IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO 225 OF 2016

MANYANKI WAMBURA @ MANYAKI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Mwanza Registry)

(Maige, J.)

dated the 17th day of March, 2015
in
Criminal Sessions Case No. 72 of 2015

JUDGMENT OF THE COURT

16th & 19th July, 2018

MWANGESI, J.A.:

The appellant herein, was initially charged with the offence of murder contrary to the provisions of sections 196 and 197 of the Penal Code Cap. 16 R.E 2002, (**the Code**). The particulars of the offence levelled against the appellant were to the effect that, on the 14th day of July, 2013 at Kenyana "A" village within the District of Serengeti in the Region of Mara, the accused murdered one Wambura Manyanki. He protested his innocence when the facts regarding the information of murder was read over to him on the 21st October, 2015 during

preliminary hearing. On the said date, a post mortem report which was not disputed, was admitted in evidence as exhibits P1.

On the 17th day of March, 2016, when the case was called on for trial, upon the information of murder being re–read over to the appellant, he offered a plea of guilty to a lesser offence of manslaughter contrary to the provisions of section 195 of **the Code**. The offer was not resisted by the prosecution and as a result, the information of manslaughter was read over to the appellant, who pleaded guilty. Procedurally, subsequent to the plea of guilty by the appellant, the facts constituting the offence of manslaughter ought to have been read over to the appellant and asked if he was admitting to the same. However, in the instant matter, the facts constituting the offence of manslaughter were not read over to the appellant. To appreciate what actually transpired before the Court, we hereby leave the proceedings of the particular date to take the floor thus:

> ***Court**: Information of manslaughter is read over and explained to the accused in Kiswahili. He is required to plead thereto:*
>
> ***Accused**: It is true;*
>
> ***Signed** by Maige Judge;*

***Court**: Entered as a plea of guilty to the charge.*

***Signed** by Maige Judge.*

***Mr. Kainunura**: May you are judicially (sic) note that the post mortem examination report and sketch map of the scene of the crime were admitted on 21st October, 2015 as P1 and 2, respect (sic).*

***Signed** by Judge.*

***Court**: Do you accept the facts read over and explained to you and which constitute the offence to be true.*

***Signed** by Judge.*

***Accused**: The facts read over and explained to me are true.*

***Court finding**: You are found guilty on your own unequivocal plea of the charge and unqualified admission of the facts constituting the offence read over and explained to you by the Republic to be true. You are therefore convicted of the offence of manslaughter contrary to section 195 and 198 of the Penal Code.*

Thereafter, the learned trial Judge invited the prosecution to give out the previous records of the accused and aggravating factors if any,

and the learned counsel for the appellant on his part, was called upon to give mitigating factors. And finally, the learned trial Judge proceeded to sentence the appellant to imprisonment for a term of eighteen (18) years, which is the subject of this appeal.

In the memorandum of appeal that was lodged by the appellant on the 14th day of March, 2018, he raised three grounds. For the reasons which will be apparent soon, we have opted not to reproduce the grounds of appeal. And when Mr. Salumu Magongo learned counsel, was assigned the case file to represent the appellant in this appeal, he lodged two supplementary grounds of appeal namely, **firstly,** that in the absence of facts being read after the plea of guilty, and considering the undisputed facts during the preliminary hearing, the trial Court had no material to impose the sentence it did; **secondly,** that had the trial Court properly considered the appellant's mitigating factors, it would not have arrived at the sentence it imposed.

When the appeal was called on for hearing before us on the 16th day of July, 2018, Mr. Salum Magongo learned counsel, entered appearance for the appellant, who was also present in Court. The

respondent/Republic on the other hand, was advocated for by Mr. Juma Sarige learned Senior State Attorney, who was assisted by Ms Sabina Chogogwe, also learned State Attorney.

Mr. Magongo rose to inform the Court that, there are two sets of grounds of appeal which have been lodged in Court that is, the grounds of appeal that were lodged by the appellant himself on the 14th day of March, 2018, and the grounds of appeal which were lodged by him on the 8th day of March, 2018. However, after consultation with the appellant, they have reached a consensus that, the grounds of appeal which were lodged by the appellant be abandoned and proceed with the grounds which were lodged by him only. He therefore, proceeded to argue the two grounds which he lodged.

In his oral submission, Mr. Magongo informed the Court that, the two grounds of appeal which he did lodge, the second ground is merely an alternative to the first one. Amplifying the first ground, the learned counsel submitted that, because the facts of the case were not read out to the appellant after he had pleaded guilty to the offence of manslaughter, the trial Court had no bases to impose the sentence which it did. And even if it were to be presumed that, the learned trial

Judge relied on the facts which were read to the appellant during preliminary hearing, the same was legally untenable, because the circumstances of the offence had changed.

Procedurally, the learned counsel went on to submit, after the appellant had pleaded guilty to the offence of manslaughter, the facts of the offence ought to have been read to him, from which the sentence to be imposed would base. Mr. Magongo argued further that, even though at page 12 of the record of appeal, it has been indicated that, in sentencing the appellant, the learned trial Judge took into consideration the circumstances of the case, such circumstances were nowhere to be seen in the record. In his view, the proceedings at the trial Court were flawed and as such, he urged us to invoke the revisional powers conferred on us by the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E 2009 (**the AJA**), to quash the proceedings of the trial Court and set aside the conviction and the sentence which was imposed.

In the alternatively, which constituted the second ground of the appeal, the learned counsel submitted that, if the learned trial Judge would have put into consideration the mitigating factors which were

advanced by the appellant's learned counsel, undoubtedly, he would not have imposed a severe sentence as he did. This was from the fact that, the appellant was a first offender, he had pleaded guilty to the charge and therefore, saving the precious time of the Court as well as the costs to the Government if the case could go to full trial. Furthermore, the appellant had already been in remand for about three years. To the contrary, the prosecution did not advance any aggravating factors. In that regard, Mr. Magongo implored us to reduce the sentence which was imposed to the appellant to a lesser and reasonable one.

On his part, the learned Senior State Attorney was in agreement with what was submitted by his learned friend on the first ground of appeal that, indeed, the proceedings of the trial Court were imperfect. The failure to read the facts of the information of manslaughter to the appellant vitiated the proceedings. He added that, even if the facts read to the appellant during preliminary hearing were to be adopted by the learned Judge, still it was improper because the said facts were in respect of an offence of murder and not manslaughter. He referred us to the decisions in **Bahati Pastory @ Gwanchele and Another Vs. Republic**, Criminal Appeal No. 133 of 2015 as well as **Kisukari**

Mmemo Vs. Republic, Criminal Appeal No. 192 of 2013 (both unreported). In fine, Mr. Sarige urged us to invoke the provisions of section 4 (2) of **the AJA** to revise the proceedings of the trial Court.

With regard to the second ground of the appeal, the learned Senior State Attorney was in agreement with the sentence that was imposed by the learned Judge of the High Court that, it was reasonable and deserving. He substantiated the stance by contending that, the offence with which the appellant was charged with and convicted of, carries a maximum term of life imprisonment. Regard being to the nature of the offence and the manner in which it was committed by the appellant as reflected at pages 2 to 3 of the record of appeal, there was no way in which, the learned trial Judge could be faulted.

In the light of what has been submitted from either side above, two issues stand for determination by the Court that is, **firstly,** whether or not, the omission occasioned by the trial Court in failing to read out to the appellant the facts of the case after he had pleaded guilty to the offence of manslaughter was fatal; and **secondly**; if the

answer to the first issue is in the negative, whether or not the sentence imposed by the trial Court was excessive.

The law is settled that, where the accused person pleads guilty to the charge that has been placed at his door, the ingredients constituting the offence to which he has pleaded guilty, have to be read over to him so as to let him be ascertained with the offence which he stands facing. The guidelines which were given by the erstwhile Court of Appeal for East Africa in **Aidan Vs Republic** [1973] EA 445, are very instructive, when it stated thus:

> *"When a person is charged, the charge and the particulars should be read out to him so far as possible in his own language, but if that is not possible then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged.* ***If the accused then admits all those essential elements, the magistrate should record what the accused has said as nearly as possible in his own words and then formally enter a plea of gullty. The magistrate should next ask the prosecution to state the facts of the alleged***

offence and, when the statement is complete, should give the accused person an opportunity to dispute or explain the facts or to add any relevant facts*. If the accused does not agree with the statement of facts or asserts additional facts which, if true might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded."*

[Emphasis supplied]

See also: **Bernadetha Paul Vs. Republic** [1992] TLR 97, **Charles Mashimba Vs. Republic** [2005] TLR 90, **Bahati Pastory @ Gwanchele and Another Vs. Republic** (supra) and **Kisukari Mmemo Vs Republic** (supra).

In **Kisukari Mmemo's** case (supra), of which the situation was almost similar to the instant appeal in that, after the accused had

pleaded guilty to the charged offence, the facts were not read out to him, the Court observed in part that:

> *"We were wondering what facts the appellant was asked to confirm to be correct? And on what basis the Court entered conviction? If there are no facts on the record after the accused had pleaded guilty to the offence, a conviction cannot stand."*

We have noted at page 12 of the record appeal in the instant appeal that, while learned trial Judge was sentencing the appellant he stated that:

> *"I have taken into account the antecedents and mitigating facts (sic) raised by the defence counsel. I am of the opinion however that, in view of the circumstances surrounding the commission of the offence a severe sentence is required to serve as a lesson to the accused and other wrong doers. I have considered that, the accused fired the residential house of the deceased after they had exchanged words while the deceased was in. Such an act was very harsh and inhuman which cannot be tolerated in a civilized society---."*

As it was wondered by our learned brethren in **Kisukari Mmemo Vs. Republic** (supra), we were as well left to wonder in the instant appeal, as to where the learned trial Judge got the facts indicated in his sentence, while they did not feature in the record of appeal. Since the record is clear that, there were no facts of the case read out to the appellant after he had pleaded guilty to the offence of manslaughter, then what was contained in the sentence was not borne out of the record and therefore, rendered the proceedings nullity. To that end, the conviction cannot be left to stand and so is the sentence. We therefore answer the first issue in the affirmative that, the omission to read the facts of the case after the appellant had pleaded guilty, did vitiate the entire subsequent proceedings, the sentence inclusive.

Having answered the first issue in the affirmative, the second issue which was subject to the first issue being answered in the negative crumbles down, and it is accordingly done away with.

Things being as they are, we are constrained to invoke the powers bestowed on us by the provisions of section 4 (2) of **the AJA,** to quash the proceedings of the trial Court from when it was called for

trial, and set aside the conviction and sentence which was imposed to the appellant. In lieu thereof, we direct that, the matter be scheduled for trial afresh before another learned trial Judge. Regard being to the age of the case that it is a long time matter, we direct that, its scheduling for trial be given priority.

In the meantime, the appellant will remain in custody.

Order accordingly.

DATED at **MWANZA** this 18th 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