REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 2 OF 2002

(Coram: Odunga, J)

REPUBLIC....................................PROSECUTOR

VERSUS

MBOYA NDINDI..................................ACCUSED

RESENTENCE

1. The accused herein, **Mboya Ndindi,** 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 on the 27th July, 2001, at Ivuuni Location, Mwitika Location, Kitui District, he murdered **Ndindi Kimanzi**. The deceased was the appellant's father and from the evidence, the death of the deceased was caused by the fact that the deceased having disposed of his land declined to share the proceeds therefrom with the appellant.

2. After hearing the evidence, the Learned Trial Judge, **Wendoh, J** found the accused guilty, convicted him accordingly and sentenced him to death which in the court's view was the only prescribed sentence. His appeal to the Court of Appeal vide Criminal Appeal No. 320 of 2005 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 14th 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. 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 purposing 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:**
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> ***"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."***
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> **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. The Privy Council in **<u>Spence vs. The Queen; Hughes vs. the Queen (Spence & Hughes</u>**) (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."**

9. 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, a son of the deceased, got annoyed when from the place he was drinking when to inquire why the said plot was being sold without his knowledge. When the other people ignored him due to his state of inebriety, he got agitated and started a scuffle with his brothers. When the deceased intervened in order to separate them, the accused unfortunately threw a *panga* which hit the deceased, killing him.

10. According to the report the accused is 56 years old was married with one wife with whom they were blessed with four children.

However, upon his incarceration, the wife left the matrimonial home together with the children and their whereabouts are unknown. He was described by the community, the family and prison authority as well behaved and a person of good character. However, his eye sight was failing due to high voltage light occasioned by his attempt to train in welding while in prison. According to the report the accused had intimate family ties and hailed from a respected family within the community and generally engaged in social functions. To the community members, he was bewitched since he was a productive family member. The family has come to terms with the reality and has since forgiven him and are looking forward to his release from prison and reintegration and settlement. Both the community and the local administration were not averse to his release and offered to assist in his reintegration and resettlement. While the family had not started the compensation process, they were ready to assist in the event that the same was demanded since the deceased is under the Kamba culture supposed to be compensated by the clan.

11. The report indicated that the prison authority described him as well behaved and was not opposed to his release. While in prison, he acquired welding skills which he was unable to complete due to the condition of his eye sight. He however acquired carving skills before his incarceration and was active in religious activities.

12. On her part **Miss Mogoi**, learned prosecution counsel submitted based on the relationship between the deceased and the accused, the attitude of the family towards the accused, though a life was lost, the court should into the circumstances and mete a sufficient sentence taking into consideration the fact that the accused was drunk at the time of the offence.

13. I have considered the circumstances in which the offence was committed, the relationship between the deceased and the accused, the attitude of the family and the community towards him. 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.

14. Loss of life is, no doubt, a very serious matter. In these circumstances, however, it is highly unlikely, that the accused will in these circumstances commit a similar offence. It is clear that the family and the community have forgiven him and are willing to welcome him back into the fold as a prodigal son. In my view the fact that the deceased, the accused’s father, lost his life in the hands the accused, is a much heavier sentence than this Court could ever hope to impose on him. He will forever to live with that psychological trauma that it was through his hands, resulting from irresponsible drinking habit, that his father lost his life. The accused’s incarceration for 18 years, in my view is sufficient punishment and consequently his incarceration has achieved three objectives of retribution, deterrence and rehabilitation.

15. In the premises, I hereby sentence him for such period as will ensure his release from custody forthwith unless otherwise lawfully held.

16. It is so ordered.

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

G V ODUNGA

JUDGE

In the presence of:

Accused in person

Ms Mogoi for the State

CA Geoffrey