REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 36 OF 2019

(Coram: Odunga, J)

IRENE NDUKU NDETO.....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

IRENE NDUKU NDETO & OTHERS.....ACCUSED

JUDGEMENT

1. The Appellant herein, **Irene Nduku Ndeto**, was charged with others before the Chief Magistrate's Court at Machakos with Robbery with Violence, contrary to section 296(2) of the ***Penal Code.*** She was found guilty of the said offence, was 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 appellant and directed that a sentence re-hearing be undertaken by the Chief Magistrate's Court.

4. It is important to point out that a resentencing hearing or any other sentencing hearing for that matter is neither a hearing *de novo* nor an appeal. Such proceedings are undertaken on the understanding that conviction is not in issue. It therefore follows that in those proceedings the accused is not entitled to take up the issue of the propriety of his conviction. He must proceed on the understanding that the conviction was lawful and restrict himself to the sentence and address the court only on the principles guiding the imposition sentence and on the appropriate sentence in the circumstances. Similarly, the court can only refer to the evidence adduced in so far as it is relevant to the issue of sentencing but not with a view to making a determination as to whether the conviction was proper. While the court is entitled to refer to the evidence in order to determine whether there existed aggravating circumstances or otherwise for the purposes of meting the sentence, it is not proper for the court to set out to analyse the evidence as if it is meant to arrive at a decision on the guilt of the accused.

5. After hearing the mitigating circumstances, the court sentenced the appellant to serve twenty-five years' imprisonment to run from the date of her conviction on 10th July, 2000.

6. Once again, the appellant is aggrieved by the said decision and has lodged this appeal in which she raises the following grounds:

> **1) THAT the learned trial magistrate erred in points of law and fact by failing to apply section 333(2) of the Criminal Procedure Code which allows for the consideration of time spent in remand to be included in the sentence to be meted to the appellant.**

2) THAT the learned trial magistrate erred in points of law and fact by failing to observe that section 46 of the Prisons Act does not prevent the appellant from the benefit of a remission of her sentence just like other convicts not sentenced to life or death sentence hence denying her right of remission.

3) THAT the learned trial magistrate erred in points of fact by sentencing the appellant to serve 25 years of imprisonment without considering her age in respect of the time served in prison and her age at the time of arrest.

7. It was submitted by the appellant that she was arrested on 11th May, 1999 and sentenced on 10th July, 200o after spending more than one year in remand prison custody. She therefore prays that pursuant to section 333(2) of the ***Criminal Procedure Code***, the said period be reduced from the said sentence.

8. According to the appellant at the time of the offence she was young and naïve being only 27 years old and a single mother of a 6-year-old boy and was forced into committing the offence due to her circumstances of life, an action which she regrets. According to her she was remorseful and sought a second chance in order to counsel her son and grandchildren as well as the community that crime does not pay. It was her case that 19 years behind the bars have been more than enough and she has learnt her lessons the hard way. Having acquired life skills in prison, she contended that the same would enable her lead a productive and independent life.

9. It was the appellant's case that the law regarding remission as provided under the ***Prisons Act***, Cap 90 Laws of Kenya is discriminatory and contrary to Article 23 of the Constitution as it assumes that those convicted of Robbery with Violence Contrary to section 296(2) of the ***Penal Code*** are incapable of reform and having good behaviour while in prison such that they cannot enjoy the benefit of having a third of their sentence remitted.

10. Based on the foregoing, the appellant prayed that she be set at liberty.

11. On behalf of the Respondent, **Ms Mogoi**, Learned Prosecution Counsel left the matter to the court to make an appropriate decision based on the circumstances of the case.

12. I have considered the submissions made by the appellant.

13. 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.

14. 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."

15. 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.

16. 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.

17. 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."

18. 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.

19. 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."

20. 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.

21. 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."

22. 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."

23. 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."

24. 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"

25. 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."

26. 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."

27. 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)"

28. 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."

29. In this case, the appellant has been resentenced to 25 years with effect from 10th July, 2000, when she was convicted.

30. In this case, the learned trial magistrate found as a fact that the role of the appellant in the commission of the offence was minimal and that she was not directly linked to the killing of the deceased. Most of the witnesses did not place her at the scene of crime. That this is a factor 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."

31. One of the justifications for imposing disparate sentences as identified in **Walter Marando vs. 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."

32. 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 that case 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."

33. I have noted that the sentence was directed to run from the date of conviction. Section 333(2) of the ***Criminal Procedure Code*** which provides that:

(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

34. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. While the court may in its discretion decide that the sentence shall run from the date of sentencing or conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so since the decision not to include the period spent in custody is an exception to the statutory provision that can only be justifiable upon reasonable grounds.

35. I associate myself with the decision in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** where the Court of Appeal held that:

"The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by *section 333(2)* of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

36. The same Court in **Bethwel Wilson Kibor vs. Republic [2009] eKLR** expressed itself as follows:

"By proviso to *section 333(2)* of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. *Ombija, J*. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

37. According to ***The Judiciary Sentencing Policy Guidelines***:

The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.

38. In the premises, in the absence of reasons justifying a contrary view, the learned trial magistrate ought to have taken into consideration the period when the appellant was in custody before she was convicted. In light of my decision however, nothing turns on that issue.

39. 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."

40. 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."

41. 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.

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 the appellant's reports from the prison depict a person who since her incarceration, has reformed to the extent that she was nominated for consideration for the exercise of power of mercy. Her present age of 46 years and she was 27 years at the time of the commission of the offence. She has stated that she is remorseful and her family is ready to welcome her back home, resettle her and assist her start her life afresh. She has learnt some skills while in prison which if put to good use are likely to help her earn a living in a honest way. Even the local administration has given her a positive report, a manifestation that she is not considered a threat to the community. I do not know what would have been the position of the family of the victim since they could not be traced. There is therefore no evidence that her release is likely to jeopardise the safety of the family of the victim.

45. It is therefore my view that the appellant's life behind bars has sufficiently rehabilitated and reformed her. Taking into account all the circumstances of the case, I find that the 25 years meted on the appellant was on the higher side, considering that there are no allegations that her conduct since her incarceration has deteriorated. To the contrary, the evidence point to a person who has had time to reflect and ponder over her past conduct and is ready to re-join the society. Taking into consideration the training that she has undertaken and the fact that no adverse evidence was adduced, it is my finding that her incarceration has achieved three objectives of retribution, deterrence and

rehabilitation.

46. It is my view the 19 years the appellant has served in prison in light of her behaviour and the attitude of the community towards her, have sufficiently reformed her to enable her be reintegrated back to the community. The skills she has acquired during her period of incarceration ought to assist her in the said process of reintegration and she should also use them to pass message to other members of the society that greed and crime do not pay.

47. In the premises, I hereby allow the appellant's appeal on sentence, set aside the 25 years' sentence meted on her and substitute therefor such period as will ensure her release from custody forthwith unless otherwise lawfully held. In other words, her sentence is hereby reduced to the period already served.

48. 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:

Appellant in person

Ms Mogoi for the Respondent

CA Geoffrey