



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 3 OF 2019**

**(Coram: Odunga, J)**

**QUERESH MULI MUTINDA.....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. 1742 of 2006)**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**QUERESH MULI MUTINDA.....1<sup>ST</sup> ACCUSED**

**ANTHONY MUSANGO NDUNGA.....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

1. The Appellant herein, **Queresh Muli Mutinda**, together with were charged with **Anthony Musango Ndunga** were charged 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. They appealed to this court in Criminal Appeal No. 91 of 2007 but their appeal was dismissed on 23<sup>rd</sup> September, 2009.

2. 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. Following the said proceedings, the appellant was on 7<sup>th</sup> December, 2018 sentenced to 25 years in prison. In making that decision the learned trial magistrate noted that the appellant and the complainant were cousins though the complainant is since deceased. The local administration is of the view that the appellant has been rehabilitated and has no objection to his being given a lenient sentence. It was further noted that the appellant was very remorseful for his acts and seriously regretted having taken part in the said offence. The court was impressed by the reform on the part of the appellant.

3. From the record, the appellant's co-accused's resentencing proceedings were determined on 1<sup>st</sup> March, 2019 and the learned trial magistrate noted that by the time of the decision there were reconciliation proceedings between the families of the complainant and the accused. Considering the circumstances under which the offence was committed, that the said accused had served 12 years, that the attitude of the family was very positive, that the complainant's family had forgiven the said accused are ready to have been back in the society, she proceeded to sentence the said accused to 15 years noting, rightly in my respectful view, that:

**“Dispute resolution is another form of bringing families back together after great animosity.”**

4. In this case, it is noted from the Probation Officer's Report that the complainant and the accused were related, age mates and friends. The offence took place after a drinking spree at a local shopping centre when the accused noticed that the complainant had a relatively significant amount of cash and waylaid him on his way home.

5. It is clear that the circumstances of the appellant and his co-accused are similar. The only plausible reason for the discrepancy in the

punishments meted against the two is that at the time the appellant herein was being sentenced, the issue of reconciliation was not brought to the attention of the trial court. In Marando vs. The Republic [1980] KLR 114, Madan, Law and Potter, JJA held that:

**“The appeal against sentence causes us much concern. When two or more people are convicted of the same offence, it is wrong in principle to impose different sentences except for good reason. For instance, one may have a bad record, but that is not the case here. The appellant is a first offender. The judge gave no reason for sentencing the appellant to four years, and his co-accused to one day’s imprisonment. The only difference we can see between the two cases is that it was the appellant who raised the hue and cry against the deceased. We do not think that he did so maliciously, but rather out of misplaced and misguided zeal. It was a foolish and unnecessary act on his part, but probably well intentioned, as he freely went to report what had happened to the police. In the words of Hilbery, J in R vs. Ball (1951) 35 Cr App Rep 164, 165:**

**‘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.’**

**We see no justification for the disparity in the sentences in this case. If the sentence passed on the appellant is allowed to stand, he will suffer a justifiable feeling that he has been a victim of injustice.”**

6. Similarly, in the matter before me there is no justification for the disparity between the sentences meted to the two accused persons save for the fact that in one case the process of reconciliation was taken into account while in the other it was not.

7. In the unique circumstances of this case, I find that the sentence meted out to the appellant was clearly disproportionate to the circumstances under which the said offence was committed and the attempts to reconcile the families in question.

8. In the premises, I set aside the sentence of 25 years imposed on the appellant and substitute therefor a sentence of 15 years and by dint of section 333(2) of the *Criminal Procedure Code*, the said period to run from the date of his incarceration on 19<sup>th</sup> September, 2006.

9. As regards remission, this Court in Machakos Petition 16 of 2019 – Sammy Musembi & Others vs. The Attorney General held that:

**“To therefore maintain that those convicted of offences under section 296(2) of the Penal Code are not entitled to consideration for remission, presupposes that such offenders are incapable of reform. First there is no empirical evidence before me to enable be justify such a conclusion. Secondly, and to paraphrase the Supreme Court in the *Muruatetu Case* Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected and it is for this Court to ensure that all persons enjoy the rights to dignity. Failing to consider 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. The dignity of the person is ignored if he is denied remission that is available to others serving similar sentences simply on the irrational presumption that he is incapable of reforming. The differential culpability can be addressed in Kenya by allowing the authorities concerned to consider the individual prisoner’s industry and conduct rather than by treating them the same. To my mind a formal equal treatment for unequal conduct is not in keeping with the tenets of fair reformation and rehabilitating process...I find that the only part of section 46(1) of the *Prisons Act* that is unconstitutional is that which denies remission to persons sentenced to imprisonment for an offence under section 296(2) of the *Penal Code*.”**

10. For avoidance of doubt, therefore, appellant is entitled to remission of his custodial sentence if he qualifies due to good behaviour while serving the said sentence.

11. It is so ordered.

**Judgement read, signed and delivered in open Court at Machakos this 30<sup>th</sup> day of September, 2019.**

**G. V. ODUNGA**

**JUDGE**

**In the presence of:**

**Appellant in person**

**Ms Mogoi for the Respondent**

**CA Geoffrey**