the mitigating factors in the case. Ms. Chivanenda went on to add other aspects of the case which the Magistrate ought to have considered. That the circumstances under which the offence was committed did not justify the manifestly excessive sentence. That the Magistrate was influenced by the words uttered by the

deceased which read "wapo wanaonitunza siyo kama wewe" in complete disregard of the fact that these words were preceded by other equally inappropriate and provocative words uttered by the said deceased. That the appellant stabbed the deceased only once. As a whole, the Magistrate overlooked material factors in the case, Ms. Chivanenda concluded.

The facts of the case can be put briefly as follows. The appellant and the deceased Helena Francis lived as husband and wife, respectively. On 15/4/2013 the appellant's aunt one Santina Petro was at her home. She heard an alarm from the appellant's homestead. She went out in answer to the alarm. On the way she saw the deceased running towards her. Within a short time the deceased fell down on the ground and died. She went near her body and saw an arrow pierced on her ribs. She reported the incident to fellow villagers. The appellant was arrested and taken to the police and eventually to a justice of peace where he admitted to have killed the deceased.

As correctly submitted by Mrs. Munissi, the general principle of sentencing is that an appellate court should not interfere with a sentence meted by a trial court because had it been the trial court it would impose a

different sentence. An appellate court can interfere where the trial court had imposed an illegal sentence or had acted on a wrong principle or had imposed a sentence which in the circumstances of the case was manifestly excessive or clearly inadequate. An appellate court may also interfere where the trial court overlooked a material factor, where the sentence was based on irrelevant considerations, etc. Indeed, the above principles are well enunciated in various authorities by this Court some of which were cited to us by both Mrs. Munissi and Ms. Chivanenda, notably **Mohamed Hatibu @ Saidi v. Republic**, Criminal Appeal No. 11 of 2004, **Mussa Ally Yusufu v. Republic**, Criminal Appeal No. 72 of 2006, **Shabani Yusufu Mfuko and Another v. Republic,** Criminal Appeal No. 140 of 2012 (all unreported). Needless to say however, the above principles are not conclusive. As pointed out by this Court in **Abdallah Njugu v. Republic,** Criminal Appeal No. 495 of 2007 (unreported) new circumstances may always arise in the course of time and this will call for expansion of the above principles.

After hearing Mrs. Munissi and Ms. Chivanenda, we too are satisfied that this is a fit case for us to interfere with the Magistrate's discretion in

sentencing the appellant to life imprisonment. In other words, we wish to say at the outset that given the overall circumstances of the case the maximum sentence meted to the appellant is manifestly excessive. In saying so, we are also of the view that as a matter of general principle the maximum sentence provided for in a statute should not be imposed unless there are very strong, grave and compelling reasons for doing so. In such a situation, as we stated in **Shabani Menge and Another v. Republic,** Criminal Appeal Nos. 182 and 183 of 2007 (unreported), in imposing a maximum sentence it is important to consider "the gravity of the offence and the way it was executed."

It may be useful to illustrate the above point by giving an example. In a recent decision by this Court in **Job Mlama and Two Others v. Republic,** Criminal Appeal No. 222 of 2012 (unreported) the appellants were charged with sexual exploitation of a child before the Mwanza Resident Magistrate's Court. The offence was basically that they procured and facilitated a dog to have sexual intercourse with a child aged 13 years. The trial court convicted and sentenced each one of them to the maximum term(s) of 20 years imprisonment provided for by statute. On appeal, the

High Court at Mwanza upheld the conviction and sentence(s). On a second appeal, this Court saw no basis for interferring with the maximum sentence(s) imposed in view of the gravity of the offence. Part of this Court's reasoning was that under our law rape is so grave that upon conviction it is usually met with a minimum sentence of thirty years imprisonment. And there is no doubt that the offence committed in **Mlama's** case was more grave and inhuman than ordinary rape. Yet, unlike rape the offence attracts only a maximum sentence of twenty years imprisonment! Faced with this situation, as an appellate Court we saw no justification in interferring with the discretion exercised by the courts below in imposing and upholding, respectively, the said maximum sentence(s) provided for under the relevant statute. In other words, we wholeheartedly sustained the maximum sentence(s) meted in **Mlama.**

In the instant case the circumstances under which the offence was committed are best captured in the appellant's extra – judicial statement thus:-

> *Ilikuwa siku ya Jumanne tarehe 15.4.2003 nilienda kwenye kazi za maendeleo kufyatua matofali ya kujenga shule. Tuliendelea na kazi mpaka saa 5*

hivi mchana ndipo tukaondoka. Nilipitia kwenye nyumba iliyokuwa na pombe nikamkuta mke wangu ambaye alitoka asubuhi akaenda kwenye hiyo pombe. Nilimuuliza kwanini hujawahi kurudi nyumbani? Akaniambia ngoja nikununulie pombe unywe. Alinunua tukanywa ikaisha akasema kuna dumu lake waliazima wawekee pombe nimngoje akaliangalie. Nikamwambia basi nenda kaliangalie. Uwahi kurudi nyumbani na nikatoka nikaenda nyumbani. Kabla ya yule mke wangu hajarudi shangazi aliniita nikaenda akanipa ugali nikala. Kisha nikarudi nyumbani. Mke wangu akawa amefika nikamwambia mbona nilikuambia uwahi kurudi? Akasema ***"huwezi kuniamrisha nitatembea ninavyotaka, kwanza wewe siyo Bwana wangu usinisumbue kwanza ulitoa mali ngapi? (mahari,")*** *Nilimwambia hayo maneno acha. Akasema,* ***"wapo wanaonitunza siyo kama wewe".*** *Pale nilipata hasira nikachukua mshale nikampiga akakimbia akaanguka....."*
(Emphasis ours.)

From the above statement, it is evident that there were other events and utterances by the deceased preceding the incident. In this sense, it was not correct, as opined by the learned Magistrate, that the appellant

killed after the words "wapo wanaonitunza sio kama wewe" were uttered. With respect, as shown above, the deceased had uttered other provocative words before that.

Again, as indicated above, in passing the sentence the Magistrate appeared to have been influenced by his own thinking that the case bordered murder. This was no doubt a misdirection. A careful reading of the facts will show that the case was not a borderline one. This was a clear case of manslaughter in which the appellant killed in a heat of passion following the deceased's provocative words. At any rate, there is nothing like a borderline case in our criminal justice system. Ideally, the offence committed in a case is either murder or manslaughter.

In sentencing the appellant the Magistrate also ought to have taken into account the fact that the weapon used was readily available in the house at the material time. In other words, this was not the sort of situation whereby one would walk out of the house to look for a weapon outside with a view to inflicting injury. And once he held the arrow the appellant stabbed the deceased only once. The stabbing was not

prolonged and protracted over other parts of the body. The injury was on the chest as is clearly borne out by the post - mortem examination report.

The Magistrate was positive that in sentencing the appellant he took into account the mitigating factors. That may well be so. But in our reading of the record we do not get the impression that he genuinely considered other mitigating factors like the fact that the appellant had been in custody for a considerable long period of time, he readily pleaded guilty to show how remorseful he was and thereby saving the valuable time of the court and everybody else, he was a first offender, etc.

When all is said and done, the appeal has merit. We note that the appellant was remanded in custody on 24/4/2003. He remained in custody from that date till 16/11/2006 when he was sentenced to life imprisonment. Overall, this means that he has been in custody for a considerable long period of time of almost 11 years todate. This is enough punishment. We think that given the circumstances under which the offence was committed and the period the appellant has already spent in custody it is fair that we revisit the sentence and impose a fairly lighter sentence. Accordingly, we hereby allow the appeal by substituting the

sentence of life imprisonment to one of such term of imprisonment as will result in his release from prison unless he is held therein in connection with a lawful cause.

DATED at DODOMA this 21st day of September 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL