REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 64 OF 2008

(Coram: Odunga, J)

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL PARAMWEYA & 2 OTHERS.....ACCUSED

RESENTENCE

1. The accused herein, **Samuel Paramweya,** 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 12th January 2007, at Makandara Township of Athi River Location in Machakos District within Eastern Province, he jointly with others murdered **Mpavia Ole Maithi**. His co-accused were acquitted after the close of the prosecution's case based on the fact that they had no case to answer.

2. After hearing the evidence from the prosecution and the defence, the Learned Trial Judge, **Jaden, J** found the accused guilty, convicted him accordingly and sentenced him to death which in the court's view was the lawfully prescribed sentence. His appeal to the Court of Appeal vide Criminal Appeal No. 30 of 2016 was withdrawn on 30th October, 2018 in order to pave way for his mitigation and resentencing based on the decision of the Supreme Court in Petition Nos. 15 and 16 of 2015 – **Francis Muruatetu & Ors vs. Republic**.

3. 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. 216 of 2018 – Samwel Paramweya vs. Republic** on 27th February, 2019, set aside the death sentence meted against him and directed that a resentencing hearing be undertaken. This decision is therefore restricted to resentencing only.

4. 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.

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:**
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> ***"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 and the deceased were friends working in the same locality. The circumstances of the offence, according to the accused were that the deceased borrowed some money from the accused and when the accused asked for the refund of the same, the deceased became rude. After the deceased had gone back to his place of work, the accused followed him and an argument ensued which led to a physical fight and the eventual death of the deceased. According to the said report,

anger may have triggered the accused in committing the offence.

11. From the report, the accused who is aged 35 years is single and has no dependants and was reported to be the only child of his parents. According to the report, the accused is a cunning and dishonest person who gave misleading information to the Probation Officer regarding his background. As a result, his home environment could not be established. He was unknown at the area which he disclosed as his home area and the community disclosed by him had no knowledge about him. Similarly, even the persons he disclosed as his parents were unknown to the community. The prison records indicated that though he was earlier attached to the industry section, he attempted to escape on 13th November, 2017 prompting the prison authorities to keep him under isolation.

12. On behalf of the accused, it was submitted by **Mr Muthama** that the accused has been in custody since 2008, 11 years down the line. It was submitted that the accused is remorseful and that the offence was committed in the fit of anger. According to learned counsel the accused has undergone counselling and has been looking for the family of the deceased for amends but the family could not be traced. According to learned counsel, the accused is not a threat to the community and being 35 years old, has a life to look forward to. Being a remorseful first offender, the court was urged to consider the period served and to release him.

13. On her part **Miss Mogoi**, learned prosecution counsel urged the court to consider the fact that a life was lost and that although the accused acted in anger, he had the option of walking away instead of killing the deceased. Though the accused has been in custody for 11 years, it was submitted that he has learnt nothing. He is indicated as dishonest and gave misleading information about his family. He has also attempted to escape from custody implying that he has not reformed. The court was therefore urged to let him remain in custody until he reforms. Since the accused's family members were never traced there is no indication whether they are willing to take him back.

14. The court was therefore urged, based on the criteria set in ***Muruatetu Case,*** to consider the accused's conduct and mete out an appropriate sentence in the circumstances.

15. I have considered the circumstances in which the offence was committed, the relationship between the deceased and the accused, the accused's conduct and the submissions made. From the judgement, it was found that the offence was committed in a very brutal manner involving the gouging out of the deceased's eyes. Accordingly, the offence was committed in the circumstances that were meant to inflict maximum pain on the deceased. From the report it is clear that the accused's incarceration has not reformed him and instead of being rehabilitated, the accused has while in custody attempted to commit another offence – escape from lawful custody. For reasons based known to him, he has misled the Probation Officer regarding his background and his family whereabouts.

16. However, the accused is a first offender. In **Charo Ngumbao Gugudu vs. Republic [2011] eKLR**, the Court of Appeal held that:

> **"It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged. In this appeal, the appellant was a first offender aged about 22 at the time of the offence. It is true that the complainant suffered serious injuries but it is equally true that the appellant was provoked at the time that he hit the complainant. There was no basis for the finding made by the trial magistrate and upheld by the superior court, that the complainant was *"completely mentally disabled"."***

17. As was held in **Bachan Singh vs. The State of Punjab (Bachan Singh) Criminal Appeal No. 273 of 1979 AIR (1980) SC 898** a decision cited in the **Muruatetu's case** (supra):

> **"It is only if the offense is of an exceptionally depraved and heinous character, and constitutes on account of its design and manner of its execution a source of grave danger to the society at large, the Court may impose the death sentence."**

18. Similarly cited was the decision of the Privy Council in **Spence vs. The Queen; Hughes vs. the Queen (Spence & Hughes)** (unreported, 2 April 2001) where **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."**

19. In the premises, considering that the accused though a first offender has not been sufficiently rehabilitated, I sentence him to 25 years' imprisonment. Pursuant to section 333(2) of the ***Criminal Procedure Code***, the said sentence will run from 21st July, 2008.

20. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 18th day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Muthama for the accused

Miss Mogoi for the State

CA Geoffrey