IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: KILEO, J.A., MJASIRI, J.A. And MASSATI, J.A.)

CRIMINAL APPEAL NO. 418 OF 2013

FATUMA NURUDINI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Karua, J.)

dated the 6th day of May, 2013
in
Criminal Sessions Case No. 43 of 2012

JUDGMENT OF THE COURT

24th & 28th October, 2014

MJASIRI, J.A.:

This is an appeal against sentence. The appellant was charged with attempted murder. She pleaded guilty to the offence of attempted murder and she was sentenced to seven (7) years imprisonment. The appellant has filed in Court three grounds of appeal which are summarized as under:

1. *The sentence imposed by the High Court was manifestly excessive.*

2. *The fact that the appellant readily pleaded guilty to the offence was not considered as a mitigating factor.*
3. *The appellant deserved a lenient sentence taking into account that she was provoked by her husband".*

At the hearing of the appeal the appellant was represented by Mr. Simon Mwakolo, learned advocate while the respondent Republic had the services of Mr. Edwin Kakolaki, learned Principal State Attorney.

Mr. Mwakolo argued the three grounds of appeal generally. He reiterated that the appellant showed remorseness by pleading guilty. He also submitted that the circumstances surrounding the appellant called for a more lenient sentence. The fact that the appellant was a first offender, with four (4) children and the fact that she was provoked when she committed the offence.

Mr. Mwakolo also submitted that the Judge took into account extraneous circumstances by calling the victim in court before sentencing the appellant. According to him, the victim should not have been called in court.

Mr. Kakolaki on his part, opposed the appeal. He submitted that the sentence was proper. He stated that the High Court Judge considered all the mitigating factors in arriving at the sentence of seven (7) years imprisonment. Given the nature of the injuries sustained by the victim, the trial Judge imposed a lenient sentence in taking into consideration the mitigating factors. He emphasized that the victim has rights and there was nothing wrong with the victim being called in court before sentencing.

We on our part after carefully reviewing the record are inclined to agree with the learned Principal State Attorney. On page 9 of the record, the trial Judge stated thus: -

> *"The crime this accused committed was indeed heinous, it has completely disfigured the complainant physiognomy".....*
> *.....*
> *I have however, considered the mitigation factors narrated by Mr. Danda, the learned counsel for the accused person. Indeed, there was provocation. The accused caught the complainant who was flirting with the accused's husband. As a matter of fact his attention was drawn towards her. The*

accused's husband neglected her and her four (4) children. I also take note that the accused person is the mother of four (4) children who depend on her entirely. I have also considered the report of the Community Service Officer that the accused person is a person of good character."

It is settled law that an appellate Court has a limited role in sentencing. The governing principles that must be taken into consideration are as follows: -

(i) Sentencing is a function which the legislature entrusts to the trial Judge (or magistrate, as the case may be);

(ii) The sentencing decision is a decision made in the exercise of a discretion;

(iii) An appeal court may only intervene where the exercise of the sentencing discretion is vitiated by error, such that there has been no lawful exercise of that discretion;

(iv) Then an appeal court can decide for itself what the sentence should have been.

See **PATRICK MATABARO @ SIIMA and ANOTHER v REPUBLIC**, Criminal Appeal No. 333 of 2007 CAT (unreported).

In the case of **Mohamed Ratibu @ Saidi v The Republic**, Criminal Appeal No. 11 of 2004 CAT (unreported) it was stated as under:

> *"It is a principle of sentencing that an appellate court should not interfere with a sentence of a trial court merely because had the appellate court been the trial court it would impose a different sentence. In other words an appellate court can only interfere with a sentence of a trial court if it is obvious that the trial court has imposed an illegal sentence or had acted on a wrong principle or had imposed a sentence which in the circumstance of the case was manifestly excessive or clearly inadequate."*

In **Charles Mashimba v Republic**, Criminal Appeal No. 86 of 2002 CAT (unreported) this Court had occasion to make reference to a **Handbook on Sentencing** by Brian Slattery at page 14 where it was stated thus: -

> *"The grounds on which an appeal court will alter a sentence are relatively few, but and 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 it is*

sometimes put, "so excessive as to shock". It should be emphasized 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 sentence. An appeal court will also alter a sentence when the trial court overlooked a material factor, such as 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 passed 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".

In **Silvanus Leonard Nguruwe v Republic**(1981) TLR 66 it was held that before the Court can interfere with the trial High Court sentence, the following factors have to be in place: -

"1. *The sentence imposed was manifestly excessive or*

2. *The trial Judge in passing sentence ignored to consider an important matter or circumstances which he ought to have considered.*
3. *The sentence imposed was wrong in principle.*

See also **Swalehe Ndugajilungu v Republic** [2005] TLR 94.

With regard to the sentence of seven (7) years imprisonment we are of the considered view that there is no basis for us to interfere with the sentence imposed on the appellant by the High Court Judge. We cannot fault the trial Judge for having the victim in court during sentencing, the focus is not about the rights of the appellant alone as the victim of crime has rights as well.

As we have already pointed out hereinabove, the sentencing decision is a decision made in the exercise of a discretion of the trial Judge. This exercise of discretion cannot be easily tempered with by an appellate Court. This principle is clearly set out in the case of **Mbogo and Another v Shah** 1968 EA 93. It was stated thus: -

> *"A Court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter as a result arrived at a wrong decision, or unless it*

is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been an injustice".

In the result, as there are no grounds to warrant this Court's interference with the sentence imposed by the High Court. We dismiss the appeal in its entirety. It is so ordered.

DATED at **MBEYA** this 25th day of October, 2014.

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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

P.W.BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL