REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 95 OF 2010

(Coram: Odunga, J)

PAUL KYALO NYIMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RESENTENCE

1. The applicant herein, **Paul Kyalo Nyimo,** was charged with the offence of robbery with violence contrary to **section 296(2)** of the ***Penal Code*** the particulars of which were that on the 12th day of December, 2009 at Tala Township in Matungulu district within Eastern Province, the applicant and 2 other co-accused persons jointly robbed **Ngina Nzole** her hand bag containing 4 mobile phones Make Nokia 1200, Aoroda C 500, Samsung E 882, Phoda Phone, ATM Card, ID Card, an umbrella and Kshs 4,600/- all valued at Kshs 43,600/- and at the time of such robbery threatened to use actual violence to the said Ngina Nzole.

2. After hearing the evidence, the Learned Magistrate, **Obulutsa, PM** found the applicant guilty, convicted him of theft and sentenced him to 10 years' imprisonment. Upon his appeal to this Court, his appeal was dismissed and instead the court in Criminal Appeal No. 95 of 2010 enhanced sentence and sentenced him to death. Based on the decision of the Supreme Court in Petition Nos. 15 and 16 of 2015 – **Muruatetu & Others vs. Republic**, this court on 27th February, 2019 set aside the said death sentence and directed that mitigation be taken for resentencing. This decision is therefore restricted to resentencing only.

3. 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 purposes 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.

4. 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.

5. 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."**

6. 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.

7. 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.

8. 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."**

9. 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.

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 in December, 2007, the applicant was convicted of the offence of theft from a person and served 20 months' imprisonment. In this case on the material day, the applicant's friends trailed the complainant and upon reaching where the applicant was resting in front of his grandfather's shop, the snatched the complainant's handbag, threw it at the applicant and fled off. The applicant contends that he was influenced by financial constraints and bad company.

12. According to the probation officer's report, the applicant was reported to be a person of bad character due to his involvement in crime. He used to drink alcohol and smoke bhang. He was married with a son aged 10 years but his wife had since remarried and left. The reported indicated that he had no close ties with the community members.

13. As regards the victim, she was opposed to the review of the applicant's sentence but did not give any reasons. Her family were also of the same view and stated that the applicant had neither compensated them nor approached them for reconciliation and that they were forced to repay the complainant's employer the lost items.

14. The community's position was that the applicant was a notorious thief who started engaging in criminal activities at a young age due to lack of parental guidance. According to the community the applicant's accomplices were still active in robberies in major towns.

15. The applicant's family's attitude was however positive towards him and felt that the period he has served in prison may have assisted him to reform and they prayed for leniency. However the community and the local administration are still apprehensive about his character and feel that he will reunite with the gang members.

16. Before me the applicant stated that he had reformed and that he nolonger takes bhang. Since he has learnt his lesson, he will not repeat the offence. He disclosed that when his said son came looking for him, he was informed that the father would be coming back. The applicant produced certificates from Resources Oriented Development Initiatives Kenya showing that he had undergone training in making of detergents and juices as well as training by the Ministry of Public Health & Sanitation's National Aids and STI's Control Program.

17. On her part **Miss Mogoi** noted that in this case, there were no injuries inflicted on the victim and that the applicant was only convicted because he was in the company of others. In her view a sentence of 15 years imprisonment would suffice.

18. 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. 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."

19. In this case the only factor that aggravated the offence was that it was committed in company of other persons. There is no evidence that any weapon was involved and there is similarly no evidence that any injuries were inflicted on the victim. The applicant has been in custody for more than 10 years now and he states that he has reformed. Regrettably the Probation Report does not contain the information from the prison authorities. As I have stated above such information is very crucial in determining the sentence of a person who has been in prison for a long time.

20. Though its stated that the applicant's conduct is reprehensible to the community which views him as a threat, he has been away from the said community for over a decade now. Therefore, the community's attitude towards him may not necessarily reflect his current conduct. It is however clear that though he had been convicted before, he never learnt from his said conduct though his sentence was anon-custodial one.

21. In my view, the incarceration of the accused has achieved at least one objective of protecting the community for one decade. It is however clear that the applicant was prior to his incarceration in a bad company and says that he had financial constraints. The skills he has acquired during their period of incarceration and his family's willingness to chip in ought to now assist him in the said process of reintegration and he should also use them to pass message to other members of the society that greed and crime do not pay.

22. In the premises, I find that the 10 years custodial sentence has made him learn his lesson. However, as appreciated in the probation officer's report, he requires guidance on the need to earn his income legally and in morally acceptable ways and to keep good company at all times. He also needs to ensure that he properly takes care of his son so that he does not follow him into crime.

23. Therefore, I hereby place the applicant on probation for 5 years. During that period, he ought to be of good behaviour and seek reconciliation from the family of the victim. He must strictly adhere to the instructions given to him by the probation officer. In the event that he fails to do so. He will spend whatever time remains in custody.

24. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 29th day of July, 2019.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in person

Ms Mogoi for the Respondent

CA Geoffrey