IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 106 OF 2014

SAMSON DANIEL MWANG'OMBE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Karua, J.)

dated the 12th day of March, 2013
in
Criminal Sessions Case No. 30 of 2012

JUDGMENT OF THE COURT

22nd & 28th October, 2014

KILEO, J.A.:

The appellant was arraigned on an information for murder consisting of seven counts in the High Court of Tanzania at Mbeya in Criminal Sessions Case No. 30 of 2012. When the charges were read over to him he pleaded not guilty to murder but he offered to plead guilty to the lesser charge of manslaughter, an offer that was accepted by the prosecution. Facts of the case were read over to the appellant who agreed that they were correct. He was convicted of manslaughter upon his own admission of the facts that

were narrated on behalf of the prosecution. The facts which were narrated and admitted by the appellant briefly showed that on the date of the incident, at about 20.30hrs, the appellant had left a burning cigarette in his father's house which caused the fire which killed seven people who were in that house. After he had left his father's house he went to his lover Aziza d/o Karume in a confused state which prompted the lover to inquire as to what was amiss. The appellant replied that there was a fire across the road and when the lover attempted to go to 'witness the fire' the appellant stopped her and they decided to go to sleep.

After he had heard the antecedents and mitigating factors from the prosecution and the defence respectively, the trial judge proceeded to sentence the appellant to 5 years imprisonment on each count, sentences which were to run consecutively. Cumulatively, the appellant was to serve 35 years in prison.

There were two memoranda of appeal that were filed in Court, one by Mr. Justinian Mushokorwa, learned counsel who represented the appellant at the hearing of the appeal, and another memorandum which was filed by the appellant himself. The memorandum of appeal filed by the appellant himself was against sentence only. After he had consulted with his client,

Mr. Mushokorwa decided to abandon the memorandum that had been filed by the appellant.

The memorandum filed by Mr. Mushokorwa was against both conviction and sentence. It is stated in the first ground of appeal filed by Mr. Mushokorwa that the plea made by the appellant was equivocal to the charge of manslaughter, rather unequivocal to accidental killing. On the second ground it is complained that the sentence was excessive to a youth first offender and it ought to have been concurrent. It is submitted on the third ground that the learned judge erred to entertain extraneous matters in sentencing the appellant.

Submitting before us on the first ground Mr. Mushokorwa argued that the appellant's plea could not be said to be unequivocal since it was not indicated where the burning cigarette was left.

In the alternative, Mr. Mushokorwa submitted that should the Court find the plea to have been unequivocal then it should find the 35 years cumulative prison sentence imposed to be excessive. Citing Deli Bura versus the Republic [2002] TLR 8 at page 11 he argued that there were no special circumstances which would have entitled the learned judge to order the sentences to run concurrently.

On the third ground Mr. Mushokorwa urged us to interfere with the sentence as the trial judge in sentencing took into account some extraneous matters.

The appeal was vehemently resisted by Mr. Edwin Kakolaki, learned Principal State Attorney who was assisted by Ms.Lugano Mwakilasa, learned State Attorney. In his view the appellant himself having offered to plead guilty to the lesser charge of manslaughter, and having agreed to the facts that were read in court showed that the appellant admitted clearly that by his omission he caused the death of his father and six other people who were in the house where he had left the burning cigarette. Mr. Kakolaki referred particularly to the facts as appearing at page 9 of the record which are to the following effect:

> *"On 21st day of June 2010 at about 20.30hrs.the accused person arrived at his father's house. He smoked one cigarate, then he started another which he did not finish. He left the piece of the cigarette without putting out the flame and left and went to* ***Aziza d/o Karume's*** *house (his lover).*
> *The accused arrived at the house confused and without vitenge.* ***Aziza d/o Karume*** *asked him what was the problem, the accused replied that on the other side of the road there is fire,* ***Aziza d/o Karume***

wanted to go to witness the fire but the accused stopped her and they decided to sleep.

Early in morning accused left his lover's house alleging that he was going to collect vitenge. It was usual for the accused to leave early, it was about 05.30 hrs and he never returned until he was arrested."

And at page 10 -11 where the facts have it that:

> *"The sketch map of the scene of crime was drawn. Upon interrogation different witness alleged that the accused person has (sic) misunderstanding with his father. The accused person was arrested. Upon interrogation and the police and before justice of peace station (sic) he admitted that he left a burning cigarette at the house which caused the fire."*

At page 12 the appellant is recorded as having responded as follows:

> *"Accused: My lord, I heard the learned State Attorney narrating the facts of this case. They are, indeed, correct."*

On the issue of sentence Mr. Kakolaki argued that it was not excessive in the circumstances and it was proper for the judge to order that the sentences run consecutively considering that several people lost their lives due to the appellant's wrongful act and further due to the fact that he did not bother to go to offer help when he saw the fire burning.

Regarding the 3rd ground Mr. Kakolaki conceded that the learned trial judge took into account extraneous matters in sentencing the appellant.The

learned Principal State Attorney was however of the view that even if those factors had not been considered the sentence imposed was befitting in the circumstances of the case.

The first issue that we have to discuss is whether the appellant's plea of guilty to manslaughter was unequivocal. As noted above, the appellant was initially charged with murder but he offered to plead guilty to the lesser charge of manslaughter. The facts, some of which have been reproduced above and which the appellant admitted to be correct show that the appellant left a burning cigarette in his father's house which caused the fire and resulted in the loss of seven lives.

The question to ask ourselves is whether the appellant's admission to the facts as reproduced above amounted to an unequivocal plea to the charge of manslaughter.

Section 195 of the Penal Code defines Manslaughter as follows:

(1) Any person who by an unlawful act or omission causes the death of another person is guilty of manslaughter.

(2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether the omission is or is not accompanied by an intention to cause death or bodily harm."

Mr. Mushokorwa's argument was to the effect that in so far as the facts that the appellant conceded to could be interpreted to mean that he was admitting to accidental killing and not necessarily manslaughter, then his plea could not be taken to have been unequivocal. The learned counsel argued that of relevancy to circumstances was the fact that it was not certain where the appellant had left the burning cigarette. On the other hand, Mr. Kakolaki submitted that the appellant's conduct, particularly his failure to go and offer help to the occupants of the house that was on fire rendered the plea unequivocal.

The question, which we have already posed, is whether we can say, in the circumstances of this case that the appellant's plea was unequivocal. In Laurence Mpinga v. Republic [1983] T. L. R, Samatta, J. as he then was, dealt with the question as to when a plea of guilty of an accused can be taken to be equivocal. We fully endorse the principles that he set down in that case. He held:

"(i) An appeal against a conviction based on an unequivocal plea of guilty generally cannot be sustained, although an appeal against sentence may stand;

(ii) an accused person who has been convicted by any court of an offence "on his own plea of guilty" may appeal against the conviction to a higher court on any of the following grounds:

1. that, even taking into consideration the admitted facts, his plea was imperfect, ambiguous or unfinished and, for that reason, the lower court erred in law in treating it as a plea of guilty;

2. that he pleaded guilty as a result of mistake or misapprehension;

3. that the charge laid at his door disclosed no offence known to law; and

4. that upon the admitted facts he could not in law have been convicted of the offence charged.

In R. v. Yonasani Egalu and others, [1942]9 E. A. the erstwhile East African Court of Appeal held as follows with regard to pleas of guilty:

"In any case In which a conviction is likely to proceed on a plea of guilty, it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every constituent....."

We must confess that the rival arguments in this appeal with regard to the plea of the appellant have exercised our minds a great deal. However, at the end we have come to the settled mind, (bearing in mind that it was not certain as to where the burning cigarette which caused the fire was left, and the fact that the appellant is entitled to the benefit of doubt), that the admission to the facts as presented could also have meant that he was admitting to accidental killing which is not the same as manslaughter. We, in the event are constrained to find merit in the first ground of appeal which we accordingly allow.

Since the ground on sentence was in the alternative we will not address ourselves to it. In the end we nullify the whole proceedings in the High Court case, quash the conviction on the purported plea of guilty and set aside the sentence. We order that the case be remitted to the trial court for the appellant to plead afresh and the matter to proceed there in accordance with the law. The appellant shall in the meantime remain in custody to await his trial.

We order accordingly.

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