



**Baariu v Republic (Petition (Application) E021 of 2022)
[2023] KEHC 21136 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21136 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION (APPLICATION) E021 OF 2022**

LW GITARI, J

JULY 27, 2023

BETWEEN

ROBERT KOBIA BAARIU APPLICANT

AND

REPUBLIC PROSECUTION

Sentence of being detained at the President’s leisure declared unconstitutional.

The petitioner, convicted of murder and found to be under eighteen, was sentenced to detention at the President's pleasure under section 25(2) of the Penal Code. Challenging that, the petitioner argued that such indefinite detention violated the constitutional right of a child to be detained only as a last resort and for the shortest period. The High Court ruled that section 25(2) was unconstitutional, as it failed to provide a definite sentence, contrary to article 53(1)(f) of the Constitution. The court declared the provision unconstitutional and substituted the indefinite sentence with a fixed fourteen-year term, effective from the date of initial detention.

Reported by John Ribia

Constitutional Law – fundamental rights and freedoms – rights of the child – right of a child not to be detained except as a measure of last resort and when detained to be held for the shortest appropriate period of time – constitutionality of section 25(2) of the Penal Code, that provided that a person charged with the offence of murder who was tried and convicted and it appeared to the court that he was under eighteen years, a sentence of death shall not be pronounced but in lieu thereof shall sentence such person to be detained during the president pleasure – whether the provision was unconstitutional - whether the provision was a violation of right of a child not to be detained except as a measure of last resort and when detained to be held for the shortest appropriate period of time – Constitution of Kenya, 2010 articles 53(1)(f)(i) and 160 (1); Penal Code (cap 63) section 25(2).

Brief facts

The petitioner was charged with murder contrary to section 203 as read with section 204 of the Penal Code in the High Court of Kenya. The petitioner pleaded not guilty and after a full trial he was found guilty. The trial court held that the age of the petitioner was not clearly known and therefore sentenced him to serve at the President’s pleasure. The appellant was dissatisfied with the decision and filed an appeal in the Court of Appeal at Nyeri. The appeal was however not successful and was dismissed.



The appellant was dissatisfied with the decision and filed an appeal in the Court of Appeal at Nyeri. The appeal was however not successful and was dismissed. Further aggrieved the petitioner filed the instant petition in which he sought a declaration that sentencing a child found guilty of murder to serve at the president pleasure is unconstitutional

Issues

- i. Whether section 25(2) of the Penal Code providing that a person charged with the offence of murder, tried and convicted while under eighteen years shall be sentenced to death but in lieu, be detained during the president pleasure, was unconstitutional.
- ii. Whether section 25(2) of the Penal Code providing that a person charged with the offence of murder, tried and convicted while under eighteen years shall be sentenced to death but in lieu thereof shall, sentence such person to be detained during the president pleasure, was a violation of right of a child not to be detained except as a measure of last resort and when detained to be held for the shortest appropriate period of time.

Held

1. The High Court had jurisdiction under article 165 of the Constitution to determine the question whether any law was inconsistent with the constitution and whether anything said to be done under the authority of the constitution or any law was inconsistent with or in contravention of the constitution.
2. Section 25(2) of the Penal Code provided that a person charged with the offence of murder who was tried and convicted and it appeared to the court that he was under eighteen years, a sentence of death shall not be pronounced but in lieu thereof shall sentence such person to be detained during the president pleasure. The sentence was in-determinate as the convict was held at the president's pleasure without specifying the period of such detention.
3. Section 25(2) and (3) of the Penal code was unconstitutional. The petitioner had been in prison since February 7, 2013. Article 53(1)(f) of the Constitution stated that every child had a right not to be detained except as a measure of last resort and when detained to be held for the shortest appropriate period of time. The petitioner had been in custody for ten years. He was supposed to be held for the shortest appropriate period. He was treated as a child who was below 18 years as his age was not known. He had been held in prison for ten years. He was supposed to serve a definite sentence which was as short as possible. Considering the serious nature of the offence which he was charged with, a sentence of fourteen years would suffice.

Petition allowed.

Orders

- i. *Declaration made that that section 25(2) and (3) of the Penal Code was unconstitutional as it violated article 53(1)(f)(1) and article 160 (1) of the Constitution.*
- ii. *The sentence that he be held at President's pleasure was set aside.*
- iii. *The petitioner was sentenced to serve fourteen (14) years Imprisonment which was to run from February 7, 2013 the date he was detained in prison at the president's pleasure.*

Citations

Cases

Kenya

AOO & 6 others v Attorney General & another (Petition 570 of 2015; [2017] KEHC 6022 (KLR)) — (Applied)

Statutes

Kenya

1. Constitution of Kenya articles 23(3)(d); 25 (c); 28 ; 50 (2); 53 (1) (f); 160 (1); 165 (3) (d)(i)(ii) — (Interpreted)
2. Penal Code Act (cap 63) sections 25(2); 25(3); 203; 204 —(Interpreted)



Advocates

Mr. Gitonga State Counsel for state

JUDGMENT

1. The petitioner Robert Kobia Baariu filed this petition which is seeking the following declaration-;
 1. That, a declaration be made under the provisions of article 23(3)(d) and 165 (3) (d)(i)(ii) of the Constitution that sentencing a child found guilty of murder to serve at the president pleasure is unconstitutional to the extent that it violates the right to a fair trial under article 25(c) and 50 (2) of the Constitution.
 2. That, a declaration be made that sentencing a child found guilty of murder to serve at the president pleasure is unconstitutional to the extent that it violates the right of the child to have inherent dignity and the right to have that dignity respected and protected under article 28 of the Constitution.
 3. That a declaration be made that sentencing a child found guilty of murder to serve at the president pleasure is unconstitutional as it takes away the courts discretionary power to determine the nature and extent of the sentence and vests it in the president. Which violates the provisions of article 160 (1) of the Constitution. Sentencing is a judicial function which requires judicial determination.
 4. That, a declaration be made that the indeterminate incarceration of the petitioner herein negates his dignity and should not be supported as it violates article 28 of the Constitution as it is a sure way of having the petitioner forgotten in jail.
 5. That a declaration be made subject to prayer No. 1,2,3 and 4 that the petitioner herein be sentenced to a determinate imprisonment term for him to enjoy fully the dictates of the Constitution on the right to a fair trial by knowing his maximum period of incarceration. After hearing his mitigation and appropriate sentence awarded.
2. The brief facts of the case are that the petitioner was charged with murder contrary to section 203 as read with section 204 of the Penal Code in the High Court of Kenya at Meru Criminal Case No 48 of 2005. The particulars of the charge were that on May 23/5/2005 at Antubankai village Ariba sub-location Meru North District he murdered Joseph Murungi M'Ikiara.
3. The petitioner pleaded not guilty and after a full trial he was found guilty. The learned trial judge held that the age of the petitioner was "not clearly known" and therefore sentenced him to serve at the President's pleasure.
4. The appellant was dissatisfied with the decision and filed an appeal in the Court of Appeal at Nyeri. The appeal was however not successful and was dismissed on August 19th August 2022. The Court of Appeal upheld the findings by the High court and held that - ;

“Given the inconclusive finding on the age of the appellant, we too think that it was only proper that his age be taken as being below 18 years. Accordingly the order of detention at president's pleasure was well founded”
5. The petitioner has now filed this petition based on the following grounds-;



- (1) That, this hon. court has the Judicial power under article 23(1) of the Constitution in accordance to article 165(3(b) of the Constitution to hear and determine applications for redress of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
 - (2) That this hon. court has judicial power under article 165 (d) (i)(ii) of the Constitution to hear and determine the question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution.
 - (3) That, sentencing a child found guilty of murder to serve at the president pleasure is unconstitutional as it violates the right to a fair trial under article 25(3) and 50(2) of the Constitution.
 - (4) That, sentencing a child found guilty of murder to serve at the president pleasure is unconstitutional as it takes away the court's discretionary power to determine the nature and extent of the sentence and vests it in the president. Which violates the provisions of article 160 (1) of the Constitution. Sentencing is a judicial function which requires judicial determination.
 - (5) That giving the executive the power to determine the measure of an offender's punishment violates the principle of the separation of powers as envisaged in our Kenyan Constitution 2010.
 - (6) That, the indeterminate incarceration of the petitioner herein negates his dignity and should not be supported as it violates article 28 of the Constitution. Moreover, it is a sure way of having the petitioner forgotten in jail.
 - (7) That, the indeterminacy of the sentence exacerbates the cruel, inhuman or degrading nature of the punishment on the ground that the maximum period of incarceration remains unknown to the petitioner and the period of incarceration is dependent on the executive. Which violates article 29 (f) of the Constitution.
 - (8) That, I the petitioner being a poor man I humbly pray for all the parties in this petition to bare their own costs.
 - (9) That I pray for this petition to succeed in its entirety.
6. The respondents opposed the petition and urged the court to dismiss it. The petition was canvassed by way of written submissions.

Petitioner's Submissions.

7. He submits that the court has jurisdiction under article 23 (1) and 165 (3) (b). He submits that sentencing a child found guilty of murder to serve at the president's pleasure under section 25 (2) of the Penal Code is unconstitutional as it violates the right to a fair trial under article 25(2) of the Penal Code.
8. The petitioner further submits failure to allow a judge discretion to receive mitigation and to exercise judicial discretion in sentencing and to pass a mandatory sentence violates the convict's right to dignity. The petitioner heavily relies on the decision in Aoo & 6 others v attorney General and Another NRB Petition No. 570 of 2015 [2017] eKLR.



The Respondent's Submissions

9. The respondent submits that sentencing a child under section 25(2) is constitutional as it does not violate the right to a fair trial. That it was declared by the High court in *Aoo & 6 others v Attorney General* (*supra*) that the section is not unconstitutional as it is not indeterminate.
10. It is the respondent's submissions that the determinate sentence of incarceration of the petitioner at the president's pleasure does not violate article 28 of the *Constitution*.

Analysis and Determination

11. I have considered the petition. The issue which arises for determination is whether section 25(2) of the *Penal Code* is unconstitutional. This court has Jurisdiction to determine the question whether any law is inconsistent with the *Constitution* and whether anything said to be done under the authority of the *Constitution* or any law is inconsistent with or in contravention of the *Constitution*. Article 165(3) (d) (i) & 2 provides-

“The question shall have jurisdiction in criminal and civil matters to determine inter alia-

- (i) The question whether any law is inconsistent with or in contravention of this *Constitution*;
- (2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.

Section 25 (2) 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”

12. The section states that a person charged with the offence of murder who is tried and convicted and it appears to the court that he was under eighteen years, a sentence of death shall not be pronounced but in lieu thereof shall sentence such person to be detained during the president pleasure. This sentence is in-determinate as the convict is held at the president's pleasure without specifying the period of such detention. The constitutionality of the sentence under section 25(2) of the *Penal Code* was considered in the case cited by the petitioner and respondent, in *Aoo & 6 Others v the Attorney General and another* (*supra*)
13. In that petition the court was asked to determine a fundamental question touching on the constitutionality or otherwise of the provisions of section 25(2) & (3) of the *Penal Code* and in particular whether or not detaining persons aged below 18 years at president's pleasure contravenes the provisions of article 53(f) (i) & (ii) (2) of the *Constitution*, international and regional conventional and regional conventions protecting the rights of the child and whether by vesting in the president responsibility of determining the time or length of the sentence in such cases is unconstitutional in that it amounts to vesting exercise of judicial authority in the executive contrary to the doctrine of



separation of powers and whether or not it offends article 160 (1) of the Constitution. The judge stated as follows:-

“The interdeterminary of the sentence – “imprisonment at president’s pleasure whose period is not defined or determined and which depends on the discretion of the executive cannot be in my view be said to conform with the provisions of article 53 (1) (f)..... and section 25(2) of the Penal Code is inconsistent with the article 53(1)(f) of the Constitution which provides that a child has the right not to be detained except as a measure of last resort”

Justice Mativo (as he then was) issued the following declarations-;

- a) A declaration be and is hereby issued that section 25 (2) & (4) of the Penal Code is unconstitutional in that it violates the provisions of article 53 (1) (f) (1) &(iii) and article 160 (1) of the Constitution.
- b) A declaration be and is hereby issued declaring that to the extent that second to seventh petitioner were imprisoned for an indefinite and or undetermined period of time at the pleasure of the president, thereby vesting into the executive judicial powers to determine the duration of their sentences contrary to the constitutional provisions of separation of powers, their imprisonment is unlawful to the extent that it violates the consent of separation of powers...”

It is my view that the issues raised by the petitioner have been determined in the above decision with a thorough and extensive analysis. I need not belabor the point safe to say that I am persuaded by this finding as it has properly determined that section 25(2) & (3) is unconstitutional.

14. I am persuaded by this decision as it was extensively analysed the issues which are similar to these raised before this court. The petitioner and the respondent have relied on this decision. I echo the judgment and hold that section 25(2) & (3) of the Penal Code is unconstitutional. The petitioner has been in prison since February 7, 2013. Article 53 (1) (f) of the Constitution states that every child has a right (f) not to be detained except as a measure of last last resort and when detained to be held-;

(1) for the shortest appropriate period of time”

15. The petitioner has been in custody for ten years. He was supposed to be held for the shortest appropriate period. He was treated as a child who was below 18 years as his age was not known. He has been held in prison for ten years. I find that hi is supposed to serve a definite sentence which is a shortest as possible. Considering the serious nature of the offence which he was charged with, a sentence of fourteen years would suffice.

16. I order as follows

- 1) The petition succeeds.
- 2) A declaration is hereby made that that section 25(2) and (3) of the Penal Code is unconstitutional as it violates article 53(1) (f) (1) and article 160 (1) of the Constitution.
- 3) The sentence that he be held at President’s pleasure is set aside.
- 4) The petitioner is sentenced to serve fourteen (14) years Imprisonment which shall run from February 7, 2013 the date he was detained in prison at the president’s pleasure.



DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF JULY 2023.

HON. LADY JUSTICE L. GITARI

HIGH COURT - JUDGE

In The Presence Of;

Mr. Gitonga S/C for the state

Court Assistant V. Kiragu

Petitioner - present

