IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 459 OF 2016

MOHAMED MAGOMA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Mlacha, J)

Dated 21st day of October, 2016
in
Criminal Sessions Case No. 77 of 2016

JUDGMENT OF THE COURT

6th & 14th December, 2018

MUSSA, J.A.:

In the High Court of Tanzania, at Mwanza Registry, the appellant was arraigned for manslaughter, contrary to sections 195 and 198 of the Penal Code, Chapter 16 of the Laws, Revised Edition of 2002. The particulars of the information alleged that on 22nd April 2014, at Vigo Village, within Geita District, the appellant unlawfully killed a certain Hamis Seleman whom we shall hereinafter refer to as "the deceased."

When the information was read over and explained to him, the appellant pleaded guilty and the presiding judge (Mlacha, J.) recorded the plea as such. Thereafter, the learned State Attorney, namely, Ms. Christina Chacha, outlined the following facts:-

> *"The accused is a resident of Wigo Village in the District and region of Geita. On 22/04/2014, at 1:00 PM, the accused was at a football ground at the village. He was with other people including Hamisi Selemani who is the deceased. While at the area playing football, the accused assaulted Hamisi on his leg (alimkanyaga mguu). Hamisi followed the accused and warned him about his behavior on the football ground. The accused said "Hata kama nikicheza rafu utafanya nini?" The deceased got angry and there was a harsh exchange of words. A dispute arose and they started to fight each other. The accused picked a knife which was nearby and stabbed Hamisi Selemani on the stomach. Hamisi got a PF3 at the police station for treatment but he died after a few days later. His body was examined and the report shows that he died out of the wound on the stomach. I pray to tender the postmortem report if there is no objection from the defence."*

Upon admission of the postmortem report which was marked as "exhibit P1", the prosecuting attorney additionally adduced a sketch map (exhibit P2), a cautioned statement made by the appellant (exhibit P3) as well as his extra-judicial statement (exhibit P4). Thereafter, this is what transpired in court:-

> "Accused: *I have heard the facts. I accept all the facts.*
>
> ***Court:***
>
> *Upon the plea of guilty of the accused which is unequivocal, I find the accused guilty of manslaughter as charged and convict him accordingly.*
>
> *Signed: L. M. Mlacha*
> *Judge*
> *18/10/2016*
>
> ***Previous records***
>
> ***Christina:***
>
> *We don't have previous records but we pray for a stiff sentence so that it can be a lesson to him and other people. Taking away the life of a person for any reason is against the law. The Penal Code prescribes for life imprisonment.*

Mitigation

Pauline:

My lord, I pray for leniency for the following reasons. This is his first offence. The accused has confessed before this court and regrets to have done the offence because it has occasioned the loss of his relative. The accused did not disturb the court. He has served the costs and time of the government.

The accused was a student of standard six at the age of 16 years when he committed the crime. He committed the crime while a child and is now regretting.

The accused has been in prison since 27/04/2014. He has stayed in prison for 2 years, 5 months and 21 days. The accused had no grudges with the deceased who is a son of his uncle (baba mdogo). They quarreled due to sports problems. It was a bad luck on the part of the accused. I pray for leniency and mercy of court because he never intended.

Christina: *(with leave). The age of the accused at the time of committing the crime was 18 years and not 16 as said by the counsel.*

"Sentence:

I have considered the submission of the state attorney and mitigation made by the defence counsel. The defence counsel has called for leniency to the

accused but I think the circumstances calls for a heavier punishment. The accused stabbed the deceased with a knife in circumstances which did not call for the use of such a weapon. If the accused will not be punished seriously, there is a danger of allowing people of the type of the accused to proceed to use the knife in normal quarrels. I sentence the accused to serve eight (8) years in jail.

Signed: L. M. Mlacha

Judge

21/10/2016

The appellant is aggrieved by the sentence and, initially on 12th April, 2018, he lodged a three grounded memorandum of appeal without the assistance of an Advocate but, a good deal later, on the 19th November, 2018 his advocate, namely, Mr. Geofrey Kange, lodged a supplementary memorandum of appeal which, has two points of complaint couched thus:-

"1. That the imposed sentence against the appellant was manifestly excessive in contrast to the circumstances of the case.

2. That the learned trial judge erred in law by sentencing the appellant to eight (8) years imprisonment

without considering the fact that the appellant readily pleaded guilty, among other mitigating factors."

When the appeal was placed before us for hearing, Mr. Kange who was representing the appellant abandoned the grounds of appeal which were initially raised by the appellant, in person and, accordingly, sought to argue the appeal on the basis of the supplementary memorandum of appeal. The learned counsel for the appellant then commenced his submissions by criticising the learned judge for his generalised statement during sentencing to the effect that he had *"considered the submission of the state attorney and the mitigation made by the defence counsel."* Mr. Kange deplored such a generalised consideration of the aggravating and mitigating factors as insufficient and improper. To fortify his contention, the learned counsel sought reliance in the unreported Criminal Appeal No. 224 of 2016 – **Rapheal Mwita v. The Republic** where it was stated:-

"Clearly, looking at the above quotation the trial judge did not mention any antecedents or 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 mitigation factors".

More particularly, Mr. Kange submitted that the trial judge should have taken into consideration the pleaded pleas that the appellant was a first offender; that he was remorseful and readily pleaded guilty to the offence; that he had stayed in custody for two years, 5 months and 21 days and; that he was a young offender. The learned counsel for the appellant urged that had the learned judge specifically considered these factors, he would have imposed a lesser sentence.

For the respondent Republic, Mr. Victor Karumuna, learned Senior State Attorney, teamed up with Ms. Mwamini Fyeregete, learned State Attorney to resist the appeal. Mr. Karumuna, who argued the appeal reminded us of the well settled principle that an appellate court will only alter a sentence imposed by a trial court if it is evident that the said trial court had acted on a wrong principle; overlooked some material factor; or if the sentence so imposed is manifestly excessive or inadequate. An appellate court, he said, is not empowered to alter a sentence on the mere ground that, if it had been trying the case, it might have passed a

somewhat different sentence. On these propositions, the learned Senior State Attorney relied upon the unreported Criminal Appeal No. 190 of 2010 – **Seleman Rashid @ Daha v. The Republic.**

Mr. Karumuna further submitted that the offence charged attracts a maximum life sentence and that the imposed sentence of eight (8) years imprisonment was quite fitting especially considering the fact that a lethal weapon was used in the commission of the offence. In the premises, the learned Senior State Attorney urged us to leave the imposed sentence undisturbed.

On our part, we have earnestly considered the learned rival contentions from either side. It is noteworthy from the summary of the sentence made by the judge that he relatively placed special consideration to the fact that a lethal weapon was employed but, as he did so, he did not quite explicitly take into account the mitigating factors raised by the appellant. More particularly, the judge overlooked to expressly take into account that the applicant was a first offendor; that by readily pleading guilty he was remorseful and; that he had stayed in custody for close to two and a half (2 ½) years.

We should, perhaps, add that, at the sentencing, there was some argument from both counsel as to whether, at the commission of the offence, the appellant was aged sixteen (16) or eighteen (18). There was no particular finding on this argument but from an entry in the cautioned statement which was adduced without demur, it was recorded that the appellant was aged 18 at the commission of the offence and hence, he had, so to speak, just surpassed childhood to the majority age. In the circumstances, we should think, at the time of sentencing it ought to have been in the mind of the judge that the appellant was a young person at the time of the commission of the offence.

All these mitigating factors which were overlooked by the judge cry for our intervention and, in our well considered view, the judge would have imposed a lesser sentence had he taken them into account.

All said, we are minded to allow the appeal, as we hereby do, and reduce the imposed sentence of eight (8) years to such term of imprisonment as would result in the immediate release of the appellant

from prison custody; unless, of course, if he is held there for some other lawful cause. Order accordingly.

DATED at **MWANZA** this 12th 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