

TANZANIA / JUDGMENT

dotto philipo others vs republic

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IN THE COURT OF APPEAL OF TANZANIA AT MWANZA fCORAM: MKUYE. J.A.. KOROSSO. J.A.,
And KAIRO, J,A,J CRIMINAL APPEAL NO. 537 OF 2019 DOTTO PHILIPO & 5
OTHERS..... APPELLANTS VERSUS THE
REPUBLICRESPONDENT (Appeal from the decision of
the High Court of Tanzania, at Mwanza) (Rumanvika, 3.1 dated the 29th day of August, 2019 in
Criminal Sessions Case No. 85 of 2017 JUDGMENT OF THE COURT 21st August & 2T> October,
2023 MKUYE. JA: This is an appeal against sentence only. The appellants together with two other
persons who are not part of this appeal, were charged before the High Court of two counts of
attempted murder contrary to section 211(a) of the Penal Code, Cap 16, [R.E. 2002 now R.E 2022].
Six of the appellants were convicted on their own plea of guilty, as one of the accused (3rd
accused) had passed away prior to plea taking. The trial court sentenced them to thirty years
imprisonment. Being aggrieved, only, with the sentence, they have now appealed to this Court
against it. i Briefly narrated, it was alleged by the prosecution that on the material day of
23/7/2015 at around midnight the appellants acting in common invaded the home of Maria
Lupanga and Scania Kahindi, residents of Muhamba village, within Mbogwe District in Geita
Region. Upon such invasion, the appellants demanded to be given money and proceeded to
attack the victims with machetes on various parts of their bodies, and injured them severely. The
appellants were arrested and arraigned before the court, who then readily pleaded guilty to the
charge. The appellants, being aggrieved by the sentence, each lodged separate memorandum of
appeal consisting a number of grounds of appeal which, the learned counsel representing them
sought and leave was granted to abandon them. He then opted to argue only the first ground of
appeal in the joint supplementary memorandum of appeal he had filed later on after having also
abandoned ground no. 2 therein. Thus, the remaining ground of appeal state as follows: "1. That
the sentence imposed was excessive with regard to the mitigating factors and peculiar circum
stances o f the case". When the appeal was called on for hearing, the appellants were represented
by Mr. Fidelis Mteuele, learned advocate whereas the 2 respondent Republic was represented by
Mr. Castuce Ndamugoba, learned Senior State Attorney who at the outset, intimated to the Court
that he supported the appeal. Mr. Mteuele prefaced his submissions by stating that the thirty
years sentences imposed on the appellants was excessive and that they were imposed without
considering the mitigating factors raised by the appellants. He pointed out that the appellants

readily pleaded guilty to the offence and had also voluntarily confessed before the police and the justice of peace through their cautioned statements (Exhibit P.2, collectively) and extra judicial statements (Exhibit P.3). According to Mr. Mteweale, the appellants were given an opportunity to mitigate, in which, they stated, among others, that they were first offenders and had been in custody for a period of four years. However, he argued, the trial Judge did not consider those mitigating factors, but rather, only mentioned them. The learned counsel was of the view that, had he considered them, he would have awarded the appellants lenient sentences. In the end, Mr. Mteweale implored the Court to consider the mitigating factors given at the trial and find it appropriate to reduce the sentence to that which will result in the immediate release of the appellants from custody. 3 On his part, Mr. Ndamugoba began his submission by re-affirming his position that he does not resist the appeal. He pointed out that, the fact that the appellants were first offenders and had readily pleaded guilty to the offence attracted leniency in sentencing. He contended further that, the appellants had spent four years in remand and that the trial Judge had only mentioned the mitigation raised by the appellants but did not assign reasons for imposing the sentence of thirty years imprisonment against them. The learned Senior State Attorney strongly held the view that, this Court has the power to interfere with the sentence where the trial court fails to consider the time spent in remand and revise it. On this position, he relied on the case of Shagi Mang'oma v. Republic, Criminal Appeal No. 356 of 2020 (unreported). Having heard the submissions from both parties, we think, we are now in a better position to make our determination on the matter, and, the issue that we need to determine is whether the sentence of thirty years' imprisonment is excessive and if so, whether this Court can interfere with the said sentence? Our starting point would be to restate the provision of the law under which the appellants were charged which is section 211(a) of the Penal Code. It states that: "Any person who -

- (a) attempts unlawfully to cause death of another; or (b) N/A Is guilty of an offence and is liable to Imprisonment for life " According to the above provision of the law, the punishment for a person who is convicted with such an offence is up to life imprisonment. The manner the provision is couched the sentence of life imprisonment is the maximum sentence which can be imposed. It means also that, the provision gives discretion to the court to impose sentence lesser than the life imprisonment, of course, depending on the circumstances, and we would add, the mitigating factors. Here, the appellants were sentenced to thirty years imprisonment. This was done after the appellants gave their mitigating factors but the trial Judge mentioned them and imposed such sentence without assigning reasons or showing have considered them. In numerous decisions, this Court has emphasized that the appellate court should rarely interfere with the discretion of the trial court in sentencing. For instance, in John Mbua v. Republic, Criminal Appeal No. 257 of 2006 (unreported), we stated among others that: "It has been emphasized by this Court in numerous cases that an appellate court should not interfere with the discretion exercised by a trial judge or magistrate as to sentence except in such cases where it appears that in assessing the sentence, the judge or magistrate has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive". See also: Rashid S. Kaniki v.

Republic [1993] T.L.R. 258 and Mohamed Ratibu @ Said v. Republic, Criminal Appeal No. 11 of 2004, Maganiko Petro v. Republic, Criminal Appeal No. 552 of 2019 and Tofiki Juma v. Republic, Criminal Appeal No. 418 of 2013 (all unreported). For instance, in the latter case of Tofiki Juma (supra) in which the cases of Nyanzala Madaha v. Republic, Criminal Appeal No. 135 of 2005 and Mathias Masaka v. Republic, Criminal Appeal No. 274 of 2000 (both unreported) were cited, we stated the circumstances upon which the Court can interfere with sentence as hereunder:

- (i) Where the sentence is manifestly excessive or it is so excessive as to shock. (ii) Where the sentence is manifestly inadequate. (iii) where the sentence is based upon a wrong principle of sentencing. (iv) where a trial court overlooked a material factor.
 - (v) where the sentence has been based on irrelevant considerations such as the race or religion of the offender. (vi) where the sentence is plainly illegal as for example, corporal punishment is imposed for the offence of receiving stolen property. (vii) where the trial court did not consider the time spent in remand by an accused person".
- From the above excerpts, two fundamental principles emerge. One, that unless a statute prescribes otherwise, sentencing is a judicial discretionary function, normally in the domain of the trial court. Two, this Court can only interfere with the lower court's exercise of discretion in sentencing where it is satisfied that the trial court has imposed an illegal sentence or had acted on a wrong principle. In the instant matter, as borne by the record, it is not disputed that the appellants readily pleaded guilty to the offence and in mitigation stated to be first offenders. In the case of Silvanus Leonard Nguruwe (1981) TLR 66, the Court in interfering with the sentence imposed on the appellant therein observed that the appellant had pleaded guilty without troubling the court. Likewise, in the present matter, the trial court ought to have considered the fact that the appellants did not hesitate in pleading guilty to the offence in court. In addition, they admitted having committed the offence before the police and the justice of peace. They also in their mitigation stated that they were first offenders. However, the trial court seems to have overlooked such material factors given by the appellants in their mitigation as the record of appeal does not show where such mitigating factors were considered. These have been among the factors attracting lenience in sentencing. Apart from that, the appellant told the court that they had been in remand custody for a period of four years which was also, among the mitigating factors ought to have been considered by the trial court. What is vivid is that the trial Judge only mentioned them. In the case of Manoni Masele v. Republic, Criminal Appeal No. 344 of (unreported) while citing the case of Willy Walasha v. Republic, Criminal Appeal No. 7 of 2002 (unreported), the Court reiterated the need for the courts not to pay lip service to mitigations. It stated that: "It appears to us that, with respect, although ostensibly a judge may say that he has taken into consideration mitigating circumstances in assessing sentence, it is not always apparent that he has, in fact, done so". We are of the view that, in only mentioning some of the mitigating factor the trial judge he did not have in mind considering them since the record does not show this. On the other hand, we are settled in our mind that had the trial Judge had considered all those factors, he would have opted to impose a lesser sentence. We agree with both, the learned

advocate for the appellant and learned State Attorney that the sentence was excessive under the circumstances. In the circumstances of this case, we think, this is a fit case for this Court's interference with the said sentence. We are, therefore, settled in our mind that the sentence of ten years imprisonment would have served the purpose. In the event, we allow the appeal, set aside the sentence of thirty years imprisonment imposed on the appellants and substitute it with that of ten years imprisonment commencing from the date of their conviction. The sentence we have imposed, takes into account the 9 period of four years the appellants spent in remand custody while awaiting trial. It is so ordered. DATED at DAR ES SALAAM this 17th day of October, 2023. R. K. MKUYE JUSTICE OF APPEAL W. B. KOROSSO JUSTICE OF APPEAL L. G. KAIRO JUSTICE OF APPEAL The Judgment delivered this 23rd day of October, 2023 in the presence of 1st Appellant, 2nd Appellant, 3rd Appellant and 4th Appellant appeared in person vide video conference facilities linked from the High Court of Tanzania Mwanza Registry, also Mr. Chistopher Olembile State Attorney, for the Respondent appeared vide video conference facilities linked from the High Court of Tanzania Mwanza Registry, is hereby certified as a true copy of the original. D. R. LYIMO O DEPUTY REGISTRAR W COURT OF APPEAL

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