IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 462 OF 2016

UHURU JACOB ICHODE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Sumari, J.)

dated the 28th day of October, 2016
in
HC. Criminal Sessions Case No. 138 of 2007

JUDGMENT OF THE COURT

26th & 29th November, 2019.

MUGASHA, J.A.:

The appellant was charged with the offence of attempted murder contrary to section 211 of the Penal Code (Cap. 16 R.E. 2002). He was convicted and sentenced to a jail term of fifteen years. It was alleged that, on 12/12/2006 at Thabache Village within the district of Tarime in Mara region, the appellant did unlawfully attempt to murder Josephate s/o Sangira by cutting him on the head and lower legs causing permanent

defect of dental formulae and nerves. The appellant did not plead guilty. In order to prove its case, the prosecution lined up three prosecution witnesses and tendered one documentary exhibit P1 namely, a Police Form No. 3 (PF3).

It was alleged by the prosecution that, in the evening of 1/12/2006 the victim Josephate Sangira Wabera (PW1) having been informed by his son that his three cows were missing embarked on a search for the cows within the neighbourhood at the appellant's millet farm. Having seen the PW1 in his farm, the appellant inquired and the victim introduced himself and moved closer to the appellant who blamed PW1 for having paid contribution for the construction of the Secondary School to the Ward Executive Officer instead of channelling the payment through him. In addition, the appellant accused PW1 to have bewitched and killed his wife and suddenly, using a bush knife struck PW1 on the head, left hand fingers and the left leg. In the said attack, the appellant was joined by his son and together they ultimately tied PW1 with ropes and hanged him upside down. PW1 raised alarm which was heeded to by among others, his wife and Magau Ghati (PW2) who rushed at the scene of crime and untied the victim. According to PW2 who found the appellant at scene of crime when

asked on what had befallen PW1, the appellant and his son opted to run away. The matter was reported to the Ward Executive Officer and the Police where the victim was given a PF3. Jongo Sayeda Machage (PW3) a medical doctor who attended PW1, recalled to have found PW1 with cut wounds on the back head, right side of the head, facial area, the back and his teeth were loose and others had to be removed, a condition which necessitated PW1's hospitalisation.

In his defence, the appellant told the trial court that on the fateful day, while near his son's house saw someone holding a bush knife. As the man was not responsive, he dropped the bush knife after he was pushed by the appellant who picked the bush knife and a fight ensued whereby the appellant using the said bush knife did assault the man who happened to be PW1.

As neighbours rushed at the scene, scared of mob justice the appellant ran away and took refuge at the house of the Ward Executive Officer. His wife Sophia Ouru Athiambo (DW2) recalled to have heard her husband lamenting to have been attacked by PW1 and that the appellant had directed her to raise alarm. The Ward Executive Officer Emmanuel

Waryoba Zakaria (DW3) confirmed to have known about the incident after the appellant took refuge at his house on being pursued by a mob armed with weapons who aimed to attack the appellant accusing him of having assaulted PW1 who was heavily bleeding. DW3 attended the matter by availing asylum to the appellant and ordered the matter to be reported to the Police.

After a full trial, the judge summed up the case to the assessors who all returned a verdict of guilt and on the whole of the evidence, the trial court was satisfied that, the prosecution case was proved to the hilt. Thus, as earlier indicated the appellant was convicted as charged.

Aggrieved, the appellant has appealed to the Court challenging the decision of the trial court. He initially filed a Memorandum with four grounds and later through his advocate, filed a supplementary memorandum containing one ground of appeal in the supplementary memorandum of appeal namely:

1) That the trial court erred in sentencing the appellant without taking into consideration the time of two years spent in custody before being admitted to bail on 15/12/2008.

The appellant abandoned the initial Memorandum of appeal and opted to pursue the sole ground in the supplementary memorandum of appeal.

To prosecute the appeal, the appellant had the services of Mr. Constantine Mutalemwa learned counsel whereas the respondent had the services of Mr. Hemedi Halidi Halfani, learned Senior State Attorney.

In addressing the ground of complaint, Mr. Mutalemwa on behalf of the appellant faulted the trial court for not having considered the term of two years which the appellant had spent behind bars before he was admitted to bail while imposing the sentence of fifteen years which he claimed to be excessive. That apart, he added that the trial judge took into account the irrelevant consideration contained in the submission of the learned State Attorney and as such, he argued, the trial judge did not exercise her discretion judiciously.

On the other hand, Mr. Halfani, did not support the appeal. He argued that, this is not one of those instances whereby discretion of the trial court in sentencing can be interfered because there is no violation of the sentencing principles. In this regard, he argued that in the present case the trial judge exercised her discretion judiciously in imposing the sentence

which is not at any rate excessive considering that, the maximum sentence for the offence of attempted murder is life imprisonment. To back up his proposition he referred us to the case of **FURAHA ALEX VS REPUBLIC,** Criminal Appeal No. 52 of 2014.

In a brief rejoinder, Mr. Mutalemwa reiterated his earlier stance that the trial judge did not exercise the discretion judiciously or else she would have not imposed excessive sentence on the appellant.

Having carefully considered the ground of appeal, the submission of learned counsel and the record of appeal, the taxing issue is whether or not the discretion exercised by the trial judge in sentencing the appellant warrants interference by the Court.

As a general rule, the Court of appeal will not readily interfere with the exercise of discretion of a judge when passing sentence, unless it is evident that has acted on a wrong principle, or overlooked some material factors. [See - **JAMES S/O YORAM VS REPUBLIC (1950)** 18 EACA 147, **MBOGO AND ANOTHER VS SHAH** [1968] E.A.93, **KATINDA SIMBILA @ NG'WANINANA VS REPUBLIC,** Criminal Appeal No. 15 of 2008, **WILLY WALOSHA VS REPUBLIC,** Criminal Appeal No. 7 of 2002 (all unreported)].

On the basis of the said general rule, upon which an appellate Court can interfere with the exercise of discretion of an inferior court or tribunal in **CREDO SIWALE VS THE REPUBLIC**, Criminal Appeal No. 417 of 2013 relying on the case of **MBOGO AND ANOTHER VS SHAH** (supra) the Court said:

> *" (i) If the inferior Court misdirected itself; or*
>
> *(ii) it has acted on matters it should not have acted; or*
>
> *(iii)* ***it has failed to take into consideration matters which it should have taken into consideration,***
>
> *And in so doing, arrived at wrong conclusion. Other jurisdictions have put it as "abuse of discretion" and that an abuse of discretion occurs when the decision in question was not based on fact, logic, and reason, but was arbitrary, unreasonable or unconscionable - See* ***PINKSTAFF VS BLACK & DECKTZ*** *(US) Inc, 211 S.W 361."*

Moreover, in the case of **RAMADHANI IBRAHIM VS REPUBLIC**, (supra) in determining the appeal against the sentence which was on higher side, the Court said:

> *"Generally, an appellate court will alter a sentence if it is evident that it is manifestly excessive. What is implied here is that the appellate court will not interfere with a sentence assessed by a trial court merely because it appears to be severe. It will only interfere if it is plainly excessive in the circumstances of the case."*

In the case of **WILLY WALOSHA VS REPUBLIC,** (supra), the court was faced with a situation whereby the appellant being a first offender who had readily pleaded guilty to the charge of manslaughter was given a sentence of twenty (20) years imprisonment. This was considered excessive and reduced to four years after the Court had observed as follows:

> *"It appears to us that, with respect, although ostensibly a judge may say 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... 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."

[Emphasis ours]

We shall be guide by the stated settled position of the law in determining the appeal before us. At the outset, we wish to point out that, it is glaring on the record that the appellant was the first offender. This is reflected at page 81 of the record whereby when called upon to submit on the record of previous conviction of the appellant the learned State Attorney said as follows:

"We have no previous record; however, we pray for stiff punishment for what he has committed. "

The appellant's advocate gave mitigating factors as follows:

"The *circumstances of the case calls for court's wisdom in sentencing. So we leave it to court to decide a fair punishment."*

In assessing the sentence, the learned judge at page 82 of the record, stated:

> *"The accused as stated deserved severe punishment for the offence committed. He is therefore sentenced to serve a term of fifteen (15) years imprisonment."*

In the light of the record above, we do not agree with Mr. Mutalemwa that the trial judge took into account extraneous considerations as that proposition is not backed by the record. However, we have gathered that, the trial judge did not consider that the appellant was a first offender who had spent two years behind bars before being admitted to bail. In that regard, it is clear that, the High Court Judge failed to consider the material factor which normally entitle a first offender to leniency. Therefore, this warrants the interference by the Court to do what the trial court ought to have done.

Having considered all the above factors, we think the sentence of fifteen years' imprisonment was on the higher side. Since the appellant was arraigned on 1/12/2006 and had spent two years behind bar before being

admitted to bail. We thus reduce the sentence imposed to a term of thirteen years. The appeal is therefore partly allowed to that extent.

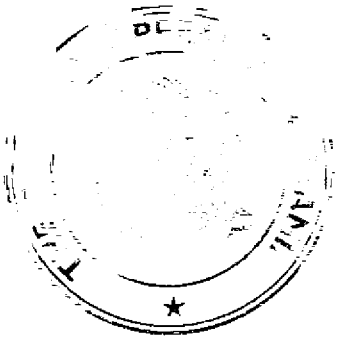
DATED at **MWANZA** this 28th day of November, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This Judgment delivered this 29th day of November, 2019 in the presence of Appellant in person, and Ms. Ghati William Mathayo, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL