IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: MMILLA, J. A., MZIRAY, J. A. And KWARIKO, J. A.)

CRIMINAL APPEAL NO. 433 OF 2018

KAKURU OSWARD @ MULONGO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mlacha, J.)

dated the 15th day of October, 2018
in
Criminal Session No. 8 of 2018
.....

JUDGMENT OF THE COURT

25th November & 2nd December, 2019

MMILLA, J.A.:

The appellant, Kakuru Osward @ Mulongo, was originally charged with the offence of murder contrary to section 196 of the Penal Code Cap. 16 of the Revised Edition, 2002 (the Penal Code). Upon acceptance by the Republic of his request to plead guilty to a lesser offence of manslaughter contrary to section 195 of the Penal Code, he was convicted and sentenced to ten (10) years' imprisonment term. That sentence aggrieved him, hence the present appeal to the Court.

The appellant and one Ashura d/o Ibrahim (the deceased) were husband and wife, having contracted a marriage in 2009. At the time of the deceased's death on 17th December, 2016, they were living at Kinagi Bumbire Island, within Muleba District in Kagera Region. It is noteworthy however, that at the time of her death they were under a voluntary separation, though they were still living under the same roof.

On the fateful day, the appellant returned home at night. He found the main door shut and pushed it open. On entering in the house, he found his wife having sex therein with another man. That sudden discovery resulted into a sudden fight between him and the intruder. After a brief moment of fighting, the stranger ran away. The appellant gave a chase, but he did not catch him. He returned to his house and faced his wife.

In the course of a fight with his wife, the appellant picked a knife on the floor and stabbed her on the chest. She fell down, bled profusely, and eventually died. The medical report (Exhibit P1) showed that death was due to excessive bleeding. It was on that background that he was subsequently arrested and charged with murder until he was offered to plead to a lesser offence of manslaughter contrary to section 195 of the Penal Code as earlier on pointed out.

This appeal was placed before us for hearing on 25.11.2019. The appellant, who was also present in Court, was represented by Mr. Aaron Kabunga, learned advocate; whereas the respondent/Republic was represented by Ms Chema Maswi, learned State Attorney.

The appellant's memorandum of appeal raised only one ground that the trial judge erred in law and in facts for passing a sentence of ten (10) years' imprisonment which was extremely excessive and in total disregard of the mitigating factors and circumstances under which the offence was committed.

Submitting in support of the appeal, Mr. Kabunga complained that the learned trial judge did not properly consider the mitigating factors which were advanced. He contended that the trial court was informed that the appellant was a first offender, and readily admitted before the police as well as before the justice of the peace, and also when he was in court, that he was responsible for his wife's death, but never intended to kill her. He also submitted that as on the date of the sentence, the appellant had stayed in remand prison for one year and eight (8) months, but the trial judge ignored all those factors.

Likewise, Mr. Kabunga referred the Court to the circumstances under which the charged offence was committed. He claimed that though the couple was on a voluntary separation, they were nevertheless living under the same roof. On arrival home on the fateful night however, he found the deceased having sex therein with a stranger, something which immensely disturbed him and pushed him into a sudden fight with the intruder. Unfortunately, the intruder ran away, after which the appellant returned to his house and began fighting with the deceased in the course of which he stabbed her to death. Mr. Kabunga maintained that had the trial judge properly considered those circumstances, he would not have imposed that excessive sentence of 10 years. He referred us to the two holdings in the case of **Charles Mashimba v. Republic** [2005] T.L.R. 90. It was held in that case that: -

> *"(i) An appellate court may interfere with the sentence imposed by the trial court where there is a cause to do so.*
>
> *(ii) The learned trial judge overlooked the fact that the appellant was outrageously provoked by the misconduct of his infidel spouse, and . . . had saved time and expense by pleading guilty, also that he*

had shown contrition for the unlawful killing of his spouse."

