



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL CASE NO. 16 OF 2001

(Coram: Odunga, J)

REPUBLIC.....PROSECUTOR

VERSUS

MUTUA KILONZO.....ACCUSED

SENTENCE

1. The accused, **Mutua Kilonzo**, was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that between 4th day of June and 5th day of August, 2000 at Makuusya village, Kyusyaani sub location, Yatta location in Kitui District of the Eastern Province, the accused murdered **Masai Ndana**.
2. After hearing the evidence, the Learned Trial Judge, **Nambuye, J** found the accused guilty, convicted him accordingly and sentenced to death. However, based on the decision of the Supreme Court in Petition Nos. 15 and 16 of 2015 – **Muruatetu & Others vs. Republic**, this Court on 9th August, 2018 set aside the death sentence imposed on the accused and directed that a sentence re-hearing be undertaken.
3. In her judgement the Learned Trial Judge found that though there was no direct evidence that linked the accused to the death of the deceased, the last person to have been seen with the deceased was the accused. Further, the circumstantial evidence pointed to the accused irresistibly as the murderer. It was however noted that the motive for the murder was unknown as the land issue had been resolved and the accused had been given a portion thereof despite his dissatisfaction therewith. It was however found that the accused had the opportunity to commit the offence as he was younger than the deceased, who was his grandfather, and could easily overpower him. That severe injuries were inflicted on the head which caused the deceased death, was sufficient to convince the Court that there was intention to kill. Further, the manner in which the accused left the deceased's home after the disappearance of the deceased carting away some of the deceased's properties portrayed the accused's guilt.
4. It was on that basis that the accused was found guilty and sentenced accordingly.
5. I agree with the Learned Trial Judge that the severity of the injuries clearly showed that either the intention was to kill or cause the deceased grievous harm.
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 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.

10. 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.”

11. It was in light of the foregoing that I 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 accused, who is aged 49 years old, is not well spoken of in his former home area and is little known where the offence took place. After his sentence to death the same was commuted to life sentence in 2009. According to the report, the accused is known to hold grudge for a long time and has been sending threats to the family members who participated in his arrest and has not fully accepted the children born after his arrest as he is said to have informed his mother in law that they belong to her. According to the said report, the accused used to drink and smoke bang.

12. From the report the immediate family members of the deceased are still bitter with the accused and expressed fears over the accused's threats and opposed his resentencing. However, his children would like his sentence revised.

13. It was therefore concluded that the family environment is unfavourable to the accused.

14. In mitigation **Mr Muthama**, learned counsel for the accused submitted that the accused has been in custody for 18 years and has 9 children, 3 being in primary school of tender years. His wife passed away and he is the only parent. The children are ready to unite with him and require a parent. Since his detention, he has studied masonry and acquired Grade 1 hence has attained necessary skills to make a living. The accused, it was submitted has no previous records and is very remorseful for what happened and has attended anger management therapy and is born again.

15. On her part **Ms Mogoi** urged the Court to consider the accused conduct during the period in custody. According to her the manner in which the deceased was killed was inhuman and does not deserve leniency. The probation report does not give a favourable picture of him hence he is not fit to be released to the community as there is need to protect the community. The custodial sentence would also be for his benefit as the community is still bitter with him.

16. I have considered the circumstances in which the offence was committed and the effect on the family and the community of the same. From the probation report, it is clear that the accused has not during his period of incarceration, fully reformed. Though he says that he is remorseful the report paints a different picture as both himself and the members of the community are still bitter with each other. Though he says his children need his care, the report states that he has disowned some of the children whose care he wishes to take.

17. Without remorse on the part of the accused and considering the bitterness that his family members have against him, it is neither in his interest nor in the interests of the community or the society that he be released back to the society as yet.

18. 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.”

19. 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.”

21. 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.”

21. Having considered the circumstances of this case, I am therefore of the view that a sentence of 35 years less the 18 years the accused has served would be the appropriate sentence since it is not alleged that he is a repeat offender. He is therefore sentenced accordingly.

22. The accused has 14 days right of appeal on the sentence. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 25th day of February, 2019.

G V ODUNGA

JUDGE

In the presence of:

Mr Muthama for the accused

Ms Mogoi for the State

