



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT GARISSA**

**CR. MISC. APPL. NO. 17 OF 2020**

**JMR.....APPLICANT**

**VERSUS**

**REPUBLIC...RESPONDENT**

**JUDGEMENT**

1. The Petitioner moved this Court by way of a Constitutional Petition pursuant to Articles 22(1), 23(1), 25(a) (c) (d), 50 (6) (a), 165, 25(b), 258 and 259 of the Constitution citing violation of his rights under the Constitution and seeking for consideration of his jail term.

2. The Applicant was charged and convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code, Garissa Chief Magistrate Criminal Case No. 680 of 2004. He was tried, found guilty of the offence and convicted. The Applicant was 17 years at the time and on account of age he was sentenced to serve at the Pleasure of the President on the 4<sup>th</sup> of May 2005. That is 16 years 9 months ago.

3. Dissatisfied with the trial Court's decision the applicant appealed to this court in High Criminal Appeal No. 84 of 2006. His appeal was dismissed.

4. In his well thought out and professionally crafted submissions the Applicant argued that though his appeal was dismissed, this court has jurisdiction to entertain an application such as the one before the court where there has been a violation of one's constitutional rights. He cited Articles 25(a) and 165 (3) (b) of the Constitution in support.

5. The Applicant having been convicted to serve under the Pleasure of the President holds the view that the sentence is a violation of the concept of separation of powers and the principles of constitutionalism. Further he argues that the provision of the law he was convicted under was against Article 53(1) and (2) of the Constitution. Further he argues, that the indefinite sentence that was imposed upon him was unconstitutional. As the sentencing envisage by the Constitution is a judicial function which ought not to be ceded to any other authority.

In this regard he relied on the case of A.O.O & 6 Others vs A.G. & Another [2017] eKLR, K.K.D. vs Republic [2018] eKLR, Republic vs Ibrahim Kamau Iringo [2019] eKR, Francis Karioko Muruatetu & Another vs Republic [2017] eKLR.

6. The State conceded to the application in their submissions dated 6<sup>th</sup> June 2021 where it relied on the case of Republic vs S.O.M. Kisumu High Court Criminal Case No. 6 of 2011. The submissions were signed by State Counsel Edwin Nyipolo.

7. As if the State had a change of mind on 13<sup>th</sup> July 2021 State Counsel Job Mulati filed a preliminary objection on the basis of the guidelines provided by the Supreme Court in the Francis Karioko Muruatetu & others versus the Attorney General directive of the 6<sup>th</sup> of July, 2021.

8. Having considered the pleadings, submissions by both sides and authorities cited, the issue for the court's determination are: -

**i. The constitutionality or otherwise of Section 25(2) & (3) of the Penal Code and**

**ii. Whether or not to reconsider the punishment meted out upon the applicant.**

9. In considering the second submission by the state where they took a preliminary objection to the petition, the court is of the view that this case is distinguishable from the cases referred to in the Muruatetu directive where a litigant would move the court for resentencing per se relating to a maximum sentence where it is deemed to be unconstitutional. Indeed, this case squarely fits within the pronouncement in paragraph 15 of the Muruatetu directive where the Supreme Court stated

**“15. To clear the confusion that exists with regard to the mandatory sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40(3), robbery with violence under section 296(2); and attempted robbery with violence under Section 297(2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that on this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases...” (Emphasize added)**

10. For the above reason the preliminary objection does not hold and stands dismissed.

11. The Applicant in this matter has called upon the court to use the power donated to it by the Constitution in Article 165(3) (d) (i) and (ii) to hear and determine any question in respect of interpretation of the Constitution including determining the issue as to whether or not any law is inconsistent or is in contravention of the Constitution.

**Article 165 (3) (b) & (d) (i) (ii) provides: -**

**“(b) Jurisdiction to determine the question whether a right of fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.”**

**“(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of**

**(i) the question whether any law is inconsistent with or in contravention of this Constitution.**

**(ii) the question whether anything said to be done under the authority of this Constitution or any other law is inconsistent with, or in contravention with this Constitution.”**

12. The question before this court is not a moot point, it has been decided upon up to the Apex Court; the Supreme Court. In the case of Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai Estate & Others [2013]. The Supreme Court stated

**“.....The Kenya Constitution has given the High Court the exclusive jurisdiction to deal with matters of violation of fundamental rights (Article 23 as read with Article 165 of the Constitution). The High Court on this point has correctly pronounced itself in a judgement by Justice Nambuye & Aroni in Protus vs Republic Constitutional Reference No. 11 of 2011, [2012] eKLR. The Shikuku case fell within the criminal justice system; it involved a claim of the Applicant's fundamental right by the Court of Appeal, in a final appeal. The trial court failed to impose against the Applicant the least sentence available in law at the time of sentencing.**

**On the issue of jurisdiction, the learned judges relying on Articles 20, 22, 23 and 165 of the Constitution rightly held that the**

**High Court had jurisdiction to redress a violation that arose from the operation of law through the courts, even if the case had gone through the appellate level...”**

13. In the case of A.O.O. & 6 Others vs the A.G. & Another [2017] eKLR. In a similar case the court was of a similar view that this court had jurisdiction and went further to state

**“An unconstitutional statute is not law, and more important judicial function includes the power to determine and apply the law, and this necessarily includes the power to determine the legality of statutes. The Judiciary has a special role in our system with respect to constitutional interpretation and must interpret it when a dispute so requires.”**

14. Therefore guided accordingly, this court will consider the question before it at two levels; whether the indeterminate nature of the sentence provided for in Section 25(2) & (3) of the penal code and the very nature of the section is in contravention of the constitution, secondly whether there was a violation of Articles 50(2)(p) the right to benefit in the least severe of the prescribed punishment of an offence, if the presented punishment for the offence has been changed between the time that the offence was committed and the time of sentencing as read with Article 53(1) for a child not to be detained, except as a measure of last resort and when detained to be detained for the shortest time, as read with Article 53(2) a child’s best interest are of paramount importance in every matter concerning a child & the Children’s Act.

