IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MBAROUK, J.A., LUANDA, J.A. And JUMA, J.A.)

CRIMINAL APPEAL NO. 62 OF 2015

ENOKA BUJIKU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Sumari, J.)

Dated the 04th day of September, 2014
In
Criminal Session No. 124 of 2012

JUDGMENT OF THE COURT

17th & 19th May, 2016

MBAROUK, J.A.:

In the High Court of Tanzania at Mwanza, the appellant was initially charged on the information of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 Vol. 1 of the Laws Revised Edition 2002. When the information was read over to the appellant on 11-12-2012, he pleaded not guilty.

However, on 04-09-2014 when the information was read over to him again, he pleaded to a lesser offence of manslaughter contrary to section 195 of the Penal Code. The appellant was then duly convicted and sentenced to serve twenty (20) years imprisonment with corporal punishment of twenty four (24) strokes. Undaunted, the appellant has preferred this appeal.

In this appeal, the appellant was represented by Mr. Stephen Magoiga, learned advocate; whereas the respondent/Republic was represented by Ms. Ajuaye Bilishanga, learned Senior State Attorney.

The appellant preferred the following grounds of complaints: -

(1) THAT, the sentence is manifestly excessive.

(2) *THAT, the trial High Court Judge did not consider the mitigation factors in reaching the decision.*

(3) *THAT, the age of the appellant was not considered as during the trial the appellants age was below 18 years so a contravention to Child Act.*

(4) *THAT, the Honourable trial judge erred in law to order the appellant to be punished with 24 strokes contrary to law.*

At this juncture, we have found it prudent to disclose the facts of the case as they were before the trial court. It was stated that on 6-1-2011, the appellant and Lameck Barabara (the deceased) who were relatives were at home at Senga, Geita. The deceased saw the appellant

entering their father's room and stole T.shs. 5,000/=. Thereafter, the deceased told the appellant that he will reveal the incident to their father. That information made the appellant to be scared and hence asked the deceased to accompany him to a cassava farm to uproot some cassava. While at the farm, the appellant retrieved a knife and cut the deceased by his throat. Thereafter the appellant fled away. On 7-3-2011, the deceased's body was found in the farm after being traced. The appellant was then traced and when he was found, he was arrested by police. During the interrogation made by the police, the appellant confessed to have killed the deceased so as to conceal the evidence that he stole T.Shs. 5,000/= of his father. When the postmortem examination was made, the report disclosed that the cause of death was due to haemorheogic shock.

Mr. Magoiga further stated that, the record shows that, the trial Judge was emotional when she sentenced the appellant and that led her to state aggravating circumstances which were never stated by the prosecution side and failed to consider each mitigating factor. For example, he said, things like that it was a brutal killing which she believed deserves a deterrent punishment was not stated by the prosecution side. The learned advocate for the appellant then said, such a failure to consider each mitigating factor when the appellant was sentenced has led to a miscarriage of justice which allows this Court to use its discretion and interfere with the sentence imposed on the appellant by reducing it at least by half.

Arguing the 3rd ground of appeal, Mr. Magoiga requested for the same to be argued in the alternative. He submitted that as far as the record shows that at the

time when the offence was committed the appellant was eighteen (18) years of age, the trial court was not supposed to sentence him to serve punishment of imprisonment. He relied upon the provisions of section 26(2) of the Penal Code, sections 114, 119, 120 and 121 of Law of the Child Act No. 21 of 2009 to support his argument. However, he lastly left the matter to the Court to reach to a decision which is proper with regard to this alternative ground.

As to the last ground, Mr. Magoiga submitted that the sentence of a corporal punishment imposed on the appellant after he was convicted of manslaughter was contrary to law. He said, looking at the section 4 of the Corporal Punishment Act [Cap. 17 R.E. 2002] and the schedule to the Act does not include manslaughter as the offence which is punishable with corporal punishment. For that reason, and also as section 195 of the Penal

Code does not provide corporal punishment to a person convicted of manslaughter, Mr. Magoiga urged us to quash the order of corporal punishment imposed on the appellant by the trial court and remain with the imprisonment sentence to which he proposed to be reduced by half.

On her part, Ms. Ajuaye from the outset indicated to support the appeal partly and specifically to the last ground of complaint. In her reply in respect of the 1st and 2nd grounds of appeal, the learned Senior State Attorney submitted that it was enough for the trial Judge to state that she has considered the mitigating factors. She then distinguished the cases referred by the learned advocate for the appellant. Ms. Ajuaye, added that, according to the circumstances in this case, the sentence of twenty (20) years imprisonment imposed on the appellant was not excessive as the maximum sentence

for manslaughter, according to law, is life imprisonment. She therefore urged us to find this ground of appeal devoid of merit.

In her response to the 3rd ground of appeal, the learned Senior State Attorney contended that, the issue as to the age of the appellant did not arise and canvassed at the trial court. After all, she said that the record clearly shows that the appellant was above the age of eighteen (18) years when he was convicted. She therefore urged us to find this ground of appeal devoid of merit too.

As to the last ground of appeal, the learned Senior State Attorney readily conceded that, the trial judge erred in law when she ordered the appellant to be punished with twenty four (24) strokes, because such a punishment is contrary to law. She added that, according to section 25(c) of the Penal Code, corporal

punishment is among the punishments which may be inflicted by a Court. However she said, such punishment may be imposed on an accused person subject to the directions of the law. She added that, the law clearly states that, a person convicted of manslaughter is liable to life imprisonment, and the provisions of the law does not direct that if a person is convicted with such an offence, the imprisonment sentence to be accompanied with corporal punishment. For that reason, she urged us to quash the wrong order of corporal punishment and remain with twenty (20) years imprisonment sentence imposed on the appellant.

After having examined the rival submissions from both sides, starting with the 1st and 2nd grounds of appeal, we are of the view that as the trial judge stated that, she

has given due consideration of the mitigating factors stated by the learned advocate who represented the appellant at the High Court, we find it enough to show that she considered those mitigating factors generally. It would have been different if the trial judge totally failed to have stated that she considered the mitigating factors. However, we are of the view that to mention each mitigating factor which has been considered when the appellant is sentenced is preferable. On the other hand, we fully agree with the learned Senior State Attorney that considering the circumstance in this case, the imposition of twenty (20) years imprisonment is not excessive. We therefore find the 1st and 2nd grounds of appeal devoid of merit.

As for the 3rd ground of appeal, we have noted that, the issue of age was not discussed at the trial court.

However, we took trouble and looked at the original record and found that, the offence was committed on 6-1-2011 and on 18-1-2011 the appellant appeared before the District Court of Geita for the first time. According to the information filed at the High Court of Tanzania at Mwanza, it was shown that the appellant was 18 years of age. However, the record is silent as to whether he was 18 years of age at the time when the offence was committed or when he was sent to court for the first time during committal proceedings. Generally, we have noted that the record is silent on the issue of age of the appellant. We are of the opinion that it is important for a trial court to put special attention when they encounter a case involving a person appearing as a child. This is because it may cause a great impact which may lead to

injustice. However, as the issue did not arise and discussed at the trial court, we have found it not proper to indulge ourselves on that issue at this stage.

As for the last ground of appeal, we fully agree with both, Mr. Magoiga and the learned Senior State Attorney that the imposition of corporal punishment after the appellant was convicted of manslaughter was contrary to law. This is for the reason that, according to section 4 and the list of offences stated in the schedule of the Corporal Punishment Act, [Cap. 17 R.E. 2002], manslaughter is not in the list of offence punishable by corporal punishment. For that reason, we quash the order of corporal punishment imposed on the appellant by the trial court and remain with the sentence of twenty (20) years imprisonment. In the event, we find this ground of appeal devoid of merit.

All said and done we find this appeal devoid of merit to the extent stated above and we therefore dismiss it.

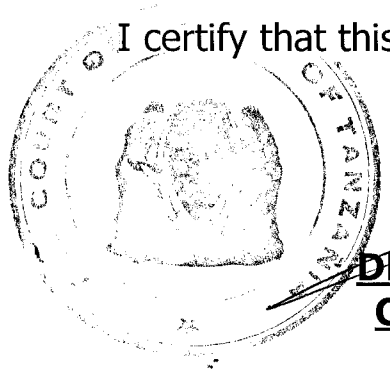
DATED at **MWANZA** this 18th day of May, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

H. JUMA
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL