



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

MISCELLANEOUS CRIMINAL APPLICATION NO. 30 OF 2019

BENSON WACHIRA THAIRU.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT ON RE-SENTENCING

1. The applicant was convicted and sentenced to death in the lower court on two counts of robbery with violence in CMCRC No. 963 of 2014. The sentence was meted on 23rd June, 2016. The offence was committed on 16th May, 2014. The trial court found that the offence of handling stolen goods had also been proved but held conviction in abeyance on the alternative count.
2. Dissatisfied, the applicant filed HCCRA No. 28 of 2016, an appeal, in the High Court. The appeal was dismissed via a judgment by Meoli J on 3rd May, 2018. That appeal was against conviction and did not specifically dwell on the issue of sentencing.
3. The applicant filed this application for re-sentencing, and subsequently, the applicant filed Miscellaneous Criminal Application No. 53 of 2019 also seeking re-hearing of sentence. The latter file (No. 53 of 2019) is hereby marked as closed, as the two files cannot run concurrently, being in respect of the same subject matter.
4. The applicant filed his submissions on sentence. He asserts that the sentence was not in accord with the principles enunciated in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** in that the applicant was not accorded a full right to a hearing on mitigation prior to sentencing; and that the trial court merely awarded the mandatory death sentence without considering mitigation, and without exercising its discretion.
5. The DPP is not opposed to the application for re-sentencing. She did not file any submissions.
6. As directed by the Court, the Probation Officer and the Prisons Service filed reports on the accused person. The Prisons Report dated 15th November, 2019 indicates as follows:

“During his [the appellant’s] stay here, he has taken full advantage of the rehabilitation programmes offered in this institution. He has trained and achieved Grade II in carpentry and joinery (2019). In addition to this, his conduct is good in prison.

He relates well with both members of staff and his fellow prisoners. In view of the above, I strongly feel that Benson has skills to enable him earn a living after release.”

7. A subsequent, detailed, Prisons Report filed on 27th January, 2020 indicates that the prisoner:

“.....is [a] well-disciplined inmate who has never been found with any prison offence while in prison.”

The report concludes:

“He is remorseful and regrets to what the offence has cost him, he has changed, he is always happy and of the mind to continue with his work using the skills attained in prison.

We are persuaded that he can be a good, hardworking citizen who can contribute to the building of the society if he does not slide back to crime and maintains his focus on going to use his carpentry and upholstery skills to earn his daily bread.”

8. The Probation Officer's Re-sentence Report indicates that as a result of applicant's incarceration, his wife Christine Mumbua remarried. They had two children; that the applicant regrets having committed the offence; that his family would readily welcome him back; that whilst in custody the applicant has been of good conduct and has obtained a number of trade and Bible course certificates. However, the Probation Report says nothing concerning the deceased's family's view.

9. In conclusion, the Probation Report recommends that:

“.....the accused [is] fit for a non-custodial sentence. I therefore recommend that he be given a chance to serve a community service at the Wangigi Level 4 Hospital in Kabete Sub-County.”

10. I have taken into consideration the foregoing information. I have also perused the proceedings in the lower court. After conviction, the following transpired in respect of mitigation

“State counsel : 1st offender, no records.

Mitigation : I am hardworking Kenyan. My family depends on me. I have all along worked to provide for my family. One of my child is even admitted in hospital at Kiambu.

Court : I have considered the nature of the offence and mitigation. This offence has a mandatory sentence upon conviction. Accused is hereby sentenced to suffer death.”

11. It is clear that the key consideration taken into account by the learned trial magistrate was the mandatory nature of the sentence. Although the trial magistrate referred to the mitigation tendered, there is nothing to indicate that the mitigation had any effect on the nature and length of sentence to be meted by the learned trial magistrate. Accordingly, this appears to be a case where the mitigation was not considered as determinative of the sentence, and this court is thus entitled to intervene.

12. The **Muruatetu** case recognized the Judiciary Guidelines on sentencing, in particular the objectives of sentencing which are 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.”

13. When considering sentencing under the objectives, the court must ensure that a multiplicity - not a single one - of the objectives are taken into account at the time of sentencing.

14. I have noted the remorsefulness of the accused. The robbery was effected through a scheme by which the accused persons pretended to be customers for purchase of sand and attacked the complainants, beat the complainants, forced them to drink some drugs dissolved in water, and robbed them of money, vehicle and other small items. One of the victims died in the robbery. This was a brutal operation, and I take those facts into account.

15. The applicant was remanded in custody from 2014 and sentenced on 23rd June, 2016 being two years. From the date of his sentence he has served four years and eight months; a total incarceration of 6 years and eight months. I also take that into account.

16. In my view, and taking into account all the foregoing matters, I am persuaded that this is a proper case in which the accused is entitled to a determinate sentence. Accordingly, I hereby sentence the accused to twenty (20) years imprisonment from the date of his first remand in custody. The sentence shall be served as follows:

a) The first ten (10) years shall be spent in formal imprisonment.

b) The next two (2) years shall be spent in non-custodial probation in a programme to be designed and facilitated by the Probation Officer, and a record of attendance shall be kept and made available to the court.

c) The balance of the term shall stand suspended provided that the accused shall successfully conclude the probation period and shall

not be convicted of any offence from the date hereof.

Administrative directions

17. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

18. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

19. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 8TH DAY OF MARCH, 2021.

.....

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the DPP
2. Benson Wachira Thairu - Applicant in person - in Naivasha Maximum prison
3. Court Assistant - Quinter Ogutu