IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 224 OF 2016

RAPHAEL PETER MWITA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Maige, J.)

dated the 15th day of March, 2016
in
Criminal Sessions Case No. 199 of 2015

JUDGMENT OF THE COURT

16th & 20th July, 2018

MKUYE, J.A.:

The appellant was charged with an offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E. 2002. On 15/3/2016 he offered a plea of guilty to a lesser offence of manslaughter contrary to section 195 of the Penal Code. He was convicted of that offence and sentenced to 20 years imprisonment. Aggrieved with the sentence, he has appealed to this Court against that sentence.

The brief facts leading to this appeal are as follows:

On 3/8/2014 at Pemba village within Tarime District in Mara Region, the appellant went to a shop managed by one Ghati Charles

and ordered for a soda. The shopkeeper demanded to be paid money first before she could give him the said soda. The appellant refused to pay for the soda. Instead, he started to insult her maliciously accusing her to be a HIV victim. Ghati, after being fed up with all the chaos decided to leave the place and went to a nearby shop which was attended by one Matinde Masase Nyamhanga. Still the appellant did not spare her. He followed her while holding a knife. He continued to insult her and this time, together with the other woman, Matinde Masase while also threatening to stab them with a knife. On seeing the appellant's persistence to insult them, they sought help. Nyangitutu Mwita (the deceased) who was incidentally the appellant's maternal uncle, responded to assist and when he tried to intervene, the appellant turned furious while replying that he was not afraid of anyone even if killing his own uncle, and, Alas! He stabbed his uncle on the right side of his chest. The deceased fell on the ground and died instantly. An alarm was raised and many people gathered at the scene of crime. The appellant disappeared. Search for the appellant ensued and he was arrested and charged accordingly.

Before the trial judge imposed the sentence, Mr. Karumuna, the learned State Attorney who prosecuted the case gave antecedents that they had no records of previous conviction but prayed for a severe penalty due to the circumstances surrounding the commission of the offence.

On the other hand, Mr. Rugaimukamu who represented the appellant (the then accused) prayed to the trial court before awarding sentence to consider mitigating factors that, the appellant was the first offender; he had confessed to the offence; and that "he was still a young person of 42 years old", whatever it meant. As was alluded earlier on, the appellant was sentenced to twenty (20) years.

On 14/3/2018 the appellant filed a memorandum of appeal consisting four grounds of appeal. At the hearing of the appeal, Ms. Marina Mashimba, the learned counsel who represented the appellant sought leave to abandon grounds No. 1, 3 and 4 and remain with the ground of appeal No. 2. We granted leave. The remaining ground is to the following effect:

"That, the imposed sentence against the appellant was manifestly excessive in contrast to the circumstances of the crime occurred."

Submitting in support of the ground of appeal Ms. Mashimba contended that though the appellant was sentenced to 20 years imprisonment; and even considering that the maximum punishment for manslaughter under section 198 of the Penal Code is life imprisonment, the trial judge did not properly consider the mitigating factors. She pointed out that even if at page 13 of the record of appeal the trial judge indicated to have considered the mitigating factors, what clearly comes out is that he concentrated on the circumstances surrounding the offence. For that matter, she said, had he properly considered the mitigating factors he would not have awarded such an excessive sentence.

While relying on the case of **Agness Julius V. Republic**, Criminal Appeal No. 188 of 2010, she argued that each case is to be considered on its own merits. The learned counsel clarified that where the appellant (accused) pleads guilty to the offence it deserves leniency in awarding the sentence. She also pointed out that even the time spent by the appellant in custody is among the

consideration for leniency. Ms. Mashimba concluded by stressing that the sentence was excessive in the circumstances of the case and prayed to the Court to intervene and reduce it.

On the part of Ms. Angelina Nchalla, learned Senior State Attorney who was assisted by Ms. Magreth Mwaseba also learned State Attorney, took off by stating their stance of not supporting the appeal. While conceding that the trial judge did not consider the mitigating factors for not having mentioned or explained them when considering sentence, she contended that the sentence awarded was proper in the circumstances of the case as the appellant was the aggressor and on account that the maximum sentence for the offence of manslaughter is life imprisonment. She pointed out that the appellant followed where Ghati was and insulted her; he followed her even when she left the place and went to a neighbouring shop; and he stabbed a person who just intervened the saga. In that case she implored us to be inspired by the decisions in cases of **Medard Karumuna @ Lugosura V. Republic**, Criminal Appeal No. 332 of 2007; and **Rweyemamu Thomas @ Kiningili Muzahura V. Republic**, Criminal Appeal No.

370 of 2008 (both unreported) in which the Court refrained from interfering with the sentences.

In re-joining in relation to the two cases cited by Ms. Nchalla, Ms. Mashimba insisted that each case should be determined on its own merits and prayed to the Court to allow the appeal.

We wish to state at the outset that it is now settled that in sentencing, except in offences falling within the provisions of minimum sentences, is in the discretion of the trial court. It is a general principle of sentencing that the appellate court should not interfere with a sentence meted by the trial court simply because had it been the trial court it would have imposed a different sentence. (See **Mohamed Hatibu @ Said V. Republic**, Criminal Appeal No. 11 of 2004 (unreported). The appellate court can, however, interfere with the discretionary powers of the sentencing court if it had imposed a sentence which is illegal; had acted on wrong principle; where the sentence is manifestly inadequate or excessive; where the trial court overlooked the material factor or ignored to take into account a relevant consideration or circumstances which ought to have been considered (See **Shabani Yusufu Mfuko and Another V. Republic**, Criminal Appeal No.

140 of 2012 (unreported) **Republic V. Mohamed Ali Jamal** (1948) 15 EACA 126; **Silvanus Mgumwe vs Republic**, [1981] TLR 66; **Bernadeta Paul V. Republic**, [1992] TLR 97 **James V. Republic**, [1980] 18 EACA 147 and **Swalehe Ndungajilugu V. Republic** [2005] TLR 94).

It is worthy to note here that we are aware that in considering sentence each case is to be considered on its own merits. (See **Agness Julius's** case (supra).

In the present case when sentencing the appellant the trial judge stated as follows and we quote:-

> *"Having considered the antecedents from the Republic and mitigating factors raised by the Defence counsel and* ***more particularly the circumstance in which the crime was committed I find that the accused deserves a severe penalty so that it can serve as a lesson to him and other wrong doers.***
>
> *The accused had,* ***before killing the deceased, threatened to harm two***

ladies. *The deceased was killed while in the course of rescuing the lives of those two ladies.*

The deceased was a maternal uncle of the accused. ***Before killing him by chopping a knife unto his chest, the accused had told the deceased that he does not (sic) afraid to kill any one even if he was his uncle.*** *In the circumstances, I sentence the accused person to twenty (20) years imprisonment"* [Emphasis added].

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 had considered them. As was rightly pointed out by both learned counsel this was not a 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 was put by the defence counsel. This was, in our view, among the

important legal mitigation to be considered by the trial judge as was held in the case of **Charles Mashimba V. Republic**, Criminal Appeal No. 86 of 2002 (unreported). In the said case it was held that the appellate court would also alter a sentence in which the trial court overlooked a material factor such as that the accused was a first offender. This emphasizes that it ought to be considered.

It was also mitigated that the appellant had pleaded guilty to the offence charged. This was another crucial mitigating factor which ought to be considered. This position was emphasized in the case of **Agness Julius** (supra) when the Court stated that:-

> *"Pleading guilty, as the appellant did in this case is one of the grounds to be considered when the determination of a sentence is in issue. Mostly when an accused pleads guilty it shows that he is remorseful and is prepared to take responsibility for his actions. A Court would normally take that factor into account when sentencing, especially considering that its time has not been wasted."*

Also in the case of **Rweyemamu Thomas @ Kaningili Muzahura** (supra) the Court cited with approval the case of

Charles Chilema vs Republic, HCD 510 in which Biron, J. had this to say:-

> *"It is generally, if not universally, recognized that* ***an accused pleading guilty to an offence with which he is charged qualifies him for the exercise of mercy from the court.*** *The reason is, I think obvious, in that one of the main objective of punishment is the reformation of the offender. Contrition is the first step towards reformation, and confession of crime as opposed to brazening it out, is an indication of contrition. Therefore,* ***in such a case a court can, and does impose, a milder sentence than it would have otherwise done."***
>
> [Emphasis added]

Like in the two above cited cases, we think, the mitigating factor that the appellant pleaded guilty ought to have been considered when imposing the sentence.

As to the mitigating factor that the appellant was a young person aged 42 years, we think, it is a phenomenon not known under our laws. Even assuming that the repealed law of The Children and Young Persons Cap 13, R.E 2002 was still operative, a

young person is defined to mean a person who is twelve years of age or more but under the age of 16 years. A person aged 42 years old would not fall within that law. Perhaps they meant he was an energetic person who could contribute to the economy. Be it as it may, we think, it ought to be considered by the trial judge in sentencing. This was not done.

On the other hand, as was submitted by both counsel and can be seen in the passage quoted earlier on, the learned trial judge predicted the sentence on the circumstances surrounding the offence such that the appellant (accused) threatening to harm the two ladies; and telling the deceased that he was not afraid even if killing his own uncle. Ms Nchalla went a step further to ask the Court to refrain from reducing the sentence as the appellant was an aggressor.

We have gone through the case of **Medard Kalumuna @ Lugosura** (supra); and **Rweyemamu Thomas @ Kaningili** (supra) in which the Court did not interfere with sentences and reduce them. We, however, think that they are distinguishable to this case. In **Medard Kulumuna's** case (supra) the Court did not interfere with the sentence of eight (8) years meted out against

appellant after having looked at the circumstances of the case in that the appellant had wounded the deceased by stabbing him with a broken bottle and left him at the river without any help. The Court found that the sentence was legal and lawful. As to the case of **Rweyemamu Thomas** (supra) the Court did not interfere with the sentence of ten (10) years imprisonment after having convicted him with the offence of manslaughter following a full trial on a murder case. The Court took into account that the death emanated from drinking illicit brew (gongo), the appellant had indulged in gambling and as a result he killed after losing his money in gambling. As it is, the circumstances in those cases are different from the case under consideration and even the sentences are low compared to this case.

In this case, though the court relied on the circumstances of the occurrence of the offence in sentencing the appellant the trial judge did not at all consider such important factors as explained herein above. We are of the settled view that, had he properly balanced the mitigating factors and what surrounded the commission of the offence, he would not have imposed such an excessive sentence even if the offence he was convicted with, is

punishable up to life imprisonment. In other words, we find that the sentence meted was on the high side. Hence, we think, we are entitled to interfere with the sentence which was meted against the appellant.

All said and done, we allow the appeal and reduce the sentence from 20 years to 10 years.

It is so ordered.

DATED at **MWANZA** this 19th 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