IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LILA, J.A, KOROSSO, J.A. AND SEHEL, J.A.)

CRIMINAL APPEAL NO. 352 OF 2016

ISSA IHALE .....APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT
(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Mruma, J.)

Dated 29th Day of October, 2012
in
Criminal Session No. 123of 2012
.....

JUDGMENT OF THE COURT

1st & 5th June, 2020
LILA, J. A.:

The appellant, Issa Ihale, was initially charged in the High Court of Tanzania at Mwanza with the offence of murder contrary to section 196 and 197 of the Penal Code, Chapter 16 R. E. 2002 (the Penal Code). It was alleged by prosecution that on 23rd day of September, 2007 at about 03:00hrs at Shinembo village within Magu District in Mwanza Region, the appellant did murder one Mabula s/o Kilulu.

However, when the case was called on for preliminary hearing, the appellant, through his defence counsel one Mr. Gaspa Mwanalyela, offered

a plea of guilty to a lesser offence of manslaughter contrary to section 195 of the Penal Code. That offer was earnestly received by the prosecution. Consequently, the charge of manslaughter was substituted to that of murder. As contemplated, the appellant pleaded guilty to the substituted charge. The High Court (Mruma, J.) was satisfied that the facts narrated proved the charge and henceforth convicted the appellant as charged. Before sentencing, the prosecution gave out the appellant's antecedents which, in essence, sought to move the trial judge to impose a "harsh sentence". Equally, the defence presented its mitigating factors seeking for the court's indulgence to impose a lenient sentence. Subsequently, the High Court sentenced the appellant to serve twenty (20) years imprisonment.

Given the significance of the facts narrated, mitigating factors and the sentence meted to the appellant in the determination of this appeal we find it compelling that we reproduce the relevant excerpts as hereunder:-

> ***"COURT: FACTS READ OVER THE ACCUSED PERSON:***

My Lord the accused Issa Ihale did on 23rd September, 2007 at Shenembo Village unlawful killed one Mabula Kilulu. On the material day the late Mabula Kilulu was drinking local beer at a Pombe Shop owned by one Mama Pili. While there the accused arrived and joined them. While continuing drink (sic) the accused got up and urinated in the deceased beer. The deceased got up and held the accused and they started to fight. They were separated. After a while the accused left and went to his home and come back with a sword which he used to cut the deceased on the head. The deceased fell down and lost consciousness. Pili d/o Kisuta raised alarm and many people gathered. They took Mbula to Hospital but he succumbed to death on arrival to the hospital. Investigations were mounted and a sketch map of the scene was drawn. We wish to tender it as exhibit..."

After the appellant had agreed that the facts narrated were all true, the learned trial Judge invited the prosecution to give the appellant's antecedents and it is on record that this is what they said:-

"COURT: ACCUSED'S PREVIOUS CONVICTIONS:

Ms. Bibiana – State Attorney:

We have no previous record of the accused conviction but we call for harsh sentence. The accused is the one who started the problem by urinating in the deceased's beer, although the first fight was settled but the accused went to his home and took a sword which he used to cute the deceased on the head."

The appellant had this to tell the trial court in mitigation:-

"ACCUSED'S MITIGATION:

My Lord it is true that the accused committed the said offence while drunk, but the purpose of punishment is to warn to teach and deter; my client has been in remand custody for 6 years now, he is now regretting for what he did. He has learnt a lot. We think the punishment should have an impact to the society if he is kept in custody for another long period society cannot learn anything from him. We pray that he be released so that he can be a teacher to others. My client has seven children and a wife.

They are missing him a lot. I pray for leniency. He is still needed by his family. He is suffering from Cancer. I could not get access to his doctor, so we pray u/s 320 of the Criminal Procedure Act that the sentence be differed till another day so that court can receive evidence regarding his health.

Court:-

In view of what has been stated in mitigation and in view of the provision of section 320 of the CPA the passing of sentence in this case is differed to 29th October, 2012 to enable Dr. Jeremiah to be summoned to produce Medical Reports of the Convict."

In exercising his discretion to impose sentence to the appellant, this is what the trial judge stated:-

"SENTENCE

The accused is a first offender and he committed this offence under the influence of alcohol. He has seven children and a wife. However,

the circumstances under which he committed this offence calls for harsh sentence. He first urinated into the deceased's beer and when the deceased complained against that act, he fought. The fighting was stopped and the accused left. After few minutes he came back armed with a machete. ***This time he was disarmed by one Marongo s/o Hamis. He left once again and after few minutes he came back armed with a sword which he used to slash the accused to death.*** *Taking all that into consideration I sentence the accused person Issa s/o Ihale to twenty (20) years imprisonment counting from today."* (Emphasis added)

Dissatisfied with the sentence, the appellant filed the present appeal seeking to impugn the said sentence imposed on him upon a memorandum of appeal comprising three grounds of appeal as hereunder;

1. *That the period of 6 years, the appellant had stayed in custody pending his trial, was not considered by the trial court when passing the sentence.*

2. *That the sentencing court erred by exaggerating facts referring appellant conduct toward the killing while remained silent on his conducts after commission of the crime in question, and a reflection of extraneous matters imported to justify a presumption of aggravating circumstances.*

3. *That the presiding court did not properly consider the general circumstances of the case, material factors, mitigating factors including the facts that the appellant was a first offender who plead guilty, thus ought to entitle leniency in sentencing him.*

Mr. Mutalemwa, learned advocate who was assigned brief by the Chief Justice condensed grounds one and two above into one ground which was lodged as supplementary memorandum of appeal in terms of rule 73(2) of the Tanzania Court of Appeal Rules, 2019 (the Rules). That ground, after seeking and being granted leave to amend the time spent by the appellant in prison to read five (5) years instead of six (6) years, is now reads thus:-

"1. *That the imposed sentence of twenty (20) years imprisonment is manifestly excessive as time of six (6) years in custody by the appellant was not expressly considered by the trial judge in the course of pronouncing the sentence."*

Ultimately, Mr. Mutalemwa remained with two grounds of appeal to argue in his verge to assail the trial court's finding on sentence. These were the sole ground in the supplementary ground of appeal and ground two (2) of appeal in the memorandum of appeal lodged by the appellant which we shall be referring to as grounds one (1) and two (2) of appeal, respectively, in the course of this judgment.

Mr. Mutalemwa, as hinted above, in this appeal, appeared for the appellant. The respondent Republic was represented by Mr. Victor Karumuna, learned Senior State Attorney.

Both counsel were at one that the record of appeal at page 31 bears out that although the appellant advanced, as mitigating factors, that he had spent six years in remand prison and he pleaded guilty to the charge at page 22 of the record of appeal, in sentencing the appellant the trial

Judge did not expressly indicate that he considered those factors in pegging the appropriate and fair sentence to the appellant. By such omission, they agreed that there was a justification for the Court to interfere with the sentence imposed. On this, to be specific, Mr. Mutalemwa cited to us the cases of **Samwel Izengo @ Malaja vs Republic**, Criminal Appeal No. 347 of 2013 (unreported) in which seven guiding principles to be considered before the Court can interfere and alter the sentence imposed on the appellant were set out. Of the seven principles, Mr. Mutalemwa relied on only two principles, that is, where the trial court overlooked a material factor and where the period spent in custody was not considered. Elaborating, he contended that the fact that the appellant pleaded guilty was a material factor and the six years spent in prison was also a factor which ought to have been considered by the trial judge in sentencing the appellant. Relying on the case of **Swalehe Ndungajilungu vs Republic**, Criminal Appeal No. 84 of 2002 (unreported), Mr. Mutalemwa was of the strong view that had such factors been considered the sentence would have been reduced.

On our prompting whether by the trial judge stating at page 23 that "*in view of what has been stated in mitigation...*" was sufficient, Mr. Mutalemwa argued that in view of the Court's decision in the case of **Samwel Izengo @ Malaja vs Republic** (supra) the trial judge was enjoined to expressly state that he had taken into consideration those factors before imposing the sentence. He forcefully argued that failure to expressly state that he considered the time spent in prison and that the appellant pleaded guilty raised doubt if such factors were duly considered and the doubt should be resolved in the appellant's favour. Guided by the Court's decision in **Juma Mwita @ Nyamiguri vs Republic**, Criminal Appeal No. 222 of 2016 that the sentencing range in manslaughter cases is between zero and life imprisonment, he contended that, if the learned trial judge was minded to sentence the appellant to serve twenty (20) years imprisonment, then if he had considered the two factors complained of herein, then the sentence would have been below that which was imposed. In that accord, he urged the Court to interfere and reduce the sentence imposed to a certain appropriate period. He however refrained from proposing the appropriate sentence.