Probed by the Court regarding the nature of the injuries and the areas on which they were inflicted, Mr. Kabunga submitted that because the appellant was in a sudden fit of anger, and since the incident occurred at night, he could not have known the areas he was striking. Nevertheless, he added, the appellant regretted a lot for what happened. He urged the Court to favourably consider those circumstances and allow the appeal.

On the other hand, Ms Maswi hastened to inform the Court that she was strongly opposing the appeal. She argued that the sentence which was meted out by the trial court against the appellant was not excessive, particularly so when it is considered that the maximum sentence for the offence of manslaughter under section 198 of the Penal Code is life imprisonment. Even, she went on to submit, in passing the said sentence the trial court took into account the surrounding circumstances, but it struck a balance between the mitigating factors and other important factors surrounding that case.

In elaborating her stance, Ms Maswi argued that she was aware that the Court has power to interfere with the sentence imposed by the trial court. However, she argued, that should only happen in circumstances

where it may be found that in imposing the sentence the trial judge ignored to consider an important matter or circumstances which he ought to have considered. She referred us to the case of **Rajabu Dausi v. Republic**, Criminal Appeal No. 106 of 2012 (unreported). In the present case however, Ms Maswi added, the trial court considered all the mitigating factors which were advanced, but similarly took into consideration other circumstances in the case which justified the passing of that sentence.

Amplifying her point, Ms Maswi stated that in paragraphs 9 and 10 of the Post Mortem Report constituted in exhibit P1, the doctor revealed that the appellant inflicted multiple injuries on the deceased's body which landed on vulnerable parts of her body. Also, she went on to say, the appellant admitted in his cautioned statement (Exhibit P2) that he stabbed her four times.

On another point, Ms Maswi contended that the appellant revealed similarly in exhibit P2 that his wife asked to be pardoned, but he went on slapping her, and later picked a knife with which he stabbed her several times, an aspect which had aggravating effects.

As regard Mr. Kabunga's contention that the appellant acted in a sudden fit of anger, Ms Maswi challenged that the assertion is not well

grounded because the appellant said he gave a chase to the fleeing intruder, therefore that he had time to cool his anger. She also disagreed with her learned brother that living in the same house after separation did not necessarily imply that the appellant loved his wife because they had equal rights over that matrimonial home.

Concerning the allegation that the appellant was assaulted and sustained injuries, Ms Maswi responded that the injury he sustained was self-inflicted because he mishandled the knife he picked in an endeavour to stab his wife long after the intruder had gone, also that the PF3 shows that in essence the treatment he received was in regard to the infliction he sustained following his attempt to kill himself.

Responding to the case of **Charles Mashimba** (supra) which was relied upon by her learned brother Mr. Kabunga, Ms Maswi contended that it was distinguishable to the circumstances of the present case because in the present case the couple was under separation.

In conclusion, Ms Maswi maintained that the factors she highlighted in the present case justify her point that the trial judge correctly imposed the complained of sentence, and urged us to dismiss the appeal.

In a brief rejoinder, Mr. Kabunga reiterated his earlier point that the appellant had acted in a fit of anger, and had no enough time to cool his temper. He also stressed that he found the deceased and the other man in his bed, which makes the circumstances quite peculiar. He repeated his prayer that we allow the appeal.

We desire to begin by appreciating the often stressed principle that in any appeal focusing on sentence, the court will not readily interfere with the discretion of the trial court unless it is evident that it has acted on a wrong principle, or it overlooked some material factors – See the cases of **Willy Walosha v. Republic**, Criminal Appeal No. 7 of 2002 (unreported) and **James Yoram v. Republic** (1950) 18 EACA 147. The position was best summarized in **Silvanus Leonard Nguruwe v. Republic** [1981] T.L.R. 66 which was followed in **Charles Mashimba's** case that:-

> *"Before the court can interfere with the trial High Court's sentence, it must be satisfied either that, the sentence imposed was manifestly excessive, or that the trial judge in passing the sentence ignored to consider an important matter or circumstances which he ought to have considered or that the sentence imposed was wrong in principle."*

See also the case of **Rajabu Dausi v. Republic** (supra).

We may add here that first offenders who plead guilty to the charge are usually sentenced leniently, unless there are aggravating circumstances. Also, the period an offender may have spent in remand prison before he is sentenced is also usually taken into consideration – Once more, see **Willy Walosha's** case (supra).

In the light of the principles revisited above, the issue in the present case becomes whether or not the circumstances under which the impugned sentence was imposed on the appellant justify interference by the Court.

As reflected at page 7 of the Record of Appeal, Mr. Kabunga had stated in the mitigation on behalf of the appellant that he was a first offender who had admitted before the police and subsequently before the justice of the peace that he caused the death of his wife; also that he readily pleaded guilty to the charge of manslaughter when it was first read to him before that court. He also informed that court that on the date of conviction and sentence, the appellant had stayed in remand prison for a year and 8 months. Further, he referred the Court to the crucial circumstances under which the killing occurred, emphasizing that all that was triggered by the fact that he found the deceased having sex with

another man in their house, something which disoriented him, forcing him into a fight which culminated into the deceased's death.

On the other hand however, we take note that the trial judge took into consideration all those factors, and implied that in a fit case they attracted leniency. However, he remarked at another point that the appellant used a knife with which he stabbed his wife on the chest, and that it was "a serious issue". As a result, he imposed the complained of sentence of 10 years.

We have dispassionately considered the trial judge's reasoning, which in fact enjoys Ms Maswi's full support. We hasten to say that we agree with those sentiments. We will explain.

In the first place, we share the views of Ms Maswi that according to paragraphs 9 and 10 of the Post Mortem Report (exhibit P1), the appellant inflicted multiple injuries on the deceased's body which landed on vulnerable parts of her body. Surely, that was corroborated by the contents of the cautioned statement (exhibit P2) in which the appellant had stated that he stabbed the deceased four times.

Equally important, we agree with Ms Maswi that according to exhibit P2, the appellant disclosed that his wife pleaded for pardon, but he went

on slapping her, and later on he picked a knife with which he stabbed her several times. It cannot be avoided to say that it was a merciless conduct.

Mr. Kabunga attempted to convince us that the appellant attacked the deceased in a fit of anger and had no enough time to cool his temper. On this again, we agree with Ms Maswi that since the appellant said in his cautioned statement that he chased the intruder but did not manage to catch him after which he returned to his house to face his wife. It cannot be accepted therefore, that he had no sufficient time in which to cool his temper.

Ms Maswi contested as well, and we agree with her, that the mere fact that the couple stayed under the same roof during separation did not imply that the appellant loved his wife because the house was a matrimonial home and it belonged to both of them. At any rate, as was properly considered by the trial court, such a fact ought not to be viewed in isolation with other surrounding circumstances which we have just discussed.

In view of the above, we think that the trial judge rightly struck a balance of all the factors that obtained in the case, hence that he violated no principles which required to be considered by a court at the time of

passing a sentence. Consequently, we have no justification to interfere with the discretion which was exercised by that court.

In conclusion, we find the ground which was raised to be devoid of merit, thus we dismiss the appeal.

Order accordingly.

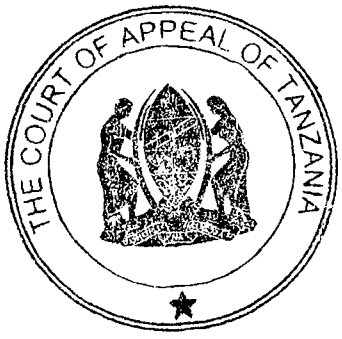
DATED at **BUKOBA** this 30th day of November, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of December, 2019 in the presence of Mr. Frank John holding brief of Mr. Aaron Kabunga for the Appellant and Ms. Chema Maswi, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL