**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: MBAROUK, J.A., MUSSA, J.A, And JUMA, J.A.)**

**CRIMINAL APPEAL NO. 347 OF 2013**

**SAMWEL IZENGO @ MALAJA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Mwanza.)**

**(Sumari, J.)**

**dated the 20th day of September, 2013**
**in**
**Criminal Session Case No. 107 of 2010**

.....

**JUDGMENT OF THE COURT**

1st & 4th September, 2014

**MBAROUK, J.A.:**

In the High Court of Tanzania at Mwanza, the appellant, Samwel Izengo @ Malaja was charged with the offence of murder contrary to section 196 of the Penal Code. The information dated 19th October, 2010 filed against the appellant shows that on 27th day of February, 2009 at Mbela "B" Bomani area within Misungwi District in Mwanza Region he murdered one David S/O Samwel @ Malaja, his own son by beating him

all over his body because he was not attending classes. Later on 20-9-2013, the appellant offered a plea of guilty to a lesser offence of manslaughter contrary to section 195 of the Penal Code. The Republic had no objection to the plea made by the appellant. When the facts were read to the appellant, he accepted that they were true, hence the trial High Court accordingly convicted him with the lesser offence of manslaughter and sentenced him to fifteen years imprisonment. Dissatisfied, the appellant has preferred this appeal on sentence.

In this appeal, the appellant earlier on filed a three grounds memorandum of appeal which was later reduced to one main ground of appeal, namely: that the sentence was based on a wrong principle of the law for its failure to have expressly mentioned the legitimate mitigating factors which were not considered when sentencing the appellant.

At the hearing, Mr. Constantine Mutalemwa, learned advocate for the appellant submitted that the record shows that when the

High Court Judge sentenced the appellant, she mainly directed herself on the gravity and other issues but failed to consider the legitimate mitigating factors, such as:-

(1) That, the appellant was the first offender.

(2) That, the appellant pleaded guilty to the offence.

(3) That, the period the appellant remained in custody was not considered.

In support of his submission, Mr. Mutalemwa cited the decisions of this Court in the case of **Agnes Julius v. The Republic**, Criminal Appeal No. 188 of 2010 and **Sospeter Majala v. The Republic**, Criminal Appeal No. 318 of 2013 (both unreported).

Mr. Mutalemwa further submitted that he is very much aware that the maximum sentence for the offence of manslaughter is life imprisonment, but considering the fact that the trial High Court Judge failed to expressly mention that she has considered the mitigating factors as the principle of the law requires when sentencing the appellant, this is enough ground

for this Court to interfere with the sentence imposed on the appellant. For that reason, the learned advocate for the appellant strongly urged us to allow this appeal on sentence by reducing it to half of the one imposed by the trial High Court.

On his part, Mr. Castuce Ndamugoba, learned State Attorney who appeared for the respondent/Republic, strongly argued against the appeal. He submitted that, the sentence imposed on the appellant was not excessive at all, as it was according to law. He added that the sentence imposed was fair considering the circumstances of the case. To some extent, the learned State Attorney later agreed that the High Court Judge was not clear enough as to whether she considered the mitigating factors when sentencing the appellant. The learned State Attorney further submitted that, even if the High Court Judge would have considered the said mitigating factors, she would have arrived at the same sentence she had issued, as the maximum sentence for a person convicted of manslaughter is life imprisonment. He reiterated that the fifteen years sentence is not a manifestly excessive sentence as it is according to law as per

the circumstances of the case. In support of his submission he cited to us the decision of this Court in the case **Sospeter Majala** (supra). He finally prayed for the appeal to be dismissed.

At this juncture, we have found it prudent to examine even if briefly the facts which led the trial court to issue the sentence of fifteen years imprisonment to the appellant after he pleaded guilty to a lesser offence of manslaughter.

On 27/02/2009 at around 20.00 hrs the appellant was back home from his evening outing. When he reached there he found his children David Samwel (deceased) Magesa Samwel, Paulo Samwel and Suzana Mathias, a house girl. The children were in the sitting room watching Television. Dinner was ready and all ate. At around 21.00 hrs the appellant told his children David and Magesa to escort him to Mitimirefu place. The children accompanied the appellnt and at Mitimirefu they found their teacher Sebastian Mtimba who was a teacher at the school where the deceased attended. The appellant and the teacher together

with the two children entered the Mitimirefu bar. They were drinking beer and children drunk soda.

At around 23.00 hrs the appellant and his children went back home. While at home, the appellant started asking David why he was not attending classes but deceased denied the allegation that he was not attending classes. The appellant then entered his room and took a stick and started beating the deceased all over his body. Deceased got injured and ordered to go to sleep.

On 28/2/2009 the appellant went out at around 8.00. a.m. leaving behind the deceased asleep. The deceased slept all the day. At around 16.00 hrs the appellant came back home and found the deceased was still asleep. He pulled him from the bed asking him why he is still asleep. The deceased cried for pardon and Suzan Mathias asked the appellant to stop beating the deceased but in vain. At around 17.00 hrs the deceased died.

On 2-3-2009 the deceased body was examined and postmortem report revealed cause of death was due to respiratory failure due to severe traumatic injuries (right haemothorax) and trauma head subdural bleeding (right Hemisphere of brain).

As pointed our earlier, the appellant agreed that the facts which were read to him were all true. When he was allowed to mitigate, the appellant's advocate prayed for leniency for the following reasons:-

- "Accused and deceased are parent and child. He would not wish to see his son dead.
- Accused came home from evening outing and ate together with his children and this shows how fatherly he was. The trip to Mitimirefu was good intended to see the teacher to discuss the education fate of his children. He even offered them soda not beer.

- The reasons to beat the child is because he defaulted classes, so he had no intention to kill his son.
- Accused drunk beer with the teacher and that might have intoxicated him and motivate him to act the way he did.
- Accused is a medical doctor so his profession is needed by the public.
- He is a first offender.
- It was an accident.
- He has been in custody for 5 years plus. So we pray for the period be taken into account.
- The conduct after death is not a strange habit as he was scared of what he did, not that it proves the intention."

In sentencing the appellant the trial Judge stated as follows:-

*"I have considered both submissions by the counsels. I have however, considered the weapon used to chasticize the deceased who was a child of 14 years old; the stick. The stick exhibit P.1 used even to an adult would have killed; it is not a small stick so to speak. But again the area of the body beaten i.e. head is a very sensitive area of the body. Not only the stick we are told he inflicted to the deceased fits and kicks. All these shows that accused excessively punished his son, the deceased. In a way the beating were brutally inflicted to the deceased despite the fact that he deserved punishment from his parent/father.*

*The habit of chasticizing children excessively should be deterred by awarding severe punishment to parents like the accused to deter the like offenders."*

From the quotation above, there is no doubt that the trial Judge failed to expressly point out the mitigating factors claimed by Mr. Mutalemwa, instead she put emphasis on the gravity of the offence.

From what we have gathered above, we are of the considered opinion that, there are two main issues for the determination of this appeal:-

(1) Whether the trial High Court Judge failed to take into account, the material factors raised in the appellant mitigation when sentencing him.

(2) Whether such failure is sufficient ground to justify us to interfere with the sentence imposed to the appellant by the trial court.

As for the first issue, whether when sentencing, the trial judge failed to take into account material factors that the appellant had raised in his mitigation, this Court through its various decisions has established guiding principles to be followed before an appellate court can interfere with the sentence imposed on the accused by a trial court. The following are the

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according to its own facts and circumstances. Hence, any time a new principle may arise and develop such a list.

In the instant case, it is a fact that the trial Judge failed to state clearly that she has considered important legitimate mitigating factors when sentencing the appellant. For example, the trial court failed to state clearly factors such as that the appellant pleaded guilty and the time he remained in custody. The main factors considered by the trial court when sentencing the appellant were the gravity and other circumstances but not the above stated mitigating factors. We agree with Mr. Mutalemwa that in a process of sentencing, the gravity of the offence and legitimate mitigating factors have to be equally considered. For that reason, we are constrained to answer the first issue in the affirmative.

Having answered the first issue in the affirmative, now let us examine whether such a failure is sufficient ground to justify us to interfere with the sentence.

Considering the fact that each case has to be looked at its own circumstances, we have been extremely cautious in examining whether the circumstances in this case allow us to interfere with the sentence imposed on the appellant. Guided by what was observed in the case of **Sospeter Mayala** (supra) where it was stated as follows:-

> *".....concerning the mitigating factors, with respect,* ***the only detectable error committed by the learned Judge was not to have expressly mentioned that he took into account the appellant's plea of guilty as an important factor in sentencing****. In* ***Elias Mangwela v. R,*** *Criminal Appeal No. 136 of 2003 (CAT, unreported) the High Court .... Fell in the same error and we respectfully held that* ***as it was not certain to the count whether or not it had taken the guilty plea as a relevant***

***consideration, the doubt had to be resolved in favour of the appellant."***

*(Emphasis added).*

As the trial Judge failed to expressly mention that she took into account the earlier stated legitimate mitigating factors, we are of the considered opinion that, that is sufficient ground to justify us to interfere with the sentence of fifteen years imposed on the appellant. One of the appellant's mitigating factor which was not expressly mentioned when he was sentenced by trial Judge is the aspect that he remained in custody for a period of nearly six years before being sentenced. We are of the opinion that such factor is an important one for consideration in the process of sentencing. As the trial Judge failed to expressly mention it, that creates doubt whether she considered it or not, hence such a doubt has to be resolved in favour of the appellant.

Considering the circumstances stated above, we are of the opinion that we are justified to interfere with the sentence imposed on the appellant and we accordingly reduce it by six years. Hence, the appellant should serve the sentence of nine

years imprisonment instead of fifteen years imprisonment. The said term of imprisonment should begin from the day he was convicted and sentenced. In the event, this appeal on sentence is allowed to the extent stated above.

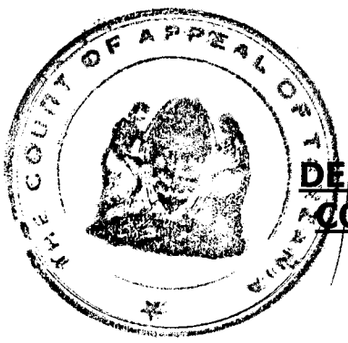
DATED at MWANZA this 3rd day of September, 2014.

M.S. MBAROUK
**JUSTICE OF APPEAL**

K.M. MUSSA
**JUSTICE OF APPEAL**

I.H. JUMA
**JUSTICE OF APPEAL**

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




M.A. MALEWO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**