IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: RUTAKANGWA, J.A., MANDIA, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 274 OF 2009

MATHIAS S/O MASAKA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Wambali, J.)

dated the 20th day of November, 2009
in
Criminal Sessions Case No. 24 of 2008

JUDGMENT OF THE COURT

5th & 11th December,2014

RUTAKANGWA, J.A.:

We have found it apt to preface this judgment with an exceedingly instructive passage from the able judgment of the High Court of Tanzania in the case of **FRANCIS CHILEMA v R** [1968] H.C.D.510. The passage reads:

> *"It is generally, if not universally, recognised that an accused pleading guilty to an offence with which he is charged qualifies him for the exercise of mercy from the court. The reason is, I think obvious, in that one of the main objects of punishment is the reformation of the offender. Contrition is the first step toward reformation,*

and a confession of a crime, as opposed to brazening it out, is an indication of contrition. ***Therefore in such a case a Court can, and does impose, a milder sentence than it would otherwise have done".*** [Emphasis is ours].

The above passage, to which we subscribe wholly , was quoted with approval by this Court in **BERNADETA PAUL v.R** [1992] T.L.R.97, while reducing a sentence of four (4) years imprisonment to such a term as would result to her immediate release from prison. Bernadeta Paul, as the appellant herein, had been convicted by the High Court, on her own plea of guilty, of the offence of manslaughter.

The appellant before us was initially charged with the murder of one Bundala Ntega @ Idoko on 29th July, 2007. When the information for murder was read out to him on 11th November, 2009, he pleaded thus:-

" It is true but it was unfortunate killing."

A plea of not guilty was correctly entered. Thereafter, Mr. Mkoba, the learned defence counsel, informed the trial High Court that the accused was offering a plea of guilty to the lesser offence of manslaughter. Mr. Ahmed Seif, learned State Attorney, had no objection to that. Then the

learned trial judge ordered for a formal substitution of the charge for manslaughter, which was done.

When the information for manslaughter was read out to the accused on 20th November, 2009, he readily pleaded guilty, and a guilty plea was entered. Thereafter the prosecuting State Attorney gave the following facts:-

> " *The accused Mathias Masaka a resident of Isagehe village Nzega district is charged of Manslaughter by causing the death of Bundala Mtega @ Idako.*
>
> *On 29/7/2007 the accused came from the traditional dance* ***during midnight*** *and when he reached home he asked his wife to prepare food for him.* ***The accused was drunk by then.*** *Food was prepared by the wife. When the accused was waiting for food one person Joseph Mazuli appeared singing and the accused asked why he was singing at his home and the fight started. Joseph Mazuri was overpowered by the accused and decided to run away. Thereafter the deceased (Bundala Mtega @ Idako) arrived at the house of the accused. The accused started beating the deceased believing that it was Joseph Mazuli who had come back. Unfortunately the accused beat the deceased on his head by a stick and the deceased fell down and died instantly.*

Neighbours heard the noise of people fighting and went to the accused's house. The accused told neighbours who went that he was the one who had killed the deceased. He was arrested and sent to the police station. The report of the doctor shows that the deceased died because of "Cerebral Haemorrhage." The Prosecution prays to tender Post Mortem Report as exhibit".[Emphasis is ours].

Mr. Ahmed further told the trial High Court that the appellant admitted causing the death of the deceased both in his cautioned statement (exh. P2) and extra- judicial statement (exh.P3). The accused, now appellant, admitted these facts and was convicted accordingly.

Mr. Ahmed Seif informed the learned trial judge that the accused was a first offender and significantly added that:

"The Court should way (sic) the sentence on the circumstances of the case".

In mitigation, Mr. Mkoba had this to say:

"The Court may consider that the accused is a first offender. He has also stayed in remand since 27/7/2007 which is almost two years and four months now. The accused has been cooperative throughout the case from

arrest to today when he has pleaded guilty and thus saved the time and costs to the court. The circumstances of the case should also be looked in that it was the deceased who went to the accused house and that the unfortunate death occurred. The accused has twelve children who depend on him. The accused is also suffering of hernia which gives him problems during the cold season. That is all."

In sentencing the accused, learned trial judge reasoned thus:

> *"The Court has taken into consideration the mitigating factors by both the prosecution and the accused person. In view of the fact that the death of the deceased occurred at the house of the accused who had already fought with Joseph Mazuri, and in view of the fact that there is no indication that the deceased went to the accused not for the purpose of fighting, the accused is sentenced to imprisonment for seven years in jail. It is so ordered".*

The accused was aggrieved by this custodial sentence, hence this appeal.

Before us, the appellant was represented by Mr. Musa Kassim learned advocate. On the side of the respondent Republic, Mr. Juma

Masanja, learned State Attorney, appeared. Mr. Kassim approached the Court with one substantive grievance. This was:-

> " *That, the trial judge erred in law for not taking into account the appellant's mitigation factors, the fact which lead (sic) to excessive jail sentence."*

Submitting in elaboration of the above ground of complaint, Mr. Kassim briefly contended that the prison sentence of seven years was too excessive in view of the fact that the appellant was drunk, had readily pleaded guilty and had been in remand prison for over two years before the custodial sentence was imposed. He was also critical of the learned trial judge's approach of making a sweeping conclusion on the mitigating factors without mentioning the specific factors he had considered. On this he relied on the Court's decision in **SIMON BAHATI @ MAGUTA v. R.,** Criminal Appeal No. 107 of 2010 (unreported). Sincerely believing that the seven year sentence was manifestly excessive in the peculiar circumstances of this case, he implored us to reduce it to such an extent as would result in the immediate release from prison of the appellant.

Mr. Kassim's impassioned plea for the Court's intervention, did not soften up Mr. Masanja. The latter was of the firm view that the impugned sentence was not excessive. It was his serious contention that the learned sentencing judge exercised his sentencing powers judicially and the appellant had proffered no cogent reason to justify our interference. He sought support for his position from the Court's decisions in :-

(a) **YOHANA BALICHEKO v. R** [1994] TLR 5,

(b) **SELELI JISABA@ MWANAPANGU v.R**, Criminal Appeal No. 183 of 2013 (unreported) etc.

Mr. Masanja also referred us to a quotation from Slattery's Handbook on Sentencing, cited by the Court in the case of **Simon Bahati** (supra), (a passage he read half way to suit his convenience). He accordingly pressed us to dismiss the appeal.

We are fully aware that in disposing of this appeal, we shall not purport to re-invent the wheel. The law governing appeals of this nature is well settled and we lack the temerity to alter it. In **SILVANUS LEONARD NGURUWE v.R** [1981] T.L.R 66, this Court succinctly stated that before it could interfere with the sentencing court's discretion:-

" ..it must be satisfied either that the sentence imposed was manifestly excessive, or that the trial judge in passing the sentence ignored to consider an important matter or circumstances which he ought to have considered or that the sentence imposed was wrong in principle."

There is no claim here that the learned sentencing judge did not consider the mitigating factors at all. The complaint is that had he explicitly addressed his mind to the specific highly convincing mitigating factors, he would not have imposed a custodial sentence in the circumstances of this case.

As we have already shown above, the learned judge adopted a general approach. He simply said that he considered "the mitigating factors by both the prosecution and the accused person". From this phrase it is obvious that the learned judge had appreciated the undisputed fact that even the prosecution had not called for a severe sentence. The learned State Attorney had urged the trial High Court to impose a sentence having regard to the "circumstances of the case" before it. Whether the

learned judge remained alive to this fact in assessing the appropriate sentence is not obvious from the record.

The above omission notwithstanding, we are aware that the generalised approach taken by the learned sentencing judge does not find favour with this Court. For instance, in **SIMON BAHATI @ MAGUTA** (supra), the Court lucidly said thus:-

> *"However we agree with Mr. Kassim that it is not clear from the record that the trial judge took into account the mitigating factors raised by the appellant. A general conclusion was reached by the trial judge without making specific reference to the mitigating factors".*

After so observing the Court embarked on the exercise of looking at the specific advanced mitigating factors. The factors were that the appellant in that case was a first offender, had readily pleaded guilty to the charge, was thirty years old when he committed the offence and had been in remand prison for one year prior to conviction. It proceeded to reduce

the sentence by one third. We laud this pragmatic and objective approach, and we urge all sentencing courts to remain faithful to it.

