IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 347 OF 2014

GASPER SIMPLIS BANAI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Moshi)
(Munisi, J.)

dated the 15th day of July, 2014
in
Criminal Session No. 10 of 2011

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JUDGMENT OF THE COURT

12th & 23rd February, 2015

KILEO, J. A.:

The appellant, Gasper Simplis Banai who had initially been charged with murder contrary to section 196 of the Penal code was convicted of manslaughter contrary to section 195 of the Penal Code in the High Court of Tanzania sitting at Moshi in Criminal Sessions Case No. 10 of 2011. Dissatisfied by the decision of the High Court he preferred this appeal. Initially the appellant had written to Court expressing his intention not to proceed with the prosecution of his appeal but when it was called on for hearing Mr. Duncan Oola, learned advocate who was assigned to represent

the appellant asked the Court to ignore the letter and adopt the grounds of appeal that he had drawn up and filed on 11/2/2015 (just a day before the hearing). The respondent Republic was represented by Mr. Marcelino Mwamnyange, learned State Attorney. Though Mr. Mwamnyange came to Court knowing that the appeal was to be withdrawn on the basis of the appellant's letter which was filed in court on 31/1/2015 nevertheless he informed the Court that he would be ready to argue the appeal. We appreciate the learned State Attorney's stance as it helped in expediting the matter.

The memorandum of appeal consists of the following grounds:

1. *That the trial court erred to convict the appellant for manslaughter for the presumption of death which was not proved.*
2. *That the trial court erred to shift the burden of proof from the prosecution to the accused to prove his innocence contrary to the settled legal principles that prosecution needs to prove its case beyond all reasonable doubt.*
3. *That the trial court erred in law to admit exhibit P3 which seriously violates the provisions of section 50 of the Criminal procedure Act, Cap 20 RE 2002 thereby used it at the accused detriment.*

4. *That the trial court erred in law for not addressing the inconsistencies in the prosecution evidence and ruled the benefit of doubt to the appellant.(sic!)*

It will be helpful to state briefly the facts as they unveiled at the trial court.

The deceased, Daniel Gasper, was the appellant's son. The appellant and his wife who had three children became estranged in 2006. Upon their separation two of their children, the deceased and his brother Denis Gasper (PW1) stayed with their grandmother on their father's side (PW4) until when the appellant forcefully took them away. On the material date (round about 21st December 2007) the appellant' punished' the two children. Since that time the deceased was never seen alive again. The appellant was charged and convicted of assault in the SRM's Court at Taveta Kenya vide Criminal Case no. 90 of 2008. The court found as a matter of fact that the appellant had hit the victim in that case (Denis Gasper who was PW1 at the trial of this case) with an axe on the head.

Following the disappearance of the deceased a search was conducted. The appellant led the search party to several spots but in vain. Subsequently a

skull was recovered in the bush and next to it a Tshirt that the deceased's mother (PW2) said belonged to her son.

It was the prosecution case that the skull was part of the remains of Daniel and that death followed the injuries that were inflicted upon him by his father on the same day that he assaulted his elder son for which he was convicted at the SRM's Court of Taveta at Taveta Kenya.

Submitting before us Mr. Oola urged us to allow the appeal as death was not sufficiently proved. He pointed out that since the body was not traced and there was no DNA test that was done on the skull that was discovered, it could not be said that it was adequately proved that the appellant was responsible for the death of his son Daniel. In support of this argument he made reference to **Hunay Langwen and three others v. Republic** [2005] 154 where this Court at page 157 stated:

> *"The crucial finding in any charge of murder or manslaughter is whether there is a person who has been killed. The trial judgment has to make a categorical finding that someone is really dead and should not leave that to be by way of inference."*

The learned counsel also argued that the Tshirt that was found at the scene where the skull was found was not established to belong to the deceased.

Mr. Oola submitted further that after the evidence of PW1 was disregarded for inconsistence there was no other evidence upon which a conviction could be sustained and for that reason the appellant should have earned an acquittal.

Opposing the appeal Mr. Mwamnyange argued that there was ample evidence that the appellant caused the death of his son Daniel. He further submitted that the trial court ought not to have completely disregarded the evidence of PW1 as the inconsistencies in his testimony did not go to the root of the matter.

There are two major questions in this appeal which require answers. One is whether Daniel Gasper is indeed dead and if the answer is in the affirmative, who caused his death?

The following matters came out from the evidence that was led at the trial.

One, that on or about the 21st of December 2007 the appellant subjected both PW1 and the deceased to a 'punishment'. **Two**, the appellant was found guilty by a Kenyan court for the assault of PW1. There was evidence led at that trial that both PW1 and his brother Daniel were assaulted by the appellant. The trial magistrate commented that the injury suffered by the victim should have been classified grievous harm though the charge was one of assault. **Three**, the deceased has not been seen alive again from the date that their father 'punished' them. **Four**, subsequently, a skull was found in the forest and close by a Tshirt which was recognized by the deceased's mother, PW2. **Five**, the appellant who had custody of the deceased and his brother and who was the last person to be seen with never reported his missing son. **Six** though the appellant claimed that he had left his son at Dr. Kisanga's hospital it came to transpire that he never sent the child there.

In the light of the above circumstances we are satisfied that Daniel is indeed dead.

Having carefully considered the rival arguments by the learned counsel for the appellant and the learned State Attorney we are of the settled mind that the learned trial judge's finding as to the appellant's

culpability was justified. We also agree with the learned State Attorney's submission that it was not proper for the trial judge to disregard the evidence of PW1 completely as the witness was consistent in his evidence that their father seriously assaulted him together with his young brother. Inconsistencies that occurred were only as to details and did not go to the root of the matter. These could be expected considering his age and the time it took before the matter went to trial. Moreover, PW1's account of the assault was not without support as according to the investigator (PW5), the appellant himself told him that he had subjected the children to a punishment using the blunt side of a machete. It is on record that the appellant further told PW5 that he had taken the injured child to Dr. Kisanga where he was admitted. Upon investigation it was found as a matter of fact however that the child was never taken to Dr. Kisanga's hospital.

According to PW5 the appellant told the police that he would show them where he had buried the child. He took the search team led by PW5 to the forest and pointed out several spots where he claimed he had buried the body but the body was not seen until when eventually a skull was discovered somewhere in the forest.

Mr. Oola argued that in the absence of a DNA test the skull could not be said to be part of Daniel's remains. We are aware that DNA test is a recent phenomenon in our country. It was only in 2009 that the Human DNA Regulation Act was passed. The absence of the DNA test does not in the circumstances of this case raise any doubt in our minds as to the fact that Daniel is indeed dead and that his father-the appellant, is the one who caused his death.

Before we conclude we wish to make reference to Mr. Mwamnyange's submission that the sentence of 15 years imprisonment was manifestly inadequate in the circumstances. Much as we may share his concerns about the sentence being lenient given the circumstances of the case, considering the principles laid down in several authorities on powers of an appellate court to interfere with a sentence imposed by a trial court, we are constrained to let the matter rest at that.

In**Patrick Matabaro @ Siima & Another v. Republic**, Criminal Appeal No. 333 of 2007 (unreported), **Medard Karumuna @ Lugosura v. Republic**, Criminal Appeal No. 332 of 2007 (unreported) and **Philipo Pastory & Another v. Republic**, Criminal Appeal No. 331 of 2007 (unreported) the Court made reference to a **Handbook on Sentencing**

with a particular reference to Tanzania by Brian Slattery where the learned author made the following observations with regard to interference by an appellate court of a sentence imposed by a trial court:

> *"The grounds on which an appeal court will alter are relatively few, but are 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 is sometimes put, so excessive as to shock. It should be emphasized that that "manifestly" is not mere decoration, and a court will not alter a sentence on appeal simply because it thinks it is 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 sentencing.....An appeal court will also overturn a sentence when the trial court overlooked a factor, such as that 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 based 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."*

Given the above principles we are settled in our minds that no sufficient ground has been laid to entitle us to interfere with the sentence imposed.

In the result we find the appeal by Gasper Simplis Banai to be lacking in merit. We accordingly dismiss it. Both conviction and sentence are sustained.

DATED at **ARUSHA** this 18th day of February, 2015

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL