



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL CASE NO. 44 OF 2008

(CORAM: ODUNGA, J)

REPUBLIC.....PROSECUTOR

VERSUS

GEOFFREY MUNYAO NGUKU.....ACCUSED

SENTENCE

1. The accused herein, **Geoffrey Munyao Nguku** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on the 31st day of July, 2007 at Kyaani Village Iiyani sub-location, Kola Location of Machakos District within the Eastern Province, the accused murdered **Philip Ngui Mwamote** (deceased).

2. After hearing the evidence, the Learned Trial Judge, **Mutende, J** found the accused guilty, convicted him accordingly and sentenced him to death. His appeal to the Court of Appeal vide Criminal Appeal No. 32 of 2016 was unsuccessful. However, based on the decision of the Supreme Court in Petition Nos. 15 and 16 of 2015 – **Muruatetu & Others vs. Republic**, this Court on 20th September, 2018 set aside the death sentence imposed on the accused and directed that a sentence re-hearing be undertaken. This decision is therefore restricted to resentencing only.

3. The prosecution's case in summary was that on 31st July, 2007 the appellant and the deceased attended a clan meeting at which the deceased was the chairman. The meeting was called to resolve a dispute between the appellant's wife and one **Dorothy Musyimi**. When the appellant arrived at the meeting he became troublesome and was asked leave which he did only shortly to return and stab the deceased leading to his death. The following day the accused was found hiding at a cousin's house and he was apprehended after which he led the police to where the murder weapon and the clothes he wore on the date of the murder were recovered.

4. In his evidence the accused confirmed having attended the said meeting and that the parties to the dispute were asked to leave briefly and that he too left. Upon his return he was told that the parties had reconciled and that he was required to give two bulls to be slaughtered for the clan members for attendance and that his pleas for forgiveness fell on deaf ears forcing him to leave. That decision prompted PW1 to order clan security personnel to arrest him and that upon his arrest, the deceased on seeing him being tortured intervened to rescue him. According to the accused, he and the deceased were shoved aside forcing them to fall on utensils which included knives and in the scuffle the deceased sustained injuries from which he died. They then helped the deceased to the roadside from where they got transport to the hospital. The following day he was arrested at his cousin's house where he had spent the night after he went to purchase doors for his sons in a nearby trading centre. He however denied that he fled and went into hiding. His defence was however rejected with the Court of Appeal terming it as "incredible".

5. According to **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015:**

“[71] To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.

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. As appreciated by the Supreme Court in *Muruatetu Case* (supra):

“Comparative foreign case law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the objectives of sentencing. In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR*, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.” The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 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.”**

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict.”

7. 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.

8. In its decision the Supreme Court referred to Article 10(3) of the Covenant stipulates that—“*[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.*” 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 has 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. The Privy Council in ***Spence vs. The Queen; Hughes vs. the Queen (Spence & Hughes)*** (unreported, 2 April 2001) (Byron CJ) was of the view that:

“In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty.”

10. It was in light of the foregoing that I directed that a probation officer’s report be prepared and filed and the said directions were duly

complied with. In the said report, the Probation Officer found that the accused is a distant relative of the deceased and they belonged to the same clan. While the deceased was a respectful member of the community and the chairman of the clan, the accused was a very pushy person who always wanted things to go his way. As a result, he was not in good terms with the deceased and the accused had initially threatened to kill the deceased.

11. According to the report the accused is 55 years old married with one wife with whom they were blessed with seven children and five grandchildren. According to the said report, the accused is not well talked of by both his family and community members. He is termed as arrogant and pushy and used to deal in illicit brews and was associated with stock theft. According to the report, no reconciliation has taken place between the two families and there is still rivalry between them. Though the accused's relationship with his siblings was not very good, they empathise with him as a sibling.

12. The report however indicated that the victim's family members comprising of his wife and children are still bitter and are satisfied with the sentence meted to the accused and that they fear for their lives as he was reported to have sent threats to those who aided his arrest. Accordingly, the deceased's family were opposed to the review of his sentence. Similarly, the community has a negative attitude towards the accused having been robbed of a respectful community leader at the hands of the accused. They accordingly fear for their safety and that of the victim's family.

13. According to the report, the accused was in remand for close to eight years and since his sentence, has only served four years.

14. The report therefore concluded that the accused requires counselling using cognitive behavioural theory to address his personality disorder and that institutional rehabilitation is the best at present for his safety.

15. It however was not clear whether the Probation Officer visited the prison where the appellant is being held in order to get the latest information concerning the accused. In view of what I have stated hereinabove with respect to the considerations that the court ought to take into account in resentencing, it is my view that it is important that the probation officer's report ought to incorporate the opinions of the prison authorities as well. This is even more crucial taking into account the fact that in most cases, the views of the victim's family and those of the accused's are unlikely to be unbiased hence the court may not get a true picture of the accused's person's true status.

16. Mercifully, there is a report by the Officer in Charge, Machakos main Prison in which it is indicated that the accused is well behaved, disciplined and has attained Carpentry Grade II, Theology Diploma level, Certificate in Alternative to Violence Program and has undertaken a course in Resource Oriented Development involving soap and fruit juice making. According to the said report, the accused is of clean prison record having not offended against prison discipline which is worthy emulating by fellow inmates and is deployed at the Prison Documentation Office.

17. In his mitigation, the accused denied the statement in the probation officer's report that he had many convictions. According to him, he has never been convicted of any offence and this was his first conviction. He stated that from 1999-2006, he was a clan elder for Kyaani Village having been elected by the community while between 200-2006 he was a signatory of Kyaani Primary School elected by members of the community. Between 2005-2006 he was elected in the locational committee as a Clerk of World Food Programme. He therefore sought for leniency for what he did and begged for forgiveness from the court and the victim's family. He stated that when he was arrested, his children were in school and his wife was unable to educate them as a result of which they dropped out of school. Presently, he has only one child in primary school who was born three days after his arrest and who has never had fatherly care.

18. The accused stated that since his conviction and sentence, he has undergone training with Emmaus Bible School and obtained a certificate, Advanced Diploma as well as a certificate with Resource Oriented Development Initiatives Kenya where he trained to make detergents, jam fruits etc. According to him, if given another chance he will start a programme for training the youth to avoid getting involve in crime. While in prison, he obtained a certificate of Man of Honour and also obtained a certificate for Alternative Violence Project where he learnt conflict resolution apart from training in carpentry and joinery up to Grade III. He also obtained a certificate in Music and produced a CD known as "*Yesu Gerezani*". While in jail, he got high blood pressure. He also disclosed that he obtained a recommendation from the Officer in Charge Machakos Prison as well as from the Catholic Church, Machakos Main Prison. He stated that he was arrested in 2nd August, 2007 and was sentenced on 27th January, 2015 hence urged the court to take into account the period he has been in custody.

19. There is a report from the Catechist in Charge of the Roman Catholic Chaplaincy Machakos Prisons in which it is stated that the accused is the oldest member of the prison church and is well behaved, disciplined and attained a number of church sacraments being also the church chairman, choir member and choir master.

20. On her part **Miss Mogoi**, learned prosecution counsel submitted based on the Probation Report the prison authorities were not interviewed and that the report mainly dwelt on the accused's past records. She however noted that in this case a life was lost and the court should consider the circumstances under which this occurred as well as the community's attitude since no reconciliation has been commenced. The court was therefore urged to consider both the accused and the family of the victim in meting the appropriate sentence.

21. I have considered the circumstances in which the offence was committed and the effect on the family and the community of the same. I have also considered the Probation Officer's Report as well as the oral mitigation made before me as well as the position adopted by **Ms Mogoi**, the learned prosecution counsel. As stated above, and as appreciated by **Ms Mogoi**, the Probation Report is not of much assistance as regards the accused person's conduct in prison after his conviction and sentence. The only available material along those lines are the various reports from the Prison and the Church which paint a picture of a person who has, since his incarceration reformed and has become an example to other prisoners. While the attitude of the victim's family is understandable, his incarceration seems to have achieved at least one objective of rehabilitation and retribution though there is no evidence of restorative justice having been achieved so far.

22. The accused has been in custody since 2nd August, 2007, a period of almost 12 years. He is now 55 years. This court cannot however close its eyes to the fact that an innocent life was lost and the community's attitude towards the accused remains repulsive.

23. Taking into account all the circumstances of this case, I hereby sentence the accused to serve 16 years imprisonment the said sentence to run from 2nd August, 2007. Upon his release from prison, the accused will be on probation for a period of 3 years for the purposes of reintegration into the community and possibly pursuit of restorative justice.

24. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 22nd day of July, 2019.

G V ODUNGA

JUDGE

In the presence of:

The accused

Miss Mogoi for the State

CA Geoffrey