



**DOO v Republic (Criminal Appeal 52 of 2015)  
[2019] KECA 416 (KLR) (31 July 2019) (Judgment)**

*Duncan Okello Ojwang v Republic [2019] eKLR*

Neutral citation: [2019] KECA 416 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 52 OF 2015  
MSA MAKHANDIA, PO KIAGE & JO ODEK, JJA**

**JULY 31, 2019**

**BETWEEN**

**DOO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Homa Bay, (D. Majanja, J) dated 16th February, 2015 in HCCRC NO. 6 OF 2012)*

**A sentence to detention during the President’s pleasure takes away the discretion of sentencing from the courts to the Executive.**

*The appeal was against the judgment of the trial court which found the appellant (a minor) guilty of the offence of murder and sentenced him to be detained at the President’s pleasure. The court held that a sentence to detention during the President’s pleasure took away the discretion of sentencing from the courts to the Executive. The court found that the accused, who was a minor during trial but had become an adult during sentencing, could not be committed to a borstal institution, but instead would be liable to a custodial sentence. The court also highlighted factors to consider in sentencing a child offender.*

Reported by Kakai Toili

**Criminal Law** - sentencing – sentencing of a child offender - detention at the President’s pleasure - whether the sentencing of a child offender to detention at the President’s pleasure amounted to taking away the discretion of sentencing from the courts to the Executive - what was the appropriate sentence to be imposed on a child offender where the offender in question was a minor during the commission of the offence but later attained the age of majority during sentencing - Penal Code (cap 63), sections 25(2), 25(3), 202, and 204; Children Act, 2001 sections 190(2) and 191(1).

**Criminal Law** - sentencing – sentencing of a child offender - what were the factors to consider in sentencing a child offender - Children Act, 2001 section 4(2).



## **Brief facts**

The appellant (a minor) brought an appeal against the judgment of the trial court which after a full trial had found him guilty of the offence of murder and sentenced him to be detained at the President's pleasure. The appellant contended that the trial court had erred in law and fact by failing to consider the merits of the defence and its legal effects. He argued that the sentence passed by the trial court was harsh and excessive in the circumstances.

## **Issues**

- i. Whether the sentencing of a child offender to detention at the President's pleasure amounted to taking away the discretion of sentencing from the courts to the Executive.
- ii. What was the appropriate sentence to be imposed on a child offender where the offender in question was a minor during the commission of the offence but later attained the age of majority during sentencing?
- iii. What were the factors to consider in sentencing a child offender?

## **Held**

1. The appellant was a minor at the time of commission of the offence. A birth certificate produced before the court indicated that the appellant was 15 years at the time of commission of the offence. The appellant was therefore a child within the definition of a child under the Children Act, 2001.
2. The Children Act did not provide for sentence of detention at the President's pleasure. Such a sentence was only found in section 25(2) and 25(3) of the Penal Code (cap 63) and the sentence only applied to instances where the offence committed by the minor was punishable by death.
3. A sentence to detention at the President's pleasure not only amounted to indeterminate sentence but also implied that an accused person remained psychologically tormented at the whim of the Executive thus taking away the discretion of sentencing from the courts which was an abdication of judicial authority to the Executive.
4. Section 191(1) of the Children Act set out various ways in which a court could sentence a child offender. The trial court was required to exercise judicial discretion in determining the manner in which to deal with a child offender. Section 191(1)(l) empowered the court to deal with a child offender in any other lawful manner, and therefore, it did not in any way conflict or oust the penalty prescribed under section 25(2) of the Penal Code.
5. While sentencing a child offender, the court was required to give effect to the principle of the best interests of a child as required under section 4(2) of the Children Act. The court was also to bear in mind the principles of proportionality, deterrence and rehabilitation, and as part of proportionality analysis, mitigating and aggravating factors were also to be considered.
6. Committing the appellant to a borstal institution as prescribed under section 6(1) of the Borstal Institutions Act was not foreseeable in view of the appellant's age. The appellant was no longer a minor. A sentence of 10 years imprisonment was appropriate since it was commensurate with the appellant's culpability.

*Appeal partly allowed.*

## **Orders**

- i. *Appeal on conviction was dismissed but on sentence, the same was allowed.*
- ii. *The sentence of detaining the appellant at the President's pleasure was set aside and replaced with 10 years' imprisonment with effect from March 10, 2015 when the appellant was sentenced by the trial court.*

## **Citations**

### **Cases**

#### **Kenya**

1. *AOO & 6 others v Attorney General & another* Petition 570 of 2015; [2017] KEHC 6022 (KLR) - (Applied)



2. *JMK v Republic* Criminal Appeal 182 of 2013; [2015] eKLR - (Explained)
3. *Njuguna, Richard Mwaura & another v Republic* Criminal Appeal 103 of 2013; [2019] KECA 1022 (KLR) - (Explained)

### **Zambia**

*S v Tcoeib* [1996] NASC 1; 1996(1) SACR 390 (NmS); 1996(7) BCLR 996 - (Explained)

### **Statutes**

#### **Kenya**

1. Borstal Institutions Act (cap 92) section 6(1) - (Interpreted)
2. Children Act (cap 141) sections 190(2); 191(1)(j)- (Interpreted)
3. Constitution of Kenya articles 53(1)(f)(i)(ii)(2); 160(1) - (Interpreted)
4. Penal Code (cap 63) section 25(2)(3) - (Interpreted)

### **Advocates**

*Mr Wangoda* for the appellant

*Mr Kakoi*, Principal Prosecution Counsel, for the respondent

## **JUDGMENT**

1. Let us start by first pointing out that before the commencement of the hearing of this appeal we pointed out to the parties that a member of this bench had taken the plea of the appellant in this appeal whilst a judge of the High Court at Kisii. We wanted to know whether that was a reason enough for the said judge to recuse himself. The verdict of the parties was that since the judge only took the plea and the plea was one of not guilty, and that thereafter the judge never participated in the hearing of the case, it was not necessary for the judge to recuse himself. It was on that basis that we proceeded with the hearing of the appeal.
2. DOO, “the appellant” was charged in the High Court at Homa Bay, with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars in the information were that on June 19, 2011 at [Particulars withheld] village in , Homa Bay County within the Republic of Kenya he murdered MO. The appellant pleaded not guilty to the offence and his trial soon thereafter ensued. In a bid to prove its case against the appellant, the respondent lined up a total of 9 witnesses. Their testimonies were in brief as follows:
3. PW1, GAO, the deceased’s mother testified that on the material day at around 5:00-5:30PM she was outside her kitchen when she saw the deceased running towards her bleeding from the back and blood oozing from his mouth. He entered the house and collapsed. She immediately thereafter saw the appellant carrying a knife and wearing a blood stained vest in pursuit of the deceased. On seeing her the appellant suddenly made a U-turn and ran to his home which was nearby.
4. PW1 immediately reported the incident to PW2, Samson Amolo Owiny, the area chief. The chief stated that on the material day PW1 went to his house and informed him that the appellant had killed her son. He then accompanied PW1 back to her house where he found villagers assembled mourning. The deceased’s body was lying in a pool of blood at the door of PW1’s house. The body had stab wounds on the back and around the ribs. He went Ndhiwa police station, reported the incident and came back with police officers who collected the deceased’s body and took it to the mortuary.
5. PW3, SOO, who was the deceased’s father and the appellant’s uncle identified the deceased’s body on June 20, 2011 for purposes of post-mortem and was present during post-mortem. The deceased had been stabbed six times on the back, both shoulders, stomach and neck according to his testimony.



6. PW4, TO, the appellant's mother, stated that she was at Adek market on the material day when she received a call from her daughter in law informing her that the appellant had killed the deceased during a fight. She went home to find the villagers mourning and the appellant seated at her doorstep. The appellant told her that he had stabbed the deceased. She went with the appellant to Ndhiwa police station where he was arrested by PW7, Jephsa Nyatta. The appellant handed over the knife and blood stained t-shirt he was wearing to PW8, PC Peter Gachie.
7. PW5, Dr Ayoma Ojwang, conducted the post-mortem on the deceased body on June 20, 2011 at Homa Bay District Hospital Mortuary. He observed that the deceased had multiple stab wounds on his body; two at the anterior chest and three at the back, all of which penetrated the chest cavity. Two ribs were severed and there was blood in the right chest cavity. The right lung had collapsed. He also had an injury to the liver. He formed the opinion that the cause of death was severe bleeding as a result of multiple stab wounds.
8. PW6, Stephen Kerario, a Clinical Officer at Ndhiwa sub-County hospital performed a mental assessment on the appellant on June 20, 2011. He concluded that he was fit to stand trial as he could remember past events, was conscious and alert and was well oriented in time and space. On assessing the appellant's age, he found him to be 17 years old.
9. PW7, PC Jephsa Nyatta, was at the police station on the material date when at around 8:00PM the appellant and his mother came calling. The appellant informed him that he had stabbed the deceased. He handed over the knife and blood stained blue t-shirt. The witness immediately placed the appellant in custody
10. PW8, PC Peter Gachie, was the investigating officer. He was at the police station when he was instructed by the commanding officer of the Police Station to proceed to the scene of crime. However, as he was about to leave, the appellant and his mother came to the police station. The appellant was wearing a blood stained blue t-shirt and carried a blood stained knife. He took possession of the t-shirt and the blood stained knife and preserved them before proceeding to the scene. When he arrived at the scene, the deceased was already dead. They in the company of other police officers carried the body of the deceased to Homa Bay hospital mortuary to await post-mortem. He subsequently prepared the exhibits, recorded statements from witnesses and thereafter charged the appellant with the offence of murder.
11. PW9, Lawrence Kinywa Muthuri, a Government analyst received the deceased's blood sample, the appellant's bluish sleeveless t-shirt, a knife and the appellant's blood sample on June 23, 2011 from PC Munene of Ndhiwa police station. He conducted a DNA profile of the blood and concluded that the DNA profiles generated from the t-shirt and knife matched the DNA profiles generated from the deceased's blood sample.
12. Put on his defence, the appellant in his sworn statement of defence stated that he was a form one student at Ojode Pala Secondary School and that at the time of his arrest he was 15 years old. The deceased was his cousin. On the material day he came home from school and found the deceased assaulting his mother. When he intervened the deceased kicked him. The kick missed the target and the deceased fell down and the knife he was holding also fell. The appellant picked the knife and as he waved it at the deceased he stabbed him who thereafter ran to his home writhing in pain. His mother inquired what he was doing with a knife to which he responded that the knife belonged to the deceased who had wanted to stab him with it. His mother then asked him to go and report the matter to the police to which he obliged. It was then that he was arrested. He was never told that the deceased had died. The appellant confirmed that he had no grudge with the deceased. He was not at home though when the fight between his mother and the deceased started nor did his mother tell him what led to the fight.



13. The learned judge in his considered judgment held that the totality of the prosecution evidence was that the appellant stabbed the deceased. His own testimony placed him at the scene. PW1 saw the appellant chase deceased immediately after he had been stabbed. The blue t-shirt he was wearing and the knife had blood which was confirmed to be the deceased's. That the evidence left no doubt that the appellant was the person who inflicted injuries on the deceased. On the issue of malice aforethought, the learned judge held that the degree and extent of stabbing was a clear indication that the deceased did not merely intend to cause the deceased grievous harm but to kill him as well. The deceased had five stab wounds, two in front and three at the back which negated any notion of self-defence advanced by the appellant. That the multiple stab wounds demonstrated malice aforethought. Accordingly, the appellant was found guilty of murder and upon considering his mitigation, and being a minor at the time, he was detained at the President's pleasure in accordance with section 25 of the *Penal Code*.
14. Aggrieved by the conviction and sentence, the appellant filed this appeal on four grounds to wit that the trial judge erred both in law and fact in failing; to appreciate that the prosecution had failed to establish their case to the required standard; to acknowledge and appreciate the glaring contradictions; wholly relying on evidence by prosecution witnesses and failing to consider the merits of the defence and or miscomprehending the said defence and its legal effect; and finally failing to consider the appellant's mitigation and passing a sentence which was manifestly harsh and excessive in the circumstances.
15. When the appeal came up for hearing, Mr Wangoda, learned counsel appeared for the appellant; whereas Mr Kakoi, Principal Prosecution Counsel appeared for the respondent. Both the appellant and respondent relied on their written submissions and opted not to highlight.
16. The appellant abandoned grounds 1, 2, and 3 of the appeal and submitted on ground 4 challenging the learned judge's decision to have him detained at the President's pleasure. In essence, the appellant abandoned the appeal on conviction and elected to pursue the appeal on sentence. He cited article 53(1)(f) of the Constitution and sections 190(2) and 191(1) of the *Children Act* in submitting that the learned judge erred in ordering the appellant to be detained at the President's pleasure. The appellant should have been taken to a Borstal institution, being a child offender. He urged us to consider imposing a sentence of 10 years since it was not possible to commit the appellant to a Borstal institution in view of his current age.
17. Mr Kakoi while submitting on sentence relied on the case of *JMK v Republic* [2015] eKLR and urged that the appellant be sentenced to a minimum of 10 years imprisonment.
18. We have considered the appeal, the submissions made by counsel and the law. The issue for determination is whether the sentence imposed on the appellant was legal as the appeal on conviction was abandoned.
19. On sentence, the trial court determined that the appellant be detained at the President's pleasure. There is no doubt that as at the time the appellant was charged he was a minor. A birth certificate which was ascertained to be genuine was produced in court on April 15, 2013. It showed that the appellant was 15 years at the time of the commission of the offence. The appellant was therefore a child within the definition of a child under the *Children's Act*. The *Children Act* does not provide for sentence of detention at the President's pleasure, such sentence is only found in section 25(2) and (3) of the *Penal Code*. The same only applies to instances where the offence committed by the minor is punishable by death as was the case in the instant case. For avoidance of doubt, the provisions provides as follows:

“(2) 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.

- (3) When a person has been sentenced to be detained during the President's pleasure under subsection (2), the presiding judge shall forward to the President a copy of the notes of evidence taken on the trial, with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make." Emphasis ours.

20. In the persuasive case of HC Constitutional Petition No 570 of 2015- [\*AOO & 6 others v Attorney General & Another\*](#) [2017] eKLR, Mativo, J declared the sentence of holding a convicted person during the President's pleasure as unconstitutional since it violated articles 53(1)(f)(i)&(ii), 53(2) and 160(1) of the [\*Constitution\*](#). We note the learned judge's sentiments in that, a sentence to detention during the President's pleasure does not only amount to indeterminate sentence but also implies that an accused person remains psychologically tormented at the whim of the executive thus taking away the discretion of sentencing from the courts which is really an abdication of judicial authority to the executive. In [\*S v Tcoetib\*](#) 1996(1) SACR 390 (NmS), 1996(7) BCLR 996 (NmS) the court held that:

"It must, I think, be conceded that if the release of the prisoner depends entirely on the capricious exercise of the discretion of the 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 unpredictable to retain for the prisoner a sufficient residue of dignity which is left uninvaded."

21. Section 191(1) of the [\*Children Act\*](#) sets out different ways in which the court can deal with a child offender. The trial court is required to exercise judicial discretion in determining the manner in which to deal with a child offender. Section 191(1)(j) of the same [\*Act\*](#) empowers the court to deal with an offender in any other lawful manner and therefore does not in any way conflict or oust the penalty prescribed under section 25(2) of the [\*Penal Code\*](#). However, the court gives effect to the best interests of the child as required under section 4(2) of the [\*Children Act\*](#). The court should also bear in mind the principles of proportionality, deterrence and rehabilitation; and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.
22. This court while faced with a similar case in [\*Richard Mwaura Njuguna & another v Republic\*](#) [2019] eKLR observed thus:

"It is worth mentioning that this court as well as the High Court have come across similar situations as the case before us, where the offender in question was a minor during the commission of the offence in issue but later attained the age of majority during sentencing. A case in point is the High Court case of [\*Daniel Langat Kiprotich v State\*](#) [2018] eKLR wherein the petitioner therein had challenged the death penalty meted out to him on account of the offence of robbery with violence on the ground that during the commission of the offence he was a minor. Ngugi, J expressed the dilemma faced by courts in such situations. He expressed:

"This often creates a dilemma for trial courts which may be faced with a juvenile who is only slightly below eighteen years old but who committed a serious offence such as (depraved heart) murder or rape or particularly vicious armed robbery. Since the statutory scheme



provides that such a child cannot be sent to prison and since the law further provides that such a child can only be sent to a borstal institution for no more than three years, the options are limited to trial courts even where on analysis and evidence such a court might be persuaded that the almost-adult it is dealing with is a danger to society; and has failed to acknowledge or come to terms with his or her errors.

A similar dilemma is created when the offender has already turned eighteen at the time of conviction or at the time of appeal as is the case here. Where the offence committed was a particularly vicious or serious one, the option of releasing such an offender back to the society is not an attractive one. It may even be downright dangerous for the society. Further, it might deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn.”

23. Earlier on this court in the case of *JMK v Republic* [2015] eKLR had observed

“...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 of Nyeri Criminal Appeal No 118 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- SAO (a minor)*, [2004] eKLR and Nyeri Criminal Appeal No 184 of 2009, *Dennis Kirui Cheruiyot v R*).

The court went further and held that:

“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 May 5, 2011. We have considered this custodial sentence as appropriate to give time to the prison authorities and perhaps the probation department to take the appellant through the rigours of coming into terms with his mistake and poor judgment which have consequences such a loss of liberty”.

24. We are in total agreement with the above sentiments and observations. Accordingly we find that committing the appellant to a borstal institution as prescribed under section 6(1) of the *Borstal Institutions Act* is not foreseeable in view of the appellant’s current age. The appellant is no longer a minor. Instead, we are inclined to impose a sentence of 10 years imprisonment which we think is commensurate with the appellant’s culpability.

25. The upshot is that we partially allow the appeal. The appeal on conviction is dismissed but on sentence the same is allowed. We set aside the sentence of detaining the appellant during the President’s pleasure



and in its place we impose a sentence of 10 years imprisonment with effect from March 10, 2015 when he was sentenced by the trial court.

**DATED AND DELIVERED AT KISUMU THIS 31<sup>ST</sup> DAY OF JULY, 2019.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**

