IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA
(CORAM: NDIKA, J.A., SEHEL, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 1 OF 2019

NEMES MYOMBE NTALANDA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ngwala, J.)

dated the 28th day of August, 2018
in
Criminal Sessions Case No. 11 of 2013

.....

JUDGMENT OF THE COURT

21st & 24th September, 2021

SEHEL, J.A.:

This is an appeal against a sentence of life imprisonment imposed on the appellant, Nemes Myombe Ntalanda by the High Court of Tanzania sitting at Mbeya. He was convicted on his own plea of guilty.

Initially, the appellant had been charged with the murder of Amina d/o Maonezi Tulyanje (the deceased) who was his wife. However, when the case was called on for the preliminary hearing, the appellant through his counsel offered a plea of guilty to a lesser offence of manslaughter. The respondent/Republic readily accepted his offer. Consequently, he was

charged with an offence of manslaughter contrary to section 195 of the Penal Code, Cap. 16. R.E 2002 (now R.E. 2019) (the Penal Code).

The facts which were read over to the appellant show that the appellant and the deceased were husband and wife respectively. They were living together until when the wife met her death on 21st July, 2011. A day before she met her death, the two had a quarrel over food. It was narrated by the prosecution that on 20th July, 2011 at dinner time, around 20:00 hours, the appellant asked his wife to serve him dinner only to be told that it was not ready. He asked her as to why she was late. The deceased responded that she had first to fetch water from the river. Upon hearing that response, he asked her to serve him spinach, a quickest food to prepare. To his surprise, the deceased brought him cooked beans. He then asked her where did she get the cooked beans. She replied that from her mother in-law. The appellant did not believe her, he had to cross-check the information with his mother who she told him that it was his step-mother. That information annoyed the appellant. He started quarrelling with his wife but he was calmed down by his father. Fearing her husband, on that night, the deceased slept in her in-laws' house.

The following day, in the morning, the appellant went to collect his wife and brought her back home. He then asked her as to why she went to sleep over at his parents' home. That question ignited a fight between the two. They exchanged bitter words to each other which made the deceased to decide to move out. She planned to go to her in-laws. Therefore, she went inside and packed her belongings. When she came outside, the appellant blocked her and started beating her with kicks and punches. He then took an axe and hit her on the head. She died instantly. The appellant was arrested and interrogated. At the police station, he admitted to have killed his wife with an axe. Even at the trial court, during the preliminary hearing, he pleaded guilty to the charge and admitted to the facts read over to him. Consequently, the learned judge convicted him on his own plea of guilty and sentenced him as aforesaid.

Aggrieved with the sentence, the appellant filed a memorandum of appeal raising four grounds of appeal which was later on substituted by a supplementary memorandum of appeal filed in term of Rule 73 (2) of the Tanzania Court of Appeal Rules, 2009. That supplementary memorandum of appeal raised one ground of appeal that:

"The learned judge erred in law and fact by convicting the appellant to life imprisonment which was a manifestly excessive punishment without considering the circumstances of mitigation in assessing sentence and without assigning cogent reasons in aggravating circumstances of the case".

At the hearing of the appeal, Ms. Joyce Kasebwa, learned advocate appeared for the appellant whereas Mr. Njoloyota Mwashubila, learned Senior State Attorney appeared for the respondent/Republic.

Ms. Kasebwa adopted the written submissions which she had earlier on filed in this Court. In the written submissions, it was submitted that, sentencing is in the discretion of the trial court and that the Court would interfere with such a discretion in certain special circumstances as it was stated in the case of **Swalehe Ndungajilungu v. The Republic,** [2005] TLR 94. She argued that the circumstances obtaining in the present appeal call for an intervention by this Court because the learned judge did not state specifically which mitigation factors were considered before sentencing the appellant. Ms. Kasebwa also took us through the mitigating factors appearing at pages 32 – 33 of the record of appeal and

submitted that the factors were not considered at all by the learned judge. Each of them, she argued, deserved independent consideration since each factor raised individual important aspect in assessing sentence. Besides, she added, the learned judge acted on two aggravating factors which would have aggravated the commission of the offence and they were not appropriate in the consideration of the sentence. To support her submission, she cited the cases of **Silvanus Leonard v. The Republic** [1981] TLR 66 and **Bernadeta Paul v. The Republic,** [1992] TLR 97. At the end, she urged us to allow the appeal by reducing the sentence.

On his part, Mr. Mwashubila supported the appeal. He conceded that the learned judge made a general consideration of the mitigation factors instead of looking at each and every factor stated by the appellant. He added that even the two aggravating factors, that is, the type of weapon used and the part of the body attacked, were not the only factors to be considered. He cited the case of **Njile Samwel @ John v. The Republic**, Criminal Appeal No. 31 of 2018 where the Court interfered with sentence because the trial court, in sentencing the appellant to the maximum sentence of fifteen years, failed to take into account that the

appellant was a first offender. In that respect, he supported the appeal and beseeched us to interfere with the sentence.

From the submissions, counsel for both parties are in agreement that the sentence imposed on the appellant is manifestly excessive. As such, the issue before us is whether there is any justification, for the Court to interfere with the sentence of life imprisonment imposed on the appellant. There is a plethora of decisions of this Court on the circumstances under which an appellate court may interfere with a sentence. One of them is the case of **Patrick Matabaro @ Siima and Another v. The Republic**, Criminal Appeal No. 333 of 2007 (unreported). In that appeal, the Court made reference to a "**Handbook on Sentencing: With particular Reference to Tanzania**" by Brian Slattery published by the East African Literature Bureau, Nairobi in 1972, specifically at page 14 that: -

> *"The grounds on which an appeal court will alter a sentence are relatively few, but are actually more numerous than is generally realized or stated in the cases. Perhaps the most common ground is that a sentence is "manifestly excessive," or as it is sometime put, so excessive as to shock. It should be emphasized that "manifestly" is not mere decoration, and a court*

will not alter a sentence on appeal simply because it thinks it is severe. A closely related ground is when a sentence is "manifestly inadequate." A sentence will also be overturned when it is based upon a wrong principle of sentencing ... An appeal court will also alter a sentence when the trial court overlooked a material factor, such as that the accused is a first offender, or that he has committed the offence while under the influence of drink. In the same way, it will quash a sentence which has obviously been based on irrelevant considerations ... Finally, an appeal court will alter a sentence which is plainly illegal, as when corporal punishment is imposed for the offence of receiving stolen property."

We have gone through the record of appeal and noted that in the trial court, Ms. Kasebwa canvassed a number of mitigating factors, on behalf of the appellants, geared at seeking leniency in sentencing but after hearing the aggravating and mitigating factors, the learned judge sentenced the appellant as follows: -

"SENTENCE: Much as the learned counsel for the accused person has tried her level best to give reasons for mitigation ***however in the circumstances of this case****, I am of the considered view that there are no*

grounds for reduction of the sentence of manslaughter as provided for under Section 198 of the Penal Code, Cap 16 R.E. 2002. ***I hold so because having regard to all the facts of this case****, this court is of the opinion that the only sentence which is appropriate to the accused person who used a lethal weapon, in disciplining a wife, an axe a "shoka" to hit his wife, the "shoka" which went deep into the head of the deceased and caused death of the deceased is unacceptable. This act should be condemned and deterred in our societies. For this reason, the accused person is sentenced to life imprisonment." [Emphasis added]*

From the above, it is clear that the learned judge heard the submission made by the counsel for the appellant that the appellant was seeking leniency for a number of reasons but she decided to ignore all mitigation factors and concentrated on two main aggravating factors. She was much minded on the type of a weapon used and the part of the body attacked and that is why she decided to impose a maximum sentence on the appellant. It is trite law that, in sentencing, the trial court has to balance between aggravating factors which tend toward increasing the sentence awardable and mitigating factors which tend toward exercising leniency. See: **Bernard Kapojosye v. The Republic**, Criminal Appeal

No. 411 of 2013 (unreported). We are therefore satisfied that the learned judge based on a wrong principle of sentencing as she concentrated on aggravating factors while ignoring the mitigation factors.

Much as the deceased was cut by an axe on her head, the appellant had also been remorseful for what he did. It is on record that he had been consistent in maintaining his plea of guilty. First, when he was interrogated at the police station he confessed. Secondly, after the charge was read over to him, he pleaded guilty. And thirdly, he admitted to all facts read over to him without any qualification. His persistent admission not only showed that the appellant was contrite for his action, but he was also prepared to face the consequences. Normally, the court would take this factor into account when sentencing. In the case of **Bernadeta Paul v. The Republic** (supra) the Court considered the accused's plea of guilty and interfered with the sentence. In that appeal, the Court set aside the sentence of four years imprisonment imposed on the appellant after it had found that the trial court did not really take into account the mitigating circumstances which included the fact that the appellant had pleaded guilty to the charge. The Court said: -

> *"It is our considered view that had the learned judge taken onto account the appellant's plea of guilty to the*

offence with which she was charged she would no doubt have found that the appellant was entitled to a much more lenient sentence than the sentence of 4 years she imposed. This is especially so taking into account that the appellant had but for the conviction an unblemished record and, if we may also mention, she had been in remand for about five years with the serious charge of infanticide hanging on her."

In another case of **Willy Walosha v. The Republic,** Criminal Appeal No. 7 of 2002 (unreported) the Court stated:

"It appears to us that, with respect, although ostensibly a judge may say that he has taken into consideration mitigating circumstances in assessing sentence, it is not always apparent that he has in fact done so. For example, first offenders who plead guilty to the charge are usually sentenced leniently, unless there are aggravating circumstances. Also, the period an offender has spent in remand custody before being sentenced, is also usually be taken into consideration to reduce the sentence which the offender would otherwise receive..."

See also: **Agnes Julius v. The Republic**, Criminal Appeal No. 188 of 2010 (unreported).

As stated herein, the learned judge failed to take into consideration the material factors which entitled the appellant for leniency in sentencing him. Had the learned judge been truly mindful of "*the circumstances of this case*", as she had put it when sentencing, she would not have imposed the maximum sentence for an offence of manslaughter, which is, life imprisonment. We stated that the counsel for the appellant pleaded a number of mitigating factors which would have entitled the appellant to get a court's leniency. Among the factors pleaded were that: - the appellant made an early admission to his responsibility thus he was remorseful for what he did, he was the first offender and at the time of sentencing, the appellant had spent a period of two years and half in custody. All these mitigation factors are also found in the sentencing manual titled "**Tanzania Sentencing Manual For Judicial Officers**" published by the Judiciary of Tanzania. We therefore urge all judicial officers and practitioners to be acquainted with it in order to ensure that sentences imposed on the offenders are consistent, proportionate, fair, just and proper.

Since in the appeal before us, the learned judge did not consider any of the mitigation factors stated by the appellant's counsel, we are

constrained to interfere with the manifestly excessive sentence of life imprisonment imposed on the appellant.

In the end, we allow the appeal. Accordingly, we set aside the sentence of life imprisonment imposed on the appellant by the trial court and substitute for it a sentence of twenty years imprisonment. That imprisonment term should be counted from the date he was convicted and sentenced in 2013.

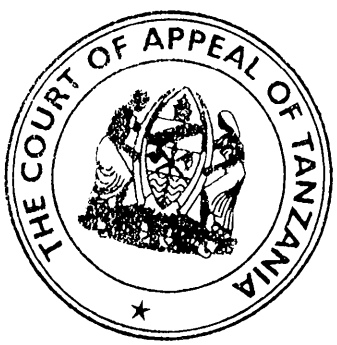
DATED at **MBEYA** this 23rd day of September, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered on this 24th day September, 2021, in the presence of the appellant in person and Ms. Safi Kashindi Amani, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL