



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 84 OF 2018

(Coram: Odunga, J)

GEORGE MUTISYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of Hon. A. Lorot SPM in Machakos

Chief Magistrate's Court Criminal Case No. 2055 of 2001)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

GEORGE MUIA MUTISYA.....ACCUSED

JUDGEMENT

1. The Appellant herein, **George Muia Mutisya**, was charged before the Senior Principal Magistrate's Court at Machakos with one count of Robbery with Violence, contrary to section 296(2) of the *Penal Code*; two counts of Robbery contrary to section 296(1) of the *Penal Code* and an alternative count of handling stolen goods contrary to section 322(1) of the *Penal Code*. The offences were alleged to have taken place on the 12th day of August, 2011, at Makaveti Catholic Church Mission in Kimutwa sub-location of Machakos District within Eastern province.

2. It was alleged that the appellant, with others, armed with a homemade pistol, an iron bar and sticks, robbed **Father Urbanus Mutuku Makau, Father Bonaventure Musyoki** and **Father Julius Kioko** of some money, a Sony pocket radio and an adaptor, a video deck, a Walkman, a mobile phone, vodka, keys, a radio cassette, cameras and a briefcase; and that immediately before or immediately after the said robbery, used personal violence to the said complainants.

3. The appellant denied all the charges but after hearing the case, the learned trial magistrate found counts one, two and three proved, convicted him accordingly and sentenced him to death in count one and five years and four strokes of the cane on each of the other counts.

4. Aggrieved by the said decision, the appellant appealed to the High Court in Criminal Appeal No. 55 of 2002. The 1st appellate court reached the same conclusion as the trial court and disallowed the appeal. The appellant then appealed to the Court of Appeal, but the Court of Appeal was not impressed and was satisfied with the conclusion reached by the first appellate court. However, the Court of Appeal agreed with the appellant that in light of his conviction and sentence to death the sentences on counts two and three were to be kept in abeyance.

5. 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 accused and directed that a sentence re-hearing be undertaken by the Chief Magistrate's Court.

6. After hearing the mitigating circumstances, the court sentenced the appellant to serve twenty five years imprisonment to run from the date of judgement on 8th March, 2002 in respect of count one and five years each in respect of counts two and three respectively to run from the same date. The said sentences were to run concurrently.

7. Aggrieved by the said decision, the appellant has now lodged this appeal in which he contends that the said sentence was disproportionate, harsh and excessive; that the learned magistrate did not consider the mitigating factors of the case before meting out the sentence; that the learned trial magistrate erred in not asking for probation report to assist him in arriving at the sentence; that the learned trial magistrate erred in not invoking the provisions of section 332(2) of the **Criminal Procedure Code** so as to take into account the period spent in custody as the time served.

8. I have considered the submissions made by the appellant and the respondent herein.

9. 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.*

10. 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.”

11. 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.

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. 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 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.

15. 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.”

16. 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.”

17. 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.”

18. 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”

19. 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.”

20. 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".

21. 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)"

22. 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."

23. In this case, the appellant has been resentenced to 25 years in respect of count one with effect from 8th March, 2002. It is however clear that he has served the sentence in respect of the two other counts in which he was sentenced to five years each with effect from the same date.

24. In **Robert Mutashi Auda vs. Republic Criminal Appeal No. 247 of 2014**, the appellant in the company of others boarded a *matatu* and proceeded to rob the passengers therein. There was no evidence at all that they were armed. The Court of Appeal considered the fact that there were no injuries inflicted on the victims and that the appellant had already served 13 years which it considered sufficient retribution. Accordingly, the Court reduced the sentence to the period already served which was 13 years. Similarly, in **Aden Abdi Simba vs. The DPP Petition No. 24 of 2015**, the Court's decision in meting out the 15 years' imprisonment seems to have been informed by the fact that nobody was injured in the incident and the items were recovered. In **Daniel Gichimu Githinji & Another vs. Republic Criminal Appeal No. 27 of 2009**, the Court of Appeal in meting out the sentence of 15 years considered the fact that the appellant was a first offender, the violence meted was minimal and the item robbed was recovered. In **John Gitonga Alias Kadosi vs. Republic Petition No. 53 of 2018**, the victim was injured as a result of being attacked with a *panga*. The court resentenced him to 15 years.

25. In **Paul Ouma Otieno & Another vs. Republic [2018] eKLR**, the complainant drove to his house in his vehicle. He stopped at the door and knocked the door for his wife to open. Four people went towards him and told him that they were his visitors and he should not make noise. When his wife opened the door, the appellant who was armed with a pistol entered into the bedroom which had lights and directed that the complainant be brought into the bedroom. His co-assailant, who was also armed with a pistol, took the complainant to the bedroom. The two demanded money and were directed to where the money was and took Kshs. 2,500/=. The robbers also took a mobile phone and sonny speaker. They also demanded the car keys and the complainant gave the keys to them. Thereafter, the complainant and his wife were led outside, forced inside the car and driven off to a sugar cane plantation where they were abandoned. The robbers drove off in the complainant's car. The Court of Appeal, while noting that when the appellants were given an opportunity to mitigate before the trial Magistrate they reiterated their innocence and failed to make any mitigation, however held that that should not be a reason to deny them equal benefit of the law. While noting that the offence was aggravated because the appellants were armed with guns, the court found that a sentence of 20 years' imprisonment would adequately serve the interest of justice.

26. In this case, however the attack occurred at 9.00pm in the complainants' house and the attackers were armed with a toy pistol and iron bars and in the process one of the complainant was injured. This was not a case where the complainants were randomly attacked but an attack which must have been pre-meditated well executed with the prior knowledge of who the complainants were. The attackers set out not only to rob but they had their targets in mind. It was a pre-meditated attack not only with a view to rob but with a view to rob specific persons in the comfort of their abode. That notwithstanding I find that the 25 years meted on the appellant was on the higher side, considering the circumstances of this case and the fact that there are no allegations that his conduct since then has deteriorated. Taking into consideration the training that he has undertaken and the fact that no adverse evidence was adduced, it is my finding that the sentence ought to be reduced to the period of 18 years which I hereby do.

27. However, the sentence was directed to run from the date of judgement. It is clear that before the Constitution of Kenya, 2010, capital offences were not bailable and there is no evidence that the appellant was out on bail. section 333(2) of the ***Criminal Procedure Code*** which provides that:

(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

28. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. While the court may in its discretion decide that the sentence shall run from the date of sentencing or conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so. However, where the

sentence does not indicate the date from which it ought to run the presumption must be in favour of the accused that the same will be computed inclusive of the period spent in custody.

29. I associate myself with the decision in Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR where the Court of Appeal held that:

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on 19th June 2012.”

30. The same Court in Bethwel Wilson Kibor vs. Republic [2009] eKLR expressed itself as follows:

“By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. *Ombija, J.* who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

31. According to *The Judiciary Sentencing Policy Guidelines*:

The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of

detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender,

the court must take into account the period in which the offender was held in custody during the trial.

32. In the premises, the learned trial court ought to have taken into consideration the period when the appellant was in custody before he was convicted. The charge sheet indicates the date of his arrest as 13th August, 2001. Accordingly, I allow the appeal, set aside the sentence meted on the appellant herein in respect of count one and substitute therefore 18 years to run from 13th August 2001.

33. As regards, remission, whereas the Court in Robert Mutashi Auda vs. Republic Criminal Appeal No. 247 of 2014 mentioned the submissions of the learned state counsel regarding remission, the Court on its part did not make any finding thereon. I however associate myself with the views of **W. Korir, J** in Musa Wambani Makanda vs. Republic of Kenya [2017] eKLR that:

“The power to remit sentence as provided by Section 46 of the Prisons Act, Cap 90 is as follows:

“(1) Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.

Provided that in no case shall -

(i) any remission granted result in the release of a prisoner until he has served one calendar month;

(ii) any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under section 296(1) of the Penal code or to be detained during the President's pleasure.

(2) For the purpose of giving effect to the provisions of subsection (1), each prisoner on admission shall be credited with the full amount for remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.

(3) A prisoner may lose remission as a result of its forfeiture for an offence against prison discipline, and shall not earn any remission in respect of any period-

(a) spent in hospital through his own fault; or

(b) while undergoing confinement as a punishment in a separate cell.

(4) A prisoner may be deprived of remission -

(a) where the Commissioner considers that it is in the interests of the reformation and rehabilitation of the prisoner;

(b) where the Cabinet Secretary for the time being responsible for Internal security considers that it is in the interests of public security or public order.

(5) Notwithstanding the provisions of subsection (1) of this section, the Commissioner may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special ground. [Act No. 25 of 2015, Sch.]”

I did not understand why Mr. Owiti was of the view that the remission of sentence was not available to the Appellant simply because he was imprisoned at a time when remission of sentence had temporarily been removed from the Prisons Act. Section 46 is clear that remission of sentence is available to convicted criminal prisoners. The Appellant was a convicted criminal prisoner when remission of sentence was reintroduced and he is entitled to benefit from remission, if he meets the conditions for remission of sentence. The only persons who could not receive remission of sentence were those sentenced and had completed their prison terms during the time that remission of sentence was removed from the law. Otherwise all convicted criminal prisoners whether convicted during the existence of the initial right to remission of sentence, during the period that remission had been removed or after remission had been reintroduced in 2015 are all entitled to remission of sentence as provided by Section 46 of the Prisons Act. This is on condition that they meet the provisions of the said Section.

I support my position using Article 50(2)(p) of the Constitution which states that:

(2) Every accused person has the right to a fair trial, which includes the right-

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

In the case of a convicted criminal prisoner, the least severe sentence is the one to which remission has been applied. It is immaterial that they were convicted during the period that remission had been removed from our statute books.”

34. I therefore find that there is no reason why remission ought not to inure to the benefit of the appellant. However, the power to award remission belongs to the prison authorities and that power cannot be usurped by this court though the manner of its exercise may be subject to judicial scrutiny. As for the issue whether remission is being exercised in a discriminatory manner is not properly before me in this appeal, I will leave it for another day.

35. I therefore agree with **Korir, J** in **Musa Wambani Makanda vs. Republic of Kenya** (supra) that:

“The power of remission of sentence belongs to the prisons authorities and this Court should not usurp power reposed elsewhere by Parliament. If the State was correct that the Appellant is not entitled to remission, then that is not a good reason for conceding the appeal since the three years imprisonment imposed on the Appellant would still be lawful.”

36. In the premises the appeal succeeds to that extent.

37. It is so ordered.

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

G V ODUNGA

JUDGE

In the presence of:

The Appellant in person

Ms Mogoi for the Respondent

CA Geoffrey