



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CORAM: D.S MAJANJA J.**

**CONST. PETITION NO. 29 OF 2019**

**BETWEEN**

**DMO.....APPLICANT**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The petitioner, **DMO** together with his co-accused, was charged with one count of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**, two counts of gang rape contrary to section 10 of the Sexual Offence Act in **Keroka SRM Criminal Case No. 301 of 2009**. The petitioner and his co-accused, were convicted on all the counts. The first appeal from conviction and sentence, **Kisii HCCRA No. 147 of 2009 consolidated with HCCRA No. 81 of 2010**, was dismissed. The second and final appeal to the Court of Appeal; **KSM CA Criminal Appeal No. 94 of 2011** was dismissed save that the petitioner was ordered to be detained at the Presidents Pleasure under **section 25(2)** of the **Penal Code** as he was child at the time he committed the offence in lieu of the sentence of death imposed on him.

2. The petitioner now seeks resentencing based on the decision of the Supreme Court decision in **Francis Karioko Muruateru & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR** declaring the mandatory death sentence for the offence of murder unconstitutional. The ratio of that decision was applied by the Court of Appeal in **William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR** to the provisions of **section 296(2)** of the **Penal Code** which imposed the mandatory death penalty for the offence of robbery with violence.

3. Since the petitioner was not sentenced to death, the issue that arises is whether this court can review the sentence following the **Muruatetu Case (Supra)**. I take the view that since the petitioner was liable to be sentenced to death but for his age, he is entitled to seek this court relief by way of re-sentencing.

4. I would further add that in **AOO and 6 Others v Attorney General and Another NRB Petition No. 57 of 2015 [2017] eKLR**, Mativo J., held that detention of child at the President's pleasure under **section 25(2)** of the **Penal Code** was unconstitutional. The learned Judge observed that:

*The indeterminacy of the sentence also exacerbates the cruel, inhuman or degrading nature of the punishment on the grounds that the maximum period of incarceration remains at all times unknown to the prisoner and the period of his/her incarceration is dependent on the executive. This, no doubt, is the cause of considerable torment. I therefore conclude that to sentence a person to what may potentially constitute life imprisonment, infringes on the rights of such person not to be subjected to cruel, inhuman or degrading treatment or punishment.*

*Imprisonment at the presidents pleasure, whose period is not defined or determined and which depends on the discretion of the executive cannot in my view be said to conform with the provisions of **Article 53 (1) (f)** of the constitution which provides that "Every child has the right— **(f)** not to be detained, except as a measure of last resort, and when detained, to be held— **(i)** for the shortest appropriate period of time; and **(ii)** separate from adults and in conditions that take account of the child's sex and age. **Article 53 (2)** provides that " A child's best interests are of paramount importance in every matter concerning the child.*

5. I agree with this statement of principle and exposition of the Constitution and the Bill of Rights. This, therefore, is a proper case for the court to grant relief and the only remedy to give effect to the provisions of the Bill of Rights is to re-sentence the petitioner.

6. The petitioner was 17 years old when he was convicted and sentenced on 2<sup>nd</sup> July 2009 having been in pre-trial custody since 4<sup>th</sup> March 2009. No doubt from his 9 years in prison, the petitioner has learnt his lesson. I shall therefore substitute the sentence of detention at the President's Pleasure with a sentence of imprisonment for time served.

7. The petition is allowed. The petitioner is set free unless otherwise lawfully held under a separate warrant.

**Dated and delivered at Kisii this 12<sup>th</sup> day of April, 2019.**

**D.S MAJANJA**

**JUDGE**

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.

Petitioner in person.