IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CRIMINAL APPEAL NO. 323 OF 2014

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

SHIDA MANYAMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision/Judgment of the High Court of Tanzania at Mwanza)

(Sumari, J.)

Dated 3rd day of September, 2014
in
HC. Criminal Session Case No. 72 of 2012

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JUDGMENT OF THE COURT

9th & 11th December, 2015
MJASIRI, J.A.:

This is an appeal against sentence. The appellant Shida Manyama was initially charged with the offence of murder contrary to section 196 of the Penal Code, Cap 16, R.E. 2002 (the Penal Code). In the course of the trial he pleaded guilty to the lesser offence of manslaughter. He was convicted of manslaughter contrary to section 195 of the Penal code and was sentenced to fifteen (15) years imprisonment. Aggrieved by the sentence he has now filed his appeal to this Court. The background to this case is as follows:- On July 27, 2011 at Katunguru Village within Sengerema District the appellant caused the death of Asha Habibu. The deceased was the

appellant's wife. There were a series of misunderstandings between the two spouses. It was agreed between them that the deceased should go to her sister's house to undergo treatment to enable her to have a child. It was believed that she failed to conceive because of witchcraft practices. The appellant also wanted the deceased to convert to Christianity. The appellant heard rumors that the deceased was seeing another man. He went to look for her. When they met, they had a discussion and in the cause of that discussion the deceased asked for a divorce. The accused was very furious he retrieved his knife and stabbed the deceased. She died on the way to Sengerema Hospital. The cause of her death was excessive bleeding. In mitigation the accused stated that he was overcome with jealousy, he showed remorseness and cooperation by pleading guilty. He has also been in custody for two (2) years.

At the hearing of the appeal, the appellant was represented by Mr. Diocles Rutahindurwa, learned advocate and the respondent Republic had the services of Hemed Halfani, learned State Attorney. The appellant presented four grounds of appeal which are reproduced as under:-

1. *That the sentence imposed upon the appellant is so excessive in contrast to the circumstances of the crime.*

2. *The judge on trial failed to positively consider the entire circumstances of the crime and mitigating factors of the appellant before sentencing him to fifteen (15) years in jail.*
3. *That, the time the appellant had stayed in custody pending his trial had not been regarded by the trial judge.*
4. *That there were unknown aggravating circumstances that could/would influence the jurist to impose such a greater sentence to the appellant.*

In arguing the appeal Mr. Rutahindurwa confined himself to the main ground of appeal which is:-

> *"That the sentence imposed by the trial court was too excessive."*

The learned advocate submitted that the trial judge did not take into account all the mitigating factors when passing sentence. According to him there was no express consideration of the said factors. He relied on the case of **Said Issa @ Ngeleja V. Republic,** Criminal Appeal No. 54 of 2014, CAT (unreported).

Mr. Rutahindurwa also contended that the trial judge took into account extraneous factors. He made reference to page 13 of the record. He

submitted that it was the irrelevant extraneous factors which led to the excessive sentence of fifteen years being meted to the appellant.

Mr. Halfani on his part supported the sentence. He argued that the offence of manslaughter carries a maximum penalty of life imprisonment. He submitted that this Court cannot interfere with the sentence imposed by the trial court, unless the trial judge misdirected herself.

Mr. Halfani submitted that the trial judge took into consideration all the mitigating factors, even though she did not expressly itemize them.

Mr. Halfani conceded that the trial judge took into account extraneous factors, but he was of the view that this aspect did not impact on the sentence. He made reference to **Ngeleja's** case (supra) and **Sospeter Mayala V. Republic,** Criminal Appeal No. 318 of 2013, CAT (unreported).

We on our part, after a careful scrutiny of the record and taking in consideration the submissions by both counsel would like to make the following observations:-

It is settled law that sentencing is considered the primary prerogative of trial courts and they enjoy a wide discretion to determine the type and severity of a sentence on a case by case basis. In doing so they have to

consider the gravity of the offence, the circumstances of the offender and the public interest. An appellate court has a limited role in sentencing. In **Silvanus Leonard Nguruwe V. Republic** (1981) TLR 66 it was held that before the Court can interfere with the sentence imposed by the trial High Court the following factors have to be in place:-

1. *The sentence imposed was manifestly excessive or*
2. *The trial judge in passing sentence ignored to consider an important matter or circumstances which he ought to have considered.*
3. *The sentence imposed was wrong in principle.*

The sentencing decision is in the exercise of a discretion of the trial judge. This discretion cannot be easily tampered by an appellate court. This principle is succinctly set out in the case of **Mbogo and Another V. Shah** (1968) E.A 93.

It was stated thus:-

> *"A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong on the*

exercise of this discretion and that as a result there has been injustice."

See – **Rashid Kaniki V.R** (1993) TLR 258; **Yohana Balicheko V.R.** (1994) TLR 5 and **Mohamed Ratibu @ Said V.R.,** Criminal Appeal No. 11 of 2004 (CAT) unreported.

In **Mohamed Ratibu** (supra) it was stated thus:-

"It is a principle of sentencing that an appellate court ***should not interfere with a sentence of a trial court merely because had the appellate court been the trial court it would impose a different sentence.*** *In other words an appellate court can only interfere with a sentence of a trial court if it is obvious that the trial court has imposed an illegal sentence or had acted on a wrong principle or had imposed a sentence which in the circumstance of the case was manifestly excessive or clearly inadequate."*

[Emphasis provided].

Given the legal position, is there any basis for us to interfere with the sentence of fifteen years meted out to the appellant? **Firstly,** was the sentence excessive under the circumstances of the case? **Secondly,** were the mitigating factors taken into account by the trial judge?

We are not oblivious to the fact that a lethal weapon (a knife) was used by the appellant against a helpless woman who was not armed and whose only fault was to ask the appellant for a divorce.

In relation to the mitigating factors, we are of the considered view that the mitigating circumstances raised by the appellant were taken into consideration, though the judge did not expressly itemize the same. However it is also evident from the record that the trial judge took into account extraneous circumstances, when imposing sentence. At page 13 of the record the trial judge stated thus:-

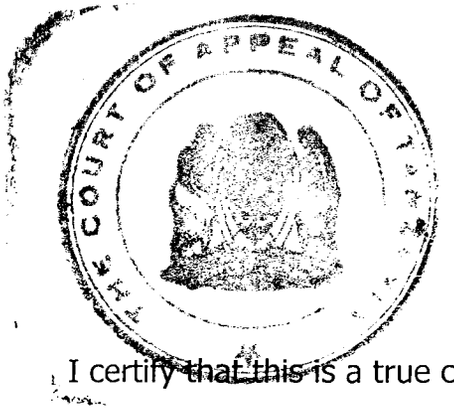
> *"I have given due consideration of the facts read out and the mitigating factors. We are told that the* ***accused planned a journey from Mwanza to Sengerema and that at the scene he had a knife which he used in the killing. The fact that the accused went to the deceased while armed with a knife gives impression that he had ill mind against the deceased*** *despite whatever words she might have uttered and provoked the accused."*
>
> *[Emphasis provided].*

It is obvious that had the trial judge not taken into account these extraneous factors, she would not have imposed the sentence she did. The facts read out to the appellant when she entered a plea of guilty do not at all reflect the conclusion reached by the trial judge before sentencing the appellant. An appeal court will always interfere with a sentence which has been passed on irrelevant considerations. See **Charles Mashimba V. Republic,** Criminal Appeal No. 86 of 2002 CAT (unreported).

Given the circumstances, we are inclined to interfere with the sentence of fifteen (15) years imprisonment and substitute it with the sentence of ten (10) years imprisonment from the date of his conviction. In the event, we allow the appeal to the extent stated hereinabove.

Order accordingly.

DATED at MWANZA this 10th 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.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL