



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL CASE NO. 102 OF 2008

(Coram: Odunga, J)

REPUBLIC.....PROSECUTOR

VERSUS

MUIMI NZALE WAMBUA.....1ST ACCUSED

STEPHEN NZALE WAMBUA.....2ND ACCUSED

RESENTENCE

1. The accused herein, **Muimi Nzale Wambua** and **Stephen Nzale Wambua** were charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. They are alleged to have murdered Kitheka Muthui on the 8th September, 2008 at Kamwa Location, Kitui District, Eastern Province.
2. After hearing the evidence, the Learned Trial Judge, **Makhandia, J** (as he then was) found the accused guilty, convicted them accordingly and sentenced them to death. Subsequently the death sentence was commuted to life sentence.
3. In Machakos Misc. Criminal Application No. 151 of 2018, the accused sought an order for resentencing based on the decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs. R (2017) eKLR**. In that case the court expressed itself as hereunder:

“47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.

[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."

4. On 11th February, 2020, pursuant to the said decision of the Supreme Court, this Court set aside the sentence imposed on the accused persons herein and directed that a resentencing hearing be undertaken. This was based on the position of the Supreme Court in the said **Francis Karioko Muruatetu & Another vs. R** (supra) as read with the Court of Appeal's decision in **William Okungu Kittiny vs. Republic, Court of Appeal, Kisumu Criminal Appeal No. 56 of 2013 [2018] eKLR**, that the Petitioners had a right to move this court to reconsider their sentence.

5. 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 of 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.

6. 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. 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.

7. I must however state that the said reports being reports which are not subjected to cross-examination in order to determine their veracity, are just some of the tools the court may rely on in determining the appropriate sentence. They are therefore not necessarily binding on the court and where there is discrepancy regarding the contents of the reports and information from other sources such as from the parties themselves and the prison, the court is at liberty to decide which information to rely on in meting out its sentence. To rely on the said reports as the gospel truth, in my view, amounts to abdication of the court's duty of adjudication to probation officers. While the same ought to be treated with great respect, it is another thing to accept them hook, line and sinker. They however ought not to be simply ignored unless there are good reasons for doing so.

8. 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.

9. In *Muruatetu Case*, the Supreme Court relied on the case of **Vinter and others vs. 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.

112. Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life

sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in Wellington – a poor guarantee of just and proportionate punishment.”

10. 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. 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.

11. 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 appellant'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.

12. According to the Probation Officer's Report, the circumstances of the offence were that the accused herein and the deceased were kinsmen, the second accused who is the father of the 1st accused being the deceased's first paternal cousin. The offence was as a result of a land dispute between the two families.

13. According to the said report, after the deceased was killed, the accused's home was burnt as a result of which the 1st accused's wife, the mother of the second accused ran away from home in Kauma to a far off place in Kisasi where she purchased land and settled there. At that place the accused persons are unknown and the community there has no problem with them. Apart from the said land dispute, the accused persons do not seem to have had any issues with their community members. Though the family of the deceased is understandably bitter due to the loss of one of their own, it is reported that they are willing to reconcile with the offender's family and live well for the sake of their future relationship which may affect their children. The reconciliation has however not been possible due to the accused persons' incarceration. On the other hand, the accused's family is positive towards their release and wish to have them back and is willing to start the reconciliatory steps and is willing to assist them settle down.

14. During their incarceration, it is reported that the 1st accused joined college and trained as a cobbler grade II and III and also obtained a certificate in Biblical Counselling, Diploma in Biblical Studies, Certificate in Prisoners Journey, Certificate in Resource Oriented Development Initiatives and Certificate in Imarisha Mradi. According to the Prison Authorities, he has reformed and is an active church member and preaches to inmates and encourages them. He is currently 66 years old. The 2nd accused, on the other hand is aged 37 years old and the prison authorities describe him as a disciplined person who is very active in Kamiti Academy Club, Morocco Club, Alaska Football Clubs and is also a rugby player. He has trained in stress management and has reformed. The Report recommended that the current home environment is conducive for their community rehabilitation since it is far from Kauma and the community members have no previous interaction with the accused making community entry easy.

15. I have considered the circumstances in which the offence was committed. I have also considered the Probation Officer's Report, the Report from the Prison as well as the position adopted by **Mr Ngetich**, the learned prosecution counsel. 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."**

16. The accused persons have been in custody since 2008, about 11½ years. Loss of life is, no doubt, a very serious matter. In these circumstances, however, it is highly unlikely, that the accused will commit a similar offence particularly taking into account the fact that their family has since relocated to another far off area. It is clear that the accused have during the period of their incarceration reformed and have engaged themselves in activities meant to assist them in reintegrating with the community. Not only are they well behaved but are willing to reconcile with the family of the deceased who no longer harbour any ill-will towards them and their family is ready to welcome them back into the fold. To my mind the period of incarceration of the accused is sufficient punishment and consequently their incarceration has achieved the objectives of deterrence and rehabilitation.

17. In the premises, it is my view that the accused's incarceration has substantially served the purposes for which imposition of sentences is meant and it is no longer necessary or desirable to continue holding the accused in incarceration. In this case, the victim's family, 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.

18. Accordingly, I hereby resentence the accused to the period that will ensure their immediate release from prison unless they are otherwise lawfully held.

19. It is so ordered.

20. This ruling has been delivered online vide Skype due to the prevailing restrictions occasioned by COVID 19 pandemic.

Ruling read, signed and delivered in open court at Machakos 11th day of June, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Ngetich for the State

Accused in attendance vide Skype

