REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

PETITION NO.37 OF 2018

ORIGINAL PETITION NO. 7 AND 8 OF THE 2018

KAZUNGU KASIWA MKUNZO ..... PETITIONER

VERSUS

REPUBLIC ..... RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Mwangereka for the state

RULING

What is before me is a ruling on re-sentencing for the offence of robbery with violence contrary to section 296/2 of the Penal Code. Following the conviction of the accused after a full hearing was convicted and sentenced to death.

Upon conviction and in order to assist the Court in reaching an appropriate sentence, the Court called for mitigation from the offender, the Pre-sentence Report, Probation Department in accordance with section 137I of the CPC. The said section provides as follows:

> ***"137I. Address by parties***
>
> ***(1) Upon conviction, the court may invite the parties to address it on the issue of sentencing in accordance with Section 216.***
>
> ***(2) In passing a sentence, the court shall take into account—***
>
> > ***(a) the period during which the accused person has been in custody;***
> >
> > ***(b) a victim impact statement, if any, made in accordance with Section 329C;***
> >
> > ***(c) the stage in the proceedings at which the accused person indicated his intention to enter into a plea agreement and the circumstances in which this indication was given;***
> >
> > ***(d) the nature and amount of any restitution or compensation agreed to be made by the accused person.***
>
> ***(3) Where necessary and desirable, the court may in passing a sentence, take into account a probation officer's report."***

In ***Republic v. Philip Muthiani Kathiwa***, **Machakos High Court Criminal Case No. 14 of 2015**, the Court considered the issue of appropriate sentence in a case of manslaughter upon a plea of guilty and said:

> ***"The Principles***
>
> ***3. The objects of a sentence is, primarily, to punish for an offence and to reform the accused in such manner as to, as appropriate in the circumstances of the case, deter the repetition of the offence by the accused and others taking into account the moral blame-worthiness of the accused, the prevalence of the crime and the situation of the accused himself.***

4. Section 17 of the Penal Code provides that criminal responsibility for the use of force in the defence of person or property shall be determined in accordance with principles of English Common Law. The question in every case is whether the force used by the accused in self-defence is, in the circumstances of the case, excessive. See Mokwa v. R (1976-1980) KLR 1337. The accused herein acted on self-defence when he tried to defend himself and others who the deceased while drunk had attacked by with a panga. The use of the poisoned arrow on the deceased, in the circumstances if this case, was excessive force, and the accused was guilty of Manslaughter.

5. In considering the appropriate sentence, same offences should attract similar consistent penalties. In Andrew v. R (1976-1980) KLR 1688, in a case where the appellant and his co-accused had in a fight started by them the deceased was stabbed, the Court of Appeal found manifestly excessive and reduced a sentence of imprisonment for 11 ½ years to imprisonment for a term of 5 years. In Orwochi v. R(1976-1980) KLR 1638, the Court of Appeal reduced as manifestly excessive the sentence of 4 years imprisonment for an appellant who, in circumstances similar to this case, had in self-defence during an ensuing struggle stabbed the deceased using the panga by which the deceased had attacked him, to such sentence as ensured the immediate release of eh appellant a young man aged 25 who had been in custody for 15 months before the sentence in the trial court and six months before appeal was heard and determined.

6. The decision of the Court of Appeal in Muoki v. R (1985) KLR 323 (Madan, Kneller JJA. & Platt, Ag. JA) is relevant. The Court approved a sentence of 3 ½ years for manslaughter as not being manifestly excessive as to warrant interference by the Court of Appeal and also approved the practice, then, of courts taking into account the period that the accused had been in remand in considering what term of imprisonment to impose. The practice of accounting for time spent in custody was given statutory backing in the 2007 amendment to section 333 (2) of the Criminal Procedure Code (Act No. 7 of 2007) which inserted a proviso that;

> ***"Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."***

Findings of the Court

The accused's mitigation according to his Advocates, Musinga & Company, is that he is a first offender, that his conduct was reasonable and sober prior and subsequent to the perpetration of the offence, that the accused is remorseful of his actions and that the lack of proximity to quality healthcare service also contributed to the death of the victim. That court should also take into account the relationship and age difference between the victim and the offender, the offender's responsibility to third parties, the period the offender has served in detention, the age of the offender, the nature and circumstances of the weapon used by the offender, the conduct of the offender during the trial and the confession of the offender under oath. The Counsel for the accused suggested that the accused be given a non-custodial sentence or if the court is inclined to mete a custodial sentence, a single year of imprisonment less the month of pre-bond detention suffices.

