REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 99 OF 2018

(Coram: Odunga, J)

JOSIAH MUTUA MUTUNGA.....1ST APPELANT

COSMUS MUSYOKI MUSILA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the resentence of Hon. D. O. Orimba, SPM in Kangundo Senior Principal Magistrate's Court Criminal Case No. 827 of 2004)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JOSIAH MUTUA MUTUNGA.....1ST ACCUSED

COSMUS MUSYOKI MUSILA.....2ND ACCUSED

JUDGEMENT ON RESENTENCING

1. The Appellants herein, **Josiah Mutua Mutunga** and **Cosmus Musyoki Musila** were jointly charged before the Senior Principal Magistrate's Court at Kangundo with one count of Robbery with Violence, contrary to section 296(2) of the ***Penal Code***, the 1st accused with one count of Rape Contrary to Section 140 of the ***Penal Code*** with the alternative count of Indecent Assault on a female contrary to Section 144(1) of the Penal Code and a third count of Rape contrary to Section 140 of the ***Penal Code*** with the alternative count of Indecent Assault on a female contrary to Section 144(1) of the ***Penal Code*** in respect of the 2nd accused. They were found guilty of the said offences, were convicted and accordingly and sentenced to death in respect of count one and life sentence with hard labour in respect of count 2 and 3.

2. 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 Trial Court. On 15th November, 2018, the resentencing proceedings were undertaken before **Hon. D. Orimba**, **PM** in which after hearing the mitigating circumstances and the sentencing guidelines the court sentenced each of the appellants to 30 years' imprisonment less 14 years served in respect of count one; 10 years' imprisonment in respect of count 2 and 3 and that the sentences were to run consecutively.

3. Once again, the appellants are aggrieved by the said decision and have lodged this appeal in which they raise the following supplementary grounds:

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

b) 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

c) 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.

d) That the learned trial magistrate erred in law and fact by failing to ask for the probation report to assist the court in arriving at appropriate sentence before dismissing the appellants' mitigating family issues.

e) That the learned trial magistrate erred in law and facts by making an observation that the appellants' have not reformed because he did not explain how he had undergone several trainings and attained various skills while incarcerated

f) 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 appellants therefore prayed that the court considers the time served and award them remission.

5. According to the appellants as at the time of their resentencing, they had served 14 years in prison. It was therefore their views that the sentence imposed upon them was not commensurate with the moral blameworthiness.

6. Based on **Joseph Kaberia Kahinga & 11 Others vs. Attorney General [2016] eKLR**, it was submitted that the trial court should not have given proportionate sentence since the law as it stands now there is no distinction between section 296(1) and 296(2) of the Penal Code hence the sentence should have been 14 years and not 30 years. In their view the sentence imposed violate Article 27 of the Constitution. It was submitted based on **Edwin Otieno Odhiambo vs. R Cr. App. 359 of 2006**, in matters of sentencing if the court fails to take into account mitigating circumstances, the chances of not coming up with an appropriate sentence were enhanced.

7. It was submitted that the learned trial magistrate failed to take into account issues as youth/immaturity, old age and serious illness. In his case, it was submitted that the court failed to consider that the 1st appellant was arrested at the age of 28 and he was now 44 years while the 2nd appellant was arrested at the age of 33 years and was now 47 years. In their view, the risk of an offender dying in prison either due to a particular health problem or simply by a reason of general life expectancy falls within the mitigating factors.

8. They therefore prayed that this court awards them appropriate sentence commensurate with their criminal responsibility and invoked section 333(2) of the ***Criminal Procedure Code*** and Section 46 of the ***Prisons Act Cap 90***.

9. On the part of the Respondent, **Ms Mogoi**, learned prosecution counsel urged the court to consider the record and make appropriate decision thereon.

10. I have considered the submissions made before me in this appeal. 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 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.

11. 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.

12. 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."

13. 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.

14. 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.

15. 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 had 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.

16. In ***Muruatetu Case***, the Supreme Court relied on the case of **Vinter and others v. 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."

17. 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.

18. 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."

19. It is therefore my view that where a resentencing is directed the trial court ought to consider the filing of a probation report in order to assist it arrive at an appropriate report. However, the failure to do so is not necessarily fatal to the sentence.

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 principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in **S vs. Malgas 2001 (1) SACR 469 (SCA)** at para 12 where it was held that:

"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

24. Similarly, in **Mokela vs. The State (135/11) [2011] ZASCA 166**, the Supreme Court of South Africa held that:

"It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

25. The predecessor of the 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."

26. To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case". **(R - v-**

Shershowsky (1912) CCA 28TLR 263) while 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 must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"**

27. The Court of Appeal, on its part, in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** restated that:

> **"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."**

28. In my view, it does not follow that in resentencing, the court is obliged to reduce the initial sentence. What is required of the court undertaking the resentencing is to look at all the circumstances of the case and to make a determination whether the appellant's incarceration has achieved the objective for which he was sentenced such as punishment, deterrence, public protection and rehabilitation. In other words, the court is not to be bound only by the appellant's conduct that led to his incarceration but also his conduct and circumstances since the said incarceration.

29. 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."

30. In this case, I have considered the circumstances in which the offences were committed and the sentences meted. To my mind the same do not warrant interference. However, in imposing the sentence, the learned trial magistrate did not indicate the commencement date for the said sentences. 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.

31. 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 and as I have stated above, the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence.

32. I associate myself with the decision in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** where the Court of Appeal 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."

33. 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."

34. 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.

35. In this case the learned trial magistrate did not state when the sentence meted would commence. In my view it is necessarily prudent that there be an indication of the same particularly where an accused has been in custody for a long period before being sentenced. In this case, however, the accused was arrested on 29th July, 2004 and was not admitted to bail. Accordingly, in computing the sentence to be served by the appellants, the period from 29th July, 2004 ought to have been taken into account.

36. The sentences were directed to run consecutively. It is however clear that the offences were committed in one transaction. In the case of **Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97**, the then Court of Appeal for Eastern Africa in a judgment read by **Sir Joseph Sheridan** stated that the practice is, where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.

37. The Court of Appeal in **Peter Mbugua Kabui vs. Republic [2016] eKLR** expressed itself on the matter as hereunder:

> **"As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment. It is our considered view that the exception in Section 14 (3) of the Criminal Procedure Code is inapplicable to this case in light of the provisions of Section 7 (1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totalling 20 years imposed on the appellant, cannot said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful" We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same."**

38. In this case it is clear that the series of offences which the appellants faced were committed at the same time in a single act/transaction. Therefore, the Learned Trial Magistrate ought to have imposed concurrent sentences.

39. Regarding remission, this court in **Sammy Musembi Mbugua & 4 others vs. Attorney General & Another [2019] eKLR** held that:

> **"In my view, the differentiation in treatment of persons sentenced to determinate periods from those facing indeterminate sentences is justifiable where it is not possible to calculate what would be the period of remission. However, where the sentence is certain and determinate, such differentiation cannot be legitimate. The question that one asks is whether such differentiation bears a rational connection to a legitimate purpose. I agree with the Petitioners that the purpose of remission is to act as an incentive to the prisoner and encourage good behaviour, rehabilitation and self-improvement if a prisoner knows that his or her conduct directly affects his or her jail-term thus placing his or her destiny in his or her own hands…To therefore maintain that those convicted of offences under section 296(2) of the *Penal Code* are not entitled to consideration for remission, presupposes that such offenders are incapable of reform. First there is no empirical evidence before me to enable be justify such a conclusion. Secondly, and to paraphrase the Supreme Court in the *Muruatetu Case* Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected and it is for this Court to ensure that all persons enjoy the rights to dignity. Failing to consider 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. The dignity of the person is ignored if he is denied remission that is available to others serving similar sentences simply on the irrational presumption that he is incapable of reforming. The differential culpability can be addressed in Kenya by allowing the authorities concerned to consider the individual prisoner's industry and conduct rather than by treating them the same. To my mind a formal equal treatment for unequal conduct is not in keeping with the tenets of fair reformation and rehabilitating process...I therefore associate myself with the position adopted by Korir, J in Brown Tunje Ndago vs. Commissioner-General of Prisons (supra) that:**
>
> **"there is no reason why a convict with a determinate or definite prison term should not benefit from remission. For a prisoner, remission is one of the beacons of hope of life outside prison. It is a motivating factor towards reformation. There is no reason why a person who commits murder, robbery with violence or "simple robbery" should be denied remission if they have been sentenced to serve fixed prison terms. It is true that these are indeed very serious offences. They are, however, not the only grave offences. The gravity of the offences cannot be good reason for denying these convicts remission for those convicted of grave offences like sexual offences are entitled to remission of their sentences. It is therefore discriminatory and indeed unconstitutional to deny remission of sentence to a certain category of prisoners serving definite sentences."**
>
> **However, as appreciated by the Petitioners, the power to grant remission should not be confused with the right to remission. While there is a right to remission, the power to exercise it and the circumstances under which it is to be exercised must remain as provided for under section 46 of the *Prisons Act."***

40. Accordingly, while I find no merit in the appeal and dismiss the same, I direct that the appellants' sentences will run concurrently and will commence from 29th July, 2004.

41. For avoidance of doubt, therefore, appellants are entitled to remission of their custodial sentences if they qualify due to good behaviour while serving their said sentences.

42. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 3rd day of October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

The Appellants in person

Miss Mogoi for the Respondent

CA Geoffrey