



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NOS. 34 AND 35 OF 2020

(CONSOLIDATED)

(CORAM: ODUNGA, J)

JOSEPH NGUMBAU KIILU...1ST APPELLANT

FREDRICK MUSYOKA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the resentencing decision of Hon. B Bartoo, SRM in Machakos Chief Magistrate's Court Criminal Case No. 1220 of 2013)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH NGUMBAU KIILU

FREDRICK MUSYOKA.....ACCUSED

JUDGEMENT ON RESENTENCING

1. The Appellants herein, were jointly charged before the Chief Magistrate's Court at Machakos with Robbery with Violence, contrary to section 296(2) of the **Penal Code**. After the hearing they were both convicted and sentenced to death.
2. 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 death sentence imposed on the appellant and directed that a sentence re-hearing be undertaken by the Trial Court. After considering the probation report and the mitigation, the Learned Trial Magistrate, **Hon. B Bartoo, SRM**, sentenced the appellants to serve to serve 20 years imprisonment.
3. Once again, the appellants are aggrieved by the said decision and have lodged this appeal challenging their sentences.
4. In their appeals the appellants complain that the Learned Trial magistrate failed to evaluate the Probation Officer's Report which was favourable to them.
5. In the respective reports it was noted that the appellants were aged 59 and 43 years respectively and had expressed remorse. It was reported that the victim of the offence though unhappy with the incident no longer considers the appellants a threat to him and believed that both the appellants had learnt their lessons during the period of incarceration. The families of the appellants on the other hand had positive attitudes towards them. They were described as responsible family men and their families were shocked about the incident. The families however believed that both the appellants had learnt their lessons and urged the Court to give them a second chance. While the 2nd appellant's wife was struggling with raising the children singlehandedly under difficult circumstances, the first appellant's wife fled the home after his incarceration due to financial difficulties as he was the sole breadwinner but his two children were regular visitors to the 1st

appellant.

6. According to the community, both the appellants related well and had no issue with anyone and the community welcomed lenient treatment to both the appellants, a position that was echoed by the administration which stated that the appellants were not a threat to the community and the community had no hostilities towards them and they could be considered for lenient sentences. As for the prison authorities, the appellants had no disciplinary issues and cooperated well with their fellow prisoners and had rehabilitated since their incarcerations. During the said period the 2nd appellant took theology training and was awarded a certificate and had undergone counselling and had been baptised. However, the 1st appellant had not undertaken any training while in prison due to the fact that he was suffering from urinal problems and was undergoing medication. He was however described as lazy.

7. 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 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 purpose 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.

8. 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.**

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. 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."

10. 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 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 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 v. 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.”

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.

15. 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.”

16. 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.

17. In the case **R vs. Scott (2005) NSWCCA 152** Howie, Grove and Barr JJ stated:

“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”

18. In a New Zealand decision namely R vs. AEM (200) it was decided:

“... One of the main purposes of punishment...Is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment.”

19. In R Harrison (1997) 93 Crim R 314 it was stated: -

“Except in well- defined circumstances such as youth or mental incapacity of the offender...Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may who otherwise would be tempted by the prospect that only light punishment will be imposed.”

20. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”

21. Similarly, in Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

22. The predecessor of the Court of Appeal in the case of Ogolla s/o Owuor vs. 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.”

23. 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)”

24. 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.”

25. 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.

26. 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.”**

27. Having considered the totality of the material placed before me, the reports of rehabilitation of the Appellants since their incarceration, the attitude of the victim and the community. According to the prosecution, the appellants were first offenders. The trial court while stating that it had considered the probation report and the mitigation did not expressly allude to the fact that the appellants were first offenders. In this case, the incarceration of the appellants has largely achieved three objectives of retribution, deterrence and rehabilitation. Though the appellants have been in custody for more than 7 years, it is my view that the said period is not sufficient to have them set free. However, from the probation report, it is no longer in the interest of the victim, the community and the appellants themselves to keep them in custody.

28. Accordingly, I direct that in order for the appellants to be given an opportunity to reintegrate with the community while taking care of their families. Accordingly, the appellants are placed on Community Service Order for three (3) years. **Joseph Ngumbao Killu** is hereby assigned to Misakwani Assistant Chief's Office while **Fredrick Musyoka Muli** is assigned to Kivandini Assistant Chief's Office. If they fail to comply with the directions and instructions given to them, they are reminded that they will serve the remainder of their terms in custody.

29. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 16th day of December, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Appellants online

Mr Ngetich for the Respondent

CA Geoffrey