



**Shinalo v Republic (Criminal Petition E003 of 2024)  
[2025] KEHC 15345 (KLR) (27 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15345 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL PETITION E003 OF 2024  
JN KAMAU, J  
OCTOBER 27, 2025**

**BETWEEN**

**HUMPHREY SHINALO ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner herein jointly with another was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The Trial Court noted that he was a minor and detained him at the pleasure of the President.
2. Being aggrieved by the said decision, he lodged first appeal at Kakamega HCCRA No 14 of 2012. The court dismissed his appeal and upheld his conviction and sentence.
3. On 19<sup>th</sup> January 2024, he filed this Petition dated 29<sup>th</sup> December 2023 seeking review of his sentence. He relied on Article 50(2)(q) and 165 of *the Constitution* of Kenya, 2010 noting that this court had the jurisdiction to redress infringement and/or denial of fundamental right or freedom.
4. He asserted that the imposition of the presidential pleasure detention order was inconsistent with the provision of Article 160 of *the Constitution* of Kenya. He added that the said sentence induced unfair trial in sentencing and violation of Article 27(1), (2) and (4) and 29(8) of *the Constitution* of Kenya.
5. His undated Written Submissions were filed on 24<sup>th</sup> March 2025 while those of the Respondent were dated 17<sup>th</sup> January 2025 and filed on 20<sup>th</sup> January 2025. The Judgment herein is based on the said Written Submissions that both parties relied upon in their entirety.



## Legal Analysis

6. The Petitioner merged all his grounds of appeal and submitted that the presidential pleasure detention order was harsh, excessive, intimidating and inconsistent with Articles 25(a) and (c), 27(1)(2)(4), 28, 29(f), 47, 48, 50(2)(p), 51(1) and 53 (1)(f) of *the Constitution* of Kenya. He pleaded with court to substitute his sentence with a definite sentence as they had been detained from 20<sup>th</sup> September 2010 without any specified date of release.
7. He argued that the presidential pleasure was excessive, inhuman, degrading and amounted to psychological torture as living without knowing when the President would act upon the imposed order amounted to psychological torture contrary to Article 25(a), 28 and 29(f) of *the Constitution* of Kenya.
8. He contended that the imposition of the presidential pleasure also infringed his right and fundamental freedom under Article 53(1)(f) of *the Constitution* of Kenya where every child is guaranteed the right not to be detained, except as a measure of last resort and when detained to be held for the shortest appropriate period of time.
9. He pointed out that the presidential pleasure detention order was inconsistent with Article 28 of *the Constitution* as the long incarceration without any future prospect of release denied him his right to dignity and it failed to promote the realisation of child right and induced unfair discrimination contrary to Article 27(1), (2) and (4) of *the Constitution*.
10. He asserted that the primary purpose of a sentence of imprisonment as per the United Nations Minimum Standard Rules (Mandela Rule No 4) was to rehabilitate offenders and enable them easier re-integration into the society. He asserted that his sentence was contrary to the said international law which under Article 2(5) and (6) of *the Constitution* formed part of Kenyan law.
11. He further argued that the imposition of the presidential pleasure detention order implied that the Trial Court imposed a blind sentence and shifted its constitutional mandate to the executive contrary to Article 160 of *the Constitution*. In this regard, he relied on the case of A.O.O & 6 Others vs AG (eKLR citation not given) where the court declared the imposition of a detention order under presidential pleasure was unconstitutional.
12. He urged the court to embrace the doctrine of stare decisis bearing in mind that every person was equal before the law and was entitled to equal benefit and equal protection of the law. He pleaded with court to consider that during the commission of the offence, he was young of age and was not well conversant with the consequences of crime hence, he could easily engage in crime unlike today when he had learned his lessons through long suffering in prison.
13. He further pleaded with court to consider that he was fully reformed and ready to re-integrate back to society when given a second chance in life.
14. On its part, the Respondent submitted that as the Petitioner had already lodged an appeal at the High Court in Kakamega which was dismissed, this court was functus officio. It placed reliance on the case of Republic vs Jagani & Another (2001) KLR 590 where it was held that the purpose of sentence was usually to disapprove unlawful conduct and assist in rehabilitation.
15. It further cited the case of John Kagunda Kariuki vs Republic [2019] eKLR where it was held that the applicant could not return to the High Court for review of his sentence as he had already been heard on appeal. The court added that he was at liberty to make an argument for reduced sentence at the Court of Appeal.



16. It invoked Section 362, 364 and Article 165 of *the Constitution* of Kenya, 2010 and argued that the powers of the High Court on revision were to be exercised only over subordinate courts and not over the High Court with respect to its own decisions. It added that where an accused person was aggrieved by the court's decision, he could either appeal or seek review of the sentence but not appeal and apply for review at the same time. It asserted that the Petitioner's Petition herein lacked merit and should be dismissed.
17. Notably, the Applicant was detained at the President's pleasure as provided for under Section 25(2) of the Penal Code Cap 63 (Laws of Kenya) as the Trial Court noted that he was a minor.
18. This court was alive to the fact that he had appealed at the High Court of Kenya as was pointed out by the Respondent herein. However, at all given times, children need special protection because they are vulnerable. It was for that reason that the drafters of our Constitution of Kenya mandated that all action that was taken had to take into account the best interests of children.
19. Notably, Article 53(1)(f)(i) of *the Constitution* of Kenya provides that:-

“Every child has the right not to be detained, except as a measure of last resort, and when detained, to be held for the shortest appropriate period of time separate from adults and in conditions that take account of the child's sex and age” (emphasis court)
20. Article 53 (2) of *the Constitution* of Kenya further provides that :-

“A child's best interests are of paramount importance in every matter concerning the child.”
21. Further, Rule 7(1) of Part II of the Sixth Schedule to *the Constitution* of Kenya entitled "Existing Laws" states that: -
  1. 14. “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.”
22. Article 29(a) of *the Constitution* of Kenya provides as follows:-

“Every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause”
23. The above provisions are clear. All law must conform to *the constitution*. This court had due regard to the case of AOO & 6 others vs Attorney General & another (Petition 570 of 2015) [2017] KEHC 6022 (KLR) where Section 25(2) and (3) of the Penal Code were declared unconstitutional. The court held that the provisions of the Penal Code pertaining to imprisonment of persons under eighteen (18) years must meet the threshold prescribed by *the Constitution* of Kenya.
24. The provisions of the law were clear that all law must conform to *the constitution*. Article 20(3) of *the Constitution* of Kenya required the court, when applying and/or interpreting a provision of the Bill of Rights, to adopt the interpretation that most favoured the enforcement of a right or fundamental freedom.
25. Notably, punishment that was meted out on a perpetrator was intended to achieve objectives set out in Judiciary Sentencing Policy . It was meted out as a deterrent punishment to deter the offender and other would-be offenders from committing a similar crime. It was also meant to make the perpetrator pay for or suffer for his wrongful act and to compensate the victim for the loss or damage that he or she has



- suffered. This was the objective of retribution. Justice not only needed to be done but it had to be seen to have been done. It could also achieve the objective of protecting the community by incarcerating the perpetrator and communicating the displeasure of the society to crimes.
26. Notably, imprisonment was not intended to merely punish a child at the pleasure of a President who had no idea was held at his pleasure. Imprisonment of a person who had committed an offence as a child to lengthy detention was tantamount to subjecting such person to torture and cruel, inhuman or degrading treatment or punishment contrary to Article 25 of *the Constitution* of Kenya.
27. Indeed, Article 25 (a) of *the Constitution* of Kenya provides as follows:-
- “Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited to freedom from torture and cruel, inhuman or degrading treatment or punishment...”
28. Imprisonment at the president’s pleasure, whose period was not defined or determined and which depended on the discretion of the executive could not in the mind of this court be said to be in conformity with the provisions of Article 53(1)(f) of *the Constitution* of Kenya regarding detention being a last resort, detention for the shortest time possible and separate from the adult convicts.
29. While releasing the appellant in *Joseph Melkino Katuta vs Republic* [2017] eKLR on account of his mental retardation, this very court agreed with the holdings in the cases of *B K J vs Republic* [2016] eKLR and *Hassan Hussein Yusuf vs Republic* [2016] eKLR where it was held that keeping a sick person for an indeterminate period in a prison under presidential pleasure was cruel, inhuman and degrading treatment and contrary to Article 25(a) and Article 29(f) of *the Constitution* of Kenya.
30. The Petitioner herein had been charged with the offence of robbery with violence. He had already served about fifteen (15) years in prison. This court did not think that such period of time could qualify to be described as “the shortest appropriate period of time” for a person who committed an offence as a child as had been envisaged in *the Constitution* of Kenya. The Respondent had also demonstrated that his continued detention was necessary.
31. While this court appreciated that a court of equal and competent jurisdiction of this court had affirmed the sentence of the Trial Court to order that the Petitioner herein be at the President’s pleasure, it was not powerless to grant a relief where the interests of justice demanded and where it had been petitioned to consider a violation, infringement and /or breach of *the Constitution* of Kenya. This was an issue that had not been considered by the High Court of Kenya.
32. This court was of the considered view that it was not sitting on appeal of the decision of the High Court at Kakamega but had only considered the Petitioner’s petition on the issue of constitutionality or otherwise of the detention under the President’s pleasure.
33. It was clear that Article 50(2)(q) of Kenya stipulated that:-
- “Every accused person has the right to a fair trial, which includes the right, if convicted, to appeal to, or apply for review by, a higher court as prescribed by law (emphasis court).
34. In the premises, as there was no clear mechanism to release convicted children who had been detained under the President’s pleasure, this court was persuaded that it would be in the interests of justice for it to order his release though no specific prayer to that effect was sought in the Petition as the Petitioner had sought for a definite sentence. The fundamental duty of the court was to do justice. The court



was required, where the circumstances so require, to act upon the assumption of the possession of an inherent power to do substantial justice.

**Disposition**

35. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Petition dated 29<sup>th</sup> December 2023 and lodged on 19<sup>th</sup> January 2024 was merited and the same be and is hereby allowed.
36. The effect of this decision is that the Petitioner be and is hereby ordered to be released from prison forthwith unless he be held for any other lawful cause.
37. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 27<sup>TH</sup> DAY OF OCTOBER 2025**

**J. KAMAU**

**JUDGE**

