REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 63 OF 2008

(Coram: Odunga, J)

REPUBLIC.....PROSECUTOR

VERSUS

PHILIP KENEI.....1ST ACCUSED

ANTONY NDEMBA.....2ND ACCUSED

RONALD ORORA.....3RD ACCUSED

RESENTENCE

1. The accused herein were 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 22nd January, 2008 at EPZ Pond Camp Kinanie Location in Athi River Division, Machakos within Eastern Province, they jointly with others not before court they murdered Andrew Ndeti Muia.

2. After hearing the evidence, the Learned Trial Judge, **Makhandia, J** (as he then was) found the accused guilty, convicted them accordingly and sentenced them to death noting that there was only one sentence for a murder convict which was death save for a few exceptions set out in law. Aggrieved by the said decision, the accused appealed to the Court of Appeal in Nairobi Criminal Appeal No. 153 of 2012. The said appeal was however dismissed on 18th October, 2013.

3. However, based on 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 accused and directed that a sentence re-hearing be undertaken. 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.

4. 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.

5. 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.

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. 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.

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 community by incapacitating the offender.

10. 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."

11. 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.

12. 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."

13. 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 1st accused is aged 40 years, the 2nd accused is aged 47 years while the third accused is aged 40 years old. It was indicated that the offence was aggravated by the incidences of stealing, mugging, robbery with violence and rape which were being experienced in EPZ Pond Area along the road between Kinanie Trading Centre and the EPZ Pond Gate and that the residents were frustrated after the Administration Police Officers who had been manning the gate were shifted to a camp at Kinanie. It was stated that in one incident involving, a bicycle theft from the EPZ Pond Residence, the security guards chased the thief and caught him towards Joska and when the person was taken to Administration Police they were informed that they ought to have just called the police to collect the body. As a result, the private security guards swung into full force in their security operations that led to the death of the deceased.

14. According to the said report, on the material day, the deceased and another person went to the gate where a victim of robbery identified the deceased as the person who had stolen from him and alerted his fellow security guards, the 1st and the 3rd accused persons who were joined by the 2nd accused, a casual farm worker who attacked the deceased with farm tools causing the deceased serious injuries from which the deceased succumbed at the scene.

15. According to the said reports, the accused were well behaved and had no bad records. They were remorseful and regretted their actions and had initiated reconciliation with the family of the deceased. According to the prison records, the 1st accused was a committed catholic serving his inmates by conducting guidance, prayers and evangelism. While in Naivasha he was a librarian while in Machakos he was serving as the Principal for the inmates undertaking primary education apart from conducting prayers for the inmates. The community spoke well of him and was not a threat to the community. The 2nd accused also got saved and became a prayerful man, a devoted church member. The third accused was also reported to be a born again Christian who interacts well with both prison staff members and serves his fellow inmates with respect. He was reported to be a well behaved person in football and served as an assistant coach at the Machakos Main Prison.

16. As regards the victim's family, his death immensely affected his mother. After reconciliatory meetings the family of the victim expressed the feeling that the accused persons had been sufficiently punished and disciplined and had learned their lessons for the 12 years they had spent behind the bars and felt that the said period could be considered as sufficient punishment and they may be set free. The same sentiments were shared by the community.

17. 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."

18. The accused have been in custody since July 2008, a period of over 11 years. Loss of life is, no doubt, a very serious matter. In these circumstances, however, it is highly unlikely, that the accused will commit a similar offence. It is clear that the accused have during the period of their incarceration reformed and have engaged themselves in activities meant to assist them in reintegrating with the community. Not only are they well behaved but they seem to have become role models for their fellow inmates. Their communities have no issue with them re-joining the society and their families are ready to welcome them back into the fold. Due to reconciliatory steps initiated by both families, the victim's family has forgiven the accused and has no issue with them being released since it is their opinion that the accused have been sufficiently disciplined and have learned their lessons during the period they have been in custody. To my mind the period of incarceration of the accused is sufficient punishment and consequently their incarceration has achieved three objectives of retribution, deterrence and rehabilitation.

19. In the premises, 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.

20. Accordingly, I hereby sentence the accused to the period that will ensure their immediate release from prison unless they are otherwise lawfully held.

21. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 16th day of October, 2019.

G V ODUNGA

JUDGE

In the presence of:

Accused persons in person

Ms Mogoi for the State

CA Geoffrey