IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., KWARIKO, J.A, And FIKIRINI, J.A)

CRIMINAL APPEAL NO. 416 OF 2017

MASHINIKA MASHAKA MSWANZALI @ SHINE..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania

at Mwanza)

(Gwae, J)

dated 26th day of May, 2017

in

Criminal Sessions Case No. 190 of 2014

.....

JUDGMENT OF THE COURT

29th June & 5th July, 2021.

FIKIRINI, J.A.:

In the High Court of Tanzania, Mwanza Registry, the appellant, Mashinika Mashaka Mswanzali @ Shine and Paschal Charles Mabula Mswanzali, the first accused person who is not a party to this appeal were charged with one count of attempted murder contrary to section 211 (a) of the Penal Code, Cap 16 R.E. 2002 (the Penal Code). The particulars of the offence were that on 16th day of October, 2013 at 19.00 hrs, at Talaga

village within Kwimba District in the City and region of Mwanza, they did unlawfully attempt to cause death to one Sophia Magembe (victim). Both accused persons pleaded guilty to the charge, and they were convicted and sentenced to eight (8) years imprisonment each.

The facts of the case which were presented before the court by Mr. Mamti Sehewa, learned Senior State Attorney can be stated as follows: that on the fateful day the victim was outside her home with her children having supper. All of a sudden the appellant and his associate arrived carrying machetes. They started slashing the victim on different parts of her body, leading to her sustaining grievous injuries. The victim raised an alarm calling for assistance and at the same time running towards her neighbour's home one Mhindi Mayanzai. She managed to identify the first accused person, Paschal Charles Mabula Mswanzali, her former son in law, who was once married to her daughter, as one of the assailants. At the time of the incident the two had divorced. The assailants fled from the scene of the crime.

Meanwhile the matter was reported to the Police at Ngudu Police station. The victim was issued with PF3 which was tendered and admitted

as exhibit "PE 1" and she was attended at Ngudu Hospital. While a sketch map of the scene of the crime was tendered and admitted as exhibit "PE 2", two cautioned statements recorded by the appellant and the first accused person were admitted as exhibit "PE 3". In their respective statements, they confessed to the commission of the crime. After the facts were read out to them, they conceded that the facts were correct and consequently the court found them guilty and accordingly convicted them on their own plea of guilty.

Prior to sentencing, the prosecution when given opportunity to comment on the accused persons, acknowledged that the two had no previous convictions, but urged the court to consider the circumstances of the assault, as had the victim not ran away and raised alarm, she could have been killed. On the contrary, Mr. Vedastus Laurian, learned advocate representing the accused persons, leading the mitigation, prayed for leniency based on the following grounds: that the two were first offenders; that the victim who sustained injuries was the source of the problem and that there was no evidence that the accused persons planned to commit the offence, but all what happened occurred after a fracas ensued. The

learned counsel, also pointed out that the two were young and had already spent almost four (4) years in remand prison. Lastly, he urged the court to consider that the accused persons had confessed before the Police Officer and pleaded guilty to the offence before the court, without wasting time.

In the sentencing that was pronounced on 26th day of May, 2017, the presiding Judge sentenced the accused persons to eight (8) years imprisonment as indicated earlier.

Aggrieved by the sentence, the appellant preferred an appeal to this court. In his memorandum of appeal lodged, the appellant fronted two grounds of appeal paraphrased as follows:

1. That, the trial court imposed a sentence on the appellant which is manifestly excessive in the circumstances of the case.
2. That, the appellant's mitigating factors as adequately stressed by his advocate were not fully taken into consideration by the trial court in sentencing the appellant.

During hearing of the appeal, Ms. Marina Mashimba, learned advocate featured for the appellant while Ms. Mwamini Fyeregete, learned

Senior State Attorney teamed up with Ms. Sabina Choghoghwe, learned State Attorney to represent the respondent.

In her submission, Ms. Mashimba's submitted on the two grounds together to the effect that the presiding Judge did not give, the mitigating factors put forward the weight they deserved. Instead of giving consideration to each of the factors, the presiding Judge just mentioned them. Had the Judge given due consideration on the mitigation, he would not have sentenced the appellant to eight (8) years imprisonment. Bolstering her submission Ms. Mashimba referred this Court to the case of **Mateso Mboje v R,** Criminal Appeal No. 466 of 2016, (unreported). She submitted that in that case the Court stressed on illustration of each factor, which in her view was lacking in the present appeal, considering the circumstances in which the offence was committed. The learned counsel was of the contention that the sentence of eight (8) years imprisonment, was excessive.

On her part, Ms. Choghoghwe, supported the sentence given the fact that the maximum sentence for the offence of attempted murder is life imprisonment. She submitted that the presiding Judge considered the

mitigating factors, as well as the circumstances in which the offence was committed as reflected at pages 11, 12 and 13 of the record of appeal.

As regards the case of **Mateso Mboje** (supra), she contended that the case was distinguishable, in the sense that the mitigating factors were generally considered by the Judge, which was not the case in the present appeal, in which the mitigating factors were considered. Ms. Choghoghwe, impressed upon the Court that it can only interfere if the sentence imposed was overlooking the principles guiding sentencing. Fortifying her position, she cited the case of **Kija Japhet v R,** Criminal Appeal No. 584, 2017 (unreported), in which the Court pointed out the circumstances in which it can interfere with the sentence.

In her rejoinder, Ms. Mashimba reiterated her position that the sentence was excessive owing to the circumstances under which the offence was committed. That the presiding Judge did not expound on the factors as stated in the **Mateso Mboje** case (supra), in which the Judge generalized the mitigating factors. In the present case the Judge instead of generalizing he listed them without due consideration. On the strength of her submission, she invited the Court to interfere.

We have thoroughly examined the grounds of appeal and the submissions by the learned counsel. And in determining the merits or demerits of this appeal we have examined, whether the sentence imposed is excessive and that the presiding Judge considered the mitigating factors. We shall discuss both grounds together.

The appellant and the first accused person were charged under section 211 (a) of the Penal Code. The offence attracts life imprisonment as the maximum penalty. Still the court imposed a lesser sentence of eight (8) years imprisonment. 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: **See: R v. Mohamed Ali Jamal** [1948] 15 E.A.C.A. 126; **Silvanus Leonard Nguruwe v R** [1981] T.L.R 66, **Swalehe Ndugajilunga v R.,** [2005] T.L.R 94; and **Mateso Mboje v R., Hassan Charles v R.,** Criminal Appeal No. 329 of 2016, **Rajabu Daudi v R.,** Criminal Appeal No. 106 of 2012 (all unreported), to mention a few. In all the above referred cases the Court laid down principles for consideration when the appellate Court is

invited to interfere with sentence. Some of those principles have been illustrated in the case of **Silvanus Leonard Nguruwe (supra)** as follows;

1. *Where the sentence is manifestly excessive or is so excessive as to shock,*
2. *Where the sentence is manifestly inadequate,*
3. *Where the sentence is based upon a wrong principle of sentencing,*
4. *Where the trial court overlooked a material factor, and*
5. *Where the trial court ignored the period, the appellant had been in custody pending trial.*

The stipulated conditions even though not exhaustive but for the time being are what could allow the appellate Court like this one, to interfere with the sentence imposed by the trial court. In the present case even though the accused persons pleaded guilty but the sentence was not pronounced immediately but two weeks later. And in his sentencing particularly pages 11, 12 and 13 of the record of appeal, it shows that the presiding Judge considered that the accused persons were first offenders, and young enough to take part in the development of the nation. He also

considered that they had pleaded guilty before the court which was preceded by their admission to the Police that they were the ones who committed the offence. The trial Judge likewise, appreciated the accused persons' admission as there was no court's and parties' precious time wasted. Furthermore, the Judge considered the time already spent in custody awaiting trial which was from 21st day of October, 2013 to 26th day of May, 2017, amounting to almost three and a half years.

All these weighed together it is evident that the presiding Judge considered each of the mitigating factors put forward, unlike in the cases of **Mateso Mboje** and **Hassan Charles** (supra) where the trial Judge generalized the mitigating factors advanced.

This Court has considered the nature of the weapon used, motive behind, the injuries sustained as reflected in the PF3 which was admitted as exhibit "PE 1" and the fact that had the victim not raised alarm and fled to the neighbour's house, she could have been killed. We have similarly considered that the offence attracted life imprisonment as sentence upon conviction, yet the trial Judge imposed a sentence of eight (8) years imprisonment which is fair, in our considered view.

In the final analysis, we find the sentence of eight (8) years imprisonment, imposed by the High Court, not excessive to invite this Court's interference. In view of what we have elucidated, we find the appeal is without merit and proceed to dismiss it.

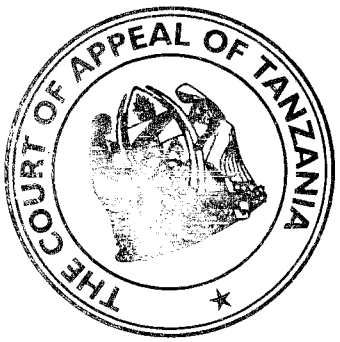
DATED at **MWANZA** this 2nd day of July, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 5th day of July, 2021 in the presence of the Appellant in person linked via video conference facility at Butimba Prison and Ms. Sabina Choghoghwe, State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL