**REPUBLIC OF KENYA**

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

**MISC. CR APPL. NO. 79 OF 2016**

**F G M …….....….....…… APPLICANT**

***versus***

**REPUBLIC …….....RESPONDENT**

**JUDGMENT**

1. **F G M (F)** was charged before the High Court at Nyeri with the **offence of murder on 26th January 2000**. As the law then required he had been through the process of committal before the magistrate's court at Nanyuki in Senior Resident Magistrate murder case No. 4 of 1999 which committal proceedings commenced on 21st May 1999. After he pleaded not guilty before the High Court at Nyeri the trial commenced.

2. The High Court at Nyeri in Criminal Case No. 36 of 1999 by its judgment of 27th November 2001 convicted F as charged. He was sentenced, as the law provides, to suffer death.

3. F filed an appeal against his conviction before the Court of Appeal. The Court of Appeal in Criminal Appeal No. 7 of 2002 by its judgment dated 16th May 2003 rejected his appeal.

4. F by his petition before this court dated 18th May 2017 now seeks as provided under **Article 50(6),** for a new trial. The main thrust of F petition is that he was 17 years old on the date it is stated the offence was committed. The offence according to the charge sheet was committed on 25th April 1999. F by his affidavit deponed that he was born on 2nd April 1982. To prove his date of birth he annexed a certificate of baptism which reflected his birth date. It is on that basis F argued that had the trial court known about his age it would have sentence him in accordance with the law. Although F also stated in his petition that the actual person who committed the murder is now known and that there are witnesses who are willing to testify to that fact – that submission cannot be taken seriously because F did not disclose the name of the other person who allegedly committed the murder nor the names of the witnesses who are willing to testify. In that regard there is no new evidence in respect to the commission of the offence for this court to consider.

5. **Article 50(6)** of the constitution provides:-

> ***"A person who is convicted of a criminal offence may petition the High Court for a new trial if-***
>
> ***(a) The person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and***
>
> ***(b) new and compelling evidence has become available.***

6. The following cases discuss what qualifies as new and compelling evidence:

**(a)** TOM MARTINS KIBISU VS REPUBLIC (2014) eKLR as:-

***"Evidence that was not available at the time of the trial or could not have been available upon exercise of due diligence, and evidence sufficiently weighty that if it was available to the trial or the appellate court, the conviction would probably not have been sustained."***

**(b)** ERNEST OTIENO KEYA & ANOTHER VS REPUBLIC (2015) eKLR:-

***"A petition under Article 50(6) is not about re-hearing of the appeal or re-evaluating evidence afresh. It is about some independent evidence that brings out a completely new dimension to the case such that a tribunal properly directing its mind on that 'new evidence' would find itself legally obliged to re-open the case for a fresh trial. It is not and should never be about feelings, doubts or even thoughts of forgiving a petitioner, but evidence that compels the court to re-think the original position taken in the matter."***

7. The respondent did not provide any contrary evidence which could counteract that which was submitted by F in regard to his age when the offence was committed. The respondent submitted that the determination of F' age could only be done by scientific process.

8. In the court's view the respondent should have sought for such examination of F to determine his age. The respondent did not seek to do so.

9. This court has, therefore, to determine whether indeed F was a minor when the offence was committed and ought therefore to have been sentenced as the law provides. It is clear that the children Act No. 8 of 2001 commenced operation 1st March 2002. It follows that the provisions of the Children Act could not have been applicable to the case of F since the sentence of death was delivered on 27th November 2001.

10. F has provided his baptismal card as evidence that he was a minor when the offence was committed. He deponed, and it was not contested by the respondent, that he does not have a National Identify card because he had not attained the age of 18 years before he was placed in custody.

11. It is instructive to note that the High Court Judge who saw F during his trial and also saw those of his friends, presumably his age mates, who testified referred to F and his friends as "pals". The full sentence where that word was used in the judgement is as follows:-

***"While the accused (F) and his pals were still at the door of PW 1 which was ajar the deceased and one G arrived at the PW 1's house."***

12. Is it a coincidence that the learned judge referred to both F and his friends as 'pals'? In my view it is not. It seems that the learned judge use of the word 'pals' in his judgement, which word is ordinarily reserved for youngsters, did so because he could see that F and his friend were young. F has now been in custody for 18 years. My observation of him in court is that he looks very young certainly in his early 30s, in terms of his age. The Magistrate's court was not informed of his age during committal proceeding because he was unrepresented, according to F and the record bears him out.

13. In my view F has, on a balance of probability, proved that he was a minor, as witnessed by his baptismal card, when he was tried and also because of his youth looks despite being in prison now for 18 years. Bearing that finding in mind F should have been sentence as per **section 25(2)** and **(3)** of the **Penal Code Cap 63** which provides:-

***"(2) Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the president's pleasure, and if so sentenced he shall be liable to be detained in***

***such place and under such conditions as the president may direct, and whilst so detained shall be deemed to be in legal custody.***

***(3) When a person has been sentenced to be detained during the president's pleasure under subsection (2), the presiding judge shall forward to the president a copy of the notes of evidence taken on the trial, with a report in writing signed by him containing and recommendation or observations on the case he may think fit to make."***

14. From the above provisions it is clear that the sentence of death passed against F who was a minor was unlawful. If it was unlawful what should this court do? As stated before F has been in custody for 18 years. If the trial court was aware of his age it would have sentenced as provided under section 25(2) of Cap 63, that is at the president's pleasure. In so sentencing him the trial court as provided under section 25(3) of Cap 63 would amongst other things, have made recommendation to the president. It is doubtful that the trial court could have recommended to the President that F be detained for 18 years. F has been in custody for more years than he was free and out of custody. In my view interest of justice will not be served by ordering either a new trial or for a new sentence. Since the sentencing, which now appear to have been illegal, was by the High Court, justice will best be served by this court dealing with the issue of sentence as per section 25(2) and (3) of Cap 63.

15. In the end I find and I hold that F G M was a minor when the offence was committed. That being so he shall be sentenced as provided under the law. **Accordingly the sentence of death against F G M is hereby set aside. F G M is sentenced to be detained at President's pleasure for the period so far served. This court therefore orders that F G M be set free unless otherwise lawfully held.**

**DATED and DELIVERED at NANYUKI THIS 2nd day of AUGUST 2017.**

**MARY KASANGO**

**JUDGE**

**CORAM:**

Before Justice Mary Kasango

Court Assistant: Njue

Petitioner: F G M ……..

For Petitioner: ……..

For the State: ….....

COURT

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**