



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 863 OF 2018

EWM.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **EWM** was the first accused in **High Court (Nairobi) Cr. Case No. 68 of 2004**. She was charged alongside another jointly with the offence of murder contrary to **Section 203** as read with **Section 203 of the Penal Code**. The particulars of the charge were that between the 21<sup>st</sup> of February, 2004 and 27<sup>th</sup> February, 2004, at [particulars withheld] Village in Maragua District of Central Province jointly with others not before the court murdered AKW.

2. At the time of the charge, the Applicant was 17 years old. The sentence was passed on 13<sup>th</sup> March, 2012. She was sentenced to be detained at the President's pleasure courtesy of **Section 25(2) of the Penal Code**. The application before the court was filed in person in which the Applicant seeks a review of the sentence. At the time of hearing the application, she engaged learned Counsel, Mr. Kitonga. In submission, Mr. Kitonga stated that in a **High Court Petition No. 570 of 2015**, a **judgment of Hon. J. M. Mativo, J. delivered on 12<sup>th</sup> May, 2017**, the court declared a sentence of detention under the President's pleasure unconstitutional. That a similar position was held by the Court of Appeal on 8<sup>th</sup> February, 2019 in **Cr. Appeal No. 103 of 2013 (Nairobi) – Richard Mwaura Njuguna and Anor vs Republic [2019]eKLR**.

3. Counsel submitted that the Applicant having committed the offence as a minor ought to have been sentenced to a non-custodial sentence. Furthermore, pursuant to the above authorities, she has been serving an unconstitutional sentence which is indeterminate.

4. On mitigating factors persuading the court to release the Applicant, counsel submitted that the Applicant has been a role model in prison and a recommendation letter for her good conduct was issued by the prison. Further, she had undergone some artisan skill training and obtained certificates of the same as well as a certificate of good conduct. Accordingly, it was urged that if released to the society, she will be a role model.

5. Learned State Counsel, Mr. Momanyi did not oppose the application. He however urged the court to note that the Applicant was a house help to PW1 and caused the death of her (PW1) child who was only 2 years old together with the 2<sup>nd</sup> accused. It was submitted that they dumped the child in a pit latrine within the compound of another witness, PW5. He noted that although the Applicant had been in custody for 15 years, the court ought not to impose a stringent sentence noting that a life was lost. He proposed a sentence of 30 years imprisonment which was passed against the 2<sup>nd</sup> accused.

6. In rejoinder, Mr. Kitonga submitted that the Applicant was extremely remorseful and had reconciled with her former boss, the mother to the deceased. That further, she was influenced by the 2<sup>nd</sup> accused who was an adult at the time.

7. After the close of the hearing, the court requested for the filing of a Probation Officer's Report which would focus both on the conduct of the Applicant as well as the victim impact statement. The report was filed in court on 2<sup>nd</sup> December, 2019 by Pamela Alambo, the Probation Officer in Nairobi. She did confirm that the Applicant was arrested in 2004 when she was 17 years old. She had now turned 32 years. That she is the first born in a family of four and the rest of her siblings are adults. She has little ties with her family who hardly visit her in prison. The only sister who was contacted was uncooperative for an interview, hence it was difficult to assess the preparedness of the family in assisting her to resettle and re-integrate with them. The Applicant also seems not to have conceptualized her role in the offence and therefore take full responsibility for her action. She did not appear to demonstrate genuine remorse. The victim who is the mother of the deceased was not reached for interview. The police file that could have impacted her attributes from her statements could not be traced. The probation Officer thus left the court to make an independent decision.

8. As regards to the Applicant's rehabilitation, the report indicates that she has undergone guidance and counseling on change of behavior. She also has attended short craft courses in bead work, basket making, hair dressing, entrepreneurship and cookery. She was currently pursuing basic primary education in standard six.

9. As regards to the family background, the Applicant parents separated while she was still young and the mother remarried. She was left in the custody of her grandparents. She has very little information of her biological father. One of her sibling's whereabouts was unknown whereas another lives with a paternal uncle. The third sibling resides in Thika and was not cooperative to be interviewed.

10. I have considered the respective submissions as well as the facts of the case. I do agree with the learned State Counsel that the circumstances of the case were serious, the Applicant having jointly with another adult thrown a two year old infant into a pit latrine. As submitted by counsel for the Applicant, it is possible that she was roped into the offence by virtue of her vulnerability as she was a child. Although she played an equal role to that played by her co-accused person, by virtue of her vulnerability, the court would consider a less serious punishment than that meted against the 2<sup>nd</sup> Accused.

11. I do agree with the Applicant's counsel that a sentence of detaining convicted persons under the President's Pleasure is unconstitutional. However, at the time the Applicant was charged, she had attained the age of criminal responsibility under the Penal Code. Having attained the age of majority, at the time of sentencing which was on 13<sup>th</sup> March, 2012, the sentence would accord with any sentence that an adult can be sentenced to. See **J.K.K vs Republic [2013] eKLR** where the Court of Appeal sitting in Nyeri determined that the appellant having been dully convicted of murder being aged 15 years old at the time of the commission of the offence should serve a determinate sentence as at the time of sentencing he was an adult. The court thus delivered itself as follows:

***“The purposes of the sentences provided for under the Children Act are meant(sic) to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while considering 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 16 years, the court can sentence him in any other lawful manner. 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”***

12. In my view therefore, this is a good case in which the court ought to consider what appropriate sentence the Applicant should serve, but which sentence should be determinate. In view of her mitigating role in the offence, I hold a different view that she should be sentenced to a lesser sentence than that of the 2<sup>nd</sup> accused. She was charged on 21<sup>st</sup> February, 2004 and has to date been in custody for fifteen years ten months which in my view ought to serve as sufficient sentence.

13. I am minded of the report by the Probation Officer that the Applicant has maintained loose ties with her family. However, keeping her in prison would not be the solution that notwithstanding the lack of family ties, she cannot reorganize her life by herself. She is now an adult aged 32 years and having stayed in prison since she was seventeen years old must be depressing and frustrating. The only sister who visits her lives in Thika and in my mind she will find a way of seeking her. Her release outweighs the purpose of her continued stay in prison.

14. In the result, I hold that the Applicant has served sufficient sentence and I order that she be forthwith set free unless otherwise lawfully held. It is so ordered.

**Dated and Delivered at Nairobi This 5<sup>th</sup> day of December, 2019.**

**G.W.NGENYE-MACHARIA**

**JUDGE.**

**In the presence of:**

1. Applicant present in person
2. M/s Nyauncho for the Respondent