



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

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

**CRIMINAL APPEAL NO. 39 OF 2016**

**BETWEEN**

**JOE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence of Hon. J. Were, PM dated 23<sup>rd</sup> April 2015 at the Principal Magistrate's Court at Nyamira in Criminal Case No. 1095 of 2014)*

**JUDGMENT**

1. The appellant, **JOE**, was charged, convicted and sentenced to death for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The charge against him was as follows:

*On the night of 5<sup>th</sup> November 2014 at Bokiambori Sublocation in Nyamira District within Nyamira county while armed with dangerous weapon namely a panga robbed NO of cash Kshs. 2,000/= and a mobile phone make Nokia valued at Kshs. 2,000/= all amounting to Kshs. 4,000/= and immediately before the time of such robbery used actual violence to the said NO.*

2. At the hearing of the appeal, the appellant urged the court to reconsider the sentence as he was a child when he committed the offence.

3. According to the judgment, the trial magistrate indicated that, *"the accused person though initially indicated to be a minor but subsequently confirmed to be an adult ..."*

4. I have reviewed the record and it shows that the appellant was initially arraigned in court, he was deemed to be a child and was in fact remanded in a Children's home pending trial. An age assessment was ordered and the doctor confirmed on 2<sup>nd</sup> February 2015 that he had a dental age of *"16 – 17 years of age."* I did not see any other determination of his age in the proceedings. At any rate when he was put on his defence and gave sworn testimony he stated he was 16 years old. The prosecution did not cross examine him on this point.

5. The totality of the evidence is that the appellant ought to have been sentenced as a child in accordance with **section 191(1)** of the **Children Act**. Given the seriousness of the offence and the deliberate act of violence inflicted on the complainant, a jail term was well deserved as an option for the sentence (see **RKS v Republic NKR HCCRA No. 25 of 2016 [2018]eKLR**). The appellant has been in pre-trial detention and prison for a total term of 4 years and no doubt he has learnt his lesson.

6. As the trial court did not consider the options available to the appellant, I quash the sentence of death and substitute it with a sentence of **six (6) years imprisonment**. However, order that the appellant be released to serve the balance of his term under Probation. The Probation Officer Nyamira County to be informed of this judgment.

**DATED and DELIVERED at KISII this 18<sup>th</sup> day of DECEMBER 2018.**

**D.S MAJANJA**

**JUDGE**

Appellant in person.

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