**Kiti v Republic (Criminal Appeal 14 of 2019)**
**[2023] KECA 1403 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1403 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CRIMINAL APPEAL 14 OF 2019**

**HM OKWENGU, HA OMONDI & JM NGUGI, JJA**

**NOVEMBER 24, 2023**

**BETWEEN**

**SULEIMAN KIBET KITI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against the judgment of the High Court of Kenya at Bungoma (Githinji, J) delivered on 9th October, 2017 in HCCR No. 35 of 2015)***

## JUDGMENT

1. The appellant, Suleiman Kibet Kiti, was charged and convicted for the offence of murder of David Simon Naibei, contrary to section 203 as read with section 204 of the *Penal Code*. The offence occurred at Koingit location of Mount Elgon District, Bungoma. A plea of not guilty was entered and the case proceeded for full hearing resulting in the appellant being sentenced to be detained at the President's pleasure.

2. Dissatisfied with the outcome, the appellant has lodged an appeal on the sentence on grounds that:

   i. The sentence imposed upon the Appellant was unconstitutional and unlawful.

   ii. The sentence imposed upon the Appellant was harsh and inhumane.

   iii. What is the appropriate sentence?

3. The evidence presented at the trial was that on the evening of the 24th October, 2015, Alex Malinga Kibibi (PW2) who had lost his wife, was visited by many relatives, friends and neighbors who had gone to mourn and condole with him. There were tents erected in the compound and at least three bulbs powered by a motor vehicle battery to supply the light. A keyboard was in place for music and a fire to warm the visitors. Christian music was playing and mourners were dancing to it. The earth was muddy

due to a downpour; and as the mourners danced, their feet splashed mud around and some of it was getting to the keyboard.

4. Present among the mourners were Boniface, Geoffrey and Collins. The deceased, David Simon Naibei, who was also present, tried to contain the situation by urging the crowd which included the appellant, to push backwards. The appellant who was present was not impressed by the deceased's action, and the two exchanged some words. The appellant told the deceased that he was behaving like a bouncer; and asked the deceased whether he was the champion of Cheposoikei, expressing that in case he was, then he, (the) appellant, was the champion of Koingit. The appellant threatened to stab him; then drew a knife from the right side of his waist; and used it to cut the deceased on the left lower waist.

5. Upon seeing what had taken place, Boniface Kirui (PW3), then removed a piece of firewood from the fireplace and armed with it, chased after the appellant. The appellant ran away with the knife, jumped over the fence and vanished. Boniface, Geoffrey and Collins assisted the deceased by administering first aid to him, while he talked, saying that the appellant had stabbed him. He urged the three to take him to the house of his brother, Peter Boiyon (PW6), and once they got to the house, Peter left the deceased in the care of Boniface, and ran to look for a motorcycle to take him to the hospital. It had rained heavily and the motorcycle could not get to the house. The group thus carried the deceased in a sack up to the place where the motorcycle was. The deceased was taken to Kapsokoi Hospital where he was referred to Bungoma Hospital where he got admitted. However, on 26th October, 2015 the deceased breathed his last.

6. Upon the news of the death reaching the community, members of the public, agitated by the incident, went to the home of the appellant to arrest him. They demolished his house, and the appellant, emerged armed with a soiled knife. (PW7), Festo, the village elder, while going to report the incident to the police, witnessed the scenario. He took charge and urged the appellant to drop the knife and surrender to him. The appellant obliged; was arrested, and taken to Koingit Police Station along with the knife he had.

7. A postmortem examination carried out established the cause of death to be cardio-respiratory arrest due to severe abdominal injury following sharp force trauma (penetrating abdominal injury).

8. Upon being placed on his defence, the appellant denied that he was the one who killed the deceased, saying he never went to the home where the incident took place, and had remained at home sleeping.

9. At the conclusion of the hearing, the trial court found that the evidence presented proved the charge, and the appellant was convicted. The appellant's plea in mitigation as presented by his counsel, was that he was a child aged 17 years old at the time of the offence, had turned 20 at the time of sentence; and that he was remorseful.

10. The learned Judge took into consideration that the appellant was a child at the time of the offence and drawing from the provisions of section 25 (2) of the Penal Code, ordered for his detention "during the President's pleasure, in such a place and under such conditions as the President may direct"

11. At the hearing of the appeal, learned counsel Mr. Mbeka, appeared for the appellant whilst Mr. Chacha of the Office of the DPP represented the State. The crux of this appeal is that the sentence meted against the appellant was unconstitutional as the duty to sentence a convicted person lies with the court, and not the President of the Republic. It is argued that sentencing a person at Presidential pleasure to serve for an undefined period of time, offends Article 53(f) of *the Constitution* of Kenya Article 37(c) UN Convention on the Rights of the Child; Article 2(b) of the African Charter on the Rights and Welfare of a Child; and paragraph 1 of the United Nations Rules for the Protection of the Juveniles deprived

of their liberty; that any punishment that cannot be determined from the outset is cruel, inhuman and degrading, hence unconstitutional.

12. It is submitted that the administration of justice is a process that entails arraignment of the accused person to court up to sentencing; that this is a function of Judiciary; that the right to fair trial encompasses both the determination of guilt and sentencing phases of the trial; and that fair trial requires fairness of the trial at all stages of the trial including sentencing.

13. Counsel for the appellant points out that at the time of committing the offence, the appellant was 17 years old; thus a child in a very vulnerable position; and in need of special protection; and the best interest of a child is the overriding concern when it comes to any matter affecting the child. In this regard, counsel submits that this special protection requires that the justice system treats every child in conflict with the law in a manner that recognizes and upholds human dignity and worth; and instills in the child, respect for the fundamental rights and freedoms of others.

14. In response, Mr. Chacha, on behalf of the State, argues that the trial court considered the appellant's plea in mitigation, taking into account that he was a child at the time of committing the offence; and the learned Judge was entitled to use the discretion under section 191 (l) of the *Children Act* to sentence the appellant in any other lawful manner. That section 25 (2) of the *Penal Code* provided for such other lawful manner with due regard to the circumstances of this case.

15. Counsel also draws our attention to Paragraph 4.1 of the 2016 Judiciary of Kenya Sentencing Policy Guidelines which lists the objectives of sentencing, to argue that in this instance, this Court cannot shut its eyes to those objectives, simply because the offender was a minor at the time of the offence. That since he had subsequently attained adulthood at the time of sentencing, then considering the nature of the offence, and the circumstances under which it was committed, if this Court were to prefer an alternative to section 25 (2) of the *Penal Code*, the best would be to adapt a judicious approach such as was taken in *J. M. K. v Republic [2015]* eKLR where the Court stated:

> "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 Nyeri Criminal Appeal No. 118 of 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 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 - S.A.O., (a minor) [2004] eKLR and Nyeri Criminal Appeal No. 184 of 2009, Dennis Kirui Cheruiyot – v- R).
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> 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 interest 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"

16. We are thus urged to take the same approach, and it is recommended that even if we are to interfere with the sentence, then we ought to substitute it with 15 years' imprisonment, and take into account the 8-year period that the appellant has already served.

17. This appeal is basically on the sentence only, and the question regarding a child who finds himself in conflict with the law, for what is a felony. Article 260 of *the Constitution* defines a "child " to mean an individual who has not attained the age of eighteen years. In addition, the *Children Act* defines a child as "any person being under the age of eighteen years". In dealing with an individual under the age of 18, and who therefore fits into the category of a person described as a child, Article 53(1) (f) of *the Constitution* provides that:

> " Every child has a right-
>
> (f) Not to be detained, except as a measure of last resort, and when detained, to be held: -
>
> (ii) For the shortest appropriate period of time, and
>
> (ii) Separate from adults and in conditions that take account of a child sex and age"

In addition to that, Article 53(2) provides inter that, a child's best interest is of paramount importance in every matter concerning the child.

18. The sentence that was meted out to the Appellant is prescribed under section 25(2) of the *Penal Code* Cap 63 Laws of Kenya which states as follows:

> " Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody."

19. The appellant has contested the legality and constitutionality of that sentence. The Courts have on previous occasions found that section 25(2) of the *Penal Code* is unconstitutional. For instance, this Court (differently constituted) in A.W.M v Republic [2009] eKLR while setting aside the sentence of a 17-year-old girl convicted of murder and sentenced to be detained at the pleasure of the President held as follows:

> " ...We also set aside the order of detention under President's pleasure apparently imposed pursuant to section 25(2) of the Penal Code and in its place, we substitute a discharge under section 191 (c) of the *Children Act* taking into account the long period the appellant has been in custody. The appellant is to be set free forthwith unless lawfully held."

20. Also, in A.O.O & 6 Others v Attorney General & Another [2017] eKLR, the Court held that section 25(2) of the Penal Code is inconsistent with the provisions of Article 53 (1) (f) of *the Constitution* which provides that a child has the right not to be detained, except as a measure of last resort, and when

to be held for the shortest appropriate period of time and separate from adults and in conditions that take account of the child's sex and age.

21. The jurisprudence on the legality of being detained at the President's pleasure as a penal sanction is now well settled, and we will not pretend to reinvent the wheel. The sentence imposed on the appellant was unconstitutional and is set aside.

22. What, then happens to any child who is found guilty of an offence of this magnitude in light of section 190 (1) of the repealed *Children Act*??? which was instructive that such children were not to face imprisonment. In addition, section 191 provided that:

> " 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 recognizance, 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"

23. Whereas the above provision appears to offer a remedy to the child offender, the twist weaves its way in, when at the time the trial is concluded, like in this instance, the child has transitioned into a young adult and cannot benefit from the sentencing options available. We are persuaded that this was the situation the trial court encountered, when it opted to fall back on section 25 (2) of the Penal Code.

24. And now that the provision has been declared unconstitutional, what screams out for an answer is whether the court is so helpless as to stand aside and say "too bad, you were a child, now you are an adult, no penalty fits your category, go home and sin no more!" Far be it that such a situation would

prevail; indeed if the objective of the Constitutional provisions; and even the *Children Act* is to prevent children who are in conflict with the law from being subjected to long imprisonments and detention in harsh conditions as was well captured by the court in J.K.K v R [2013] eKLR, then that purpose must be preserved in instances where the need for correction and rehabilitation of a young offender remains, even as the Court takes into account the over-arching objective which is the preservation of the life of the child and his best interest.

25. It is desirable that a message be sounded out that children who commit serious crimes, and transit into adulthood at time of conviction, cannot walk home scot-free; and whereas, it is indeed in their best interest that they must not be treated like adults; yet in the absence of a penalty commensurate with the objectives in meting out a sentence, then the measure of last resort contemplated in Article 53 (2) of *the Constitution* must become applicable.

26. From the foregoing, having set aside the unconstitutional sentence which was meted; and taking into consideration the period that he has been incarcerated, we substitute it with a prison term of 10 years, which shall run from the date that he was arrested in October 2015, and which translates to the term served.

**DATED AND DELIVERED AT KAKAMEGA THIS 24TH DAY OF NOVEMBER, 2023.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**H.A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

Signed

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

**Deputy Registrar**