



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mbogo v Republic (Criminal Appeal 54 of 2017)  
[2025] KECA 578 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KECA 578 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CRIMINAL APPEAL 54 OF 2017  
S OLE KANTAL, JW LESSIT & AO MUCHELULE, JJA  
MARCH 21, 2025**

**BETWEEN**

**SIMON IRERI MBOGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from part of the ruling and order of the High Court at Embu (Lenaola, J.) dated 18th May 2007 in Criminal Case No. 54 of 2017)*

**JUDGMENT**

1. The appellant, Simon Ileri Mbogo, was together with two others jointly charged with, and him and one of them, convicted of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars were that on 23<sup>rd</sup> November 2002 at Kiang'ombe in Mbeere District they jointly murdered Andriano Njagi.
2. The appellant was at the time of conviction under 18 years. Under section 25(2) and (3) of the [Penal Code](#), he was sentenced to be detained at the President's pleasure. In the appeal that he filed to this Court, he challenged both the conviction and sentence. However, he subsequently filed a supplementary memorandum of appeal in which he blamed the High Court (the learned Justice Isaac Lenaola, as he then was) for sentencing him –

“under unconstitutional law.”

Before us, he abandoned all other grounds and took up only this ground as regards sentence.

3. During the virtual hearing, the appellant's counsel Ms. Grace Maina pointed out that the High Court (J.M. Mativo, J., as he then was) had on 12<sup>th</sup> May 2017 in A.O.O. & 6 Others -vs- Attorney General & Another [2017]eKLR declared section 25(2) and (3) of the [Penal Code](#) to be unconstitutional for



violating Articles 53(1)(f) (i) and (ii), (2), and 160(1) of *the Constitution* and international conventions governing the rights of children; and also unconstitutional to the extent that it had sanctioned an indefinite and/or for undetermined sentence at the pleasure of the President which went against the principle of separation of powers and the principle of constitutionalism under the repealed constitution.

4. Learned counsel Mr. Naulikha for the Director of Public Prosecutions agreed with learned counsel for the appellant, and asked that the Court comes up with an appropriate order on sentencing.
5. Now that it is conceded that the constitutionality of section 25(2) and (3) of the *Penal Code* was successfully questioned in the High Court, the question is what, by way of sentencing, we should do with the appellant. We do not know whether there was any appeal against the decision, and also note that the question is not before us on appeal. All that we wish to emphasize is that sentencing is a judicial function that cannot be shared with the Executive. Secondly, a child offender is protected under Article 53(1) of *the Constitution* from indefinite and indeterminate detention and treatment.
6. The appellant was the 3<sup>rd</sup> accused in the trial court, and it was found that, without any provocation, he had, using a knife, stabbed the deceased and caused injuries to the heart and lungs from which the deceased had succumbed. The appellant was not allowed to mitigate. He was aged 17 years old at the time of the offence, and under 18 years when he was convicted on 18<sup>th</sup> May 2007. He has therefore been detained for 18 years.
7. We note the fact that for the entire 18 years, the appellant has suffered mental anguish, trauma and anxiety as he did not know how long the President's pleasure would last. He suffered a long and indefinite sentence.
8. We consider that the appellant has suffered more than enough for the crime he committed. The sentence is set aside and the appellant be released forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT NYERI THIS 21<sup>ST</sup> DAY OF MARCH 2025**

**S. OLE KANTAI**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**A.O. MUCHELULE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**Signed**

**DEPUTY REGISTRAR**

