REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL CASE NO. 83 OF 2018

(Coram: Odunga, J)

NICHOLAS MUKILA NDETEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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

Chief Magistrate's Court Criminal Case (SO) No. 412 of 1998)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

NICHOLAS MUKILA NDETEI.....ACCUSED

JUDGEMENT

1. The Appellants herein, **Nicholas Mukila Ndetei,** was charged before the Machakos Chief Magistrate's Court in Criminal Case No. 412 of 1998 with IV counts of robbery with violence. He was found guilty and convicted of the four counts of robbery and the court proceeded to sentence him to suffer death for the said 4 counts.

2. Following the decision of the Supreme Court in Petition Nos. 15 and 16 of 2015 (Consolidated) – Francis Karioko Muruatetu and Anor. Vs. Republic, the appellant petitioned this court for resentencing which petition was allowed and he was sent back to the trial court for thesaid purpose.

3. After hearing his mitigation, the learned trial magistate resentenced the appellant to 30 years for each of the said counts. The said sentence was directly to run concurrently.

4. Aggrieved by the said sentence, the appellant has filed this appeal based on the following grounds

1. That the learned trial magistrate erred in law and fact by awarding disproportionate, harsh and excessive sentence despite being unrepresented.

2. That the learned trial magistrate erred in law and fact by failing to consider the facts, circumstances and any other mitigating factors of the case in their entirety before settling for any given sentence.

3. That the learned trial magistrate erred in law and fact by failing to ask for the probation report to assist the court in arriving at appropriate sentence before dismissing the appellant's mitigating family issues.

4. That the learned trial magistrate erred in law and fact by failing to invoke section 333(2) of the Criminal Procedure Code as amended so that the period of time spent in custody is taken into account as part of the time served.

5. That the learned trial magistrate erred in law and fact by making observation that the appellant had not reformed because he did not explain how he underwent several trainings and attained various skills while incarcerated.

6. That the learned trial magistrate erred in law and fact by failing to consider the appellant's health status, age and general life expectancy which falls within mitigating factors.

5. The appellant therefore prayed that the court considers the time served and awards him remission.

6. According to the appellant as at the time of his resentencing, he had served 20 years in prison. It was therefore his view that thesnetnce imposed upon him was not commensurate with themoral blameworthiness. According to him, though the atatckers were armed with dangerous weapons, they were humane and the injuries they occasioned were not aggravating and no one lost his life. According to him, in the circumstances the starting point ought to have been section 296(1) of the ***Penal Code*** which provided for 15 years.

7. Based on **Joseph Kaberia Kahinga & 11 Others vs. Attorney General [2016] eKLR**, it was submitted that the trial court should not have given proportionate sentence since the law as it stands now there is no distinction between section 296(1) and 296(2) of the Penal Code hence the sentence should have been 14 years and not 30 years. In his view the sentence imposed violate Article 27 of the Constitution. It was submitted based on **Edwin Otieno Odhiambo vs. R Cr. App. 359 of 2006**, in matters of sentencing if the court fails to take into account mitigating circumstances, the chances of not coming up with an appropriate sentence were enhanced.

8. It was submitted that the learned trial magistrate failed to take into account the fact that the appellant had a family comprising of his wife and three children who require his attention hence his prayer for mercy couples with the remorsefulness ought to have been considered. According to the appellant the court ought to have considered such issues as youth/immaturity, old age and serious illness. In his case the court failed to consider that he was arrested at the age of 28 and he was now 48 years hence capable of making prudent decisions. He contended that for the last 20 years of his incarceration he had shown propensity to reform.

9. He therefore prayed that this court awards him appropriate sentence commensurate with his criminal responsibility and invokes section 333(2) of the ***Criminal Procedure Code*** and section 46 of Cap 90 in arriving at the final decision.

10. On the part of the Respondent, it was submitted by **Ms Mogoi** that ***Muruatetu*** decision did not pronounce the death sentence unconstitutional and that what was pronounced unconstitutional was the mandatory nature of the punishment. Therefore, the effect of the decision was to give a trial court a chance to evaluate the circumstances of the offence on a case to case basis when pronouncing the suitable sentence. However, the court can still sentence an accused person to death if circumstances call for it.

11. It was submitted that a sentence of 30 years is lenient, sufficient and very reasonable considering the number of counts the appellant was facing and the circumstances surrounding the commission of the offence hence the court ought not to interfere with the sentence particularly since the sentences were ordered to run concurrently. It was the respondent's case that the trial court exercised due diligence in sentencing the appellant to 30 years and was well guided by the law and the evidence on record hence did not err.

12. The court was therefore urged to uphold the sentence but direct that the same run from the time when the trial commenced as opposed to the date of judgement.

13. I have considered the submissions made before me in this appeal. 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.

14. 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.

15. 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."**

16. 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.

17. I must however state that the probation report being a report which is not subjected to cross-examination in order to determine its veracity, is just one of the tools the court may rely on in determining the appropriate sentence. It is therefore not necessarily binding on the court and where there is discrepancy regarding the contents of the report and information from other sources such as from the parties themselves and the prison, the court is at liberty to decide which information to rely on in meting its sentence. To rely on the probation report as the gospel truth, in my view, amounts to abdication of the court's duty of adjudication to probation officers. While the report of the probation officer ought to be treated with great respect, it is another thing to accept it hook, line and sinker. It however ought not to be simply ignored unless there are good reasons for doing so.

18. 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.

19. 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."

20. 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.

21. 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."

22. 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.

23. 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."

24. 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."

25. 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."

26. 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"

27. 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."

28. 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."**

29. 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)"**

30. 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."**

31. In my view, it does not follow that in resentencing, the court is obliged to reduce the initial sentence. What is required of the court undertaking the resentencing is to look at all the circumstances of the case and to make a determination whether the appellant's incarceration has achieved the objective for which he was sentenced such as punishment, deterrence, public protection and rehabilitation. In other words, the court is not to be bound only by the appellant's conduct that led to his incarceration but also his conduct and circumstances since the said incarceration.

32. The appellants relied on *inter alia* the decision of **J. Ngugi, J** in **Benson Ochieng & Another vs. Republic [2018] eKLR**. and contended that the starting point when considering sentences for those charges with robbery with violence is 15 years. In that case the learned judge expressed himself in paragraph 20 as hereunder:

> **" I begin from the position that given that "simple" robbery under section 296(1) of the Penal Code attracts a minimum sentence of fourteen years imprisonment, it seems logical that the minimum sentence for robbery with violence should begin at fourteen years imprisonment. This is because robbery with violence under section 296(2) is, by definition, an aggravated robbery which has been singled out by the Legislature for enhanced penalty due to the impact of the crime on the victim and the society…An entry point of fourteen years for robbery with violence, in my view, is also appropriate for reasons of uniformity and parity in sentencing."**

33. I respectfully do not entirely agree with the said view. First, the said view seems to suggest that in determining the sentence in robbery with violence cases, the minimum sentence ought to be fourteen years. I am however not a proponent of mandatory minimum sentences. My view is supported by the decision of the Court of Appeal in **Jared Koita Injiri vs. Republic [2019] eKLR** where it held that:

> **"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by *section 8 (1)* of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic (supra)*, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."**

34. Apart from that I am aware of the view expressed in **Joseph Kaberia Kahinga & 11 Others vs. Attorney General [2016] eKLR** that sections 295, 296(1) and 296(2) do not meet the constitutional threshold of setting out in sufficient precision, distinctively clarifying and differentiating the degrees of aggravation of the offence of robbery and attempted robbery with such particularity as to enable those accused to adequately answer to the charges and prepare their defences. In light of lack of clarity between the ingredients of robbery with violence vis-à-vis attempted robbery, in my view it would not be proper to apply the sentence prescribed for attempted robbery as the minimum yardstick for the sentence for robbery with violence.

35. I however agree with the opinion of the learned judge in paragraph 22 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."

36. In that case the learned judge expressed himself as hereunder:

"23. Looking at these factors, the following recommend themselves as extenuating:

a. First, I accept that both Applicants have demonstrated genuine remorse;

b. Second, both are first offenders;

c. Third, both have patently demonstrated that they are reformed and that they are capable of re-integration into the society through their ability to become useful members of the society;

d. Fourth, both Applicants were fairly youthful during the commission of the offence since they were both in their early twenties;

e. Fifth, through their family connections and civic engagement participation, they have each demonstrated an affinity to a crime-free life in the future. As such, it would appear there is no demonstrated need to continue holding them in custody for the protection of the community."

37. He, however appreciated that:

"…there are serious aggravating circumstances present in this case:

a. First, the Applicants were armed with multiple guns during the commission of the offence;

b. Second, the commission of the offence involved a prolonged shoot-out with the Police during which members of the public were at risk;

c. Third, unfortunately, during the attempt by the Applicants to flee from justice, the lives of some of their colleagues were lost; and

d. Fourth, the Applicants were part of a seemingly organized gang whose sphere of operations ranged from Central Rift Valley to Western Kenya."

38. The learned judge however concluded that:

"25. Taking all these factors into consideration, I find that while the mitigating circumstances are substantial – including the well-documented rehabilitation of both Applicants as certified by the Prisons authorities -- the aggravating circumstances in the case are quite weighty. In particular, even while accepting that the Applicants are demonstrably reformed and rehabilitated, it is important for the Court to accentuate the societal denunciation for the heinous and socially damaging crime the two Applicants committed: the use of multiple guns by an organized gang to commit armed robbery. A sufficiently stiff sentence will also serve the deterrence function to the extent that a custodial sentence has a signaling effect.

26. In my view, therefore, considering the entirety of the facts, it is appropriate to substitute the death sentence pronounced on the Applicants in this case. In its place, I re-sentence both Applicants to twenty (20) years imprisonment commencing the date of sentencing before the Trial Court that is from 01/02/2001."

39. In this case, it is regrettable that the learned trial magistrate did not deem it fit to call for a probation officer's report in order to inform himself about the positions of the various parties who would be affected by the decision made on resentencing including the victim's family, the appellant's family, the community and the prison authorities.

40. According to the court, the appellant and others robbed several people armed with machetes and other crude weapons. They also cut their victims leaving them with injuries. Some of these victims were women. According to the court these were heinous crimes that were committed with violence.

41. I have considered the foregoing. While the court stated that the appellant did not explain how he had reformed, it is my view that this issue would have been properly addressed if an order was made for the preparation of the Probation officer's report.

42. In **Robert Mutashi Auda vs. Republic Crimial 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.

43. 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.

44. In this case therefore in the absence of the probation officer's report, the court seems to have relied heavily on the appellant's conduct prior to his conviction. In so doing it failed to consider whether or not the appellant had reformed. In fact, it could not do so in the absence of the probation officer's report. However, nothing prevented the appellant from adducing evidence which would support his contention that he had reformed. He could have for example produced evidence showing what he was engaged in during the b20 years he was in prison and whether he had undertaken any training and courses that would assist him once he rejoined the society in earning an honest living. He could have also requested the prison authorities to furnish him with a report indicating his conduct in prison and whether he had reformed.

45. As regards, remission, I 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."**

46. In light of the decision in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015** regarding constitutionality of sentences which do not take into account the dignity of individuals but treats them *en masse*, it may well be debatable whether the decision not to extend remission to persons of the class of the appellant herein as a class rather than as individuals herein is justifiable. In that case the Supreme Court expressed itself *inter alia* as hereunder:

"[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.

[49] With regard to murder convicts, mitigation is an important facet of fair trial. In *Woodson* as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.

[50] We consider *Reyes* and *Woodson* persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.

[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.

[52] We are in agreement and affirm the Court of Appeal decision in *Mutiso* that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in *Joseph Kaberia Kahinga* that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.

[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict."

47. In other words, what the Supreme Court was saying was that in meting out the sentence, the peculiar circumstances of a particular case must be taken into consideration. An offence committed with brutality leading to serious injuries and may be death cannot be treated on the same plane as one where there are no injuries sustained. Similarly, the role played by offenders may not necessarily be the same hence their sentencing may not be the same. That is, however, a matter for another day.

48. In the circumstances, I hereby set aside the 30 years sentence imposed on the appellant and substitute therefor a sentence of 25 years for each count. The said sentences to run concurrently and the same shall commence from 19th February, 1998.

49. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 26th day of July, 2019.

G V ODUNGA

JUDGE

In the presence of:

Appellants in person

CA Geoffrey