

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT MWANZA fCORAM: JUMA. C.J.. MWARI3A. J.A. And MUGASHA. J.A.) CRIMINAL APPEAL NO. 459 OF 2015 BONIFACE YUSTAS.....APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the Judgment of the High Court of Tanzania at Mwanza) (Hon. Gwae. J.1 dated the 21st day of July, 2015 in Criminal Sessions Case No. 249 of 2014 JUDGMENT OF THE COURT 24th & 26th September, 2018 JUMA, C.J.: The appellant, BONIFACE YUSTAS, was in the High Court at Mwanza convicted on his plea of guilty for the offence of Manslaughter contrary to Sections 195 and 198 of the Penal Code [Cap. 16 R.E. 2002]. The particulars of the offence are that on 21st day of August, 2013 at Bwanga village, Chato District within Geita Region, unlawfully killed CHAKUPEWA S/O KATOTO. He was sentenced to serve eight (8) years imprisonment. He has appealed against the sentence. In his memorandum of appeal, the appellant challenged his sentence on three grounds. In the first ground the appellant complains about the sentence of eight (8) years imprisonment, which in the context of the case against him, he regards as excessive. The second complaint is about the failure to consider mitigating factors. And in the third ground the appellant blames the trial Judge that in arriving at the sentence he imposed, he relied on facts which were not in the record of the proceedings. It is appropriate at this stage to look at the chain of events, which led to the sentence subject of the three grounds of appeal. On 21st August 2013 the deceased was sitting drinking local liquor at a counter of a pub, locally going under the name "NGOME" (fortress). The deceased was still drinking when the appellant arrived and ordered his own drinks. It is not clear what triggered their altercations, except that the appellant was seen pushing down the deceased as they broke into a fight. When they were separated, the deceased remained on the ground unconscious while the appellant made an attempt to escape, but was immediately arrested. The deceased later died from his apparent injury. According to the post-mortem report which was admitted as exhibit PI, the cause of the deceased's death was due to "severe haemorrhage following deep penetrating injury perforating through the lungs to the heart." A drawn sketch of scene of crime was also admitted as exhibit P2. After considering the salient facts including those contained in exhibits PI and P2, which the appellant had admitted to be correct, the learned trial Judge concluded that the appellant's plea was unequivocal, and the appellant was accordingly convicted for the offence of manslaughter. Being aggrieved by the sentence passed, the appellant appealed to this Court. At the hearing before us the appellant was represented by Mr. Geoffrey Kange, learned Advocate. The respondent Republic was represented

by learned Senior State Attorney Mr. Castus Ndamugoba assisted by Mr. Maurice Mtoi, learned State Attorney. Arguing the first and second ground of appeal together, Mr. Kange blamed the trial court for failing to consider the appellant's mitigation on one by one basis; he specifically faulted the operative sentencing paragraph on page 11 where court stated: "For the above reasons and circumstances of the case, the accused ought to be severely punished so as to be deterrence to him and the public at large to forbear from carelessly drinking and lack of personal control as to limit of amount of drink reasonable to take. Consequently the accused is sentenced to eight

- (8) years imprisonment." Mr. Kange submitted that these words exemplify the generalized way the trial court treated the mitigation factors which the learned trial Judge recorded on pages 6 and 7 of the record of appeal. To support his position that the sentence that results from generalized consideration of individual mitigating factors warrants interference by this Court, Mr. Kange referred us to several decisions of the Court in *RAPHAEL PETER MWITA V. R*, CRIMINAL APPEAL NO. 224 OF 2016 (unreported); *BERNADETA PAUL V. R* [1992] TLR 97; and *SWALEHE NDUNGAJILUGU V. R* [2005] TLR 94. The learned advocate referred us to a paragraph in *RAPHAEL PETER MWITA V. R* (supra) which disapproves generalized treatment of mitigating factors: "Clearly, looking at the above quotation the trial judge did not mention any antecedents or the mitigating factors which he said to have considered. He just generalized that he had considered them. As was rightly pointed out by both learned counsel this was not a proper consideration of the mitigating factors. In both antecedents and mitigation; for example, it was stated that the appellant had no previous record of conviction or rather he was first offender as was put by the defence counsel. This was, in our view, among the important legal mitigation to be considered by the trial judge...." The mitigating factors which the learned advocate for the appellant felt were overlooked under the generalized consideration, include, the appellant being a first offender, the appellant's readiness to plead guilty to manslaughter, and the period of two years he spent in custody before pleading guilty. Moving on to the third ground of appeal, Mr. Kange took exception to the way on page 11 of the record, the learned trial Judge was wrongly motivated by the alleged careless drinking and use of excessive force to justify the sentence of eight years as deterrence to both the appellant and the public at large. The learned advocate wondered where in the record of appeal the learned trial Judge obtained facts regarding the appellant's excessive drinking and his use of excessive force against the deceased. Mr. Kange concluded by urging us to vary down the sentence by taking into account the two years the appellant spent in custody while waiting for his trial, and another three years he has so far served in prison. Mr. Castus Ndamugoba learned Senior State Attorney for the respondent, opposed the appeal contending that while it is true that the learned trial Judge did not individually address the mitigating factors, this does not diminish the appropriateness of the sentence of eight years which was imposed. He urged us to assume our role of the Court that is sitting on first appeal against the sentence of eight years imprisonment. Mr. Ndamugoba believes that in our reconsideration of the mitigating factors we shall like the trial Judge also arrive at the sentence of eight years. He further urged that, in our reconsideration of the mitigating factors, we should also look closely at facts contained in the post-mortem examination

report (exhibit PI) which bears out the trial court's conclusion that the appellant in fact used excessive force when he fought the deceased. The learned Senior State Attorney concluded his submissions by reiterating to us that this appeal should be dismissed and appellant should complete his eight year term in prison. In a brief rejoinder to the respondent's submissions, Mr. Kange urged us to allow the appeal, and reduce the sentence of eight years the outcome of which should either set the appellant free, or order him to serve a non-custodial sentence. Having heard the submission made by Mr. Kange for the appellant and Mr. Ndamugoba, this being the first appellate Court, we have re-considered the appellant's six-point mitigation appearing on pages 6 and 7 of the record of appeal that the appellant was a first offender who readily pleaded guilty, and the fact that he has dependants together with the period he spent in custody to wait for his trial. In our re-evaluation of facts on record we could not help but note that the prosecution should probably have presented the salient facts with much more clarity than they did before the trial court. Mr. Ndamugoba has urged us that in the exercise of our role as the Court sitting on first appeal we should find as an established fact that the appellant used excessive force against the deceased which justified the sentence he was ordered to serve and which warrants the dismissal of this appeal. Mr. Kange, on the other hand, has urged us to allow the appeal at very least by reducing the sentence from eight years which the trial court imposed, to either unconditional release from custody or to a non-custodial sentence. Interference by appellate courts with the sentencing domain of the trial courts should not be taken lightly as a matter of course. This Court in ROBERT NICHOLAUS V R CRIMINAL APPEAL NO 195 OF 2010 (unreported) recognized the difficulties which trial courts invariably face, when called to determine when to order a stiff sentence, and when lenient sentence is appropriate: "We admit that sentencing is a difficult and controversial area of the law where the rights and obligations of the person have to be balanced against the requirements of the society in which the offender lives. There is no shortage of authorities on sentencing which give guidance to the courts in sentencing, but the first rule of thumb is that sentencing is the domain of the trial court and an appellate court should rarely interfere with the discretion of the trial court in sentencing. The second rule of thumb is that in sentencing there are always aggravating circumstances which may agitate for a stiff sentence, and mitigating factors which call for leniency in sentencing. We have noted in the facts outlined in the trial court, as well as in the address of the respective parties before us, that there are more mitigating factors in this case rather than aggravating factors." In the instant appeal before us, we think there is a factual basis to support the conclusion of the trial Judge that the appellant used excessive force which is an aggravating factor in sentencing. The fact that the Post-Mortem Examination Report (Exhibit PI) refers to a deep penetrating injury perforating through the lungs to the heart of the deceased is a clear sign that considerable force was used by the appellant. The sketch plan of the scene of crime (exhibit P2) further sheds more facts regarding how the appellant used a knife to attack the deceased. At point "A" of the Exhibit P2 reads— "Sehemu kisu kidogo cha kukunjwa kilipokutwa ambacho kiiitumika kumchoma marehemu— translating to mean a spot on the sketch map where the appellant dropped a penknife which he had earlier used to grievously injure the deceased.

To use the language this Court employed in ROBERT NICHOLAUS V R (supra), we can dare say that requirements of the society in which the appellant lives, does not expect revellers to go out to the pubs to fight others, or to use such offensive weapons as penknives. In light of our finding that there was aggravating factor of excessive force which the appellant used against the deceased, there is no basis for interference with the sentence of eight (8) years imprisonment which the learned trial Judge had imposed. For the above reasons this appeal is dismissed in its entirety. DATED at MWANZA this 25th day of September, 2018. I. H. JUMA CHIEF JUSTICE A. G. MWARIJA JUSTICE OF APPEAL S. E. MUGASHA JUSTICE OF APPEAL I certify that this is a true copy of the original. S . j . i\an iua DEPUTY REGISTRAR COURT OF APPEAL 10

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