IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUSSA, J.A., MWANGESI, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 453 OF 2016

MASIGE EUNYO ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Masanche, J)

Dated 10th day of November, 2004
in
Criminal Session No. 66 of 2003

JUDGMENT OF THE COURT

28th Nov. & 14th December, 2018

MUSSA, J.A.:

In the High Court of Tanzania, Mwanza Registry, the appellant was arraigned for murder, contrary to section 196 of the Penal Code, Chapter 16 of the Laws. The particulars on the information were that on or about the 27th November 2007, at Kiemba Village, within Musoma District the appellant murdered a certain Maria Mwita whom we shall hereinafter refer to as "the deceased."

When the information was read over and explained to the appellant, he pleaded guilty to the lesser offence of manslaughter to which the trial judge (Masanche, J.) recorded, accordingly. Thereafter, Mr. Mwenempazi, learned State Attorney, outlined the facts of the case which may be paraphrased as follows:-

The appellant and the deceased were lovers. On the fateful day, both the appellant and the deceased went to Kiemba Village to attend separate business. Whilst there, the appellant bumped into the deceased who was in the company of a certain Meregesi Baitan, eating mangoes. Just as he saw the appellant, Meregesi stood up, wielding a knife. The appellant recoiled backwards but, he then, all of a sudden, confronted Meregesi and wrested the knife from his grip. Next, the appellant attacked the deceased by the use of that knife. Shouts were then heard from the scene which led to the arrest of the appellant. The deceased died on the way as she was being taken to hospital. The report on postmortem examination attributed her death to hypovolaemic shock secondary to the severance of the left carotid and jugular veins.

The appellant admitted the outlined facts, whereupon the trial court found him guilty and convicted him of the lesser offence of manslaughter and, upon conviction, this is what transpired in court:-

> ***"Mr. Mwenempazi**:*
>
> *No previous record.*
>
> ***Mr. Nasimire** (in mitigation).*
>
> *We pray for a lenient sentence. He is a first offender. The accused is still a youth. His future is spoilt. He has lost a lover. He is in custody for three years now. The source of the trouble was the boy Meregesi.*
>
> *"Sentence:*
>
> *If the other boy called Maregesi Baitan was the source of the trouble, why jump on the girl, the deceased? The deceased was not his wife. She was a young girl with liberty to chose a lover. This was, really, a brutal killing. The accused is still young. He was 22 years when the incident took place. I have a feeling that he deserved a stiff custodial sentence, at least as a warning to other youths. The deceased was deprived of her life at a*

prime age of 21 years. I sentence the accused to fifteen years imprisonment.

Sgd. J. E. C. Masanche
Judge
Musoma
10TH November, 2004."

Dissatisfied, the appellant presently seeks to impugn the sentence imposed by the trial court upon a memorandum of appeal which is comprised of three points of grievance, namely:-

"1. THAT: the presiding court (sic) did not consider the general circumstances of the crime/case (i.e in both material and mitigating factors) in including the plea of guilty and that the appellant was a first offender.

2. THAT: the 21 years jail sentence imposed upon the appellant is so excessive in contrast to the whole circumstances of the crime which tacking (sic) brutal and/or aggravating factors.

3. THAT: the time the appellant had stayed in custody pending his trial had not regarded (sic) by the presiding judge."

When the appeal was called on for hearing before us, the appellant was represented by Mr. Anthony Nasimire, learned Advocate, whereas the respondent Republic had the services of Ms. Ajuaye Bishanga, learned Senior State Attorney, who was being assisted by Ms. Ghati Mathayo, learned State Attorney.

The learned counsel for the appellant proposed to approach the grounds of appeal generally and, we should suppose, quite rightly so as the same boil down to a single issue as to the sustainability of the sentence meted out by the trial court. In substance, Mr. Nasimire criticised the presiding trial judge for not taking into account the appellants mitigating factors at the time of his apportioning the appropriate sentence. The learned counsel for the appellant was of the view that had the judge taken into account, for instance, the plea that the appellant was a first offender and that he had readily pleaded guilty to the charged offence, the judge would have found that the appellant was entitled to a much more lenient

sentence than the one imposed. To fortify his contention, Mr. Nasimire referred to us our decision in **Bernadeta Paul v. The Republic** [1992] TLR 97.

On her part, Ms. Bishanga went along with the submissions of her friend and supported the appeal on account of the failure, by the trial judge to consider the appellant's mitigating factors.

Having heard the learned arguments from either side, we also note, from the extracted portion of the trial proceedings, that during sentencing the trial judge did not consider the mitigating factors raised by the appellant save for his being a youthful offender. The crucial issue is nevertheless, whether or not in the circumstances, this Count should intervene and vary the sentence.

Dealing with the question of the intervention by an appellate court to vary the sentence imposed by the trial court, the defunct Court of Appeal for Eastern Africa had this to say in **R v. Mohamed Ali Jamal** [1948] 15 EACA 126:-

> *"An appellate court should not interfere with the discretion exercised by a trial judge as to sentence*

except in such cases where it appeals that in assessing sentence, the judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive."

Coming to the case under our consideration, it is patently obvious that in imposing sentence, the learned trial judge overlooked several of the mitigating factors raised by the appellant, more particularly, that he was a first offender and that he had stayed in custody for a period of three years.

That being the position, we are certainly entitled to intervene for we are of the considered view, that had the learned judge taken into account the fact that the appellant was a first offender as well as the period he spent in custody, he would have, no doubt, found that the appellant was entitled to a much more lenient sentence then the one he imposed. We, accordingly, allow the appeal but the irony is that counting the imposed 15 years from the 11th November, 2004 when he was sentenced, the appellant has, seemingly, served a substantial portion of the sentence imposed on him. Thus, we reduce the sentence imposed by the trial judge to such term of imprisonment as would result in his immediate release

from custody, unless, of course, he is otherwise lawfully held in connection with another matter.

It is so Ordered.

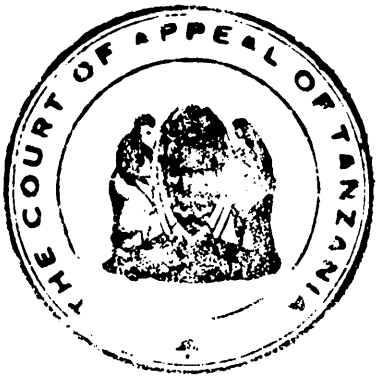
DATED at **MWANZA** this 12th day of December 2018

K. M. MUSSA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL