IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MWARIJA, J. A., KOROSSO, J. A. And KITUSI, J. A.)

CRIMINAL APPEAL NO. 344 OF 2016

MANONI MASELE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Gwae, J.)

dated the 13th day of June, 2016
in
Criminal Session No. 147 of 2015
.....

JUDGMENT OF THE COURT

25th October & 6th November, 2019

KITUSI, J.A.:

On his own plea, the appellant was convicted of manslaughter under section 195 and 198 of the Penal Code, [Cap 16 R.E. 2002], and on his admission of the facts, that on 23rd May, 2013, at Hugnamalwa Village in Kwimba District, Mwanza Region, he caused the death of one Nyanzobe s/o

Bulugu. He was consequently sentenced to 15 years imprisonment, but he is aggrieved by that sentence, hence this appeal.

Both in the Memorandum of Appeal which the appellant had personally filed earlier containing two grounds, and in the later memorandum of appeal containing one ground which was filed by Mr. Innocent John Kisigiro, learned counsel, the complaint is that the trial High Court judge failed to consider the mitigating factors and thereby sentenced the appellant excessively. Mr. Kisigiro who appeared for the appellant at the hearing elected to argue this one ground. The respondent Republic appeared through Mr. Robert Kidando, learned Senior State Attorney.

Submitting, Mr. Kisigiro listed down the mitigating factors that were not given due consideration by the learned High Court Judge. These are that; **one**, the appellant was a first offender; **two**; he had readily pleaded guilty; **three**; he had been in remand custody for three years before being brought to trial; **four**; the deceased was the first to insult and assault the appellant.

The learned counsel faulted the High Court for reopening the proceedings by analyzing evidence at the time of composing sentence in the course of which he imported into the sentencing order, matters that ought to have been part of the order of conviction.

Opposed to the appeal, Mr. Kidando submitted that the appellant had raised only three mitigating factors which the High Court considered in sentencing. These are; the time he spent in custody, the fact that he pleaded guilty and that he was under the influence of alcohol. The learned Senior State Attorney went on to submit that the maximum sentence for the offence of manslaughter is life imprisonment. He invited us to bear in mind that the appellant was the first to talk to the deceased woman who was in the company of another man and when the misunderstanding arose, he retreated home to go arm himself.

When probed by the Court, Mr. Kidando conceded that the learned High Court Judge raised issues during sentencing and determined them without giving parties a hearing. In a short rejoinder, Mr. Kisigiro implored us to make a statement regarding what should be considered in sentencing.

We need to interject that if we are going to have to make the statement suggested by Mr. Kisigiro, it will be by way of a mere reminder, because there is a large family of case law on sentencing and guidelines as to what should Magistrates or Judges consider.

Now back to the principles. The powers of this Court on sentencing are limited, so we shall guard against overstepping the boundaries. In **Elias Kifungo vs Republic**, Criminal Appeal No. 208 of 2010 (unreported) we reproduced the following time-tested principle which was echoed in **Mohmed Ratibu Saidi vs Republic**, Criminal Appeal No. 11 of 2004 (unreported):-

> *"It is a principle of sentencing that an appellate court should not interfere with a sentence of a trial court merely because had the appellate court been the trial court it would impose a different sentence. In other words, an appellate court can only interfere with a sentence of a trial court if it is obvious that* ***the trial court has imposed an illegal sentence or had acted on a wrong principle or had imposed a sentence which in the circumstances of the case was manifestly***

excessive or clearly inadequate. *(See also* ***Ogalu s/o Owoure vs Reginam*** *(1954] 21 EA CA 270)."*

Certainly, there is no contention that the sentence imposed in this case was illegal, so we shall test the remaining two factors, that is, whether the Judge acted on a wrong principle or that the sentence was manifestly excessive. In principle, a sentencing Magistrate or Judge is required to consider the mitigating factors and the aggravating circumstances. In the case of **Shaban Ismail vs Republic**, Criminal Appeal No. 102 of 2012 (unreported) emphasis was placed on taking mitigating factors into account. In that case the following statement from an earlier decision in **Willy Walasha vs Republic**, Criminal Appeal No. 7 of 2002 (unreported) was reproduced: -

"It appears to us that, with respect, although ostensibly a judge may say that he has taken into consideration mitigating circumstances in assessing sentence, it is not always apparent that he has, in fact, done so. For example, first offenders who plead guilty to the charge are usually sentenced

leniently unless there are aggravating circumstances. Also, the period an offender has spent in remand custody before they are sentenced is usually taken into consideration to reduce the sentence which the offender would otherwise receive. We expect judges will in future demonstrate more clearly, when assessing sentence that they have properly taken into account both mitigating and aggravating circumstances of each individual case."

Mr. Kisigiro cited the case of **Juma Mniko Muhere vs Republic**, Criminal Appeal No. 211 of 2014 (unreported) to bring home the point that failure to consider mitigating circumstances is faulty. We shall later associate ourselves with a number of observations that were made in that case. But first let us get more insight in the mitigation factors. In a book, CRIMINAL LAW. A Handbook on sentencing, East African Literature Bureau, Brian Slattery, 1972, the author writes the following on mitigation:-

"Mitigating factors fall into two broad categories; the first relating to the degree of the offender's

moral responsibility for his offence, the second to his reformabililty. As for the first, the courts recognize that in certain circumstances an offender may not be greatly to blame for his crime. At that time he may not have been fully aware of the implications of his actions, whether due to ignorance of the law, or confusion as to the circumstances. Or he may have found it difficult to control himself, because of internally debilitating factors such as intoxication, fatigue, or mental instability or because of external factors such as provocation, great temptation or intimidation ... All these factors have been recognized by the courts as reducing the responsibility of an offender for a crime and as entitling him to leniency."

We need not consider each and every item in that long menu, but for our case it is enough to gauge how the learned judge dealt with the issue of intoxication. First of all, intoxication during sentencing is raised not as a defence but only to ask for leniency. However, in the case before us, the judge took upon himself the duty to discuss the law and evidence on intoxication and finally stated:-

"I am not convinced that there is evidence of that the accused was drunk on the material date as it is evidently stated that the accused had no money..."

With respect, we think this part of the judge's finding was rather unfortunate because it was arrived at without giving the parties, especially the appellant, an opportunity to elaborate. This we think, is what Mr. Kadando rightly submitted that the judge raised and determined issues without hearing the parties. But then we wonder, how did the learned judge expect to have evidence of intoxication when nobody had been invited to testify? We are also uncertain if the learned judge was correct in concluding that the appellant could not have been drunk because he had no money on him. Our conclusion on this aspect is that the judge acted on a wrong principle.

Understandably, there are a good number of times when a plea of guilty is offered by an accused and accepted by the prosecution, for an offence that would otherwise be more serious. But we think, once a plea of guilty is entered in such scenario for that lesser offence, the court's finding of guilt and conviction should be confined to that lesser offence. If,

during sentencing, as in this case, the trial judge has one eye on the offence of manslaughter to which a plea of guilty has been entered, and another eye on the offence of murder, he runs the risk of losing sight of the mitigating factors, which is one of his major considerations at that stage. We think in the process the learned Judge strayed into errors of discussing issues unrelated to sentencing. For instance, we do not see how he considered it useful to discuss the issue of death resulting from a fight, usually discussed in determining the guilt of a person. In any event, this point was not raised by any of the parties. However, the learned Judge did not take into account that the deceased was the appellant's paramour and he caught her enjoying drink with another man. Yet, all the appellant did was to ask them for a drink. We do not think that this attitude describes the appellant as confrontational up to that point. What triggered off the fight was the response of the deceased and the man she was enjoying the drink with. They insulted him, which may not qualify as legal provocation, but the fact that it may have caused the appellant to lose control of himself cannot be excluded.

Mr. Kidando submitted that the appellant should not be heard to complain because, after all, the maximum sentence for the offence is life imprisonment. Indeed, that is the case, but in **Juma Mniko Muhere V. Republic** (Supra) it was emphasized that maximum punishment should be reserved for the worst offence of the class for which the punishment is provided, and we have no reasons to differ with our position in that case.

In fine we are of the settled view that the High Court Judge considered extraneous matters and failed to consider relevant mitigating circumstances. We think we should wind up by bringing forth the counsel that was offered in **Juma Mniko Muhere V. Republic** (supra):-

> *"It is at this stage that the judge, magistrate and even the prosecuting attorney has to cast aside his or her personal emotions or even idiosyncratic views of the offence and/or offender and do justice to the convict according to law."*

Accordingly, bearing in mind all the circumstances of the case, we think a sentence of ten (10) years would meet the justice of the case. We therefore substitute the sentence of 15 years with that of 10 years, to be

counted from the date the appellant was sentenced by the High Court. To that extent, the appeal is allowed.

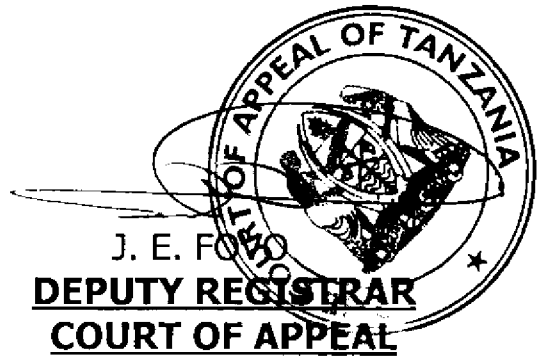
DATED at **MWANZA** this 5th day of November, 2019

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The judgment delivered this 6th day of November, 2019 in the presence of Appellant Manoni Masele appeared in person and Mr. Robert Kidando, learned Senior State Attorney for the Respondent is hereby certified as a true copy of the original.



J. E. FOKO
DEPUTY REGISTRAR
COURT OF APPEAL