



**Adan v Republic (Miscellaneous Criminal Application E008 of 2023)
[2023] KEHC 27353 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27353 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
MISCELLANEOUS CRIMINAL APPLICATION E008 OF 2023
JN ONYIEGO, J
DECEMBER 18, 2023**

BETWEEN

ABBULLAHI SALAT ADAN APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant herein was arraigned before the Wajir Principal Magistrates Court charged with two counts as follows: Count I, he was charged with being in possession of a Firearm without a license contrary to section 4 A(1)(a) of the *Firearms Act* 2012. Particulars of the offence were that on February 5, 2019 at around 1730hrs at Kanjira Trading Centre in Habasweini Sub County, within Wajir County, he was found in possession of a fire arm make RPD Machine Gun S/No. PC458, without a license.
2. Count II, he was charged with being in possession of ammunition without a license contrary to section 4(2) of the *Firearms Act* 2012. Particulars were that on February 5, 2019 at around 1730hrs at Kanjira Trading Centre in Habasweini Sub County, within Wajir County, he was found in possession of 14 live rounds of 7.62MM ammunition x 39 Ammunitions without a license.
3. The applicant pleaded not guilty and the matter proceeded to trial where he was convicted of both counts and sentenced to 5 years imprisonment on each count and sentences to run concurrently.
4. Aggrieved by the aforesaid judgment and sentence by the trial court, the applicant preferred an appeal before this court and by a judgment delivered on December 17, 2021 by Aroni J. (as she then was), it was dismissed for want of merit.
5. From the record, this court also noted that the applicant through his advocates, Okubasu, Munene and Kazungu had equally lodged a notice of appeal dated December 22, 2021 to the Court of Appeal at Nairobi seeking to quash and set aside the finding of Aroni J.



6. The application in a nutshell was based on the fact that the applicant had neither owned a firearm nor ammunition in his life. That the alleged firearm and ammunitions herein were recovered from a neighbour's house. He contended that he had been in lawful custody from February 6, 2019 to November 17, 2020 and therefore, the same ought to have been deducted from the sentence period.
7. It was his case that he is a father of eleven children who currently are staying at home as their school fees remain unpaid to date. He urged this court to consider the application herein and review the sentence to that of community service order.
8. Directions were taken that the application be canvassed by way of written submissions. The applicant in his oral submissions reiterated the content of his application.
9. Mr. Kihara, the learned prosecution counsel in rebuttal submitted that the application herein was incompetent as the same had been determined by a court of equal jurisdiction to this court. That this court was therefore functus officio. Additionally, it was stated that the applicant had since filed a notice of appeal seeking to appeal the determination by Aroni J. That the applicant ought therefore to wait for an opportunity to argue his appeal at the Court of Appeal. As a consequence, counsel urged this court to dismiss the application for the same was devoid of merit.
10. I have considered the application herein together with submissions by both parties. The only issue for determination is whether the order for resentencing can be granted.
11. The applicant has invoked the resentencing jurisdiction of this court as was laid down by the Supreme Court in *Francis Karioko Muruatetu & another v Republic* Petition No. 15 and 16 of 2015 where the Learned Judges held that section 204 of the *Penal Code* was unconstitutional in so far as it provided for the mandatory death sentence for the reasons that it limited the trial court's exercise of discretion while sentencing. The court while remitting the matter to the High Court for re-hearing on sentence held that: -

“The facts in this case are similar to what has been decided in other jurisdictions. Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing...”

12. In the instant case, the applicant was convicted and sentenced by the trial court. Subsequently, he appealed to this court and the appeal was upheld by Aroni J. (as she was then). From the record, the applicant has since filed a notice of appeal seeking to quash and set aside the determination by Aroni J.
13. It is trite 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 court. 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. [Also See *Republic v Ongaro & another* (Criminal Case 62 of 2013) [2023] KEHC 2309 (KLR)].
14. It is this court's considered opinion that the applicant having lodged an appeal before the Court of Appeal at Nairobi seeking to overturn the finding by Aroni J, it would be prejudicial and embarrassing to this court if the court of appeal were to arrive at a verdict different from the finding of this court.



15. From the foregoing, it is my finding that I have no jurisdiction to entertain the applicant's application for resentencing and as such, I am inclined to dismiss the application herein on grounds that this court is *functus officio*.

DATED, SIGNED AND DELIVERED THIS VIRTUALLY THIS 18TH DAY OF DECEMBER 2023

J. N. ONYIEGO

JUDGE.