The pre-sentence report confirmed that the victim and the accused were longtime friends. It's disclosed an altercation that ensued between the victim's family and the accused a year before the incident concerning a lost cache of timber which had been bought by the victim's mother which the offender and his colleagues confiscated and allegedly sold later.

On this issue no evidence on motive was adduced by the prosecution. Further that the accused was known to be of good behavior unless when he has taken some alcoholic drinks. When he is drunk, he would go to the extent of threatening residents with death by bullet.

Most importantly, it is alleged that the accused kept on threatening to cause more harm to the victim's family to a point where they had to report to Mpeketoni Police Station vide: **OB 32/20/04/2014**. The victim's family has also suffered given that the deceased was their most active and dependable son.

On the other hand, the pre-sentence report acknowledges that the accused was the soul breadwinner of his family, his children were out of school and that he seems remorseful and regrets his actions.

The maximum sentence for manslaughter is imprisonment for life. This court has to balance the mitigating and aggravating factors herein before arriving at an appropriate term of years of imprisonment. The apparent aggravating fact is that a life was lost by the actions of the accused.

> ***"The right to life is protected under Article 26 of the constitution and therefore a person shall not be deprived life intentionally except to the extent authorized by this constitution or other written law."***

The accused alleged self-defense and mistake of fact which were all found to be unavailable for him. It is noted that the accused was allowed to use the firearm to kill the hippopotamus as that was in the course of the problem in animal control. He was also allowed under the law to use the firearm in self-defense or in defence of another officer or another person as the Wildlife Conservation and Management, 2013 Act or the Penal Code but to the extent that he should not inflict greater harm that threatened by the aggressor.

I have noted that there was no imminent danger posed to him or his colleagues by the crowd pressing for the caucus prior to the incident. Both the prosecution and defence evidence does not disclose that the people at the scene of the crime intended to cut each other when sharing the meat.

Therefore, there was no satisfactory justification or excuse for the use of the firearm at the time the deceased was badly injured.

The accused is someone trained to ensure security and conservation of life and endowed with skill on the use of the firearm. His failure to

ascertain whether he had emptied his riffle of live bullets before affixing the BFA, which exploded and caused the deceased's death serves as proof of negligence on his part. The accused himself affirmed that he fired at the crowd instead of firing in the air to scare the crowd.

There is no doubt whatsoever that the accused's actions or omissions which were unlawful, caused the death of the deceased. If it were not for his unlawful actions or if he had practiced due diligence, the deceased's untimely death could have been avoided.

It is noteworthy that when passing a sentence, the court must look at the objective to be achieved. Whether deterrence, public protection or rehabilitation of the offender. Guided by these objectives, courts must first of all have regard to the nature and circumstances of the offence, personal circumstances of the offender, the victim and the public interest. In simple terms, courts look at the aggravating and the mitigating factors of the offence to come up with a proportionate sentence.

The sentencing court must therefore weigh the two and come to an informed conclusion as to the type of sentence to impose.

Having taken into account the victim impact assessment report, the pre-sentence report, the submissions and mitigation tendered by the counsel for the accused and the aggravating factors of this matter, I hold the view that aggravating factors to weigh any mitigation by the accused.

I have taken into account the fact that this is a matter which involves the robbery with violence as a result of the accused's actions or omission.

I have also considered the petitioners were in remand custody before conviction. After conclusion of the trial and death penalty imposed. From the record the accused was in remand for a period of 3 years as at 16th January, 2003. He was sentenced for the offence of Robbery on the same date which he served up to date under the death penalty. In total the petitioner served 19 ½ years under the **Principle Muruatetu** the death sentence is hereby set aside substituted with the period of 19 ½ years' imprisonment. As the petitioner has already served it is found to be sufficient punishment of the offence in view of the mitigation.

Accordingly, petition on conviction dismissed sentence allowed to the period served. In the premises the petitioner is set at liberty unless otherwise lawful held.

This period has taken into account the pre-detention of the accused before he was released on bail as provided for under **Section 333(2)** of the Criminal Procedure Code.

DATED, DELIVERED AND SIGNED AT MALINDI THIS 17TH DAY OF JULY 2019

……..

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangereka for the state

2. Appellant present in person