IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., WAMBALI, J.A. And SEHEL, J.A.)

CRIMINAL APPEAL NO 584 OF 2017

KIJA S/o JAPHET..... APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Bukuku, J.)

Dated 24th day of April, 2017
in
Criminal Session No. 74 of 2016

JUDGMENT OF THE COURT

8th & 15th February, 2021.

MUGASHA, J.A.:

The appellant was in the High Court convicted on his own plea of guilty for a lesser offence of Manslaughter contrary to sections 195 and 198 of the Penal Code [CAP 16 R.E. 2002]. He was subsequently sentenced to imprisonment for a term of ten (10) years. Before disposing this appeal, it is crucial to give a brief account of the facts underlying the conviction of the appellant: The appellant and the deceased cohabited as husband and wife for one year residing at their homestead together with one Happiness d/o Abel. On the fateful day, that is on 10/8/2015 at around 7:30 pm the appellant returned home and found the deceased not at the homestead.

Shortly thereafter, the deceased returned home and sent Happiness to buy french fries (chipsi) and she obliged. Upon returning home, Happiness found the appellant and the deceased locked inside the house and were fighting. She in vain pleaded with the appellant to open the door which forced her to call neighbours who heeded to the call and rushed to the scene of crime. Initially, the neighbours unsuccessfully pleaded with the appellant to open the door. Later, he opened the door and told those who had assembled to leave the vicinity, locked the room and continued to beat the deceased. Those neighbours persistently mounted pressure on the appellant to open the door which he ultimately obliged and upon entry, they found the deceased unconscious lying down on the floor in a pool of blood.

The deceased was taken to Nyarugusu dispensary and later referred to Geita District Hospital where she succumbed to death. The doctor who conducted the autopsy established the cause of death to be severe traumatic pain and multiple injuries on the face, shoulders, on the back, knees and ankles. Following investigation, the appellant was arrested and arraigned in court for the offence of murder but he offered and pleaded guilty to a lesser offence of manslaughter. The prosecution tendered in court the postmortem examination report and the sketch map which were admitted as exhibits P1 and P2 respectively, without being objected. The two documents exhibited

the injuries sustained by the deceased which caused her death and the location of the piece of wood used by the appellant to strike the deceased. Following the appellant's admission of guilt to the charge and the facts of the case, he was convicted and given custodial sentence as earlier pointed out.

Dissatisfied with the sentence, the appellant has preferred the present appeal. On 11/1/2019 he lodged a three-point Memorandum of Appeal and on 21/1/2021, through his counsel, lodged a Memorandum of Appeal with the following grounds namely:

1. *That the trial Court erred in its decision by not considering the mitigating factors which were advanced on behalf of the appellant by his learned counsel.*
2. *That the sentence imposed by the trial Court was manifestly excessive regard being to the circumstances in which the offence was committed.*

At the hearing of the appeal, the appellant was represented by Mr. Cosmas Tuthuru, learned counsel whereas the respondent Republic had the services of Ms. Lilian Meli, learned State Attorney. At the outset, the appellant's counsel informed the Court that he agreed with the appellant that the initial Memorandum of Appeal be abandoned and instead, the appeal be

argued relying on the subsequent Memorandum of Appeal filed by the learned counsel.

In addressing the first ground of appeal, Mr. Tuthuru faulted the learned High Court Judge in considering the mitigation factors in a generalised manner instead of considering each and every mitigation factor. He argued this to have occasioned a failure of justice and had a bearing on the imposed excessive sentence which is improper in the light of what the Court said in the case of **RAPHAEL PETER MWITA VS REPUBLIC**, Criminal Appeal No. 224 of 2016 (unreported).

