Case Number:	Criminal Case 77 of 2007
Date Delivered:	21 Dec 2018
Case Class:	Criminal
Court:	High Court at Machakos
Case Action:	Sentence
Judge:	George Vincent Odunga
Citation:	Republic v Solomon Mutuku Mativo [2018] eKLR
Advocates:	Miss Mogoi for the State
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Machakos
Docket Number:	-
History Docket Number:	-
Case Outcome:	Accused sentenced
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL CASE NO. 77 OF 2007

(Coram: Odunga, J)

REPUBLIC.....PROSECUTOR

VERSUS

SOLOMON MUTUKU MATIVO.....ACCUSED

SENTENCE

1. The accused **Solomon Mutuku Mativo** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which was that on the night of 8th and 9th December, 2007 at Mbee Village, Kathiani Location in Machakos District within the Eastern Province, jointly with others not before the court murdered **Rebbecca Mutheu Mwanzia**.

2. After hearing the evidence, the Learned Trial Judge, **Mutende, J** found the accused herein guilty, convicted him accordingly and sentenced to death. However based on the decision of the Supreme Court in Petition Nos. 15 and 16 of 2015 – **Muruatetu & Others vs. Republic**, this Court on 25th July, 2018 set aside the death sentence imposed on the accused and directed that a sentence re-hearing be undertaken.

3. In her judgement the Learned Trial Judge found that the deceased died from multiple lacerations on the head and the neck and that there was an attack by more than one person. The houses of the deceased were burnt and other than that, the rooms in the main house were blood stained while the bedroom had been broken into and blood splattered all over. According to the Learned Trial Judge, the act of the perpetrators of the crime of injuring victims and even locking them inside houses that were set ablaze was evidence of the knowledge on their part that the victims would either sustain grievous harm or die.

4. In this case there was evidence that the deceased was found with her legs tied apart by ropes that were fastened on a tree and her private parts were visible with a lot of fluids/discharge flowing therefrom. She had multiple cuts on both left and right face and throat and lay in a pool of blood. The said several lacerations were caused by a sharp object and an eye had been gouged out. The deep laceration went up to the skull.

5. I agree with the Learned Trial Judge that the severity of the injuries clearly showed that those who occasioned the same were indifferent on their part as to the results they would achieved.

6. 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.

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 appellant 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. In its decision the 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, in order to determine whether the accused has sufficiently reformed or has been adequately rehabilitated to direct that a pre-

sentencing report be compiled. 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.

10. Similarly cited was the decision of the Privy Council in **Spence vs. The Queen; Hughes vs. the Queen (Spence & Hughes)** (unreported, 2 April 2001) where **Byron CJ** was of the view that:

"In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty."

11. It was in light of the foregoing that I directed that a probation officer's report be prepared and filed and the said directions were duly complied with. In the said report, the Probation Officer found that the accused apart from denying the offence was not remorseful concerning the deceased's death or the injuries caused to the deceased's sons but instead insisted that he had forgiven the witnesses in the case and specifically mentioned the deceased's sons.

12. As for the deceased's husband, he is still bitter with the accused and does not wish to meet him. As a result of the bitterness within the family, the family disintegrated. The family of the deceased are also bitter with the accused and would wish that he be treated in the same manner he treated the deceased. In fact according to the report, they are prepared for vengeance and promise to kill him. Similarly the community members still harbour disturbed memories and bitterness towards the accused.

13. In his mitigation, the accused stated that he is now saved and that since his arrest both his parents have passed away. While in prison, for the past 11 years, he has undertaken studies and obtained three diplomas. As a result of having reformed, the prison authorities wrote a recommendation to him. He therefore requested the Court to consider the period he has served todate.

14. **Miss Mogoi**, the Learned Prosecution Counsel, on the other hand, urged the Court to take into account the seriousness of the offence and the fact that the intention was to kill more than one person who was brutally killed with no regard to human life. Since the offence took place in 2011, the memory is still fresh and the community is baying for the accused's blood. Learned Counsel therefore urged that for the sake of the accused's own protection, and in light of the foregoing, this Court should confirm the deaths sentence.

15. I have considered the circumstances in which the offence was committed and the effect on the family and the community of the same. It is clearl that the deceased was killed in a very brutal manner. The people who killed her wanted to inflict maximum pain and seems to have done so. The injuries which she sustained must have caused her a lot of pain before she died. Her assailants not only sexually assaulted her but also exposed her nakedness to the public. In essence the assailants were not satisfied with the death of the deceased but humiliated her even in death. It would seem that the assailants were not satisfied with the fact that the deceased had been brutally killed but they also wanted to send a message to other people.

16. In my view this was a most brutal murder; a murder most foul, a murder that one cannot imagine was committed by humane people.

17. Both in the probation officer's report and before me, the accused has not shown any signs of remorse. The only thing he has stated is that he has undergone some religious studies. Without remorse on the part of the accused and considering the bitterness that his family members and the family of the deceased understandably have against the accused, it is neither in his interest nor in the interests of the community or the society that he be released back to the society as yet.

18. 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."

19. 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."

20. 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."

21. I am therefore of the view that a sentence of 40 years less the 11 years the accused has served would be the appropriate sentence since it is not alleged that he is a repeat offender. He is therefore sentenced accordingly.

22. The accused has 14 days right of appeal on the sentence.

23. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 21st day of December, 2018.

G V ODUNGA

JUDGE

In the presence of:

Accused in person

Miss Mogoi for the State