



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL CASE NO. 105 OF 2008**

**(Coram: Odunga, J)**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**GEOFFREY WAFULA MAKOE.....ACCUSED**

**SENTENCE**

1. For the purposes of this decision, the accused herein, **Geoffrey Wafula Makoe** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on the 18<sup>th</sup> November, 2008 at Mtito Andei Township in Kibwezi District, within the Eastern Province, the accused murdered **Issack Ndunda Muli** (deceased).

2. After hearing the evidence, the Learned Trial Judge, **Mutende, J** found the accused guilty of that offence, convicted him accordingly and sentenced him to death. Based on the decision of the Supreme Court in Petition Nos. 15 and 16 of 2015 – **Muruatetu & Others vs. Republic**, the said sentence was set aside and it was directed that a sentence re-hearing be undertaken. This decision is therefore restricted to resentencing only.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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:-

**“111. 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.**

**112. Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in Wellington – a poor guarantee of just and proportionate punishment.”**

8. 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.

9. 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.

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

**“[71] 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.**

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. 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:**

**“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.”**

12. 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.

13. In its decision the Supreme 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, 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 has 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. The Privy Council in **Spence vs. The Queen; Hughes vs. the Queen (Spence & Hughes)** (unreported, 2 April 2001) (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.”**

15. It was in light of the foregoing that I directed that a probation officer's report be prepared and filed and the said directions were duly complied with. In the said report, the Probation Officer found that the accused who is 43 years old was an administrative police officer and that the incident was caused by lack of self-control, conflict resolution skills and poor anger management. Both family and community reports indicated that the offender was well behaved save for the sudden indulgence into alcoholism prior to the incident.

16. While serving his sentence, the report indicated that he displayed good conduct and actively participated in various rehabilitation activities. He had undergone theological training and attained Diplomas in theology, skills in production of detergents and tomato sauce. He had also attained first aid skills from St. John Ambulance and had undertaken short courses on alcohol and drug abuse and mindful leadership. He was teaching fellow inmates in science, CRE and languages and was reported to have stopped drinking while he was out on bond for three years and six months before his imprisonment.

17. As regards the victim the report revealed that he was known for criminal activities. His mother was deceased while his surviving siblings were linked to one criminal offence or the other. Accordingly, no one was available to give meaningful report from his family.

18. I have considered the circumstances in which the offence was committed. I have also considered the Probation Officer's Report. 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.

- ii. Was the offender armed with a gun?
- iii. Was the gun an assault weapon such as AK47?
- 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;
- 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:**

- 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."

19. Loss of life is, no doubt, a very serious matter. The circumstances under which the offence was committed was due to poor anger management. There is no indication that the accused had, before the commission of the offence, criminal tendencies. While fact that the deceased was himself involved in criminal activities does not justify the fate that befell him, when considering the sentence to be imposed on the accused, the same may well be taken into account. In these circumstances, however, it is highly unlikely, that the accused will commit a similar offence. It is clear that the accused has during the period of his incarceration reformed and have engaged himself in activities meant to assist him in reintegrating with the community. Not only is he well behaved but has been instrumental in shaping the lives of his fellow inmates. He has maintained close links with his family and his community has no issue with him re-joining the society. Both his family and society are ready to welcome him back into the fold. To my mind the period of incarceration of the accused is sufficient punishment and consequently his incarceration has achieved three objectives of retribution, deterrence and rehabilitation. It is my view that once the sentence imposed on an accused has met the objectives of retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation, it is no longer necessary or desirable to continue holding the accused in incarceration.

20. Accordingly, I hereby place the accused on probation for a period of three years. During that period, he must comply with the directions given to him by the Probation Officer and in the event that he does not do so he will be liable to serve the remainder of the said sentence in custody.

21. It is so ordered.

**RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 29<sup>TH</sup> DAY OF JULY, 2021.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Accused online**

**Mr Ngetich for the State**

**CA Simon**