REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 29 OF 2020

(Coram: Odunga, J)

KNN..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the resentence of Hon. C. A. Ocharo, SPM in Machakos Chief Magistrate's Court Criminal Case (SO) No. 144 of 2008)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

KNN.....ACCUSED

JUDGEMENT

1. The Appellant herein, **Kiio Ndungi Ndolo,** was charged before the Chief Magistrate's Court at Machakos in SO Criminal Case No. 144 of 2008 with and convicted of the offence of incest contrary to section 20(1) of the ***Sexual Offences Act*** the particulars being that on 3rd February, 2008 at Wamuyu Location, [Particulars Withheld] Village in Machakos District, he intentionally and unlawfully penetrated the genital organ of **MK** aged 9 years old.

2. At the conclusion of the hearing he was convicted thereof and sentenced to life imprisonment, the trial magistrate in the original trial stating that that was the only prescribed sentence.

3. Pursuant to the decision of the Supreme Court in Petition Nos. 15 and 16 of 2015 – **Muruatetu & Others vs. Republic**, this Court set aside the said sentence imposed on the appellant and directed that a sentence re-hearing be undertaken by the Chief Magistrate's Court. Following the said proceedings, the appellant was on 12th March, 2020 again sentenced to life imprisonment.

4. In arriving at the said sentence, the learned magistrate in the resentencing proceedings was informed by the fact that the appellant took away the innocence of his child and this left the child scarred for life. According to her nothing could mitigate this situation as he was meant to offer safety and protection to his child which he failed to do. The Court found that the time that the appellant had served was sufficient to say that he had paid for such a heinous crime.

5. This appeal is therefore restricted to resentencing decision only. It is important to point out at the outset 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 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.

6. 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.

7. 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."

8. 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.

9. 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.

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 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 ***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."**

12. 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.

13. 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."**

14. It was in light of the foregoing that the learned trial magistrate must have 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 appellant is aged 54 years old. At the time of the incident, the victim was in primary school though she has since gotten married with one child while expecting a second child. Due to financial constraints some of the appellant's children dropped out of school. Since his incarceration more than a decade ago, his children have grown up to adulthood while some cannot remember seeing him as they were toddlers at the time. The family, including the victim has however forgiven him and are all interested in reconciling with him as the victim says that she has moved on with life.

15. According to the said report, the appellant related well with the community and is said to be well behaved in prison where he is a pastor and a counsellor and has managed to get good recommendation from the prison authorities. The report indicates that the appellant is elderly and his body is becoming weaker and has developed numbness in the legs from below the knee to the feet. Though he was alcoholic prior to his incarceration, he has since reformed and is living a drugs-free life.

16. It was reported that the conflicts which existed between the appellant and his in-laws have since been resolved. It was reported that the administration believed that the appellant had reformed over the years of his incarceration and urged the court to consider the appellant for commutation of his sentence to a lesser sentence.

17. According to the prison authorities the appellant has serve 11 years and 10 months including the period spent in remand. He is well behaved, disciplined and hardworking and has attained National Grade Test Certificate Grade III in General Fitters. He is a preacher and a counsellor who trains fellow inmates how to live positively, is born again and has maintained a good relationship with fellow inmates and prison staff.

18. I have considered the foregoing as well as the submissions filed. 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. The appellant has been in custody since 4th February, 2006, a period of over 14 years and 6 months. Whereas this was clearly a gender violence based violence crime against the appellant's own child, it seems that since the appellant's incarceration he has reformed and has undergone some rehabilitating steps which have not only reformed him but have also made him a leader in prison. Both the family including the victim and the community have since forgiven him. His absence clearly took a toll on his family's wellbeing. Both the family and the community including the provincial administration have no issue with his release. It is clear that the accused has during the period of their incarceration reformed and has while in prison engaged in attaining skills necessary for him to take care of himself if released from prison.

20. While the offence committed by the appellant was clearly despicable, to a large extent it would seem from the circumstances of this case, that the appellant's incarceration has substantially 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, it would seem that the learned trial magistrate's decision on resentencing was informed mainly by the gravity of the offence. She seemed not to have attached much weight to the other factors such as rehabilitation, the views of the victim and the community as well as deterrence.

21. Having considered all these factors, it is my view that the sentence imposed on the appellant considering all the factors that ought to be

considered which were not so considered in handing down the decision on resentencing, the said sentence is manifestly excessive in the circumstances taking into account the fact that the appellant was a first offender.

22. Accordingly, I hereby allow the appeal set aside the life sentence imposed against the appellant and substitute therefor 20 years imprisonment. Pursuant to section 333(2) of the ***Criminal Procedure Code*** the said sentence will run from 4th February, 2006.

23. Based on this court's decision in **Sammy Musembi Mbugua & 4 Others vs. Attorney General & Another [2019] eKLR,** the appellant is entitled to remission of his custodial sentence if he qualifies due to good behaviour while serving their said sentence.

24. It is so ordered.

25. This Judgement is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic.

Ruling read, signed and delivered in open Court at Machakos this 30th day of September, 2020.

G V ODUNGA

JUDGE

In the presence of:

The Appellant vide Skype

Mr Ngetich for the Respondent

CA Geoffrey