REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MURDER CASE NO. 19 OF 2000

(Coram: Odunga, J)

REPUBLIC……..PROSECUTOR

VERSUS

MUEMA MAKALI……..……..…..…….……ACCUSED

RESENTENCE

1. The accused, **Muema Makali,** 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 19th August, 1999 at Kisaani Village in Machakos District within the Eastern Province, he murdered **Catherine Mbithe Nzioki**. In count two he was alleged to have murdered **Fidelis Musau** on the same date while in Count 3 he was alleged to have murdered **Kennedy Nzioki**.

2. After hearing the evidence from the prosecution and the defence, the Learned Trial Judge, **Nambuye, J** (as she then was) found that the circumstances and the entire evidence manifested by the nature of injuries inflicted on the victim that is hitting and cutting and then burning the house in which the victims were to ensure there was no scape, showed that the accused had an intention to kill and did kill the victims. It was the learned Judge's holding that the accused intended the consequences of his actions and found him guilty as charged in all the three counts and convicted him accordingly. He was accordingly sentenced to death.

3. His appeal to the Court of Appeal vide Criminal Appeal No. 219 of 2004 was however dismissed in its entirety on 10th October, 2011. It is however to be noted that the death sentence imposed on him has since been commuted to life sentence.

4. Based on the decision of the Supreme Court in Petition Nos. 15 and 16 of 2015 – **Francis Muruatetu & Ors vs. Republic**, this court in **Misc. Criminal Aplication No. 164 of 2018 – Muema Makali vs. Republic** on 13th November, 2018, set aside the death sentence meted against him and directed that a resentencing hearing be undertaken. This decision is therefore restricted to resentencing only.

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 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 purpose 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. 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.

7. 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."

8. 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.

9. 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 society by incapacitating the offender.

10. 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."

11. 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, it was found that the accused had worked for the deceased's parents as a farm assistant from February, 1997 to August 1998 when he left. In February, 1999 he returned and continued working till August of that year. On the material day, the accused ferried his employer's wife to the market on a bicycle and on his return, he sent one of the deceased to the nearest kiosk for refreshments which he distributed to the victims while in the main house before locking the door from the inside while armed with two *pangas*. When confronted with the deceased in Count 1 upon being suspicious, the accused attacked him with a *panga* and proceeded to do the same to the two other victims. After that he set the house on fire and burnt the victims destroying all the family property. He then set the kitchen cum bedroom on fire before escaping through the window and attempting to commit suicide.

12. From the accused's own statements his relationship with the victims was cordial though he had an issue with his employer regrading non-payment of Kshs 4,500/- in salary arrears. According to the accused, the offence was caused by drug abuse and frustrations arising from the failure by his employer to pay him.

13. From the report, the accused dropped out of school due to truancy and possesses no technical skills. From his young age he was known to abuse alcohol and smoked bhang. Though both the families of the victim and the accused are distant relatives and are in talking terms, the issue of reconciliation and compensation has never been addressed due to reluctance on the side of the accused's family to do so. Accordingly, the victims' family is still bitter that despite the victim's family having broached the issue of reconciliation and compensation, the accused's family have not taken up the offer. The community is still in shock and would not wish to see the sentence revised while the accused's family is positive towards him and would not mind the said sentence being revised despite having not visited him while in prison after his conviction in 2003.

14. According to the Officer in Charge of Machakos Main Prison, the accused holds grade three in carpentry and has displayed a lot of commitment, dedication, patience and obedience in his duly duties. He has also proved to be responsible and able to work under minimum supervision and to follow all instructions given to him. The prison authorities therefore welcomed any assistance that may be given to him.

15. In this case as appreciated by the Court of Appeal in its judgement in Criminal Appeal No. 219 of 2004:

> **"The appellant murdered the three innocent children, left in his care by their father, in a most brutal manner, hammering their heads and leaving their bodies to burn beyond recognition."**

16. In his mitigation, the accused asked the court for forgiveness stating that he will never repeat the offence. According to him, during his incarceration he has learnt from his mistake. He urged the Court in determining an appropriate sentence to consider the remission and the period he has served which ought to run from the date of his arrest on 19th August, 1999, having therefore served a total of 19 years as well as the fact that prior to the offence he was in cordial relationship with the victims and this was his first offence.

17. **Miss Mogoi**, the Learned Prosecution Counsel, on the other hand, reiterated that the accused was charged with three counts of murder of three innocent children in cold blood in a most inhuman manner with utmost cruelty. He not only attacked them with a *panga* in the house but set their house on fire to ensure that they were dead based on the flimsy ground that their parents owed him money. According to learned prosecution counsel, that did not warrant the taking away of the lives of the innocent children who trusted and believed the accused. It was her view that the accused's action was inhuman and unacceptable and deserves no mercy as he himself showed no mercy to the children. In her view, it is best that the children get justice by the accused being locked in for life more so as the accused has not taken any steps to reconcile with the family of the victim. The court was therefore urged to confirm the sentence as a deterrence to others.

18. I have considered the circumstances in which the offence was committed and the effect on the family and the community of the same. It is clear that the deceased were killed in the most brutal and inhuman manner. In killing the deceased, the accused did not set out to revenge for the non-payment of his alleged salary arrears since the offence was not directed at his perceived culprit but at innocent children who held him in trust. This is not a case where the accused set out to cause grievous harm but one where he set out to cause death in a most chilling manner.

19. In my view this was a most brutal murder; a murder most foul, a murder that one cannot imagine was committed by humane person. While the accused states that he is remorseful, no steps in that direction have been taken. To the contrary despite efforts by the family of the victim to reconcile with his family, his family seems reluctant to do so. Without practical signs of remorse on the part of the accused and considering the bitterness that the family of the deceased and the community understandably have against the accused, it is neither in his interest nor in the interests of the community or the society that he be released back to the society as yet.

20. In the case **R vs. Scott (2005) NSWCCA 152** **Howie, Grove** and **Barr JJ** stated:

> **"There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed…One of the purposes of punishment is to ensure that an offender is adequately punished…a further purpose of punishment is to denounce the conduct of the offender."**

21. In a New Zealand decision namely **R vs AEM (200)** it was decided:

> **"… One of the main purposes of punishment…Is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment."**

22. In **R Harrison (1997) 93 Crim R 314** it was stated:-

"Except in well- defined circumstances such as youth or mental incapacity of the offender…Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may who otherwise would be tempted by the prospect that only light punishment will be imposed."

23. The accused is currently serving life sentence. 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."

24. 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. While I am not at all convinced that the accused has sufficiently reformed and that his release back to the society will do him any good considering the attitude of the community and even his family, from the Probation Report, the family of the victims seems willing to reconcile with his family if his family shows willingness to do so.

25. I am therefore of the view that a sentence of 40 years less the 11 years the accused has served would be the appropriate sentence since it is not alleged that he is a repeat offender. He is therefore sentenced accordingly. The said sentence will run from 19th August, 1999.

26. The accused has 14 days right of appeal on the sentence.

27. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 19th day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

The accused in person

Miss Mogoi for the State

CA Geoffrey