IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 155 OF 2012

MOHAMED LIDA ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Singida)

(Mjemmas,J.)

dated 4th day of March, 2009
in
Criminal Sessions Case No. 78 of 2006

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JUDGMENT OF THE COURT

6th & 13th March 2013

ORIYO, J.A:

In the High Court of Tanzania sitting at Singida, the appellant, Mohamed Lida, was initially charged with Murder, contrary to sections 196 and 197 of the Penal Code, Cap 16, Revised Edition, 2002. He denied the charge. Subsequently, he was charged with the lesser offence of Manslaughter contrary to section 195 of the Penal Code. He readily pleaded guilty to the lesser offence of Manslaughter and consequent upon

that the trial High Court convicted him as charged. He was sentenced to imprisonment term of thirty years (30) on 4/3/2009. He was aggrieved by the sentence which he considered to be excessive. Through the services of the Central Region Law Chambers Advocates, the appellant has appealed to this Court, with a single ground:-

> "THAT, having considered the circumstances of the case, the Trial Judge erred in law and in fact in imposing such a heavy sentence".

The brief facts of the case can be put as follows.

In the morning hours on 22/9/2005, the deceased and another person went to the house of the appellant to drink local brew which was being sold by the appellant's wife. The deceased purchased local brew worth Shs 200/= which was shared between the deceased, his friend and the appellant. The deceased issued a Shs 1,000/= bill note to pay for the brew he had ordered. As the appellant's wife did not have the exact change of the balance of Shs 800/=, she gave him Shs 500/= with a promise to deliver the balance of Shs 300/= to the deceased later. The deceased then left. Later, the appellant's wife left home so as to deliver

the balance of Shs 300/= to the deceased. On the way, she met the appellant who ordered her to return home, which she did.

Later in the day, the appellant, the deceased and his friend resumed drinking local brew together with some other people elsewhere until around 5pm when the deceased left. After an hour or so later, the appellant left for his home. Upon entering his house on reaching home, the appellant found the deceased naked in his bedroom with the appellant's wife. The deceased hurriedly jumped out of the appellant's bed. It was at that moment when the appellant picked up a billhook from the room, assaulted the deceased and caused his death.

At the hearing of the appeal, Reverend Kuwayawaya S. Kuwayawaya, learned counsel who appeared for the appellant, sought a reduction of the sentence which was considered excessive in the circumstances of the case and the mitigating factors. Submitting on the special circumstances in this case, the learned counsel, relying on the confession made to the Justice of the Peace by the appellant, stated that there had been suspicion that the deceased was having an illegal sexual relationship with the appellant's

wife. He further stated that the situation was aggravated and that matters came to a head on the date of the incident, 22/9/2005, which took place in the appellant's own homestead. He said, considering that the incident took place late in the evening, when it was past 6.30 pm, and the appellant not being sure of what weapon the deceased might have had with him, the appellant was forced by these special circumstances to react as he did at the scene. Learned counsel concluded that under those circumstances, the appellant deserves a more lenient sentence. He urged the Court to intervene and reduce the sentence.

Mr. Angaza Mwipopo, learned Senior State Attorney, who argued against the appeal for the Republic/respondent, was not persuaded that there were any special circumstances to warrant this Court to interfere and reduce the sentence of 30 years imprisonment because in his view, it is not excessive. He submitted that the sentence was fair because the High Court imposed it after taking into account all the mitigating factors in favour of the appellant.

The only issue for our consideration here is whether, in the circumstances of the case, there are grounds to justify the Court to

interfere and reduce the sentence of 30 years imposed by the trial High Court.

This being an appellate Court it is guided by certain legal principles in the exercise of its jurisdiction before interfering with a sentence imposed by a trial court.

These principles include:-

1) It will not interfere merely because it would not have imposed such a sentence if it were a trial court, see -**Wilson Fanuel v R** 1993 TLR 267;
2) It will interfere where:-
   (a) a trial court used a wrong principle; or.
   (b) the sentence is patently inadequate or excessive; or
   (c) the trial court ignored an important matter or circumstance it ought to have considered – See **Rashid Kaniki vR,** [1993] TLR 258 and **Bernadeta Paul vs R** [1992] TLR 97

Also see: **Mohamed Ratibu @ Said vR,** Criminal Appeal No. 11 of 2004, (unreported).

It is correct as stated by the learned Senior State Attorney that the trial court considered all the mitigating factors in favour of the appellant before sentencing him as it did. The factors considered by the trial learned judge included:-

- He was a first offender;
- He readily pleaded guilty which showed that he was remorseful;
- He had been in custody since 2005;
- The deceased was , to some extent the source of the conflict;
- The deceased and the appellant had been drinking local brew for the whole day.

We agree with the learned High Court judge's comment before sentencing the appellant that when wronged by others, people are not allowed to take the law into their own hands to punish the wrongdoers. The learned Judge stated the following:-

> "Just imagine if every man or woman in our society was to react the way the accused did when his/her spouse has been shown whatever sign what would happen."

Here, the learned judge was referring to the finger signal the deceased used to make to the appellant's wife which signified the existence of an illegal sexual relationship between the deceased and the appellant's wife.

However, to us it appears the finger signal was a common occurrence. It is our strong conviction that the learned trial judge in sentencing the appellant, he overlooked a material factor in favour of the appellant thereof. He overlooked to consider as a mitigating factor the evidence tendered by the prosecution in the trial court that the appellant, on the material date, found the deceased naked in his bed, with the appellant's wife, (**in flagrante delicto**).

This evidence was available in the appellant's extra judicial statement taken before a Justice of the Peace and admitted as Exhibit "P3" at the trial. Failure by the trial court to take into consideration this piece of evidence as part of the mitigating factors in favour of the appellant, in that

he attacked the deceased in the heat of passion and he had no time to cool upon finding the deceased **"in flagrante delicto"** having sex in his bed with his wife, has adversely affected the appellant.

Going by the record, the appellant has been in custody since September, 2005; first as a remandee, then as a convict; making a total of over seven (7) years. We think the period of over seven (7) years incarceration has sufficiently reformed the appellant.

In the event we allow the appeal, quash and set aside the sentence of thirty (30) years imprisonment and in substitution thereof we impose a sentence which will result in the immediate release of the appellant.

We so order.

DATED at **DODOMA** this 13th day of March, 2013

E.M.K.RUTAKANGWA
JUSTICE OF APPEAL

K.K.ORIYO
JUSTICE OF APPEAL

B.M.K. MMILLA
JUSTICE OF APPEAL

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

(Malewo M.A)
DEPUTY REGISTRAR
COURT OF APPEAL