In the case be hand, the appellant and prosecution had put forward the following mitigating factors:

(i) the appellant is a first offender;

(ii) the appellant had readily pleaded guilty;

(iii) the appellant had been in remand custody for two years and four months (because, for reasons not obvious to us, the prosecution had at first opted to charge him with an unbailable murder offence);

(iv) the appellant had from day one shown full co-operation with the law enforcement agencies by admitting liability for the deceased's death;

(v) the appellant had a family of twelve children, and

(vi) the appellant was suffering from hernia.

Not listed among these factors, was the age of the appellant which as we have gathered from the record before us to be 47 years at the time of the commission of the unpremeditated killing.

We are aware that sentencing is a judicial process. The sentencing powers by any court must therefore be exercised judicially and not arbitrarily. Sentencing is not a mechanical process but a balancing act, taking into account the needs of the community and that of the accused. Furthermore, a sentence imposed must have a clear objective and properly rationalized otherwise it becomes a non-utilitarian mechanical process. What does one want to achieve in imposing a certain sentence? That should always be the main consideration. We have respectfully found out that the learned judge did not attempt to show the purpose of sending a remorseful and contrite appellant to prison.

As we pointed out at the outset "one of the main objectives of punishment is the reformation of the offender" and definitely not retribution. Indeed, this is the primary objective of punishment which is on the currency . It is not disputed here that the appellant, a first offender by accident, readily admitted his offence. Had the deceased not intruded into the appellant's domain at that odd hour (mid-night) when the drunk appellant was settled at his home waiting for his food, death would not have visited him. In the case of **SIMON BAHATI @ MAGUTA** (supra)

relied on by both Mr.Kassim and Masanja, but for different reasons, this Court approvingly cited Slattery's Handbook (supra), wherein he says:

> *" An appeal Court will also alter a sentence when the trial court overlooked a material factor. Such as that the accused is a first offender or* ***that he has committed the offence while under the influence of drink."***

In this case it is obvious that the learned sentencing judge overlooked favourable material factors. **One,** that the appellant committed the offence while under the influence of drink when the deceased followed him at his home in the dead of the night. **Two,** and disturbing to us, the learned judge never considered the welfare of the remorseful appellant's wife and twelve children before resorting to a prison sentence. A family is the nucleus of any society. So the welfare of a family or families any where is the concern of the community. **Three**, the offence was committed under the cover of darkness, when the appellant could not easily detect whether this second intruder, who apparently neither introduced himself nor made known the purpose of his late visit, was armed or not. **Four**, the appellant never used a lethal weapon in his

attempt to ward off the silent intruder. Although these factors were not fronted by the parties, the learned judge had a duty to consider them. We are now a shade unsure if the learned judge we would have imposed a custodial sentence on top of the time the appellant had already spent in custody if he had considered these pertinent factors. It is from this perspective that we are increasingly of the view that given the circumstances of this case the custodial sentence imposed was not only manifestly excessive but also inappropriate and ought to be interfered with by this Court. The appellant was entitled to a more lenient sentence.

On the basis of the above considerations, we reduce the sentence of seven years imprisonment to such an extent that would result into the appellant's immediate release from prison.

In fine, we allow the appeal in its entirety.

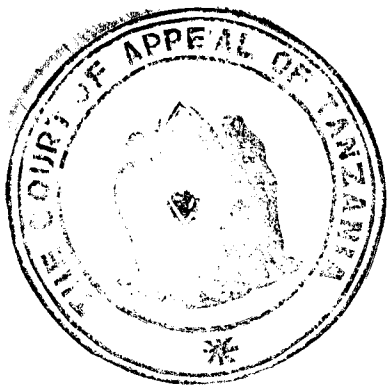
DATED at **TABORA** this 10th day of December, 2014.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL