



REPUBLIC OF KENYA



**Bisaso v Republic (Criminal Revision 291 of 2019)
[2023] KEHC 1102 (KLR) (Crim) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1102 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION 291 OF 2019
DO OGEMBO, J
FEBRUARY 21, 2023**

BETWEEN

ANN BIRUNGI BISASO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant Ann Birungi Bisaso, has moved this court by way of a Chamber Summons application (undated) filed on January 5, 2022. The application states that she was tried, convicted and sentenced to serve life imprisonment and a fine of Ksh,254,893,200/= , which was later revised to 30 years imprisonment and a fine of Kshs.120,000,000/= and in default to serve 1 year. That she has spent 11 years since the time of her arrest, she pleads for sentence reduction.
2. In the submissions that the applicant filed on 2.6.2022, the applicant submits that her sentence does not account for the time she spent in custody while undergoing trial as required by section 333(2) of the *Criminal Procedure Code*. That her co-accused John Mugisha, already had his sentence revised to 31 years imprisonment by the Hon. Justice G. N. Ngenye and later to 15 years imprisonment by Hon. D. Kuto (Principal Magistrate), at Kibera Law Courts on July 2, 2021, she therefore feels discriminated against.
3. The applicant urges that her sentence be ordered to run from the date of her arrest and not date of conviction. She has also requested for a chance to mitigate for purpose of resentencing. She relied on *Protus Buliba Shikuku v Attorney General* (2012)eKLR, and *Jasbir Singh Rai & 3 others v Turglochan Singh Rai Estate and 4 others* (2012), on breach of her constitutional rights. And *Sango Mohamed Sango & Another v Republic* (2015)eKLR, on the right of an accused person to mitigate.



4. This is basically the plea of the applicant who has otherwise expressed herself in a rather lengthy submissions of 20 pages. She has in the submissions raised several mitigating factors including, That she is a first offender. That she is remorseful and has been in prison now for 12 years. She has rehabilitated and learned skills in dressmaking, bead work, bakery, embroidery and paralegalism amongst others.
5. The applicant has attached several certificates and testimonial and a probation officers report in support of the application.
6. Ms. Kibathi, for the state, made an oral response to this application. That this application be struck out for want of jurisdiction. That this court is *functus officio* of this matter as the Hon. Lady Ngenye Macharia already heard and determined the application of the applicant and accordingly revised the sentence. That this court lacks the jurisdiction to entertain a matter already determined by a Judge of concurrent jurisdiction.
7. I have considered the submissions of both sides. By this application, the applicant seeks revision of her sentence so as to account for the period she spent in custody awaiting determination of her trial. The prosecution has however raised the objection that the court lacks jurisdiction to entertain this matter as similar application had been heard and determined by a court of concurrent jurisdiction (Hon. Lady Justice G. W. Ngenye-Macharia). In the case of *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* (1989)eKLR, the Court of Appeal faced with the issue of jurisdiction held in part

“jurisdiction is everything. Without it, a court has no power to make any one step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of a matter before it the moment its holds the opinion that it is without jurisdiction.”
8. And in the same breath, the Court of Appeal in *Samuel Kamau Macharia and Another v KCB and Another* (2012)eKLR, held in part,

“A court jurisdiction flows from either the constitution or legislation, or both. Thus a court of law can only exercise, jurisdiction as conferred by the constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon by the law.”
9. And on the doctrine of *functus officio* raise by the Respondent the Supreme Court of Kenya in *Raila Odinga and others v IEBC and others* (2013)eKLR, observed,

“The *functus officio* doctrine is one of the mechanisms, by means of which the law gives expression to the doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same power... the principle is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary), final and conclusive such a decision cannot be revoked or varied by the same decision makers.”
10. I have considered the ruling of the Hon Justice G. W. Ngenye Macharia dated September 28, 2020. The same was clearly on an application for resentencing. Therein the applicant raised the same mitigating factors and in added the same prayers as raised in this application. And the court, having considered the same, allowed the application and duly resentenced the applicant as prayed.
11. Article 165 of the constitution, giving this court its jurisdiction, does not give the court any jurisdiction to reconsider any decisions of a court of concurrent jurisdiction. And section 362 of the Criminal Procedure Code limits the revisionary, jurisdiction of this court over decisions of subordinate courts,



not courts of concurrent jurisdiction. In effect therefore, neither the constitution nor any written law bestows on this court any powers to reconsider any such orders or findings of a such court of concurrent jurisdiction.

12. By asking this court to revise the orders of the Hon. Justice Ngenye-Macharia, the applicant is for all practical purposes inviting this court to sit on appeal over its own decision. This court must decline the invitation, as I hereby do, as the same would be unconstitutional and devoid of any basis.
13. For lack of jurisdiction, this application of the applicant filed on January 5, 2022 must fail. I accordingly dismiss it wholly. It is so ordered.

D. O. OGEMBO

JUDGE

21st FEBRUARY, 2023

Court:

Ruling read out in open court (on line) in presence of the applicant, and Ms. Joy for the Respondent.

D. O. OGEMBO

JUDGE

21ST FEBRUARY, 2023

