REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 126 OF 2018

JOHN MUOKI MBATHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the resentence of Hon. C.A. Ocharo (SPM) in Machakos*

Chief Magistrate's Court Criminal Case No. 3099 of 1997 on 23rd November, 2018)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JOHN MUOKI MBATHA.....ACCUSED

RULING

1. The Appellant herein, **JOHN MUOKI MBATHA** was jointly charged with 4 other co-accused before the Chief Magistrate's Court at Machakos with two counts of robbery with violence, contrary to section 296(2) of the Penal Code and one count of lawful escape from custody contrary to Section 123 of the Penal Code. He was convicted in respect of count 2 and 3 and sentenced to death in respect of count 1 and 1 year imprisonment in respect of count 3. His appeals to the High Court and the court of appeal were unsuccessful and on 16th October, 2008 this court Cr. Misc App. 48 of 2018 quashed and set aside the death sentence that was imposed on the appellant in Chief Magistrates Cr. Case 3099 of 1997, High Court Cr. Appeal 80 of 2002 as well as Court of Appeal Cr. Appeal 72 of 2007 and directed that the Chief Magistrates Court undertake resentencing proceedings in respect of the appellant pursuant to directions issued by the supreme court.

2. On 7.11.2018, the resentencing proceedings were undertaken before Hon. C.A Ocharo, SPM in which after hearing the mitigating circumstances and considering the probation officers report sentenced the appellant to 40 years' imprisonment from the date of conviction namely 14.10.1999.

3. The appellant is aggrieved by the sentence and has lodged this appeal in which he raised the following supplementary grounds:

a) That the learned trial magistrate erred in law and fact by awarding disproportionate, harsh and excessive sentence despite the appellant been unrepresented.

b) That the learned trial magistrate erred in law and fact by failing to consider the facts, circumstances and any other mitigating factors of the case in their entirety before settling for any given sentence.

c) That the learned trial magistrate erred in law and fact by putting much reliance on the probation report which is not binding especially derived from emotional victims which ought not to have attracted a disproportionate sentence in isolation of other independent mitigating factors like age of the accused, remorsefulness among others.

d) That the learned trial magistrate erred in law and facts by observing that the appellant was accessory to the killing of Gideon Muli Makau yet the appellant had not consented to the killings but to stealing only since consequence is not the same thing as intention.

e) That the learned trial magistrate erred in law and facts by holding that the appellants life is at risk in isolation of the security provided by the state and no one has power to take the law in his or her hands.

f) That the learned trial magistrate erred in law and facts by failing to observe that Section 296(1) and 296(2) and 297(2) of the Penal Code are ambiguous and therefore discriminatory contrary to article 27 of the Constitution of Kenya.

g) That the learned trial magistrate erred in law and facts by failing to invoke section 333(2) of the Criminal Procedure Code as amended so that the period of time spent in custody is taken into account as part of the time served.

h) That the learned trial magistrate erred in law and fact by failing to consider the appellants' age and general life expectancy which falls within mitigating factors and there should be light at the end of the tunnel.

4. The appellant therefore prayed that the court considers the time served and award him remission.

5. According to the appellant he was resentenced to 40 years imprisonment and the first gravamen was that the trial court did not consider the time served in remand as per Section 333(2) of the Criminal Procedure Code Act.

6. He relied on the case of **Francis Karioko Muruatetu & Another v R (2017) eKLR** and argued that intention is not the same as consequence because the intention was to steal and not to kill.

7. He therefore prayed that this court awards him an appropriate sentence commensurate with the offence committed and also consider that he demonstrated that he is a reformed and changed person who is remorseful. The appellant urged the court to grant him remission under Section 46 of the Prisons Act.

8. On the part of the Respondent, it was submitted that the sentencing guidelines do not replace judicial discretion and therefore the 40 years was lenient warranting the dismissal of the application. Further he notified the court that the appellant had assaulted an inmate on 29th May, 2019 and the question to be determined at this stage is whether the appellant has reformed.

9. I have considered the submissions made before me in this appeal. The singular issue to be determined is whether the court may make a downward review of the resentence by the trial court as well as grant an order of remission. It is important to point out 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 passing 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. The East Africa Court of Appeal in the case of **Ogolla s/o Owuor vs. Republic, [1954] EACA 270**, pronounced itself on this issue as follows:-

> "The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

11. In the case of **Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated thus:-

> "Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle and must be interfered with

12. I have noted that the learned resentencing magistrate has not indicated when the sentence was to run. 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.**

13. It is therefore clear that the foregoing provision imposes an obligation on the trial court to take into account the period an accused has spent on remand in the determination of an appropriate sentence. Failure to comply with the foregoing provision renders the subsequent sentence a contravention of the law.

14. One of the grounds of appeal was on a point of law only as it was in respect of Section 333(2) of the Constitution and because the resentencing court did not take into account the period the appellant spent on remand and direct that the same should run from the date of arrest namely 28.7.1997.

15. One of the prayers of the appellant is that of remission and in this regard, I associate myself with the views of Korir, J in **Musa Wambani Makanda vs. Republic [2017] eKLR** that:

"The power to remit sentence as provided by Section 46 of the Prisons Act, Cap 90 is as follows:

"(1) Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.

Provided that in no case shall -

(i) any remission granted result in the release of a prisoner until he has served one calendar month;

(ii) any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under section 296(1) of the Penal code or to be detained during the President's pleasure.

(2) For the purpose of giving effect to the provisions of subsection (1), each prisoner on admission shall be credited with the full amount for remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.

(3) A prisoner may lose remission as a result of its forfeiture for an offence against prison discipline, and shall not earn any remission in respect of any period-

(a) spent in hospital through his own fault; or

(b) while undergoing confinement as a punishment in a separate cell.

(4) A prisoner may be deprived of remission -

(a) where the Commissioner considers that it is in the interests of the reformation and rehabilitation of the prisoner;

(b) where the Cabinet Secretary for the time being responsible for Internal security considers that it is in the interests of public security or public order.

(5) Notwithstanding the provisions of subsection (1) of this section, the Commissioner may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special ground.

16. The court in **Francis Opondo v Republic [2017] eKLR** stated that the power of remission lies with the prisons authorities and not the court. Therefore the appellant ought to address his request to the prisons authorities and this court has no jurisdiction to grant the appellants' request for remission.

17. The third limb of the issues for consideration is whether or not the sentence should be revised downwards. **Section 382 of the Criminal Procedure Code Act provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:**

"***Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

18. The trial magistrate is vested with wide discretion which an appellate court can only interfere with, if it occasioned a failure of justice, and justice will apply both ways to the victim and to the accused. In the instant appeal, there is on record a probation officer's report that has indicated that the commission of the offence is attributed to poor upbringing and that the appellant is illiterate. The report also indicates that the victim sustained severe injuries as a result of the actions of the appellant. The appellant is found to be 60 years old and who has insisted that he was not guilty. He is known to be a thief in Nairobi and reportedly kept bad company and at home he camouflaged himself as a good person. His family members give a good report and state that he cannot visit the area where the victims hail from for he risks lynching. The community reported that he is an old man who has little energy to partake in robbery and his fellow gang members are dead but maintain that his gang members killed a watchman and whose family was compensated by the Amutei Clan. It was reported that while in prison, he has undergone shoe making and that the victim indicated that she has forgiven him and left him to God and that the probation officer intimated that the appellant be given a lesser sentence. From the record, no miscarriage of justice has occurred to the appellant so as to warrant interference with the sentence of 40 years and I find no illegality of principle when the learned magistrate resentenced the appellant to 40 years.

19. Be that as it may, the jurisprudential trends have seen sentences of between 30 and 25 years being handed over to persons who commit robbery with violence, and I do this with all caution because the appellant appealed against sentence only and hence the court could not analyze the evidence that prompted the conviction. In any event his appeal was heard by this court and found to lack merit and same was dismissed and similarly the court of appeal. In **Aggrey Chiteri v Republic [2019] eKLR,** the applicant was resentenced to 5 years for robbery with violence from the date of the resentence judgement; In **Leonard Kipkemoi v Republic [2018] eKLR,** the appellant was resentenced on appeal to 20 years imprisonment to run from the date of sentencing. I have noted the appellant's circumstances and find that he should also be allowed to benefit from the after effects resulting from the Supreme Court decision in **Francis Karioko Muruatetu V R**

(2017) eKLR. The appellant has already served 23 years in prison custody and is deemed to have atoned his sins and no wonder that the victim's family are seeking that the sentence be reviewed downwards. In that regard, the appellant is resentenced to 25 years to run from the date of arrest namely 28.7.1997.

20. In the result the appeal succeeds to the extent that the trial magistrate's resentence of 40 years is hereby substituted with a resentence of 25 years from the date of arrest namely 28.7.1997.

It is so ordered.

Dated and delivered at **Machakos** this **16th** day of **October, 2019.**

D. K. Kemei

Judge