



REPUBLIC OF KENYA



KENYA LAW
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**SJ alias S v Republic (Criminal Appeal 192 of 2018)
[2024] KECA 453 (KLR) (12 April 2024) (Reasons)**

Neutral citation: [2024] KECA 453 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 192 OF 2018
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
APRIL 12, 2024**

BETWEEN

SJ ALIAS S APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgement the High Court of Kenya at Busia by (F. Tuiyott, J.) dated 15th November, 2015 in Constitutional Petition No. 5 of 2014)

REASONS

1. On 25th October, 2023, we allowed the appeal that was lodged before us by SJ alias S, and directed that he be released forthwith unless otherwise lawfully held. We reserved our reasons for releasing the appellant and now give the reasons in this judgment.
2. The appellant was charged in Busia Criminal Case No. 425 of 2002, with the offence of Robbery with violence contrary to Section 296(2) of the *Penal Code*. He was tried convicted and on 13th December, 2005, sentenced to death by the Chief Magistrate's Court at Busia.
3. During his trial, the appellant had, on 24th March 2005, raised an issue concerning his age and informed the trial court that he was 16 years old. The Court ordered that the appellant be subjected to an age assessment, but the order appears not to have been acted upon. Consequently, the trial proceeded, was completed and a death sentence imposed upon the appellant, without him being subjected to an age assessment.
4. The appellant appealed to the High Court against his conviction and sentence, and the High Court (Msagha & Ochieng, JJ., as they then were) dismissed the appeal against both conviction and sentence in a judgment delivered on 2nd July, 2009. The appellant lodged an appeal before this Court against the judgment of the High Court, which appeal, was allowed (Onyango Otieno, Azangalala and ole Kantai



- JJA) in regard to sentence. The death sentence was ordered to be set aside and the appellant ordered to be detained at the President's pleasure.
5. Subsequently, the appellant filed Constitutional Petition No. 5 of 2017 in Busia High Court contending inter alia that new and compelling evidence had arisen that required his case to be heard afresh and an order made for his release. He argued that having been a minor at the time of his conviction, death sentence should not have been imposed on him. That petition was dismissed by the High Court (Tuiyott, J as he then was) on 16th November, 2015.
 6. By an undated memorandum of appeal filed by the appellant in person, the appellant lodged an appeal before us from the judgment of Tuiyott J in which he complained that the learned Judge erred in failing to find that his rights were contravened as the trial court failed to properly address the issue of his age; that his subsequent commitment at the President's pleasure was unconstitutional; and that the trial court erred in failing to consider the provisions of Section 191 of the Children's Act as he was under age.
 7. Learned counsel Mr. Okoyo Omondi Shem, who was the appellant's advocate added that the appellant was seeking refuge in the provisions of Article 53(1)(f) (i) & (ii), 2, & Article 160 of the *Constitution* in line with the decision in *AOO & 6 others v Attorney General & another* [2017] eKLR.
 8. In his written submissions, counsel for the appellant expounded that in *AOO & 6 Others v AG* (*supra*) the High Court (Mativo, J. as he then was), made a declaration that an order for detention of a prisoner for an indefinite and indeterminate period at the pleasure of the President was contrary to the separation of powers and therefore unlawful and unconstitutional.
 9. The appeal was opposed by the respondent through written submissions that were filed by Ms. J. Busienei, Senior Principal Prosecution Counsel, from the office of the Director of Public Prosecutions (ODPP). In the submissions, Ms. Busienei argued that the appellant had not exhausted the legal avenues of redress available to him, as he had not petitioned the President through the advisory committee on the power of mercy as provided under Article 133(1) of the *Constitution*. She pointed out that the issue of the appellant's age was addressed by this Court in its previous judgment and it contributed to his appeal being partly allowed on sentence. She, therefore, urged the Court to dismiss the appeal as it lacks merit.
 10. Upon considering this appeal, we were satisfied that the appellant was under the age of 18 years and was, therefore, a child when he was convicted and sentenced by the Chief magistrate's Court at Busia. An age assessment done by Dr. Patson Kubuta on 23rd June 2015, though belated, confirmed that the appellant was 16 years old as at 13th December, 2005, when he was convicted and sentenced. The order made by this Court for him to be detained at the pleasure of the President, which is an indeterminate term, was inconsistent with the *Constitution* and a violation of his constitutional rights. To this extent, we agree with the position taken by a number of superior courts' decisions on this including *AOO & 6 Others v AG* (*supra*) which was cited to us by the appellant.
 11. It was for these reasons that we allowed the appeal and reversed the previous order of the Court for the detention of the appellant at the President's pleasure. We took cognizance of the fact that the appellant had been in detention for a period of over 15 years, since his arrest and arraignment in court, and noted that he was a child at the time of his conviction and sentence, and directed that the appellant, who is now obviously an adult, be released forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF APRIL, 2024.

HANNAH OKWENGU



.....
JUDGE OF APPEAL

H.A. OMONDI

.....
JUDGE OF APPEAL

JOEL NGUGI

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

