IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KWARIKO, J. A., LEVIRA, J.A And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 114 OF 2019

BAHATI JOHN ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Sumari, J.)

dated the 5th day of September, 2014

in

Criminal Sessions Case No. 86 of 2013

.....

JUDGMENT OF THE COURT

4th & 11th July, 2022

LEVIRA, J.A.:

This is an appeal against the sentence of twenty (20) years imprisonment meted out to the appellant having been convicted of manslaughter contrary to section 195 of the Penal Code, Cap.16 R.E. 2002 (Now R.E. 2022) (the Penal Code). Initially, the appellant was charged with murder but in the course of proceedings, he offered to plead guilty to a lesser offence of manslaughter which was not objected to by the prosecution side and hence his conviction and sentence as intimated

above. The appellant was aggrieved by the sentence and thus preferred the present appeal.

Briefly, the facts giving rise to the present appeal are to the effect that, on 14th February, 2011 at about 10:00 am at Buhama village in Sengerema District within Mwanza Region the appellant was at his home. While there, he was informed by one lady called Suzan that Mashaka (deceased), a child of 3 years old was pooping at her door. The appellant went outside his house and saw the child pooping at Suzan's door. He beat him all over his body by using a stick and squeezed his neck. The child sustained injuries but he went to sleep. Later, the appellant discovered that the condition of the child became worse due to the injuries he had sustained and thus accompanied by his wife, they took him to Sengerema Hospital. However, he died on the way before arriving there. The incident was reported to the village leaders and later to the police station leading to the appellant's arrest. The deceased's body was examined and the post mortem report (exhibit P1) revealed the cause of death to be internal haemorrhage and asphyxia. The appellant was arraigned before the High Court of Tanzania at Mwanza facing murder charge which was later reduced to a lesser offence of manslaughter as indicated above.

In this appeal, the sole ground of appeal reads: -

"That, the trial court erred in law and fact in imposing the said sentence (20 years imprisonment), which is excessive and that the said trial court did not consider the mitigating factors."

At the hearing of the appeal, the appellant was represented by Mr. Chama A. Matata, learned advocate whereas, the respondent Republic had the services of Ms. Rehema Mbuya, learned Senior State Attorney.

Mr. Matata submitted that the appellant is opposing the sentence meted on him on account of being excessive as the trial Judge did not consider the appellant's mitigating factors. In elaborating on what were those factors, the learned advocate referred us to page 42 of the record of appeal where the appellant prayed for lenience of the High Court on the following grounds; **one**, he was the first offender; **two**, he intended to warn the deceased; **three**, he took responsibility to take the child to the hospital; **four**, even after realising that he has killed, he surrendered himself to his mother; **five**, he was remorseful for what happened and he pleaded for mercy in this case; **six**, he has been in custody for about 4 years by then; **seven**, the appellant has good reputation in the community; and **eight**, he is HIV positive.

Through his advocate, the appellant urged the Court to consider his mitigations and adjust the sentence as we may deem just. Mr. Matata

supported this prayer by the decision of the Court in **Gervas Tito & Another v. Republic.,** Criminal Appeal No. 26 of 2008 (unreported) where the sentence of eight (8) years imprisonment was set aside and in substitution thereof, the appellant was sentenced to a term of imprisonment which resulted into his immediate release because his mitigation was not considered. Finally, Mr. Matata prayed for the appeal to be allowed.

Nonetheless, the appeal was vehemently opposed by Ms. Mbuya arguing that the sentence is not excessive though the Judge did not consider the appellant's mitigations. According to her, the punishment imposed on the appellant was proper because section 198 of the Penal Code provides for life imprisonment as a maximum sentence for the offence of manslaughter and as such, the High Court had discretion to impose the sentence having considered circumstances of the case and that was precisely done.

Ms. Mbuya distinguished the case cited to us by the counsel for the appellant from the circumstances of the present case. She referred us to page two of the said decision where it was stated categorically that, the cause of death was due to a fight between family members which is not the case in the current matter. In addition, she stated that in the present case the Postmortem Report indicates clearly that the child's neck was

strangled which indicates use of excessive force when the child was being beaten. This, she said does not justify a claim that the appellant was just chastising him. Therefore, she prayed for the appeal to be dismissed.

In rejoinder, Mr. Matata reiterated his submission in chief and prayed for the Court to consider the appellant's mitigating factors.

Having heard from both sides and after perusing the record of appeal, we entertain no doubt that both parties are at one that the record of appeal is silent in as far as consideration of mitigating factors of the appellant by the trial Judge is concerned. It is as well not in dispute that the appellant was convicted of manslaughter contrary to section 195 and was sentenced in terms of section 198 both of the Penal Code. For ease of reference, section 198 provides as follows:

> *"Any person who commits manslaughter* ***is liable to imprisonment for life."*** *[Emphasis added].*

The term 'liable' used in the above provision as highlighter does not impose life imprisonment as the only sentence to a convict of manslaughter. It gives flexibility to the presiding judge to exercise his/her discretion in sentencing depending on the circumstances of each case after considering both the aggravating and mitigating factors, the hilt being total incarceration for life. The Court in the case **Faruku**

Mushenga v. Republic, Criminal Appeal No. 356 of 2014 (unreported) was guided by the interpretation of the phrase "*shall be liable to*" as it was stated **in Opoya v. Uganda** (1967) EA 752 by the defunct East Africa Court of Appeal in the following manner:

> *"It seems to us beyond argument that the words* ***shall be liable to*** *do not in their ordinary meaning require that imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the Court. In other words, they are not mandatory but provides a maximum sentence only and while the liability existed the court might not see fit to impose it." [Emphasis added].*

It should be noted at the outset that in the event the trial court or presiding judge has exercised his discretion and imposed the sentence to a convict as in the present case, the same shall not be interfered with by the Court unless there are justifiable grounds so to do. Some of the said justifiable grounds are stated by the Court in **Ramadhani Hamis @ Joti v. Republic,** Criminal Appeal No. 513 of 2016 while quoting its decision in **Nyanzala Madaha v. Republic,** Criminal Appeal No. 135 of 2005 (both unreported) to include: -

1. *Where the sentence is manifestly excessive or it is so excessive as to shock;*

2. *Where the sentence is manifestly inadequate;*
3. *Where the sentence is based upon a wrong principle of sentence;*
4. *Where a trial court overlooked a material factor;*
5. *Where the sentence has been based on irrelevant considerations such as the race or religion of the offender;*
6. *Where the sentence is plainly illegal, as for example, corporal punishment is imposed for the offence of receiving stolen property; and*
7. *Where the trial court did not consider the time spent in remand by an accused person.*

In the current case, we agree with the counsel for the parties that the mitigating factors were not considered by the trial Judge before sentencing the appellant. This can be discerned in the sentencing order as follows:

> *"This is one of the brutal killing which must be condemned unequivocally brutalizing such an infant whom in fact did nothing wrong other than helping herself (sic) is unexplainable and unfounded. The accused person shall suffer severe punishment to deter other offenders of his like. Consequently, I sentence the accused to serve twenty (20) years imprisonment".*

It is glaring from the above excerpt that the presiding Judge did not weigh out the circumstances under which the offence was committed *viz a viz* the mitigating factors as advanced by the appellant. For instance, the circumstances that led to the death whereby the appellant stated that the beating was a way of chastising the child (deceased) not to repeat the same mistake; mitigating factors including; taking the child to the hospital after his condition deteriorated, the appellant being the first offender and was remorseful for what he did to the child; together with other factors he advanced, required equal attention. In **Rehema Rashidi Umagi v. Republic,** Criminal Appeal No. 314 of 2017 (unreported) the Court stated that:

> *".... It seems clear to us that the learned trial Judge did not consider the immediate circumstances that led to the death of the deceased. Had he considered the whole circumstances and mitigating factors given, we think he would have imposed a lesser sentence."*

In the light of the above decision, circumstances surrounding the occurrence of the offence and the mitigating factors, the imposed sentence of twenty years seems to be on the higher side and the appellant is entitled to a lenient sentence as is a general rule in respect of first offenders. We think, in our considered view, the trial Judge did not exercise judiciously the discretionary powers in sentencing. As we are

mandated to do what the trial Judge ought to have done, having taken into consideration both the aggravating and mitigating factors in the current case, we are satisfied that being the first offender, the time which the appellant has already spent in custody of almost eleven (11) years serves as a deterrent on the appellant.

For the foregoing reason, we allow the appeal up to the term of sentence served. Thus, the sentence of twenty (20) years imprisonment is set aside and we order immediate release of the appellant from the prison unless otherwise he is held therein for any other lawful cause.

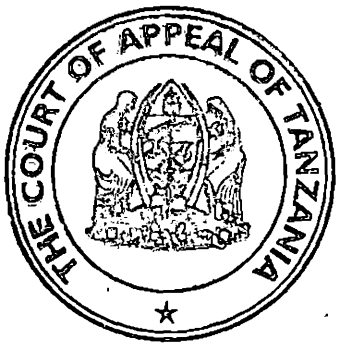
DATED at **MWANZA** this 9th day of July, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 11th day of July, 2022 in the presence of Appellant in person and Ms. Ghati Mathayo, the learned State Attorney also hold brief for Mr. Chama Matata for the Respondent is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL