



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL CASE NO. 14 OF 1994**

**(Coram: Odunga, J)**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BENARD WAMBUA MBENZI.....1<sup>ST</sup> ACCUSED**

**PAUL KITUKU MUTISYA.....2<sup>ND</sup> ACCUSED**

**SENTENCE**

1. The accused herein, **Benard Wambua Mbenzi** and **Paul Kituku Mutisya** were charged together with **Paul Katiku Musyoka** with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on 14<sup>th</sup> day of January, 1992 at about 9.00 pm at Kavete Village in Mitamboni Location of Machakos District within Eastern Province, they jointly murdered **Charles Kiio Mulei**.

2. After hearing the evidence, the Learned Trial Judge, **Osiemo, J** found the accused guilty, convicted them accordingly and sentenced them to death. Their appeal to the Court of Appeal vide Criminal Appeal No. 226 of 2002 was unsuccessful. However, based on the decision of the Supreme Court in Petition Nos. 15 and 16 of 2015 – **Muruatetu & Others vs. Republic**, this Court on 27<sup>th</sup> November, 2018 set aside the death sentence imposed on the accused and directed that a sentence re-hearing be undertaken. This decision is therefore restricted to resentencing only.

3. In his defence the 2<sup>nd</sup> accused while admitting that he participated in the crime, the intention was to rob the deceased and not to kill him. It was his evidence that he was misled by his colleagues. On his part the 1<sup>st</sup> accused, denied having participated in the offence. However, his statement under caution was admitted in evidence in which he stated that he had been invited by two of his colleagues to accompany them to Mitamboni where the two were going to ask for their money. However, upon failing to get the money they conspired on how to rob the deceased. It was then decided that he would remain outside while the other two entered the deceased's shop. However, while the two were inside he heard the deceased scream twice and the two came out and he was given Kshs 2,000/- and each of them escaped. According to him, their intention was not to kill the deceased but to rob him. It was however his evidence that the deceased was murdered by one **Musyoki Kioko**.

4. Whereas there was no evidence that the accused set out to kill the deceased, the fact that they had set out to commit a felony, i.e. rob the deceased was sufficient for the purposes of murder and it does not matter who among them murdered the deceased.

5. 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.*

6. 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.”**

7. 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.

8. 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.

9. 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.”**

10. 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 1<sup>st</sup> accused, **Benard Wambua Mbenzi**, who is aged 68 years old, does not have any dependants as his wife left and returned to her maternal home while all his children are adults with one being deceased. While in prison, the 1<sup>st</sup> accused is a member of the Kamiti Prison Choir and is a Church elder therein and has since been made a Trustee in Prison. According to the 1<sup>st</sup> accused he has spent 23 years and 7 months since his sentence to death and asks for leniency and forgiveness.

11. The report indicates that his children and brothers are willing to resettle him and reintegrate him at his Msambweni home if released. The members of his community in Msambweni are also ready to reintegrate him in the security arrangements made in their respective areas as protective measures.

12. As for the family of the deceased, the widow was still bitter due to the tribulations she and the family went through following the death of the deceased. The community members at Mitamboni however still remember the incident and condemn it.

13. The Report however indicated that there were no risk factors raised by either of the community concerning his release and that his period in prison has given him an opportunity to reflect on his life and conduct and he has learnt his lesson. While in prison he has acquired a lot of skills in tailoring, making of liquid detergents, hair shampoo, disinfectant, handwashing detergents, fruit jam, yoghurt and has participated in Kamiti Prison Choir production of VCD/DVD branded *Yesu Gerezani*. According to the report these skills would help in his reintegration if he chooses to utilise them in earning his livelihood.

14. As for the 2<sup>nd</sup> accused, **Paul Katiku Mutisya**, he was aged 49 years and had similarly spent 23 years and 7 months in prison since his sentencing to death on 25<sup>th</sup> July, 1995. Before his sentence he had spent 3 years and 7 months in remand from 14<sup>th</sup> January, 1992. While admitting the offence, he regretted that it was driven by lust for quick money and peer influence and that the deceased was killed when he attempted to resist the robbery. While in prison he acquired carpentry and joinery skills Grades III and II and also obtained Diploma in Theological education as well as Alternative to Violence Project as Trainer of Trainers. While the members of his community do not remember him, his mother and siblings have been visiting him in prison and he has been made a Trustee in Prison and is reliable in information to prison authorities. However, his family has accepted to receive him and work on his reintegration and resettlement.

15. As regards the family of the deceased, their attitude was similar to the one they have towards the 1<sup>st</sup> accused. However, there were no risk factors raised by both communities concerning his release.

16. According to the Report the skills acquired by the 2<sup>nd</sup> accused while in prison ought to help him in effective reintegration once released.

17. I have considered the circumstances in which the offence was committed and the effect on the family and the community of the same. I have also considered the Probation Officer's Report as well as the oral mitigation made before me as well as the position adopted by **Ms Mogoi**, the learned prosecution counsel. From the probation report, it is clear that both the accused have substantially reformed to the extent that they have been made Trustees while in prison. While the attitude of the victim's family is understandable, as stated hereinabove in this case the incarceration of the accused has achieved three objectives of retribution, deterrence and rehabilitation. In my view the 27 years the accused have served in prison in light of their behaviours and the attitude of the community towards them, they have sufficiently reformed to enable them to be reintegrated back to the community. The skills they have acquired during their period of incarceration ought to assist them in the said process of reintegration and they should also use them to pass message to other members of the society that greed and crime do not pay.

18. In the premises, I hereby sentence them to such period as will ensure their release from custody forthwith unless otherwise lawfully held.

19. It is so ordered.

**Judgement read, signed and delivered in open Court at Machakos this 24<sup>th</sup> day of June, 2019.**

**G V ODUNGA**

**JUDGE**

**Accused persons in person**

**Ms Mogoi for the State**

**CA Geoffrey**