IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MASSATI, J. A., ORIYO, J. A., And MMILLA, J. A.)

CRIMINAL APPEAL NO. 349 OF 2013

AKIDA RAMADHAN SALEHE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, at Mwanza.)

(Sumari, J.)

Dated the 02nd day of October, 2013
in
Criminal Session Case No. 94 of 2006

.....

JUDGMENT OF THE COURT

11th & 13th March, 2015

MASSATI, J.A.:

The appellant was initially charged with the offence of murder contrary to section 196 of the Penal Code. It was alleged before the High Court sitting at Mwanza, that on or about the 6th day of July, 2000 at 11.00 hours, at Mission Street Nyamagana District, Mwanza Region, he did murder ANDREW S/O ROBERT. He pleaded not guilty to that offence. But after several adjournments, the appellant changed his plea, and accepted that of guilty to the lesser offence of manslaughter contrary to section 195

of the Penal Code. He was accordingly convicted, and sentenced to 15 years imprisonment on 2/10/2013.

The appellant was aggrieved by the sentence. He has thus filed the present appeal. Mr. Stephen Magoiga, learned counsel, appeared for the appellant, and argued the two grounds of appeal he had lodged, together. The grounds were:-

1. That the Honourable trial High Court judge erred in law and fact in sentencing the appellant to serve a sentence of fifteen years in custody, which sentence is manifestly excessive in the circumstances of this case.
2. That the honourable trial High Court judge erred in law for not taking into account that the appellant pleaded guilty to the offence and his ill health which was vivid before her."

In his submission, the learned counsel submitted that the sentence of 15 years imprisonment was manifestly excessive considering the mitigating factors displayed before the trial court and the directions of section 337 (1) of the Criminal Procedure Act (the CPA). He also referred to the Court, the unreported decision of **WILLY WALOSHA VS R**, Criminal Appeal No. 7 of

2002 (unreported) which sets out the guidelines to be observed by trial courts in meting out sentences. Finally Mr. Magoiga prayed that the appeal be allowed to the extent that the appellant be released from custody, at most on conditional discharge.

But Mr. Hemed Halfani resisted the appeal. He also argued against the two grounds generally. He briefly submitted that although this Court could in certain circumstances, interfere with the trial court's discretion in sentencing, the present case was not one of them. He referred us to the principles set out in **MOHAMED RATIBU @ SAIDI VS R**, Criminal Appeal No. 11 of 2004 (unreported) which was followed **in FATUMA NURUDINI VS R,** Criminal Appeal No. 418 of 2013 (unreported). In his view, the sentence of 15 years fitted the crime and was not excessive, given the aggravating circumstances surrounding the nature of the offence. On probing from the bench, however, Mr. Halfani conceded that the learned judge's sentence was too short and lacked details of what she considered before passing sentence. Nertherless, he insisted that this alone did not call for this Court's interference with the sentence. He thus prayed for the dismissal of the appeal.

In his reply, Mr. Magoiga submitted that since the respondent has conceded that the trial judge did not follow the principles before sentencing the appellant, this alone was sufficient for that Court to interfere with the sentence. He reiterated his prayer that the appeal has allowed.

The general principle is that this Court would not ordinarily interfere with the discretion of a trial court, exercised when passing sentence, unless it is evident that it has acted on some wrong principle, or overlooked some material factors. (See **WILLY WALOSHA VS R.,** Criminal Appeal No. 7 of 2002 (unreported)).

In the present case, after convicting the appellant, the appellant's advocate gave 6 mitigating factors, namely that; the accused was a first offender, that he had been in custody for 8 years already by then; that the deceased was his friend, that the deceased was the author of his death; that the deceased was a notorious thieving street boy, and was in poor health and that the accused was repentant for what he did. At the hearing of the appeal, Mr. Magoiga, also drew the attention of the Court to the directions of section 337 (1) of the CPA. That section provides as follows:-

"s. 337. (1) In any case in which a person is convicted before any court of an offence not punishable with death and no previous conviction is proved against him, if it appears to the court before which he is convicted that, having regard to the youth, character, antecedents, health or mental condition, of the offender or to the trivial nature of the offence was committed, it is expedient to release the offender on probation the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties and during that period (not exceeding three years, as the court may direct), to appear and receive sentence when called upon and in the meantime to keep the peace and be of good behavior."

As seen above the learned counsel was of the view that the learned judge should have that provision in mind when sentencing the appellant. We

agree. But we further agree with the observations of this Court in **WILLY WALOSHA VS R.** (supra) that:-

> *"judges will demonstrate more clearly, when assessing sentence, that they have properly taken into account both mitigating and aggravating circumstances of each individual case."*

In the present case, in assessing sentence the learned judge stated:-

> *"All stated by the counsels for the accused are considered. I therefore sentence the accused to a fifteen years (15) imprisonment."*

This was inadequate. It was incumbent upon the judge to specify which mitigating factors, she considered, and which aggravating factors prevailed over these mitigating factors. For instance, if she took into account only the mitigating factors, then it is obvious that she did not take into account that the appellant had pleaded guilty and the aggravating factors, because none of those were mentioned by the "accused's counsels". What distinguishes a judicial (even if discretionary) decision from any other administrative decision is that a judicial decision must be supported by reasons. Otherwise, it becomes an arbitrary one, for it has been said that it

is a fundamental requirement of fair play and justice that parties should know at the end of the day why a particular decision has been taken. (See **TANZANIA AIR SERVICES LIMITED VS MINISTER FOR LABOUR, ATTORNEY GENERAL AND THE COMMISSIONER FOR LABOUR** (1996) TRL 217 (HC)).

With that background, we conclude that the trial court failed in its judicial duty to show the reasons which led to it imposing the impugned sentence. We are thus forced to intervene and do what the trial court ought to have done.

In assessing the sentence that would fit the crime, we would take into account that, the maximum sentence for the offence is life imprisonment. We would also have to consider that the appellant pleaded guilty, that he was a first offender, he is repentant for what he did, and that he had been in custody for 8 years prior to the date of conviction. We would also take into account that the appellant and the deceased were friends, and that it was the appellant who introduced the deceased to Paulo, the owner of the stolen money over which a quarrel had erupted. However, it was equally wrong for the appellant to have beaten the deceased to death, but even worse, for him to have run away until he was

arrested on 5/5/2005. The latter factor would have aggravated the circumstances of the commission of the offence, but for the fact that according to the facts the appellant only struck the deceased once but there is no evidence as to the size of the stick used by the appellant to beat him.

Having considered all the above factors, we think the sentence of 15 years is on the higher side. We would reduce it to 5 years. The sentence is to begin from the date of his conviction. The appeal, is therefore allowed to that extent.

Order accordingly.

DATED at **MWANZA** this 12th day of March, 2015.

S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL