JNG v Republic (Criminal Appeal 189 of 2017)
[2025] KECA 1006 (KLR) (2 May 2025) (Judgment)

Neutral citation: [2025] KECA 1006 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 189 OF 2017

JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA

MAY 2, 2025

BETWEEN

JNG .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nanyuki (M. Kasango, J.) delivered on 7th June, 2017 in H.C. CR. Case No. 015 of 2016.)

JUDGMENT

1. JNG, the appellant, was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on the 14th June 2016 at Muthaiga Estate, within Nanyuki Township in Laikipia County, murdered Hadijah Wajera Jullo. The appellant pleaded not guilty to the charge and the matter proceeded to trial.

2. The prosecution called 13 witnesses. Briefly, the prosecution case was that the deceased, a mother of six, was walking through a farm when she met with the appellant, approaching from the opposite direction. PW2, was taking a shortcut through the same farm when he heard screams and saw a lady and a young man in a tussle 20 meters away from him. The young man was holding a knife ready to stab the lady. The young man was facing him while the lady's back was towards him. PW2 saw the young man stab the lady before running away.

3. PW1, who had given the deceased a place to live at his place was returning home at around 2 p.m. He heard screams from the nearby farm and ran there to see what was happening. He said that he saw the deceased who was screaming, holding her upper stomach with blood gushing from her abdomen and splashing onto her face. At the same time, he saw a young man running away from the deceased and from where he was. He started shouting for him to be arrested.

4. The appellant ran into the path of PW3, PW5 and PW9. PW3 and PW5 arrested him and returned him to the scene where shouts of "apprehend him" were coming from. PW9 picked the blooded knife the appellant dropped and later handed it to PW7, a police officer who was on patrol in the area and who was called to the scene by members of the public.

5. Later PW12 did DNA analyses of blood samples taken from the deceased, from the knife recovered from the appellant and the appellant's blood and found that the DNA of the blood on the knife matched the DNA of the blood samples taken from the deceased. PW10 who performed the post mortem on the body of the deceased formed the opinion that the deceased died due to massive bleeding due to a penetrating stab injury to the upper rib cage.

6. The appellant gave a sworn defence and denied the charge. He testified that he was returning home from the library having been sent home for lack of fees. He said that as he crossed the river, he was hit by a man in dirty clothing who was carrying sticks. He said that he fell. He said that he stood up and saw he was bleeding. He was immediately arrested and taken back to the scene. He was charged with the offence, which he denied. He did not call any witness.

7. The learned trial Judge, after considering the evidence from both sides, found the appellant guilty and convicted him of the offence. Being a minor at the time the offence was committed and also at the time of sentencing, the learned trial Judge ordered:

> " In sentencing you I do make a recommendation that you should be detained for no less than 10 years. You need to respect and value life.
>
> I therefore hereby order that JNG be detained during the (sic) H.E. the President's pleasure as provided for under section 25(2) of the *Penal Code*. He shall be detained at such place and under such conditions as H. E. may direct."

8. Being aggrieved by the trial court's ruling on sentence, the appellant has now preferred this appeal. Urging this Court to allow his appeal, the appellant raised only one ground of appeal:

9. That the learned Judge of the High Court erred in Law by sentencing the appellant under an unconstitutional law.

    1. We heard this appeal on the 29th January 2025, through this Court's virtual platform. The appellant was present and appeared virtually from Nyeri Prison. He was represented by learned counsel Mr. Muchangi, while learned counsel Mr. Mwakio held brief for Mr. Solomon Naulikha for the State. Both counsel had filed their written submissions which they wholly relied on and briefly highlighted.

    2. This is a first appeal. Our mandate as a first appellate Court was spelt out in a plethora of cases of this Court and of the High Court, among these cases is this Court's decision in Jonas Akuno O'kubasu vs. Republic [2000] eKLR where it was held:

    > " It is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it..."

11. Mr. Muchangi submitted that the appellant was challenging only the sentence and proposed that the only issue for determination is whether the sentence dispensed by the trial court was lawful. He urged that the sentence was unconstitutional based on section 2 (1) and (3) of the *Penal Code*. That the Learned Judge erred in Law by sentencing the appellant under an unconstitutional law. He urged that the appellant was 16 years old when he was sentenced on 17th June, 2017, and that he has served 7 years since his sentence. Mr. Muchangi urged that the sentence contravenes Article 53 (f) of *the Constitution* on the rights of a child and Article 163 (1) of *the Constitution*. He relied on the High Court decisions in JMR vs. Republic [20170 eKLR and AOO vs. Attorney General [2022] eKLR where the Court declared the provisions of section 25 (2) and (3) of the *Penal Code* unconstitutional for prescribing an indeterminate sentence. That detention of minors at the President's pleasure under this section contravened the rights of children recognized under Article 53(1)(f) and Article 160 (1) of *the Constitution* of Kenya 2010 and International Conventions governing the rights of children.

12. He urged that the UN Convention on the Rights of the Child, Article 37(a) provides that neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age. Further that 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, 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.

13. Mr. Muchangi submitted that during sentencing, the learned Judge in the case of Republic vs. Jagan & Another [2001] KLR indicated that the appellant needed to be rehabilitated and ruled that the appellant be detained in order to learn to respect and value life. Counsel urged that Republic vs. Jagan, supra, defined the purpose of sentencing thus:

> "The purpose of a sentence is usually to disapprove or denounce unlawful conduct as a deterrent to deter the offender from committing the offense, to separate the offenders from society, if necessary to assist in rehabilitation of offenders, and in retribution in providing for reparation for harm done to victims in particular and to society in general. It is also seen as promoting a sense of responsibility in offenders."

14. Learned counsel urged us to take note that the appellant was detained for the purpose of rehabilitation and has served under the President's Pleasure for a period of 7 years and one month. He urged us to consider his age at the time of committing the offense and find that the period served is adequate and sufficient sentence.

15. Mr. Mwakio for the State observed that the State was relying on the same authorities relied on by the appellant. He submitted that the State has noted that the appellant was a minor at the time he committed the offence. Citing AOO vs. Rep, (supra), and JMR v Rep, (supra), counsel submitted that they had taken cognizance of the Superior Court's declaration that section 25 (2) and (3) of the *Penal Code*, the same provisions relied upon by the learned Judge to pass the impugned sentence, as unconstitutional. Counsel urged that the State has noted that the appellant has served 7½ years in prison, that there were aggravating and mitigating circumstances and was of the view that the period he was held in custody was sufficient.

16. We considered the written submissions filed by the State. The State observed that the appellant was sentenced to be detained for a period of not less than 10 years during H.E the President's pleasure as provided for under section 25(2) of the *Penal Code*. It was urged that in meting out the sentence, the learned Judge noted that the period was befitting in order for the appellant to learn to respect and value

life. While acknowledging the decisions of AOO vs. Rep and JMR vs. Rep, counsel urged that although the conviction was safe, the sentence has since been declared unlawful. That taking all circumstances of this case into account, the orders of the aforesaid authorities, while weighing the aggravating and mitigating factors which now tilt in favour of the appellant, it therefore follows that the sentence served thus far by the appellant is sufficient.

17. We have considered this appeal, which challenges only the sentence. We have considered the ruling on sentence, the submissions of counsel and the cases relied upon. Having done so, we find that the issue that lies for our determination is whether the sentence imposed upon the appellant by the learned trial Judge was lawful.

18. 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 15 years of age.

19. There is no dispute that the appellant was below 18 years at the time of the impugned sentence. It is common ground that the sentence meted out was unlawful by dint of Article 53 (1) (f) of *the Constitution*; and Article 37 (b) of the UN Convention on the Rights of a Child, which by virtue of Kenya is a signatory, by virtue of Article 2(5) of *the Constitution* which expressly imports the General Rules of International Law and makes them part of the law of Kenya.

20. We note that the learned Judge, in the impugned ruling made reference to section 191(1) of the *Children Act* and observed that the said sub-section provided the sentence that should be meted out to children. The learned Judge then cited section 191 (1) (e) and ruled that as the provision prescribed the kind of sentence that ought to be meted out to children above 10 years and under 15 years, and the appellant being 16 years then, she was not bound to apply the said provision. The learned Judge then noted that although the sentence for murder, was death, she could not pass that sentence as the *Children Act* and section 25 of the *Penal Code* outlawed it.

21. Having come to the above conclusion, the learned Judge proceeded to pass sentence and ordered as follows:

> “ In sentencing you I do make a recommendation that you should be detained for no less than 10 years. You need to respect and value life.
>
> I therefore hereby order that JNG be detained during the (sic) H.E. the President's pleasure as provided for under section 25(2) of the *Penal Code*. He shall be detained at such place and under such conditions as H. E. may direct.”

22. There are plethora of cases on the issue of the appropriate sentence for a child offender convicted of murder. This Court has had occasion to consider the appropriate sentence for a child convicted of murder. In O. O. N. (a minor) vs. Republic [2004] eKLR this Court, when considering the 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....”

23. In a later case in Dennis Motanya Mokua & Another vs. Republic [2014] eKLR this Court 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."

24. In yet another decision, in J. M. K. vs. Republic [2015] eKLR this Court 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 a mandatory 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 was 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."

25. 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 interests of the child in all actions concerning children. This is in line with the Convention of the Rights of the child cited by both parties to this appeal. In the present case, the appellant was 15 years of age at the time of offence, he was 16 years at conviction. 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. As for the relevant time to consider the appropriate sentence is the age at the time of sentence. In that regard, the appellant was 16 years at the time of sentence. Being 16 years at the time of the sentence, the appropriate provision of the *Children Act* should have been section 191 (1)(g) as opposed to 191 (1)(e) which the learned Judge applied.

26. Section 191 of the said *Children Act* provides the punishments available for a child offender. Under 191 (1)(g) it provides 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-

f. 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."

27. The learned trial Judge misdirected herself, by failing to consider the provision of 191 (1)(g) and therefore fell into error. Had she applied her mind to the correct provision, she would have sent the appellant to a Borstal Institution as prescribed under 191 (1)(g). That also means that the appellant would have benefitted by being sent to the correct institution, which would have been better suited to deal with his age appropriate issues.

28. The question is what sentence then can we order for the appellant? Can we order that he be sent to a Borstal institution, or to some other sentence? The appellant is too old for Borstal institution. We also think that the appellant having served 7½ years in prison custody, that is more than sufficient sentence in all the circumstances of the case.

29. Based on our finding above we find that the appellant's appeal succeeds in part. We set aside the order to serve a minimum of 10 years at the President's pleasure and in its place direct that he should be set at liberty unless he is otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 2ND DAY OF MAY, 2025.

J. LESIIT

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JUDGE OF APPEAL

ALI – ARONI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR