**IN THE COURT OF APPEAL OF TANZANIA**
**AT MWANZA**

**(CORAM:MUGASHA, J.A., MKUYE, J.A., And MWANGESI, J.A.)**

**CRIMINAL APPEAL NO. 221 OF 2016**

**GHATI KAHURU @ OBOSI..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania, at Mwanza)**

**(Maige, J.)**

**dated the 22nd day of March, 2016**
**in**
**Criminal Sessions Case No. 6 of 2016**

.....

## JUDGMENT OF THE COURT

11th & 18th July, 2018

**MKUYE, J.A.:**

The appellant was initially charged with the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap 16 R.E. 2002 (the Penal Code). It was alleged by the prosecution that on 21st day of January, 2015, at Bonchugu village within Serengeti District in Mara Region, the appellant did murder one Kahongo Kobora. During the trial, the appellant offered a plea of guilty on a lesser offence of manslaughter contrary to section 195 of the Penal Code. After the facts of the case were read over to him, and the relevant exhibits such as the Postmortem

Examination Report, sketch map of the scene of crime, the cautioned and extra judicial statements were tendered and admitted as Exhibits, he admitted the same to be true and correct. Subsequently, the trial court found him guilty on his own plea of guilty and convicted him of the offence of manslaughter contrary to section 195 of the Penal Code.

Before the trial court imposed the befitting sentence against the appellant, Mr. Karumuna, learned State Attorney who prosecuted the case gave antecedents that they had no record of previous conviction but prayed for a stiff sentence. On the other hand, Mr. Adam who advocated for the appellant (accused) advanced mitigating factors as follows:-

*1) He has regrettably confessed to the offence.*

*2) He has been in custody for a year.*

*3) The deceased was a cause of his own death.*

*4) He has his mother, wife and 4 children depending on him.*

*5) He is a first offender.*

In sentencing the appellant the trial judge stated as follows:-

*"The accused is a first offender. He has a mother and 4 children depending on him. He has been in*

*custody for a year and has regrettably confessed to the commission of the offence. All these mitigating factors have been taken into account."*

The trial court went further to consider other factors as shown at page 9 of the record that:-

*"However, the accused used a dangerous instrument, a spear and applied excessive force to chop the deceased with it on his back. Before committing the offence, the accused had threatened to kill a human being. In my opinion therefore,* ***the killing was voluntary***. [Emphasis added].

The trial court sentenced him to 29 years imprisonment.

Dissatisfied with the sentence meted out against him, he (appellant) has appealed to this Court on the basis of the following grounds:-

*1) That the impugned sentence was manifestly excessive in the circumstances of the case.*

*2) That there was no known aggravating circumstance to warrant the said sentence.*

*3) That the trial judge was increasingly and prejudicially influenced by his wrong opinion that "the killing was voluntary"."*

At the hearing of this appeal the appellant was represented by Mr. Serapion Kahangwa, learned counsel; whereas the respondent Republic had the services of Mr. Lameck Merumba assisted by Ms Gati William Mathayo both learned State Attorneys.

Submitting in support of the appeal, Mr. Kahangwa started with ground no. 3 and argued that, though the appellant was convicted with the offence of manslaughter the trial judge seemed to base the sentence on his opinion that the killing by the appellant was voluntary. He pointed out that, even if the sentence under section 198 of the Penal Code is up to life imprisonment, the sentence of 29 years imprisonment was manifestly excessive in the circumstances of the case. The learned counsel clarified that the appellant had pleaded guilty and admitted to have killed the deceased unintentionally and that the Extra judicial statement which was admitted as Exhibit P4 portrays a full picture that the appellant was provoked by the deceased who insulted and beat him and further to that he pursued the appellant even when he ran towards his home. For that

matter Mr. Kahangwa argued, the trial judge did not consider the mitigating factor that the deceased perpetrated his death through his acts. He referred us to the case of **Lucas John vs Republic**, Criminal Appeal No. 8 of 2002 (CAT) (Mza); and **Juma Mniko Muhere vs Republic**, Criminal Appeal No. 211 of 2014 (both unreported). He also urged the Court to consider that the appellant has been incarcerated for a period of 4 years now and reduce the sentence.

