**Republic v Nguli (Criminal Case 31 of 1999)**
**[2022] KEHC 12765 (KLR) (31 August 2022) (Resentence)**

Neutral citation: [2022] KEHC 12765 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL CASE 31 OF 1999**

**GV ODUNGA, J**

**AUGUST 31, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**MUSYOKA MAINGI NGULI ..... ACCUSED**

**RESENTENCE**

1. The accused herein, Musyoka Maingi Nguli, was charged before this court in this case with murder contrary to Section 203 as read with Section 204 of the *Penal Code* the facts being that on November 9, 1999 at Yanzonga Village, Machakos he murdered Lucia Mutio Wambua a charge which he denied. After hearing the evidence both for the prosecution and the defence, this Court (Mwera, J as he then was) found that the accused was guilty of the murder of the deceased, on the basis of the accused having been the last person to have been seen leaving with the deceased on the fateful night before the deceased as found dead. The deceased had a cracked skull and had been raped. The accused's jacket was found nearby with the deceased's underpants.

2. Upon his conviction, the accused was sentenced to death.

3. The accused however appealed to the Court of Appeal in Criminal Appeal No 94 of 2006 and though his appeal on conviction was dismissed, the sentence was quashed on the ground that he was not afforded an opportunity of mitigating before the sentence was meted. The Court of Appeal therefore directed that the matter remitted to this Court for mitigation and sentencing. It was however directed that pending the same, the accused would remain in custody.

4. When the matter placed before me I directed that the pre-sentencing report be prepared and the same was duly prepared and filed. According to the said report, the accused, now aged 44 years old, has undergone training in carpentry and stated that the 25 years he has been in prison has taught him a lesson and prayed for leniency. The family of the victim was still bitter with the accused. Though the

family of the victim had initiated some reconciliatory steps the same were turned down by the accused's clan on the ground that they could not compensate the victim's family as long as the accused remained on death row. However, with the turn of events, the accused's clan has since change and is willing to reconcile though no steps had been taken in that direction.

5. According to the report, the accused is a maternal cousin to the deceased and the deceased's family is not opposed to his sentence being revised though they lost trust in him and do not wish to have him back in their village which is approximately 20 kilometres from his village. They are however willing to reconcile with his family and to be compensated according to Kamba Traditions and Customs. The deceased's family does not plan to revenge the death as long as the accused does not disturb them.

6. On the other hand, the accused's family gave a positive report about him as a resourceful person and stated that he has his share of the land where he can settle and the family expressed willingness to assist him to settle down. The family also expressed willingness to reconcile with the deceased's family and to compensate them through their clan as per the Kamba Traditions and Customs.

7. The local administration also returned a positive report about the accused and stated that he faced no threat and was not a threat to the community.

8. According to the Probation Officer, the offence was caused by lack of self-control and self-gratification.

9. There was also a report from Kamiti Maximum Prison which set out the courses which the accused had undertaken. It was stated that the accused had taken various course including carpentry and was deployed in the carpentry section since 2017 where he was making quality furniture and was well behaved with no disciplinary offence. There was also a positive report from Our Lady of Assumption Catholic Church, Kamiti which disclosed that the accused had been baptised and received confirmation and was a trained catechist who was also a choir member and alter server.

10. It is important to point out that a resentencing hearing or any other sentencing hearing for that matter is neither a hearing *de novo* nor an appeal. Such proceedings are undertaken on the understanding that conviction is not in issue. It therefore follows that in those proceedings the accused is not entitled to take up the issue of the propriety of his conviction. He must proceed on the understanding that the conviction was lawful and restrict himself to the sentence and address the court only on the principles guiding the imposition of sentence and on the appropriate sentence in the circumstances. Similarly, the court can only refer to the evidence adduced in so far as it is relevant to the issue of sentencing but not with a view to making a determination as to whether the conviction was proper. While the court is entitled to refer to the evidence in order to determine whether there existed aggravating circumstances or otherwise for the purposing of imposing the sentence, it is not proper for the court to set out to analyse the evidence as if it is meant to arrive at a decision on the guilt of the accused.

11. That the possibility of reform and social re-adaptation of the offender is to be considered in sentence re-hearing, in my view implies that where the accused has been in custody for a considerable period of time the Court ought to consider calling for a pre-sentencing report and possibly the victim impact report in order to inform itself as to whether the accused is fit for release back to the society. In my view, fairness to the accused where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the accused during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the Court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not, hence the necessity for considering a pre-sentencing report.

12. As appreciated by the Supreme Court in *Muruatetu* Case (*supra*):

> " Comparative foreign case law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the objectives of sentencing. In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v Republic* Criminal Appeal No 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: "deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim." The 2016 *Judiciary of Kenya Sentencing Policy Guidelines* lists the objectives of sentencing at page 15, paragraph 4.1 as follows:
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> "Sentences are imposed to meet the following objectives:
>
> 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
> 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
> 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
> 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
> 5. Community protection: To protect the community by incapacitating the offender.
> 6. Denunciation: To communicate the community's condemnation of the criminal conduct."
>
> The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict."

13. In my view where the accused has spent a considerable period of time in custody, it may be prudent for the Court while conducting a sentence re-hearing, to direct that an inquiry be conducted by the probation officer and where necessary a pre-sentencing and victim impact statements be filed in order to enable it determine whether the accused has sufficiently reformed or has been adequately rehabilitated. This is so because the circumstances of the accused in custody may have changed either in his favour or otherwise in order to enable the Court to determine which sentence ought to be meted. It may be that the accused had sufficiently reformed to be released back to the society. It may well be that the conduct of the accused while in custody may have deteriorated to the extent that it would not be in the interest of the society to have him released since one of the objectives of sentencing is to protect the community by incapacitating the offender.

14. In *Muruatetu* Case, the Supreme Court relied on the case of *Vinter and others vs the United Kingdom* (Applications nos. 66069/09, 130/10 and 3896/10) in which the Court held that:-

> "It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognised by the Court of Appeal in Bieber and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated."

15. I must however state that the said reports being reports which are not subjected to cross-examination in order to determine their veracity, are just some of the tools the court may rely on in determining the appropriate sentence. They are therefore not necessarily binding on the court and where there is discrepancy regarding the contents of the reports and information from other sources such as from the parties themselves and the prison, the court is at liberty to decide which information to rely on in meting out its sentence. To rely on the said reports as the gospel truth, in my view, amounts to abdication of the court's duty of adjudication to probation officers. While the same ought to be treated with great respect, it is another thing to accept them hook, line and sinker. They however ought not to be simply ignored unless there are good reasons for doing so.

16. In other words, the court appreciated that the circumstances under which the initial sentence was imposed may change as one serves out the sentence. Accordingly, in undertaking a resentencing the court must consider whether the circumstances of the accused during his/her incarceration have changed for the better or for worse. It is therefore important that not only should a report be availed to the court concerning the position of the victim's family and the offender's family but also the report from the prison authorities regarding the conduct of the offender during the period of incarceration. It is therefore my view that where a resentencing is directed the trial court ought to consider the filing of a probation report in order to assist it arrive at an appropriate report. However, the failure to do so is not necessarily fatal to the sentence.

17. In my view, it does not follow that in resentencing, the court is obliged to reduce the initial sentence. What is required of the court undertaking the resentencing is to look at all the circumstances of the case and to make a determination whether the appellant's incarceration has achieved the objective for which he was sentenced such as punishment, deterrence, public protection and rehabilitation. In other words, the court is not to be bound only by the appellant's conduct that led to his incarceration but also his conduct and circumstances since the said incarceration.

18. According to *Francis Karioko Muruatetu & Another vs Republic*, Petition No 15 of 2015:

> "To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:
>
> (a) age of the offender;
>
> (b) being a first offender;
>
> (c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

19. I associate myself with views of J Ngugi, J in *Benson Ochieng & Another vs Republic* [2018] eKLR that:

> "Re-phrasing the *Sentencing Guidelines*, there are four sets of factors a Court looks at in determining the appropriate custodial sentence after determining the correct entry point (which, as stated above, I have determined to be fifteen years imprisonment). These are the following:
>
> a. Circumstances Surrounding the Commission of the Offence: The factors here include:
>
> i. Was the Offender armed? The more dangerous the weapon, the higher the culpability and hence the higher the sentence.
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> ii. Was the offender armed with a gun?
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> iii. Was the gun an assault weapon such as AK47?
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> iv. Did the offender use excessive, flagrant or gratuitous force?
>
> v. Was the offender part of an organized gang?
>
> vi. Were there multiple victims?
>
> vii. Did the offender repeatedly assault or attack the same victim?
>
> b. Circumstances Surrounding the Offender: The factors here include the following:
>
> i. The criminal history of the offender: being a first offender is a mitigating factor;
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> ii. The remorse of the Applicant as expressed at the time of conviction;
>
> iii. The remorse of the Applicant presently;
>
> iv. Demonstrable evidence that the Applicant has reformed while in prison;
>
> v. Demonstrable capacity for rehabilitation;
>
> vi. Potential for re-integration with the community;
>
> vii. The personal situation of the Offender including the Applicant's family situation; health; disability; or mental illness or impaired function of the mind.
>
> c. Circumstances Surrounding the Victim: The factors to be considered here include:
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> i. The impact of the offence on the victims (if known or knowable);
>
> ii. Whether the victim got injured, and if so the extent of the injury;

iii. Whether there were serious psychological effects on the victim;

iv. The views of the victim(s) regarding the appropriate sentence;

v. Whether the victim was a member of a vulnerable group such as children; women; Persons with disabilities; or the elderly;

vi. Whether the victim was targeted because of the special public service they offer or their position in the public service; and

vii. Whether there been commitment on the part of the offender (Applicant) to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime."

20. In my view, fairness to the accused where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the accused during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the Court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report.

21. In its decision the Court referred to Article 10(3) of the Covenant stipulates that—"[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation." In my view where the accused has spent a considerable period of time in custody, it may be prudent for the Court while conducting a sentence re-hearing, in order to determine whether the accused has sufficiently reformed or has been adequately rehabilitated to direct that a pre-sentencing report be compiled. This is so because the circumstances of the accused in custody may have changed either in his favour or otherwise in order to enable the Court to determine which sentence ought to be meted. It may be that the accused had sufficiently reformed to be released back to the society. It may well be that the conduct of the accused while in custody may have deteriorated to the extent that it would not be in the interest of the society to have him released since one of the objectives of sentencing is to protect the community by incapacitating the offender.

22. Similarly cited was the decision of the Privy Council in *Spence vs The Queen; Hughes vs the Queen (Spence & Hughes)* (unreported, 2 April 2001) where Byron CJ was of the view that:

> "In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty."

23. I have considered the circumstances in which the offence was committed and the effect on the family and the community of the same. I have also considered the Probation Officer's Report as well the mitigating circumstances. From the probation report, it is clear that the accused has served 25 years in prison. He was related to the deceased. According to the report, the offence was caused by lack of self-control and self-gratification. He however, poses no risk to the community and it is very unlikely that he would repeat a similar offence.

24. I borrow the words of Ojwang, J (as he then was) in *Yussuf Dahar Arog vs Republic* [2007] eKLR where he expressed himself as hereunder:

> " Such is of course, a maximum sentence and within that constraint, the court has a wide discretion which it exercises on judicial principles. Such principles would I believe, take into account the ordinary span of life of a human being, the general circumstances surrounding the commission of the offence, the possibility that the culprit may reform and become a law-abiding member of the community, the goals of peace and mutual tolerance and accommodation among people – those who are injured and those who have occasioned injury."

25. As stated hereinabove in this case the incarceration of the accused has achieved two objectives of deterrence and rehabilitation. However, retribution is yet to be achieved. Incarcerating him further will however, not serve any purpose towards the achievement of that objective. To do so, and considering the period already served, I place the accused on probation for a period of 18 months.

26. It is so ordered.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 31ST AUGUST, 2022.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**The Appellant**

**Mr Jamsumba for the Respondent**

**CA Susan**