REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 46 OF 2003

(Coram: Odunga, J)

REPUBLIC……..……..PROSECUTOR

VERSUS

PETER MUTUKU MULWA……..……..1ST ACCUSED

GEORGE MUCHEMI NDIRANGU…....……2ND ACCUSED

RESENTENCE

1. The accused herein, **Peter Mutuku Mulwa** and **George Muchemi Ndirangu** were charged with the offence of murder contrary to section 203 as read with section 204 of the ***Penal Code***. They are alleged to have murdered **Zacharius Kioko Kitonyi** on 2nd October, 2002 at Matangini Village, Mbiuni Sub location, Mwala Division in Machakos District.

2. After hearing the evidence, the Learned Trial Judge, **Wendoh, J** (as he then was) found the accused guilty, convicted them accordingly and sentenced them to death.

3. In Machakos Misc. Criminal Application No. 4 of 2019, the accused sought an order for resentencing based on 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.**
>
> **[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.**
>
> **[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. After this court has made several attempts to have the previous records forwarded to this Court by the Court of Appeal Registry without any success, on 11th December, 2019, pursuant to the said decision of the Supreme Court, this Court set aside the sentence imposed on the accused persons herein and directed that a resentencing hearing be undertaken. This was based on the position of the Supreme Court in the said **Francis Karioko Muruatetu & Another vs. R** (supra) as 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**, that the Petitioners had a right to move this court to reconsider their 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."

5. 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."

6. 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."

7. 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.

8. 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.

9. 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.

10. 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 out 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.

11. 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.

12. 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."**

13. 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.

14. 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.

15. Just like in the case of **Myaka and 2 Others vs. The State**, the said petition concerned the liberty of the petitioners whose rights to resentencing was being hindered by circumstances beyond their and there was no indication as to when, if at all, the said records would be availed. Just like the Judges in the above case appreciated, I was of the view that their petition could 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.***

16. This Court appreciates that the best practice is that where an appeal is pending before the Court of Appeal or a higher court or where the previous proceedings have not been availed 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 or the availability of the previous records. However, where the applicant has waited for a very long time to get his previous records transmitted back to this court in order to facilitate this court in carrying out its constitutional mandate as pronounced in the said ***Muruatetu Case*** to no avail, the justice of the case dictates that the rights of the

petitioner be upheld. In this case, mercifully a copy of this Court as the trial court was availed and as is customary, the said judgement contained the facts of the case.

17. Since what the Accused are seeking is a reconsideration of their sentence, there is no undue hindrance to this court which was the trial court undertaking the resentencing proceedings by 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. According to the Probation Officer's Report, the circumstances of the offence were that the accused herein had sawed some timber and left with for a meal. On their return they found the deceased stealing the said timber and they beat him up, tied his hands and left to get some help. When they returned they found him dead.

19. According to the said report, the 1st accused has while in incarceration used to operate a number plate printing machine and also learnt carpentry through apprenticeship. According to the community he was social and related well with his community members, was industrious, supportive and resourceful and had a positive attitude and respectful to the authorities both at home and in prison. It was confirmed that reconciliation had taken place between the families of the 1st accused and those of the victim's both of whom belonged to the same clan and therefore the deceased's family had no objection to the court being lenient to the 1st accused as customary compensation had been done.

20. As for the 2nd accused, **George Muchemi**, he was contracted by the family of the 1st accused to saw timber for them. He was described as well behaved and industrious person who took good care of his family. The family of the deceased held no grudge against him after the reconciliation between them and the 1st accused since the 2nd accused was not from the same clan and he had only been contracted by the family of the 1st accused to saw timber for them. Similarly, the prison gave a positive report towards him and had no problem with the local administration.

21. I have considered the circumstances in which the offence was committed. I have also considered the Probation Officer's Report, the Report from the Prison as well as the position adopted by **Ms Mogoi**, the learned prosecution counsel. 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:**
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> **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?**
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> **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?**
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> **b. Circumstances Surrounding the Offender: The factors here include the following:**
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> **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;**
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> **iii. The remorse of the Applicant presently;**
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> **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."

22. According to the Prison Report, the accused have been in custody for a period of 17 years. Loss of life is, no doubt, a very serious matter. In these circumstances, however, it is highly unlikely, that the accused will commit a similar offence. It is clear that the accused have during the period of their incarceration reformed and have engaged themselves in activities meant to assist them in reintegrating with the community. Not only are they well behaved but they have reconciled with the family of the deceased who no longer harbour any ill-will towards them. Their communities have no issue with them re-joining the society and their families are ready to welcome them back into the fold. Due to reconciliatory steps initiated by both families, the victim's family has forgiven the accused and has no issue with them being released since it is their opinion that the accused have been sufficiently disciplined and have learned their lessons during the period they have been in custody. To my mind the period of incarceration of the accused is sufficient punishment and consequently their incarceration has achieved three objectives of retribution, deterrence and rehabilitation.

23. In the premises, it is my view that the accused's incarceration has served the purposes for which imposition of sentences is meant. 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 nolonger necessary or desirable to continue holding the accused in incarceration. In this case, the victim's family, the community and the accused's family as well as the prison authorities are agreed that it is nolonger in their interest to keep the accused incarcerated.

24. Accordingly, I hereby sentence the accused to the period that will ensure their immediate release from prison unless they are otherwise lawfully held.

25. It is so ordered.

26. This ruling has been delivered pursuant to section 168 of the ***Criminal Procedure Code*** as read with Article 50 of the Constitution in the absence of the accused due to the prevailing restrictions occasioned by COVID 19 pandemic and particularly as the decision is in favour of the Accused.

Ruling read, signed and delivered in open court at Machakos 30th day of March, 2020.

G V ODUNGA

JUDGE

In the presence of:

Ms Edna Ntabo for the State

Sadique for the Prison

CA Josephine