REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CRIMINAL REVISION NO. 5 OF 2020

(From Original conviction and sentence in Criminal Case No. 2935 of 1996 of the Chief Magistrate's Court at Naivasha)

JAMES MAINA MBUGUA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Background

1. This is an application for revision of the Applicant's sentence.

2. The Applicant's journey in this matter has been long and arduous. He was charged with robbery with violence contrary to **Section 296 (2)** of the **Penal Code** on 17th September 1996. He had been arrested on 13th September 1996 and in fact faced two counts of robbery with violence. The particulars were that he had robbed Isaac Njuguna Mwangi Kshs 3,120/= at Nyamathi area Naivasha. The second count was attempted robbery with violence contrary to **Section 297 (2)** of the **Penal Code**.

3. The Applicant was convicted both on counts and sentenced to death on 5th May, 1999. Dissatisfied, he appealed in the High Court in **HCCRA No. 86 of 1999**. The two Judge bench sitting on appeal dismissed it on 15th May, 2003.

4. He filed an appeal to the Court of Appeal in **Criminal Appeal No.133 of 2003**. Again, he lost the appeal in a judgment dated 24th September, 2004.

5. Whilst imprisoned in Mombasa, and following the Supreme Court decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR**, the Applicant filed High Court (Mombasa) Constitutional Petition No. 13 of 2018. He argued that his rights to fair trial were violated and that he should be re-sentenced. The matter was transferred to Naivasha where the original case was tried.

6. The High Court Naivasha, noting that the Petitioner sought only re-sentencing remitted the matter to the Chief Magistrate's Court for re-sentencing upon hearing the mitigation of the Petitioner.

7. A file in the lower court **Miscellaneous Criminal Application No. 360 of 2019** was opened for the re-sentencing trial. On 19th March, 2019 the Chief Magistrate Naivasha after hearing the Applicant's detailed mitigation rendered himself thus:

> ***"He has been in prison for 23 years. I have taken all these into consideration plus of course the maximum penalty provided for under Section 296 (2) of the Penal Code. I have taken into account the fact the accused has been in remand for 23 years. Bearing in mind all these factors, I hereby sentence the accused to serve a sentence of seven (7) years imprisonment.***

8. By Miscellaneous Criminal Application No. 82 of 2019 in the High Court, the Applicant sought clarification on the sentence of 7 years meted upon him in the Miscellaneous Criminal Application No. 360 of 2019. The High Court ordered that the file be remitted back to the Chief Magistrate:

> ***"For clarification on the sentence and in particular the effective date of commencement and the time/period to be served."***

9. On 23rd September, 2019 the Chief Magistrate clarified that the court had taken into account the period already served and that the

Applicant was to serve seven (7) years imprisonment with effect from 19th March, 2019.

10. It appears that the Applicant then filed, through counsel, High Court Criminal Appeal No. 19 of 2019. He submitted there that: prior to his original conviction in 1996 he had spent 3 years in remand; that after conviction he had been in prison for 20 years and that the trial magistrate did not pay attention to the period he had spent in prison, and now at 50 years cannot possibly reform further.

11. It appears that the appeal was abandoned in favour of filing a Criminal revision case, and so High Court Revision No. 5 of 2020, was filed. This is the file in which counsel is pursuing the revision.

12. For good administrative order, I hereby direct that the file High Court Criminal Appeal 19 of 2019 be and is hereby deemed as closed. Similarly, High Court Miscellaneous Criminal Application No. 82 of 2019, having been spent, is hereby closed.

The Arguments on Review

Applicant's Case

13. The Applicant's submissions may be summarized as follows: -

a) That the period the Applicant spent in custody should have been taken into account on resentencing by the lower court (See **Section 333 (7)** of the **Criminal Procedure Code** and **Judiciary Policy Guidelines**).

b) The Applicant spent 3 years (in actual fact it is 2 years and eight months) in custody from date of his arrest on 13th September 1996 the date he was sentenced on 5th May, 1999.

c) That a prisoner should have a defined prison term upon being sentenced. The present sentence of 7 years has pushed back the applicant's prison term by four (4) years.

d) That the sentence meted is reversible despite **Section 382** of the **Criminal Procedure Code**, because sentencing is an act of discretion. (See **Shadrack Kipkoech Kogo v Rep. Eldoret Criminal Appeal No. 253 of 2003** Court of Appeal).

e) That the court is bound in law to take into account the period of remand custody in a meaningful way. In the case of **Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR** where the Court of Appeal held that: -

> ***"The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."***

f) That the object of sentencing under the 2016 Judiciary Policy guidelines Page 15 paragraph 4.1 are: Retribution, Deterrence, Rehabilitation, Restorative Justice, Community Protection and Denunciation." The Applicant's 24 years incarceration so far shows that he has achieved his uttermost in these categories. This is clearly shown in his achievements in prison disclosed his Prison Reports and Certificates, and in the Probation Officer's Report dated 24th July, 2020. The Probation Report discloses that the community where he lives would have no issues as he committed the offence in another region and most people do not know of his whereabouts.