15. Section 25 (2) & (3) provide 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.**

**Power delegated to the Minister and to the Permanent Secretary of the Ministry for the time being responsible for Prisons (L.N. 579/1963).**

**(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.”**

16. Two issues arise from the above the provision of Section 25(2) & (3), firstly the nature of detention is indeterminate, it depends on the prerogative of the president. Secondly the Judiciary unconstitutionally yields or gives away the power donated to it in the Constitution by the people of Kenya to another arm; the executive.

17. This concerns have been expressed by the high court in several decisions.

**In the case of A.O.O & 6 Others versus The Attorney General (supra) the court stated: -**

**“Imposition of sentences is a judicial function to be performed by the sentencing court. The function of sentencing courts is to impose a sentence upon each offender that is appropriate to the offence and the offender. ....”**

**In the case of K.K.D versus Republic (2018) eKLR the court held while in agreement with the A.O.O. case**

**“I entirely agree with the learned Judge in that a sentence to detention during the president’s pleasure does not only amount to indeterminate sentence but implies that an accused remains psychologically tormented at the whim of the executive thus taking away the discretion of sentencing from the courts. Simply stated, it amounts to abdicating judicial authority to the executive.”**

**In the case of Republic Versus Kamau Irungu (2019) eKLR where an accused of unsound mind was to be held at the**

pleasure of the president;

**“The fact that the court is only allowed to give terms of where the accuse is to be held pending a determination by the President as to the sentence to be served by the convicted person, only serves to usurp the powers of the court in exercising the judicial functions by concluding the case. The right to a fair trial starts from the moment the accused is arrested and ends upon determination of the case and when the sentence is delivered. The court finalizes the matter when it issues a determinate sentence. To do otherwise is to leave the case hanging which is an absurdity.”**

18. Notable also is that **Article 2(5)** of the Constitution expressly imports the general rules of international law and makes them part of the law of Kenya. Indeed, **the Court has also considered regional and international instruments which our Constitution borrows heavily from and where Kenya as a country is a signatory and has ratified the same.**

**The United Nations Convention on the Rights of the Child** which Kenya ratified in 1990 provides in **Article 37(a)** that

**“[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”** (Emphasize provided)

**Article 37(b)** states

**“Detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”**

19. In the African Charter on the Rights and Welfare of the child which Kenya ratified in 2001 on its part states: -

**Article 4** Best Interest of the Child

**“1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.**

**2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law,”**

**Article 17: Administration of Juvenile Justice**

**“1. Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.**

**2. States Parties to the present Charter shall in particular:**

**(a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;**

**(b) ensure that children are separated from adults in their place of detention or imprisonment;**

.....

**3. The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her**

reformation, re-integration into his or her family and social rehabilitation.”

20. This court based on the above resonates with the views of the applicant and totally agrees with the great minds of the learned judges hereinabove quoted; that the Section 25 (2) & (3) of the Penal code is in violation of the provisions of the Constitution of Kenya 2010 and regional and international instruments as the section interferes with the separation of powers set out in the Constitution as it requires Judicial officers to cede the powers bestowed on them to another arm of government; the executive thus interfering with the independence of the judiciary. It also violates the right of the person convicted as the sentence is indeterminate thus oppressive and more importantly violates the right of the child in conflict with the law.

21. Further the court finds that the applicant, a child at the time of commission of the offence and sentencing was also subjected to severe and degrading punishment and kept in a maximum prison yet the Children’s Act, which was in force at the time of his conviction and which is in line with the Constitution provides for lesser punishment and how to deal with children in conflict with the law.

22. The Children’s Act sets the following terms; -

**“190. Restriction on punishment**

- (1) No child shall be ordered to imprisonment or to be placed in a detention camp.**
- (2) No child shall be sentenced to death.**
- (3) No child under the age of ten years shall be ordered by a Children’s Court to be sent to a rehabilitation school.”**

**191. Methods of dealing with offenders**

**(1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—**

- (a) By discharging the offender under section 35(1) of the Penal Code (Cap. 63);**
- (b) by discharging the offender on his entering into a recognisance, with or without sureties;**
- (c) by making a probation order against the offender under the provisions of the Probation of Offenders Act ([Cap. 64](#));**
- (d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children’s institution willing to undertake his care;**
- (e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;**
- (f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;**
- (g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;**
- (h) by placing the offender under the care of a qualified counsellor;**
- (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 provisions of the Probation of Offenders Act ([Cap. 64](#));

(k) by making a community service order; or

(l) in any other lawful manner.

**(2) No child offender shall be subjected to corporal punishment.”**

23. Based on the analysis above and the findings of the Court the Petition succeeds. The court therefore makes the following declarations and orders.

**a. A declaration that Section 25(2) & (3) of the Penal code is inconsistent with the constitution and in applying the same the applicant’s right under the Constitution were violated.**

**b. A declaration that the punishment meted out to the applicant was extremely severe considering the age of the applicant at the time of the commission of the offence and sentencing and inconsistent with the Article 53 (1) & (2) of the Constitution.**

**c. The punishment meted out to the Applicant be and is hereby set aside.**

**d. The applicant be and is hereby set free forthwith unless he is otherwise lawfully held.**

**DELIVERED AND SIGNED AT GARISSA THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2022**

.....

**ALI-ARONI**

**JUDGE**

**In the presence of**

.....for the state

**Applicant present and acting in person**

**Amina & Martin Court Assistants**



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