



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

MISC CR. PETITION NO. 18 OF 2017

(CORAM: F.M. GIKONYO J.)

Revision from Original Conviction/Sentence

in Criminal Case No. 1659 Of 2014 Of the Senior

Principal Magistrate's Court at Narok and HCCRA 17 of 2015 at Narok

GEORGE MAINA.....APPLICANT

-versus-

REPUBLIC.....RESPONDENT

JUDGMENT

Re-sentencing

[1] The Applicant moved this court vide an undated application filed on 23/10/2017 seeking for orders that a retrial of his case be granted in accordance with article 165, 27(1), 159(a) (e) of the constitution 2010 and section 358 Criminal Procedure Code.

[2] The applicant was convicted for the offence of attempted robbery with violence contrary to section 297 (2) of the Penal Code and was sentenced to death. He filed **appeal**; Narok **HCCRA 17 of 2015**; the **appeal was dismissed; conviction and** the death sentence upheld. Of importance here is that sentence was upheld because it was the only penalty authorized by law.

[3] The applicant on 9/2/2021 made an oral application for resentencing pursuant to the Supreme Court decision in the matter of **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR**.

[4] The applicant's case is that his mitigation was not considered and he was not accorded a fair hearing of sentencing from the trial court which was in contravention of article **25(c) and 50 of** the Constitution of Kenya. He submitted that the death sentence meted on him is a gross violation of his rights as enshrined in the Bill of Rights in the Constitution of Kenya 2010. He relied on article 26(1) ,27(2) of the Constitution and the decision in **Susan Kigula and 416 Others Vs Ag [Uganda] (2005)** among others. The applicant further seeks to benefit under Supreme Court **Muruatetu decision**.

Prosecution submission

[5] Ms. Torosi, the prosecution counsel for the Respondent in her oral submission opposed the application and submitted that the High Court had already pronounced itself. She therefore insisted that the applicant should go to the Court of Appeal. She urged the court to dismiss the application.

ANALYSIS AND DETERMINATION

Nature and scope of resentencing

[6] Re-sentencing is neither a hearing *de novo* nor an appeal. It is a proceeding undertaken within the court's power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding *inter alia*, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.

[7] The prosecution counsel, challenged this court's jurisdiction to entertain this re-sentencing application on the basis that the court has already pronounced itself on the matter and therefore *functus officio*. According to her, the only available option to the applicant is an appeal to the Court of Appeal.

[8] Arising from the arguments herein are the following two issues for determination: -

1. *Whether this court has jurisdiction to entertain re-sentencing hearing; and*
2. *Whether the sentence imposed is illegal, harsh or excessive in the circumstances*

Jurisdiction

[9] Jurisdiction is the judicial power given to the court to determine disputes; without it, the court cannot adjudicate the dispute. See the decision of Nyarangi, J.A. in the often-cited case of *The Owners of Motor Vessel Lilian "S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1* at page 14:

“Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

[10] The Supreme Court of Kenya buttressed the centrality of jurisdiction in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others, Application No. 2 of 2011*, where it pronounced that:

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”

[11] An augury exposition or judicial hint: courts have inherent jurisdiction in order to do justice between the parties. Such jurisdiction is not written law or granted by legislation. Similarly, jurisdiction of court may draw from sources of or law which in not necessarily written law, for instance, international customary law or common law.

[12] Be that as it may, does this court have jurisdiction to determine re-sentencing application herein?

[13] The applicant filed appeal number **HCCRA NO. 17 of 2015** which was heard and dismissed. The prosecution counsel argued that this court pronounced itself on the sentence and so it is *functus officio*. The applicant has approached the court on the basis of the decisional law in Muruatetu. How does the court assume jurisdiction in such matters?

[14] The Court of Appeal in the case of *William Okungu Kittiny -v- R (2018) eKLR* stated:

“The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit court below it from ordering sentence re-hearing in a matter pending before the courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all the other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases”.

[15] In light thereof, nothing prevents the court from applying the decisional law and ordering sentence review in cases where the penalty imposed was mandatory penalty in law even if the cases are finalized. To me, denying an accused the benefit of court's discretion to impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes sentencing. On that basis this court has jurisdiction to determine review of sentence.

[16] Nonetheless, I will dig more previous wells on this question. The High Court, in *Stephene Kimathi Mutunga -v- Republic (2019) eKLR* while holding that the High Court has unlimited jurisdiction in both Civil and Criminal matters, it was stated that the mandate of enforcing fundamental rights and freedoms as enshrined in the Constitution, confers the High Court jurisdiction to deal with the petition for sentencing rehearing.

[17] In *Michael Kathewa Laichena & Another -v- Republic (2018) eKLR* Majanja J. stated:

“by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence”.

[18] It bears repeating that, the High Court has the mandate under *Article 165 (3) of the Constitution* to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in the constitution.

[19] A further leapfrog development; under article 50(2)(p) of the Constitution: -

50(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

[20] Thus, a subtle judicial hint emerges when **Muruatetu** decisional law is interposed to article 50(2)(p) of the Constitution. Arguably, the decisional law in **Muruatetu** changed the law on mandatory punishments and provided room for discretion of court to impose appropriate sentence- which may be less severe than the mandatory sentence depending on the facts of the case. By parity of reasoning, imposition of mandatory sentences was a deprivation of the right to appropriate sentence. I should think, therefore, that, any person who suffered mandatory sentence may invoke article 50(2)(p) of the Constitution and seek a less severe sentence under Muruatetu decisional law. Such would remedy the injustice and the violation of the right to fair trial caused by imposition of mandatory sentence.

[21] By law, a violation of right is remedied through a proceeding in the High Court. See article 23 of the Constitution which provides: -

23. Authority of courts to uphold and enforce the Bill of Rights

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights

[22] In my view, where a violation of right has been alleged, there is no necessity of or legal requirement for filing an appeal for redress. The party may invoke this court's jurisdiction under article 165 of the Constitution to hear and determine applications for redress of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Re-sentencing hearing on the basis of denial or violation of a right in the Bill of Rights is in the nature of application for redress of denial or violation of right and fundamental freedom in the Bill of Rights envisioned in article 23 of the Constitution. This is one such application. Therefore, I will address the violation of right and resentence the applicant in accordance with the circumstances of his case.

Sentence

[23] The application of the decisional law in Muruatetu (**supra**) to mandatory death sentence in other category of cases other than murder cases was stated in the case of **William Okungu, Kittiny -vs- Republic [2018] eKLR**, the Court of Appeal sitting in Kisumu as follows:

" we hold that the findings of the Supreme Court particularly in paragraph 69 applies "Mutatis Mutandis" to Section 296 (2) and 297(2) of the Penal Code. Thus, the sentence of death under Section 292(2) and 297(2) of the Penal Code is a discretionary punishment. To the extent that Section 292(2) and 297(2) of the Penal Code provides for mandatory death sentence, the Sections are inconsistent with the Constitution."

[24] I have perused the decision by this court and it is apparent that the applicant was convicted for attempted robbery with violence contrary to, and sentenced in accordance with section 297 (2) of the Penal Code. The death penalty was imposed because it was the only sentence prescribed in law at the time. This law was declared to be inconsistent with the Constitution. See Court of Appeal decision cited above. I also find it to be a violation of the right to fair trial. On that basis, I set aside the death sentence imposed upon the applicant.

[25] What is appropriate sentence to be imposed? I will consider the principles which guide the court in imposing appropriate sentence.

[26] Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in its entirety so as to arrive at appropriate sentence. The Court of Appeal **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Maharashtra** at paragraph 70-71 where the court held the following on sentencing:

"Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

[27] See also **Francis Karioko Muruatetu & Another -Vs- Republic (Supra)** where the Supreme Court stated the guidelines and mitigating factors in a re-hearing on sentence. These factors are also Applicable in a re-sentencing for the offence of attempted robbery.

[28] The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1. Among others; the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the Applicant to inflict harm.

[29] Some past decisions; In **Peter Maina Kimani v Republic [2019] eKLR** the Petitioner jointly with others while armed with a panga and metal rod robbed a complainant of Kshs.4000/- and itel Phone valued at Ksh 3,500/-. During resentencing the court took into account the fact that Appellant was a first offender and that the sentence imposed on an offender must be commensurate to his moral blameworthiness. The Court set aside the life imprisonment, sentencing the Appellant to serve 20 years imprisonment.

[30] What are the relevant circumstances of this case? In the case before me, the evidence shows that the applicant with others entered the yard of the complainant and started removing batteries from lorries parked therein. They kicked **PW1** who got injured. The applicant held **PW1** by the neck and tried strangling him. The applicant together with others were armed with metal bars. They used actual violence on

PW1. The applicant with others tried to take away the batteries using actual violence on the complainant. The manner the offence is committed is relevant consideration. In this case it was cruel. The offence is also serious; attempted robbery with violence. And, the weapons used were also dangerous weapons; metal bars.

[31] In the circumstances of this case, deterrent sentence is most appropriate. I therefore sentence the applicant to 25 years' imprisonment.

Taking account of time spent in custody

[32] The Applicant was granted bond of Kshs 1 million with one surety of like sum. He did not raise the bond and so remained in custody. Section 333 (2) of the Criminal Procedure Code requires the sentencing court to take account of the period spent in custody. In re-sentencing, the court should be aware that, in some instances, time spent in custody may mean; (1) the period spent in remand during trial; and (2) the time actually served upon initial sentence. If a court does not clearly state the commencement date of the sentence upon re-sentencing, or states that the sentence commences on the date of judgment may be problematic or introduce an illegality. Care should, therefore, be taken by sentencing courts on the implication of, and to give full effect to section 333(2) of the CPC. I am aware that section 333(2) of the CPC does state how a court should take account of the time spent in custody. This problem was identified in the Judiciary's Criminal procedure Bench Book at page 122 as follows: -

The sentence imposed by the trial court begins on the date on which it is pronounced (s. 333(2), CPC). The court must take into account the time already served in custody before sentencing (s. 333(2), CPC; para. 7.10, Sentencing Policy Guidelines). In Bethwel Wilson Kibor v R (Court of Appeal at Eldoret Criminal Appeal No. 78 of 2009), the offender was convicted of manslaughter and sentenced to five years imprisonment. The trial court did not indicate whether it had taken into account the nine years that the offender had already served in custody. Guided by section 333(2) of the CPC, the appellate court reduced the sentence to time served. Section 333(2) does not specify how the court is to 'take into account' the time in custody.

[33] In my view, however, in resentencing, a sentence that commences from the date of re-sentencing, may harness real possibility for judicial absurdity and great injustice to the accused. For instance, if a person was sentenced to serve 10 years and he has already served 6 years, if you reduce the sentence to 5 years with effect from the date of re-sentencing, the person will actually serve more than he would have served under the original sentence given the right to remission. Such sentence; (a) will violate the right to fair trial; (b) will enhance the sentence albeit inadvertently; (c) will be real judicial embarrassment and absurdity; and (d) will not have taken account of time spent in custody as required under section 333(2) of the CPC. It has been stated time without number, and I will state it again; merely stating that the court has taken account of time spent in custody is not sufficient. My humble view is; although section 333(2) of the CPC constitutes mitigating factor, it relates to ascertainable period of time; thus, it should be stated categorically when the sentence commences in a manner that readily and actually gives full effect to the requirements of section 333(2) of the CPC.

[34] In consideration of section 333(2) of the CPC, the sentence of twenty-five (25) years in prison will start from 6th day of October, 2014-the day the applicant was first charged in court and remained in custody to date. It is so ordered. Right of appeal explained.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 9TH DAY OF MARCH 2021

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F. GIKONYO

JUDGE

In the Presence of:

- 1. Mr. Kasaso – CA
- 2. Ms. Torosi for DPP
- 3. Applicant in person

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F. GIKONYO

JUDGE