

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)**

AT BABATI

CRIMINAL SESSION NO. 40 OF 2016

(Originating from PI. No. 7/2015 in the Resident Magistrate's Court of Manyara at Babati)

REPUBLIC.....COMPLAINANT

VERSUS

NG'ANG'I GWARUDA GIDABAYOKTA..... ACCUSED

SENTENCE

16/02/2022 & 24/02/2022

GWAE, J

The offender One **Ng'ang'i s/o Gwaruda Gidabayokta** was convicted of the offence of manslaughter contrary to section 195 read together with section 198 of the Penal Code, Chapter 16, Revised Edition, 2002 ("Code") to one **Gisayado Gidabalan** who was his relative (deceased) by hitting him by an arrow on his neck on the 5th day of February 2015 at Dajamedia village within Hananag District in Manyara Region.

The convict was initially charged, tried and convicted of the murder by the court (**Maghimbi, J**). However, on his appeal to the Court of Appeal of Tanzania vide Criminal Appeal No. 245 of 2017 whose judgment was delivered on the 30th April 2021, it was ordered that, for the interest

of justice and that there was no possibility of the prosecution to fill any gaps in its evidence, the case be tried de novo, the case be re-tried.

When the case was called on for the ordered trial denovo before the court, the accused person now convict pleaded guilty to the lesser offence of manslaughter contrary to section 195 and 198 of the Code, the plea which was accepted by the prosecution.

It is now for sentencing him in accordance with law and of course pursuant to the circumstances surrounding the fateful incidence that is aggravating and mitigating factors.

The aggravating circumstances given by the learned counsel for the Republic (**Mr. Ngassa-SA**) are; use of more excessive force that is use of offensive weapons taking into account that he was yet to be hit by the deceased and that the same were directed to the sensitive parts of the body. According to the counsel, the offender deserves custodial sentence attracting high level sentence or medium. He then urged this court to make a reference to the Tanzania Sentencing Manual at Page 49.

On the other hand, **Mr. Mniko** for the defence, prayed for the court's mercy basing on the following mitigating factors;

1. The accused is the first offender as no previous record as to his conviction that has been demonstrated.

2. There was a fight or fracas between the deceased and another against the accused. It was the deceased and that other person who started attacking the accused taking into account that the deceased was older than the deceased (He was their little father). The deceased and another ought to have respected the accused
3. The accused person was seriously abused in that he was impotent
4. The deceased and his colleague were the ones who followed the accused to his residence. The accused's life was therefore threatened.
5. The accused's subsequent conducts deserve mercy of the court since he surrendered himself to the alarm's attendants, he confessed the offence instantly and today before the court. More so, his act of leaving from the pombe shop is an indication that the accused decided to avoid more quarrels
6. His stay in remand prison for about 7 years should also be taken into account without undue regard to being a condemn.
7. The accused is too old to serve custodial
8. The accused is married with two wives and 13 children

According to our Sentencing Manual, the fact that, the accused is the first offender, that, he or she pleaded guilty either during plea taking or immediately before commencement of trial against him are the mitigating factors that are eligible for reducing the actual sentence that the offender deserves if the trial was concluded (See page 24-25 of the

Sentencing Manual). There is also a chain of courts' decisions demonstrating that, an accused who promptly pleads guilty to an offence and who is the first offender must be leniently punished for example in **Lubaga Senga v. Republic** (1992) TLR at page 358, this court held inter alia that;

"In this case the appellant admitted guilt, a factor speaking mitigatingly in favour of him. He was first offender, a factor eloquently praying for leniency in favour of the appellant, and to still add, the appellant contritely beginning pardon.....could not have left mercy without smile"

See also judicial jurisprudence in **Mashimba vs. Republic** (2005) TLR and **Swalehe Ndungajilungu vs. Republic** (2005) TLR 94

I am also supposed to examine the record and see if the accused from very beginning started pleading to the lesser offence, if so, the offender would have been entitled to a reduction of 1/3 of the actual sentence. However, the record reveals that, when the offender was duly arraigned for plea taking before Maghimbi, J on the 19th August 2016, he did not exhibit any offer of guilt to the lesser offence as he merely pleaded not true, 'it is not true', without further elaboration to qualify him a mercy. Equally, it was the same position when he was reminded of the charge immediately before commencement of trial by the Court (Maghimbi, J).

I have also considered the period spent by the offender in prison custody that is from 2015 to when he was convicted by the court (2017) (Judicial jurisprudence in **Augustino Mponda v Republic**. [1991] TLR 97 adopted).

Likewise, I have taken into account the period saved by the offender when he was unlawfully convicted that is from 23rd May 2017 to 30th April 2021 (About four years). The period when the offender was serving an illegal sentence must be excluded as consistently been the case in our judiciary. In **Mokiri Mwita @ Gesine v. Republic**, Criminal Appeal No. 182 of 2015 (unreported), where the trial court Judge (**Gwae, J**) convicted the appellant of the offence of manslaughter c/s 195 of the Penal Code (supra) but it was discovered that the accused was not asked to either admit or deny the facts so read over to him, the Court of Appeal of Tanzania sitting at Mwanza at page 10 of the judgment stated and I quote;

“We order the case to be remitted to the High Court for retrial before another Judge. We further order the retrial be expedited and if thereafter the appellant is convicted, the term he has already served in prison should be taken into consideration”.

Also. in **Amani Ramadhani Mgonja v. Republic**, Criminal Appeal No. 219 of 2007 (unreported-CAT)

As this matter was for re-trial by the court as per the order of the Court of Appeal, the offender's service of the actual sentence must start from when he was initially convicted of the offence of murder. I have further considered the fact that the accused is married to two wives who have 13 children depending on him in terms of welfare and raising the up as father. More so, the accused might have been provoked by insulting word spoken to him by the deceased and his colleagues that is the offender is impotent ("Nyalaida). In ordinary sense, it is serious abusive and provocative word to call a responsible and potent man "an impotent".


Apart from considering the mitigating factors, I have also taken in board the aggravating circumstances as rightly advanced by the learned counsel namely; the convict when he discovered that the deceased and other persons were following him from behind, he entered his house and picked a bow and two arrows. The deceased and others having noticed that, the convict was armed, they ran away and went to their respective homesteads. In that situation the accused was not justified to follow the deceased at his residence and then hit him with the arrow (offensive weapon) on the neck (Sensitive). Had the deceased and other attempted

to hit the convict while on his residence that would, in my view, be different. As it is, the accused applied excessive force unnecessarily. Hence, the gravity of a conviction, according the offender's wrongful or unjustifiable acts, ranks to **high level** as suggested by the learned counsel for the Republic in order to preserve also the right of the victim of crime to have his assailant appropriately punished and to meet the society's reasonable expectation from the court for the appropriate deterrent punishment.

Therefore, the actual sentence, according the said circumstances of this particular case is fifteen (15) years jail **minus** the period spent in prison custody (2) and four years period being spent serving the illegal sentence as well court's mercy expected from the plea of guilty, (1/4 reduction from the actual which is equal to three years and nine months (3 $\frac{3}{4}$) years)

That said and done, the accused is sentenced to the term of **five and three months (5 $\frac{1}{4}$)** years imprisonment commencing from today.

Order accordingly.


M. R. GWAE,
JUDGE
24/02/2022

Court: Right of appeal to the Court of Appeal of Tanzania in respect of the imposed sentence to either side is fully explained.

