Republic v Ongaro & another (Criminal Case 62 of 2013)
[2023] KEHC 2309 (KLR) (27 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2309 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE 62 OF 2013

KW KIARIE, J

MARCH 27, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

EDDY ODONGO ONGARO ..... 1ST ACCUSED

ZEITUN AYUKO ODONGO ..... 2ND ACCUSED

RULING

1. Eddy Odongo Ongaro and Zeitun Odongo were convicted for the offence of murder contrary to section 204 of the *Penal Code*. They were sentenced to death. Both appealed to the Court of Appeal in criminal Appeal 50 of 2016. Their conviction was upheld. The court however remitted the matter for mitigation and resentencing in line with the decision of the Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic [2017] eKLR*. In doing so the Court said:

   Turning to the issue of sentence, it is true that mandatory death sentence in murder cases is now unconstitutional. The sentence was passed on June 28, 2016 before the Supreme Court pronounced itself in the Muruatetu case. In the circumstances, we are of the view that the appellant ought to be presented before the trial court for mitigation hearing and resentencing, taking into consideration all the relevant factors as spelt out by the Supreme Court, which we hereby so order.

2. The Court of Appeal did not set aside the sentence by Majanja J. before remitting this case to this court for resentencing. This therefore prompted me to invite submissions on the issue of resentencing and whether this court has jurisdiction to do so

3. The firm of Aluoch Odera & Nyauke advocates for the 1st accused submitted that this court has jurisdiction to resentence and it is not functus officio.

4. The second accused was represented by the firm of Moriasi Osoro & company Advocates who did not file any submissions.

5. The state equally did not file submissions.

6. When the accused were before court on February 15, 2016, the original record shows that they were given a chance to mitigate. This is what each told the court through their advocate in mitigation before sentence at page 52 of the record:

> Mr. Nyauke for accused 1: We have nothing to state at this point. We only seek to appeal.
>
> Mr. Osoro for accused 2: I have nothing to state.

7. I have perused the record and nowhere did the accused on appeal claim that they were denied the right to mitigate.

8. The Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic [2017] eKLR* stated:

> [112] Accordingly, with regards to the claims of the petitioners in this case, the Court makes the following Orders:
>
> (a) The mandatory nature of the death sentence as provided for under Section 204 of the *Penal Code* is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the *Constitution*.
>
> (b) This matter is hereby remitted to the High Court for re- hearing on sentence only, on a priority basis, and in conformity with this judgment.
>
> (c) The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same.
>
> (d) We direct that this Judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law, to give effect to this judgment on the mandatory nature of the death sentence and the parameters of what ought constitute life imprisonment.

8. This is the basis on which the Court of Appeal remitted this matter to this court.

9. The resentencing order without setting aside the sentence by the trial court pose two legal issues. One is that of the doctrine of functus officio. The *Black's Law Dictionary, Tenth (10th) Edition* describes functus officio as: -

> [having performed his or her office]" (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.

In *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR* the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "*The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832* which reads:

...The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this 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 matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.

At paragraph 19 in the Raila Case(Supra) the Court further stated:

This principle has been aptly summarized further in *Jersey Evening Post Limited v A1 Thani [2002] JLR 542 at 550*:

> " 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 on adjudication must be taken to a higher court if that right is available"

10. 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 judgment 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.

11. The second issue that is raised is that of retroactivity. The doctrine of retroactive application of the law is defined in *Black's Law Dictionary, 7th Edition*, as:

    A legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect. The retroactive law is not unconstitutional unless it 1) is in the nature of an ex post facto law or a bill of attainder, 2) impairs the obligation of contracts, 3) divests vested rights, or 4) is constitutionally forbidden...Also termed retrospective law.

12. In the case of *Khaemba Patrick Wanyonyi v Teachers Service Commission [2013] eKLR*, Gikonyo J. had this to say on the origins of this doctrine:

    The concept of retroactive or retrospective law developed over time in the 1700s to cure the grave injustices occasioned by what was called the bill of attainder (1300-1600) on a person (attainder) who had been sentenced to death or declared an outlaw. Literally, all civil rights of the attainder were extinguished whether past, present and future, and could not perform any of the legal functions that he performed before the attainder.

13. The Supreme Court in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR* with regards to the general rule against retrospective application of the law stated:

    As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and

retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it: (i) is in the nature of a bill of attainder; (ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden.

14. In criminal law, the rule against retroactive application is provided for under Article 50 (2) (n) of the *Constitution*, 2010. The Article provides that:

    Every accused person has a right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law.

    Conversely, an accused cannot benefit from a statute or legal position that was not in force when the crime and the trial took place except where such a statue explicitly allows retroactivity.

15. From the foregoing, I find that unless the sentence by the trial court is set aside, I have no jurisdiction to entertain the accused in resentencing.

DELIVERED AND SIGNED AT HOMA BAY THIS 27TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE