IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LUANDA, J.A., MASSATI, J.A. And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 418 OF 2015

TOFIKI JUMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mwambegele, J.)

dated the 15th day of October, 2014
in
Criminal Session Case No. 82 of 2013

JUDGMENT OF THE COURT

23rd & 25th November, 2015

MASSATI, J.A.:

The appellant was convicted of the offence of manslaughter by the High Court sitting at Tabora, and sentenced to 10 years imprisonment.

It was alleged that on 13/6/2011 at Kichwere Relini area, Gungu Ward, Kigoma District and Region, the appellant caused the death of one JUMANNE MUSTAFA. According to the undisputed facts, at about 8.00 p.m. on the material night, the appellant asked his wife, Neema to send his handset to

have it re-charged at one Khadija Mikidadi's place at Tambuka Relini area. She obliged, but the appellant thought she took unusually long. So he decided to follow her. He did not find her at Khadija's place. On his way back, he found silhouettes of two people in front of him. When he went closer, he discovered that the two silhouettes were in fact, the deceased and his wife, who were making love. He caught the deceased but the latter slipped off and tried to run away, but he got hold of him. Then a passerby, Bura Kamnyama appeared in the scene. A fight then broke up between the deceased on the one hand, and the appellant and the passerby, on the other. It was in the cause of this fight that the deceased sustained head injuries, which eventually led to his death. The appellant and his wife were arrested immediately, and initially charged with murder. Eventually, however, as indicated, he pleaded guilty to the lesser offence of manslaughter, and earned himself the sentence now sought to be challenged in this Court.

In assailing the sentence imposed on the appellant, Mr. Mgaya Mtaki, learned counsel, who appeared for the appellant in this Court filed only ground of appeal, which is:

"That the sentence of 10 years imprisonment on the Appellant was excessive in the circumstances of the case."

Arguing the appeal, Mr. Mtaki submitted that in sentencing the appellant, the learned judge gave undue consideration to the prayer by the prosecution for a deterrent sentence, but did not consider the totality of the circumstances of the case, particularly the fact that to a large extent, the deceased brought about his own death by his own immoral misdeeds and that no weapon was used by the appellant. It was therefore his submission that, the learned judge did not exercise his judicial discretion properly. Therefore, he called upon this Court to interfere and reduce the sentence, and thus allow the appeal. He brought to our attention the decision of this Court in **MATHIAS s/o MASAKA v R**, Criminal Appeal No. 274 of 2000 (unreported), and asked us to follow it.

On his part, Mr. Miraji Kajiru, learned State Attorney, supported the appeal. He unreservedly supported the arguments marshalled by Mr. Mtaki, that it was manifestly wrong for the trial judge to have ignored the

circumstances leading to the death of the deceased in sentencing the appellant. He therefore asked us to allow the appeal.

From the submissions of the parties, it is clear that the issue that we have to determine is, whether, the sentence of 10 years imprisonment is excessive in the circumstances, and if so, whether this Court can interfere in the said sentence?

The resolution of the above issue requires the recognition of two fundamental principles. The first is that, unless a statute prescribes otherwise, sentencing is a judicial discretionary function, normally in the domain of the trial court. According to the **FREE DICTIONARY** by PARLEX "discretion is the power or right to make decisions using reason and judgment to choose among acceptable alternatives". In all cases of judicial discretion, what is important to observe is that in exercising such function, the court must do so, not arbitrarily, but according to principles of justice, equity, law, rhyme and reason (See **MWITA s/o MHERE AND IBRAHIM MHERE v R** (2005) TLR 107).

The second principle is that, like in all cases of exercise of judicial discretion before interfering with the exercise of the lower court's or

tribunal's exercise of discretion, this Court may only do so on well settled principles, which are, that the Court must be satisfied that the decision is clearly wrong due to misdirections, or because the lower court or tribunal acted on matters on which it should not have acted upon or it has failed to take into consideration matters which it should have taken into consideration and in doing so, arrived at a wrong conclusion (See **MBOGO v SHAH** (1968) EA 93. The Court will also interfere with the exercise of that discretion if the decision is capricious, clearly biased, or made in excess of jurisdiction.

