IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., LEVIRA, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 146 OF 2020

MASHAKA SILYVESTER ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Rumanyika, J.)

dated the 29th day of August, 2019

in

Criminal Session Case No. 10 of 2015

.....

JUDGMENT OF THE COURT

29th April & 7th May, 2024

LEVIRA, J.A.:

On 29/08/2019, the appellant, Mashaka Silyvester was sentenced to life imprisonment by the High Court of Tanzania at Mwanza having been convicted on his own plea of guilty of the offence of attempted murder contrary to section 211 (a) and (b) of the Penal Code, Cap 16 (the Penal Code). It was alleged by the prosecution that the appellant and another person (not a party to this appeal), jointly and together on 07/12/2013 at about 23:00 at Ilalambogo Village within Misungwi District, in Mwanza Region with intent to cause death of one Magdalena Bernado @ Mayala,

did unlawfully cut her by using a machete on the right side of her head and on her left hand. The appellant was aggrieved by the sentence imposed on him and is now challenging it in this appeal.

Before we consider the appellant's grounds of appeal, we think, it is not insignificant to briefly narrate the facts of the case as follows: On the fateful night, the victim's house was invaded by two people. With the aid of light from a rechargeable lantern, she managed to recognize them to be the appellant and his fellow. Unexpectedly, she was hit by a heavy object on her head and fell down. The lantern which she was holding fell down as well, but continued to illuminate the house. The invaders started to cut her in various parts of her body using a machete. Thereafter, they left the scene of crime. Subsequently, the victim started to call her grandchildren who were in the bedroom to rescue her. They responded and found the victim bleeding due to multiple cut wounds on her body, the situation which made them to inform the victim's sons about the incident. The victim's sons responded immediately to the scene of crime and reported the incident to Misungwi Police Station. Thereafter, they arranged for transport and the victim was sent to Misungwi District Hospital for treatment.

The investigation was conducted and the sketch map of the scene of crime was drawn. On 12/12/2013 the appellant was arrested at Ilalambogo, Misungwi. He was interrogated and confessed to the crime in his cautioned statement. Upon being arraigned before the High Court, the appellant pleaded guilty to the charge. The victim's PF3, the copy of sketch map of the scene of crime and the appellant's cautioned statement were admitted as exhibits P1, P2 and P3, respectively. Eventually, he was convicted on his own plea of guilty and after mitigation, he was sentenced to life imprisonment, which sentence, is the subject of the present appeal.

Before us, the appellant has presented a memorandum of appeal comprising six grounds and a supplementary memorandum of appeal comprising five grounds. For the reasons to come into light shortly, we shall not reproduce them here save for one main complaint that:

> *"The trial Judge erred in law for imposing an excessive sentence of life imprisonment on the appellant."*

At the hearing of the appeal, the appellant appeared in person and was represented by Mr. Innocent Kisigiro, learned advocate whereas, the respondent Republic had the services of Ms. Magreth Mwaseba, learned

Senior State Attorney assisted by Ms. Fortunata Guvette, Messrs. Deogratius Rumanyika and Japhet Ngussa, all learned State Attorneys.

In support of the appeal, Mr. Kisigiro commenced his submission by abandoning the supplementary memorandum of appeal which he had filed in Court on 14th April, 2024. He as well abandoned some of the grounds of appeal which were presented by the appellant in his memorandum of appeal which was filed on 17th August, 2020, thereby ending up submitting on the above complaint. Expounding it, he stated that the High Court Judge did not consider the strong mitigating factors advanced by the appellant. As a result, he imposed on him an excessive sentence. He went on to submit that, the appellant was charged with attempted murder. He pleaded guilty to the charge and was convicted accordingly. After conviction, he was given an opportunity to mitigate and the prosecution had no his previous criminal records, as it can be seen at page 37 of the record of appeal.

It was Mr. Kisigiro's argument that, had the High Court Judge considered the appellant's mitigating factors, he would not have imposed on him the maximum sentence of life imprisonment. He brought to our attention the fact that, when the appellant was convicted in 2019, he had

already spent seven (7) years in remand prison awaiting trial and now this is his eleventh (11^{th}) year in prison. He urged us to consider the appellant's mitigation and reduce his sentence accordingly. In particular, he implored us to consider that the appellant had stated to the trial court that he was afflicted by a permanent illness along with chronic back pains. On this basis, he urged that the appellant's sentence be reduced to the effect of releasing him from prison forthwith.

Ms. Mwaseba's reply to this sole ground of appeal was preceded by her stance against the appeal. In her submission, she stated that the appellant was charged under section 211 (1) and (2) of the Penal Code which provides for a maximum sentence of up to life imprisonment. Therefore, she argued that the trial court has discretion in sentencing which will rarely be interfered by the Court. She countered the submission by Mr. Kisigiro by stating that, he did not show any special circumstances which ought to have been considered by the trial Judge to reduce the appellant's sentence. According to her, the sentence meted out on the appellant was proper and the trial Judge stated the reason why he imposed that sentence as shown on page 49 of the record of appeal.

However, in the course of arguing further, she conceded that indeed, the trial Judge did not consider the appellant's mitigation, otherwise he could have imposed on him a lesser sentence. Surprisingly, even after such concession, Ms. Mwaseba did not change the respondent's stance as far as this appeal is concerned. She urged us to uphold the appellant's sentence imposed by the trial court.

Mr. Kisigiro made a very brief rejoinder requesting the Court to consider that, even Ms. Mwaseba has supported the appellant's argument, that his mitigating factors were not considered by the trial court while sentencing him. Finally, he implored us to allow the appeal and reduce the appellant's sentence.

We have carefully considered the submissions by the counsel for the parties and reviewed the record of appeal. The issue calling for our determination is whether the sentence imposed on the appellant by the trial court was excessive. We wish to note at the outset that, the appellant's plea of guilty and the fact that the trial court did not consider his mitigating factors in sentencing are non-contentious matters. The only contentious issue between the parties is on the sentence. While the appellant claims that failure of the trial Judge to consider his mitigation

resulted into an excessive sentence being imposed on him; on the contrary, the respondent insisted that the appellant's sentence was not excessive.

It is an established principle that, no appeal lies against a conviction entered on a plea of guilty. The door for appeal is only open to those who are aggrieved with the sentence, as the appellant in the present case. Section 360 of the Criminal Procedure Act, Cap. 20 provides that:

> *"360-(1) No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence."*

According to the record of appeal, the appellant was convicted and sentenced under section 211(a) and (b) of the Penal Code. For ease of reference this provision provides:

> *"211- Any person who;*
>
> *(a) Attempts unlawfully to cause the death of another or*
>
> *(b) With intent unlawfully to cause the death of another, does any act or omits to do any act which it is his duty to do the act or omission being of such a nature as to be likely to endanger human*

life, ***is guilty of an offence and is liable to imprisonment for life."***

[Emphasis added]

The appellant's cautioned statement (exhibit P3) provides in clear terms how the appellant cut his mother by machete and caused injuries on her body believing that she was dead. We shall let part of his statement to speak for itself hereunder:

> *"Tarehe 7/12/2013 majira ya saa 23:00hrs nilitoka kwenye chumba nilikokuwa nimelala na Eli... nilikuwa nimeshika panga na Eli alikuwa ameshika tochi tukaingia kwenye chumba alicholala mama na ambacho huwa analala na wajukuu zake watatu, ... Baada ya kuingia humo ndani na Eli, yeye alikuwa anamuiika tochi, mimi nilianza kumkata mama mapanga sehemu ya kichwani kushoto, kulia na mkono wa kushoto karibu na kiwiko baada ya hapo alianguka chini nikaamini tayari amekufa tuiitoka tukakimbilia chumbani kwetu kulala."*

Loosely, it can be translated that, on 7/12/2023 at about 23:00 hours, the appellant and one Eli got out of their bedroom while the appellant holding a machete and his fellow a torch. They entered in the appellant's mother's bed room where she used to sleep with her three

grandchildren. Having done so, the appellant's fellow flashed the torch and the appellant started to cut his mother by using a machete on the left side of her head, right side and her left hand. The said mother fell down and the appellant believed that she was dead. They left and went back to their room to sleep.

The appellant's act of cutting his mother's body was unlawful and falls squarely under the provision of the law with which he was charged. Subsection (b) of section 211 of the Penal Code provides that any person committing such an offence shall be liable to imprisonment for life. The phrase *"shall be liable"* has been broadly construed by our courts to signify discretion of the court in imposing sentence. In a persuasive authority quoted by the Court in **Faruku Mushenga v. Republic**, Criminal Appeal No. 356 of 2014 (unreported), the defunct Court of Appeal of East Africa in **Opoya v. Uganda** (1967) EA 752, had the following to say:

> *"It seems to us beyond argument that* ***the words shall be liable to do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court.*** *In other words they are not mandatory but provides a maximum sentence*

only and while the liability existed the court might not see fit to impose it."
[Emphasis added]

Being guided by the above stated position, we find no difficulty to determine the issue we have raised earlier on. We are mindful of the established principle that court's discretion must be exercised judicially. This means, the prevailing circumstances of a particular case and the applicable law need to be considered to gauge whether or not to impose a certain sentence on a convict, be it maximum or minimum sentence. It is equally settled principle that the Court cannot interfere with the sentence imposed by the trial court; unless, **one**, the sentence is excessive; **two**, it is inadequate; **three**, the sentence is based on a wrong principle; **four**; the trial court overlooked a material factor; **five**; it is based on irrelevant considerations; **six**, the sentence is illegal; and **seven**, where the trial court did not consider the time spent in remand by an accused person- see: **Ramadhani Hamis @ Joti v. Republic** Criminal Appeal No. 513 of 2016 quoting **Nyanzala Madaha v. Republic**, Criminal Appeal No. 135 of 2005 (both unreported) and **Yohana Balicheko v. Republic** [1994] TLR 5.

As intimated above, the appellant's complaint in this appeal was that the sentence meted out on him is excessive, hence illegal. He faulted the trial Judge for not considering the mitigating factors he had advanced, when he stated:

> *"(i) [He] remained behind the bars for 7 years awaiting trial.*
> *(ii) [He] readily confessed to the charges, therefore saved time and court's costs.*
> *(iii) [He] is married and blessed with 8 children (dependants). He is a victim of HIV AIDS and of back problems (as per cards)."*

Having in mind the above guiding principles on which the Court can interfere with the sentence imposed by the trial court, and upon evaluation of the record of the appeal, we think, the trial Judge misdirected himself when he stated, while sentencing the appellant, at page 49 of the record of appeal as follows:

> *"The 1st accused has unequivocally pleaded guilty to the charge ... I think if an upright confession of accused generally was wholesale acceptable as a mitigating factor, none of accused would have denied the charges. And, with respect to Mr.*

Bugoti learned counsel that once happening, no convicts would have missed the mitigating factor."

With respect, our reading of the above excerpt clearly shows that the trial Judge did not give effect to the above established principles. In our considered opinion, had it been that he considered those principles *vis a vis* the mitigating factors, he would not have given the appellant the maximum sentence of life imprisonment. We think, the fact that the appellant was a first offender as stated by Mr. Hemedi Halfan, the learned State Attorney who appeared at the trial and his mitigating factors were sufficient grounds to guide the trial Judge in exercising his discretionary powers to impose a lesser sentence on the appellant – see: **Faruku Mushenga v. Republic** (supra). We are not persuaded by Ms. Mwaseba's submission that despite the mitigation, the sentence imposed on the appellant was proper.

We have no flicker of doubt that, the circumstances of this case fall squarely under the conditions upon which the Court can interfere with the sentence imposed by the trial court. Therefore, as argued by Mr. Kisigiro, we find that the sentence imposed on the appellant was manifestly excessive. Accordingly, we allow the appeal, set aside the sentence of life

imprisonment imposed on the appellant. In lieu thereof, bearing in mind the appellant's mitigating factors; particularly, the appellant's health condition and the time of almost eleven (11) years he has spent behind the bars since his arrest on 12/12/2013, we sentence him to such a term of imprisonment that will result into his immediate release from prison unless otherwise lawfully held.

DATED at **MWANZA** this 6th day of May, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 7th day of May, 2024 in the presence of Mr. Innocent John Kisigiro, learned counsel for the Appellant and Ms. Tabitha Zakayo, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL