IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CRIMINAL APPEAL NO. 211 OF 2014

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

JUMA MNIKO MUHERE . . . . . APPELLANT

VERSUS

THE REPUBLIC . . . . . RESPONDENT

(Appeal against sentence from the Conviction/Judgment of the High Court of Tanzania at Mwanza)

(Mwambegele, J.)

dated the 27th day of March, 2014

in

HC. Criminal Sessions Case No. 11 of 2014

JUDGMENT OF THE COURT

25th November & 4th December, 2015

RUTAKANGWA, J.A.:

But for the adamancy of Ms. Ajuaye Bilishanga, learned Senior State Attorney, in resisting this otherwise meritorious appeal against the severity of sentence only, we would not have overstrained ourselves to reach the conclusion we are destined for in this appeal.

From the above premise, we have found it apt to preface this judgment with this quotation from the judgment of this Court in the case of

KATINDA SIMBILA @ NG'WANINANA V. R., Criminal Appeal No. 15 of 2008 (unreported). The Court lucidly said:

> *"Admittedly, the sentencing process is one of the most intractable and delicate tasks in the administration of justice,* ***especially where the law has not fixed a minimum sentence.*** *This is where ingenuity and wisdom work together in order to lead us to substantive justice as no two cases are identical in all circumstances. This is all because there is no common yardstick or denominator for measuring the sentence which will match every case."*
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> *[Emphasis is ours].*

The appellant in this case was convicted upon his own plea of guilty of the offence of manslaughter contrary to section 195 of the Penal Code, Cap. 16, Vol. I R.E. 2002 ("the Penal Code"). The punishment for manslaughter is prescribed in section 198 of the Penal Code, which reads:

> *"S. 198 - Any person who commits manslaughter is liable to imprisonment for life."*

The law, therefore, has fixed a maximum sentence for the offence of manslaughter but not a minimum sentence.

As alluded to above, this appeal is against the sentence of life imprisonment imposed on the appellant following his own plea of guilty for unlawfully causing the death of one Karagwa w/o Mniko on 29th October, 2008. According to the facts of the case which were admitted by the appellant, the latter unlawfully caused the death of his step mother as a result of provocation from the deceased and furthermore in self-defence as he warded off an attack from the armed deceased.

Before the appellant was sentenced to that maximum sentence, the learned State Attorney, one Mr. Mayenga, had told the learned sentencing judge that the appellant (then accused) was a first offender. All the same, he pressed for a *"stringent sentence"* which would serve as a lesson to others, especially in the region from which the appellant hails *"in which acts as the present one are rampant."* We have noted with consternation, that the learned State Attorney had not given any statistics or data to bear him out in this assertion.

On his part, Mr. Malongo, learned defence counsel, made an impassioned plea for leniency. Grounds advanced by Mr. Malongo in mitigation were:-

a) The accused was a first offender;

b) The accused had been in remand prison for about 6½ years;

c) The deceased was the author of her own death as she was the first one to assault the appellant with a hoe;

d) The accused acted in self defence and under provocation and hit the deceased once with a panga which was in his possession at the time;

e) The accused had shown great remorse for his act from the outset as he surrendered himself to the village authorities and had readily pleaded guilty; and

In addition, the appellant himself had this to tell the learned judge:

"I pray for lenience. It was by bad luck. I am an orphan, my mother died long ago. It was 2003. I married my wife paying dowry on my own from the money I got from tilling the land. I really am sorry and repent for what happened."

All these facts were not disputed by the prosecution, but received scanty consideration, if any, from the learned sentencing judge.

In handing down a sentence of life imprisonment, the learned judge made a fleeting reference to some of the above mitigating factors. And after conceding that the appellant inflicted only one fatal blow, he proceeded to surmise that:

> *". . . the accused person exhibited cruelty and was the one who instigated the quarrel by going to where the deceased was while armed with a panga and taking the deceased to the shamba while still armed with the panga which ultimately was used to cause the deceased's death.*
> *In the premises, the court sentences the accused Juma Mniko Mhere to life imprisonment."*

The appellant was, evidently, greatly perturbed by this sentence, hence this appeal.

Prior to being assigned counsel, the appellant had lodged his memorandum of appeal containing four complaints. These are:-

> *"1. That, the sentence delivered by the High Court was excessive.*

2. *That, the court did not consider the time spent when I was remanded.*
3. *That, the Court did not prove* ***mens rea.***
4. *That, the Court did not take into consideration my mitigations."*

At the hearing of the appeal the appellant appeared in person but was being advocated for by Mr. Anthony Nasimire, learned advocate. For the respondent Republic, Ms. Ajuaye Bilishanga, as already indicated, appeared.

Mr. Nasimire opted to adopt the memorandum of appeal lodged by the appellant, but for obvious reasons abandoned the 3rd ground of appeal. He argued the remaining three grounds together. He was right, as these boil down to one crucial ground of appeal. This is that had the learned sentencing judge objectively, considered the highly touching and uncontested mitigating factors, he would not have imposed the sentence of life imprisonment, which in the circumstances of this case was manifestly excessive. It was his strong contention, therefore, that the learned judge wrongly exercised his discretion. He accordingly urged us

to interfere and reduce the sentence so as to do justice to the remorseful appellant.

Ms. Bilishanga, on the other hand, was unpersuaded. To her, the learned High Court Judge properly exercised his sentencing discretion and this Court cannot interfere with it unless it is satisfied that the sentence is manifestly excessive and/or that he failed to consider relevant factors.

We think that the law on the only issue for determination in this appeal is well established. An appellate court will not interfere with the sentencing discretion of the trial judge or magistrate unless it is evident that the impugned sentence is patently inadequate illegal or manifestly excessive: See, for instance, **R. v. MOHAMEDAL ALI JAMAL** (1948) 15 EACA 126. Furthermore, an appellate court will interfere where *"it is evident that he has acted upon some wrong principle or overlooked some material factor"*: see, for instance, **JAMES s/o YORAM V. R.** (1951) 18 EACA 147, **KATINDA SIMBILA,** (supra), **MASANJA CHARLES V. R.,** Criminal Appeal No. 219 of 2011 and **EDWARD MANGE V. R.,** Criminal Appeal No. 51 of 2014 (both unreported), among many others.

We are also very much alive to the fact that sentencing is a judicial function. Nevertheless, it is probably fair to say that it *"is one of the least generally understood functions undertaken by the courts, beyond a superficial coverage by the media of newsworthy and often sensational cases"* (Prof. Geraldine Mackenzie in her book *"HOW JUDGES SENTENCE").* This function, therefore, must be executed with objectivity with no room for overflowing sentimentalism (see, **BERNARD KAPOJOSYE V. R.,** Criminal Appeal No. 411 of 2013 (unreported)).

It is at this stage that the judge, magistrate and even the prosecuting attorney has to cast aside his or her personal emotions or even idiosyncratic views of the offence and/or offender and do justice to the convict according to law. This Court, for example, could not resist the impulse to frown upon the trial judge's caustic language in *"branding accused persons as animals to be incarcerated for life"*, in the case of **BENARD KAPOJOSYA** (supra). Such attitudes inevitably lead to lack of objectivity in sentencing.

It is, therefore, of utmost importance that in sentencing one says the right things supported by the facts on the record, gives the sentence the solemnity it deserves and avoids descending into a tirade or

jettisoning to the winds clear statutory provisions or settled principles of law. What one says and does in this exercise should exude the **feering** that we hate the offence and not the offender. Otherwise, we shall fail to achieve the primary objective of sentencing which is to reform the offender.

In our endeavour to reach a fair and just decision, we have remained alive to settled law that sentences which approach the maximum should only be imposed when the offence comes close to the worst of its type. In **REGINA v. MAYERA** (1952) SR 253, it was thus held:-

> *"It has been repeatedly stressed that the infliction of punishment is pre-eminently a matter of discretion of the trial court and that an appellate court will not interfere with the sentence unless it is manifestly excessive.* ***But in considering the quantum of a sentence regard must be had to the maximum penalty provided by law.*** *As the learned authors of Gardiner and Landsdown's Criminal Law say, at page 534 of the 5th edition of the work:*
>
> *"A maximum punishment is reserved for the worst offence of the class for which the punishment is*

provided. A court, in sentencing for an offence, should consider whether it may not be likely that far worse instances of the same class may in future come before it, and should keep some penalty in reserve in order to be able more severely to punish the greater offences. Thus it is undesirable to punish a first offender who steals a lamb with the maximum penalty ....for then no greater penalty can be inflicted on the hardened criminal, who steals an ox or a horse, or a number of sheep, unless he happens to come within the provision allowing a greater punishment in case of second or subsequent conviction."

[Emphasis is ours.]

We are also aware that it is a settled principle of law that an appellate court will interfere with the trial court's sentence where it is based on extraneous considerations. It will be instructive to return to what we held in the case of **WILLY WALOSHA v. R.,** Criminal Appeal No. 7 of 2002. We thus observed:-

"In the appeal before us, the trial judge not only did he import into the case prejudicial factors, he failed to take properly into consideration material factors which normally entitle an offender to leniency.

There were no known aggravating circumstances which would have influenced the judge to impose the sentence of 20 years imprisonment on the appellant. That sentence was, therefore, in the circumstances, manifestly excessive . . .

Before we part with this appeal we wish to observe that this is the fourth appeal coming before us in these sessions on similar grounds. It appears to us that, with respect, although ostensibly a judge may say that he has taken into consideration mitigating circumstances in assessing sentence, it is not always apparent that he has in fact done so. ***For example, first offenders who plead guilty to the charge are usually sentenced leniently, unless there are aggravating circumstances. Also, the period an offender has spent in remand custody before they are sentenced is also usually taken into consideration to reduce the sentence which the offender***

would otherwise receive. We expect judges will in future demonstrate more clearly, when assessing sentence, that they have properly taken into account both mitigating and aggravating circumstances of each individual case."

[Emphasis is ours].

We need not say more. Our present appeal provides a total vindication of our stance in the **WILLY WALOSHA** case (supra). We shall elaborate.

It was Mr. Nasimire's strong argument before us that the learned sentencing judge never adquately considered the mitigating factors but took into account extraneous matters to the effect that it was the appellant who had instigated the quarrel, which indeed, was not the case. It is true. He had gone there to seek a solution to their shamba dispute. It was also his strong contention that there was no aggravating factor to justify the imposition of the maximum penalty. Ms. Bilishanga offered no credible counter-argument.

It is true that *"the learned sentencing judge did import into the case prejudicial factors."* Apart from the factor pointed out by Mr. Nasimire, we

have gleaned two other such factors from his sentencing reasoning process. **One,** the appellant was sentenced to life imprisonment because he had used excessive force and *"exhibited cruelty."* We undestand that the use of excessive force was unconsciously resorted to, to ward off a vicious attack from the deceased (a fact not considered at all by the trial judge) when the appellant acted on the heat of passion on account also of provocation from the deceased. Acting in self-defence and under provocation reduced the killing to manslaughter. The use of excessive force, in the circumstances, was reognized by the law.

Two, we have also failed to gather from the record any perverse conduct on the part of the appellant which would justifiably have earned him a reputation for being cruel when he inflicted a single blow with the panga on the deceased leading to excessive haermorrhage which was the sole cause of death.

That the learned sentencing judge failed in our view to consider all together the touching mitigating factors, is proved by the sentence he imposed. We have already shown that the maximum sentence for the offence is life imprisonemnt. The appellant was sentenced to life impriosnment. How then can it be rationally and convincingly argued that

the host of mitigating factors were considered by the learned judge? Had they been considered he would not have receivd that sentence? Our answer is in the negative.

Furthermore, it is our settled view that the learned judge overlooked the settled principle of law that a maximum punishment is always reserved for the worst offence of the class for which the punishment is provided and/or for may be an unrepentant offender. What punishment, then, would the learned judge have imposed on the appellant had he pleaded not guilty and eventually convicted after a full trial? Even, Ms. Bilishanga failed to hazard an answer to this pertinent question.

In view of the above discussion, we are now of the settled minds that the impugned sentence is indeed unjustifiably manifestly excessive. We are, therefore, constrained to interfere with it . We accordingly quash it and set it aside and, all factors considered, we substitute thereof a sentence of four (4) years imprisonment from the date of his conviction.

In conclusion, we find ourselves under a duty to observe that sentencing courts should recognize the remorseful accused person's propensity for reform. Reformation and not retribution should be the core value of our criminal justice system. This will provided an incentive for

pleas of guilty in fitting cases, whose multiplier effect will most likely be expeditious disposal of criminal cases pending trial, reduced workloads for judges and magistrates, reduced case backlogs and definitely reduced avoidable appeals to this Court. Let us swim with the current while it serves, lest we lose our venture.

In fine, we allow this appeal to the extent shown above.

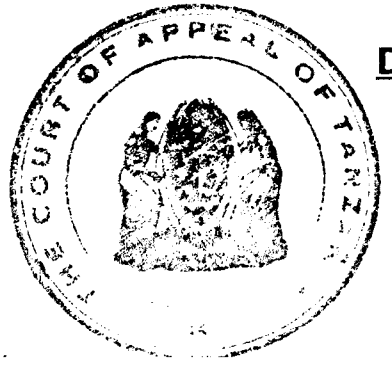
DATED at MWANZA this 3rd day of December, 2015.

E. M. K. RUTAKANGWA
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.



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DEPUTY REGISTRAR
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