



**JMK v Republic (Criminal Appeal 116 of 2011)
[2015] KECA 935 (KLR) (26 February 2015) (Judgment)**

JMK v Republic [2015] eKLR

Neutral citation: [2015] KECA 935 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 116 OF 2011
ARM VISRAM, MK KOOME & JO ODEK, JJA
FEBRUARY 26, 2015**

BETWEEN

JMK APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from Judgment of the High Court of Kenya at Meru
(Lesiit, J) delivered on 5th May, 2011 in H.C.CR. Case No. 11 of 2008)*

It is not in the best interests of a child to be indefinitely detained at the pleasure of the president

The court held that the relevant time in determining the age of a child for criminal liability, was the age of the child at the time of commission of the offence and not the age of the child at the time of conviction.

Reported by Moses Rotich

Constitutional Law - Bill of Rights - rights of a child - the right of a child not to be detained except as a measure of last resort - the principle of the best interests of a child - where the appellant (a minor) was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code - where the appellant was convicted of murder and sentenced to be detained at the pleasure of the president by the trial court - whether the sentence of being detained at the pleasure of the president, imposed on the appellant who was a minor at the time of commission of the offence was lawful - Constitution of Kenya, 2010, articles 53 (1) (f) and 53 (2); Children Act, 2001, sections 4 and 190 (2); Penal Code, Cap 63 Laws of Kenya sections 203 and 204.

Criminal Law - child offenders - criminal liability - time for determination of age for criminal liability - what was the relevant time in determining the age of a child for criminal liability.

Brief facts

The appellant (a minor) was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 Laws of Kenya (Penal Code). After trial, he was convicted of murder and sentenced to be detained at the president's pleasure.



Aggrieved by the decision of the trial court, the appellant lodged an appeal challenging both the conviction and detention order. It was the appellant's contention that the trial court erred in law and fact in failing to find that the alleged identification or recognition was not free from error. The appellant argued that the trial court erred in law and fact in relying on the evidence of a single witness to convict him.

Further, the appellant contended that the trial court erred in law and fact in failing to observe that the prosecution failed to summon vital witnesses mentioned during the trial. Also, the appellant claimed that the trial court erred in rejecting his defence.

Issues

- i. Whether the sentence of being detained at the pleasure of the president, imposed on the appellant who was a minor at the time of commission of the offence was lawful.
- ii. Whether the relevant time in terms of determining the attainment of the age of criminal responsibility by an accused person was the time of the commission of the offence and not the time of convicting an accused person.

Held

1. By returning to the scene armed with a sharp object, which the appellant aimed at the deceased neck, the appellant had formed the necessary intention to harm the deceased. The appellant ought to have known that by stabbing the deceased with a sharp object and with great force on the neck, such act would probably cause grievous harm or death to the deceased. The appellant by stealthily attacking the deceased from the back clearly intended for a surprise attack on the deceased and denied the deceased any opportunity to defend himself. The court was satisfied that the prosecution proved malice aforethought as required under section 206 (b) of the Penal Code.
2. Section 190 (2) of the Children Act, 2001 (Children Act) prohibited the sentencing of child offenders to death. Article 53 (2) of the Constitution of Kenya 2010, (the Constitution) and section 4 of the Children Act provided for the consideration of the best interests of a child in all actions concerning children.
3. In the instant case, the appellant was aged 16 years at the time of commission of the offence. The appellant was above the age of 18 years at the time of conviction and he could not be sent to a borstal institution. The relevant time in determining the age of a child for criminal responsibility, was the age at the time of commission of the offence and not the child's age at the time of conviction. It was not in the best interest of the appellant to be indefinitely detained at the pleasure of the president.
4. The appellant was not found to be of unsound mind so as to be detained at the pleasure of the president. No legal provision was cited to the court to support the order that if a child offender was found guilty of murder, he was to be detained at the pleasure of the president. Given the gravity of the offence and the current age of the appellant, he could not be released to the society.

Appeal partly allowed.

Orders

i. The order by the trial court directing the appellant to be detained at the pleasure of the president was substituted with a custodial sentence of 10 years' imprisonment from the date of the appellant's conviction by the trial court.

Citations

Cases

Kenya

1. *Anjononi & others v Republic* Criminal Appeals 480, 208 & 209 of 1978; [1980] KECA 23 (KLR); (1976-80) 1 KLR 1566 - (Explained)
2. *DKC v Republic* (Criminal Appeal 184 of 2009) [2014] KECA 230 (KLR)- (Mentioned)
3. *JKK v Republic* Criminal Appeal 118 of 2011; 1. [2013] KECA 241 (KLR) - (Explained)
4. *Kimunzu, Said Karisa v Republic* Criminal Appeal No 266 of 2006; [2006] eKLR - (Explained)
5. *Muthoka & another v Republic* [2008] KLR 297 - (Mentioned)



6. *Republic v SAO (a minor)* Criminal Case 236 of 2003; [2004] eKLR - (Mentioned)
7. *Suleiman Juma alias Tom v Republic* Criminal Appeal 181 of 2002; [2003] KECA 73 (KLR) - (Explained)

Regional Court

Okeno v Republic [1972] EA 32 - (Mentioned)

Statutes

Kenya

1. Children Act (cap 141) sections 4, 190(2); 191(1)(g) - (Interpreted)
2. Constitution of Kenya article 53(1)(f)(2) - (Interpreted)
3. Penal Code (cap 63) sections 203, 204, 206(b) - (Interpreted)

Advocates *Mr Muriuki* for the appellant *Evans Onderi* Senior Assistant Director of Public Prosecution for the respondent

JUDGMENT

1. JMK was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (cap 63 of the Laws of Kenya). The Information was that on the February 3, 2008, at around 2030 hrs in Igembe District within Eastern Province he murdered James Kirinya Kiendia.
2. The appellant was 16 years of age at the time of the offence. He was tried, convicted and being a child offender he was sentenced to be detained at the pleasure of the President. Aggrieved by the conviction and detention order, he has lodged this appeal.
3. The prosecution case hinged on the testimony of PW2 and PW3. Mercy Nkirote, PW 2, testified as follows:

I live in Athiru Gaiti, I knew the deceased. I had known the deceased for about 20 days. I had also known the child offender. The deceased and the child offender were my customers at my pool table business and coffee shop. On February 3, 2008, at about 8.00 pm, I was with the deceased and some other few people and as the child accused entered, the deceased abused him. The child accused was asked to go home (I do not remember the exact words) the deceased stated that even if you go, we will meet another day. Then the child offender came through the back door, found the deceased near the door, he stabbed Kirinya with a knife. I did not see the knife. He came suddenly; he timed the deceased, stabbed him and ran away. The deceased fell on the floor and died. He did not say anything. I started crying, the customers ran away. Some other people came. Police came and took away the body. I had not seen them the whole day. It is the deceased who had said to the child offender – you had insulted me at the miraa place. My business place was lit by a pressure light. There was enough light. It is quite big. I was at the counter about 6 to 7 metres. I have no grudge against the child offender. After I ran away, I did not return until the next day when I reported to the police at Maua. I have never seen the child offender until today. I told the police it was the child offender who had killed the deceased. It is Kirinya who came first to the hotel...I sold him coffee. He did not play pool. Kirinya stayed at the hotel for about 5 minutes then Mwenda came. It is when Mwenda insulted him. He was a little afraid of Kirinya but he insulted him. Then they fought. It is Kirinya who started the fight. I had never heard of any previous disagreement or quarrel between them. Kirinya slapped Mwenda, other patrons came to reconcile them. Mwenda went away and came back after 20 minutes. I saw him enter. It was about 9.00 pm...Kirinya was taking coffee when Mwenda entered the second



time. I was checking my figures of sales and that is the time I saw Mwenda stab Kirinya and run away. The deceased was seated facing the centre with his back to the door. As Mwenda came in I am sure the people saw as they screamed that Mwenda has killed Kirinya. I do not sell alcohol”.

4. PW3 Obadiah Ntarangwi testified as follows:

“I recall on February 3, 2008. In the evening I was at a place where they sell tea/coffee and play pool. It is a canteen within Athiru Gaiti. I was idling to see how they play pool. The owner of the canteen is Mercy Nkirote. There were customers at the canteen. I knew the deceased, he is called Kirinya; he was present at the canteen. I knew the offender, he is called Mwenda. He was present. The child offender was playing pool. Kirinya and Mwenda started quarrelling. I tried to separate them. I do not know what they were quarrelling about. I succeeded in separating them and they sat down. After a few minutes Mwenda left as if going home and came back after a short while. When he came back, he stabbed Kirinya. He was stabbed on the neck. He was stabbed once. I heard noise as if he struck something. I saw him stab him. Light came from a pressure lamp. After stabbing the deceased he first went out and ran away. He never talked to anyone. The deceased bled profusely like water. We went out to look for a vehicle to take him to hospital. I was with Mercy Nkirote. We did not get one. After a short while we were told the deceased had passed away and we decided to report to the AP camp at Athiru Gaiti. When we made the report we gave the name of the accused”.

5. PW 4 Dr Catherine Mwende Mutuku a medical officer at the Meru District Hospital produced a post mortem report conducted on the body of the deceased by Dr Isaac Macharia. The report shows that the deceased was a male African aged 19 years, moderately built. There was a deep cut on the left neck. There was a fracture on the cervical spine. There was a cut on right forearm measuring 4 cm in length. The stab wound was the cause of internal injuries. There was damage to the tracheal. There was injury to the cardiovascular system and the caratoid and the jugular on the nervous system was severed on the nervous system. There was a fracture and an opening on the 3rd and 4th cervical bone with damage to the spinal cord at the same level. The cause of death was cardio pulmonary arrest secondary to damage to the caratioids jugular caused by a sharp object.

6. The appellant in his sworn testimony stated that he was 16 years old at the time of the offence and 18 years at the time of trial; that on 3rd February, 2008, at 8.00 pm the deceased came and hit him with a panga. He only knew the deceased as Kirinya, he did not know him by any other name. That there were many people including Obadiah Ntarangwi, (PW3). That the panga flew in the air and it cut the deceased. That it was the deceased who first hit him with the panga; that he hit him on the right cheek and then on the left and he heard people scream; that he then realised that someone had died. That when the deceased hit him he jumped on the deceased and that is when the panga flew and cut the deceased by accident; that they had not disagreed with the deceased and he did not know why he hit him.

7. The trial court in evaluating the evidence held that the prosecution had proved the offence of murder beyond reasonable doubt. The court expressed as follows:

“I have considered the evidence of both Mercy, PW2, and Obadiah, PW3, that the accused and the deceased had quarrelled 20 minutes before the incident. It is evident that even if the accused was incensed by the word spoken to him by the deceased, the accused had time to cool his anger. I find that by returning to the scene armed with a sharp object which he then aimed at the deceased’s neck, that the accused had formed the necessary intention to harm the deceased. I find that the accused person should have known that by stabbing the deceased with a sharp object and with great force on the neck that such act would probably



have caused grievous harm or death to the deceased. I am satisfied that the prosecution has proved malice aforethought under section 206(b) of the Penal Code. I also considered the fact that after the incident, the accused also ran away from the scene with the weapon he had used which was never recovered. That was conduct of a person with a guilty mind. It was the defence of the accused that the deceased attacked him and that when he jumped on the deceased, the panga the deceased was holding flew in the air and landed on the deceased. The accused's explanation of how the deceased met his death is neither plausible nor reasonable. In addition, the evidence by PW2 and PW3 is that the deceased was seated at a table near the door through which the accused entered and suddenly attacked the deceased. There was no physical confrontation between the accused and the deceased immediately before the attack. I am satisfied that the prosecution case remained unshaken”.

8. Aggrieved by the conviction and detention order, the appellant has lodged this appeal citing the following grounds:
 - a) that the learned judge erred in law and fact in not finding that the alleged identification and or recognition was not free from error;
 - b) that the trial judge erred in law and fact in relying upon the evidence of a single witness to convict without noting that that evidence left a lot to be desired;
 - c) that the trial judge erred in law and fact in not observing that the prosecution failed to summon vital witnesses mentioned during the trial;
 - d) the trial Judge erred in law and fact in rejecting the defence offered by the appellant.
9. At the hearing of the appeal, the State was represented by Messrs Evans Onderi, Senior Assistant Director of Public Prosecution. The appellant was represented by learned counsel Mr Muriuki.
10. Counsel for the appellant reiterated the grounds of appeal and concentrated on the issue of *mens rea* - malice aforethought. The appellant contends that the learned Judge failed to give proper weight and consideration to the fact that there was a scuffle and quarrel between the deceased and the appellant; that the aggression was initiated by the deceased who even told the appellant that “even if you go away, I will get you”. That there was no motive proved in this case; that the deceased who was the aggressor was an adult and the appellant was a minor; that the failure by the prosecution to call the Investigating Officer was fatal. The other ground urged by the appellant is that the learned Judge erred in law in holding that the appellant be detained at the pleasure of the President. It was submitted that section 191(1)(g) of the *Children Act* provides for the method of dealing with child offenders and the learned judge erred by ordering the appellant to be detained at the pleasure of the President. That the appellant being a child offender should have been dealt with under the section 191(1)(g) and taken to a Borstal Institution; that although it is acknowledged a life was lost, the appellant was sixteen years of age at the time of the offence and should not have been sentenced to be detained at the pleasure of the President.
11. The state opposed the appeal submitting that malice aforethought in accordance with section 206(b) of the *Penal Code* had been established. That the appellant was at the scene of crime; he had the opportunity to commit the offence; that whereas the deceased did insult the appellant and there was a quarrel between the two, they were separated and the appellant left the scene. That the conduct of the appellant leaving the scene and coming back amounts to premeditation; the deceased was stabbed while seated down and the prosecution proved it was the appellant who stabbed the deceased. It was submitted that the appellant had malice aforethought as there was a grudge between the two; that the appellant stabbed the deceased to deal and solve the problem between them once and for all; that he stabbed the deceased with such force on a delicate part of the body that the deceased did not get an



opportunity to be treated. He took the law unto his hands; that despite the grudge between the two, the appellant was not entitled to take the law unto his hands. It was conceded that the Investigating Officer was not called to testify; however, no prejudice was caused to the appellant. On sentence, it was submitted that even though the appellant was a minor, he was convicted for murder and there is no other known sentence for the offence.

12. We have considered the submissions by both the appellant and the state. This being a first appeal, we are reminded of our primary role as the first appellate court namely, revisiting the evidence that was tendered before the trial judge, analyzing the same independently and then drawing conclusion bearing in mind the fact that we neither saw nor heard the witnesses and make an allowance for that. See the case of *Muthoka and another v Republic*, (2008) KLR 297 and *Okeno v R.*, [1972] EA 32 at p 36)
13. In *Suleiman Juma alias Tom v R*, Criminal Appeal No 181 of 2002 (Msa), this court stated that where the life of an individual is at stake, the prosecution must be extremely careful not to bring evidence that is less than watertight. One of the issues in this appeal relates to mens rea - malice aforethought. In the present case, motive was not established and no evidence was led to show that prior to the commission of the alleged offence, the appellant had formed an intention to kill the deceased or any other person. The trial court found that when the appellant went out of the hotel and came back armed with a sharp object; this was proof that he had formed the intention to kill. In *Said Karisa Kimunzu v R*, Criminal Appeal No 266 of 2006, this court stated that in a charge of murder, the specific intention required to prove such as offence is malice aforethought. From the evidence of PW 2 and PW3, we are convinced that it is the appellant who inflicted the injuries that led to the death of the deceased. We dismiss the appellant's contention that his identification or recognition was not free from error. The identification of the appellant by PW2 and PW3 was one of recognition. As was stated in *Anjononi & Others v Republic*, (1976-80) 1 KLR 1566, at page 1568,

...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other”.
14. As regards mens rea, we concur with the finding of the trial court that by returning to the scene armed with a sharp object, which he then aimed at the deceased neck, the appellant had formed the necessary intention to harm the deceased. We agree with the finding that the appellant should have known that by stabbing the deceased with a sharp object and with great force on the neck, such act would probably have caused grievous harm or death to the deceased. The appellant by stealthily attacking the deceased from the back clearly intended a surprise attack on the deceased and deny the deceased any opportunity to defend himself; although initially the appellant was not armed, by returning to the scene armed with a knife, the appellant had not only prepared himself to commit the offence but had formed the intention to cause grievous harm to the deceased and he was indifferent as to whether grievous harm or death occurred. We are satisfied that the prosecution proved malice aforethought as required under section 206(b) of the *Penal Code*.
15. 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*).

16. 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. 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 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. The appellant cannot be released to the society without being taken through rehabilitation which cannot happen anywhere else due to his age. We have considered the other grounds of appeal and the applicable law; we find they have no merit.

DATED AND DELIVERED AT MERU THIS 26TH DAY OF FEBRUARY, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

