IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MBAROUK, J.A., MZIRAY, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 345 OF 2016

JOHN MAYALA.....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 Sessions Case No. 31 of 2014

JUDGMENT OF THE COURT

3rd & 5th April, 2019.

MBAROUK, J.A.:

This appeal is against the Judgment of the High Court of Tanzania at Mwanza in Criminal Session Case No. 31 of 2014 dated the 13th day of June, 2016. The appellant was arraigned before the High Court for the offence of Attempted Murder c/s 211 (a) of the Penal Code Cap. 16 R.E. 2002. It was alleged in the charge sheet that on 23rd day of August, 2012 at Sumve village within Kwimba District in Mwanza Region, unlawfully attempted to cause the death of one

Elizabeth d/o Elias. After the charge and facts were read over to him, the appellant pleaded guilty and the court proceeded to convict him on the basis of his own plea of guilty. He was then sentenced to fifteen (15) years imprisonment. Having been aggrieved by the sentence, he has preferred this appeal.

The appellant's Memorandum of Appeal contained five grounds to the effect that:-

1. *The whole circumstances of the crime/case plus mitigating factors including the time the appellant as a first offender had stayed in custody pending trial were not considered adequate by the trial court before passing the sentence.*
2. *The material factors were not positively considered.*
3. *The sentence imposed upon the appellant was/is manifestly excessive in contrast to the circumstances of the crime occurred.*
4. *The presiding judge ought to have moved with the pre and post offence conducts by the appellant already*

moved (sic), who contracted and to the extent of awarding him undeserved serious condemnation.

5. *There were no known aggravating factors that influencing the presiding judge to impose such an excessive sentence upon the appellant.*

At the hearing of the appeal, the appellant was represented by Mr. Constantine Mutalemwa, learned advocate holding brief for Emmanuel Sayi, learned advocate, whereas the respondent/Republic was represented by Mr. Victor Karumuna, Senior State Attorney, assisted by Ms. Lilian Meli, State Attorney.

At the outset, Mr. Mutalemwa prayed to abandon the 1st, 2nd and 4th grounds of appeal and remained with the 3rd and 5th grounds. He argued the two grounds together and submitted that, the sentence imposed was manifestly excessive in the circumstance of the case. He stated that, the appellant was charged with the offence of attempt to murder and was sentenced to fifteen (15) years. Mr. Mutalemwa went

on that, the mitigating factors given by the appellant were basically considered but, the trial judge considered other extraneous matters when he sentenced the appellant. To elucidate this contention, he gave the example that the trial judge said that when the appellant did the act, was armed with a panga, but that observation of the judge does not tally with the facts.

Mr. Mutalemwa submitted further that, in sentencing the appellant, the judge said that the victim was grievously harmed but, looking at exhibit P1, the medical examination report, and the doctor's remarks, shows that he was severely injured and was of fair condition on discharge. Hence, he said, the circumstances lead to forgiveness and not sympathy. To augment his submission on this point, he referred us to the decision of this Court in **Juma Mwita @ Nyamiguri versus Republic,** Criminal Appeal No. 222 of 2016 (unreported) and said that, in this case the Court stated that when sentencing, the court has to consider forgiveness, common sense and wisdom.

The learned advocate, Mr. Mutalemwa went on to submit that, when sentencing, the learned judge was wrong as he considered extraneous matters especially on the second reason he gave that, the purpose of sentencing is to deter offenders and other persons from committing offences. On this point he referred us again to the case of **Juma Mwita @ Nyamiguri** (*supra*), in which the Court asked itself as to whether in sentencing the appellant to go to jail for a period of twenty eight years, the learned judge was justified. He stated that, the Court though conceded with what was submitted by the learned State Attorney that it was legal, but it was doubtful as to whether such sentence had any particular purpose to serve to the society.

Concluding his submission, Mr. Mutalemwa stated that, fifteen years is excessive, instead the sentence should have been cut to half which is seven years. He stressed that, fifteen years is on a higher side, and that seven years is enough. He added that, four years spent in custody before the appellant was sentenced, was considered by the trial judge, hence the

time he already spent in prison is enough to make the appellant released.

The Republic opposed the appeal. The learned Senior State Attorney, in response to what was submitted by his learned friend, submitted that, the sentence is not excessive due to the circumstances of the case. He stated that, the offence attracts life sentence hence fifteen years sentence is not excessive. He said, the factors the court has to consider before sentencing, include how grave the offence is, circumstances of the case and public interest. To buttress his submission on this point, he cited to us the decision of this Court in the case of **Shida Manyama versus Republic,** Criminal Appeal No. 323 of 2014 (unreported). He added that the judge considered all those factors when he imposed the sentence to the appellant. Mr. Karumuna further submitted that, the Court in interfering with the sentence has to observe the following factors; **first,** that the sentence imposed was manifestly excessive; **second,** that the trial judge in passing sentence ignored to consider an important matter or

circumstances which he ought to have considered and **third**, that the sentence imposed was wrong in principle. He cited the case of **Shida Manyama,** (*supra*) which cited with approval the case of **Sylvanus Nguruwe versus Republic** [1981] TLR 66. He went on that, though the PF3 shows that the appellant caused severe injury to the victim, yet to some extent severe injury is grievous harm. He concluded that fifteen years is not excessive, hence prayed the appeal to be dismissed.

Mr. Mutalemwa rejoined briefly that, the sentence in this type of offence ranges from zero years to life imprisonment. He again cited the case of **Juma Mwita,** (*supra*). He then prayed for the appeal to be allowed.

In this case the circumstances, leading to the appellant committing the offence of attempt to murder are as follows. On 2.5.2012 the misunderstanding arose between the appellant and the victim who were husband and wife respectively. After the misunderstanding, the appellant

became raged and decided to set fire to the victim's clothes. The matter was then lodged in the primary court of Mabula in Kwimba District *vide* case No. 73 of 2012. Following that dispute, the couple separated and each started to live on his or her own life. On 23-8-2012 at 05:00 hrs the appellant went to the victim's resident and found her outside the house making cleanliness. The appellant asked the victim as to why she didn't want to return to their matrimonial home, the victim remained silent. The appellant then told the victim that the source of their misunderstanding was her father and that was her last day. The appellant then grabbed the victim and started hacking her at different parts of her body. The victim raised an alarm for rescue but no response was given timely. Later, the victim's young sister one Regina went to the crime scene but found the appellant already departed. The appellant was arrested and was brought to court and then charged. When the charge and facts were read over to him in court, as already alluded to above, he pleaded guilty and was convicted

and sentenced to fifteen years imprisonment as earlier above shown.

In the present case, on sentencing, the trial judge stated as follows, we quote:-

> *"Since the fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just and fair sanctions that have one or more of the following objectives,* ***firstly****, to denounce unlawful conduct;* ***secondly****, to* ***deter offenders and other persons from committing offences and separate offenders from society, where necessary as well as to assist in rehabilitating offenders and others, this case to my firm (sic) is one which highly needs deterrence and rehabilitation by sentencing the accused to***

custodial sentence, presently aggravating circumstances considerately higher than mitigating factors."

[Emphasis added].

In mitigation, the appellant had prayed for lenience on the grounds that, he already stayed in remand for more than three and a half years; that he pleaded guilty and that, he had two children being taken care of by his sister.

The question before us is whether in this case the circumstances under which the sentence of fifteen years was imposed on the appellant, justify interference by the Court. At this juncture we must say that, it is apparent that the trial judge considered extraneous matters in imposing the sentence of fifteen years on the appellant. Some of the remarks made by the trial judge, quoted in this judgment, were irrelevant considerations for sentencing the appellant after he had pleaded guilty to the offence of attempted murder.

