IN THE COURT OF APPEAL OF TANZANIA

AT SONGEA

(CORAM: NDIKA, J.A., KEREFU, J.A., And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 503 OF 2021

ELLY MILLINGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the Resident Magistrate's Court of Songea at Songea)

(Lyakinana, PRM – Ext. Juris)

dated the 15th day of September, 2021

in

RM Criminal Sessions Case No. 25 of 2012

JUDGMENT OF THE COURT

23rd & 24th August, 2023

NDIKA, J.A.:

The appellant, Elly Millinga, was on 14th September, 2021 convicted by the Resident Magistrate's Court of Songea at Songea (Lyakinana, PRM – Ext. Juris) of manslaughter on his own plea of guilty. On the following day, he was sentenced to twenty years' imprisonment, which he now challenges on four grounds that it is excessive.

The appeal arises in the following context. The appellant was initially charged with the murder of his wife Florida Mhaiki that allegedly occurred on 6th October, 2011 at Masumini, Mbinga District, Ruvuma Region. The Resident Magistrate's Court of Songea at Songea (Dyansobera, PRM – Ext.

Juris, as he then was) tried and convicted him of the offence. Accordingly, he was sentenced to death on 13th June, 2013. On appeal, the Court of Appeal of Tanzania on 3rd May, 2021 nullified the trial proceedings, quashed the conviction, and set aside the sentence due to an incurable irregularity in the trial. In consequence, the Court ordered a retrial in the same court presided over by a different Resident Magistrate with Extended Jurisdiction with a new set of assessors.

After a few false starts, the appellant's retrial for murder commenced on 13th September, 2021 before Lyakinana, PRM – Ext. Juris who heard and recorded the evidence of three prosecution witnesses. On the following day, the prosecution, with the leave of the court, substituted the charge of murder for the charge of manslaughter. Upon arraignment on the substituted charge, the appellant pleaded guilty and admitted the facts of the case.

Briefly, it was stated by the prosecution that in the evening of 6th October, 2011, the appellant was at the home of his father-in-law, Ivo Mhaiki, at Masumini, Mbinga. He went there seeking the intercession of the said Ivo Mhaiki over his matrimonial misunderstanding with his wife who was living there at the time. A first round to conciliate the couple ended vainly that evening around 20:00 hours. Since it was already late, Ivo Mhaiki allowed his son-in-law to stay there for the night. It came to light later that

before midnight the appellant went to the deceased's bedroom to continue with the discussion during which a misunderstanding arose between them. In the end, the appellant stabbed the deceased with a knife right into her heart. He was promptly arrested at the scene and taken to the police station. The deceased was taken to Mbinga District Hospital, but her life could not be saved. According to Dr. M.T. Mwingira of the said hospital, the deceased succumbed to death due to severe heart injury with intrathoracic bleeding.

The court, having been satisfied on the unequivocality of the appellant's plea, convicted him of the offence and sentenced him to the custodial term of twenty years as indicated earlier.

The appellant assails the said penalty on four grounds: one, that the trial court did not consider that he had been in prison for ten years and that he suffered mental and psychological harm for over eight years he was incarcerated as a condemned prisoner. Two, that the trial court did not reflect on the fact that he was supporting a family of two children as well as his mother who was in advanced age. Three, that the trial court did not consider that he was a mere first offender. Finally, the trial court glossed over his contrition for killing his wife.

Mr. Eliseus Ndunguru, learned counsel, argued the appeal on a dock brief for the appellant, who was also present. Learned Principal State

Attorney Edgar H. Luoga, accompanied by learned Senior State Attorney Sabina Siiayo, appeared for the respondent Republic.

In essence, Mr. Ndunguru argued that although an appellate court would ordinarily not interfere with the trial court's exercise of sentencing discretion, the circumstances of the instant case require the Court to intercede. Referring to the learned trial magistrate's sentencing remarks at page 76 of the record of appeal, Mr. Ndunguru faulted the learned trial magistrate for blaming the appellant for failing to have confessed to the offence of manslaughter upon his arrest. He argued that the appellant had all along since his arrest been facing the offence of murder until 14th September, 2021 when the prosecution preferred the charge of manslaughter in substitution of the earlier charge of murder whereupon he pleaded guilty. On this basis, he said, the learned trial magistrate's blame was a misapprehension that affected his exercise of the sentencing discretion.

To fortify the above submission, Mr. Ndunguru cited **Bahati John v. Republic**, Criminal Appeal No. 114 of 2019 [2022] TZCA 407 [11 July 2022; TanzLII], and **the Director of Public Prosecutions v. Focus Patric Munishi**, Criminal Appeal No. 672 of 2020 [2022] TZCA 478 [25 July 2022; TanzLII] for the propositions that the sentence imposed on the appellant is

manifestly excessive, that it was based on a misapprehension of a sentencing principle and that a material factor that the appellant was contrite was overlooked. He added that the learned trial magistrate did not effectively consider the time that the appellant spent in remand prison as well as the period of eight years he spent as a condemned convict. In the end, the learned counsel beseeched us to reduce the twenty years imprisonment term.

Replying for the respondent, Ms. Silayo argued that the learned trial magistrate not only considered all the mitigating circumstances pointed out by the appellant, as shown at page 72 of the record of appeal, but also followed to the letter the Sentencing Guidelines. According to the Guidelines, she said, the offence of manslaughter committed by using a lethal weapon falls in the high-level category and attracts the imprisonment range from ten years onwards and that the starting point is life imprisonment. She supported the learned magistrate's view that all factors considered the proper sentence was thirty years imprisonment reduced to the term of twenty years imprisonment upon taking account of the ten years the appellant spent in remand prison and lived as a condemned convict.

Rejoining, Mr. Ndunguru acknowledged that the manner the offence was committed falls in the high-level category due to the use of a dangerous

weapon, but he maintained that the sentence of twenty years imprisonment was so shockingly excessive considering that the minimum penalty in the circumstances was ten years' imprisonment.

It is imperative, at this point, to reiterate that it is settled that an appellate court's role in sentencing is so circumscribed. In **Fatuma Nurudini v. Republic**, Criminal Appeal No. 418 of 2013 [2014] TZCA 188 [28 October 2014; TanzLII], the Court, citing its earlier decision in **Patrick Matabaro @ Siima & Another v. Republic**, Criminal Appeal No. 333 of 2007 (unreported), stated as follows:

> *"It is settled law that an appellate court has a limited role in sentencing. The governing principles that must be taken into consideration are as follows: -*
>
> *(i) Sentencing is a function which the legislature entrusts to the trial Judge (or magistrate, as the case may be);*
>
> *(ii) The sentencing decision is a decision made in the exercise of a discretion;*
>
> *(iii) An appeal court may only intervene where the exercise of the sentencing discretion is vitiated by error, such that there has been no lawful exercise of that discretion;*

(iv) Then an appeal court can decide for itself what the sentence should have been."

In **Tofiki Juma v. Republic**, Criminal Appeal No. 418 of 2015 [2015] TZCA 410 [25 November 2015; TanzLII], the Court, following **Nyanzala Madaha v. Republic**, Criminal Appeal No. 135 of 2005 and **Mathias s/o Mashaka v. Republic**, Criminal Appeal No. 274 of 2000 (both unreported), outlined the circumstances in which an appellate court can interfere with a sentence imposed by the trial court:

"(i) Where the sentence is manifestly excessive or it is so excessive as to shock.

(ii) Where the sentence is manifestly inadequate.

(iii)Where the sentence is based upon a wrong principle of sentencing.

(iv)Where a trial Court overlooked a material factor.

(v)Where the sentence has been based on irrelevant considerations such as the race or religion of the offender.

(vi)Where the sentence is plainly illegal as for example, corporal punishment is imposed for the offence of receiving stolen property.

(vii) Where the trial Court did not consider the time spent in remand by an accused person."

In urging the Court to interfere with the sentence imposed on the appellant, Mr. Ndunguru contended that the sentence is manifestly excessive, that it was based on a misapprehension of a sentencing principle and that a material factor that the appellant was contrite was disregarded. On the other hand, Ms. Silayo disagreed with her learned friend, positing that the sentence was properly meted out.

To resolve the sticking issue before us, we, at first, wish to extract from the learned trial magistrate's sentencing remarks at pages 75 and 76 of the record of appeal:

> *"The facts indicate that the accused stabbed the deceased at a dangerous part of her body ... by using a knife and caused her death. In his mitigation ... [the] accused prayed for a lenient sentence [because] he regrets ... the offence [he] committed; he pleaded guilty to save the court's time; and that [he and the deceased] were blessed with two children who depend on him.* ***To me, it would sound otherwise if the accused person would have confessed to the offence he committed since he was arrested (manslaughter).*** *It is true that there are Sentencing Guidelines. However, the said guidelines do not apply mechanically. The maximum sentence for a person who commits manslaughter is life imprisonment.... According to the Sentencing Guidelines, the sentence of the accused person fails in [the] high level sentence, that is,* ***between 15 (fifteen years) to life***

imprisonment *because he used a dangerous weapon to cause the death.* ***Due to the reason that. the accused person pleaded guilty after ten years passed from the date of the event, this court will reduce sentence from 30 years imprisonment.*** *Hence the accused is a first offender, he has stayed in prison for about ten years, and he then pleaded guilty. This makes me satisfied to reduce the sentence ... of 30 years in jail [by] 10 years."* [Emphasis added]

From the above extract, the following are discernible. First, that the learned trial magistrate was alive that he was bound to sentence the appellant in accordance with the **Tanzania Sentencing Manual for Judicial Officers** issued in 2020 ("the Manual"), which he referred to as the **Sentencing Guidelines**. To be sure, the Manual provides nine steps in sentencing for the offence of manslaughter. Perhaps, we should interpose here and remark that the said Manual was recently updated and replaced by the **Tanzania Sentencing Guidelines** of 2023. For the offence of manslaughter, these new guidelines provide a six-step sentencing process.

Secondly, it is also apparent that in accordance with the Manual the learned trial magistrate rightly placed the imposable sentence within the high-level category due to the use of a dangerous weapon in the commission of the offence. Nonetheless, he erroneously viewed the minimum imposable sentence under the high-level category for manslaughter as being fifteen

years jail term as minimum while the bottom point is expressly stated to be ten years imprisonment. Thirdly, although the learned trial magistrate rightly considered the aggravating factors as well as the most mitigating circumstances raised by the appellant, we agree with Mr. Ndunguru that he did not give sufficient weight to the appellant's contrition because he unjustifiably blamed him for not confessing to manslaughter or offering a plea of guilty to that offence at the earliest stages following his arrest. It is on record that the first opportunity for him to plead to the offence of manslaughter came on 14th September, 2021 upon the prosecution preferring the new charge of manslaughter in substitution of the earlier charge of murder and so he pleaded guilty to that offence. Certainly, that was almost ten years after his arrest. For this reason, we uphold Mr. Ndunguru's submission that the learned trial magistrate's blame towards the appellant was a misapprehension that affected his exercise of the sentencing discretion. Fourthly, as part of Step Six, the learned trial magistrate set thirty years jail term as the sentence the appellant deserved and that in accordance with Step Seven, he deducted ten years period as the time the appellant had spent in prison before sentencing.

Based on the foregoing analysis, we are of the considered view that had the learned trial magistrate considered that the minimum imposable

sentence for manslaughter within the high-level category was ten years imprisonment (not fifteen years jail term) and that the appellant was not to blame for the ten years delay in pleading guilty to the offence of manslaughter, he would have imposed a lighter sentence. He could have possibly arrived at twenty years' imprisonment from which he would have deducted the ten years period of pre-conviction incarceration.

In conclusion, we find merit in the appeal and allow it. In consequence, we set aside the sentence of twenty years' jail term imposed on the appellant and substitute for it a term of ten years imprisonment.

DATED at **SONGEA** this 24th day of August, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

This Judgment delivered this 24th day of August, 2023 in the presence of the Appellant in person and Mr. Alfred Maige, learned State Attorney for the respondent, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL