



Muhia v General & another; Kenya National Human Rights and Equality Commission (Interested Party) (Miscellaneous Criminal Application E138 of 2022) [2023] KEHC 503 (KLR) (Crim) (30 January 2023) (Ruling)

Neutral citation: [2023] KEHC 503 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E138 OF 2022
JM BWONWONG'A, J
JANUARY 30, 2023**

BETWEEN

LUCY WANGARE MUHIA APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND
RESPONDENT**

AND

**KENYA NATIONAL HUMAN RIGHTS AND EQUALITY
COMMISSION INTERESTED PARTY**

RULING

The Case For The Applicant

1. The applicant was charged and convicted of the offence of murder contrary to section 203 as read with 204 of the *Penal Code* (cap 63) Laws of Kenya. She was found to be guilty but insane. Under the provisions of section 166 (2) of the *Criminal Procedure Code* (cap 75) Laws of Kenya, the trial court directed that she be held at the pleasure of the State President at Lang'ata Women's Prison.
2. By a notice of motion application, she is seeking to be released from prison, where she is held at the presidential pleasure.
3. The grounds in support of the application are set out on the face of the notice of motion. They are reiterated in the supporting affidavit sworn by the applicant. She has averred as follows. She has averred



that she is suffering from severe depression and has since recovered after undergoing treatment. She is remorseful and pleads for mercy from the court and the victims of the crime.

4. She is a first offender. She has undergone immense rehabilitation that has had a positive impact towards her rehabilitation. She is a single mother of 5 children, who need care and protection. She is ready to be reintegrated back into society.
5. She urged the court to consider the decision of Mrima J, in petition No 226 of 2020 *Isaac Ndegwa Kimaru & 17 others v The Honourable Attorney General & 2 others*. She has sought her release and has urged the court to take into account the time she has been in prison.

The Case For The 1st Respondent (Hon. The Attorney General)

6. In response, Ms Elina Ayuma, senior state counsel for the 1st respondent filed a replying affidavit dated October 25, 2022. She averred that a stable condition and stable mental condition is not a sufficient reason to warrant the release of the applicant. The orders sought by the applicant would be prejudicial to the community, where she will be released to. The decision of Mrima, J. in Petition 226 of 2020, is that mentally ill offenders should no longer be held at the state president's pleasure and should be referred back to their respective trial courts for re-sentencing and appropriate orders.
7. The application is misconceived and as such should be dismissed.

The Applicant's Written Submissions

8. The applicant submitted that her application is based on the decision of Mrima, J. in Petition No 226 of 2020. That pursuant to that decision, the trial court is clothed with the powers to make appropriate orders and also make its own decision based on the applicant's mental stability and number of years spent in prison. She argues that she has already spent 12 years in custody, where she has undergone treatment, counselling and rehabilitation. That she is now reformed. The 12 years period has given her time to reflect on her actions and is sufficient punishment considering she was not in the right state of mind at the time of the commission of the offence.
9. She urged the court to re-sentence her within the provisions of the law, which are supported by the Supreme Court decisions in *Francis Kioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus curiae)* [2021] e-KLR.

The 1st Respondent's Written Submissions

10. Ms Elinah Ayuma, Senior State Counsel submitted that the court should give determinate sentences in cases, where an accused person was found guilty but mentally insane, when he committed the offence. She argued that passing a sentence was a judicial function and while exercising mercy was a responsibility of the executive branch of government. As such, the executive should exercise mercy once the court has sentenced the accused person.
11. The 2nd respondent and the interested party did not file any submissions.

Issues For Determination

12. I have considered the application, the response and the submissions by the parties. The issues that arise for determination are:
 1. Whether this court has jurisdiction to entertain and determine the application
 2. Whether the applicants should be granted the orders sought.



Analysis And Determination

13. It is trite law that the jurisdiction of courts in Kenya is always conferred by the Constitution or other written laws and that a court of law can only exercise jurisdiction that is conferred upon it by the constitution or other written law (An Act of Parliament). A court of law cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. The jurisdiction of the High Court includes unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce the bill of rights; appellate jurisdiction; interpretative jurisdiction; any other jurisdiction, original or appellate, conferred on it by legislation and supervisory jurisdiction.
14. From the record, the applicants are is being held at the pleasure of the State President. It is this sentence that the applicant wants to be reviewed. In the case of Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] e-KLR, the court stated that: -

"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."
15. Further, in the case of Joseph Maburu alias Ayub v Republic [2019] e-KLR, where the learned judge stated that: -

"Sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. *Black's Law Dictionary* Tenth (10th) Edition describes/defines sentence as: The judgement that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer. Remitting a matter to the trial court which had become functus officio after sentencing flies in the face of the doctrine of functus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality."
16. The rule of thumb is that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction. The sentence which the applicant is desirous to be reviewed was passed by Lesiit, J (as then was) on March 14, 2017, following a trial of the applicant on a charge of murder in the High Court sitting in Nairobi.
17. I find that the only time that this court can review a sentence imposed by a court is when such a sentence was imposed by a subordinate court pursuant to the provisions of section 362 of the Criminal Procedure Code (cap 75) Laws of Kenya or where this court is approached *vide* an application for re-sentencing pursuant to the decision in Francis Karioko Muruatetu & another v Republic [2017] e-KLR.
18. Furthermore, it is a cardinal rule of law that litigation must come to end. Once a case has been heard and concluded, that is the end of that case and may only be appealed or reviewed if there is in place a statutory provision for such an appeal or review. In the absence of an authorizing statute the aggrieved



party cannot appeal or seek review. In this regard, the Court of Appeal pronounced itself in Kiwala v Uganda (1967) EA 758 at page 761 letters F and G, as follows:

"The general rule of law is expressed by the maxim, "interest reipublicae ut sit finis litium." Once an act is the subject of litigation and final judgement is entered by a competent court that is the end of the matter, except there is statutory provision providing for further consideration of that judgement on appeal or, as in this case, on revision; but once that right has been exercised and the appeal or revision heard then again the litigation comes to an end unless there is again statutory provision for further appeal or revision. The law in this case only provides for one revision; no provision is made for further revision or for the High Court to revise its own order of revision. The court once it has exercised its power of revision is "functus officio" and has no authority to subsequently revise its own order."

19. Furthermore, the said Court of Appeal also observed that:

The provision of this section (337 (1) and (7) of the Uganda CPC) would apart from any other reason make it abundantly clear that once a case has been revised by the High Court, that court becomes "functus officio" and that revision is final unless there is an appeal to this court." at page 762 letter C.

20. I find the foregoing pronouncement of that court to be on all fours with this case and is equally persuasive. I therefore find that it applies to this case.

21. Consequently, I find that this court is *functus officio* and therefore has no jurisdiction to review the sentence imposed by Lesiit, J (as she then was) A court cannot confer on an aggrieved party a right of appeal or review. It is for the foregoing reasons that I that I am unable to agree with the decision of Mrima, J in Isaac Ndegwa Kimaru & 17 others v The Honourable Attorney General & 2 others, in petition 226 of 2020. Accordingly, I find that the application is incompetent and is hereby struck out.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF JANUARY 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

The applicant in person.

Ms. Ayuma for the 1st respondent

Ms Akunja for the 2nd respondent.

There was no appearance for Interested Party.