In respect of the second ground of appeal, the appellant's counsel faulted the learned trial Judge in imposing excessive sentence. He argued this to have been occasioned by what is reflected at page 10 of the record of appeal whereby in imposing the sentence of ten years, the learned trial Judge did not consider that the appellant had remained behind bars for more than two years awaiting trial. Instead, she was influenced by her consideration of the offence of murder whereas the charge facing the appellant was that of manslaughter which was irregular. To support the propositions, he referred us to the case **MANONI MASELE VS REPUBLIC,** Criminal Appeal No. 344 of 2016 (unreported). Ultimately, the appellant's

counsel urged the Court to allow the appeal and reduce the sentence imposed on the appellant.

Ms. Meli conceded that, the learned High Court Judge made a generalised consideration of the mitigating factors which was not in order. However, the learned State Attorney opposed the appeal against the sentence imposed arguing the same reasonable considering the circumstances surrounding the occurrence of the offence of manslaughter which statutorily attracts a maximum punishment of life imprisonment. She pointed out that, the appellant admitted to have caused death of the deceased having struck her with a piece of wood on various parts of the body and she had severe injuries on the head and multiple parts of the body as reflected in the autopsy report. That apart, the appellant did not heed to pleas by one Happiness and neighbours and instead, continuously used excessive force to beat the deceased until when she lost consciousness and later succumbed to death. On this account she argued that, the punishment meted on the appellant is reasonable not warranting interference by the Court. To support the proposition, she referred us to the case of **HELMAN BASEKANA VS REPUBLIC,** Criminal Appeal No. 443 of 2016 (unreported). Ms. Meli concluded his submission by urging the Court to consider each and every mitigation factor together with the aggravating factors in the

commission of the offence and proceed to dismiss the appeal against the sentence.

In rejoinder, Mr. Tuthuru reiterated his earlier submission and prayed the Court to be lenient, consider the term in which the appellant has stayed behind bars and reduce the term of imprisonment imposed.

After a careful consideration of the grounds of appeal and the submission of the learned counsel, at the outset, we agree with the parties that the learned High Court Judge made a generalised consideration of the mitigation factors which is improper. Thus, this being the first appellate court it is incumbent on us to reconsider the appellant's mitigation factors. The Court took a similar stance in the case of **RAPHAEL MWITA VS REPUBLIC** (*supra*) cited to us by the appellant's counsel whereby, having gathered that though the trial court seemed to have considered the mitigation factors in a generalised mode, it actually did not consider them in imposing the sentence of 20 years. Thus, after considering each and every mitigation factor, the Court found it warranted to intervene and reduced the jail term to ten years. We shall in due course be accordingly guided by our previous decision and more others on the subject which categorically state the circumstances warranting the intervention of the Court where the sentence imposed is a subject on appeal.

Pertaining the submissions of the learned counsel, while Mr. Tuthuru urged us to exercise leniency on the appellant and vary the sentence on account of the mitigating factors and the circumstances surrounding the occurrence of the offence, Ms. Meli urged us to find as an established fact that the appellant used excessive force to strike the deceased and caused her death. It is glaring that, such facts were unequivocally admitted by the appellant to be true as to the cause of death stated in the Postmortem and the sketch map of the scene of crime which among others, shows the piece of wood used by the appellant to strike the deceased which was actually found at the scene of crime and the homestead of the appellant.

Although it is settled law that, sentencing is the domain of the trial court, the appellate court can alter or interfere with the sentence imposed by the trial court, where there are good grounds for doing so. This has been emphasized in a number of cases including: **REPUBLIC VS MOHAMED ALI JAMAL** [1948] 15 E.A.CA.126; **SILVANUS LEONARD NGURUWE VS REPUBLIC** [1981] TLR 66; **SWALEHE NDUGAJILUNGA VS REPUBLIC** [2005] TLR 94; **RAJABU DAUDI VS REPUBLIC,** Criminal Appeal No. 106 of 2012 and **ILOLE SHIJA VS REPUBLIC,** Criminal appeal no. 357 of 2013 (both unreported). In the case of **RAJABU DAUDI VS REPUBLIC** (*supra*) the Court stated as follows:

"The law is well settled that the circumstances in which the Court can interfere with the sentence are those where it is:

(a) manifestly excessive, or

(b) based upon a wrong principle, or

(c) manifestly inadequate (d) or plainly illegal, or

(e) where the trial court failed or overlooked a material consideration or

(f) where it allowed an irrelevant or extraneous matter to affect the sentencing decision. "

In the light of the stated principles, in the case at hand, it is our considered view that, the learned High Court Judge was justified in having concluded that the appellant used excessive force which is an aggravating factor in sentencing. The learned High Court Judge's conclusion is cemented by the Post Mortem report (Exhibit P 1) which shows the demise of the deceased to have been caused by severe head injuries and multiple bruises on the face, shoulders, left upper part of the back and both knee joints. Moreover, the sketch map of the scene of crime (Exhibit P 2), sheds light on the nature of weapon used by the appellant to beat the deceased whereby key A1 reflects as follows:

"Kilipokuwa kipande cha ubao kilichotumika kumpiga marehemu".

The literal meaning is the spot where was found a piece of wood used to strike the deceased.

Furthermore, the appellant's reluctance to heed to pleas by the neighbours and instead the continued assault of the deceased until when she was found lying down unconscious in a pool of blood leaves a lot to be desired as it also contributed to the aggravating factor which led to termination of deceased's life. Therefore, looking at the circumstances surrounding the occurrence of the offence and the mitigation factors such as the appellant readily pleading guilty to the charge of manslaughter; being a first offender and being provoked because of the deceased's drunkenness, we are satisfied that there was an aggravating factor of excessive force which the appellant used against the deceased.

It was the appellant's counsel submission that, the learned High Court Judge's remark that life has been lost, she had in mind the offence of murder which influenced her in imposing excessive sentence. We view this to be a complaint that the learned High Court Judge was influenced by extraneous matters because the appellant's counsel cited to us of **MANONI MASELE VS REPUBLIC** (*supra*) whereby the Court had to intervene and vary the imposed

sentence because the trial Judge had considered extraneous matters instead of the mitigating factor. We found the appellant's argument wanting because the referred lost life is connected with deceased person here and not any other person. Thus, the remark was justified and it was not at any stretch of imagination an extraneous matter as viewed by the appellant's counsel.

In view of what we have endeavoured to discuss, we found the cases of **RAPHAEL MWITA VS REPUBLIC** (*supra*) and **MANONI MASELE VS REPUBLIC** (*supra*) cited to us by the appellant's counsel distinguishable from the circumstances obtaining in the present case. We say so because whereas in the said cases in imposing the sentences the mitigation factors were not considered and extraneous factor were considered, in the matter at hand, the trial judge was justified to impose the sentence of ten (10) years on account of the aggravating factors which outweighed the mitigation factors though generally considered. In that regard, the appellant was not prejudiced in any manner.

All said and done, having considered circumstances warranting interference with the sentence as stated under case law, the sentence of ten years of imprisonment imposed by the High Court is not excessive and we do not find any compelling reason to interfere with it. Thus, the two grounds of appeal are hereby dismissed.

In view of what we have endeavoured to discuss we find the appeal not merited and accordingly dismiss it.

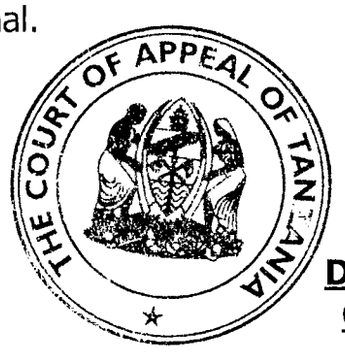
DATED at **MWANZA** this 12th day of February, 2021

S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

This Judgment delivered this 15th day of February, 2021 in the presence of Ms. Nasimire holding brief for Mr. Cosmas Tuthuru, learned counsel for the Appellant and Ms. Georgina Kinabo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL