DN v Republic (Criminal Appeal 17 of 2015)
[2024] KECA 1096 (KLR) (21 August 2024) (Judgment)

Neutral citation: [2024] KECA 1096 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 17 OF 2015

F SICHALE, FA OCHIENG & WK KORIR, JJA

AUGUST 21, 2024

BETWEEN

DN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal against the judgment of the High Court of Kenya at Nakuru delivered by Hon. Justice R.P.V. Wendoh dated and delivered on 15th December, 2014 in HCCR No.56 of 2011)

JUDGMENT

1. The appellant DN was charged with the offence of murder contrary to Section 204 of the Penal Code. The particulars of the offence were that on 21st May, 2009 at Keringet Trading Centre in Kuresoi within Nakuru County murdered John Otundo Ondipo.

2. The appellant denied the offence and a trial ensued. On 15th December, 2014, the appellant was found guilty of the offence of murder and the court ordered that "...he be detained at the President's pleasure under Section 25(2) of the Penal Code." as he had been certified to be a minor.

3. The appellant was dissatisfied with the said outcome, hence this appeal. Although in his homegrown grounds of appeal he challenged his conviction, in a supplementary Memorandum of Appeal and in his written submission, both dated 20th March, 2023, he abandoned his appeal against conviction and confined his appeal on the sentence only.

4. On 22nd May, 2023 when this appeal came up for hearing before us, Miss Mwayo learned Counsel for the appellant informed us that the appellant relied fully on his written submissions and she did not wish to make oral highlights.

5. In opposing the appeal, Miss Kisoo, learned Counsel for the respondent also fully relied on her written submissions dated 15th May, 2023 and opted not to make oral highlights.

6. A brief background of the now uncontested facts are that the appellant murdered the deceased, "buried" him in a borehole and took off from the place of murder in Kuresoi. He was arrested 6 days later in Kisii.

7. In the appellant's written submissions, it was contended that the appellant was a child aged 13 years at the time of the commission of the offence. We were urged to find that sentencing the appellant to serve at the President's pleasure offends Article 160 of *the Constitution* which provides: -

> " 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."

8. In support of this contention, reliance was placed on the persuasive decision of Mativo, J. (as he then was), in AOO & 6 Others -vs- AG & Another, wherein the learned Judge held:-

> " ...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. 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. 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."

9. The Judge, (Mativo,J) further noted:-

> " .... *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 Code allows a person aged below 18 years to be detained at the President's 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."

10. It was the appellant's position that in view of the Constitutional imperative of Separation of Powers, the appellant ought not to have been sentenced to serve at Presidential pleasure as this is tantamount to the Executive illegal infringement of a judicial duty.

11. The appellant concluded that in view of the indeterminate nature of the sentence and the usurpation of a judicial function by the Executive, the only recourse open to us is to have the appellant released from prison. As stated above, heavy reliance was placed on the AOO (supra) decision where the learned Judge (Mativo, J) in the penultimate part found as follows:

> " In view of my analysis and conclusion herein above stated, I find that this petition succeeds. Accordingly, I allow this petition and make the following declaration/orders:

a. A declaration be and is hereby issued that section 25(2) & (3) of the Penal Code is unconstitutional in that it violates the provisions of Article 53(1) (f) (i) and (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 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 president's pleasure is unlawful to the extent that it violates the concepts 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 Section 25(2) & (3) of the Penal Code conform with the Provisions of Article 53(I) (f) (i) & (ii),(2), and Article 160(I) of *the 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."

12. In opposition to the appeal, the respondent contended that the appellant cannot get away with the offence he committed and that he should get a custodial sentence as he has now attained the age of majority. Reliance was placed on the decision of R vs ECM [2021] eKLR wherein, the case quoted the decision of JKK vs. Republic [2013] eKLR where it was stated: -

> " The purposes of the sentences provided for under the *Children Act* are meant to correct and rehabilitate a young offender, i.e any person below the age of eighteen years while taking into account the overarching objective is the preservation of the life of the child, and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of sixteen years the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant, though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes which can only happen after serving a custodial sentence."

13. The respondent further submitted that the appellant was deserving of a custodial sentence given the fact that he inflicted multiple injuries on the deceased as stated by PW5, the Doctor.

14. We have anxiously considered the record, the submissions and the authorities cited before us. A child is defined as an individual who has not attained the age of 18 years. At the time of the commission of the offence that the appellant was charged with, his age was 13 years. Article 53 of *the Constitution* provides:

> "(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.

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

15. Further, Section 25(2) of the Penal Code provides as follows: -

> " 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."

16. On the other hand, Sec.191(1) of the repealed Children's Act provides as follows:

> " In spite of the provisions of any other written 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 an offender on entering a recognizance with the or without sureties;
>
> c. By making a probation order against the offender under the *probation of Offenders Act* (Cap 64);
>
> d. By committing the offender to the case of a fit person whether a relative or not or a charitable Children's Institution willing to take him under his case;
>
> e. If the offender is above ten years and under 15 years of age by ordering him to be sent to a rehabilitation school;
>
> f. By ordering the offender to pay a fine, compensation or costs or any of them;
>
> g. In the case of a child who has attained the age of 16 years dealing with him in accordance with any Act which provides for the establishment and regulation of a borstal institution;
>
> h. By placing the offender under the case of a qualified Counselor;
>
> 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 *probation of Offenders Act* (Cap 64);
>
> k. Making a Community Service Order; or

l. In any other lawful manner."

17. In Dennis Motanya Mokua & another -vs- Republic [2014] eKLR, this court reconciled S.25(2) of the Penal Code with S.191 of the *Children Act* thus:

> "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 "
>
> 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)(1) 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."

18. It is on account of the delicate balance between the rights of a child vis a vis the wrongs committed by a minor that such a child is detained at the President's pleasure. The appellant herein thinks that this is wrong as in the decision of AOO (Supra), the High Court declared, S.25(2) of the Penal Code unconstitutional. The High Court Judge was of the view that sentencing a minor to serve under the Presidential pleasure is tantamount to the Judiciary ceding power to the Executive. We do not think so and as a matter of fact we hold a different view from the decision of AOO (Supra).

19. Firstly, and as stated above, it was because of the delicate balance between the rights of the child vis -a - vis the offence committed that such a child is sentenced to serve at Presidential pleasure. In our view, there is no usurpation of judicial power as the President does not impose a custodial sentence but exercises leniency.

20. One may well imagine that if an offence committed by a minor was not to have retribution, then minors would get away with literally everything under the sky.

21. It is also important to point out that apart from S.25(2) of the Penal Code which permits Presidential leniency. Article 133 of *the Constitution* donates executive power to the President on the exercise of power of mercy. It provides:

> " Article 133 (1)
>
> On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by:-
>
> a. granting a free or conditional pardon to a person convicted of an offence;
>
> b. postponing the carrying out of a punishment, either for a specified or indefinite period;
>
> c. substituting a less severe form of punishment; or
>
> d. remitting all or part of a punishment".

22. The membership of the Committee of Mercy includes members of the executive. Article 133(2) provides its membership to be:

> " a. The Attorney-General,
>
> b. The Cabinet Secretary responsible for correctional services, and
>
> c. At least five other members as prescribed by an Act of Parliament, none of whom may be a State officer or in public service."

23. In the exercise of the Power of Mercy, the President on the advice of the Advisory Committee may:

> " Article 133(1)
>
> a. granting a free or conditional pardon to a person convicted of an offence;
>
> b. postponing the carrying out of a punishment, either for a specified or indefinite period;
>
> c. substituting a less severe form of punishment; or
>
> d. remitting all or part of a punishment"

24. In our view and with respect, it is superfluous to declare Sec.25 (2) and (3) of the Penal Code unconstitutional and yet Article 133 of *the Constitution* provides for *the constitution* of an executive body to advise the President on the exercise of the Power of Mercy.

25. In the exercise of the prerogative of Mercy, it cannot be said that this conflicts with Article 160(1) of *the Constitution* which vests the exercise of judicial authority on the Judiciary. In sentencing a minor to serve at Presidential Pleasure, the Court has exercised its mandate. The Executive may come in to exercise mercy in accordance with Article 133 of *the Constitution*. In our view, there is no usurpation of judicial power in the exercise of power of mercy by the President.

26. We are aware that the findings of Mativo, J in the decision of AOO were not challenged on appeal. On our part, fortunately, we are not bound by that decision. As stated above, we are of the considered view that S.25 (2) and (3) of the Penal Code is not unconstitutional. It is our considered view that there is merit in having children not convicted and sentenced to imprisonment.

27. In so far as the instant appeal is concerned, we were asked to impose a definite sentence upon the appellant. We are cognizant that the imposition of indeterminate sentences has lately been frowned upon. What then is the appropriate sentence for a minor who has been found guilty of the offence of murder? At the time of the commission of the offence, the appellant was 13 years old. The appellant committed the heinous offence, "buried" the deceased in a borehole and took off. The provision of having the appellant serve at the President's pleasure is one in lawful manner as stipulated in S.191(1)(l) of the *Children Act*. Having sentenced him to serve at the Presidential pleasure under S.25(2) of the Penal Code and given the indeterminate nature of this sentence, we further direct that the period of detention shall not exceed 25 years from the date he was first arraigned in Court i.e 18th July, 2011.

    It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF AUGUST, 2024.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR