REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 14 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

B O M.....1ST ACCUSED

CLIFFON OTIENO MAKOKHA.....2ND ACCUSED

JUSTUS MAKOKHA BARASA.....3RD ACCUSED

SILAS MAKOKHA OPANGA.....4TH ACCUSED

SENTENCE

1. In a judgment delivered on 16th August, 2016, my brother Tuiyott, J found B O M (the 1st Accused) and Justus Makokha Barasa (the 3rd Accused) guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63. He convicted them accordingly.

2. The learned Judge was already on transfer to another station at the time of delivering judgment and that explains why the task of sentencing the 1st and 3rd accused persons has been left to me.

3. The sentencing process has taken a bit of time owing to the fact that the 1st Accused was a minor at the time the offence was committed. The defence counsel had requested the court for time to make submissions as to the appropriate sentence for the 1st Accused.

4. Section 204 of the Penal Code provides that any person convicted of murder shall be sentenced to death. In **Joseph Njuguna Mwaura & 2 others [2013] eKLR**, the Court of Appeal held that "**the sentence of death shall continue to be imposed in case of conviction where the law provides**." However, a person who commits murder whilst under the age of eighteen years cannot be sentenced to death. Such a person is sentenced to be detained during the President's pleasure. This is as provided by Section 25(2) of the Penal Code which states that:

> **"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."**

5. However, matters are not as straightforward as imagined since Section 190 of the Children Act, 2001 outlaws imprisonment for children by stating that:

> **"190. Restriction on punishment**
>
> **(1) No child shall be ordered to imprisonment or to be placed in a detention camp.**
>
> **(2) No child shall be sentenced to death.**
>
> **(3) No child under the age of ten years shall be ordered by a Children's Court to be sent to a rehabilitation school**."

6. Section 191 of the said Children Act provides the punishments available for a child offender as follows:

"191 (1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways-

(a) By discharging the offender under section 35(1) of the Penal Code (Cap. 63);

(b) by discharging the offender on his entering into a recognisance, with or without sureties;

(c) by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap. 64);

(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;

(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;

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

(h) by placing the offender under the care of a qualified counsellor;

(i) by ordering him to be placed in an educational institution or a vocational training programme;

(j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (Cap. 64);

(k) by making a community service order; or

(l) in any other lawful manner."

6. The Court of Appeal has had occasion to consider the appropriate sentence for a child convicted of murder. In **O. O. N. (a minor) v Republic [2004] eKLR** the Court of Appeal when considering appropriate sentence for a minor offender found guilty of the lesser charge of manslaughter held that:

"We now proceed to consider what would be an appropriate sentence in this case. The appellant was below the age of 18 years when the offence took place. He was then a child under the Children Act and the court should have proceeded to sentence him under the Children Act. Section 191(1) of the Children Act provides ways in which the court may deal with a child offender. The appellant as we have stated above, was provoked by the deceased. He was remorseful and regretted what happened. We also note that he hit the deceased on the head once with a stone. Having considered all these circumstances, we order that a probation report be availed to us…."

7. In **Dennis Motanya Mokua & another v Republic [2014] eKLR** the Court of Appeal reconciled Section 25(2) of the Penal Code and 191 of the Children Act by stating that:

"Mr. Okenye submitted that the 2nd appellant being a child should have been sentenced under the Children Act (Act No. 8 of 2001). The Act came into force on 1st March, 2002 long before the 2nd appellant committed the offence. Section 189 of the Act provides that the word *"conviction"* and *"sentence"* should not be used in the case of a child, that is, where the offender is under eighteen years of age and section 191(1) thereof provides methods of dealing with offenders under the age of 18 years which includes a discharge, probation order, committal to rehabilitation school or Borstal institution. Section 190(1) of the Act, proscribes the sentence of imprisonment and detention in a detention camp in respect of a child.

Further, by section 25(2) of the Penal Code, a sentence of death cannot be imposed on a person who was under the age of 18 years at the time when the offence was committed and in lieu thereof, such person should be detained at the President's pleasure. However, section 191(1) of the Act which prescribes the methods of dealing with child offenders provides in part:

"*In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways...."(emphasis added*)

It is apparent that although the Act does not repeal section 25(2) of the Penal Code, the court has the discretion to deal with the child found guilty of a capital offence under section 191(1) of the Act notwithstanding the provisions of section 25(2) of the Penal Code. It is noteworthy, however, that section 191(1) is not mandatory and the court has the discretion to deal with the child in any other lawful manner as section 191(1) (l) specifically provides. It follows that section 25(2) of the Penal Code and Section 191(1) of the Act are not mutually exclusive but rather complementary.

In this case the 2nd appellant told the trial magistrate that he was 17 years of age and the trial magistrate made a finding to that effect. The 2nd appellant was found guilty of capital robbery which carries a death sentence. The 2nd appellant was not

sentenced to death as the High Court erroneously stated. Since section 25(2) of the Penal Code and Section 190(2) of the Act proscribes a death sentence where the offender is under 18 years of age, the court could have dealt with him as provided under section 25(2) of the Penal Code or under section 191(1) of the Act, whichever was the appropriate method. The appellant was an adult by the time the High Court dealt with his appeal and he could not have been suitably dealt with under section 191(1) (a)-(k) of the Act. In the circumstances detention at the president's pleasure was the suitable method of dealing with the 2nd appellant. We confirm the detention as the correct method."

In **J.M.K. & another v Republic [2011] eKLR** the Court of Appeal held that: **"Section 25(2) of the Penal Code is still a lawful provision of the law and was in existence before the enactment of the Children Act. No provision on the Children Act overrides that section."**

8. Our society through legislation has placed the offence of murder in the category of offences that should attract the ultimate penalty of death. In the case of a person who commits the offence of murder when under the age of eighteen years, Parliament through Section 25(2) of the Penal Code directed that such a person be detained at the President's pleasure.

9. Mr. Ashioya for the accused persons has urged the court to consider the sentences provided by Section 191 of the Children Act for the 1st Accused as ordering him detained under the President's pleasure is unconstitutional. He cited the decision of Kiarie Waweru Kiarie, J in **B. K.J. v Republic [2016] eKLR** in support of his submission. In that case the learned Judge, after considering the various provisions of the Constitution, held that Section 167(1) of the Criminal Procedure Code Cap. 75 is unconstitutional as it provides a punishment which is cruel, inhuman and degrading.

10. Section 167(1) of the Criminal Procedure Code provides that:

"167(1) If the accused, though not insane, cannot be made to understand the proceedings -

a) in cases tried by a subordinate court, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the President's pleasure; but every such order shall be subject to confirmation by the High Court;

b) in cases tried by the High Court, the Court shall try the case and at the close thereof shall either acquit the accused person or, if satisfied that the evidence would justify a conviction, shall order that the accused person be detained during the President's pleasure."

[Emphasis supplied]

Section 25(2) of the Penal Code uses the same words with Section 167(1) (a) of the Criminal Procedure Code.

11. In **J. M. K. v Republic [2015] eKLR** the Court of Appeal avoided the issuance of an order under Section 25(2) of the Penal Code and opted to instead impose a prison sentence of ten years. In doing so, the Court stated:

"A critical issue in this appeal relates to the appropriate sentence for a minor who has been convicted of murder. At the time of the offence, the appellant was a minor 16 years of age. The offence of murder attracts amandatory death sentence. In Nyeri Criminal Appeal No. 118 of 2011 (JKK- v- R (2013) eKLR), this Court had an opportunity to consider the appropriate punishment for a minor offender. The Court stated that the offence of murder committed by the minor appellant was serious and an innocent life was lost. The appellant though a minor at the time of the offence was to serve a custodial sentence so that he could be brought to bear the weight and responsibility of his omission or lack of judgment. The Court expressed that the appellant who now of age of majority could not be released to society before being helped to understand the consequences of his mistakes. (See also Republic – v - S.A.O., (a minor) [2004] eKLR and Nyeri Criminal Appeal No. 184 of 2009, Dennis Kirui Cheruiyot – v- R).

Section 190(2) of the Children Act prohibits the sentencing of child offenders to death. Article 53(2) of the Constitution and Section 4 of the Children Act provides for consideration of the best interest of the child in all actions concerning children. In the present case, the appellant was 16 years of age at the time of offence, he was above the age of 18 years at conviction and he could thus not be sent to a Borstal Institution. The relevant time in determining the age of a child for criminal liability is the age at the time of the offence not age at the time of conviction. We do not believe that it is in the best interest of the appellant to be indefinitely detained at the pleasure of the President. We take cognizance of the provisions of Article 53(1) (f) of the Constitution which stipulates that if a child has to be detained, this has to be as a last resort and the detention must be for the shortest appropriate period of time. The appellant in this case was not found to be of unsound mind to be detained at the pleasure of the President. No legal provision was cited to us to support the order that if a minor offender is found guilty of murder he should be detained at the pleasure of the President. Due to the gravity of the offence and the current age of the appellant, he cannot be released to society. The Children Act prohibits a death sentence to a child offender, life sentence is also not provided for; we, therefore, allow the appeal to the extent that we substitute the order directing the appellant to be detained at the pleasure of the President with a custodial term of imprisonment for 10 years from the date of conviction by the trial court on 5th May 2011."

12. Considering the various decisions cited above, I hold the view that Section 25(2) of the Penal Code provides one of the alternative punishments for a child who commits murder. Though it may be argued that the President is too busy to attend to those detained at his

pleasure, the truth of the matter is that there could be failure in the process of bringing the matters to the attention of the President. Section 25(3) of the Penal Code can easily take away the indeterminate nature of the punishment in Section 25(2) if the report of the Court accompanying the detention order is acted upon. In my view the sentence provided by Section 25(2) is legal. However, in view of the discomfort expressed by the courts about this particular sentence, I urge Parliament to take a fresh look at Section 25 of the Penal Code.

13. Turning to the facts of this case, I note that the 1st Accused is a first offender. He is remorseful. The pre-sentence report prepared by the Probation Service paints him in a positive light. He has been in custody for a period of two years. The 1st Accused is now an adult. The offence of murder is a serious offence and he needs to be kept away from society in order to reflect on the consequences of his actions. Had I opted to proceed under Section 25(2) of the Penal Code I would have sentenced him detained at the President's pleasure with a recommendation under Section 25(3) that the period of detention should not exceed ten years. However, as the option of imposing a custodial sentence is available to me, I sentence the 1st Accused to ten years imprisonment.

14. As for the 3rd Accused, I note that his mitigation is already on record and the same may be used in future by the Advisory Committee on the Power of Mercy in making any recommendations to the President under Article 133 of the Constitution. I note that the only sentence available for the offence of murder is death. I therefore sentence the 3rd Accused to suffer death in the manner authorized by the law.

Dated, signed and delivered at Busia this 3rd day of November, 2016.

W. KORIR,

JUDGE OF THE HIGH COURT