



REPUBLIC OF KENYA



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**PKI v Republic (Criminal Appeal 37 of 2022)  
[2023] KECA 1218 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1218 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 37 OF 2022  
MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA  
OCTOBER 6, 2023**

**BETWEEN**

**PKI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a Judgment of the High Court of Kenya at Nairobi  
(Lesiit, J.) dated 13th December, 2018 in HC. CR.C. No. 31 of 2012)*

**JUDGMENT**

1. When the appellant, PKI was presented before the High Court of Kenya at Nairobi on 9<sup>th</sup> April, 2012 on a charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code*, it being alleged that he had on 2<sup>nd</sup> January, 2012 murdered HW at Mathare Kosovo slums in Nairobi, it was ordered that he be detained at Industrial Area Remand Prison as investigations were incomplete. He appeared for plea on 26<sup>th</sup> April, 2012 and denied the charge. It was ordered that he be taken to Mathare Mental Hospital for treatment and the Consultant Psychiatrist at that hospital was ordered to avail a report on the appellant's mental status at the next mention. That order for availing of a report on mental status was made by the trial Judge many times. On 5<sup>th</sup> July, 2012 it is recorded that the defence counsel raised the issue that there were two conflicting reports in the court file on the appellant's mental status. There was one dated 2<sup>nd</sup> January, 2012 which stated that the appellant was fit to plead but it was contradicted by another dated 2<sup>nd</sup> July, 2012 addressed to the Chief Magistrate's Court, Nairobi stating that the appellant was unfit to plead. It was ordered that the two conflicting reports of the Consultant Psychiatrist be taken back to that consultant to rectify the anomaly. The matter was mentioned again many times to ascertain the appellant's mental status and on 26<sup>th</sup> September, 2012 the State Counsel reported to court that a medical report from Mathare Mental Hospital indicated that the appellant "... is not normal." It was ordered that he be remanded at that hospital for further treatment and this order was made at many mentions when the matter came up before the Judge.



2. On 18<sup>th</sup> March, 2013 it was reported by the State Counsel that the appellant had escaped from Mathare Mental Hospital on 30<sup>th</sup> January, 2013 and could not be traced. He was arrested around October, 2013 and remanded at Industrial Area Prison and it was ordered that he be escorted to Mathare Mental Hospital for treatment. The matter was mentioned many times when it was recorded that the appellant was not fit to stand trial due to mental illness. When the matter came up for mention on 26<sup>th</sup> February, 2015 for a report to be produced on the appellant's mental status the State Counsel reported to the Judge that the appellant's family were in Court. Questioned by Court on the appellant's mental status this is what is recorded:

“ Accused mother: He has been insane.

Accused wife: He is not insane. He talks to me outside court.”

3. The trial court ordered that the appellant be escorted to Kenyatta National Hospital to be evaluated by a panel of 3 psychiatrists; the investigating officer was ordered to facilitate the attendance of family members during evaluation and a compressive report be filed in court within 30 days of the date of the order.

4. When the matter was mentioned before the trial Judge on 25<sup>th</sup> May, 2015 the State Counsel reported that a report had been received stating that the appellant was unwell, and not mentally fit to stand trial. It was ordered that the appellant be admitted to Mathare Mental Hospital for further treatment. Meanwhile it appears that the Court received a complaint from the appellant's wife regarding an unstated issue and on 22<sup>nd</sup> June, 2015 State Counsel and counsel for the defence made submissions. State Counsel submitted that further investigations had revealed that the appellant had once escaped from Mathare Mental Hospital in 2013; that there was a robbery with violence case (Kibera Criminal Case no. 601 of 2012) where the appellant was the accused; that there was a sworn affidavit from the appellant's wife stating that the appellant had raped their daughter; that the appellant continued to suffer mental illness and the case should proceed under Sections 162, 163 and 166 *Criminal Procedure Code*. In response defence counsel challenged the depositions in the affidavit. It was ordered that the appellant be remanded at Industrial Area Prison and be escorted regularly to Mathare Mental Hospital as recommended by the attending doctors at that hospital. It was later ordered that he be remanded at the maximum security unit of that hospital from where he had escaped in the past and that special guards be assigned to him.

5. There was a dramatic turn of events on 2<sup>nd</sup> November, 2017 when defence counsel addressed the trial court to the effect that the case had been pending for 5 years without plea being taken but that he had just been served with a letter from Mathare Mental Hospital stating that the appellant was now ready to take plea. That letter was noted by the trial Judge and when the Information and every element of it was read over and explained to the appellant in Kiswahili language on 21<sup>st</sup> November, 2017 over 5½ years after time being presented to court he responded as follows:

“ I understand the charge. During that time I was sick. I did not know what happened or how it happened. It is recently I was told about it.”

6. A plea of not guilty was entered.

7. We decided to travel that long route to show the special circumstances of the case that the trial Judge was confronted with.

8. The facts of the case that emerged during the trial were chilling and disturbing. MWN (W – PW2) was in a marriage relationship with the appellant. They did not live together as he had another family but



he visited her house in Mathare Kosovo often. She had been in a previous marriage and had children including a daughter, MWN (W – PW3) from that marriage. The relationship between W and the appellant had resulted in a daughter, HW (the deceased) who at the material time was aged about 6 weeks. On 5<sup>th</sup> May, 2011 the appellant visited W and told her that he had visited a certain place for prayers and it was revealed to him that were it not for her prayerful nature she would have died a long time ago. This revelation disturbed her; the appellant promised to take her to the place of prayer someday. Things cooled off until 1<sup>st</sup> January, 2012 when the appellant visited W at 10 a.m. and wished her a happy new year. She responded that it could not be a happy year for her as she was mourning the death of her aunt. He asked whether there were any clothes belonging to him in her house and she responded in the positive. He wanted the clothes; she removed them and placed them on a chair. He changed his mind and asked that the clothes remain in her house. Then he made a request which W found strange: he wanted to be given a picture photo of W and the child (deceased) and also the child's clinic card. She refused to accede to the request as she could not understand its substance. He asked that all photographs be burnt and then he left only to return at 9 p.m. this time carrying a panga (machete) which, in W's own words:

“ ... The panga did not look like the normal one. I have seen such a panga only in the TV ”

9. The panga had holes in the center with one side sharp (it was described by W (PW3) as a Samurai sword). In the house were W who was holding the deceased, her daughter W and W's elder sister JN (N PW4) who had visited accompanied by her 3 children. On the charcoal burner there was hot water boiling for making ugali and, according to N, the appellant looked at the boiling water in a way that suggested that he could use it to burn someone so she ran out of the house with her children. The appellant who all along stood at the door entered the house and held the child on the throat. N was now outside and was screaming, shouting that the appellant wanted to kill the child. The appellant let go of the child and followed N outside. When W walked out of the house the appellant had this chilling message for her as he lifted the panga:

“ . one day I will come and kill you.”

10. The appellant then lifted the panga and aimed it at the child who was held by her mother W. W blocked the blow with her left hand which got injured. The appellant then went away but again returned at 1 a.m. when W observed fire at her door. She heard him loudly say “ Mungu amekataa – meaning God has refused” and she heard her door give in to a huge stone that was hurled at it. The appellant entered the house carrying a big torch and the panga. He hit the electric bulb and the lights went off. W had asked W to hide so that they were not all killed and W hid under the bed. That is when the attack started when the appellant cut the child and inflicted severe injuries on Wa who lost consciousness and ended up being admitted to Kiambu hospital for several months. The child died.
11. W testified that when the deceased was born the appellant one evening requested her to allow him to be accompanied by W to buy some items for the child but he took her to his house and attempted to rape her.
12. Back to the events of 1<sup>st</sup> January, 2012. W, who was 16 years old at the time of the incident, lived with her mother W and when the appellant was introduced to her and became a constant visitor she regarded him as her stepfather. She testified that when they had gone to buy items for the child the appellant tried to rape her but she had fought back by hitting him with her elbow and then fleeing from the house. She informed her mother and aunt R NW (N – PW5) of the attempted rape. On the material day she was asleep with her mother and the child when the appellant entered the one room mabati (iron sheet) house by breaking the door. She hid and witnessed the macabre events that unfolded. When it



was over she stepped outside and found the appellant who ordered her to accompany him to his house and that if she refused to go with him what had happened to her mother would happen to her. He was still holding the panga. When they got to the house he ordered her to wash the bloodied panga which she did. He then ordered her to strip and get into bed and when she resisted he picked the panga and placed it next to the bed. She complied and he proceeded to defile her and when he was finished he put some clothes in a bag which he carried when he left, locking her in the house. She was rescued in the morning when she used a hammer to break the door. She informed her rescuers including her aunt N that she had been raped by the appellant and then locked in the house. She was taken to Blue House hospital, Eastleigh, where she was told that her mother and sister were dead. She saw a lot of blood in the house and later visited her mother in hospital where she found her in critical condition.

13. That narration of events was corroborated by N who confirmed that she was at W's house on 1<sup>st</sup> January, 2012 when at 8 p.m., when she was about to depart to go buy ugali flour the appellant arrived and demanded photographs and the child's clinic card. When she noted the appellant eyeing the boiling water she ran out in fear of an oncoming attack and the appellant followed and threatened to stab her. The appellant left but N was woken up by screams at 2 a.m. where W was shouting that the appellant was killing the child. She did not leave her nearby house as she feared for her life but was screaming for help. When help arrived (her door had been locked from outside) she went and found W and the child lying on the ground and observed many injuries on them. Police arrived and W was taken to Kiambu hospital where she was admitted and the child was taken to the mortuary. She was later called to an identification parade at Muthaiga Police Station where she identified the appellant.
14. N was accompanied by her uncle JM on 2<sup>nd</sup> January, 2012 when they visited City Mortuary and saw the body of the deceased which had an injury on the head. She was one of those who rescued W who had been left locked in the appellant's house the previous day. W informed her that she had been raped by the appellant and she took her to hospital.
15. Dr. Njau Mungai (PW1), a pathologist at National Public Health Laboratories at Kenyatta National Hospital examined the body of the deceased on 31<sup>st</sup> January, 2012 for purposes of post mortem. The child was about 1 month old. He found a deep cut on the temporal region above the ear on right the side of the head which had exposed fractured bone and there was loss of brain tissue. He concluded that the child died due to severe head injury in a sharp trauma and discounted that a knife could cause such injury. In his view the injury was caused by a panga or such object and he produced a P3 Form as part of the prosecution evidence.
16. IP Musyimi Kelo (PW6) was at the material time attached to Muthaiga Police Station where he handled investigations. When he reported to work on 2<sup>nd</sup> January, 2012 he found that a report of murder, attempted murder and rape had been made. While carrying out investigations he discovered that the appellant had been arrested on a charge of robbery with violence and was detained at Industrial Area Police Station. He collected the appellant from there and took him to Police Surgery, Nairobi, for examination on his mental status, which was done by Dr. Kamau (PW9). The reason for that visit to the doctor was that the appellant had caused drama at Kibera Magistrate's Court when he was whistling during proceedings and claimed that he could not follow the proceedings. Dr. Kamau opined that the appellant was fit to stand trial. On 18<sup>th</sup> April, 2012 the police officer escorted W to the police surgeon for examination and later handed over investigations to PC Paul Ngei (PW7) as he proceeded on transfer.
17. Paul Ngei, who took over investigations, visited the locus in quo on 2<sup>nd</sup> January, 2012. He found a single iron sheet room whose door was broken and there was a lot of blood. He did not recover the panga that neighbours told him the appellant had during the incident the day before. When he visited Kiambu hospital he found W who he observed had many injuries. He also saw the body of the deceased at the mortuary. He was to later learn that the appellant was held at Industrial Area Prison and when he



went there he found that he was facing a charge of robbery with violence presented to court through Gigiri Police Station. He charged the appellant with the offence of murder. He later was informed by a doctor from Mathare Mental Hospital that the appellant, who had been detained there on orders of the court, had escaped. He did not recover the murder weapon which he learned the appellant had taken him when he left W in his house.

18. The last 2 prosecution witnesses were doctors. Dr. Gibson Mareko (PW8), a Consultant Psychiatrist at Kenyatta National Hospital was one of the 3 doctors who had examined the appellant on 22<sup>nd</sup> April, 2015 in the company of Dr. Violet Okech and Dr. Ayan Kanyanya, both Consultant Psychiatrists at the said hospital. Their findings were that the appellant suffered from Psychiatric Disorder (PD) Secondary to Retroviral Disease. The appellant was also diabetic and hypertensive. They concluded that he was not fit to plead and recommended that he be treated at Mathare Mental Hospital. There was a medical file on the appellant which showed that he had in 2008 contracted Retroviral disease. They signed a report that the doctor produced in court. He explained in cross-examination that a person who suffered PD may not be able to do what normal people do like engaging in employment or behaving normally or responsibly. Such persons' memory will be impaired. Of the appellant the doctor testified that he spoke to himself throughout the examination.
19. Dr. Kamau was the last witness called by the prosecution. He was the doctor at Nairobi Police Surgery who on 17<sup>th</sup> April, 2012 received the appellant from Muthaiga Police Station for mental assessment. He found that the appellant was 48 years old; he had no physical injuries and found him mentally fit to stand trial.
20. Dr. Kamau had on 1<sup>st</sup> February, 2012 received W on allegations of having been defiled. He found normal genitals with an absent hymen which absence, in his own words, was "... an old affair". He produced a P3 Form.
21. On 18<sup>th</sup> February, 2012 Dr. Kamau examined W who was on crutches. She had various injuries including fractures; comminuted fracture of the right leg all caused by a sharp object and he assessed the injuries as "serious harm". He produced an appropriate P3 Form in support of his findings.
22. That was the case made out against the appellant and the trial Judge found that there was a prima facie case for the appellant to answer.
23. In an unsworn statement the appellant stated that he had heard all that had been stated by prosecution witnesses and:

"What I can tell the court is that for the issues I heard spoken here, I cannot tell the court whether it is true or not. The reason for that is that I was sick and came to my realization while admitted at Mathare. The doctor told me that I had been charged with an offence. He told me he had treated me and that I had recovered. He told me that I would be taken to court to face the charges. The doctor did not give me details of the offence but he told me I had been sick for many years which he did not specify. That is all.

I cannot tell what happened where or when. The one who said I killed her child I was shocked because she is my wife and we have never disagreed. I was shocked to hear her evidence as I was not aware of it. That is all."

24. He called his mother, 75 years old TWK, as a witness, who stated that her third born child (the appellant) had left home and gone to live in Nairobi. The appellant visited her at home in Muranga



and informed her that he had married W who had 2 children. She had been informed that the appellant had been arrested and of his mental status:

“My older son went to Mathare Hospital three times. When he could not recover I took him back to the elders who performed cultural rites on him with a goat. He has fully recovered. His name is Samuel.”

25. The trial Judge, Lesiit, J. (as she then was) analysed the case by the prosecution and the defence and in a Judgment delivered on 13<sup>th</sup> December, 2018 found that the appellant was suffering from a disease of the mind; that the evidence in the case established that the appellant may have been mentally unsound at the time of the incident due to the said disease so as not to know the nature and gravity of his actions or that those actions were wrong. The Judge found that the way to deal with the case was as provided by Section 166 of the *Criminal Procedure Code* and thus found the appellant guilty of the offence of murder but was insane at the time he committed the offence. In a Ruling on the sentence dated 28<sup>th</sup> March, 2019 the Judge ordered that the appellant be detained at the pleasure of the President; that proceedings, Judgment and order be placed before the Cabinet Secretary, Ministry for Interior and National Coordination for reporting to the President for consideration as provided by the said Section 166 *Criminal Procedure Code (CPC)*.

26. The appellant is not satisfied with those findings and in homemade “Memorandum Grounds of Appeal” where 5 grounds are set out, it is said that the trial Judge erred in law by failing to re-evaluate and analyse the findings from medical experts and find that the appellant suffered from automatism and not insanity; that the Judge erred in law by entering a special finding of guilty under the said Section 166 *CPC* contrary to a final report from Mathare Mental Hospital which had found that he had recovered and was fit to plead; at ground 3:

“That, the High Court judge erred in Law by failing to make declaration that the burden and standard of proof by the psychiatrists against the accused discharged and thus the prosecution case discharged. Thus the prosecution case of special finding verdict was unsafe and could not be supported having regard to evidence and that on any ground it was an injustice (Cooper) 1969) QB 267 at 271.”

27. The penultimate ground is a repeat of ground 1 – that a finding should have been made that he (the appellant) was suffering from automatism, not insanity, and finally, that the Judge erred in law by admitting, yet failing to take into account evidence of the appellant’s good character which was raised by a 3 number board of psychiatrists in their final report.

28. When the appeal came up for hearing before us on 21<sup>st</sup> March, 2023 on a virtual platform the appellant appeared from Kamiti Prison and was represented by learned counsel Mr. Atancha while learned State Counsel Miss Vitsengwa appeared for Office of Director of Public Prosecutions. Both sides had filed written submissions which we have perused, considered and are grateful to counsel for the industry employed to urge their different cases. It is submitted for the appellant that he was charged 5 years after being produced in court and that there was his mother’s sworn testimony on mental illness that ran in the family. It is submitted that the appellant received treatment both at Kenyatta National Hospital and Mathare Mental Hospital due to his mental status and the board of 3 psychiatrists had confirmed that the appellant had a disease of the mind. Counsel submitted that the appellant, arrested when he was 50 years old was now 62 years old, was diabetic requiring use of insulin which was not available at Kamiti Prison; he suffered from high blood pressure. On sentence counsel submitted that to be sentenced to be held at the President’s Pleasure had since been declared unconstitutional by the High Court and, finally, that the appellant has recovered from automatism.



29. In opposing the appeal Miss Vitsengwa submitted that the appellant's mental status had been a recurring theme during the trial; the board of 3 psychiatrists had found that the appellant suffered from mental illness. Counsel pointed out that the appellant had escaped from Mathare Mental Hospital and was at large for a long time and there was no evidence that the appellant suffered automatism which is caused by epilepsy. Counsel supported the finding of the trial Judge that the appellant was insane when he killed his own daughter.
30. According to Miss Vitsengwa the appellant had not addressed the issue on Section 166 *CPC* being unconstitutional; that the appellant had been one of the petitioner's in High Court Constitutional Petition No. 266 of 2020 where that Court made declarations and orders and gave directions to Attorney-General to make directions. Counsel submitted that office of the Attorney-General had not made directions as ordered by the High Court and wondered why the appellant had filed this appeal and not pursued the office of Attorney-General. She urged that the appeal be dismissed.
31. In a brief rejoinder Mr. Atancha for the appellant submitted that the psychiatrists had stated that the appellant was insane; that he was epileptic.
32. We have considered the whole record, submissions and the law and this is how we determine this appeal.
33. We have already reproduced the evidence produced before the trial Judge and we analyse it as we are required to do in a first appeal like this one – *Okeno & another v Republic* [1972] EA 32 where this Court stated of the duty of a first appellate Court:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

34. As we have seen the appellant and W lived in a loose relationship where the appellant, who resided elsewhere with his other family would be a constant visitor at W's house. On the material day (1<sup>st</sup> January, 2012) he came calling in the morning and acted in what W found to be strange behavior – first, he told her that a visit to a prayer center had revealed to him (the appellant) that W would have died long before save for the fact that she was a prayerful person. He was to take her to that center some day. Then he demanded for his clothes but when they were removed he asked that they be taken back. Then he wanted photographs of W and the child and also the child's clinic card but W refused to accede to this request which she found to be strange. When the appellant returned in the early evening he was armed with a panga which W said was a type she had only seen on television. W, who was present, thought that it was a Samurai sword. N described how the appellant, who stood by the door, was eyeing water that was boiling on a charcoal burner in such a way that she was fearful that he would use the boiling water to burn someone. The appellant tried to attack the child but W blocked the blow meant for the child and received an injury to her hand. But that was only the beginning of the events of that night as the appellant returned at 2 am. when W noted fire at her door. She then heard the appellant exclaim “Mungu amekataa” after which the appellant used a big stone to break the door, entered the room and



attack both W and the deceased in the manner we have described, all witnessed by W. When he was through with the killing – the appellant thought he had killed mother and child as per W’s testimony:

“... When accused saw me during the ID parade I heard him ask the OCS

“you mean to tell me that this woman is still alive?”.

35. He ordered W to accompany him to his house and proceeded to rape her under threat of violence with a panga. This is a man who is raping a girl who considered herself his daughter when he had participated in killing his other daughter moments earlier.
36. Dr. Kamau described the severe injuries inflicted on W and Dr. Njau Mwangi, who conducted post-mortem on the deceased child’s body and opined that the child died of severe head injury in a sharp trauma like machete following an assault.
37. In defence the appellant stated that he did not know whether the allegations made against him were true or not. His mother gave a history of mental illness in the family which had affected her first born son and her father. She described how the appellant had visited their home in Muranga when she realized that he was unwell as he made strange demands like that, he would send an aeroplane to collect wood. There was no airport and it is not ordinary or normal that an aeroplane be sent for such a purpose.
38. Dr. Gibson Mareko, a Consultant Psychiatrist, examined the appellant on a board consisting of himself and 2 other consultants. Their findings were that the appellant suffered from Psychiatric Disorder secondary to Retroviral Disease. They concluded that he was not fit to plead due to his mental status.
39. The trial Judge evaluated the whole case on whether the appellant had malice aforethought as defined in Section 206 of the *Penal Code* and found at paragraph 28 of the Judgment:

“In this case it was a machete like instrument which was used. PW2 described it while in addition PW3 drew it. It was a long blade with holes on the blade side, about a foot and a half long. The two witnesses described it as heavy. PW3 washed it so she could tell its weight. The object of the attack included a child of one and a half months. Obviously, the use of the heavy and sharp weapon of choice speaks to malice, and the intention to cause grievous harm or death is very clear. There is however the issue of whether malice may have been negated by the accused state of mind at the time of incident.”

40. The trial Judge evaluated the evidence of the doctors who had found that the appellant suffered Psychiatric Disorder possibly secondary to retroviral disease, diabetes mellitus and hypertension and had recommended that the appellant be admitted to Mathare Mental Hospital for treatment. The Judge went through the history of the matter before the plea was taken and even after plea and revisited many incidents in the case. She found that both W and N had described how the appellant was of good behavior (save the attempted rape on W); how W had described the strange demands made by the appellant on the various visits on 1<sup>st</sup> January, 2012; that W stated that the appellant had been good to her until the child (deceased) was born when he totally changed. The Judge recognized that for the defence of insanity to stand an accused person must satisfy the *McNaughten* rules set out in *R v McNaughten* [1863] 8 ER 718 case and that the test was purely cognitive and the defence must show whether the accused understood his actions or understood that his actions were wrong. She considered the said test in *McNaughten* case and other cases and came to the conclusion that the appellant was suffering from disease of the mind as the evidence established that he may have been mentally unsound when he committed the offence.



41. We have considered the whole record and the reasoning of the Judge and we come to the same conclusion. The conduct of the appellant particularly on the material day when he made strange demands and finally carried out a vicious attack that killed his daughter and viciously injured W (he thought he had killed her) was not that of a normal man. Dr. Gibson Mareko, one of the 3 Consultant Psychiatrists who examined the appellant concluded that he was not mentally fit to stand trial and should be admitted at Mathare Mental Hospital for treatment. We had earlier noted in this Judgment that a man who kills his daughter and seriously injures his wife (he thought he had killed her) and then forcefully defiles a person who considers herself his daughter moments after killing his child is not normal as people with normal minds don't do that. There was also evidence of the appellant's mother that mental illness ran in the family.
42. The other ground of appeal is on the manner the Judge handled the matter under Section 166 [CPC](#) and whether it was right to order that the appellant be held at the pleasure of the President. It is said that the High Court had made certain declarations in High Court Constitutional Petition No. 266 of 2020. We have perused that Judgment and note that the Attorney General has not made directions as directed by the Constitutional Court.
43. We note that when one is detained at the President's pleasure he does not know when the pleasure will be exercised or when he will be released. The matter has to be brought to the attention of the President by the concerned authorities but there is no set procedure on when this is done. The convicted person has no way of knowing when the executive will carry out those steps of reporting to the President and the matter is then beyond the reach of the Judiciary. There is no procedure on when the President will exercise his pleasure. In the persuasive case of [A.O.O & 6 Others v Attorney General & Another](#) [2017] eKLR, Mativo J. (as he then was), dealt with the issue, citing the case of SVTCOEIB (1966) (1) SCAR, 390 where the court observed as follows:

“It must, I think, be conceded that if the release of the prisoner depends entirely on the capricious exercise of the discretion of the prison or executive authorities leaving them free to consider such a possibility at a time which they please or not at all and to decide what they please when they do, the hope which might yet flicker in the mind and the heart of the prisoner is much too faint and much too unpredictable to retain for the prisoner a sufficient residue of dignity which is left uninvaded”.

The Judge then proceeded and stated as follows:

“Imprisonment at the President's pleasure is a legal term of art referring to the indeterminate sentences of some prisoners. Originating from the United Kingdom, it is based on the concept that all legitimate authority for government comes from the Crown. The term is used to describe detention in prison for an indefinite length of time. Prisoners held at Her Majesty's pleasure are frequently reviewed to determine whether their sentence can be deemed complete. Prisoners' sentences are typically deemed to be complete when the reviewing body is "satisfied that there has been a significant change in the offender's attitude and behavior.”

44. Indefinite imprisonment or indeterminate imprisonment is the imposition of a sentence by imprisonment with no definite period of time set during sentencing. Its length is instead determined during imprisonment based on the inmate's conduct. The inmate can be returned to society or be kept in prison for life. In theory, an indefinite prison sentence could be very short, or it could be a life sentence if no decision is made after sentencing to lift the term. It has neither a minimum nor a maximum term that can be served allowable by law. The main rationale for imposing indefinite as



opposed to fixed sentences is to protect the community. An offender can then be kept behind bars until it is determined the offender would not pose any danger to the society.

.....

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.”

The Judge finally determined:

“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 Presidents pleasure is unlawful to the extent that it violates the concept of separation of powers and the principles of constitutionalism under the repealed Constitution and the Constitution of Kenya, 2010.”

45. We are persuaded by the above reasoning and are inclined to adopt and apply it in the circumstances of this case.
46. The Supreme Court of Kenya in the petition of Francis Karioko Muruatetu & another v Republic [2017] eKLR emphasized the importance of the Courts retaining an independent discretion in sentencing.
47. The High Court of Kenya in the persuasive case of Republic v SOM [2018] eKLR found that holding a minor at the pleasure of the President was unconstitutional and a violation of the right to a fair trial under the Constitution and that the indeterminacy of the sentence exacerbates the cruel, inhuman or degrading nature of the punishment on the grounds that the maximum period of incarceration remains at all times unknown to the accused and the period of incarceration is dependent on the executive.
48. The Privy Council in Director of Public Prosecutions of Jamaica v Mollison [2003] 2 AC 411 held that by giving the Governor-General as an officer of the executive the power to determine the measure of an offender’s punishment violated the principle of the separation of powers implicit in all constitutions based on the Westminster model, including that of Jamaica. In this case the Privy Council held that since the applicable Order in Council empowered the court to modify and adapt existing laws so as to bring them into conformity with the Constitution, accordingly the relevant statute ought to be modified throughout by substituting the words “the court” for “Her Majesty” or “the Governor General”.



- 49. The Judge in the case leading to this appeal entered a special finding under Section 166(1) of the Criminal Procedure Code to the effect that the appellant was guilty but insane. She ordered that the appellant be held at the pleasure of the President and that the proceedings and Judgment be placed before the Cabinet Secretary, Ministry of Interior and National Coordination for reporting to the President for his consideration. We have found in this Judgment that it is the duty of the Judiciary to impose sentences to accused persons who are convicted after being tried in criminal trials. Such convicted persons are entitled to know with certainty the sentence that they are to serve after conviction. Sentencing such persons to indeterminate sentences at the pleasure of the President robs the Judiciary of its constitutional role of imposing definite sentences to convicted persons. We think that it was wrong to sentence the appellant to an undetermined period of imprisonment. To that extent only does this appeal succeed. The appeal on conviction fails and is dismissed.
- 50. What, then, is the appropriate sentence?
- 51. The appellant, upon conviction, in mitigation stated that he was 57 years old; was sickly having been diagnosed HIV positive and was diabetic and hypertensive. He suffered mental problems which he had lived with for several years. His wife had died while he was in custody and had 3 children, some in school. He had been in custody for 8 years (sentence was imposed on 28<sup>th</sup> March, 2019) and was remorseful and regretted what had happened to his daughter.
- 52. State Counsel informed the trial Court that the appellant was a first offender.
- 53. We have considered all the circumstances of the case and mitigation offered by the appellant in the case. Having done so we think that an appropriate sentence in the case is imprisonment for a period of twenty five (25) years.
- 54. The final orders of the Court are that the appeal on conviction fails and is dismissed. The appellant will serve an imprisonment term of twenty five years from 19<sup>th</sup> April, 2012 when he was first presented before the High Court for trial.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF OCTOBER, 2023.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**M. GACHOKA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

