REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 142 OF 2018

(Coram: Odunga, J)

JOSEPH MUSYOKI……..……APPELANT

VERSUS

REPUBLIC……..…….……RESPONDENT

(Being an appeal from the resentence of Hon. C. K. Kisiangani, SRM in Machakos Chief Magistrate's Court Criminal Case No. 816 of 2006)

BETWEEN

REPUBLIC…….PROSECUTOR

VERSUS

JOSEPH MUSYOKI..……...…….…..……..ACCUSED

JUDGEMENT

1. The Appellant herein, **Joseph Musyoki,** together with **Kimuyu Mutisya** were charged before the Chief Magistrate's Court at Machakos with Robbery with Violence, contrary to section 296(2) of the ***Penal Code.*** The particulars were that on 29th April, 2006 at [particulars withheld] Estate Athi River Township, Athi River Division in Machakos District they with others robbed **FM** of properties valued at Kshs 5,200/= and at or immediately before or immediately after the said robbery used personal violence against the said complainant. They also faced a second count of rape contrary to section 140 of the ***Penal Code*** that on the same day at the place they unlawfully had carnal knowledge of the said complainant without her consent. To that count was an alternative charge of indecent assault on a female contrary to section 144(1) of the ***Penal Code***.

2. After hearing, the appellant herein was convicted of the offences of robbery with violence and indecent assault on a female while his co-accused was acquitted. In sentencing the appellant to death in count 1, the learned trial magistrate noted that that was a mandatory sentence. In respect of count 2 the appellant was sentenced to 5 years imprisonment. The appellant appealed all the way to the Court of Appeal but in its judgement in Criminal Appeal No. 22 of 2013, the said court dismissed the appeal. However, from the probation officer's report, the said sentence has since been commuted to life sentence.

3. Pursuant to the decision of the Supreme Court in Petition Nos. 15 and 16 of 2015 – **Muruatetu & Others vs. Republic**, this Court set aside the death sentence imposed on the appellant and directed that a sentence re-hearing be undertaken by the Chief Magistrate's Court. Following the said proceedings, the appellant was on 10th December, 2018 sentenced to 40 years imprisonment. In making that decision the learned trial magistrate stated that she had considered the mitigation as well as the probation officer's report.

4. This decision is therefore restricted to resentencing only. It is important to point out at the outset 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 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. To that list I would add whether the accused has taken steps towards reconciling with the victim or the family of the victim which ought to be promoted under Article 159(2)(c) of the Constitution.

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. I must however state that the probation report being a report which is not subjected to cross-examination in order to determine its veracity, is just one of the tools the court may rely on in determining the appropriate sentence. It is therefore not necessarily binding on the court and where there is discrepancy regarding the contents of the report and information from other sources such as from the parties themselves and

the prison, the court is at liberty to decide which information to rely on in meting its sentence. To rely on the probation report as the gospel truth, in my view, amounts to abdication of the court's duty of adjudication to probation officers. While the report of the probation officer ought to be treated with great respect, it is another thing to accept it hook, line and sinker. It however ought not to be simply ignored unless there are good reasons for doing so.

10. 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.

11. 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."**

12. 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.

13. 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."**

14. It was in light of the foregoing that the learned trial magistrate must have 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 appellant is aged 34 years old and that at the time of the commission of the said offence both the appellant and the complainant were drunk. It was noted that the appellant has strong familial ties and that his relatives have been helping him in prosecuting the case and have been visiting him in prison. It was noted that he is popular in Athi River amongst his peers and fellow residents.

15. As regards the attitude of the victim, it was reported that the victim who was in touch with the appellant's family members and had a cordial relationship with his family, recommended that the appellant's life sentence be commuted to a lesser sentence including being equated to the period already served. It was the victim's belief that the appellant had suffered enough for the anguish he caused her.

16. The appellant's family also desired that the appellant's sentence be commuted to a lesser sentence considering the long period that the appellant had served and the circumstances of the offence and the family was willing to help him resettle and get reintegrated back into community life where he can apply the carpentry and theology skills acquired in prison.

17. On the part of the community, the appellant was described as a polite man with no previous records. To the community and the administration, the real culprits of the offence ran away from the scene of crime leaving the appellant who was too drink to linger at the scene.

18. It was the recommendation of the probation officer that the appellant's sentence be commuted to a lesser sentence.

19. I have considered the circumstances in which the offence was committed. 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. I associate myself with views of **J. Ngugi, J** in **Benson Ochieng & Another vs. Republic [2018] eKLR** that:

"Re-phrasing the *Sentencing Guidelines*, there are four sets of factors a Court looks at in determining the appropriate custodial sentence after determining the correct entry point (which, as stated above, I have determined to be fifteen years imprisonment). These are the following:

a. Circumstances Surrounding the Commission of the Offence: The factors here include:

i. Was the Offender armed? The more dangerous the weapon, the higher the culpability and hence the higher the sentence.

ii. Was the offender armed with a gun?

iii. Was the gun an assault weapon such as AK47?

iv. Did the offender use excessive, flagrant or gratuitous force?

v. Was the offender part of an organized gang?

vi. Were there multiple victims?

vii. Did the offender repeatedly assault or attack the same victim?

b. Circumstances Surrounding the Offender: The factors here include the following:

i. The criminal history of the offender: being a first offender is a mitigating factor;

ii. The remorse of the Applicant as expressed at the time of conviction;

iii. The remorse of the Applicant presently;

iv. Demonstrable evidence that the Applicant has reformed while in prison;

v. Demonstrable capacity for rehabilitation;

vi. Potential for re-integration with the community;

vii. The personal situation of the Offender including the Applicant's family situation; health; disability; or mental illness or impaired function of the mind.

c. Circumstances Surrounding the Victim: The factors to be considered here include:

i. The impact of the offence on the victims (if known or knowable);

ii. Whether the victim got injured, and if so the extent of the injury;

iii. Whether there were serious psychological effects on the victim;

iv. The views of the victim(s) regarding the appropriate sentence;

v. Whether the victim was a member of a vulnerable group such as children; women; Persons with disabilities; or the elderly;

vi. Whether the victim was targeted because of the special public service they offer or their position in the public service; and

vii. Whether there been commitment on the part of the offender (Applicant) to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime."

20. The accused has been in custody since 30th April, 2006, a period of over 13 years. Whereas this was partly a gender based violence crime, it seems that some steps towards reconciliation have been taken leading to the victim forgiving the appellant and recommending that he be released based on the period already served. It is clear that the accused has during the period of their incarceration reformed and has while in prison engaged in attaining skills necessary for him to take care of himself if released from prison. Both the family and the community including the provincial administration have no issue with his release. The offence itself seems to have been committed under the influence of alcohol. While that is not an excuse for one to commit an offence, it is a mitigating factor since one must distinguish the said circumstances from a situation where one sets out to waylay a victim and proceeds to commit an offence. This was the position of the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015,** where it expressed itself as hereunder:

"Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity…To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial…It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness…Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict."

21. In the circumstances of this case, it is my view that the accused's incarceration has served the purposes for which imposition of sentences is meant. It is my view that once the sentence imposed on an accused has met the objectives of retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation, it is nolonger necessary or desirable to continue holding the accused in incarceration. In this case, the victim's family, the community and the accused's family as well as the prison authorities are agreed that it is nolonger in their interest to keep the accused incarcerated.

22. Accordingly, I hereby allow the appeal set aside the sentence of 40 years imposed against the appellant and substitute therefor 18 years imprisonment.

23. In imposing the sentence, the learned trial magistrate stated that the sentence would run from the date of sentencing. No reasons were disclosed for this decision. Section 333(2) of the ***Criminal Procedure Code*** provides that:

(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

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.

24. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. While the court may in its discretion decide that the sentence shall run from the date of sentencing or conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so since the decision not to include the period spent in custody is an exception to the statutory provision that can only be justifiable upon reasonable grounds since an accused is constitutionally entitled to the benefit of the least severe of the prescribed punishments for an offence.

25. Dealing with that provision, the Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** 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(2) 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."

26. The same Court in **Bethwel Wilson Kibor vs. Republic [2009] eKLR** expressed itself as follows:

"By proviso to *section 333(2)* of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. *Ombija, J*. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

27. According to ***The Judiciary Sentencing Policy Guidelines***:

The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.

28. In this case, the appellant was arrested on 30th April, 2006 and was not admitted to bail. Accordingly, in computing the sentence to be served by the appellant, the said sentence of 18 years will run from 30th April, 2006.

29. Based on this court's decision in **Sammy Musembi Mbugua & 4 Others vs. Attorney General & Another [2019] eKLR,** the appellant is entitled to remission of his custodial sentences if he qualifies due to good behaviour while serving their said sentence.

30. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 17th day of October, 2019.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey