



**Wamukota v Republic (Criminal Appeal 117 of 2016)  
[2023] KEHC 3927 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3927 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL 117 OF 2016  
JRA WANANDA, J  
APRIL 28, 2023**

**BETWEEN**

**NELSON WAMUKOTA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant was among two accused persons charged with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*. The particulars were that on the 22<sup>nd</sup> day of January 2014 at Makunda village in Bungoma North District within Bungoma County, they robbed Jane Muonje her mobile phone make LG-105, 15 kgs of dry maize mixed with beans, 3 kgs of wheat flour all valued at Kshs 4,140/- and at or immediately before or immediately after the time of such robbery wounded the said Jane Muonje.
2. The Appellant was the 1<sup>st</sup> Accused. He pleaded not guilty to the charge.

**Prosecution evidence**

3. The prosecution called 6 witnesses.
4. PW1 was the complainant (Jane Muhiya). She stated that on 22/01/2014 she was at her home alone and had just left the kitchen to go to the main house when she met the 2<sup>nd</sup> accused carrying items from her house, when she asked him what he was doing he responded by holding her by the throat and began struggling with her, he pulled her tongue out and pulled her to the bedroom, they were many and one cut her with an axe while another hit her with a jembe, they had torches which they flashed.
5. She further stated that because of the flashes of the torch she was able to identify the Appellant and the 2<sup>nd</sup> Accused among the assailants, she then fell down and passed out, she was able to identify Silas (1<sup>st</sup> accused), Wamukota (Appellant), Daddy, Simon and Simiyu She then identified the mixture and



- beans and also stated that the assailants cut 4 fingers of her left hand, hit her 3<sup>rd</sup> tooth until it came off and that she was then rushed to Naitiri hospital and referred to Kakamega. She then also identified the P3 Form and medical notes. Finally, she stated that she knew the accused people because they were her neighbours and that she was in hospital for 2 weeks.
6. In cross-examination, she stated that she was not related to the accused persons but they were neighbours, she did not know who was found with the items, she had never done any business with the accused persons, the Appellant flashed a torch and she saw him.
  7. The next witness PW2, (Edward Maila Sisila) described himself as a village elder. He stated that he knew the complainant as she lives in his area, on 22/01/2014 he was at home when he received a phone call from one Joshua Klie, a neighbour and munyumba kumi, who told him that PW2 should go to where he was (near the home of one Brigid Mutila). Joshua Klie told him that he suspected something because Wamukota (Appellant) had passed with some luggage which was questionable, PW2 went and it was discovered that the Appellant had gone to the home of one Oscar Arubain.
  8. PW2 added that he went to one Brigit who was also a nyumba kumi, they called the said Oscar and informed him of the occurrence, Oscar called back shortly thereafter and informed them that he had the boy (Appellant), they went to Oscar's home and indeed found the Appellant there, they began interrogating the Appellant on where he had gotten the wheat, maize, beans, flour and phone, the Appellant owned up and confessed that he had stolen the same from Jane Muhonje (complainant).
  9. He added that they then sent word to the complainant's home but the report came back that she was in shock, however two children from her home came and confirmed that indeed their property had been stolen, they were the complainant's grandchildren, a crowd had gathered, they called AP Makungu who came and arrested the Appellant and took him to the police, they were asked to go and tell the complainant to go and write a statement, when they went to the complainant's home they found that she had locked herself in, when they knocked they heard groaning from inside, they then broke the door and entered, they found the complainant bleeding from the head and fingers and on inquiry on who had cut her she said that it was Wamukota (Appellant) and others.
  10. He further testified that they took the complainant to hospital and later recorded statements, the family took the complainant to Kakamega, he later heard that Silas (2<sup>nd</sup> accused) was arrested. He then confirmed that the sack of maize and beans referred to above were in Court and he identified them. Finally, he stated that they gave the phone to the police and that he has known the accused persons from when they were born.
  11. In cross-examination, PW2 reiterated that he saw the Appellant with the items which he confessed to have stolen from the complainant, the Appellant was alone when they arrested him, he did not know when the 2<sup>nd</sup> accused was arrested or who he was found with.
  12. PW3 (Oscar Andrew Wambani) stated that on 22/01/2014 he was at home at night around 8pm, his children were playing in the compound since there was bright moonlight when he saw Nelson Wamukota (Appellant) and 2 other young men whom he knew as Josphat and Simon, the Appellant was leading them, they came to his compound and went to the kitchen where PW3's wife was, the other 2 young men waited outside, the Appellant was asking PW3's wife if she could buy the maize which the Appellant was carrying in a gunny bag, PW3's wife told the Appellant that she did not have money to buy, the Appellant then went to PW3 and inquired whether he could buy, he was asking for Kshs 600/-, PW3 asked the Appellant where he had got the maize, Simon and Josphat responded that the maize belonged to the Appellant.



13. PW3 stated that he decided to check the bag and realized that it had beans, maize meal and maize all mixed, PW3 asked the Appellant to wait as he went to get the money, PW3 went to the house and tried to call the village headman, he however did not have sufficient credit on his phone to sustain the call, the headman called him back and informed him that he had also received a report that the complainant had been attacked and robbed of certain items, he asked PW3 to keep the Appellant around by buying time until the headman arrived, PW3 then tricked the Appellant by asking him to accompany him to a neighbour's home where they could keep the maize, by then he had alerted the headman on the route that they would take with the Appellant, after walking for about 50 metres they met the headman with a torch, the headman was with other people, upon interrogation the Appellant stated that he had worked for the complainant and he had taken the cereals as payment for the work, villagers then came and threatened to lynch the Appellant, one of them called the police, PW3 and the headman successfully restrained the crowd from lynching the Appellant, the headman and others escorted the Appellant to the AP camp.
14. He testified further that the next morning he visited the complainant's home and was shocked to learn that she had been seriously injured on the fingers and head. The complainant had narrated to the neighbours that she had been attacked by the Appellant and others and he learnt that the complainant had been escorted to hospital in critical condition. He then identified the Appellant in Court. He added that he also noticed that the Appellant had a cell-phone, he was suspicious of the Appellant as he is known to be involved in petty theft, he had not seen Josphat and Simon since they left his homestead, the Appellant is his nephew, he later recorded a statement.
15. In cross-examination, he stated that he did not know where the Appellant got the items that he wanted to sell. He however reiterated that the Appellant was carrying the items suspected to have been stolen and that the Appellant even stated that he took the items from the complainant. He further testified that he knows the 2<sup>nd</sup> accused very well, however the 2<sup>nd</sup> accused was not among those who came to his compound on that day.
16. PW4 (Joel Kimei) stated that he is attached at Makunga AP post as a constable, he has been a police officer for 18 years, on 22/01/2014 at around 9pm, him and his colleagues were called by members of the public, the person who made the call is a village headman, he described where they were, he and 2 of his colleagues left to go to the village, they met the village elder and others escorting the Appellant who was carrying a sack of maize, beans and other items, the Appellant was tied using a rope, they arrested him and asked a police motor vehicle to escort the Appellant to the police, at the police station they conducted a body search on the Appellant and recovered a cell-phone of LG make, inside the sack there were maize, beans and maize meal, the Appellant had 2 trousers, while they were still at the police station they received a call that a lady by the name Jane had had named the Appellant as one of her attackers, they also learnt that the said Jane was in critical condition, they went to Jane's house and recovered an axe and a metal rod, they escorted the lady to Naitiri hospital, she was seriously injured on the head and fingers, on 16/06/2014 the 2<sup>nd</sup> accused was escorted to Makunga AP post by members of the public, it was alleged that he was one of those who attacked the lady while in the company of the Appellant. He then identified the Appellant and the 2<sup>nd</sup> accused in Court.
17. In cross-examination, he reiterated that the Appellant had already been arrested by members of public, he was tied with a rope and that he visited the scene of robbery. He further stated that the 2<sup>nd</sup> accused was also arrested by members of the public, no exhibit was found with the 2<sup>nd</sup> accused, it was alleged that he had been mentioned by the complainant.
18. PW5 (Michael Okurumait) described himself as a clinical officer at Naitiri sub-county hospital, Karima health centre, he has been a clinical officer for 15 years, on 31/02/2014 he examined the complainant



with a view to filling a P3 Form, the complainant came to the hospital with a history of having been assaulted by thugs some of whom she could identify, she had not used any alcoholic drink, she had a wound on the head, she complained of pain on the chest, her left hand had a wound and it had been stitched, the approximate age of the injury was 2 months 9 days, the probable object causing the injury was sharp, she had been treated, he assessed the degree of injury as grievous harm, she had been treated at Naitiri hospital on 22/01/2014. He then produced the treatment card and P3 Form as exhibits

19. The last prosecution witness, PW6 (Paul Kierich) described himself as a police officer attached to Kiminini Police Station. He stated that in 2014 he was at Mbakalo Police Station, he has been a police officer for 28 years, on 22/01/2014 on arrival at Makunga Police AP camp he found that the APs had arrested a suspect who had items suspected to have been stolen, the suspect had a sack of maize and beans and a cell-phone, they asked the suspect to accompany them to Mbakalu Police Station, later on Jane Muhonje (complainant-PW1) came to report that she had been attacked and robbed of the items in question, she had been injured on the head and had wounds, she mentioned the suspects as Nelson Wamukota (Appellant), Silas Lwadanyi Ndiwa (2<sup>nd</sup> accused) and others who are still at large. He added that the complainant narrated how she had been attacked and viciously injured before being robbed, how neighbours came to her rescue, a neighbour who had been approached to purchase the stolen goods had the Appellant arrested. He then identified the accused persons in Court and added that he visited the scene on the same night of 22/01/2014, he recovered an axe and a metal rod allegedly used to attack the complainant, and also a blood-stained trouser belonging to the Appellant. He then produced the axe, the metal bar, the trouser and the maize and beans mixture, LG cell-phone and flour as exhibits.
20. He stated that the cell-phone was valued at Kshs 2,000/-, that the 2<sup>nd</sup> accused was arrested later by members of the public, the other suspects are still at large, the accused persons are neighbours of the complainant, the complainant gave the names of the suspects and therefore there was no need for an identification parade.
21. In cross-examination, PW6 reiterated that the Appellant was identified by the complainant, that he was arrested with the exhibits and that he had a blood stained trouser. He further reiterated that he (PW6) was the investigating officer, that the complainant is the one who identified the 2<sup>nd</sup> accused, the 2<sup>nd</sup> accused was arrested by members of the public, he disappeared after the incident, he was arrested in June 2014, they (police) came to look for the 2<sup>nd</sup> accused on several occasions but they could not find him.

### **Defence evidence**

22. At the close of the prosecution case, the Court made a finding that there was a case to answer and put the both the Appellant and his co-accused to their defence.
23. In his defence, the Appellant gave sworn testimony. He stated that he comes from Makunga, he was a student at Makunga primary school, he understood the charges against him, on 22/01/2022 at 10.00 am he was coming from the shop where he had been sent by his mother, he met 3 people who asked him to stop, they demanded to know his name, they then asked him to accompany them to the police station, he was ushered into a cell, he told them that he knew nothing about the case, they asked him about Jane Muhonje (complainant), he told them that he knew her, they told him that she had been robbed.
24. In cross-examination, he stated that he was a student in class 5 in the year 2014, school fees had been paid, they used to go class by 7 am, he had not gone to school on the day of his arrest, his mother was unwell, he knew the complainant, he used to stay and work with her, it is not true that he used to stay



with the complainant, he was staying with his mother, he did not attack the complainant, she was a close neighbour, on 22/01/2014 he was not in school, he was arrested on 22/01/2014 and escorted to Mbakalo police station, he was not lying to the Court.

25. The 2<sup>nd</sup> accused on his part stated that he does casual jobs, he understood the charges against him, on 14/06/2014 he was herding his parent's cattle when two men came and arrested him and escorted him to Makunga AP's post, he was then transferred to Mbakalo police station where he was locked in the cells, he stayed there for 4 days before being arraigned in Court, he did not know about the charges against him.
26. In cross-examination, he stated that he could not recall what happened on 22/01/2014, he could only recall when he was arrested on 14/06/2014, he could not tell whether the people who arrested him were policemen or members of the public, he did not know the complainant.

### **Trial Court's verdict**

27. After analyzing the evidence, on 26/04/2016 the trial Court found both accused persons guilty and convicted them both for the charge of robbery with violence. The Learned trial Magistrate stated that as regards the Appellant, the records indicated that he was a minor as at the time of the commission of the offence and therefore ordered that he be held at the pleasure of the President. As for the 2<sup>nd</sup> accused, he was sentenced to death.

### **Grounds of Appeal**

28. Being dissatisfied with the decision, the Appellant lodged this appeal on 10/05/2016. In the Petition, he has raised 5 grounds of Appeal as follows:
  - i. That I pleaded not guilty to the above preferred charges.
  - ii. That the Learned Magistrate erred by failing to regard my mitigation and my age at the time of arresting and Judgment.
  - iii. That the Learned Magistrate erred in law and facts by rejecting my defence without giving meritorious reasons.
  - iv. That the Learned Magistrate erred in law and facts by not considering enough evidence to support the alleged evidence of PW1 against me.
  - v. That since I cannot recall all that was attested before Court, I pray to be furnished with a copy of the lower Court proceedings to enable me prepare more grounds of Appeal.
29. Parties then filed written submissions in support of their arguments. The Appellant's Submissions were filed on 10<sup>th</sup> January 2023. On its part, the Respondent filed its Submissions on 02/08/2022 through Learned Senior Assistant Director of Public Prosecutions Robert Oyimbo.

### **Appellant's Submissions**

30. In summary, the Appellant faulted the Charge Sheet which, in his opinion, was defective. He submitted that the same lacked a signature or stamp and that the occurrence book details entered in the Charge Sheet are contrary the details on the P3 Form. He also submitted that the dates given by PW1 as to when she was treated contradict the date in the P3 Form, that instead of being placed under the President's pleasure he should have been sent to a borstal institution. Lastly, he claimed that the evidence presented was not sufficient to sustain a conviction



## Respondent's Submissions

31. On his part, State Counsel submits that the trial Court considered the Appellant's age and the mitigation and only thereafter sentenced the Appellant in accordance with the law. He submitted that the Court passed different sentences against the two accused persons because as regards the Appellant it inquired about his age and the Appellant stated that he was 17 years old at the time of the sentence. He submitted that the Court was therefore fully alive to the fact that the Appellant was a minor when he committed the offence and treated him as such. Counsel submitted further that the Appellant's defence was fully considered and that all other evidence was sufficient to convict the Appellant. He pointed out for instance the evidence that the Appellant was a neighbour to the complainant and other witnesses, he was found carrying the stolen items barely an hour after the attack and robbery, he was positively identified and that the Appellant did not offer any explanation on where he was at the material time.

## Analysis and determination

32. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the impugned Judgment.
33. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanor of the witnesses (see *Okeno v Republic* [1972] EA 32)

## Issues for determination

34. In my view, the issues that arise for determination in this appeal are the following;
- i. Whether there was error in the Charge Sheet rendering the trial fatal.
  - ii. Whether the prosecution proved its case beyond reasonable doubt.
  - iii. Whether the sentence of imprisonment at the President's pleasure was lawful and proper.
35. I now proceed to analyse and answer the said issues.

### **i. Whether there was an error in the Charge Sheet rendering the trial fatal**

36. Section 134 of the [Criminal Procedure Code](#) provides as follows:

“Every charge of information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

37. As aforesaid, the Appellant has faulted the Charge Sheet which he claimed was defective in that it lacked a signature or stamp and that the occurrence book details entered in the Charge Sheet are contrary to the details on the P3 Form.
38. Regarding the signing and stamping, I note that indeed the typed version attached in the Record of Appeal is not signed nor stamped. However, in the record of the lower Court, there is the original version of the Charge Sheet, filled by hand, duly stamped and signed. Clearly the copy attached to the Petition is simply a typed raw draft apparently included in the Petition in error. Since the lower Court Record contains the original which is what was used in the trial, this ground of Appeal appears to be



a fishing expedition and lacks merit. I presume that this is why the Appellant never raised this issue of the purported defectiveness of the Charge Sheet during the trial.

39. In any event, Section 382 of the [Criminal Procedure Code](#) provides as follows:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

40. It is therefore clear from the foregoing that irregularities in a Charge Sheet are curable as long as they do not occasion “a failure of justice”. In this Appeal, it has not been demonstrated how the mix-up in the compilation of the Record of Appeal has in any way prejudiced the Appellant or occasioned “a failure of justice” to him.

41. I also find that if it were genuine, “the objection could and should have been raised at an earlier stage in the proceedings” as required under Section 382 of the [Criminal Procedure Code](#) (supra).

42. In view thereof, this ground fails.

#### **ii. Whether the prosecution proved its case beyond reasonable doubt**

43. The appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the [Penal Code](#). Section 296 provides for both the offences of robbery and aggravated robbery and their respective penalties under sub-sections (1) and (2) as follows:

‘(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.’

44. In this case, the complainant (PW1) narrated how, while in her compound in the evening, she stumbled on the 2<sup>nd</sup> accused carrying items from her house and when she confronted him, he attacked her then pulled to her bedroom where she found more of the assailants. The attackers cut her with an axe and hit her with a jembe. Although it was dark, she was able to identify several of them including the 2<sup>nd</sup> accused and the Appellant since they were well-known to her and they had torches which they flashed.

45. On his part, PW3 stated that the Appellant was his nephew but was notorious for petty theft. He narrated how the Appellant suddenly appeared at his home at around 8 pm accompanied by two other young men and tried to sell to him the stolen items (maize, beans and flour). Because PW3 was suspicious, he secretly alerted the village headman (PW2) about the incident. As a coincidence, the headman also informed PW3 that he had just received a report that PW1 had been attacked and robbed by thugs at her home that same evening. PW3 and the headman then devised a strategy to delay the



Appellant by keeping him around until the headman arrived. The plan worked, the Appellant was then arrested within the vicinity red-handed with the stolen items by members of the public, upon interrogation, he admitted that indeed he had stolen the items from PW1's home, he was then handed over to the police. PW2 confirmed this account.

46. PW4, the police officer also testified that when the Appellant was handed over to them by the members of the public, his trousers had blood stains and the body search revealed that the Appellant had an LG cell-phone, the same one stolen from PW1.
47. It is therefore clear that the Appellant resides in the same locality and neighbourhood as PW1, PW2 and PW3. The Appellant himself confirmed this fact. He is therefore a person well-known to all of them. There was therefore no element of mistaken identity of the Appellant. The identification was therefore more of recognition.
48. I find that the Prosecution witnesses gave truthful, vivid and graphic accounts of the incident. PW1 in particular gave the same account to PW2, to PW3, to the police, to the medical staff and also to the trial Court all on different occasions. I have carefully considered the above testimonies and find them to be consistent and believable
49. I therefore find that PW1's account to the trial Court on the identity of the Appellant as one of the perpetrators was wholly consistent with the accounts given by all the other prosecution witnesses. Since I have already found that the testimonies of the prosecution witnesses were consistent, candid and credible, I find that the Appellant was positively identified as the perpetrator; there was no mistaken identity or error. It is also not lost on me that the Appellant's defence was simply a general denial without any specifics.
50. Accordingly, I find that the prosecution proved its case beyond reasonable doubt and that the trial court did not err in convicting the appellant. The appeal on conviction therefore lacks merit and is hereby dismissed.

### **iii. Whether imposition of the sentence of imprisonment at the President's pleasure was lawful**

51. The Appellant has submitted that because of his alleged age of 17 years at the time of conviction, instead of being placed under the President's pleasure, the Court should have sent him to a borstal institution.
52. Section 25(2) & (3) of the [Penal Code](#) provides as follows:

“(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.
53. However, Article 53(1)(f) of the [Constitution](#) provides that "every child has the right—
  - (f) not to be detained, except as a measure of last resort, and when detained, to be held —
    - (i) for the shortest appropriate period of time; and
    - (ii) separate from adults and in conditions that take account of the child's sex and age.



54. Further, Article 53(2) provides that:

“ A child’s best interests are of paramount importance in every matter concerning the child.”

55. Article 260 defines a "child" as follows:

“ means an individual who has not attained the age of eighteen years.”

56. On its part, the Children’s’ Act defines a “child” as follows:

“ means any human being under the age of eighteen years.”

57. Even further, Article 160 (1) of the Constitution provides that:

“In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.”

58. By reason of the apparent conflicts in the foregoing provisions of the law, a school of thought has emerged in the Kenyan Judiciary and other stakeholders, correctly so in my opinion, that Section 25(2) of the Penal Code is unconstitutional in that it violates the provisions of Article 53 (1) (f) (i) & (ii), (2) and Article 160(1) of the Constitution of Kenya, 2010 and also international conventions governing the rights of children and also the constitutional concept of separation of powers.

59. For the said judicial views, I refer to the decision of Mr. Justice Mativo (as he then was) in 400 & 6 others v Attorney General & another [2017] eKLR and the decision of Lady Justice Lesiit J (as she then was) in Republic v ENW [2019] eKLR.

60. As aforesaid, I fully concur with the above school of thought. I therefore find that that to the extent that the Appellant was imprisoned for an indefinite and/or an undetermined period of time at the pleasure of the President, the sentence is unlawful.

61. Regarding the Appellant’s plea that he should have been taken to a borstal institution, Section 191 of the Children Act provides as follows:

“

“(1) In spite of the provisions of any other 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—

.....

(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;

.....”

62. Section 5 & 6(1) of the Borstal Institutions Act, Cap 92 then provides as follows:

“ 5. Court before sentencing youthful offender to consider his history.



Before sentencing a youthful offender, a court shall consider the evidence available as to his character and previous conduct and the circumstances of the offence, and whether it is expedient for his reformation that he should undergo a period of training in a borstal institution.

5. Court before sentencing youthful offender to consider his history.

Before sentencing a youthful offender, a court shall consider the evidence available as to his character and previous conduct and the circumstances of the offence, and whether it is expedient for his reformation that he should undergo a period of training in a borstal institution.

6. Committal of youthful offender to borstal institution

- (a) Where the High Court or a subordinate court of the first class or a juvenile court is satisfied, after considering the matters specified in section 5 of this Act, that it is expedient for his reformation that a youthful offender should undergo training in a borstal institution, it may, instead of dealing with the offender in any other way, direct that the offender be sent to a borstal institution for a period of three years.”

63. While the borstal option may have been an available option at the time of sentencing on 2016 if the Appellant was 17 years old at that time, the same is of no relevance right now since the Appellant having already served almost 7 years in prison must now be about 24 years.

64. I also refer to the decision of Lady Justice Mumbi Ngugi in *R v DKK* [2019] eKLR, where the Judge stated as follows:

“21. The Probation Officer recommends that the subject be placed in a Borstal institution and specifies Shikusa Borstal institution. I agree with this recommendation. However, I have considered various decisions of courts in this jurisdiction in which the courts have had to grapple with the question of sentencing minors who have committed serious offences.

22. In *R v DKC* [2014] eKLR, the appellant had been convicted of the offence of murder and sentenced to life imprisonment. He was aged 20 at the time of sentencing but was 15 years old when the offence was committed.

23. In reducing the sentence of life imprisonment to 10 years, the trial court cited the decision of the Court of Appeal in Nyeri Criminal Appeal No 118 of 2011- *JKK v R* [2013] eKLR where the Court had considered the correct punishment for a minor offender and had stated as follows:

“The dilemma we face in this appeal was the ascertainment of the age of the appellant. Going by the remarks by the Judge, he was about 17 years when he was first arraigned in court in March, 2009, it is now four years later, which means he is now over the age of



18 years, therefore, he is not suitable to be subjected to any of the sentences provided for under the *Children Act*. 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 18 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 16 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 omission 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.” (Emphasis added)

24. See also the decision in *Daniel Langat Kiprotich v State* [2018] eKLR.
25. In this case, I take note of the fact that it was the deceased, who was older than the subject, who revived the fight the day following their confrontation at the bar. I further observe that they were both drunk. I also take into account the deep remorse that the subject showed when he sought forgiveness from the family of the deceased when the plea agreement between him and the state was being recorded. Nonetheless, I do not think that a brief stint of two years in a Borstal institution where he cannot be held after he reaches the age of majority, is sufficient to allow the subject appreciate the enormity of his actions, and to understand the consequences of his rash act. I therefore commit the subject to serve two years in the Shikusa Borstal institution. Upon attaining the age of 18, he shall serve a term of 2 years imprisonment at the Kericho GK prison.”
65. From the foregoing and since as set out at Section 5 & 6(1) of the *Borstal Institutions Act*, the sentence for committal at a borstal institution can only be for a maximum of 3 years, it is debatable whether the borstal option would have been suitable considering that the Appellant would have attained 18 years, the age of majority, within a year later and therefore no longer eligible to be retained in the institution.
66. In conclusion, I do find that it is expedient and judicious to give a determinative sentence in cases concluded under Section 25(2) of the *Penal Code*. I have considered the period the accused has been in custody during the pendency of the case. I note from the Charge Sheet that he was arrested on 23<sup>rd</sup> January 2014, arraigned on 24<sup>th</sup> January 2014 and sentenced on 26<sup>th</sup> April 2016. Although he was granted bail, all indication is that he did not pay the same and therefore continued being detained in custody throughout the trial, a period of about 2 years and 3 months. After sentencing, he has been in prison for almost 6 years and 10 months. He has therefore been in custody for a combined period of about 9 years.
67. Having come to the conclusions I have, and having taken all the relevant factors pertaining to sentencing into consideration, I set aside the sentence imprisoning the Appellant at the pleasure of the



President and substitute it with a sentence of imprisonment for 10 years computed from the date of arrest, namely, 24<sup>th</sup> January 2014.

**Final Orders**

68. In the end, I rule as follows:

- i. The Appeal against conviction is not merited and the same is dismissed.
- ii. The Appeal against the sentence is merited and the same succeeds.
- iii. The sentence imprisoning the Appellant at the President's pleasure is hereby set aside and substituted with a sentence of imprisonment for 10 years to be computed from the date of arrest, namely, 24<sup>th</sup> January 2014.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 28<sup>TH</sup> DAY OF APRIL 2023**

.....

**JOHN R. ANURO WANANDA**

**JUDGE**

