



**AOO & 6 others v Attorney General & another (Petition 570 of 2015)
[2017] KEHC 6022 (KLR) (Constitutional and Human Rights) (12 May 2017) (Judgment)**

A O O & 6 others v Attorney General & another [2017] eKLR

Neutral citation: [2017] KEHC 6022 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 570 OF 2015**

JM MATIVO, J

MAY 12, 2017

IN THE MATTER OF ARTICLES 3, 10, 22, 23 (1), 25 (A), (C), (D), 27, 28, 29 (A), (C), (D), (F) , 50, 133, 159, 165, 258 AND 259 CONSTITUTION OF THE REPUBLIC OF KENYA AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW

AND

**IN THE MATTER OF SECTION 14 AND 25 (2) (3)
OF THE PENAL CODE CAP 63, LAWS OF KENYA**

BETWEEN

- AOO 1ST RESPONDENT**
- BN 2ND RESPONDENT**
- SIM 3RD RESPONDENT**
- JN 4TH RESPONDENT**
- JKM 5TH RESPONDENT**
- TOO 6TH RESPONDENT**
- NKM 7TH RESPONDENT**

AND

- THE HON. ATTORNEY GENERAL 1ST RESPONDENT**
- OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT**



Detention at the President's pleasure under sections 25(2) & 25(3) of the Penal Code is a violation of the rights of children and the principle of separation of powers.

The main issue before the court was whether detention at the President's pleasure under section 25(2) and 25(3) of the Penal Code was unconstitutional as it went contrary to the rights of children recognized under article 53(1)(f) of the Constitution and international instruments. The High Court held that the imprisonment of a child had to conform to the provisions of article 53 of the Constitution and international and regional conventions. Imprisonment at the President's pleasure for an indeterminate period, dependent on the executive's discretion, did not conform with the requirements of article 53(1)(f) of the Constitution. A declaration was issued that sections 25(2) and (3) of the Penal Code was unconstitutional in that it violated the provisions of article 53(1)(f)(i), and (ii), (2), and 160(1) of the Constitution and international conventions governing the rights of children. The Attorney General and Parliament were directed to move with speed to enact the necessary amendments to ensure that the provisions of sections 25(2), and (3) of the Penal Code conformed with the provisions of article 53(1)(f)(i) and (ii), (2) and 160(1) of Constitution.

Reported by Beryl Ikamari

Constitutional Law - fundamental rights and freedoms - the rights of children - the right not to be detained except as a measure of last resort and when detained, to be held for the shortest appropriate period, separate from adults and in conditions that take account of the child's sex and age - whether detention at the President's pleasure under sections 25(2), and (3) of the Penal Code was a violation of the rights of children - Constitution of Kenya 2010, article 53(1)(f); Penal Code (Cap 63), section 25(2), and (3).

Constitutional Law - separation of powers - exercise of judicial power - whether detention of child offenders at the President's pleasure under sections 25(2), and (3) of the Penal Code amounted to an exercise of judicial power by the President and was a violation of the principle of separation of powers - Constitution of Kenya 2010, article 160(1); Penal Code (Cap 63), sections 25(2), and (3).

Constitutional Law - interpretation of the Constitution - considerations that the Court would make when interpreting the Constitution - the import of article 53(1)(f) of the Constitution in situations where a child offender was being sentenced - Constitution of Kenya 2010, article 53(1)(f); Penal Code (Cap 63), sections 25(2), and (3).

Statutes - interpretation of statutes - interpretation of section 25(2), and (3) of the Penal Code - constitutionality of section 25(2), and 25(3) of the Penal Code - whether detention at the President's pleasure under sections 25(2), and (3) of the Penal Code was a violation of the rights of children and the principle of separation of powers - Constitution of Kenya 2010, articles 53(1)(f), and 160(1); Penal Code (Cap 63), sections 25(2), and (3).

Brief facts

The petitioners, with the exception of the 1st petitioner, were charged and convicted in various courts in the country and sentenced to be detained at the President's pleasure. At the time of conviction, the petitioners were aged between 12 and 17 years. They said that detention at the President's pleasure for an indeterminate period was unconstitutional.

The petitioner's assertion was that detention at the President's pleasure under section 25(2) and 25(3) of the Penal Code was unconstitutional. Particularly, they said that it went contrary to articles 53(f)(2) of the Constitution; article 37(c) of Convention of the Rights of the Child; article 2(b) of the African Charter on the Rights and Welfare of the Child and paragraph 1 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

The petitioners also contended that given that the duration of the punishment was indeterminate such punishment amounted to cruel, inhuman and degrading treatment. They asserted that the Penal Code provision on the detention was unconstitutional as it donated judicial power to the President contrary to the principle of separation of powers.



Issues

- i. Whether detention at the President's pleasure under section 25(2) and 25(3) of the Penal Code was unconstitutional as it went contrary to the rights of children recognized under article 53(1)(f) of the Constitution and international instruments.
- ii. Whether detention at the President's pleasure under section 25(2) and 25(3) of the Penal Code was unconstitutional as it undermined the principle of separation of powers and allowed the President to exercise judicial power.
- iii. What would the court consider when interpreting the Constitution?
- iv. Whether the provisions of section 25(2) and 25(3) of the Penal Code on detention of children at the President's pleasure were compatible with the provisions of the rights of children found in the Children Act.

Relevant provisions of the Law

Penal Code (Cap 63), section 25(2) and 25(3);

(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.

Constitution of Kenya, articles 53(1)(f) & 160(1);

Article 53(1)(f);

53. (1) 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.

Article 160(1);

160. (1) 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.

Held

1. Under article 53(1)(f) of the Constitution, the imprisonment of a child would be as a last resort and for the shortest period possible. International instruments on sentencing of children emphasized the reintegration of the children to society. Those international instruments included the United Nations Convention on the Rights of the Child (1989) and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985).
2. The Constitution entailed the supreme law of the land and it created a fundamental framework within which the respective ambits of the legislative, executive and judicial arms of the State were defined. It was not exhaustive and a generous and purposive interpretation of the Constitution was to be adopted in order to give effect to its underlying values.
3. In interpreting the Constitution, a narrow, artificial, rigid and pedantic interpretation would be avoided. An approach to interpretation which served the interests of the Constitution and best carried out its objects and promoted its purpose would be preferred. All relevant constitutional provisions would be considered as a whole and where rights and freedoms were conferred on persons, derogations from those rights would be construed narrowly and strictly.



4. What the Court was to determine was whether the statutory mechanisms provided under sections 25(2) and 25(3) of the Penal Code constituted a sufficiently concrete and fundamentally realizable expectation of a person aged below 18 years being detained in the shortest time possible as provided for in the Constitution and whether those provisions protected the prisoner's right to dignity, including the belief in and hope for an acceptable future for himself.
5. An indeterminate sentence in which authorities were free to consider the possibility of a release or not at all and to decide on what they please when they do decide, left too little hope for a prisoner to be said to retain a sufficient residue of dignity. Furthermore, the sentence of detention at the President's pleasure was not pre-determined. It was a discretionary sentence which could not be said to be for the shortest time appropriate.
6. The indeterminacy of the sentence imposed exacerbates the cruel, inhuman or degrading nature of the punishment given that the maximum period of incarceration remained unknown to the prisoner and was dependent on the executive. That situation was a cause of considerable torment. Sentencing a person to what could potentially constitute life imprisonment infringed on that person's right not to be subjected to cruel, inhuman or degrading treatment or punishment.
7. Imprisonment at the President's pleasure for an indeterminate period, dependent on the executive's discretion, did not conform with the requirements of article 53(1)(f) of the Constitution. Article 53(1)(f) of the Constitution provided that every child had the right not to be detained except as a measure of last resort and when detained, to be held for the shortest appropriate period, separate from adults and in conditions that take account of the child's sex and age. Some of the petitioners had been in jail for more than twenty years and the possibility of being in jail for decades or for life at the President's pleasure was real.
8. Given the importance that the Constitution placed on the rights of children, the imprisonment of a child had to conform to the provisions of article 53 of the Constitution and international and regional conventions. The Constitution required children to be treated as children and with care, compassion, empathy and understanding of their vulnerabilities and inherent frailties. Even when children were in conflict with the law, the hand of the law could not be permitted to fall hard on them like a sledgehammer lest it destroy them.
9. Article 160 (1) of the Constitution provided for the independence of the Judiciary. It stated that in exercising judicial authority, the Judiciary would be subject to the Constitution and the law, and it would not be subject to the control or direction of any person or authority. Additionally, the Constitution provided for separation of powers between courts and other branches of Government. The powers of the Judiciary, Executive and Legislature were separate and judicial power was to be exercised by the Judiciary.
10. Sentencing was a judicial function. In sentencing, the court's function was to impose a sentence which was appropriate to the offence and the offender. The review of such sentences was a function performed by appellate courts.
11. Imposition of punishment in a criminal matter included the assessment of the punishment's severity and was an integral part of the administration of justice and was therefore an exercise of judicial and not executive power. In so far as sections 25 (2) and 25(3) of the Penal Code allowed a child to be detained at the President's pleasure, thereby granting the President powers to determine the sentence or when to release the person and required a judicial officer to forward notes to the President, the provisions offended the principle of separation of powers and article 160 (1) of the Constitution of Kenya 2010.
12. The detention of child offenders at the President's pleasure under section 25(2) and 25(3) of the Penal Code was different from the exercise of the power of mercy under article 133 of the Constitution. That power included the grant of a pardon, respite, substituting a less severe form of punishment and remission. Such powers were exercised by the President in accordance with the advice of the Advisory Committee established under article 133 (2) of the Constitution.



13. Under the concept of implied repeal, the court would not construe a later statute as repealing an earlier one unless it was impossible to make the two statutes and sections of the statutes stand together, meaning, if the section of the later statute could only be given a sensible meaning if it were treated as impliedly repealing the section of the earlier statute. The provisions of section 25(2) of the Penal Code could not stand together with the provisions of the Children's Act which safeguard the rights and welfare of children.

Petition allowed.

Orders

- i. *Declaration issued that section 25(2) and (3) of the Penal Code was unconstitutional in that it violated the provisions of articles 53 (1) (f) (i) and (ii), (2), and 160(1) of the Constitution and international conventions governing the rights of children.*
- ii. *Declaration issued that to the extent that the second to the seventh petitioners herein were imprisoned for an indefinite and or an 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 provision of separation of powers, their imprisonment at the Presidents pleasure was unlawful to the extent that it violated the concept of separation of powers and the principles of constitutionalism under the repealed constitution and the Constitution of Kenya.*
- iii. *That the Hon. Attorney General and Parliament were directed to move with speed to enact the necessary amendments to ensure that the provisions of sections 25 (2), and (3) of the Penal Code conformed with the provisions of article 53(1)(f)(i) and (ii), (2) and 160(1) of Constitution.*
- iv. *The 2nd, 3rd, 4th, 5th, 6th, and 7th petitioners were ordered to be released from prison unless otherwise lawfully held.*
- v. *No orders as to costs.*

JUDGMENT

Introduction

1. Children in conflict with the law cannot be subjected to the death penalty.¹ The law prohibits the imposition of the death penalty upon offenders convicted of an offence punishable by death but which was committed when the offender was below the age of 18 years. Instead, such an offender is to be imprisoned at the President's pleasure.² In such a case, the court is required to forward to the President notes of the evidence adduced during trial as well as a signed report expressing his/her observations or recommendations.³
2. This petition raises a fundamental question touching on the constitutionality or otherwise of the provisions of section 25 (2) & (3) of the Penal Code⁴ and in particular

¹ Children Act, s 190(2); Convention on the Rights of the Child, a 37(a); International Covenant on Civil and Political Rights, a 6(5); African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para 9(c), African Charter on the Rights and Welfare of the Child a. 5(1)

² Cap 63, Laws of Kenya, s 25(2).

³ Ibid, s 25(3).

⁴ Ibid



- (a) whether or not detaining persons aged below 18 years at the President's pleasure contravenes the provisions of the article 53(f)(i) & (ii), (2) of the [Constitution](#), International and Regional Conventions protecting the rights of the child; and
- (b) secondly, whether by vesting in the president the responsibility of determining the term 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 specifically whether or not it offends the provisions of article 160(1) of the [Constitution of Kenya, 2010](#).

Petitioners case

- 3. Save for the first petitioner, all the other petitioners were charged and convicted in various courts in the country and sentenced to be detained at the Presidents pleasure.⁵ At the time of their conviction, the petitioners were aged between 12 and 17 years. As at the time of filing this petition, ie, on December 18, 2015, the second to seventh petitioners had been in prison for the following periods; BN, 13 years; JKM, 8 years; JN, 21 years; SIM, 13 years, TOO, 22 years and NKM 14 years and that all of them continue to serve their jail terms at the President's pleasure.
- 4. The petitioners state that they bring this petition as a matter of public interest and seek to invoke the jurisdiction of this court under article 165(3),(d),(ii) of the [Constitution](#).

Petitioners Submissions

- 5. The first petitioner, on behalf of all the petitioners, adopted the written submissions filed on November 18, 2016 and others dated March 20, 2017. The crux of the petitioners case is that sentencing a person at the President's pleasure, to serve for an undefined period of time offends articles 53(f)(2) of the [Constitution](#); article 37(c) of [Convention of the Rights of the Child](#); article 2(b) of the [Africa Charter on the Rights and Welfare of the Child](#) and paragraph 1 of the [United Nations Rules for the Protection of Juveniles Deprived of their Liberty](#) and that any punishment that cannot be determined from the outset is cruel, inhuman and degrading, hence unconstitutional,⁶ and that in so far as section 25(3) of the [Penal Code](#)⁷ donates judicial power to the President, then the same is unconstitutional and offends article 160(1) of the [Constitution](#)⁸ and that the administration of justice, a process that entails arraignment of an accused person to court up to sentencing is a function of the judiciary,⁹ and that the right to a fair trial encompasses both the determination of guilt and sentencing phases of the trial and that fair trial requires fairness of the trial at all stages of the trial including sentencing.¹⁰

⁵ As stipulated under section 25(2) & (3) of the [Penal Code](#), Ibid

⁶ [Hassan Hussein Yusuf v Republic](#) {2016} cited

⁷ *supra*

⁸ [In re the Matter of the IIEC](#) {2011}eKLR cited

⁹ [AG v Kigula](#) {2009} UGSC

¹⁰ [Kafantayeni v AG](#) {2007} MWHC 1, 11



Respondents Case

6. The respondents did not file responses to the petition, despite being granted time twice by the court to do so. However, counsel for the first respondent filed written submissions which he highlighted orally in court. Counsel submitted that the above sections do not offend the Constitution in any manner, that some of the petitioners exhausted their rights of appeal, hence their relief lies in petitioning this court under article 50 of the Constitution and that the sentence complained of is provided for under the law, hence it is constitutional.
7. However, counsel did not address himself on the important question of the constitutionality of the challenged sections, either under the repealed constitution or under article 53(f)(2) of the Constitution of Kenya, 2010 or under the international conventions cited above which to me are the core issues raised in this petition.

Jurisdiction

8. Article 165(3)(d)(i) & (ii) of the Constitution vests power to the High Court to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the Constitution and also the question whether anything said to be done under the authority of the Constitution or of any law is in consistent with, or in contravention of, the Constitution. An unconstitutional statute is not law; and more important judicial function includes the power to determine and apply the law, and this necessarily includes the power to determine the legality of statutes. The judiciary has a special role in our system with respect to constitutional interpretation. Courts are bound by the Constitution and must interpret it when a dispute so requires.¹¹

Rights of Children

9. Children need special protection because they are among the most vulnerable members of society. They are dependent on others - their parents and families, or the state when these fail - for care and protection. As a result, the drafters of our Constitution made children's rights a priority - and stated that the best interests of a child are the overriding concern when it comes to any matter affecting a child. Thus, the inclusion in the Bill of Rights of a provision on the rights of the child was an important development for Kenyan children, many of whom have suffered and continue to suffer long imprisonments and detention in harsh conditions. The objective of this special protection is to ensure that the justice system treats every child in conflict with the law in a manner that recognizes and upholds human dignity and worth, and instills in the child respect for the fundamental rights and freedom of others. The Rule considers the developmental age of the child and the desirability of the child's reintegration in and assumption of a constructive role in society in accordance with the principles of balanced and restorative justice.
10. 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

¹¹ Marbury v Madison, 5 US 137 (1803), was a landmark United States Supreme Court case in which the Court formed the basis for the exercise of judicial review



- (ii) separate from adults and in conditions that take account of the child's sex and age.

11. Article 53(2) provides that

"A child's best interests are of paramount importance in every matter concerning the child."

Article 260 of the Constitution defines a "child"

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

The Children Act defines a child as follows:-

"means any human being under the age of eighteen years."

12. Article 53(1)(f) of the Constitution does not distinguish between persons under eighteen years convicted of offences carrying the death penalty and persons under eighteen years convicted of lesser offences. The words used in the Constitution are "Every child has the right" without offering a distinction on those convicted of minor offences or offences attracting the death penalty.

13. Rule 7(1) of part two of the sixth schedule to the Constitution of Kenya, 2010, entitled "Existing Laws" provides that:-

- (1) "All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution."

14. The above provisions are clear. All law must conform to the constitutional edifice. It follows that the provisions of the Penal Code¹² pertaining to imprisonment of persons under eighteen years must meet the threshold prescribed by the Constitution. Section 25(2) & (3) of the Penal Code¹³ 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.
- (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.

¹² Supra

¹³ Ibid



International conventions

15. The [*UN Convention on the Rights of the Child*](#) provides in article 37(a) that

'[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.'

Article 37(b) is to the effect that the 'detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. In addition to Kenya being a signatory to the above instruments article 2(5) of the [*Constitution*](#) expressly imports the general rules of international law and makes them part of the law of Kenya.

Imprisonment at the Presidents Pleasure

16. Imprisonment at the President's pleasure is a legal term of art referring to the indeterminate sentences of some prisoners. Originating from the United Kingdom, it is based on the concept that all legitimate authority for government comes from the Crown. The term is used to describe detention in prison for an indefinite length of time.¹⁴ Prisoners held at Her Majesty's pleasure are frequently reviewed to determine whether their sentence can be deemed complete. Prisoners' sentences are typically deemed to be complete when the reviewing body is "satisfied that there has been a significant change in the offender's attitude and behavior."
17. Indefinite imprisonment or indeterminate imprisonment is the imposition of a sentence by imprisonment with no definite period of time set during sentencing. Its length is instead determined during imprisonment based on the inmate's conduct. The inmate can be returned to society or be kept in prison for life. In theory, an indefinite prison sentence could be very short, or it could be a life sentence if no decision is made after sentencing to lift the term. It has neither a minimum nor a maximum term that can be served allowable by law. The main rationale for imposing indefinite as opposed to fixed sentences is to protect the community. An offender can then be kept behind bars until it is determined the offender would not pose any danger to the society.

Applying the law to the facts of this case

18. The court acknowledges that the sentencing of juvenile offenders is much more complex than sentencing adult offenders and that youth has always been considered as a mitigating factor. In addition to the 'so-called traditional approach' (the crime, the offender and the interests of society), child offenders should be sentenced with due regard to article 53(1) of the [*Constitution*](#). In particular, every child has the right

'not to be detained except as a measure of last resort'

and then

'the child may be detained only for the shortest appropriate period of time.'

19. If detained, child offenders have the right to be kept separate from adult prisoners and to be treated and accommodated in 'conditions that take account of the child's age.' The detention should be a last resort and for the shortest time possible.¹⁵ The international instruments that affect the sentencing of

¹⁴ Blackstone, William (1836), [*Commentaries on the Laws of England: in four books; with an analysis of the work*](#), Volume 2, 24, London: Law Booksellers & Publishers

¹⁵ [*S v Brandt*](#) {2005} 2 All SA 1 (SCA) (also reported as S v B 2006 (1) SACR 311) par 18.



child offenders emphasise the reintegration of the child into society.¹⁶ The principle that imprisonment should be used as a last resort and then for the shortest period possible, are expressly included in the Constitution. The Constitution is the supreme law of the land and it creates a fundamental framework within which the respective ambits of the legislative, executive and judicial arms of the State are defined. It is not exhaustive in its own terms and, consequently, a generous and purposive interpretation of the Constitution has to be adopted in order to give effect to its underlying values.

20. A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid the ‘austerity of tabulated legalism’ and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.¹⁷
21. This court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and, where rights and freedoms are conferred on persons, derogations there from, as far as the language permits, should be narrowly or strictly construed.¹⁸
22. In my view, sentencing of children is a constitutional matter of great concern and import for the criminal justice system, beyond and above the interest of a specific applicant.¹⁹ I must emphasise that children’s rights are of the utmost importance in our society. Courts are required to distinguish between children and adult offenders when sentencing and children must enjoy preferential sentencing treatment.²⁰
23. The question which calls for an answer is whether the statutory mechanisms provided under section 25(2) & (3) of the Penal Code²¹ constitutes a sufficiently “concrete and fundamentally realizable expectation” of a person aged below 18 years being detained in the shortest time possible, as provided in the Constitution and whether the said provisions protect the prisoner’s right to dignity, which must include belief in, and hope for, in an acceptable future for himself.
24. It must, I think, be conceded that if the release of the prisoner depends entirely on the capricious exercise of the discretion of the 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 unpredictable to retain for the prisoner a sufficient residue of dignity which is left uninvaded.

¹⁶ United Nations Convention on the Rights of the Child (1989) and United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985)

¹⁷ The Namibian Supreme Court in Government of the Republic of Namibia & anor v Cultura 2000 & Anor, 1994 (1) SA 407 (Nm SC) at 418 F-G, Mahomed CJ

¹⁸ Rattigan & ors v Chief Immigration Officer & anor 1994 (2) ZLR 54 (S) at 57 F-H, 1995 (2) SA 182 (ZSC) at 185 E-F, Gubbay CJ

¹⁹ See Mpofu v Minister for Justice and Constitutional Development and others (CCT 124/11) [2013] ZACC 15; 2013 (9) BCLR 1072 (CC); 2013 (2) SACR 407 (CC) (6 June 2013)

²⁰ Ibid

²¹ *supra*



25. 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:-
26. 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
27. In deciding whether a citizens' constitutional right not to be deprived of his rights except by due process of law, it is the legal system as a whole which must be looked at, not merely one part of it.²⁴ The fundamental human right, as Lord Diplock said, is to a 'legal system that is fair.'²⁵ The sentence of detention at the President's pleasure in my view is not pre-determined, but is a discretionary sentence and cannot be said to be for the shortest time appropriate because it is left at the discretion of the executive and can easily translate into a life sentence.
28. In *Reg v Secretary of State for the Home Department Ex parte Venables and Thompson*¹² and *Hinds vs The Queen*¹³ the Privy Council pointed out that one of the points arising from such decisions was the character of the sentence of "detention during Her Majesty's pleasure," which is a form of life sentence or a sentence for such a duration as should thereafter be decided. The view which prevailed was that it was not a life sentence but was a wholly discretionary sentence.
29. Lord Browne-Wilkinson in the above case said detention during Her Majesty's pleasure is wholly indeterminate in duration: It lasts so long as Her Majesty...considers appropriate...[It is] not a sentence of the same kind as the mandatory life sentence imposed on an adult murderer, the duration of which is determined by the sentence of the court and is for life. In cases of detention during Her Majesty's pleasure the duty of the Secretary of State is to decide how long that detention is to last, not to determine whether or not to release prematurely a person on whom the sentence of the court is life imprisonment.
30. Lord Steyn said at pp 552-3
- "Parliament differentiated between the two sentences. An order of detention during Her Majesty's pleasure involves merely an authority to detain indefinitely. That means that the Home Secretary must decide from time to time, taking into account the punitive element whether detention is still justified. Life imprisonment involves an order for custody for life."²⁶
31. The indeterminacy of the sentence also exacerbates the cruel, inhuman or degrading nature of the punishment on the grounds that the maximum period of incarceration remains at all times unknown to the prisoner and the period of his/her incarceration is dependent on the executive. This, no doubt,

²² In *S v Tcoeb* 1996 (1) SACR 390 (NmS), 1996 (7) BCLR 996 (NmS).

²³ Ibid

²⁴ *Independent Publishing Co Limited* {2004} 65 WIR 338

²⁵ {2004} 65 WIR 338 at paragraph 88

²⁶ Ibid



is the cause of considerable torment.²⁷ I therefore conclude that to sentence a person to what may potentially constitute life imprisonment, infringes on the rights of such person not to be subjected to cruel, inhuman or degrading treatment or punishment.

32. Imprisonment at the presidents pleasure, whose period is not defined or determined and which depends on the discretion of the executive cannot in my view be said to conform with the provisions of article 53(1)(f) of the [Constitution](#) which 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.

Article 53 (2) provides that

"A child's best interests are of paramount importance in every matter concerning the child."

33. Both domestic and international human rights law are clear when it comes to the detention of children. The detention of a child must only be a measure of last resort²⁸ and must only be for the shortest appropriate period of time.²⁹ The Convention on the Rights of the Child makes clear that if the detention of children is necessary in order to achieve a particular aim, then the length of detention should be the shortest appropriate period for the achievement of that aim.³⁰

34. Some of the petitioners have been in jail for over twenty years and the possibility of many more having been in jail for decades or continuing to be detained for decades or for life at the presidents pleasure is real and this calls for an urgent examination of the relevant legal provisions. The right of a child to be detained as a last resort and for the shortest appropriate period of time was addressed in the South African case of [DPP Kwa Zulu Natal vs P](#)³¹ where the court stated:-

Having regard to s 28(1)(g) of the [Constitution](#) and the relevant international instruments, as already indicated, it is clear that in every case involving a juvenile offender, the ambit and scope of sentencing will have to be widened in order to give effect to the principle that a child offender is 'not to be detained except, as a measure of last resort' and if detention of a child is unavoidable, this should be 'only for the shortest appropriate period of time'."(Emphasis added)

35. Article 20(3) of the [Constitution](#) commands the court when applying a provision of the Bill of Rights, to develop the law to the extent that it does not give effect to a right or fundamental freedom; and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom and further, in interpreting the Bill of Rights, a court, tribunal or other authority shall promote the values

²⁷ Constitutional Court of South Africa, Case CCT 28/00 [Willem Hendrik Niemand v The State](#), Heard on : 22 February 2001, Decided on : 8 October 2001

²⁸ [Convention on the Rights of the Child](#), article 37(b).

²⁹ Ibid

³⁰ Ibid

³¹ 2006(1) SACR 243 (SCA)



that underlay an open and democratic society based on human dignity, equality and freedom and the spirit, purport and objects of the Bill of Rights.

36. This requires the courts to play a crucial role in giving content and meaning to the fundamental rights enshrined in the Bill of Rights. Therefore the courts are the guardians of the Constitution and the values it espouses. In interpreting the law the courts have to infuse it with values of the Constitution. Courts should never shirk the constitutional responsibility. Given the importance which the Constitution places the rights of children, imprisonment of a child must conform to the provisions of article 53 and international and regional conventions.
37. All that the Constitution requires is that children be treated as children; with care, compassion, empathy and understanding of their vulnerability and inherent frailties. Even when they were in conflict with the law, the hand of the law cannot be permitted to fall hard on them like a sledgehammer lest it destroy them. the Constitution demands that the criminal justice system be child-sensitive.
38. The Constitution of Kenya, 2010 provides for the rights of a child during arrest and detention. It is clear that the rights of the child are protected under article 53 of the Constitution and a court must be vigilant in ensuring that those rights are respected. Hence, the existence of a system providing for consideration of the possibility of a child being detained for the shortest time possible is a factor to be taken into account when assessing the constitutionality of the provisions under consideration.
39. I find that section 25(2) of the Penal Code³² is inconsistent with the provisions of 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, and when held to be held for the shortest appropriate period of time and separate from adults and in conditions that take account of the child's sex and age.

Whether section 25(3) of the Penal Code offends article 160(1) of the Constitution

40. Article 160(1) of the Constitution on the independence of the Judiciary provides that:--
- 160.
- (1) 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.
41. 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.”

³² *supra*

³³ *supra* note 27



42. 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. At paragraph 13 the Privy Council identified the element of unconstitutionality as

“the fact that the decision on the length of the sentence is entrusted to the Executive not to the Judiciary.”

The Privy Council went on to say that

“it follows from this that what is required to make the provision comply with the *Constitution* is that the decision should be made by a court.”

Article 159(1) on Judicial authority provides that:-

159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

43. Judicial authority, is the term given to the power given to a judge that allows him to hear a case and to decide in favour of one party.³⁴ It is the constitutional authority vested in courts and judges to hear and decide justifiable cases and to interpret and enforce or void, statutes when disputes arise over their scope or constitutionality.
44. 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. Underpinning this decision is article 6(1) of the *European Convention of Human Rights* ('ECHR'), incorporated into the British domestic law via the Human Rights Act 1998.
45. The question of separation of powers was considered by Lord Bingham of Cornhill in the above case³⁶ where his Lordship stated as follows:-
1. An accused has a constitutional right to a fair trial by an independent and impartial tribunal. (the executive is not an independent and impartial tribunal or court).
 2. The imposition of sentence is part of the trial. Therefore, the sentence should be imposed by an independent and impartial tribunal.
46. 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

³⁴ <http://thelawdictionary.org/judicial-authority/>

³⁵ {2002} UKHL 46

³⁶ Ibid

³⁷ C Montesquieu, *The Spirit of the Laws* (1989), AM Cohler, BC Miller and HS Stone (ed) Cambridge University Press



47. 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 Code³⁸ allows a person aged below 18 years to be detained at the presidents 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.
48. The Constitution of Kenya, 2010 provides that "the Constitution is the supreme law of the Republic and any law which is inconsistent with the Constitution is to the extent of the inconsistency void."³⁹ The Penal Code⁴⁰ was one of the 'existing laws' that continue to be in force. Subject to rule 7(1) of the sixth schedule to the Constitution, section 25 (2) & (3) of the Penal Code⁴¹ must be construed with such modifications, adaptations, qualifications and exceptions necessary to bring its provisions into conformity with the Constitution. The courts are accordingly empowered to construe the provisions of the Penal Code⁴² to bring them into conformity with the Constitution.
49. Imposition of sentences is a judicial function to be performed by sentencing courts. The function of sentencing courts is to impose a sentence upon each offender that is appropriate to the offense and the offender. Review of sentences imposed by sentencing courts is a judicial function to be performed by appellate courts. 'Sentence' is defined to mean a dispositive order of a criminal court consequent upon a finding of guilt, whether or not a formal conviction is recorded.⁴³ It also includes indefinite sentences of imprisonment imposed immediately following conviction as well as extended supervision and detention orders which, although not imposed by a sentencing judge immediately following a finding of guilt or conviction, are indirectly founded upon a conviction.⁴⁴ The definition of 'sentence', compared with other forms of sanctions and penalties, is constitutionally critical, as sentencing is a judicial power that, can only be constitutionally vested in a court.⁴⁵ It has proven problematic to

³⁸ supra

³⁹ Article 2(1)

⁴⁰ supra

⁴¹ Ibid

⁴² Cap 63, Laws of Kenya

⁴³ See R Fox and A Freiberg, Sentencing – State and Federal Law in Victoria (Oxford University Press, 2nd ed, 1999), [1.507].

⁴⁴ Cf control orders that do not require a conviction at any stage of proceedings. In Fardon v Attorney-General for the State of Queensland (2004) 223 CLR 575 it was noted that the dangerous offender legislation was not 'in truth part of the sentencing process, but was a *sui generis* regime, the application being made in relation to a person who was already serving a term of imprisonment. The fact that there was a connection between the operation of the Queensland Act and anterior conviction by the usual judicial processes was a relevant matter for Gummow J (see at [106] and Kirby J at [165]);

⁴⁵ Polyukhovich v The Commonwealth (1991) 172 CLR 501, 608-609 (Deane J); Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); Leeth v The Commonwealth (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ); Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board (2007) 81 ALJR 1155, [82] (Kirby J).



comprehensively define and delimit the scope of ‘judicial power.’ In *Nicholas v The Queen*⁴⁶ Gaudron J stated:-

50. The difficulties involved in defining “judicial power” are well known. In general terms, however, it is that power which is brought to bear in making binding determinations as to rights, liabilities, powers, duties or status put in issue in justiciable controversies, and in making adjustment of rights and interests in accordance with legal standards. It is a power which is exercised in accordance with the judicial process and in that process, many specific and ancillary powers are also exercised.”
51. 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.
52. It is also important to clarify that detaining convicted persons aged below 18 years at the Presidents pleasure should not be confused with the exercise of power of mercy under article 133 of the *Constitution*. The issue of the exercise of mercy by the executive was addressed by the Privy Council in *Reyes v R*.⁴⁹ It deals with the grant of a pardon, respite, substituting a less severe form of punishment and remission. Such powers are exercised by the president in accordance with the advice of the Advisory Committee established under article 133(2) of the *Constitution*.
53. Lord Hoffmann in the above cited case summarizing the law on the subject stated at paragraph 44 as follows:-

“...The Board is mindful of the constitutional provisions...governing the exercise of mercy by the Governor-General. It is plain that the Advisory Council has a most important function to perform. But it is not a sentencing function...Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is a judicial, the latter is an executive, responsibility.” (Emphasis added).

54. I respectfully adopt the views of Lord Hoffman.

⁴⁶ *Nicholas v The Queen* (1998) 193 CLR 173, 207; see also *Huddart Parker v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

⁴⁷ *Waterside Workers’ Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434, 444 (Griffith CJ); *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 608-609 (Deane J); *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *Leeth v The Commonwealth* 1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ).

⁴⁸ *supra*

⁴⁹ *(Belize)* [2002] UKPC 11



55. In the exercise of judicial power, the courts ought to be independent and not to be subject to the control or direction of any person or authority.⁵⁰ The Executive has no role in performance of judicial process which includes sentencing. the Constitution prohibits all forms of interference with courts or judicial officers from any person or authority. Judicial power is derived only from the people and is exercised by only the courts established under the Constitution. The independence of the judiciary is a cornerstone for the realization of a democratic governance and in it is hid the realization of the judiciary as a sure guarantor of human rights and civil liberties. the Constitution provides for the separation of powers between the Executive, the Legislature and the Judiciary. Thus any law which has the effect of tying the hands of the judiciary in executing its function to administer justice is inconsistent with the Constitution.
56. It is beyond dispute that to sustain a democracy in the modern world, an independent, impartial and upright judiciary is an absolute necessity. Therefore, the Constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the State. Judicial independence is recognized in many international and regional human rights instruments as one of the cornerstones of good governance.
57. The principle is also enshrined in all democratic Constitutions. It involves two tenets;
- (a) judicial power must exist as a power separate from and independent of, executive and legislative power and;
 - (b) judicial power must repose in the judiciary as a separate organ of government, composed of persons different from and independent of those who compose the executive and legislature.

As the United States Supreme Court observed in O' Donoghue v. United States⁵¹ if it be important to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows as a logical corollary, equally important, that each department should be kept completely independent of the others - independent not in the sense that they shall not co-operate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other department. A democratic Society calls for a strong and independent judiciary and a commitment by the State to the rule of Law.

58. An independent judiciary is central to the protection of human rights, promotion of good governance and as a check on executive abuses. It is an essential check and balance on other branches of the government, and in ensuring that laws of the legislature and acts of the executive comply with the Constitution.⁵²

The application of the concept of "Implied Repeal"

59. The Children Act⁵³ came into effect on March 1, 2002. The Penal Code's⁵⁴ commencement date was August 1, 1930. According to principles of construction if the provisions of a later Act are so

⁵⁰ Dr Kizza Besigye & others v Attorney General, Constitutional Petition No 07 of 2007-Uganda

⁵¹ 289, US 516, 1933

⁵² Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System Muna Ndulo, Cornell Law School, Cornell University, USA.

⁵³ Act No. 8 of 2001



inconsistent with or repugnant to those of an earlier Act that the two cannot stand together, the earlier Act stands impliedly repealed by the latter Act. It is immaterial whether both Acts are Penal Acts or both refer to Civil Rights. The former must be taken to be repealed by implication.⁵⁵ This principle was properly adopted in *Martin Wanderi & 19 others v Engineers Registration Board of Kenya & 5 others*,⁵⁶ where the Court, rendered itself as follows:-

“This is because of the canons of interpretation with regard to the timing of legislation, and the doctrine of implied repeal, which is to the effect that where provisions of one Act of Parliament are inconsistent or repugnant to the provisions of an earlier Act, the later Act abrogates the inconsistency in the earlier one....”

60. The same position was restated in *United States v Borden Co*⁵⁷ where the court rendered itself as follows:-

“...There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy'...”

61. In *Steve Thoburn v Sunderland City Council*⁵⁸ the court stated that:-

“[I]f they [the two statutes] are inconsistent to that extent [viz. so that they cannot stand together], then the earlier Act is impliedly repealed by the later in accordance with the maxim *Leges posterior es prioribus contrariis abrogant*’ ...Authority to the effect that the doctrine of implied repeal may operate in this limited fashion is to be found in *Goodwin v Phillips*,⁵⁹ in the High Court of Australia, in which Griffith CJ stated at 7:” ... if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act.”

62. A similar position was taken in *Elle Kenya Limited & others v The Attorney General and others*,⁶⁰ where the court stated as follows at paragraphs 39-41 of its decision:

“In the English case of *Vauxhall Estates Ltd v Liverpool Corporation*,⁶¹ the court stated as follows at page 746; “If it is once admitted that Parliament, in spite of those words of the sub-section has power by a later Act expressly to repeal or expressly to amend the provisions of the sub-section and to introduce provisions inconsistent with them, I am unable to understand why Parliament should not have power impliedly to repeal or impliedly to

⁵⁴ *supra*

⁵⁵ See Uganda Court of Appeal in *David Sejjaka Nalima v Rebecca Musoke* Civil Appeal No 12 of 1985

⁵⁶ {2014} eKLR

⁵⁷ 308 US 188, (1939)

⁵⁸ 2002 EWHC 195

⁵⁹ {1908} 7 CLR 1

⁶⁰ High Court Petition No 320 of 2011

⁶¹ {1932} 1K.B



amend these provisions by the mere enactment of provisions completely inconsistent with them.”

63. In *Nzioka & 2 Others v Tiomin Kenya Ltd*,⁶²

“...The.....Act being a more recent Act must be construed as repealing the old Act where there is inconsistency....where the provision of one statute are so inconsistent with the provisions of a similar but later one, which does not expressly repeal the earlier Act, the courts admit an implied repeal.”

64. The court does not construe a later Act as repealing an earlier one unless it is impossible to make the two Acts or the two sections of the Acts stand together i.e. if the section of the later Act can only be given a sensible meaning if it is treated as impliedly repealing the section of the earlier Act.⁶³ Clearly, the provisions of section 25(2) of the *Penal Code*⁶⁴ cannot stand together with the provisions of the *Children Act*⁶⁵ which safe guard the rights and welfare of children.

Judicial Discretion

65. In a bid to achieve and promote constitutionalism, it's of great essence that judicial offices exercise their powers with discretion. Justice A Aguda⁶⁶ was right when he astutely observed;

“It would, of course, be erroneous and catastrophic if judges in developing countries accepted the formalistic interpretation of the Rule of Law, and thus, stood aloof while countries fall into the errors....., a judge in a developing country must regard himself (or herself) to the extent possible, as the bulwark against tyranny and oppressive laws. He must continuously remind himself (or herself) of the assertion by the International Commission of Jurists, that ‘The Rule of Law is of universal validity and application as it embraces those principles of justice which are considered minimal to the assurance of human rights and the dignity of man’.”

66. The exercise of judicial discretion enables the courts to do justice in each case to preserve the values and goals of the preservation of the rule of law and a stable constitutional order and the prevention of chaos and anarchy.⁶⁷

Determination

67. The *Constitution* itself does not direct courts to pass blind or undetermined sentences on convicted persons. A law must always be right, just, fair, not arbitrary, fanciful or oppressive.⁶⁸ If a law is not all these, it is no law at all and our courts are not called upon to exercise judicial power in conformity

⁶² Mombasa Civil Case No 97 of 2001

⁶³ See *Attorney General v Silver Springs Hotel Ltd and others* SCCA No 1 of 1989 and *Re Berrey* [1936] 1 Ch 274.

⁶⁴ *supra*

⁶⁵ *supra*

⁶⁶ *Essays On Third World Perspectives In Jurisprudence*, 1978

⁶⁷ *Attorney General v PK Semogerere* SC Constitutional Appeal No 3 of 2004

⁶⁸ *Susan Kigula & 416 others v Attorney General*, Constitutional Petition No 6 of 2003-Uganda



with such a "law."⁶⁹ It is clear from the above discussion that sentencing is a judicial function and not an executive function. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the Constitution.

68. The Constitution and its importance cannot be over emphasized, much less, its supremacy. The question as to the supremacy of the Constitution is indisputable; it is "the law of last reference. The supremacy of the Constitution as the basic law of this country and a yardstick by which all other laws are measured is not in dispute. A court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view.⁷⁰
69. The provisions of a Constitution cannot be diluted by adopting a narrow interpretation. A Constitution safeguards the basic rights and freedoms of the people by incorporating a Bill of Rights, and providing the machinery for their enforcement through an independent judiciary.
70. Article 165(2) of the Constitution vests in this court unlimited original jurisdiction in criminal and civil matters including jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and the question whether any law is inconsistent with or in contravention of the Constitution. Article 23 confers the court with authority to uphold and enforce the Bill of Rights and to grant any of the reliefs provided under article 23(3).
71. I must hasten to point out that all the petitioners were convicted long before the promulgation of the 2010 constitution. However, in my view, the concept of separation of powers is not new and was envisaged under the repealed constitution. Under the previous constitution, just like the 2010 constitution, the judicial function was and remained the preserve of the judiciary and it was never the intention of the framers of the former constitution to vest judicial authority in the hands of the executive, and in particular transfer determination of sentences in the hands of the executive. I must also point out that after the promulgation of the 2010 constitution, it was expected that all existing laws would be amended to conform to the new constitutional dispensation, but seven years after the promulgation of the Constitution, such unconstitutional provisions still remain in our law books.
72. Having found that the challenged provisions offend the provisions of the Constitution as discussed above and international conventions, and considering that the second to seventh petitioners were all below 18 years at the time of the commission of the offences and conviction, and considering that all have now served jail terms as follows; BN, over 14 years; JKM, over 9 years; JN, over 22 years; SIM, over 14 years, TOO, over 23 years and NKM over 15 years, I do not think that such periods of time can qualify to be described as "the shortest appropriate period of time" envisaged in the Constitution and international conventions nor has the state demonstrated that their continued detention is necessary.
73. This court is not powerless to grant a relief where the interests of justice demand. Having found that the challenged provisions are unconstitutional and having concluded that the periods served by the second to seventh respondents enumerated above cannot be described "as the shortest appropriate period of time" I am persuaded that it would be in the interests of justice for this court to order their release though no specific prayer to that effect was sought in the petition. The petitioners had sought for orders that the court orders a definite number of years of imprisonment and any other relief the court may deem fair and just. The fundamental duty of the court is to do justic. The court is required, where the circumstances so require, to act upon the assumption of the possession of an inherent power to do real and substantial justice for the administration, for which alone, it exists.

⁶⁹ Ibid

⁷⁰ Das, J., in Kesava Menon v. State of Bombay[1951] S.C.R. 228



74. In view of my analysis and conclusions herein above stated, I find that this petition succeeds. Accordingly, I allow this petition and make the following declarations/orders:-

- 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.
- b. A declaration be and is hereby issued declaring that that to the extent that the second to the seventh petitioners herein were imprisoned for an indefinite and or an 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 provision of separation of powers, their imprisonment at the presidents pleasure is 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*.
- c. That the Hon. Attorney General and Parliament be and are hereby directed to move with speed to enact the necessary amendments to ensure that the provisions of sections 25(2) & (3) of the *Penal Code*⁷² conform with the provisions of article 53(1)(f)(i) & (ii), (2) and article 160(1) *Constitution of Kenya, 2010*.
- d. That the second, third, fourth, fifth, sixth, and seventh petitioners herein be and are hereby ordered to be released from prison forthwith unless otherwise lawfully held.
- e. No orders as to costs.

Orders accordingly

SIGNED, DELIVERED AND DATED AT NAIROBI THIS 12TH DAY OF MAY, 2017

JOHN M. MATIVO

JUDGE

⁷¹ Cap 63, Laws of Kenya

⁷² Ibid

