IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUSSA, J.A., MWANGESI, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 461 OF 2016

FIKIRI CHARLES ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

(Appeal from the judgment of the High of Tanzania

at Mwanza)

(Mlacha, J.)

dated the 20th day of October, 2016

in

Criminal Sessions Case No. 120 of 2016

JUDGEMENT OF THE COURT

4th & 12th Dec. 2018

MWANGESI, J.A.:

Upon a plea of guilty to the charge of manslaughter contrary to the provisions of sections 195 and 198 of the Penal Code Cap 16 R.E. 2002 (**the Code**), in Criminal Sessions Case No. 120 of 2016, the appellant herein was sentenced to go to jail for a period of ten years. In sentencing the appellant, the learned trial Judge stated that:

> *"I have heard the submissions of both counsels (sic). I have also heard the accused who spoke with*

leave of Court. I sense that the present killing is associated with false beliefs or there is something hidden behind the facts. In both situations, the accused have (sic) to be punished to prevent the occurrence of such acts. I sentence the accused to serve ten (10) years in jail."

The sentence imposed by the trial Judge aggrieved the appellant who through the services of Mr. Paulin R. K. Rugaimukamu, preferred an appeal premised on one ground only namely:

"The trial Judge did not fully and vividly consider at all the appellant's mitigating factors, or else he would not have imposed a sentence of 10 (ten) years imprisonment."

Before we embark on considering the merits of the appeal, we think it is pertinent to reproduce the information which was laid at the door of the appellant, and the facts of the case albeit in brief. According to the statement of the offence which was presented in the High Court of Tanzania at Mwanza, the appellant was charged with the offence of manslaughter contrary to the provisions of sections 195 and 198 of **the Code.** The particulars of the offence were to the effect that, on the 21st day of March, 2015 at about 20: 00 Hours, at Samina village within the

district and Region of Geita, the appellant did unlawfully kill one Frank s/o Jackson.

The facts leading to the commission of the offence had that the appellant and the deceased, were living in the same house at the village of Iparamasa. The deceased who was the son of the appellant's sister and therefore, a nephew of the appellant, was staying at his uncle's (the appellant) premises.

On the 21st day of March, 2015, the appellant and the deceased as well as other people, were at the appellant's home. At about 20: 00 Hours, the appellant woke up his wife one Rebecca Kija, and told her that he had seen a hyena coming. He picked up a panga and a spear so that he could use them to kill the beast. On her part Rebecca, rose up quickly and went out of the house to call neighbours. At the material moment, the deceased was sleeping in another room of the same house with other children.

Armed with the spear and panga, the accused did not get outside the house, instead, he moved to the other room where the deceased and his colleagues were sleeping, and stubbed the deceased on the stomach with his spear. In the meantime, the neighbours who responded to the call

which was made by Rebecca, arrived at the scene only to find that, the appellant had stabbed his nephew to death. They picked the deceased and rushed him to the hospital, where he was pronounced dead. According to the post mortem examination report which was tendered in Court as exhibit P1, the cause of death was due to stabbed wound.

Information was relayed to the police who later arrested the appellant. When asked by the police officer about the incident, the appellant readily confessed to have committed the offence. His recorded cautioned statement was tendered and admitted in Court as exhibit P2. A police officer did also draw the sketch plan of the scene of incident which was tendered and admitted as exhibit P3.

As stated earlier, upon the unequivocal plea of guilty by the appellant to the charged offence and all the facts reproduced above, the learned trial Judge convicted him of the charged offence on his own plea of guilty and imposed the impugned sentence.

During the hearing of the appeal, Mr. Paulin Rugaimukamu, learned counsel, represented the appellant, while the respondent had the services

of Mr. Paschal Marungu, learned Senior State Attorney, who was assisted by Ms Sabina Choghoghwe, learned State Attorney.

Elaborating the sole ground of appeal, Mr. Rugaimukamu faulted the learned trial Judge, for failing to consider the mitigating factors of the appellant in assessing the sentence which he imposed on the appellant after he had pleaded guilty to the offence of manslaughter. As a result, he imposed an excessive sentence. The learned counsel referred us to pages 3 to 5 of the record of appeal, where six mitigating factors were advanced in favour of the appellant by his learned counsel. Nevertheless, in sentencing the appellant, the learned trial Judge never mentioned any of them. What the learned trial Judge managed to do was to make a generalized statement that he had considered them.

In the opinion of Mr. Rugaimukamu, the procedure which was applied by the learned trial Judge, was improper in view of the guidelines which have been given by this Court. He referred us to the decisions in **Masumbuko Herman Vs Republic,** Criminal Appeal No. 9 of 2002, **Mateso Kamala Vs Republic,** Criminal Appeal No. 458 of 2015 and **Samwel Izengo @ Malaja,** Criminal Appeal No. 347 of 2013 (all unreported).

Basing on the authorities named above, and putting into consideration the mitigating factors which were raised for the appellant, the learned counsel for the appellant urged us to interfere with the sentence of eight (8) years' imprisonment which was imposed on the appellant by the trial Judge and in lieu thereof, a reasonable sentence be substituted.

In response to what was submitted by his learned friend, the learned Senior State Attorney told the Court that, he was at one with Mr. Rugaimukamu that indeed, the learned trial Judge failed to consider the mitigating factor of the appellant. Such failure by the learned Judge, justified this Court to interfere with the sentence which he imposed to the appellant. However, the learned Senior State Attorney cautioned us that in so doing, we had to put into consideration the nature of the offence which was committed by the appellant that is, causing death to a human being, as well as the circumstances under which the offence was committed that is, using a lethal weapon (a spear). In his view, the sentence which was imposed by the learned trial Judge was reasonable and fair and as such, he implored us not to disturb it.

In a brief rejoinder, the learned counsel for the appellant maintained his submission in chief that, the fact that the learned trial Judge did not consider the mitigating factors of the appellant, he imposed an excessive sentence which had to be interfered with by this Court. He thus insisted that the sentence be reduced and if possible, leading to the immediate release of the appellant from prison.

At issue for our determination in the light of what has been submitted above, is whether the sentence of ten years' imprisonment which was imposed by the learned trial Judge on the appellant after he had pleaded guilty to the charge of manslaughter, was excessive. The requirement of law in sentencing a convicted person is that, the mitigating factors of the convicted person and the antecedents presented by the prosecution, have to be put into consideration. And, the procedure to be followed as it was correctly submitted by the learned counsel for the appellant is that, it has to be explicitly indicated in the sentence that, each of the mitigating factor has been considered. See: **Swalehe Ndungajilungu Vs Republic** [2005] TLR 94, **Boniface Yustas Vs Republic**, Criminal Appeal No. 459 of 2015 and **Raphael Peter Mwita,** Criminal Appeal No. 224 of 2026 (both unreported).

Expressing the Court's disapproval to the generalized treatment of mitigating factors in the case of **Raphael Peter Mwita Vs Republic** (supra), the Court stated in part that:

> *"Clearly, looking at the above quotation, the trial Judge did not mention any antecedents or the mitigating factors which he said to have considered. He just generalized that he considered them. As it was rightly pointed out by both learned counsel, this was not the proper consideration of the mitigating factors. In both antecedents and mitigation, for example, it was stated that the appellant had no previous record of conviction or rather he was a first offender as it was put by the learned defence counsel. This was in our view, among the important legal mitigation to be considered by the trial Judge."*

According to the facts of the case in the appeal which is before us, the death of the deceased was occasioned with the use of a spear. Additionally, it was suggested that the killing was associated with some false beliefs, which in our view, have no room in the administration of justice. On the other hand, the mitigating factors advanced on behalf of the appellant which were six in number, were that he was a first offender,

he had pleaded guilty to the offence, he had stayed in remand for one year, he was suffering from HIV and that, he had dependants. Upon considering the situation for both sides, it is our considered view that there is no basis for interference with the sentence of ten years' imprisonment, which the learned trial Judge imposed. To that end, the appeal is dismissed in its entirety.

Order accordingly.

DATED at **MWANZA** this 10th day of December, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL