



**Kimani & another v Attorney General & another (Constitutional Petition 17 of 2020)  
[2022] KEHC 14366 (KLR) (Constitutional and Human Rights) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14366 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION 17 OF 2020**

**M THANDE, J**

**OCTOBER 28, 2022**

**BETWEEN**

**MATTHEW MUNGAI KIMANI ..... 1<sup>ST</sup> PETITIONER  
JAMES KIIRU NJIIRI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS .... 2<sup>ND</sup>  
RESPONDENT**

**JUDGMENT**

1. In this petition, the court is invited to consider the constitutionality of sections 25(2) and (3) of the *Penal Code*. The petitioners Matthew Mungai Kimani and James Kiiru Njiiri stated that they were charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. They were convicted and sentenced to death. On appeal, their conviction was upheld. However, because the petitioners were minors at the time they committed the offence, the sentence was set aside and they were detained during the president's pleasure.
2. The petitioners have thus moved to this court seeking the following orders:
  3. An order declaring sections 25(2) & (3) of the *Penal Code* unconstitutional to the extent that it violates the provisions of article 53(1) (f) (i) & (ii), (2) and article 160 (1) of the *Constitution of Kenya 2010* and international conventions governing the right of a child.
  4. An order declaring the petitioner's imprisonment at president's pleasure unlawful to the extent that it violates the concept of separation of powers and the principles of constitutionalism under the repealed *Constitution* and the *Constitution of Kenya 2010*.



5. That this court be pleased to grant the orders as prayed and set the petitioners free.
  6. That this hon court do order such other order(s) it shall deem just.
3. The petitioners contended that the sentence imposed upon them is unconstitutional and contravenes the provisions of article 53(2) of the *Constitution of Kenya, 2010*. They stated that the sentence vested judicial authority upon the executive contrary to the doctrine of separation of powers thus contravening article 160(1) of *the Constitution*.
  4. The petition is opposed by the 2<sup>nd</sup> respondent vide grounds of opposition dated June 27, 2022. The grounds are that the petition is vexatious and an abuse of the court process as the constitutionality of section 25(2) & (3) of the *Penal Code* was determined in by a court of competent jurisdiction in *AOO & 6 others v Attorney General & another* [2017] eKLR. No appeal was preferred to upset the decision. Further that the declaration of unconstitutionality of sections 25(2) & (3) of the *Penal Code* did not vitiate the lawfulness of the petitioners' convictions for capital offences by the trial courts and which had been affirmed by both the High Court and Court of Appeal. Moreover, that the prayers may only be considered by the trial court upon full resentencing hearing. Further that the interests of justice will only be served if the State and victims of the atrocities committed by the petitioners are afforded an opportunity to participate in a resentencing hearing.
  5. The court notes that the 2<sup>nd</sup> petitioner has not attached evidence of his conviction and sentence to death or detention during the president's pleasure. The 1<sup>st</sup> petitioner annexed a copy of the High Court decision on his appeal which I have duly considered. Accordingly, this judgment only relates to the 1<sup>st</sup> petitioner's case.
  6. The 1<sup>st</sup> respondent did not file any response to the petition. The 2<sup>nd</sup> respondent relied on the grounds of opposition which I have duly considered together with the submissions by the 1<sup>st</sup> petitioner.
  7. The issues for determination are:
    - i. Whether the constitutionality of section 25(2) & (3) of the *Penal Code* was determined in by a court of competent jurisdiction.
    - ii. Whether this court can relook at the sentence imposed upon the 1<sup>st</sup> petitioner.
    - iii. What orders should be made.

**Whether the Constitutionality of Section 25(2) & (3) of the Penal Code Was Determined in By a Court of Competent Jurisdiction**

8. The 1<sup>st</sup> petitioner seeks a declaration that section 25(2) & (3) of the *Penal Code* is unconstitutional. The 2<sup>nd</sup> respondent has opposed this stating that the issue was determined in the case of *A O O & 6 others v Attorney General & another* [2017] eKLR.
9. Section 25(2) and (3) of the *Penal Code* provide 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.



(3) When a person has been sentenced to be detained during the President's pleasure under subsection (2), the presiding judge shall forward to the President a copy of the notes of evidence taken on the trial, with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make."

10. In the *A O O* case (*supra*), Mativo, J (as he then was) considered the constitutionality of the above provisions and had this to say:

"Imposition of sentences is a judicial function to be performed by sentencing courts... Sentencing under Commonwealth legislation is an essentially judicial function.[47] The Constitution provides that if legislation cannot be read as to be compatible with the Constitution, a court has powers to declare the statute, to the extent that it is inconsistent, void. In my view, a sentence whose duration is not determined and which depends on the whims of the executive cannot be constitutionally sustainable in that it offends the provisions of article 53 (1) (f) (i) & (ii), (2) of the Constitution. I also find that section 25 (3) of the Penal Code[48] offends the provisions of article 160 (1) of the constitution, in that it confers powers to the president to determine period of imprisonment of persons under 18 years which is a judicial function contrary to the constitutional doctrine of separation of powers."

11. The learned judge proceeded to declare the provisions unconstitutional and rendered himself thus:

"a) A declaration be and is hereby issued that section 25 (2) & (3) of the Penal Code[71] 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 international conventions governing the rights of children."

12. This decision has never been reviewed or overturned on appeal. Accordingly, this court cannot re-declare that the provisions in question are unconstitutional.

13. The 1<sup>st</sup> petitioner seeks an order declaring his imprisonment at president's pleasure unlawful to the extent that it violates the concept of separation of powers and the principles of constitutionalism under the repealed *Constitution* and the *Constitution of Kenya 2010*. The *Constitution* has made provision for the separation of powers between the Executive, the Legislature and the Judiciary. Indeed, each has its own elaborate chapter in the *Constitution* which contains the establishment, composition powers and functions, which are distinct from the others.

14. A look at the judgment in the *A O O* case indicates that the issue of detention during the president's pleasure offends the constitutional separation of powers was extensively dealt with therein. The learned judge stated:

"I find it appropriate to borrow the words of Lord Diplock in the above cited case when he said at pp 225-6:-[33]

"...what Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders."



The Privy Council went on to hold that such a provision is contrary to the Constitution and that the sentence passed was an unlawful sentence."

The learned judge went on to state:

"Where sentencing powers properly lie has been the subject of intense debate in other jurisdictions such as the UK. The very recent case of R vs Secretary of State for the Home Department, ex p Anderson,[35] is the latest milestone in this debate. In reversing the lower decision of the Court of Appeal, the House of Lords held that sentencing powers are to lie with the courts and not the Crown."

The learned judge stated further that:

"The Constitution requires effective separation of powers between the courts and the other branches of the government. Separation of powers is necessary to ensure a balance of power. A more fundamental reason for the separation of the power of judging is the liberty of the citizen. Nor is there liberty if the powers of judging are not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizen would be arbitrary, for the judge would be legislator. If it were joined to executive power, the judge could have the force of an oppressor.[37]

The constitution being the supreme law of the land separates the powers of the legislature, the executive and the judiciary. Judicial power is reserved to the judiciary. The imposition of a punishment in a criminal matter which includes the assessment of its severity is an integral part of the administration of justice and is therefore the exercise of judicial, not executive, power. In so far as section 25 (2) & (3) of the Penal Code[38] allows a person aged below 18 years to be detained at the president's pleasure, thereby granting the president powers to determine sentence or when to release the person and requires a judicial officer to forward notes to the president, in my view it offends the principle of separation of powers and article 160 (1) of the Constitution of Kenya 2010."

15. It is readily discernible from the foregoing that granting the president the power to determine sentence, the severity and term thereof, offends the constitutional principle of separation of powers. This issue was determined by Mativo, J (as he then was) and to my knowledge, the decision still stands, having not been set aside. In the premises, the court finds that the detention of the 1<sup>st</sup> petitioner during the president's pleasure is unlawful as it offends the concept of separation of powers under the [\*Constitution of Kenya, 2010\*](#).

#### **Whether this Court Can Relook At the Sentence Imposed Upon the 1<sup>st</sup> Petitioner**

16. The 1<sup>st</sup> petitioner's case is that the sentence imposed upon him of detention during the president's pleasure is unconstitutional. The 2<sup>nd</sup> respondent however contended that it was not within the ambit of this court to grant the prayers sought, on the ground that this may only be considered by the trial court. Relying on the case of [\*Evans Kalo v Republic\*](#) [2020] eKLR, the 2<sup>nd</sup> respondent submitted that sentence remains a function of the trial court. The 2<sup>nd</sup> respondent further argued that the issue in question has been conclusively determined and that litigation must come to an end. Reliance was placed on the case of [\*GWM Omondi & another vs National Bank of Kenya & 2 others\*](#) (2001) eKLR.
17. I have looked at the exhibited copy of judgment of the High Court in the case of [\*Mathew Mungai Kimani v Republic\*](#) [2008] eKLR. The 1<sup>st</sup> petitioner had appealed against the conviction and sentence



- to death by the trial court. The court upheld the conviction but set aside the sentence of death and detained him during the president's pleasure pursuant to section 25(2) of the Penal Code.
18. The issue before this court is the constitutionality of the latter sentence that was imposed upon the 1<sup>st</sup> petitioner. It has not been demonstrated to the court that this issue has been considered by any other court. Accordingly, it cannot be said that the issue has been conclusively dealt with. Indeed the 1<sup>st</sup> petitioner does not seek resentencing but release on the ground that the sentence imposed upon him is illegal.
19. This jurisdiction of the court is stipulated in article 165(3) of the Constitution which provides that the High Court shall have *inter alia*:
- "(a) unlimited original jurisdiction in criminal and civil matters;
  - (b) jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened;
  - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
    - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
    - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;"
20. It is evident from the above provision that the original jurisdiction of this court in criminal and civil matters is unlimited. In particular, this court has power to determine whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened, whether any law is inconsistent with or in contravention of the Constitution. The court is also empowered to determine whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, the Constitution.
21. What is before the court is a constitutional petition that has raised pertinent constitutional issues. As indicated herein, the question as to the constitutionality of section 25(2) and (3) of the Penal Code has been dealt with and determined. What remains is for this court is to make a determination as to whether the sentence imposed upon the 1<sup>st</sup> petitioner is unconstitutional.
22. It can be seen from the exhibited judgment that upon conviction of the 1<sup>st</sup> petitioner of the offence of robbery with violence, he was sentenced to death. On appeal however, the court affirmed the conviction but set aside the sentence and stated:
- There is unchallenged evidence that when the appellant committed the offence he was actually fifteen or so years. He should therefore have been sentenced to be detained during the president's pleasure. Pursuant to section 354 of the Criminal Procedure Code, we set aside the sentence of death imposed on the appellant and in lieu thereof we direct that the appellant be detained during the president's pleasure.
23. In its finding, the court was guided by section 25(2) of the Penal Code. Granted, this decision was made in 2008 before the promulgation of the Constitution of Kenya, 2010. It is the duty of the courts to ensure that the sentences prescribed by statute are not inconsistent with or in contravention of the Constitution and are imposed in accordance with the Constitution



24. It is not disputed that the 1<sup>st</sup> petitioner was a minor when he committed the offence with which he was charged and of which he was convicted and sentenced. The *Constitution* has made very specific provisions for the protection of the rights of children. Article 53(2) provides that a child's best interests are of paramount importance in every matter concerning the child. This is echoed by the *Children Act* in section 4(2) which provides that In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
25. The reference to every matter in article 53(2) and all actions in section 4(3) includes a matter concerning a child in conflict with the law, such as the 1<sup>st</sup> petitioner was, when he committed the offence in question. Article 53(1)(f) provides that every child who commits an offence 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."
26. The 1<sup>st</sup> petitioner was sentenced to be detained during the pleasure of the president. This sentence was imposed upon the 1<sup>st</sup> petitioner on October 21, 2008. It has been 14 years. Given that the offence of robbery with violence was not bailable, prior to the promulgation of the *Constitution of Kenya, 2010*, the 1<sup>st</sup> appellant has been detained for a total period of 17 years since his arrest on March 31, 2005. This period of incarceration of the 1<sup>st</sup> petitioner cannot by any standard be deemed to be the shortest appropriate period of time envisaged in article 53(1)(f) of the *Constitution*.
27. Further, the sentence imposed upon the 1<sup>st</sup> petitioner is for an indefinite and indeterminate term. Nobody knows for a fact when the term will come to an end. Indeed, such sentence could end up being a life sentence which would run afoul the provisions of article 53(1)(f) of the *Constitution*. In the premises, I find and hold that the sentence imposed on the 1<sup>st</sup> petitioner of detention during the pleasure of the president notwithstanding that it was done under the authority of the law, to wit, section 25 of the *Penal Code*, is unconstitutional as it violates the rights of the 1<sup>st</sup> petitioner as guaranteed under article 53 and also his right to dignity under article 28. Such sentence cannot therefore stand.
28. In view of the sentence imposed upon the 1<sup>st</sup> petitioner, his fate is left at the mercy of the executive. He must await the exercise of discretion by an executive that is preoccupied with affairs of state; an executive to whom the matter of a person detained at the president's pleasure may not rank very high in its priorities. In this regard, it bears citing Mativo, J once again who stated:
- "The effect of an indeterminate sentence on a detained persons right to dignity was eloquently expressed by Mahomed CJ, [22] albeit in the context of a life sentence:-
- "It must, I think, be conceded that if the release of the prisoner depends entirely on the capricious exercise of the discretion of the prison or executive authorities leaving them free to consider such a possibility at a time which they please or not at all and to decide what they please when they do, the hope which might yet flicker in the mind and the heart of the prisoner is much too faint and much too unpredictable to retain for the prisoner a sufficient residue of dignity which is left uninvaded." [23]



## What Orders Should Be Made

29. The court has found that the sentence imposed upon the 1<sup>st</sup> petitioner of detention during the president's pleasure, that is founded upon a provision that has been declared to be unconstitutional, is itself unconstitutional. A sentence that cannot pass constitutional muster is void and cannot stand. Article 23(3) provides that in any proceedings where a party claims, as the 1<sup>st</sup> petitioner has, that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened, this court may grant appropriate relief.
30. The 2<sup>nd</sup> respondent submitted that justice in this case will be served if the State and victims of the atrocities committed by the 1<sup>st</sup> petitioner are afforded an opportunity to participate in a resentencing hearing. Reliance was placed on the case of *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) where the Supreme Court stated:
- "In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence."
31. It must be stated that the 1<sup>st</sup> petitioner has not moved to this court seeking resentencing. On the contrary, he seeks a declaration that the sentence that he be detained during the president's pleasure be declared unconstitutional and that he be set free. The court has made a finding that the sentence in question is void and a nullity for being unconstitutional. An unconstitutional sentence cannot stand. In this regard I adopt the finding in the case of *Macfoy vs United Africa Co Ltd* [1961] 3 All ER 1169, where Lord Denning stated:
- "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."
32. The circumstances herein are that the 1<sup>st</sup> petitioner has spent 17 years behind bars since he was detained on March 3, 2005. This detention flies in the face of the provisions of article 53(1)(f) thereby violating his right to be held for the shortest appropriate period of time. 17 years is by no means a short period of time. In the premises, I am satisfied that the appropriate relief to be granted to the 1<sup>st</sup> petitioner in the circumstances, is his immediate release.
33. In the end and in view of the foregoing, I make the following orders:
- i. A declaration be and is hereby made that the detention of the 1<sup>st</sup> petitioner Mathew Mungai Kimani during the president's pleasure is unlawful as it offends the principle of separation of powers under the *Constitution of Kenya, 2010*.
  - ii. A declaration be and is hereby made that the detention of the 1<sup>st</sup> petitioner Mathew Mungai Kimani during the president's pleasure for an indefinite and or an undetermined period is unconstitutional.
  - iii. The 1<sup>st</sup> petitioner Mathew Mungai Kimani is hereby ordered to be released from prison forthwith unless otherwise lawfully held.



- iv. Leave is hereby granted to the 2<sup>nd</sup> petitioner James Kiiru Njiiri to file a fresh petition attaching evidence of his conviction and sentence for consideration by the court.
- v. No order as to costs.

**DATED AND DELIVERED IN NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2022**

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... for the Petitioner

..... for the Respondents

.....Court Assistant