This Court has developed instructive jurisprudence on two areas on the question of sentencing. The first relates to broad guidelines that sentencing courts should follow, which include the seriousness of the offence, the factors leading to the commission of the offence, and lastly the period that the convict has spent in remand or police custody. (See **YUSUFU ABDALLA ALLY vs DPP** (Criminal Appeal No. 300 of 2009 (Zanzibar). The second category outlines the circumstances in which this Court could interfere with the sentence imposed by the sentencing courts. A number of decided cases establish those beacons. They are comprehensively reviewed in **NYANZALA MADAHA v R**, Criminal Appeal No. 135 of 2005 (unreported) and **MATHIAS s/o MASAKA** (op cit). In both cases the Court was

reviewing the principles upon which the Court can interfere with a sentence. They were listed as:

> *(i) Where the sentence is manifestly excessive or it is so excessive as to shock.*
>
> *(ii) Where the sentence is manifestly inadequate.*
>
> *(iii) Where the sentence is based upon a wrong principle of sentencing.*
>
> *(iv) Where a trial Court overlooked a material factor.*
>
> *(v) Where the sentence has been based on irrelevant considerations such as these race as religion of the offender.*
>
> *(vi) Where the sentence is plainly illegal, as for example, corporal punishment is imposed for the offence of receiving stolen property.*
>
> *(vii) Where the trial Court did not consider the time spent in remand by an accused person.*

(See also **RAJABU DAUD v R**, Criminal Appeal No. 106 of 2012 (unreported).

In the present case, it is common ground that the sentence of 10 years imprisonment is excessive. The reason cited is that the trial Court overlooked

material factors. Both counsel are at one that had the trial judge taken into consideration the fact that the appellant surprised the deceased fornicating with his wife, but resisted the arrest by fighting him, which fight eventually led to his demise, he would not have imposed such a sentence.

Under sections 195 and 198 of the Penal Code, a conviction of manslaughter attracts a maximum of life imprisonment. So, on the face of it, it appears that the sentence of 10 years was within this range. But the sentencing court also had other alternative sentences set out under section 25 or section 38 of the Penal Code excepting that of death, and of course, subject to other statutory limitations, such as those set out under the Law of the Child Act No. 21 of 2009 which prohibits custodial sentences on children, and statutory minimum sentences.

As succinctly put in **MATHIAS MASALA v R** (supra) sentencing is a balancing act between aggravating factors, mitigating factors, and the needs of the community and that of the convict. To arrive at an appropriate sentence, a sentencing court should not only consider the needs of the community which is expressed in the term "deterrence", but also both aggravating and mitigating factors. On receiving aggravating factors the

court then weighs them against the convict's mitigating factors, around the interests of the community which acts as the centrifuge.

But in imposing the sentence in this case, the trial court considered only the societal need for deterrence. As against the appellant's mitigating factors, the prosecution did not advance any aggravating factors.

In addition, we agree with both learned counsel that in the circumstances of this case, the cause of the fight, and whether or not any weapons were used were material factors that had to be taken into account when passing sentence on the appellant. As submitted by counsel, the appellant found the deceased and his wife in a compromising situation. He approached the couple and tried to apprehend them. Under ordinary circumstances, any man worth his name would have done the same. Moreover, the appellant had no weapon of any kind that could have caused the sort of injuries to the deceased's head that led to his death. And after that, the appellant immediately reported to the authorities, and surrendered to the police. In such a situation, we think, the community is expected to sympathise with the appellant.

It is for all the above reasons that we agree with the learned counsel that this appeal has merit. The sentence of 10 years imprisonment is manifestly excessive. We thus allow the appeal.

We order that the sentence is to be reduced to such extent as to result to his immediate release from custody, unless he is held there for some other cause.

DATED at **TABORA** this 24th day of November, 2015.

B. M. LUANDA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL