SWALEHE NDUNGAJILUNGU *v.* REPUBLIC

COURT OF APPEAL OF TANZANIA AT MWANZA

(Ramadhani, Munuo and Msoffe, JJ.A.)

CRIMINAL APPEAL No. 84 OF 2002

(From the conviction of the High Court of Tanzania at Tabora, Lukelelwa, J., dated the 30 May 2002, in Criminal Sessions Case No.80 of 2001)

Criminal Practice and Procedure – Sentence – Sentence of thirty years imprisonment where the accused pleaded guilty to the offence of manslaughter – Whether the sentence imposed was excessive.

Criminal Practice and Procedure – Sentenceing – Whether the Appellate Court may alter a sentence imposed by the trial court.

The appellant was charged with murder contrary to section 196 of the Penal Code but pleaded guilty to the lesser offence of manslaughter contraty to section195 of the Penal Code. Following his plea the court convicted him and sentenced him to thirty years imprisonment on the ground that the offence charged was separated from murder by only a thin thread. The appellant appealed against the sentence.

Held: (i) It is trite law that the Court of Appeal cannot alter a sentence imposed by the High Court unless there are good grounds upon which to alter or interfere with such sentence.

(ii) The sentence of thirty years imprisonment is excessive taking into account, among other factors, that the appellant was gravely provoked.

Appeal allowed

Cases referred to:

(1) *Silvanus Leonard Nguruwe v. R* [1981] T.L.R. 66

(2) *Ogalo s/o Owoura v. R* (1954) 21 E.A.C.A. 270

(3) *Hadija d/o Omari v. R* [1970] HCD n.158

(4) *MacDonald v. R* (1959) 2 R and N 157

(5) *R v. Ratilal Amarshi Lakhani* [1958] E.A. 140

(6) *James v. R* (1950) 18 E.A.C.A. 147

(7) *Mohamed Ali v. R* [1969] HCD n.54

(8) *R v. Khamis Suleiman* [1969] HCD n.117

Statutory provision referred to:

(1) Penal Code Chapter 16 section 195,196

Mr Magongo for the appellant

Mr Feleshi for the republic

JUDGMENT OF THE COURT

(Dated 16 July 2004)

Msoffe, JA: The appellant was charged with murder contrary to section 196 of the Penal Code. In the information filed against him at the High Court of Tanzania at Tabora and dated 17 July 2001, it was alleged that on 17 April 2000 he murdered one Amina Athumani. On 30 May 2002 he offered a plea of guilty to a lesser offence of manslaughter contrary to section 195 of the above Code. The plea was accepted by the Republic. The facts were then read out, and he readily admitted them. He was accordingly convicted of the lesser offence and sentenced to thirty years imprisonment. This is an appeal against sentence.

At the hearing of the appeal, Mr Magongo, learned advocate, advocated for him while Mr Feleshi, learned State Attorney, appeared and resisted the appeal on behalf of the respondent Republic.

In brief, the facts, which were read out and accepted by the appellant, were that the deceased and one Khadija Hamisi were his wives. On 17 April 2000 at around 6:00 p.m. the two wives were sorting groundnuts in the presence of the appellant. In the meantime, two young men passed along, riding a bicycle. One of the two men gave a "signal"

to the appellant's wives. The signal, which was in the form of "clearing his throat", was quickly responded to by the deceased who followed them immediately thereafter. The appellant also followed behind. Shortly, the deceased ran back home, picked up a pail and went out to a well to fetch water. The appellant also went back home whereupon he began beating Khadija on a belief that the two men were their (i.e. his wives) lovers. When the deceased returned from the well the appellant also roughed her up. Indeed, the appellant tied her to a tree stump with her "Kitenge" cloth and beat her up to around 19:00 hours when he set her free. When she was released, the said deceased went back home to feed her baby. The appellant followed her and demanded to be told her relationship with the two men. In the process, the deceased admitted that one of the two men was her lover. The appellant then beat her again till she died. Upon realizing that the deceased had died, the appellant went out to inform neighbours.

In sentencing the appellant, the learned trial judge took into account the following factors:

(i) That he was provoked,

(ii) That he was a first offender, and

(iii) That he was a young man with an extended family of eight people.

However, in the end, the said judge was of the view that this was a case calling for a severe sentence because the appellant's actions amounted to a very serious manslaughter where "only a thin thread separates his offence from that of murder".

Mr Magongo filed one ground of appeal which reads:

1. That had the learned trial judge fully considered the mitigating factors and properly applied the sentencing principles, he would not have imposed a sentence of 30 years against the appellant.

In arguing the above ground of appeal, Mr Magongo submitted mainly that there were other factors, which the judge ought to have considered i.e. that the appellant did not use any weapon, he was remorseful for

what he did and hence his offer of a plea of guilty to manslaughter, the period he had spent in prison, and that by admitting the offence the appellant actually assisted in the administration of justice in that time and expense were saved. Mr Magongo also went on to fault the judge who said somewhere in the Judgment that the deceased was beaten for a period of over one hour. According to Mr Magongo, the beating did not take more than one hour.

In response, Mr Feleshi was of the view that since the maximum sentence provided for the offence is life imprisonment, the sentence of thirty years imprisonment meted to the appellant was well within the judge's discretion. He went on to urge, therefore, that the sentence should not be disturbed. He also submitted that it was true that the judge did not consider the other factors mentioned above by Mr Magongo. He was quick, however, to say that even if the judge had taken into account the other factors, the sentence would not have changed. Otherwise, Mr Feleshi agreed with Mr Magongo that the deceased's beating did not last more than one hour.

As observed by this court in the case of *Silvanus Leonard Nguruwe v. Republic* (1) it is trite law that the Court of Appeal cannot alter a sentence imposed by the High Court on the mere ground that if it was sitting as a trial court it would have imposed a different sentence. There have to be good grounds upon which this court could alter or interfere with a sentence passed by the High Court. The opportune question for us to ask ourselves at this juncture will then be this: Which are those grounds?

In answering the above question, it will be instructive for us to cite with approval a few examples which are mentioned by Brian Slattery in his **Handbook on Sentencing** at page 14 thus:

(i) Where the sentence is manifestly excessive – *Ogalo s/o Owoura v. Republic* (2); *Hadija d/o Omari v. Republic* (3) or where the sentence is so excessive as to shock – *MacDonald v. Republic* (4) at 169.

(ii) Where the sentence is manifestly inadequate – *R. v. Ratilal Amarshi Lakhani* (5).

(iii) Where the sentence is based upon a wrong principle of sentencing – *Ogalo s/o Owoura v. Republic* (2).

(iv) Where the trial court overlooked a material factor – *James v. Republic* (6).

(v) Where the sentence has been based on irrelevant considerations, such as the race or religion of the offender – *Mohamed Ali v. Republic* (7).

(vi) Where the sentence is plainly illegal, as when, for example, corporal punishment is imposed for the offence of receiving stolen property – *Republic v. Khamis Suleiman* (8).

In relation to (i) above, we may emphasize here that the use of the word "manifestly" is not without significance. For this court to interfere, the sentence has to be really "manifestly" excessive. The sentence cannot be altered simply because the court thinks it is severe.

In the light of the above general principles, it will now be quite in order to see whether in the instant case any of the above principles was violated. Without much ado, we are of the view that the trial judge overlooked the other factors mentioned by Mr Magongo, which, we think, were material in the justice of the case. We think that further to the appellant being a first offender etc. , the judge ought also to have taken into account the other factors i.e. that the appellant did not use any weapon, he was remorseful for what he did and hence his readiness to plead guilty to the lesser offence of manslaughter, the two year period he had spent in prison as a remandee, and that by his plea of guilty he saved the court's (and other parties) time and expense. If the judge had considered these other factors, we think, he would have imposed a lesser sentence. For this reason, we believe, we are entitled to interfere with the sentence imposed in this case.

We accordingly allow the appeal and set aside the sentence of thirty (30) years imprisonment. Taking into account the fact that the appellant was gravely provoked as the above facts show, and that he has so far spent around four years in prison i.e. two years as a remand prisoner and two years and a month or so as a convict, we hereby sentence him to five (5) years imprisonment. The five (5) year term of imprisonment will be effective from the date of this Judgment. It is so ordered.

We wish to mention, albeit in passing, that once the appellant pleaded guilty to manslaughter, it was unnecessary for the judge to remark that the offence was separated from murder by only a thin thread. Having so pleaded as aforesaid, that should have been the end of the matter; and in that regard the remark was uncalled for.