For purposes of this appeal, we wish to reiterate what has been stated by this Court in a number of our decisions that, sentencing is a difficult task and in particular, where the law has left a wide range in which the trial Judge or magistrate is left to swim as it is, for the charged offence. See: **Juma Mwita @ Nyamiguri** (*supra*). But all in all, in sentencing, the court has to balance between aggravating factors which tend toward increasing the sentence awardable and mitigating factors which tend toward exercising leniency. See: **Bernard Kapojosye versus The Republic,** Criminal Appeal No. 411 of 2013 (unreported).

It has been a legal principle that, where a sentencing court imports extraneous matters into sentencing, an appellate court is entitled to interfere. See: **Bernard Kapojosye** (*supra*). In the present case, we subscribe to the submission made by Mr. Mutalemwa learned counsel for the appellant that, the mitigating factors made by the appellant were basically considered by the trial judge but, the judge had

considered other extraneous matters in imposing the sentence to the appellant.

It is settled that an appellate court will not interfere with the discretion of the trial court in sentencing except in such cases where it appears that in assessing the sentence the trial court acted on a wrong principle, or overlooked some material factors or imposed a sentence which is either patently inadequate or manifestly excessive: see, for instance, **Marco Elias versus The Republic,** Criminal Appeal No. 460 of 2016; **Mateso Kamala versus The Republic,** Criminal Appeal No. 358 of 2015, and **Edward Mange versus Republic,** Criminal Appeal No. 51 of 2015 (all unreported).

However, we are of the opinion that, the above mentioned matters are not exhaustive taking into account that each case must be determined on its own merit.

In this particular case, the appellant was consistent in maintaining his plea of guilty from the time when the charge was read over to him to when the facts were also read over to

him. This not only showed that the appellant was regretful for his action, but he also saved the time and costs for conducting the trial both on the part of the court and the prosecution. He was as well a first offender; this was also another factor which the trial court had to consider.This Court in **Ahmad Ally @ Gavana versus The Republic,** Criminal Appeal No. 117 of 2012, cited with approval the case of **Willy Walosha versus Republic,** Criminal Appeal No. 7 of 2002 (both unreported) in which we stated thus:-

> *"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 being sentenced, is also usually be taken into*

consideration to reduce the sentence which the offender would otherwise receive ..."

Furthermore, the case of **Samwel Yose @ Kijangwa versus Republic**, Criminal Appeal No. 208 of 2005 (unreported), referred the case of **Bernadetta Paul versus Republic** [1992] TLR. 97 where the Court observed as follows: -

> *"It is our considered view that had the learned judge taken into account the appellant's plea of guilty to the offence with which she was charged she would no doubt have found that the appellant was entitled to a much more lenient sentence than the sentence of 4 years she imposed. This is especially so taking into account that the appellant had but for the conviction an unblemished record and, if we may also mention, she had been in remand for about five years with the serious charge of infanticide hanging on her."*

We are of the opinion that, the trial court failed to take into consideration the material factors which entitle the appellant for a leniency in sentencing him. This is because, as pointed out by Mr. Mutalemwa, the sentence of fifteen years imposed by the trial court is on a high side. In sentencing, the judge has to consider the general circumstances of the case, material factors, mitigating factors especially where the appellant had pleaded guilty and was a first offender leading to the entitlement of the court's leniency. We think, there were no known aggravating circumstances which would have influenced the trial judge to impose the sentence of fifteen years imprisonment. Hence, in the circumstances, we are increasingly of the view that, the sentence of fifteen years imprisonment imposed on the appellant was manifestly excessive.

That said, we find ourselves constrained to interfere with the sentence imposed by the trial judge. In so doing, we reduce the jail term from fifteen years to a term of ten years inclusive the jail period already spent by the appellant.

Order accordingly.

DATED at **MWANZA** this 4th day of April, 2019.

M. S. MBAROUK
JUSTICE OF APPEAL

R. E. S.MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL