



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL CASE NO. 21 OF 2002**

**(Coram: Odunga, J)**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BENSON MATHEKA JUMA.....ACCUSED**

**RESENTENCE**

1. The accused herein, **Benson Matheka Juma**, was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on the 9<sup>th</sup> day of December, 2000 at Kaseve Village, Kiima-Kiu Location in Makueni District within Eastern Province, the accused murdered **Stalus Thiongo**.

2. According to the evidence adduced, the deceased, a police officer, in company of the complainant and his colleagues went to the accused's house with the intention of searching for some stolen goods. However, upon reaching the accused's house, a scuffle occurred when the accused declined to give access to the said police officers to search his house. As a result, the accused removed a *somali* sword, cut one of the officers who with others ran away. The deceased was however, not so lucky as his body was later found near the accused's house with cut wounds with a depressed skull.

3. After hearing the evidence, the Learned Trial Judge, **Wendoh, J** found the accused guilty, convicted him accordingly and sentenced him to death. His appeal to the Court of Appeal vide Criminal Appeal No. 111 of 2009 was unsuccessful. However, based on the decision of the Supreme Court in Petition Nos. 15 and 16 of 2015 – **Muruatetu & Others vs. Republic**, this Court in Misc. Criminal Application No. 14 of 2018 on 16<sup>th</sup> October, 2018 set aside the death sentence imposed on the accused and directed that a sentence re-hearing be undertaken.

4. This decision is therefore restricted to resentencing only. This decision is therefore restricted to resentencing only. It is important to point out at the outset 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.

5. 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.

6. To that list I would add whether the accused has taken steps towards reconciling with the victim or the family of the victim which ought to be promoted under Article 159(2)(c) of the Constitution.

7. 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.”**

8. 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.

9. In my view where the accused has spent a considerable period of time in custody, it may be prudent for the Court while conducting a sentence re-hearing, to direct that an inquiry be conducted by the probation officer and where necessary a pre-sentencing and victim impact statements be filed in order to enable it determine whether the accused has sufficiently reformed or has been adequately rehabilitated. This is so because the circumstances of the accused in custody may have changed either in his favour or otherwise in order to enable the Court to determine which sentence ought to be meted. It may be that the accused has sufficiently reformed to be released back to the society. It may well be that the conduct of the accused while in custody may have deteriorated to the extent that it would not be in the interest of the society to have him released since one of the objectives of sentencing is to protect the community by incapacitating the offender.

10. 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.”**

11. It was in light of the foregoing that I directed that a probation officer's report be prepared and filed and the said directions were duly complied with. In the said report, the Probation Officer found that the accused is aged 57 years old. Prior to his conviction for the instant offence, he had been convicted of house breaking and stealing and Stealing for which he was sentenced to 6 months and 15 months respectively. He was also arrested for stealing stock but was acquitted. According to the said report, after the commission of the instant offence, the accused went into hiding from 9<sup>th</sup> December, 2000 till his arrest on 28<sup>th</sup> February, 2001. The report indicates that the accused is married with four children. However, subsequent to his conviction, his wife got three more children, a fact which has not been disclosed to him.

12. Prior to his arrest, the report discloses that the accused was a feared man in his home area to his violent character. He was also involved in housebreaking and theft. He is however reported to have embraced Christianity while in prison and is stated to be a born again Christian and a preacher having changed his behaviour and plans to open a church to mentor the youth. It was reported that his family is willing to embrace him and support him. Both the family and the community have a positive attitude towards him as a result of his reported changed behaviour a development which according to the report makes home environment favourable for him, the challenge being only his reaction to the changed circumstances of his family and the dispute surrounding the land where his family is.

13. Since the family of the victim could not be traced their attitude could not be gauged and as a result no steps had been taken towards reconciliation.

14. The report concluded that the accused who has been in custody for close to 19 years, now a father of 7 and grandfather of six requires help in order to help him embrace his family as currently constituted. However, the accused poses no threat to the community given his behavioural change. While the land issue is emotive, it was reported that it involves many community members. It was the opinion of the probation officer that the accused requires counselling intervention to enable him accept the new developments in his family and support to achieve his dreams.

15. Apart from the probation officer's report, there was a report from the prison which disclosed that the accused since his conviction on 30<sup>th</sup> March, 2006 and sentence to death has had his sentence commuted to life imprisonment. During the period he has been in prison, the accused attained Trade Test Grades I, II and III in upholstery from NITA, Trade Test Grades I, II and III in Carpentry/Joinery from NITA, Diploma in Biblical studies from International School of Ministries, Diploma in Biblical studies from Emmaus Bible School, Diploma in Biblical studies and Theology from Christian Leadership Institute-Minnesota and Diploma in Biblical studies from AFCM International Training Centre. It was further disclosed that the accused was deployed in prison industries as a carpenter since 2010 and had made quality items and earned the section much reputation. He was reported to be well behaved with exemplary conduct.

16. In his mitigation, the accused expressed remorse at what he did and accepted that he made a mistake which he could have avoided. He therefore prayed for leniency. According to him, he comes from a family of 9 but that they were abandoned by their parents and underwent a lot of suffering as a result. According to him, he has since his conviction been saved and has been a preacher in Naivasha, Machakos and Kamiti Prisons and is now a church elder at both Kamiti and Machakos Prisons where he has learnt carpentry and joinery hence is in a position to serve the community.

17. On her part **Miss Mogoi**, learned prosecution counsel urged the court to consider the fact that the accused murdered a police officer in line of duty while causing injuries to another officer after which he disappeared for over a year. According to learned counsel the accused is known for violence and a habitual offender who graduated from petty offence. The court was urged to consider justice for the deceased and while appreciating that no amount of punishment can bring back the life lost the court should mete a sentence that is proportionate to the offence and send a message to the victims and others. It was her view that the time served by the accused so far is not sufficient hence the sentence meted should one that would give peace to the deceased officer's family.

18. I have considered the circumstances in which the offence was committed, the Probation Officer's Report as well as the oral mitigation made before me as well as the position adopted by **Ms Mogoi**, the learned prosecution counsel. **Miss Mogoi** urged this court to consider the circumstances under which the offence was committed and also the need to ensure that the deceased's family gets justice. I associate myself with views of **J. Ngugi, J** in **Benson Ochieng & Another vs. Republic [2018] eKLR** 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."

19. 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 accused'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. It is therefore my view that an all-round consideration must be undertaken. The court in undertaking a resentencing process, particularly where the accused has been incarcerated for a long period of time must not only consider the circumstances of the accused, the victim and the community but must also consider the changed circumstances of the accused's family and his family set up. The accused must therefore be brought to speed and be updated about changes, if any in his family set up in order to enable him be reintegrated with the family. Any factor that is relevant cannot therefore be treated as irrelevant.

20. Just like in cases of remission, in undertaking a resentencing after the accused has spent a considerable period in prison, the court ought to consider whether during the period of his incarceration, the system has inculcated a sense of responsibility in the accused and whether the accused has now been provided with an incentive to serve his time productively, with a mind-set of moving forward.

21. While the court cannot close its eyes to the fact that an innocent life of a law enforcement officer was lost, there is however no evidence as to the feelings of the family of the victim. What we have is evidence that the accused's incarceration seems to have substantially served the purposes for which imposition of sentences is meant. It is my view that once the sentence imposed on an accused has met the objectives of retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation, it is no longer necessary or desirable to continue holding the accused in incarceration. This was appreciated by the Supreme Court in the *Muruatetu Case* when it referred to Article 10(3) of the Covenant which stipulates that:

**"[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."**

22. In this case, the community and the accused's family as well as the prison authorities are agreed that it is no longer in their interest to keep the accused incarcerated and that the accused may serve the society better outside the prison than inside. However, it is clear that there are some unresolved issues within the accused's own family that needs to be addressed. These are the issues which are akin to what therapists refer to as "unfinished business" which describe the emotions and memories surrounding past experiences that a person has avoided or repressed, feelings around an event which are not fully processed at the time, often because they are too overwhelming or traumatic. To mete

out a sentence without addressing such unfinished business may work injustice to the family of the accused. Accordingly, it is only fair that the said business be addressed and resolved before an appropriate sentence is meted out. In the premises I direct that the Probation Officer preferably in collaboration with the prison church authorities take steps to counsel and reconcile the accused with his family particularly with the wife as regards the changed circumstances in his family composition.

23. Accordingly, I defer the sentencing pending the said process and the filing of a report therefor.

24. It is so ordered.

**Judgement read, signed and delivered in open Court at Machakos this 28<sup>th</sup> October, 2019.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**The Accused person present in person**

**Ms Mogoi for the State**

**CA Geoffrey**