On his part, Mr. Karumuna, apart from conceding that the learned trial Judge omitted to consider the two factors and hence a justification for the court to interfere and bolstering his assertion with our decision in the case of **Agnes Julius vs Republic**, Criminal Appeal No. 188 of 2010 (unreported), he parted ways with his learned friend on the prayer for reduction of the sentence. He urged the Court to consider the gravity and the way the offence was committed to determine the appropriate sentence. It was his view that even if such factors were taken into consideration, the sentence meted would have been maintained because it was fair in the circumstances of this case. He accordingly urged the Court to dismiss that ground on the extent of sentence imposed.

On the complaint that the learned trial judge exaggerated the facts by introducing into the record extraneous matters not reflected in the facts narrated after the appellant had pleaded guilty, again, both counsels were not at issue. Mr. Mutalemwa made reference to the statement that "*a few minutes he came back armed with a machete. This time he was disarmed by one Marongo Hamisi. He left once again and after few minutes he came back armed with a sword which he used to slash the accused to death*" and

argued that these extraneous facts which were not part of the facts narrated influenced the Judge's mind for they aggravated the gravity of the offence hence affecting his mind in his exercise of discretion in sentencing the appellant. It was his view that without such influence the sentence might have been less. On his part, the learned Senior State Attorney conceded that the facts narrated did not show that, after the fight between him and the deceased was resolved, the appellant went home and took a machete and was disarmed by one Marongo Hamisi before he again went home and took a sword with which he cut the deceased on the head. He was however not inclined to agree that such facts influenced the trial judge in imposing the sentence being challenged.

From the concurring views of the learned counsel in respect of both grounds, the critical issue which is to be determined by this court is whether there is justification in the circumstances of this case to interfere with the sentencing discretion exercised by a trial court.

As correctly argued by both learned counsel, the law is well settled that an appellate court will only interfere with the sentencing discretion of the

trial court where certain established factors obtain in the sentencing process. Such factors were set out by the Court in the case of **Shida Joseph vs Republic,** Criminal Appeal No. 293 of 2012 (Unreported) as being:-

> "a) *The sentence imposed is manifestly excessive or it is so excessive to shock.*
> *b) The impugned sentence is manifestly inadequate.*
> *c) The sentence is based on a wrong principle of sentencing.*
> *d) The trial court overlooked a material factor.*
> *e) The sentence has been based on irrelevant considerations.*
> *f) The sentence is plainly illegal.*
> *g) The time spent by the appellant in remand prison before conviction and sentencing was not considered."*

The record of appeal, as reproduced above, speaks for itself. Page 22 shows that the appellant had risen, as mitigating factors, that he committed the offence while drunk, he has been in remand for six years and had family commitment as he had a wife and seven children. The appellant, in principle, pleaded guilty. Besides, the prosecution had already

told the trial court that they had no previous records of the appellant hence was a first offender. In sentencing the appellant, as reflected at page 31, the learned trial Judge took into consideration that he committed the offence while under the influence of alcohol, that he had a wife and seven children and the circumstances under which the appellant committed the crime against the deceased. It is apparent that the trial court when passing sentence to the appellant, did not take into account that the appellant pleaded guilty. This is, on the authority of **Samwel Izengo @ Malaja vs Republic** (supra), among the material factors to be taken into consideration before interfering with the sentence imposed to an accused person by the trial court.

Even the time (five years) the appellant had already spent in remand prison was not considered. According to page one (1) of the record of appeal the appellant was arraigned in court on 18th day of June, 2010 and was sentenced on 29th day of October, 2012. As rightly submitted by Mr. Mutalemwa, a simple calculation shows that the appellant had spent five (5) years in remand prison not six years. That error notwithstanding, the fact remains that there is no indication that such time was considered by

the trial judge when imposing the sentence as we insisted in our decision in the case of **Samwel Izengo @ Malaja vs Republic** (supra) rightly cited by Mr. Mutalemwa.

Consequences of failure to consider time spent in remand prison was discussed with lucidity in the case of **Nyanzala Madaha vs Republic**, Criminal Appeal No. 135 of 2005 (unreported), which was cited with approval in the case of **Agnes Julius vs Republic,** Criminal Appeal No. 188 of 2010, (unreported) rightly cited by Mr. Karumuna in which the Court observed that:-

> *"Failure to take into account the time that an accused (who has all along been admitting his offence) has spent in remand custody would amount to unduly punishing a remorseful accused on account of the weaknesses in our criminal justice system."*

We concur with the legal position set above.

The issue of the trial Judge importing extraneous matters into the facts narrated as complained in ground two (2) of appeal poses no difficult at all. As can easily be discerned from the above quoted excerpts, the

emboldened part of the judge's observation during sentencing were not part of the facts narrated by the prosecution which were meant to establish the circumstances under which the offence was committed and the appellant's involvement. Both counsels agreed on this fact. They, however, differed on the effects in the minds of the trial Judge in the exercise of his discretion in imposing the sentence. In that case therefore, the issue we are invited to determine is whether such words affected the minds of the trial Judge in the exercise of his discretion.

We have to examine such words as they appear. The learned trial Judge stated:-

> *"a few minutes he came back armed with a machete. This time he was disarmed by one Marongo Hamisi. He left once again and after few minutes he came back armed with a sword which he used to slash the accused to death."*

Carefully considered, the words tend to show that the appellant was such a person who could not be stopped from doing what he had determined to do and that even after being disarmed the machete, he went back home and fetched a more serious weapon with which he cut the

deceased to death. No doubt, those words had the effect of aggravating the circumstances under which the appellant committed the offence. This, we entirely agree with Mr. Mutalemwa, had a direct bearing with the extent of the sentence to be imposed. The fear by Mr. Mutalemwa that the Judge was moved by such aggravating circumstances in exercising his discretion hence imposing the impugned sentence cannot thereby be easily dismissed. It is on this account that the Court has pronounced it as a principle that importation of extraneous matters into sentencing proceedings entitles the Court to interfere with the sentence imposed. (See **Bernard Kapojosye vs Republic**, Criminal Appeal No. 411 of 2013 (unreported) cited in the case of **John Mayala vs Republic**, Criminal Appeal No. 345 of 2016 (unreported).

From the foregoing, we are of the settled mind that this Court has justification to interfere the trial court's discretion to sentence the appellant.

The immediate issue that calls for our determination is then which is a fair sentence in the circumstances of the present case. Much as we

appreciate the task of sentencing to be a difficult one, but this being an area the Court had occasions to deal with, we shall be guided by the principles we had already set in our previous decisions which, in our firm view, are still valid and applicable in the circumstances of this case.

As a starting point, in the case of **John Mayala vs Republic** (supra) the Court made reference to the case of **Ahamad Ally @ Gavana vs Republic**, Criminal Appeal No. 117 of 2012 in which the case of **Willy Walosha vs Republic**, Criminal Appeal No. 7 of 2002 (both unreported) in which it stated that:-

> *"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..."*

In another case of **Samwel Yose @ Kijangwa vs Republic**, Criminal Appeal No. 208 of 2005 (unreported) the Court made reference to the case of **Bernadetta Paul V. R.,** [1992] TLR 97 and observed that:-

> *"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."*

In the instant case the appellant pleaded guilty to the charge and also had spent five years in remand prison before he was sentenced. As demonstrated above, these factors were not taken into account in assessing the sentence to be meted on the appellant. Going along with the words of Mr. Mutalemwa, if the trial judge was minded to sentence the

appellant to serve twenty years jail term, then had he taken the above factors into consideration the sentence should have been so much reduced.

Lastly, we wish to re-emphasize here that it is doubtful whether by the statement "*in view of what has been stated in mitigation...*" the learned trial judge actually took into account all what was stated in mitigation. Like Mr. Mutalemwa, it occurs to us that this was too general a statement. We think, if at all the judge considered such mitigating factors he ought to have gone further to expressly state such factors. The judge ought to have been more forthright and thorough in his statement [see **Willy Walosha vs Republic** (supra). Failure to do so raises doubt if they were considered.

For the foregoing reasons, we allow the appeal. Taking into account that, apart from the five years the appellant had spent in remand prison which was not considered by the trial judge and now he has already served close to eight (8) years jail term, we quash and set aside the sentence of twenty (20) years imprisonment imposed by the learned judge and substitute thereof with a sentence that would amount to his immediate

release from prison. For avoidance of doubt, the appellant should be set at liberty forthwith unless incarcerated therein for another lawful cause.

DATED at **MWANZA** this 4th day of June 2020.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 5th day of June, 2020 in the presence of the appellant - linked via video conference and Mr. Constantine Mutalemwa, counsel for the Appellant and Mr. Victor Karumuna, Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL