REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

MISCELLANEOUS CRIMINAL APPLICATION NO. 136 OF 2018

BETWEEN

JOHNSTON MWITA IKWABE.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGEMENT

1. The applicant herein, **Johnston Mwita Ikwabe**, and another person were charged before the Kajiado Resident Magistrate's Court in Criminal Case No. 857 of 2009 with the offence of robbery with violence contrary to section 296(2) of the ***Penal Code***. After the hearing the learned trial magistrate found them guilty as charged and convicted them accordingly. He then found that the only sentence provided for the said offence was death and, holding that his hands were tied, he proceeded to sentence both accused persons to suffer death in the manner provided by the law.

2. Aggrieved by the said decision, the said accused person lodged Criminal Appeals Nos. 103 and 104 of 2011 to this court. By its judgement delivered on 15th June, 2012 this Court **(J. M Ngugi and Asike-Makhandia, JJ)** found that the said conviction was safe and proceeded to dismiss the said appeal.

3. According to the applicant herein, he filed a Notice of Intention to Appeal to the Court of Appeal against the said decision but for more than two years he has never received any communication from that court. He therefore decided not to continue with the said appeal and applied before this court for resentencing pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs. R (2017) eKLR**. In that case the court expressed itself as hereunder:

> **"47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.**
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> **[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.**
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> **[49] With regard to murder convicts, mitigation is an important facet of fair trial. In *Woodson* as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.**
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> **[50] We consider *Reyes* and *Woodson* persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an**

undifferentiated mass, violates their right to dignity.

[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.

[52] We are in agreement and affirm the Court of Appeal decision in *Mutiso* that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in *Joseph Kaberia Kahinga* that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.

[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict."

4. Since this application was lodged on 23rd August, 2018, this court has made several attempts to get the position of the matter in the Court of Appeal without any success. By a letter dated 24th December, 2018, the applicant intimated to the Deputy Registrar, Court of Appeal, his intention not to proceed with the appeal. Again despite this court relaying the same to the Deputy Registrar, Court of Appeal, no response not even an acknowledgement of the same has been forthcoming from the said Deputy Registrar. The effect of that is that the applicant has been left in limbo as regards his fate for reasons not of his own making.

5. As held in the said **Francis Karioko Muruatetu & Another vs. R** (supra) read with the Court of Appeal's decision in **William Okungu Kittiny vs. Republic, Court of Appeal, Kisumu Criminal Appeal No. 56 of 2013 [2018] eKLR**, the applicant has a right to move this court to reconsider his sentence. In that latter case the court held at paras 8 and 9 that:

"[8] Robbery with violence as provided by Section 296 (2) and attempted robbery with violence as provided under Section 297 (2) respectively provide that the offender:-

"…shall be sentenced to death."

The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27 (1) of the Constitution, every person has *inter alia*, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general.

…..

[9] From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies *mutatis mutandis* to Section 296 (2) and 297 (2) of the Penal Code. Thus, the sentence of death under Section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution."

6. That a delay in determining criminal proceedings infringes upon the rights of an accused person to have the trial begin and conclude without unreasonable delay pursuant to Article 50(2)(e) of the Constitution is not in doubt. Dealing with the effect of delayed judgements, the South African Supreme Court of Appeal in **New Clicks South Africa (Pty) Ltd vs. Minister of Health and Another 2005 (3) SA 238 (SCA)** at pages 249 – 250, paragraphs [5] – [8] stated in paragraph [31] that:

"The Supreme Court Act assumes that the judicial system will operate properly and that a ruling of either aye or nay will follow within a reasonable time. The Act – not surprisingly – does not deal with the situation where there is neither and a party's right to litigate further is frustrated or obstructed. The failure of a lower Court to give a ruling within a reasonable time interferes with the process of this Court and frustrates the right of an applicant to apply to this Court for leave. Inexplicable inaction makes the right to apply for leave from this Court illusory. This Court has a constitutional duty to protect its processes and to ensure that parties, who in principle have the right to approach it, should not be prevented by an unreasonable delay by a lower court. In appropriate circumstances, where there is deliberate obstructionism on the part of a Court of first instance or sheer laxity or unjustifiable or inexplicable inaction, or some ulterior motive, this Court may be compelled, in the spirit of the Constitution and the obligation to do justice, to entertain an application of the kind presently before us."

7. The High Court of South Gauteng, Johannesburg in **Myaka and 2 Others vs. The State 2012 SA (GSJ)**, (**Claasen, J)** in a decision delivered on 21st September 2012, while citing the above decision, stated that:

"It would be a sad day in the administration of justice in this country if the laches of one member of a three bench tribunal, should cause the stifling of the normal appeal procedures prescribed by law. In my view this approach was necessitated by the conduct of Mailula J not responding to the requests made by the senior judge. In my respectful view, a deadlock occurred preventing the finalization of the appeal…In my respectful view, judges ought not to be the cause for the adage, "justice delayed, is justice denied" to apply to any case. The rendering of judgment within a reasonable time is not merely a matter of courtesy towards the litigants – the public's respect for the administration of justice is at stake. It was stated more than half a century ago:

> **"Much more than a matter of courtesy is involved. By such conduct the administration of justice is hampered, and may be seriously hampered, by an arbiter of justice himself, whose responsibility it is to render it effective and not add judicial remissness to its already irksome delays."**

For the reasons set out above I am in agreement with Satchwell J that this matter can no longer be delayed. It concerns the liberty of individuals and the reputation of the administration of justice. Both these considerations are of such importance that I am driven to agree to this majority judgment being handed down."

8. In **Julius Kamau Mbugua vs. Republic [2010] eKLR** the Court of Appeal expressed itself as follows:

"The following broad principles emerge from the consideration of the Commonwealth and international jurisprudence on the right to a trial within a reasonable time which we will endevour to restate, thus:

(i)The trial within a reasonable time guarantee is part of international human rights law and although the right may not be textually in identical terms in some countries the right is qualitatively identical.

(ii)The right is not an absolute right as the right of the accused must be balanced with equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions.

(iii)The general approach to the determination whether, the right has been violated is not by a mathematical or administrative formula but rather by judicial determination whereby the court is obliged to consider all the relevant factors within the context of the whole proceedings.

(iv)There is no international norm of "reasonableness". The concept of reasonableness is a value judgment to be considered in particular circumstances of each case and in the context of domestic legal system and the economic, social and cultural conditions prevailing.

(v)Although an applicant has the ultimate legal burden throughout to prove a violation, the evidentiary burden may shift depending on the circumstances of the case. However, the court may make a determination on the basis of the facts emerging from the evidence before it without undue emphasis on whom the burden of proof lies.

(vi) The standard of proof of an unconstitutional delay is a high one and a relatively high threshold has to be crossed before the delay can be categorized as unreasonable.

(vii) Although the procedure for raising a violation of the right varies from one jurisdiction to the other, the violation of the right should be raised at the earliest possible stage in the proceedings to enable the court to give an effective remedy otherwise the right may be defeated by the doctrine of waiver where applicable.

(viii)The purpose of the right is to expedite trial and is designed principally to ensure that a person charged should not remain too long in a state of uncertainty about his fate.

***(ix)* The right is to trial without undue delay. It is not a right not to be tried after undue delay except in Scotland and it is not designed to avoid trials on the merits.**

(x)(a) The remedy for the violation of the right varies from jurisdiction to jurisdiction. In some jurisdictions such as Canada and New Zealand it seems that permanent stay of proceedings is the normal remedy for violation of the right.

(b) Under the Common Law and under the jurisprudence of European Court of Human Rights, a permanent stay of proceedings is considered a draconian remedy only granted where it is demonstrated that the breach is so severe that a fair trial cannot be held.

(c) In most of the Commonwealth countries with Bill of Rights and a Constitution based on West Minister model, and, in South Africa the remedies are flexible – courts can grant any relief it considers appropriate in the circumstances of the case.

(d)In some jurisdictions, where the applicant is already convicted the quashing of a conviction is not considered a normal remedy and the court could take into account the fact that the applicant has been proved guilty of a crime, the seriousness and prevalence of the crime and design an appropriate remedy without unleashing a dangerous criminal to the society.

9. 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 meting 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.

10. 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.

11. I must however state that the probation report being a report which is not subjected to cross-examination in order to determine its veracity, is just one of the tools the court may rely on in determining the appropriate sentence. It is therefore not necessarily binding on the court and where there is discrepancy regarding the contents of the report 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 its sentence. To rely on the probation report as the gospel truth, in my view, amounts to abdication of the court's duty of adjudication to probation officers. While the report of the probation officer ought to be treated with great respect, it is another thing to accept it hook, line and sinker. It however ought not to be simply ignored unless there are good reasons for doing so.

12. 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.

13. 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.**
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> **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."**

14. 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.

15. 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.

16. Just like in the case of **Myaka and 2 Others vs. The State**, the petition before me concerns the liberty of the petitioner who has had to wait for his appeal to be listed for hearing for several years. There is no indication as to when that appeal will be heard. Just like the Judges in the above case appreciated, this matter can no longer be delayed. To my mind a convict does not lose his rights and fundamental freedoms simply because he is in prison. This is so because Article 51(1) of the Constitution provides that:

> **A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.**

17. This Court appreciates that where an appeal is pending before the Court of Appeal or a higher court resentencing proceedings ought not to be proceeded with and the latter ought to be kept in abeyance pending the determination or termination of the pending appeal. However, as I stated at the beginning of this judgement and as shown hereinabove, the applicant has waited for a very long time to get information from the Court of Appeal regarding the position of his appeal to no avail. In this case, mercifully copies of the proceedings before the trial court and this court are available. What the petitioner seeks is a reconsideration of his sentence. From my discourse above, there is no hindrance to the trial court undertaking the resentencing proceedings calling for the probation officer's report, victim impact report and report from the prison and proceeding to consider the petitioner's mitigation and arriving at an appropriate sentence taking into consideration the sentiments of the Supreme Court in ***Muruatetu Case***.

18. I therefore allow this petition, quash the death sentence imposed on the Applicant in Kajiado Resident Magistrate's Court in Criminal Case No. 857 of 2009, set aside this court's decision in Criminal Appeals Nos. 103 and 104 of 2011 to the extent that it confirmed the death sentence meted on the petitioner and direct that the matter be remitted to the trial court for mitigation and resentencing.

19. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 27th day of January, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Petitioner/Applicant in person

Miss Mogoi for the Respondent

CA Geoffrey