In response, Mr. Merumba while supporting the sentence meted out against the appellant contended that the sentence was proper in terms of section 198 of the Penal Code which provides for a sentence of up to life imprisonment. While relying on the case of **Samwel Izengo @ Malaja vs Republic**, Criminal Appeal No. 347 of 2013, he urged the Court to be hesitant to interfere with sentences. At any rate, he said, the trial judge considered the legitimate mitigating factors. According to him the question of provocation could not arise as the appellant had time to cool down.

In rejoinder, Mr. Kahangwa stressed that the appellant had no time to cool down having regard to the fact that the deceased pursued him up to his home.

The issue for our consideration is whether the Court can interfere with the sentence which was imposed by the trial court.

As was rightly submitted by Mr. Merumba, the Court has been in most cases hesitant to interfere with sentences meted out by the trial courts when exercising their discretion in sentencing. The principle of law is that the appellate court should not interfere with the discretion exercised by the trial judge as to sentence except on such situations where it appears that in assessing sentence the learned judge acted upon a wrong principle or that the sentence is patently inadequate or manifestly excessive. (See **Lucas John's** case supra).

When faced with a similar situation in the case of **Samwel Izengo @ Malaja** (*supra*) the Court expounded the guiding principles on which the Court can interfere with sentences by trial courts. The Court itemized them as follows:-

> *"(1) Where the sentence is manifestly excessive.*
>
> *(2) Where the sentence is manifestly inadequate.*
>
> *(3) Where the sentence is based upon a wrong principle of sentencing.*
>
> *(4) Where the trial court overlooked a material factor.*

*(5) Where the sentence was based on irrelevant considerations such as the race or religion of the offender.*

*(6) Where the sentence is plainly illegal, for example, corporal punishment is imposed on the offence of receiving stolen property.*

*(7) Where the period spent in custody was not considered.*

*(See for example,* ***Silvanus Leonard Nguruwe vs Republic*** *(1981) TLR 66;* ***Yohana Balicheko vs Republic****, Criminal Appeal No. 37 of 2007;* ***Said Salum @ Bakari vs Republic****, Criminal Appeal No. 37 of 2007;* ***Sospeter Mayala vs Republic****, Criminal Appeal No. 318 of 2013;* ***Joachim John vs Republic****, Criminal Appeal No. 58 of 2014* (All unreported)."

Though the list may not be exhaustive we wish to add that the Court cannot interfere with a sentence of the trial court merely because had it been the appellate court it would have imposed a different sentence. (See

**Mohamed Hatibu @ Said vs Republic**, Criminal Appeal No. 11 of 2004 (unreported).

We are also aware that the punishment prescribed under section 198 of the Penal Code is life imprisonment. The provision reads as follows:

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

As it is, the way the provision is couched, it fixes the maximum sentence for the offence of manslaughter. It does not fix the minimum sentence for the offence.

In this case, as was alluded earlier on, the trial judge in awarding a sentence against the appellant considered such mitigating factors that the accused was a first offender; was depended upon by his mother and his 4 children; had been in custody for one year; and that he regrettably confessed to the commission of the offence. Though there was another mitigating factor to the effect that "**the deceased was a cause of his own death**", the trial judge did not consider it at all. Instead the trial judge seems to have been influenced by the gravity of the offence and considered the instrument that was used to kill, "the spear" and the excessive force that was used by the appellant to chop the deceased's

back. He also considered the "alleged" threatening words that he would kill a human being which, unfortunately, do not feature in either the caution statement (Exh P3) or the extra judicial statement (Exh P4). He then lumped all those factors together in his opinion that "**the killing was voluntary**" without considering the other equally crucial mitigating factors. We think this was not proper. We say so because connoting that the killing was voluntary may have connoted malice aforethought when taking into account that the appellant was convicted with a lesser offence of manslaughter and not an offence of murder. We are of the view that, he ought to have had in mind that he was dealing with an offence of manslaughter.

But again, regarding the mitigating factor which, was not considered when passing the sentence that the deceased was a cause of his death, Mr. Kahangwa drew our attention to Exhibit P4 which, he said, portrayed a picture of there being provocation on the part of appellant.

We have taken the liberty of reproducing part of the extra judicial statement (Exh. P4) as hereunder:

> *"...akanitukana kuwa **mbwa wewe**. Ndiyo nikamwambia mbona kila siku tukikutana na wewe*

*unatukana tu na kunipiga nimekukosea nini. Na yeye akarudia tena,* ***mbwa wewe hujui kisa****?* ***Na tayari akawa amesogea na kunikaba na kuanza kunipiga ngumi machoni na kunisukuma nikaanguka niiipoamka mwenzake naye akaanza kunipiga mateke na mimi kwa kujizoazoa nikafanikiwa kuwaponyoka na kukimbia na wao wakanifukuza hadi nyumbani kwangu*** *na walipokaribia nyumbani kwangu lipo jiwe kubwa wakasimama pale na* ***kuanza kunirushia matusi na wakasema nisiseme kitu ninyamaze kwani nikisema watanifuata wanipige mbeie ya mke wangu.Ndipo niiiamua kwa kushikwa na hasira niiichukua mkuki*** *na kuchungulia kwenye lile jiwe nikawaona bado wapo wananichungulia nikawaambia tokeni hapo hamwoni nimewaogopa lakini wakasema hata uwe na mkuki tutakupiga tu kwani tulikwisha kuvunja mkono wako mmoja utaweza kurusha mkuki? Na huo mkuki niliuchukua*

*kwa nia ya kumtishia tu ili aogope akimbie, alikwisha nipiga mara tatu na hata kunikata mkono.*

*Hivyo* ***aliponiona nina mkuki ule alikuja kwangu huku akisema ngoja nikutoe huo mkuki mbele ya mkeo na nikupige nao na kweli alikuja mbio kwangu na mimi nikakimbia akanipiga na jiwe mgongoni ndipo niiigeuka nikamtupia ule mkuki*** *na huku nakimbia na mkuki huo ukamchoma..."*

[Emphasis added].

From the above quotation we have failed to glean any aggravating factors which could warrant such a sentence. We are satisfied that the appellant was not only provoked by the deceased's utterances and actions, but also the deceased perpetrated his death. We say the appellant was provoked because the deceased used abusive language (insulted) to him. He called him "Mbwa wewe", felled him on the ground, beat him and declared to beat him in the presence of his wife. On top of that the deceased pursued him when he ran home while insulting him. When the appellant took a spear to threaten him he still followed him until he was

chopped by the spear. Even if Mr. Merumba argued that provocation could not arise as he had time to cool down, we think, given the fact that the deceased pursued the appellant up to his home and threatened to beat the appellant in the presence of appellant's wife, suggests that there could not be time for him to cool down. Having looked at the totality of the sequence of events we find that the appellant had acted under the heat of passion. Hence, we agree with Mr. Kahangwa's proposition that the appellant was provoked.

As to the mitigation that the deceased was the cause of his death, we think, the fact that the deceased pursued the appellant when he ran to his home and hid behind the rock near the appellant's house; and his act of following the appellant despite the fact that he was holding a spear which he used to threaten him, contributed to his death. This was a crucial mitigating factor which, we think, had the trial judge taken into consideration, he would not have awarded such a sentence.

Before we pen off, we feel inclined to address another mitigating factor which Mr. Kahangwa raised though it was not mitigated before, or considered by the trial court which is that of the appellant pleading guilty to the offence. We think, the fact that the appellant pleaded guilty ought to

have been considered by the trial court. On this we are guided by the case of **Juma Mniko Muhere** (supra) where the Court adopted with approval the case of **Willy Walosha V Republic,** Criminal Appeal No 7 of 2002 (unreported) where the Court observed that the offender who pleads guilty to the charge is to be sentenced leniently. Even in this case pleading guilty to the offence was among the grounds which the trial judge ought to have considered.

We have asked ourselves as to whether such non consideration of the mitigating factors amounted to such excessive sentence to warrant interference with the sentence imposed to the appellant. We found that our answer is in the affirmative. We are entitled to interfere because the circumstances surrounding the fatal incident whereby the deceased seems to have been the cause were not considered. Likewise, the other important mitigating factor of the appellant having willingly pleaded guilty to the offence was not considered. These were crucial factors which ought to have been considered by the trial judge in sentencing. By his failure to take into account such important factors, we are settled in our mind that we are justified to interfere with the sentence imposed on the appellant.

We have been reminded that the appellant has been in custody for over four (4) years now. We think that, the period he has served so far meets the ends of justice.

Given the circumstances of the case, we reduce the sentence to that which would amount to his immediate release unless held for some other lawful reasons. The appeal is allowed to that extent.

**DATED** at **MWANZA** this 16th day of July, 2018.

S.E.A. MUGASHA
**JUSTICE OF APPEAL**

R. K. MKUYE
**JUSTICE OF APPEAL**

S. S. MWANGESI
**JUSTICE OF APPEAL**

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

B. A. MPEPO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**