REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL (MURDER) CASE NO. 1 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

ECM.....ACCUSED

R U L I N G

1. The accused was convicted of murder. The accused committed the offence when he was a minor. **Section 204 of the Penal Code** provides that a person convicted of murder shall be sentenced to death. The mandatory nature of the death penalty has been outlawed by the Supreme Court in the now famous case of ***Francis Karioko Muruatetu and Another -v- Republic and Others 2015 eKLR.***

However, the court did not outlaw the death sentence. This has been re-affirmed by the Court of Appeal in the case of ***Joseph Njuguna Mwaura & 2 Others -v- Republic (2013) eKLR*** where the court stated that ***"the death penalty shall continue to be imposed in a case of a conviction where the law provides."*** The law provides that a person who commits an offence while under the age of eighteen (18) years cannot be sentenced to death. This is under **Section 25 (2) of the Penal Code** which states:-

> ***" 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……"***

On the other hand **Section 190 of the Children's Act** outlaws the sentencing of children to imprisonment. It provides that –

> ***"(1) No child shall be sentenced to imprisonment or to be placed in a detention camp.***
>
> ***(2) No child shall be sentenced to death***
>
> ***(3)……"***

The Acts proceeds to make provision for the punishment of a child offender. **Section 191 of the Acts** provides:-

> ***" In spite of the provisions of any other written law and subject to this Act where a child is tried for 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:-***
>
> ***a) by discharging the offender under Section 35(1) of the Penal Code (Cap 63) .***
>
> ***b) by discharging an offender on entering a recognizance with the or without sureties.***
>
> ***c) by making a probation order against the offender under the probation of offenders Act (Cap 64) .***
>
> ***d) by committing the offender to the case of a fit person whether a relative or not or a Charitable Children's Institution willing to take him under his case.***
>
> ***e) if the offender is above ten years and under 15 years of age by ordering him to be sent to a rehabilitation school.***
>
> ***f) by ordering the offender to pay a fine, compensation or costs or any of them.***
>
> ***g) in the case of child who has attained the age of 16 years dealing with him in accordance with any Act which provides for the establishment and regulation of a borstal institution.***

h) by placing the offender under the case 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 probation of offenders Act (Cap 64)

k) making a Community Service Order.

l) in any other lawful manner."

The Court of Appeal had occasion to deal with a similar issue as the one which is in this case. In ***O.OP (minor) -v- Republic (2004) eKLR*** where the Court held that the court should have sentenced him as provided under **Section 191 of the Children Act** and proceeded to call for a probation officer's report. In ***Denis Mokula Motanya and Another -v- Republic 2014 eKLR*** the Court of Appeal considered **Section 191 of the Children Act and Section 25(2)** of the **Penal Code** held that the court has discretion to deal with the child in any other manner.

In this case the accused has been convicted of murder. As he was proceeding with this case he was at Shimo La Tewa Borstal for offence of defilement.

2. It should be noted that under **Section 191 (1) (L) of the Children Act** (Supra) the Court is given discretion to deal with the child offender in any other lawful manner. This discretion in my view should not be used in a manner that fails to appreciate that the law recognizes that child offenders must be dealt with as provided under the Constitution and the Children Act, that is, the best interest and preservation of his life through rehabilitation. It is therefore my view that for the court to exercise discretion under **Section 191 (L) of the Children Act** and punish the offender in any other lawful manner, it will depend on the circumstances of the individual case which warrants the dealing with the child offender in any other lawful manner. The factors to be considered are:-

1) The offender is over 18 years at the time of sentencing for the offence he committed when he was a minor.

2) The sentence under **Section 191(1) (g) of the Children Act** may not be appropriate where the offender has attained the age of 18 years at the time of sentencing.

3) The nature of the offence committed for which the offender has been convicted.

4) Where the child offender is a repeat offender.

5) Where a social inquiry has been conducted and it has been established that a none custodial sentence is not suitable.

6) The victim impact statement where applicable should also be considered.

The consideration would in my view assist the court to deal with the predicament when sentencing a person who was a minor when he committed the offence but attains the age of majority at the time of sentencing. Where in a case like this one the offence committed is a serious one and was committed when another serious offence he committed was hanging over his head like ***'the sword of damocles'*** and on top of that he has been committed to a borstal institution and served the term, it would not be in the interest of justice to consider a none custodial sentence. He requires rehabilitation in a penal institution. In deed this is the considered view by the Court of Appeal who in the case of ***Republic -v- Dennis Kirui Cheruiyot (2014) eKLR*** stated ***'that when faced with a situation like the one we have in this case, the solution lies in Section 191 (L) of the Children's Act to deal with the offender in question in any other lawful manner.'*** In this case, the appellant was aged 15 years when the offence was committed. He was convicted of murder. The trial court sentenced him to death. On appeal, the court sentence him to ten (10) years imprisonment. The court stated in ***JKK -v- Republic (2013) eKLR:***

> ***" The purposes of the sentences provided for under the children Act are meant to correct and rehabilitate a young offender, i.e any person below the age of eighteen years while taking into account the overarching objective is the preservation of the life of the child, and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of sixteen years the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant, though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his emission or lack of judgment by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes which can only happen after serving a custodial sentence."***

In this case I have considered the mitigation. I have also perused the probation officer's report which shows that the accused is not remorseful. This offence is a very serious, one which carries a death penalty. The accused is a repeat offender who committed this offence within a period of six months while on bail/bond in earlier case. The victims in both cases were innocent minor children of age six years and below. The victim in this case no doubt died a painful death. The wounds on the victim's mother are still fresh as per the probation officer's report. The community is not convinced that the offender has reformed since the present offence and the earlier one was committed within a period of six months. The accused is not remorseful. An innocent life was lost. Guided by the above decisions, which bind this court, it is my view that the accused who is now over eighteen years, should be dealt with under **Section 191(1) (L) of the Children Act** to give him an opportunity to realize his mistakes and for his rehabilitation. He was above 15 years old and slightly below 16 years. The accused had served a term in a rehabilitation institution, that is Shimo La Tewa Borstal Institution and due to his age he can no longer be committed to the institution. A custodial sentence is called for. I sentence the accused a term of **twenty (20)** years imprisonment. There is a right of appeal within 14 days.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 8TH DAY OF JUNE 2020.

L.W. GITARI

JUDGE

8/6/2021

Ruling on sentence read out in the presence of the accused through virtual.

L.W. GITARI

JUDGE

8/6/2021