REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC CRIMINAL APPLICATION NO 254 OF 2018

[CONSOLIDATED WITH MISC. CRIMINAL APPLICATION NO 134 OF 2019 AND 17 OF 2019]

MOSES OPULA MATIKA..... 1ST APPLICANT

HENRY AYWA MAKHOTSA.....2ND APPLICANT

SILA SAMSON ONGALA ..... 3RD APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

RULING

INTRODUCTION

1. The applicants were initially charged with the offence of robbery with violence in Criminal Case No. 943 of 2007 wherein they were all convicted and sentenced to suffer death.

2. Being dissatisfied with the said conviction and sentence they all filed appeals to this court being Criminal Appeal No. 275 of 2008 consolidated with Nos. 276 & 277 of 2008 which appeals were dismissed on 25th November 2008.

3. They then filed a second appeal to the Court of Appeal at Nairobi being Criminal Appeal No. 147 of 2016 which appeal was on 17th February 2017 dismissed and the conviction and sentence affirmed.

4. While serving their lawful sentence, the Supreme Court of Kenya delivered their now infamous decision in **FRANCIS KAROKO MURUATETU and Others PETITION No. 15 &16 of 2015** upon which the applicants filed MISC. CRIMINAL APPLICATION No. 413 of 2018 to this court in which they sought orders of resentencing in line with the said decision of the supreme court.

5. The application for re-sentencing was placed before Lesiit J on 30th august 2018 who ordered that the matter be referred back to the trial court for mitigation and re-sentencing. In compliance with the said order, the applicants presented themselves before the Senior Resident Magistrate Court at Kibera and were duly resentenced.

6. The 1st Applicant was re-sentenced to serve an imprisonment term of Ten (10) years from 19th June, 2019 in addition to the Twelve years already served while the 2nd and 3rd applicants were sentenced to serve terms of 20 years in addition to the period already served. They were given rights of appeal.

APPLICATIONS.

7. Not being deterred and without taking the wise counsel of the learned trial magistrate to file appeals, the applicants individually approached this court with the current applications, the subject of this ruling.

8. The first applicant approached the court by way of Chamber Summons in which he sought for an order for the court to call for and review orders regarding section 296(2) of the penal code and to determine whether he was entitled to remedies granted in the case of joseph kaberia and twelve others.

9. He thereafter sought leave, which was granted, to substitute his application with one for review of resentencing ruling, which application was filed on 10th December 2017 in Re –sentencing Revision No 17 of 2019 in which he sought that the sentence given should run from the date of his arrest within the meaning of section 333(2) of the Criminal Procedure Code as opposed to the date of re-sentencing as given by the trial court on resentence.

10. The 2nd and 3rd applicants also filed their application in misc. Application no 134 of 2019 in which they also sought similar orders in addition to asking the court to re-visit whether the thirty years' imprisonment mated was appropriate

SUBMISSIONS

11. When the matter came up for hearing, the applicants who were not represented submitted that the years given to them should run from the date of their arrest in the year 2007 and not from the date of re-sentencing as meted out by the trial court. They submitted that they had reformed while in custody and should therefore be allowed to go back into the society to become useful members of society. They submitted that they were arrested on 1/2/2007 and had been in custody throughout. The 2nd and 3rd applicants submitted that they were aged 49 and 42 years respectively and that if the 20 years were to run from the date of arrest they would still be remaining with seven years to serve.

12. Mr Momanyi for the State conceded that the trial court should have taken into account the pre-conviction period while resentencing the applicants. He submitted that whereas the offence of robbery with violence occurred and was proved, nobody was injured in as much the applicants were armed with a pistol, a metal bar and harmer. He submitted that the period served by the applicants of 13 years should have been considered adequate.

DETERMINATION.

13. This is yet again one of the applications arising out of the determination of the Supreme Court Decision in **FRANCIS K MURUATETU** and lack of practise directions arising there from. I am of the considered opinion that it is the right time for the Honourable The Chief Justice to put in place practise direction on the resentencing as a result of the judgment of the Supreme Court now that the Honourable court has not taken steps to comply with the same.

14. As can be seen from the introduction herein, the applicants first approached this court for resentencing and where referred back to the trial court for mitigation and resentencing, which was duly done. To my mind there is a lacuna in practise as to the rights of the applicants arising out of a resentencing ruling which ought to be set out clear otherwise our criminal courts will continue being over burdened with applications framed as either:- constitutional petition, revision, review and appeals to no end.

15. In this matter before me, from the lower court file, it is clear that while resentencing the applicants, the trial court having reduced the death sentence into a definite term, should have taken into account the preconvention custody period as provided for under section 333(2) of The Criminal Procedure Code and it therefore follows that the sentence was erroneous for which the applicants are entitled to revision so as to effect the provisions of Section 333(2) of the C.P.C which requires the court to take into account the pre-conviction custodial period as period served.

16. As regards the issue of the period of sentence mated out running from the period of arrest, it is clear to my mind that the applicants misunderstood the sentence mated out. The trial court was very clear in her ruling, that the 1st applicant (Moses Opula Matika) was to serve twenty years' imprisonment from the date of the judgement, for avoidance of doubt she stated that he would now serve ten (10) years from the date of ruling.

17. As regards the 2nd and 3rd applicants she gave each one of them a sentence of thirty years from the date of judgement and for avoidance of doubt stated that they would therefore serve additional twenty years from the dated of her ruling.

18. The question now before this court for determination is whether the said sentence was erroneous, illegal and unlawful to entitle the applications to revision and or review as provided for in section 362 and 364 of the criminal procedure code?

19. Sentencing is at the discretion of the trial court and whereas section 364 of the code confers upon this court the powers to review or alter any order of the subordinate court, that power can only be exercised where the court has committed any wrong, illegality or impropriety.

20. If the applicants were dissatisfied with the sentence as its severity, the best approach would have been to approach the court by way of appeal wherein the court would have been in a position to re-evaluate the evidence tendered before the lower court having in mind the principles set out in the case of **MACHARIA VS REPUBLIC [2003]2EA 559** to the effect that the key principle is that a court on appeal does not alter a sentence on mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat deferent sentence. Secondly, unless it is evident that the Judge (magistrate) has acted upon some wrong principles or overlooked some material factors.

21. Justice Odunga when face with the issue of resentencing in the case of **JOSIA MUTUA MUTUNGA &ANOTHER v REPUBLIC [2019] eKLR** had this to say:-

> ***25. The predecessor of the Court of Appeal in the case of OGOLLA S/O OWUOR v REPUBLIC, [1954] EACA 270, pronounced itself on this issue as follows: -***
>
> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."***

26. To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case". (R - v- Shershowsky (1912) CCA 28TLR 263) while in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"

27. The Court of Appeal, on its part, in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that:

"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

28. 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."

22. I associate myself with what the good Judge stated herein above and would have dismissed their applications for lack of merit save for the one year they were in custody before conviction , however arising from the confusions created by resentencing , the applicants raised an issue which this court as a court of justice should not close its eyes upon , taking into account Article 159 of the Constitution which requires the courts to determine matters without due regard to procedural technicality and to promote and protect the principles of the constitution.

23. The applicants submitted that many of the convicts who were serving death sentence had been released on the principle of the years served and the fact that they had during the period they had been in prison undergone reformation. It was their submission that they are entitled to same treatment.

24. I have looked at several cases while writing this ruling where the applicants were charged with robbery with violence and where there was no loss of life and limb and find that the conventional figure is between 15 years and 20 years see **PETER MATIKU MUHIRU v REPUBLIC [2019] eKLR, MICHAEL KAYHEWA LACHENA & Another V REPUBLIC [2018] eKLR and BENSON OCHIENG & OTHERS Vs REPUBLIC [2018] eKLR.**

25. I have further taken into account the fact that the application was not opposed by the State while though not binding on the court submitted that the court should consider the 13 years served as adequate sentence and the current situation created by COVID 19 pandemic which calls for the need to reduce the prison population and would in exercise of my discretion and unlimited jurisdiction conferred under Article 169 of the Constitution review the sentence meted out to the applicants to an imprisonment for a period of twenty years from the date 9-2-2007 when they first appeared in court.

26. Of the said twenty years, the 1st applicant shall serve the last 4 years on probation taking into account the fact that he was sentenced to a lesser period by the trial court and the 2nd and 3rd accused shall serve 3 years each on probation, during which period of time they shall be rehabilitated and resettled in society under the watchful eyes of the probation officers.

27. In the final analysis it is ordered as follows: -

a) The first applicant to serve a term of twenty years from the date of first appearance in court of which the last four (4) thereof shall be on probation.

b) The 2nd and 3rd applicants to serve twenty years from the date of first appearance in court of which the last three (3) years thereof shall be on probation.

Signed dated and delivered at Nairobi this 24th day of September 2020 Through Teams

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J. WAKIAGA

JUDGE

In the presence of:-

Applicants in person

Ms Chege For the Respondent

Karwitha court assistant