REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NOS. 114 AND 116 OF 2018 (CONSOLIDATED)

(Coram: Odunga, J)

DUNCAN KYALO MUANGE.....1ST APPELLANT

JACKSON MUTUNGA KIMATU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the resentence of Hon. C. A. Ocharo, PM in Machakos Chief Magistrate's Court Criminal Case No. 1667 of 1999)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

DUNCAN KYALO MUANGE.....1ST ACCUSED

JACKSON MUTUNGA KIMATU.....2ND ACCUSED

IRENE NDUKU NDETO & OTHERS.....3RD ACCUSED

JUDGEMENT

1. The Appellants herein, **Duncan Kyalo Muange** and **Jackson Mutunga Kimatu** were charged with another person before the Chief Magistrate's Court at Machakos with Robbery with Violence, contrary to section 296(2) of the ***Penal Code.*** They were found guilty of the said offence, were convicted accordingly and sentenced to death.

2. Aggrieved by the said decision, the appellant appealed to the High Court but 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.

3. 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. 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. After hearing the mitigating circumstances, the court sentenced the appellants to life imprisonment.

5. Once again, the appellants are aggrieved by the said decision and have lodged this appeal in which they raise the following grounds:

1) THAT the Learned Resentencing Magistrate erred in both law and fact through serious misdirection that went beyond the scope of sentence re-hearing.

2) THAT the Learned Resentencing Magistrate erred in both law and fact by failing to follow strictly the directions of the Supreme Court decisions on the points to consider during resentence hearing which are echoed in the Sentence Policy Guidelines and which should reflect fairness, justice, clarity, proportionality among others.

3) The Learned Resentencing Magistrate erred in law by openly displaying bias against the appellants by relying on aggravating factor of remorsefulness that was never canvassed by the prosecution.

4) THAT the Learned Resentencing Magistrate erred in both law and fact and fact by not considering the possibility of miscarriage of justice in our criminal justice system hence basing the test of remorse on the appellants' admission or lack of it of the facts recorded by the convicting courts.

5) THAT the Learned Resentencing Magistrate erred in both law and fact by not considering other very compelling mitigating factors which were submitted by the appellant and which were in line with the directions of the Supreme Court decision.

6) THAT the Learned Trial Magistrate erred in of law and fact by awarding disproportionate, harsh and excessive sentence, despite being unrepresented.

7) THAT the Learned Trial Magistrate erred in both law and fact by failing to warn or caution the appellant about the dangers involved when one denies committing the offence in the probation report and being sorry before the court during resentencing process bearing the magnitude of sentence it attracted, yet resentencing process is a new phenomenon in Kenya.

8) THAT the Learned Trial Magistrate erred in both law and fact by acting upon unequivocal statement to hold that the appellants had denied committing the offence, thus not remorseful.

9) THAT the Learned Trial Magistrate erred in both law and fact by making observation that the appellants had undergone several trainings and attained various skills while incarcerated and yet failed to observe that they are capable of reform.

10) THAT the Learned Trial Magistrate erred in both law and fact by failing to consider their health status, age, general life expectancy which falls within the mitigating factors.

11) The life sentence imposed on the appellants was manifestly harsh and which although still is in our laws the Supreme Court has ordered for its review to definite number of years which demonstrate its deficiency and hence not in tandem with the spirit of the Constitution.

6. The appellants based their submissions on **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015**, **Joseph Kaberia Kahinga and 11 Others vs. Attorney General [2016] eKLR**, ***Judiciary Criminal Procedure Bench Book, 2018*** and the ***Sentencing Guidelines*** with regard to the sentencing tests.

7. It was submitted by the appellants that the learned trial magistrate erred in purporting to amend the life sentence which the appellants are already serving as a result of the commutation of their death sentence by the President. To the appellants this was a mockery of the decision in the ***Muruatetu Case*** as it made resentencing futile.

8. It was further submitted that in arriving at her decision the learned trial magistrate only considered one test which is remorsefulness of the offender without considering the other seven tests thus subjecting the appellants to prejudice. In any case the test of remorsefulness was erroneously applied as the point was never canvassed in the submissions.

9. Contrary to the provisions of the Sentencing Policy, it was submitted that the decision lacked accountability and transparency because the reasoning informing the sentence imposed is not evidence in the ruling particularly the disparity in sentencing the appellants which lacked coherence contrary to section 169 of the ***Criminal Procedure Code*** and paragraph 28 of the ***Judiciary Criminal Procedure Bench Book*** as well as **Walter Marando vs. R Kisumu Criminal Appeal No. 16 of 1980** and **Luka Kingori Kithinji and Another vs. R Nyeri Criminal Appeal No. 130 of 2010**.

10. According to the 1st appellant the court ought to consider the fact that he went to prison a young man and is now 50 years old hence wiser and experienced in life situations.

11. As regards the health of the appellants, they relied on the case of **Bernard Cr. App. R 135 England and Wales (1977)** and submitted that bad health and terminal medical condition is a weighty mitigating factor. Based on a number of authorities, the appellants submitted that the presiding judge has discretion in sentencing depending on the circumstances of the case and relied on **Mulamba Ali Mabanda Criminal Appeal No. 12 of 2013**.

12. According to the appellants, since the definition of section 296(1) and 296(2) are the same, it is discriminatory to sentence a person under section 296(2) and not 296(1). In this respect they relied on **Joseph Kaberia Kahinga and 11 Others vs. Attorney General [2016] eKLR** and submitted that the trial court ought not to have given disproportionate sentences since there is no distinction between the said two sections. In their view, the starting point in awarding sentence ought to have been 15 years and not life sentence.

13. It was submitted that since the appellants made different statement in the probation report and in court during their mitigation, the court ought to have sought clarifications from them and ought to have brought to their attention, the consequences of denying the commission of the offences.

14. Based on paragraph 24 of the ***Judiciary Criminal Procedure Bench Book, 2018*** as read with the decision in **Charo Ngumbao Gugudu vs. R Mombasa Criminal Appeal No. 358 of 2008**, it was submitted that the court should not impose a maximum sentence on a first offender unless there are aggravating circumstances. According to the appellants, the maximum sentence imposed on them violated the provisions of the law as it never considered that the appellants were first offenders who had served 19 years in prison, their health status, rehabilitation programmes and courses undertaken while in prison.

15. It was submitted that the learned trial magistrate mistook the appellants' mitigation as amounting to disputing the findings of the trial courts and failed to consider the strong mitigating factors placed before the court.

16. On behalf of the Respondent, **Ms Mogoi**, Learned Prosecution Counsel, submitted that from the appellants' mitigation, they did not acknowledge the offence they committed and the impact/effect it had on the victim and his family despite their conviction having been upheld by the Court of Appeal. It was submitted that part of the remorsefulness is the acknowledgement of what one committed and accepting to change but that was not the case with the appellants who were not remorseful at all but were only interested in getting out of prison.

17. It was submitted that the object of resentencing is not to have the accused released or his sentence reduced but is meant to give the trial court a chance to evaluate the circumstances of the offence on a case to case basis when pronouncing the suitable sentence and that the Court could still sentence accused person to death if the circumstances called for the same. It was submitted that the court is expected to consider the circumstances of each case in terms of the gravity thereof, whether the accused were armed, the injuries suffered by the victim and whether there was loss of life, the impact of the offence on the victims and the purpose the sentence is meant to serve depending on whether it is intended to deter the offence, to punish the accused person or to rehabilitate him, and finally the importance of protecting the community from the accused person.

18. It was submitted that considering that in this case life was lost and the appellants played direct and indirect roles in that loss of life, the sentence of life imprisonment is sufficient under the circumstances.

19. I have considered the submissions made by the parties herein.

20. 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.***

21. 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."

22. 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.

23. I must however state that the probation report being areport 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.

24. 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.

25. 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."

26. 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.

27. 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."

28. 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.

29. 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."

30. 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."

31. 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."

32. 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"

33. 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."

34. 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."

35. 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)"

36. 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."

37. In this case, the appellants have been resentenced to life imprisonment. By the time of the resentencing, the death sentence that had been imposed on the appellants had already been commuted to life sentence. Dealing with the issue of life sentence, the Supreme Court in ***Muruatetu Case***, cited **Vinter and Others vs. the United Kingdom (Applications nos. 66069/09, 130/10 and 3896/10)** where it was noted that:

"112. …if…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."

38. 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.

39. The appellants have taken issue with the fact that the learned magistrate based her decision only on the fact that the appellants were not remorseful for their conduct. According to the appellants the court ought to have considered the other facts outlined in ***Muruatetu Case*** which are age of the offender; being a first offender; whether the offender pleaded guilty; character and record of the offender; commission of the offence in response to gender-based violence; remorsefulness of the offender; the possibility of reform and social re-adaptation of the offender; and any other factor that the Court considers relevant. In my view what is required of the court is a holistic approach. Accordingly, it is not a matter of assigning grades to each factor. It may well be that the offender has achieved all the objectives but the community may not be ready to welcome him back in which event the determination may well be based on the sole issue of social re-adaptation of the offender and rehabilitation. Therefore, the mere fact that the learned trial magistrate did not mention the other considerations does not necessarily render the decision wrong.

40. The appellants relied on *inter alia* the decision of **J. Ngugi, J** in **Benson Ochieng & Another vs. Republic [2018] eKLR**. 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."

41. 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."

42. 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.

43. 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."

44. 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."

45. 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."

46. 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."

47. In this case, the learned trial magistrate found that according to the pre-sentencing report, the appellants still maintained their innocence and that they were framed notwithstanding the fact that three courts had made concurrent findings about their guilt. It was however noted that the documents in support of the 1st appellant's mitigation showed that he had serious health complications such as hypertension, diabetes and pulmonary tuberculosis which had affected his eye sight. While the 1st appellant stated that he had fully reformed and pleaded with the court to grant him a second chance, the 2nd appellant was very apologetic and prayed for pardon.

48. According to the court, the appellants herein were not actually sorry for having committed the offence but were sorry to the country and the court. It was the court's finding that their refusal to acknowledge the crime they committed was an aggravating factor that the court ought to take into consideration. It was the court's finding that the accused persons properly planned to commit the offence and that as a result, a person lost life for no apparent reason save for the fact that the accused persons were on a mission to rob. It was noted that it was the 1 st appellant who pulled the trigger. It was based on the foregoing that the court proceeded to resentence the appellants to life imprisonment.

49. Although the appellants took issue regarding the disparity of the sentence imposed against them and that imposed on the 3rd accused, the learned trial magistrate explained this based on the minimal role played by the said 3rd accused and the fact that as opposed to the appellants, the 3rd accused expressed remorse. That those are factors to be considered in sentencing is clearly appreciated in ***The Judiciary Criminal Procedure Bench Book, 2018*** in which it is stated at page 117 paragraph 28 that:

"If two or more people have been convicted of the same offence, there should be no disparity in the sentences imposed without good reasons. If the Court does impose disparate sentences, it should state its reasons on record."

50. One of the justifications for imposing disparate sentences as identified in **Walter Marando v Republic [1980] eKLR** would be for example where one man has a bad record. Similarly, **Hilbery, J** in **R vs. Ball (1951) 35 Cr App Rep 164, 166**, a case cited in the ***Marando Case***, it was stated that:

"The differentiation in treatment is justified if the Court, in considering the public interest, has regard to the differences in the characters and antecedents of the two convicted men and discriminates between them because of those differences."

51. In **Luka Kingori Kithinji and Another vs. R Nyeri Criminal Appeal No. 130 of 2010 [2011] eKLR,** the respective roles played by the accused in the commission of the offence was found to have been a justification for disparity in the sentences. In **Luka Kingori Kithinji and Another vs. R Nyeri Criminal Appeal No. 130 of 2010 [2011] eKLR**, the Court held that:

"In this case, the co-accused were committed to a Borstal Institution for 3 years for the reason that they were child

offenders. The two appellants were adults. The 2nd appellant as guardian of the deceased during circumcision should have protected the deceased. The two being adults should have protected the deceased and also dissuaded the co-accused from assaulting the deceased. In our view, a slight disparity in sentencing is for that reason, justified. The appellants were in custody for one year before they were sentenced."

52. There is therefore nothing wrong in disparate sentences as long as there is a rational explanation for the same.

53. According to the probations reports the 1st appellant maintained the he was framed and that he does not know anything about the robbery and the killing of the victim. It was reported that he suffers from chronic illnesses like hypertension, diabetes mellitus, pulmonary tuberculosis relapses which has affected his eye sight. Regarding the views of the victim's family, the same was unavailable as none of the family members could be traced. However, the sisters of the 1st appellant, his mother and uncle pleaded with the court to have leniency in resentencing since the appellant had suffered a lot for close to 20 years in prison and remand and they believed he had had enough punishment. Due to his ill health they pleaded that he be given a second chance. His wife ran away and got remarried leaving his two children under the care of his elderly mother and sister. His sisters were ready to help him resettle and empower him in starting a business.

54. His community was unaware of the circumstances under which the offence was committed and even doubted whether he was the one who committed the offence. According to the area chief the 1st appellant was well behaved person and hoped that the 20 years' incarceration taught him a lesson. According to the administrator the 1st appellant is now a grownup who may not go back to crime if given a second chance and the community welcomed his resentencing or release.

55. As regards rehabilitation, the 1st appellant had certificates in theology, peer counselling, peer education and several certificates and according to the prison authorities, he had reformed and can be considered for release or resentencing.

56. It was therefore the Probation Officer's opinion that the 1st appellant who is aged 49 years old has been in prison for 20 years and the records from the prison shows he has reformed. The home report is positive as the local administration says he has no previous records and is not a threat to the community hence they are ready to reintegrate him back into the community. The family even allocated the 1st appellant a land in Mwea- Kambiti currently manned by a servant waiting for his release.

57. As regards the 2nd appellant, he is 55 years and maintained that he knew nothing about the offence. He was described as a changed person of good character and was commended by the prison authorities for his good behaviour and as a reformed person who can be given another chance back to the community. He is a father, a son and a husband who has maintained close family ties with is relatives, wife and siblings. His wife pleaded with the court to consider the years he has served in prison and to give him another chance in order to take his parental responsibility. They believed that he has paid for his sins and may have committed and repented his sins hence need pardon. His wife and children pry for his release. The community was not opposed to his release as they believed he had reformed.

58. In prison he underwent a course in carpentry grade 3.

59. I have considered the foregoing. From the Probation officer's reports, it is clear that both the appellants had no previous bad records before the commission of the offence. Both their communities and their families are ready to welcome them back into the fold and reintegrate them into the community. The prison records show that they have sufficiently reformed in order to be allowed back into the society. That have spent nearly two decades in custody during which the prison records show remarkable reform on their part. It would seem that in meting the sentence the learned trial magistrate was persuaded by the denial of the offence by the appellants than by the consideration of the other factors which were similarly relevant such as the present conduct of the appellants.

60. It is clear that the appellants are persons who have the means and the support to be able to honestly carry on with the lives if they chose to do so. There is no evidence that they are disposed to relapsing back to crime. There is also no evidence that they may threaten the family of the victims or the members of their community. In fact, their death sentences were commuted to life and this is also another fact that seems to have escaped the attention of the learned trial magistrate.

61. Having considered the circumstances of this case and the factors set out in **Benson Ochieng & Another vs. Republic [2018] eKLR** I agree with the probation Officer's report that the appellant's reports both the home and the prison are favourable. Accordingly, I agree that the custodial sentence of 19 years served by them has sufficiently achieved the three objectives of retribution, deterrence and rehabilitation and have sufficiently reformed them to enable then be reintegrated back to the community. The skills they have acquired and the support from their respective families ought to assist them in the said process of reintegration and to pass a message to other members of the society that greed and crime do not pay.

62. 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.

63. 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.

64. However, the court cannot ignore the fact that a life was lost.

65. Accordingly, considering the mitigating as well as aggravating circumstances, I hereby resentence the appellants to twenty years in prison. The said sentence will commence from 12th May, 1999.

66. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 24th day of July, 2019.

G V ODUNGA

JUDGE

In the presence of:

Appellants in person

Ms Mogoi for Respondent

CA Geoffrey