



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 30A OF 2018

MMM.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS....RESPONDENT

JUDGMENT

1. The Petitioner herein was a minor aged about 16 years when he was arraigned before the trial court and charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on 7/11/2012 in Lamu County, he murdered SW. The matter proceeded and the Petitioner was convicted and sentenced to death in High Court Criminal Case Number 29 of 2012.
2. The Petitioner is now in this court for resentencing pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** where the court declared unconstitutional the mandatory nature of the death sentence.
3. Mr. Fedha, learned counsel for the prosecution submitted that the Petitioner although 16 years old at the time the offence was committed, nevertheless defiled and murdered an innocent girl aged 5 years. Counsel submitted that the life of the innocent girl cries out for redemption and that the Petitioner should be jailed to serve 45 years in jail including the 7 years already served.
4. On his part the Petitioner submitted that he was only 16 years old when he was arrested, and that under Section 191 of the Children's Act he ought to have been sentenced to a Borstal Institution, but instead he was jailed together with adults. This was a violation of his right which should be vindicated by this court. The Petitioner, who is now 23 years, submitted that the 7 years he has served in prison is adequate punishment and that he should be allowed to go home to his sister since he had also lost his parents.
5. I have carefully considered the circumstances of the case. The deceased was a girl aged 5 years by the time she was murdered. The Petitioner was 16 years when he was arraigned in court for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The deceased's body was dumped into a shamba at the home of the Petitioner. It was found naked and lying face down. She had been sexually molested and sustained severe injuries to her private parts. Her neck was broken and the cause of death was established to be cardiorespiratory arrest following asphyxiation. A 16 year old boy was old enough to know that it was unlawful to sexually defile and murder a defenseless girl of 5 years. This offence was proved, and the Petitioner convicted.
6. Further, although the Petitioner was 16 years when he committed the offence, he is now 23 years. This court cannot now send him to a Borstal Institution because he is now an adult. Again this court cannot release him into the society because he has been found guilty of murder. Since he is now an adult, he will have to spend the rest of the sentence in prison.
7. I hereby now set aside the death sentence and in place thereof I sentence the Petitioner to serve a prison term of 35 years from the date of arrest.
8. The right of appeal in 14 days.

Dated, Signed and Delivered at Mombasa this 30th day of March, 2020.

E. K. O. OGOLA

JUDGE

In the presence of:

Ms. Mwangeka for DPP

Petitioner in person via video link

Mr. Kaunda Court Assistant