State's Case

14. The DPP's position is that the re-sentencing should consider the period of remand (**Section 333 (2)** of the **Criminal Procedure Code**); the issues of brutality of the offence; the injuries inflicted; nature of offence; issues of remission; the prisoners conduct during his imprisonment; his reformation, and whether the sentence has served its purpose. DPP cited **Criminal Appeal 36 of 2019 Irene Nduku Ndeto v Republic [2019] eKLR**.

15. I have reviewed the file and the Applicant's previous files, and considered the parties' submissions carefully. I think that what is before me is simply a cry and plea by the Applicant to be shown leniency and understanding for the great strides he has made in his reformation and rehabilitation. He committed the offence when he was just 27 years old and is now 51 years. Thus almost half of his life has been spent in jail, and for that he has shown reformation. His is a plea that justice be tempered with mercy. He seeks to use the law to achieve that goal.

16. The crux of the issue before me is this: The Applicant's conviction for robbery with violence resulted in the death sentence. That

sentence has no remission. He exhausted all his appeal opportunities and lost. All the courts found the Applicant guilty and re-affirmed his conviction and sentence.

17. Upon the advent of the **Muruatetu Case**, a new paradigm in our jurisprudence emerged: that notwithstanding that the death penalty is not unconstitutional and may be imposed, a mandatory death sentence is nevertheless at the discretion of the trial court. Such sentence must take into account a plethora of criteria before being imposed.

18. In its application, the **Muruatetu Case** has led to a substantial upsurge in pleas for re-sentencing in cases where a mandatory sentence has been imposed, but also in respect of other long term sentences. Here, the Applicant is basically urging that having been incarcerated for 20 years as of 2019, the re-sentencing exercise in the lower court leading to his sentence for 7 years from 2019, leads to an excessive sentence considering the milestones he has achieved in his reformation journey.

19. The question is whether this court can intervene.

20. I have carefully considered the Applicant's mitigation and Probation Officer's Report of 24th July, 2020. The mitigating factors highlighted in it are compelling and include:

> ***"The Inmate is currently a peer counsellor at the facility. He champions against the use of drugs. He is currently the chairperson of a Group of Inmates who campaign against use of Drugs and Substances.***
>
> ***Prison authority had no record of indiscipline in his respect. He reported to be well organized, a teacher, a pastor, and a counsellor with a visionary mind."***

21. The Probation report concludes:

> ***"He (Applicant) committed the offence while under the influence of drugs; he displayed a repentant heart and mind…… He acquired several certificates as part of his rehabilitation; this could form a basis of a new establishment and focus in his life. His larger family pleads for his release on account of the period served. They are willing to assist him in re-settling. In view of the underlying mitigating circumstances, we propose to the honourable court to consider reviewing his sentence in leniency."***

22. I am struck at the sheer will of the Applicant to turn-around a single deprecatory and shameful occurrence in his life with dire consequences, into a shining monument of hope and anticipation of a future of splendour. I see that he is a person who would be as useful, if not more in the world outside prison as he has been inside it. He has potential as an anti-drugs campaigner, activist, teacher, counsellor, leader, pastor, trainer. He has plenty of potential, and some to spare.

23. The question niggling in my mind is not whether I can review the sentence meted on re-sentencing by the lower court. Both statutory and inherent jurisdiction are vested in the court. In order to review the sentence, however, it must be shown that the sentencing magistrate exercised his discretion incorrectly, illegally, without propriety or irregularly in terms of **Section 362** of the **Criminal Procedure Code**. From the facts and circumstances of this case, I do not see that such as case has been made out. That is, the magistrate exercised his discretion judiciously, and not capriciously. He took into account the remand custody period. He gave a definite sentence taking into account the mitigation factors.

24. To take into account the period spent in custody means that such period would form part of the entire sentence. So that, the computation by the lower court on re-sentencing appears to be: period in remand (13th September, 1996 to 5th May, 1999) of two (2) years and eight (8) months, plus period served after sentencing (5th May, 1999 to 19th March, 2019) of 19 years and 2 months, plus period added on re-sentencing of 7 years. Thus 2 years 8 months + 19 years 2 months + 7 years = 28 years 10 months.

25. This means that from 5th May 1996, the Applicant's term would terminate on 4th January, 2025 after serving 28 years and 10 months.

26. So the question that now arises in this: For all the rehabilitative effort and good conduct of the Applicant whilst serving his sentence, does he get any benefit? **Section 46** of the **Prison Act** grants powers to the Commissioner for remission of sentences. The provision reads as follows:-

> ***"1. Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by <u>industry and good conduct earn a remission of one-third of their sentence or sentences</u>.***
>
> ***Provided that in no case shall:***
>
> ***i. any remission granted result in the release of a prisoner until he has served one calendar month.***
>
> ***ii. any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under Section 291 (1) of the Penal Code or to be detained during the President's pleasure."***
>
> ***2. For the purpose of giving effect of the provisions of subsection (1), each prisoner on admission shall be credited with the full amount of remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.***

3. A prisoner may lose remission as a result of its forfeiture for an offence against prison discipline, and shall not earn any remission in respect of any period:

(a) spent in hospital through his own fault; or

(b) while undergoing confinement as a punishment in a separate cell.

4. A prisoner may be deprived of remission:

(a) where the Commissioner considers that it is in the interest of the reformation and rehabilitation of the prisoner.

(b) where the Cabinet Secretary for the time being responsible for internal security considers that it is in the interests of public security or public order.

5. Notwithstanding the provisions of subsection (1) of this section, the Commissioner may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special ground." (Emphasis added)

27. The provision allowing remission is apparently inapplicable in cases of robbery with violence pursuant to **Section 296** of the **Penal Code**. However, in the case of **Brown Tunje Ndago v Commissioner General of Prisons [2019] eKLR**, Korir J held that the provision disallowing remission in cases of robbery with violence was unconstitutional. The learned Judge could understand why the sentences persons serving life imprisonment or those detained at the President's pleasure could not benefit from remission: they are indeterminate. The learned Judge then held:

"29. ……I find that the petition herein succeeds to the extent that every convict, whatever offence they are convicted of, serving a determinate, definite or fixed prison term is entitled to remission. Although the Petitioner urged this court to declare Section 46 of the Prisons Act unconstitutional, I find that no case has been made for declaring the entire section unconstitutional. Such a step will end up outlawing remission of sentence which, ironically, the Petitioner is fighting for through this petition.

30. For clarity, the only part of Section 46(1) of the Prisons Act declared unconstitutional is that which denies remission to persons sentenced to imprisonment for an offence under Section 296(1) of the Penal Code." (Emphasis added)

28. I fully agree with the learned Judge in **Brown Tunje** and would adopt the same position. So that, in this case the Applicant would be entitled to the benefit of remission under **Section 46** of the **Prison's Act**. He has a definite sentence of 28 years and 10 months; he qualifies for remission pursuant to the declaration of unconstitutionality of the provision of **Section 46** of the **Prisons Act** that denies remissions to persons sentenced for robbery with violence; and he eminently qualifies in terms of his industry, good conduct and length of time already served, to earn one-third of his sentence in remission. For avoidance of doubt, this court confirms that the Applicant's Probation Report clearly identifies the Applicant's industry and good conduct. The only aspect of industry and good conduct not disclosed is what the Prisons Service itself would report concerning the Applicant's industry and good conduct.

29. I note that a one-third remission on the Applicant's sentence of 28 years and 10 months would be computed as being divided by 3 giving 7 years 3 month's remission. For all practical purposes that would result in the Applicant being freed forthwith on application of full remission. However, his remission was not, and could not be, credited to him on admission to prison.

Disposition

30. Accordingly, the appropriate manner of dealing with the Applicant's situation in light of all the facts and circumstances outlined is, in my view, as follows.

31. Subject to a report being availed by the Prisons Service as to the industry and conduct of the Applicant, this court confirms that the other conditions for remission apply to him.

32. I therefore direct that the Prisons Service do make a report on the Applicant forthwith, which report shall cover:

a) The Applicant's conduct and industry vide **Section 46 (1**) of the **Prisons Act**.

b) Instances, if any, disclosing the Applicant's grounds for forfeiture of remission under **Section 46 (3)** of **Prisons Act**; and

c) Instances, if any, in respect of which the Applicant may be deprived remission under **Section 46 (4)** of the **Prisons Act**.

33. I further direct as follows:

a) That should such report be favourable to the Applicant, he shall forthwith be granted remission.

b) In light of the fact that the Applicant could not earn one-third of his remission at the commencement of his sentence, which was then indeterminate, he shall be entitled to be set at liberty forthwith unless otherwise lawfully held.

c) The Prison Service shall report back to this court within fourteen (14) days.

Administrative directions

34. 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 Zoom 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.

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

36. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 13th Day of October 2020

RICHARD MWONGO

JUDGE

Attendance list at video/teleconference:

Delivered in the presence of:

1. Ms Maingi for the State

2. Mr. Nyandieka holding brief for Mwongeli for the Applicant

3. James Maina Mbugua - Applicant present in Maximum Prison

4. Court Clerk - Quinter Ogutu