



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CRIMINAL DIVISION**  
**AT MALINDI**  
**CONSTITUTIONAL PETITION NO. 12 OF 2015**

**LUCIAN MWANDOE SHUMA.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(In respect of Criminal Case No. 32 of 2005 of the Senior Resident Magistrate's Court at Voi – Hon. K. Muneeni)

**JUDGEMENT**

The petitioner is seeking an order to the effect that the judgement and sentence imposed by the trial court on 17<sup>th</sup> November, 2005 be varied since the petitioner was under the age of 18 years when he committed the offence. The petition is supported by the petitioner's affidavit sworn on 26<sup>th</sup> May, 2015.

The main issue being raised by the petitioner is that he informed the trial court that he was 18 years old during the time of sentencing. He was however sentenced to suffer death. In his written submissions, the petitioner submit that he informed the trial court that he had finished standard eight the previous year and was 18 years. Section 2 of the Children Act number 8 of 2001 defines a child to be any human being under the age of 18 years. It is further submitted that section 73 (e) of the Children Act allows the High Court to substitute a sentence imposed by the trial court if the convict is under 18 years.

It is the petitioner's contention that having informed the trial court that he was eighteen, it was incumbent upon that court to have ordered for age assessment. Section 190 of the Children Act prohibits the sentencing of a child to death or imprisonment or detention. The petitioner contends that he reached the age of 18 years at the time of sentencing. His constitutional rights were therefore violated. The petitioner relies on the case of **AMOS KARUNGA V REPUBLIC, Nyeri Criminal Case No. 12 of 2006 eKLR** and that of **JOSEPH YUSUF MIMO V REPUBLIC; Kisumu Criminal Appeal No. 19 of 2010**. It is the petitioner's prayer that this court find that his constitutional rights as a child then as provided by the Constitution and the Children Act, were breached and contravened and therefore any continued detention will be constituting further breach of his constitutional rights. The court should order for the petitioner's release from prison.

The state opposed the petition. Mr. Fedha, prosecution counsel, relied on the replying affidavit sworn by Mr. Timothy Musyoki on 28<sup>th</sup> October, 2015. It is submitted that the petition does not raise anything new. The petitioner appealed to both the High Court and Court of Appeal and the appeals were

dismissed. There is no evidence that the petitioner was under the age of eighteen years old.

The background to this petition is that the petitioner and five other people were charged with four counts of robbery with violence contrary to section 296 (2) of the Penal Code. The petitioner herein was also charged with three alternative counts of handling stolen goods contrary to section 322 (2) of the Penal Code. The robberies took place on 6<sup>th</sup> December, 2004 at Chunga-unga Village in Mwachabo Location, Mwatate Division, Taita Taveta County. The petitioner was the suspect before the trial court.

The petitioner and his co-accused were arraigned before the Voi Senior Resident Magistrate's Court on 14<sup>th</sup> January, 2005. The trial court convicted the appellant and his co-accused of the main counts of robbery with violence. The judgement was delivered on 17<sup>th</sup> November, 2005.

The record of the trial court shows that the petitioner gave unsworn evidence in his defence. He informed the court that he had completed standard 8 the previous year. (Page 77 of the record of the trial court). Upon conviction, the petitioner was called upon to mitigate. At page 135 of the trial court's record, the petitioner said "*I am 18*". The petitioner and his co-accused filed Criminal Appeal number 236 of 2005 before the Mombasa High Court. The appeal was dismissed by Justices F. Azangalala and M. Odero vide a judgement delivered on 18<sup>th</sup> May, 2010. The petitioner and his co-accused filed a second appeal before the Court of Appeal this being Criminal Appeal number 63 of 2014. The court of Appeal dismissed the appeal in its judgement delivered on 26<sup>th</sup> February, 2015. I have read the two judgements of both the High Court and the Court of Appeal. In both cases, the issue of age was not raised.

The petitioner informed the trial court that he had finished standard eight in 2004. The school where the petitioner did his class 8 is not given. No leaving certificate or standard eight results were given to the trial court. There is no specific date of birth indicated by the petitioner. Having been put on his defence, the petitioner was supposed to prove all his allegations. He had the right to remain silent. However, having opted to testify, he ought to have proved all his allegations. He gave unsworn evidence and it cannot be concluded with finality that indeed the petitioner finished standard 8 in 2004. There are situations where class 8 students are over 18 years. The trial took less than one year. The petitioner submit that he became 18 years at the time of sentencing. When was he born? No date of birth is given. The petitioner's position is that the trial court ought to have ordered for age assessment. The trial court saw the petitioner and was able to see his physical features then. In the absence of any other evidence, the petitioner's contention that he was under 18 years at the time the offence was committed is not proved. This remains a mere allegation. During the hearing, the petitioner and his co-accused asked to be taken for treatment in hospital. At that time the law did not allow the release on bond of accused persons charged with capital offences. It could have been easy for the petitioner to have asked for his age to be assessed at that time.

Given the background of the petition, I do find that the allegations by the petitioner that his constitutional rights as a child were violated are not proved. There is no proof that the petitioner was a child in 2004. If the petitioner did his class 8 exams in November or December 2004, why would he engage in robbery with violence about one or two months later?

It is also clear to me that both the High Court and Court of Appeal read the record of the trial court. The petitioner's allegations that he was 18 years were part of the record. It is nothing new. There is no new or compelling evidence being introduced by the petition.

In the end, I do find that the petition herein lacks merit and is hereby dismissed. There shall be no order as to costs.

**Dated and delivered in Malindi this 14<sup>th</sup> day of September, 2016.**

**S.J. CHITEMBWE**

**JUDGE**