



**SKG v Republic (Miscellaneous Criminal Application E195 of 2022)
[2023] KEHC 22098 (KLR) (29 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 22098 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
MISCELLANEOUS CRIMINAL APPLICATION E195 OF 2022**

**GL NZIOKA, J
AUGUST 29, 2023**

BETWEEN

SKG APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant filed a notice of motion application on December 6, 2021 seeking for review of his sentence meted out against him in criminal case No. 2430 of 2012 at the Chief Magistrate’s Court at Naivasha on the grounds that there is new and compelling evidence under article 50(6) of the Constitution of Kenya, 2010.
2. He relies on his supporting affidavit and a document titled “application” wherein he avers that he was charged with the offence of incest. That the case was fully heard and he was convicted and sentenced to life imprisonment. That, he filed an appeal to the High Court at Nakuru but the same was dismissed and conviction and sentence affirmed. Subsequently, he lodged Petition No(s). 127 and 128 of 2019 at the High Court at Nakuru which were later transferred to the High Court at Naivasha but are yet to be determined.
3. That, there is new and compelling evidence from the Area Chief dated May 3, 2019, that led to the filing of the application and relies on the case of *Rodgers Ondieki v Rep* Pet 468 of 2012 where the court stated that the evidence must be favourable to the applicant and must likely persuade the court to reach an entirely different view.
4. Further, he relies on the case of *Wilson Thirimba Mwangi v DPP* misc appl No 271 of 2011 that the discovery of new and important matter not within the knowledge of party when the decree was made entitles the applicant to apply for a review.



5. Furthermore, he relied on the case of *Peter Mason Okeyo v Rep* (2014) eKLR that for an application under article 50 (2) (6) of the [Constitution](#) to succeed the applicant must adduce new and compelling evidence.
6. That the court failed to consider his mitigation in breach of section 216 and 329 of the [Criminal Procedure Code](#) (cap 75), Laws of Kenya.
7. The respondent never failed a response to the application despite being given an opportunity to do so.
8. I have considered the application and find that, since the applicant canvassed an appeal vide High Court criminal case No. 25 of 2013 at Nakuru over the same subject matter and judgment was entered on November 8, 2011 wherein the court dismissed the appeal in its entirety. In the circumstances this court is *functus officio*.
9. On *functus officio* this court in the case of; [Lucy Wangari Mubia v Republic](#) [2022] eKLR pronounced itself as follows;
 - “ 15. *Functus officio* is a latin expression that translates to; “having performed his or her office.” According to Ulpian, after a judge has delivered his judgment, he immediately ceases to be the judge:
“hoc jure utimur ut judex qui semel vel pluris vel minoris condemnavit, amplius corrigere sententiam suam non posset; semel enim male vel bene officio functus est.” (see Alexandr Koptev, “*Digestae Justinian*” The Latin Library at Book 42, Title 1, Note 55, online:

The gist of Ulpian’s words is: “[A] judge who has given judgment, either in a greater or a smaller amount, no longer has the capacity to correct the judgment because, for better or for worse, he will have discharged his duty once and for all.” (see Translation in Daniel Malan Pretorius, “*The Origins of the Functus Officio Doctrine, with Specific Reference to Its Application in Administrative Law*” (2005) 122:4 SALJ 832 at 836).
 16. The law of *functus officio* thus dictates that, decision-makers; judges, administrative officials, or arbitrators, cannot as a general rule re-open their decisions to correct a mistake. There is no opportunity for them to; “do better next time” in the same case because there will be no next time. They must get it right the first time, for that will be their only time.
 17. This is contrary to the Lyrics to the song; “Mistake” from the popular children’s cartoon Shimmer and Shine enlighten:

“When we make a big mistake.
Don’t fret, let’s celebrate Cause we’ll get another try (Oh yeah)
We’ll do better next time”.
10. I also note the content of letter dated May 3, 2019 written by Senior Assistant Chief Satellite Sub-location Naivasha, wherein it is stated that, the family of the applicant reported to the Chief that, they have forgiven the appellant. These family members are as HM, JW and JMM, being, the daughter of the appellant, his first and second wife respectively. However, there is no room form review of sentences in a criminal case where the court has fully discharged its function in relation to the same.



The review discussed herein of new and compelling evidence is a matter of civil suits governed by the *Civil Procedure Rules*, 2010. Therefore on that basis above the application cannot succeed

11. Be that as it were, in the given circumstances, the application herein is not tenable and it is struck out for want of jurisdiction and/or on the basis of functus officio.
12. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 29TH DAY OF AUGUST 2023.

G. L. NZIOKA

JUDGE

In presence of:

The applicant present virtually

Mr. Ndiema for the respondent

Ms Ogutu: court assistant

