REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[CORAM: MRIMA, J]

CRIMINAL APPEAL NO. 48 OF 2018

JOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

SENTENCE

1. The Appellant was sentenced to life imprisonment by the trial court. The sentence was however set-aside on appeal and re-sentencing proceedings undertaken.

2. This Court received additional evidence on appeal. The evidence was largely on the consensus of the parties herein. The new evidence was on the age of the Appellant. According to Certificate of Birth No. [particulars withheld] issued on 29/05/2018 the Appellant was born on 03/04/2002. Therefore, at the commission of the offence the Appellant was around 14½ years old. He was a minor in law. He is by now above 17 years old but below 18 years old. He is still a minor in law but soon attaining adulthood.

3. In essence the Appellant ought to be sentenced under **Section 191** of the **Children's Act No. 8 of 2001**. The section provides as follows: -

> **(1) In spite of the provisions of any other law and subject to this Act, where an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways-**
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> **a) by discharging the offender under Section 35(1) of the Penal Code (Cap.63);**
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> **b) by discharging the offender on his entering into a recognizance, with or without sureties;**
>
> **c) by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap 64);**
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> **d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;**
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> **e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;**
>
> **f) by ordering the offender to pay a fine, compensation or costs, or any or all of them.**
>
> **g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of boarstal institutions;**
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> **h) by placing the offender under the care of a qualified counsellor;**
>
> **i) by ordering him to be placed in an educational institution or a vocational training programme;**
>
> **j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (Cap. 64)**
>
> **k) by making a community service order; or**

l) in any other lawful manner.

2. No child offender shall be subjected to corporal punishment

4. It is clear from the foregone that a term of imprisonment is not one of the intended modes of sentencing a minor in law. That legal position has been interrogated by Courts. The Court of Appeal on 31/07/2019 rendered itself on the subject in *Kisumu Court of Appeal Criminal Appeal No. 52 of 2015 Duncan Okello Ojwang v. Republic (2019) eKLR* as follows: -

> ***Section 191(1) of the Children Act sets out different ways in which the Court can deal with a child offender. The trial Court is required to exercise judicial discretion in determining the manner in which to deal with a child offender. Section 191 (1) (j) of the same Act empowers the Court to deal with an offender in any other lawful manner and therefore does not in any way conflict or oust the penalty prescribed under Section 25(2) of the Penal Code. However, the Court gives effect to the best interests of the child as required under Section 4(2) of the Children Act. The Court should also bear in mind the principles of proportionality, deterrence and rehabilitation; and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.***
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> ***This Court while faced with a similar case in Richard Mwaura Njuguna & Another v Republic [2019] eKLR observed thus:***
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> *It is worth mentioning that this Court as well as the High Court have come across similar situations as the case before us, where the offender in question was a minor during the commission of the offence in issue but later attained the age of majority during sentencing. A case in point is the High Court case of Daniel Langat Kiprotich vs. State [2018]eKLR wherein the petitioner therein had challenged the death penalty meted out to him on account of the offence of robbery with violence on the ground that during the commission of the offence he was a minor. Ngugi, J. expressed the dilemma faced by courts in such situations. He expressed:*
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> *"This often creates a dilemma for trial courts which may be faced with a juvenile who is only slightly below eighteen years old but who committed a serious offence such as (depraved heart) murder or rape or particularly vicious armed robbery. Since the statutory scheme provides that such a child cannot be sent to prison and since the law further provides that such a child can only be sent to a boarstal institution for not more than three years, the options are limited to trial Courts even where on analysis and evidence such a Court might be persuaded that the almost-adult it is dealing with is a danger to society; and has sailed to acknowledge or come to terms with his or her errors.*
>
> *A similar dilemma is created when the offender has already turned eighteen at the time of conviction or at the time of appeal as is the case here. Where the offence committed was a particular vicious or serious one, the option of releasing such an offender back to the society is not an attractive one. It may even be downright dangerous for the society. Further, it might deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn.*
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> ***Earlier on this Court in the case of J M K v Republic [2015Eklr had observed.***
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> ***…..****A critical issue in this appeal relates to the appropriate sentence for a minor who has been convicted of murder. At the time of the offence, the appellant was a minor 16 years of age. The offence of murder attracts a mandatory death sentence. In Nyeri Criminal Appeal No. 118 2011 (JKK-v-R (2013) eKLR, this Court had an opportunity to consider the appropriate punishment for a minor offender. The Court stated that the offence of murder committed by the minor appellant was serious and an innocent life was lost. The appellant though a minor at the time of the offence was to serve a custodial sentence so that he could be brought to bear eh weight and responsibility of his omission or lack of judgment. The Court expressed that the appellant who was now of age of majority could not be released to society before being helped to understand the consequences of his mistakes. (See also Republic -v- S.A.O.., (a minor) [2004] and eKLR and Nyeri Criminal Appeal No. 184 of 2009, Dennis Kirui Cheruiyot - v - R).*
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> ***The Court went further and held that:***
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> *The appellant in this case was not found to be of unsound mind to be detained at the pleasure of the President. No legal provision was cited to us to support the order that if a minor offender is found guilty of murder he should be detained at the pleasure of the President. Due to the gravity of the offence and the current age of the appellant, he cannot be released to society. The Children Act prohibits a death sentence to a child offender, life sentence is also not provided for; we, therefore, allow the appeal to the extent that we substitute the order directing the appellant to be detained at the pleasure of the President with a custodial term of imprisonment for 10 years from the date of conviction by the trial court on 5th May, 2011. We have considered this custodial sentence as appropriate to give time to the prison authorities and perhaps the probation department to take the appellant through the rigours of coming into terms with his mistakes and poor judgment which have consequences such a loss of liberty."*

5. In this matter, the Appellant is almost turning 18 years old. In that case, this Court has to consider the effectiveness of the sentences in **Section 191** of the ***Children's Act*** vis-à-vis the duty to ensure that the Appellant is properly rehabilitated. The Court has also to consider public interest and the fact that the victim is secured from the possible repeated acts of the Appellant. A balance must be struck.

8. I have carefully considered the various sentences under **Section 191** of the **Children's Act** and the unique circumstances of this case. I am convinced that none of the sentences provided therein will strike the required balance.

9. This Court must hence consider separating the Appellant from the victim for a reasonable period. The victim is still a minor and the Appellant is turning to adulthood very soon. If the Appellant is released back to the community, there is the possibility of the victim living in fear. That will adversely affect the victim.

10. I have perused the Pre-Sentence Report and noted its recommendation.

11. Guided by the circumstances of this case, the Sentencing Guidelines, the law and precedent I hereby sentence the Appellant to 10 years' imprisonment. The sentence shall run from the date the Appellant was sentenced at the trial court that is on 27/06/2018.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **MIGORI** this **31st** day of **October 2019**

A. C. MRIMA

JUDGE

Sentence delivered in open Court and in the presence of:

Mr. Marvin Odero Counsel holding brief for Mr. Ezekiel Oduk for the Appellant.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant