

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

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

**CRIMINAL APPEAL NO. 465 OF 2016**

**SIMON SAMSON KAHAYA ----- APPELLANT**

**VERSUS**

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

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

**(Mlacha, J.)**

**dated the 21<sup>st</sup> day of October, 2016**

**in**

**Criminal Sessions Case No. 221 of 2014**

**-----**

**JUDGMENT OF THE COURT**

**12<sup>th</sup> & 14<sup>th</sup> Dec. 2018**

**MWANGESI, J.A.:**

In the High Court of Tanzania at Mwanza, the appellant stood arraigned for the offence of manslaughter contrary to the provisions of sections 195 and 198 of the Penal Code Cap 16 R.E. 2002 (**the Code**). It was the case for the Republic that, on the 5<sup>th</sup> day of July, 2014 at 20:00 hours at Ikulwa village within the District and Region of Geita, the appellant did unlawfully kill one Joseph s/o Juma. He pleaded guilty to the charge.

The undisputed facts which the appellant accepted after they were read to him by the learned State Attorney were thus:

*"The accused is a resident of Ikulwa village. The deceased, Joseph Juma was a resident of Rujenezi village which is nearby. The two people were related. The wife of the deceased was a sister of the accused.*

*On the 5<sup>th</sup> July, 2014 at about 8:00 pm, the accused and deceased met at Ikulwa centre. The deceased started to speak harsh words to the accused demanding a fight. The accused said no. The accused left the place in the company of his friends using a bicycle. The deceased also moved on a bicycle in the company of Mr. Simon Salila. They met on the way. The deceased moved ahead and blocked the accused. The deceased pulled the accused from the bicycle and started to fight with him. The accused hit back. The accused picked a knife and stabbed the deceased on the chest and he died on the spot. The accused moved to report to the village chairman. The police came at the scene of crime. They also arrested the accused. The body of the deceased was examined. The cause of*

*death was established as being excessive bleeding.  
We pray to tender the medical report.*

***Pauline:*** *No objection*

*Signed: L. M. Mlacha -Judge*

*18/10/2016*

*The statement of the accused was recorded. He  
confessed. We pray to tender it.*

***Pauline:*** *No objection.*

***Court:*** *Exhibit P2*

*Signed: L. M. Mlacha – Judge*

*18/10/2016*

*He was also sent to a justice of peace. He also  
confessed. I pray to tender the extra judicial  
statement.*

***Pauline:*** *No objection*

***Court:*** *Exhibit P3*

*Signed: L. M. Mlacha*

*18/10/2016*

On the basis of the facts reproduced above, which were unequivocally admitted by the appellant, the learned trial Judge,

accordingly convicted the appellant of the charged offence. In giving the antecedents of the appellant the learned State Attorney told the Court that he was a first offender. All the same he prayed for a stiff sentence against the appellant to make it a lesson to himself and other people of his type because these crimes were rampant.

Mr. Pauline on the other hand, advanced basically three mitigating factors in asking the Court to be considerate in assessing the sentence for the appellant that is:

***One, that the appellant was a first offender***

***Two, that he was remorseful (sic) to what had happened as he had no grudges with the deceased and that just found himself in a conflict that claimed the life of his brother in law.***

***Three, that he had been in remand for about two years and 3 months.***

The impugned sentence of the learned trial Judge bore the following wording that is:

***"I have considered the submission of the Republic as well as mitigations from the defence. I think the***

*accused used a knife in circumstances which did not call for the use of a knife. Such behaviors (sic) have to be prevented from repeating. I sentence the accused to serve eight years in jail to make a lesson to him and the public."*

Being aggrieved by the sentence which was meted out to him by the learned trial Judge, the appellant through his learned counsel has preferred an appeal to challenge it premised on one ground only namely; that the learned trial Judge erred in law and in fact for not adequately or expressly considering the mitigating factors in the course of sentencing the appellant.

On the date when the appeal was called on for hearing before us, Mr. Constantine Mutalemwa learned counsel entered appearance for the appellant whereas, Ms Revina Tibilengwa, learned Senior State Attorney being assisted by Ms Mwanahawa Changale learned State Attorney, joined forces to represent the respondent Republic.

In clarification of the ground of appeal, the learned counsel for the appellant submitted that, they are challenging the sentence which was imposed on the appellant by the learned trial Judge, because it was done

without observing the principles of sentencing. He argued that while the law requires the consideration of mitigating factors to be made on the principle of one by one, in the instant appeal the learned just generalized that he had considered the mitigating factors. He criticized the procedure placing reliance on the decisions in **Samwel Izengo @ Malaja Vs Republic**, Criminal Appeal No. 347 of 2013 and **Juma Mwita @ Nyamiguri Vs Republic**, Criminal Appeal No. 222 of 2016 (both unreported). He therefore, invited us to intervene and impose a deserving sentence to the appellant.

Ms Tibilengwa, on the other hand, resisted the appeal contending that, even though they sailed along with the learned counsel for the appellant on the argument that, the learned trial Judge indeed omitted to consider the mitigating factors, she was of the view that, the sentence imposed was fair regard being to the nature of the offence committed that is, causing death to a human being with the use a knife, which is a lethal weapon. She thus implored us not to disturb the sentence of the trial Court.

At issue for our determination in the light of the above submissions from either side, is whether the sentence which was imposed by the trial Court to the appellant was excessive. To begin with, as conceded by the learned counsel from both sides, the learned trial Judge did not consider the mitigating factors of the appellant while assessing the appropriate sentence for the appellant. In view of the holding in **Masumbuko Herman Vs Republic**, Criminal Appeal No. 9 of 2002, **Mateso Kamala Vs Republic**, Criminal Appeal No. 458 of 2015 (both unreported) and **Samwel Izengo Vs Republic** (supra), the procedure adopted by the learned trial Judge was erroneous.

The subsequent question is whether there are any compelling circumstances for the Court to interfere with the sentence which was imposed by the learned trial Judge. Situations in which an appellate Court can interfere with the sentence imposed by the trial court include but not limited to:

- 1. In case the sentence is manifestly excessive or inadequate.*
- 2. Where the sentence was based on a wrong principle of sentencing.*
- 3. If the trial Judge/magistrate overlooked a material factor.*

4. *Where the sentence is plainly illegal.*
5. *In case the sentence was based on irrelevant considerations.*
6. *If the period spent in custody was not considered.*

See for instance: **Said Salum @ Bakari Vs Republic**, Criminal Appeal No. 37 of 2007, **Sospeter Mayala Vs Republic**, Criminal Appeal No. 318 of 2013 and **Joackim John Vs Republic**, Criminal Appeal No. 58 of 2014 (all unreported).

When we revert to the appeal before us, we note from the content of the cautioned statement of the appellant which was tendered in Court as exhibit P2 and the extra judicial statement which was tendered as exhibit P3 that, to some extent the deceased contributed in authoring his own death. Part of the contents of the two exhibits reads that, we quote:

*"--- Muda kama saa 19: 30 hrs. niliamua kuondoka kwenda nyumbani kwani nilikuwa nimenunua mahitaji ya nyumbani. Niliondoka tukiwa tumeongozana na Subi Ngayaningo na Frank Mayengela. Nyuma yetu walikuwa wakitufuata Simon Salila na Joseph Juma (deceased) wakiwa wamepakizana na Joseph Juma ndiye aliyekuwa anaendesha baiskeli. Tukiwa njiani tumeshatoka*



*sent, ndipo Joseph Juma alipitisha baiskeli yake kwa mbele na kunizuia nisipite. Mimi nilisimamisha baiskeli yangu na Joseph Juma akawa amenifuata na kunisukuma nikanguka. Nilinyanyuka na tukaanza kupigana. Baada ya kuona nataka kumzidi nguvu Joseph Juma, mwenzake waliyekuwa naye aitwaye Simon Salila alikuja kuchangia ugomvi na mkononi akiwa ameshika kisu. Mimi nilimuwahi na nikawa nimemshika mkono simon Salila na kumnyang'anya kisu alichokuwa nacho na nikawa ninamchoma nacho Joseph Juma kifuani na akanguka chini---."*

In the light of the foregoing facts, we are of the opinion that, the trial Judge was not correct while sentencing the appellant when he stated that, the appellant used the knife in the circumstances which did not call the use of a knife. As revealed by the facts, the deceased was the cause for the fight in the first place. Furthermore, the knife used in killing the deceased was to be used against the appellant himself by the colleague of the deceased. Under the circumstances, there was an element of self defence on the part of the appellant.

Having considered such situation and the other mitigating factors which were advanced by his learned counsel, we find merit in the appeal by the appellant. We thus reduce the sentence imposed on him by the learned trial Judge appellant from eight years to a period which will result to his immediate release from prison. That said, we allow the appeal in terms of what we have stated.

Order accordingly.

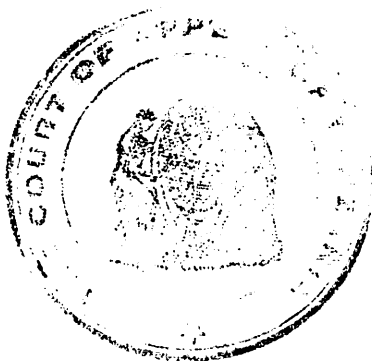
**DATED at MWANZA** this 13<sup>th</sup> day of December, 2018.

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**