IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 443 OF 2016

HELMAN BASEKANA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Bukoba)

(Sambo, J.)

dated the 10th day of May, 2007

in

Criminal Session Case No. 130 of 2005

JUDGMENT OF THE COURT

3rd & 5th September, 2018

MBAROUK, J.A.:

In the High Court of Tanzania at Bukoba (Sambo, J.) in Criminal Sessions Case No. 130 of 2005, the appellant Helman Basekana was charged of murder contrary to section 196 of the Penal Code Cap. 16 R.E. 2002. He pleaded not guilty to the offence charged, but offered to plea guilty to a lesser

offence of manslaughter. He was then convicted of that lesser offence and sentenced to thirty (30) years imprisonment. Aggrieved, the appellant has lodged this appeal challenging both conviction and sentence.

The brief facts of the case are as follows:

The appellant and Adelina Herman (the deceased) were husband and wife. Both were living at Nyabisindu, Kabanga Ward in Ngara District. In their life, they got a number of children. During their life, they have been quarrelling now and then, and the appellant was the source because of his conduct of being a drunkard. On 18/8/2001, at about 7.00 p.m. the appellant came back to his home from his walk where he had also drunk pombe, and did not find his wife at home. She was selling pombe known a "Mgoligoli" as her business. At about 8:00 p.m. she arrived at home and found the appellant there. The appellant asked her where she was, and replied that she had been selling "pombe" as her economic

business to fight poverty. He was not satisfied, and prevented her from entering into the house. The deceased entered into the house in order to prepare food for the whole family. Then a quarrel cropped up when the appellant started breaking the house of his son who built it so that in case of the quarrel between their parents, he could sleep there with his mother and young brothers and sisters. She asked him why he was breaking the house. The house belonged to their 15 years old son called Yamungu s/o Herman at that time. The appellant then beat the deceased, his wife. His children tried to settle the dispute, including a sister in law of the appellant Veronica w/o Josephat. Thereafter the appellant entered his house hoping that he went to rest. Other people were still outside. The appellant came out with two empty bottles of soft drink and Primus beer. He threw a primus bottle at the deceased, and it hit her at the head. She fell down unconscious. The accused ran away. The deceased was

carried inside by her children, Veronica w/o Josephat, and Godibereta w/o Jaston. At 2.00 a.m. she passed away. The matter was reported to the village leaders and later at Police Station. Investigation started. The appellant was then arrested. The deceased body was examined by the doctor, who said severe blood loss caused the death.

In this appeal, Ms. Aneth Lwiza, learned advocate represented the appellant; whereas Mr. Nestory Paschal Nchiman, learned State Attorney, represented the respondent / Republic.

We have found it prudent just in passing to make a note that in the appellant's notice of appeal at page 34 of the record of appeal it has been indicated that the appellant intends to appeal against conviction and sentence while at the trial, the appellant pleaded guilty to the offence of manslaughter. It is pertinent to note that the law bars an appeal against conviction where an accused had pleaded

guilty to an offence. Section 360 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) states as follows:-

"360. No appeal on a plea of guilty:

(1) No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent legality of the sentence."

In support of the provisions of section 360 (1) of the CPA, this Court in its decision in **Mkiwa Nassoro Ramadhani v. Republic,** Criminal Appeal No. 187 of 2013 (unreported) stated as follows:-

" Appeal which result from a plea of guilty are governed by section 360 of the Criminal Procedure Act. Subsection (1) to that section bars

appeals of such nature except as to

the extent or legality of the sentence."

Also see **Ramadhami Haima v. The DPP**, Criminal Appel No. 213 of 2009 (unreported).

For that reason, the appellant in this appeal cannot appeal against his plea of guilty. However, according to the grounds of complaint in this appeal there is no ground concerning conviction even if in his notice appeal the appellant indicated to appeal against both conviction and sentence.

According to the memorandum of appeal lodged by the appellant three grounds of appeal were preferred. They read as follows:-

"1. *That the presiding judge had failed to properly consider the entire circumstance of the crime and mitigating factors of the*

appellant before sentencing him to thirty (30) years in jail.

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

3. *That the time / period the appellant had stayed in custody pending his trial was not regarded by the presiding Court."*

In support of the grounds of appeal, Ms. Lwiza submitted that, the sentence of thirty (30) years imprisonment imposed on the appellant is excessive bearing in mind that the trial judge failed to consider mitigating factors after the appellant pleaded to a lesser offence of manslaughter. Ms. Lwiza added that as shown in his mitigation, the appellant had repented also considering that

he is the first offender, and had a family of seven children. Further considering the circumstance that he was drunk, the trial judge ought to have reduced the sentence. In support of her submission, Ms. Lwiza cited the decision in the case of **Bernadeta Paul v. Republic,** [1992] TLR 97. For those reasons, Ms. Lwiza urged us to reduce the sentence to the period that would result into the immediate release of the appellant from prison. After all, she said, the appellant had remained in custody for six (6) years before he was convicted and thereafter he has now served eleven (11) years since he was convicted in 2007. Altogether, he has been in custody for seventeen (17) years period which is enough for the appellant to have learned a lesson.

On his part, Mr. Nchiman supported the appeal. He also agreed that according to the circumstances of this case, the trial judge ought to have given a lesser sentence. He added that, apart from what the trial judge considered in his

sentence, he was also required to consider the age of the appellant at the time of sentencing him, mitigating factors, that the appellant had not wasted time of the court as he readily pleaded guilty to the lesser offence of manslaughter. He then supported his submission by citing the decisions of this Court in **Shabani Ismail v. Republic**, Criminal Appeal No. 102 of 2012 and **Rajabu Daudi v. Republic**, Criminal Appeal No. 106 of 2012 (both unreported). Mr. Nchiman further submitted that a sentence of thirty (30) years is excessive considering the circumstances of this case and proposed that the trial court could have imposed fifteen (15) years imprisonment taking into account the period of six (6) years he had been in custody and the appellant being the first offender.

All in all, just like Ms. Lwiza the learned State Attorney also prayed for the Court to consider the period of six (6) years the appellant stayed in remand custody prior to the

period when he was convicted and sentenced and the period of eleven (11) years he has already served since 2007. Thereafter, the learned State Attorney further prayed for the Court to impose a sentence of imprisonment for a period that would result in the immediate release of the appellant from prison.

According to the decision of this Court in the case of **Rajabu Daudi** (supra) this Court stated as follows:-

> *"The law is well settled that the circumstances in which the Court can interfere with the sentence are those where, it is: (a) manifestly excessive, or (b) based upon a wrong principle, or (c) manifestly inadequate(d) or plainly illegal, or*
>
> *(e) where the trial court failed or overlooked a material consideration or*

(f) where it allowed an irrelevant or extraneous matter to affect the sentencing decision.

(See: ***Silvanus Leonard Nguruwe v. R,*** *(1981) TLR 66;* ***Nyanzela Madaha v. R****, Criminal Appeal No. 135 of 2005;* ***Mussa Ally Yusufu v. R****, Criminal Appeal No. 72 of 2006 (both unreported)."*

As to the essential matters to be considered in sentencing, this Court in the case of **Silvanus Leonard Nguruwe** (supra) cited with approval the case of **Shabani Ismail** (supra) where it was stated as follows:-

"We will now refer to those circumstances which were not considered by the judge when assessing sentence. One of such

circumstances which were referred to us by Mr. Jadeja in his submission is the fact that the learned trial judge did not give due weight to the fact that although the appellant was clearly guilty of assaulting the deceased, his conduct could not properly be described as vicious in view of the prosecution's own concession that the appellant hit the deceased only once with a stick. The other factor which, in our view, were material to the assessment of appropriate sentence in the case but which, once again, the judge appears not to have considered are the advanced age of the appellant; the period of two years which the

appellant spent in remand custody before being brought to trial; and lastly, the fact he pleaded guilty to manslaughter thereby saving the trial court and the Republic from needless trouble and expense both in time and money. Further by pleading guilty, the appellant clearly demonstrated a spirit of contrition which in our view, was a circumstance entitling him to consideration of more lenient treatment by the trial High Court." (Emphasis added).

In the instant case, the record show at page 14 that the matters to which the trial judge considered when he sentenced the appellant were as follows:

1) The accused being the first offender.
2) The age of the appellant being 50 years old at the time of sentencing.
3) The appellant's conduct, before during and after the killing.
4) The period of six years the appellant remained in custody.

We are of the opinion that other important factors which should have been considered by the trial judge were not considered as stated in the case of **Silvanus Leonard Nguruwe** (supra). For example the appellant pleaded guilty without troubling the court, that he hit the deceased only once with an empty bottle, that the appellant was blessed with

seven children with the deceased and some were still young and they would have remained without both parents, also the fact that the appellant loved his wife but it was just the devil who interfered and the wife lost her life and that he has repented.

We are of the view that, if the trial judge considered all those factors, he would have opted to impose a lesser sentence. We agree with both, the learned advocate for the appellant and learned State Attorney that the sentence was excessive. We are very much aware that the sentence for manslaughter is life imprisonment, but the practice is that in most cases sentence imposed depends on the circumstances and facts of each case. In the circumstances of this case, we think the sentence of fifteen (15) years imprisonment would have served the purpose. We therefore agree with the learned State Attorney and impose a sentence of fifteen (15) years imprisonment. The sentence we have imposed takes

into account the period of six (6) years the appellant was in remand custody and the period he has served after he was convicted and sentence by the trial High Court. In the event, we allow the appeal, set aside a sentence of thirty (30) years imprisonment imposed on the appellant and substitute it with that of fifteen (15) years to which would result to the immediate release of the appellant from prison, unless otherwise he is lawfully held. It is so ordered.

DATED at **BUKOBA** this 5th day of September, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL