

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

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

CRIMINAL APPEAL NO. 466 OF 2016

MATESO MBOJEAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the Judgment of the High Court of
Tanzania at Geita)
(Mlacha, J.)**

Dated 30th day of October, 2016

In

Criminal Sessions Case No. 66 of 2016

JUDGMENT OF THE COURT

29th Nov. & 14th Dec, 2018

MUSSA, J.A.

In the High Court of Tanzania, Mwanza Registry, the appellant was arraigned for Manslaughter, contrary to sections 195 and 198 of the Penal Code, Chapter 16 of the Revised Laws Edition of 2002. The particulars on the information alleged that on the 8th October 2015, at Kikwete Village, within Geita District, the appellant unlawfully killed a certain Mhoja Mathias.

When the information was read over to the appellant he was recorded to have pleaded guilty, whereupon the trial court, accordingly,

entered a plea of guilty. Thereafter, the prosecution outlined the facts which we may materially paraphrase as follows:-

The appellant and deceased persons were, respectively, husband and wife. In the morning hours of the fateful day, the appellant left home and headed towards his farm. He left behind the deceased who had excused herself from attending the shamba work on account of being sick. Moments later the appellant saw the deceased at the farmland carrying sugarcane. Naturally, the appellant was surprised to see the deceased there and required of her as to what brought her there following which the deceased retorted to him that he should leave her alone, more particularly, in Kiswahili: "*achana na mimi niendeleee na mambo yangu*".

The appellant was unimpressed by the reply and his immediate response was to fetch a stick with which he started to attack the deceased. Soon after, the deceased succumbed to the beatings, fell down and died there and then. Aside from the outlined facts, the prosecution adduced into evidence the following documents in support of their case, that is, a cautioned statement (exhibit P1), an extra-judicial statement (exhibit P2), a

post mortem report (exhibit P3) and a sketch map of the scene of the crime (exhibit P4).

In response, the appellant admitted the outlined facts, whereupon the Court (Mlacha, J.) found him guilty as charged and convicted him. Upon conviction, the learned State Attorney in attendance told the presiding trial Judge:-

"We have no previous records but the accused killed an innocent person. The accused has killed a young person who was being depended by the nation. The deceased has left leaving (sic) behind her children. The accused acted brutally. We pray for a stiff sentence to create a lesson to him and others."

In mitigation the learned defence counsel informed the trial court:-

"I pray for lenience to my client on the following reasons:-

- 1. The accused has stayed in remand from 8/10/2015 up to now which is one year and 11 days. He has regretted as lost (sic).*
- 2. The accused has pleaded guilty and served the time and costs of the court.*

3. The accused has people who depend on him two children and his mother."

In the upshot, the trial court concluded the matter thus:

"SENTENCE

I have considered the submission of the state attorney and the defence. I think this is one of the cases which call for a heavier (sic) punishment. The circumstances under which the killing happened show that the accused was just too harsh. If the accused will not be punished seriously, it will attract people of the type of the accused to proceed to kill their wives on minor issues. I sentence the accused to suffer fifteen (15) years in jail

*L.M. MLACHA, JUDGE
20/10/2016"*

Originally, on the 14th March, 2018 the appellant, on his own filed a memorandum of appeal which was comprised of four points of grievance. A good deal later, on the 15th November, 2018 Mr. Constantine Mutalemwa, learned Advocate for the appellant, drew and filed another one grounded memorandum of appeal which complained as follows:

"1. That the learned trial erred in law and in fact for not adequately/or expressly considering all mitigating factors in the course of sentencing the Appellant."

At the hearing before us, the same Mr. Mutalemwa appeared before us to prosecute the appeal, whereas the respondent Republic had the services of Mr. Paschal Marungu, learned Senior State Attorney, who was being assisted by Ms. Sabina Choghoghwe, learned State Attorney. The learned counsel for the appellant commenced his submissions by abandoning the memorandum of appeal which was earlier lodged by the appellant.

Arguing the sole ground in the retained memorandum of appeal, Mr. Mutalemwa criticized the learned trial judge for considering the mitigating factors of the appellant generally rather than individually. Such a generalised consideration, he said, was inadequate as the trial judge was enjoined to specify which mitigating factors he/she considered as against the aggravating factors. To buttress his contention the learned counsel for the appellant referred us to unreported decisions of the Court-viz-Criminal Appeal No. 349 of 2013 – **Akida Ramadhan Saleh v. The Republic** and;

Criminal Appeal No. 347 of 2013 – **Samwel Izengo @ Malaja v. The Republic**. Thus, as he conceived it, on account of such a wrong approach in the consideration of mitigating factors, Mr. Mutalemwa urged us to intervene so as to mete out a justifiable sentence.

In his reply submissions, Mr. Marungu conceded that the trial judge made a generalised consideration of both the aggravating and mitigating factors. He, thus, also urged us to intervene and arrive at an appropriate sentence upon a specific consideration of both the aggravating and mitigating factors.

Having heard and considered the learned arguments on the sustainability or otherwise of the impugned sentence, we propose to preface our determination with the general principle that this Court would not ordinarily interfere with the discretion of the trial court in apportioning sentence unless it is evident that the trial court acted on some wrong principle or overlooked some material factors (See, for instance, **R.V Mohamed Ali Jamal** 15 EACA 126).

Thus, as submitted by counsel from either side, the trial judge arrived at the impugned sentence on the basis of a generalised as against an explicit consideration of the aggravating and mitigating factors. We recall that such an approach was particularly criticized in the unreported Criminal Appeal No. 224 – **Raphael Peter Mwita v. The Republic** where the court observed:-

"Clearly looking at the above quotation, the trial judge did not mention any antecedents or mitigating factors which he said to have consideration. He just generalised that he had considered them. As was rightly pointed out by both learned counsel, this was not a proper consideration of the mitigating factors."

As is patently clear from the pronounced sentence, the learned trial judge only took into account the aggravating circumstances under which the killing was perpetrated. We do not see, for instance, any mention of the fact that the appellant had spent more than a year in custody; that he readily pleaded guilty to the offence and; that he had dependants.

Considering that the learned trial judge did not equally consider the mitigating circumstances, we are unable to say with certainty that the

judge would have meted out the same sentence had he explicitly taken into account the appellants antecedents. We are, thus, constrained to interfere with the sentence of fifteen years imprisonment which was meted out but, in so doing, we do not lose track of the fact that the offence was grave just as the circumstances under which it was committed were vicious.

All said, we are minded to allow the appeal, as we hereby do, and reduce the sentence from fifteen years to eight years which is to run from the date of his conviction.

It is, accordingly, ordered.

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