



REPUBLIC OF KENYA



**Ileh v Republic (Miscellaneous Criminal Application E011 of 2023)
[2023] KEHC 27352 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
MISCELLANEOUS CRIMINAL APPLICATION E011 OF 2023**

JN ONYIEGO, J

DECEMBER 18, 2023

BETWEEN

ABDIGOROT YARROW ILEH APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant herein was tried and convicted of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on 05.11.2018 at Danyere market in Balambala Sub County within Garissa County jointly with others not before the court murdered Abaile Sagar Dagane.
2. The accused pleaded not guilty and the matter went to full trial with the prosecution calling a total of seven witnesses in support of their case. The trial court upon hearing and considering the evidence before it delivered its judgment on 11.08.2022 thus convicting the accused and thereafter sentenced him to serve 10 years' imprisonment.
3. Subsequently, he filed the current application on 22.05.2023 seeking for orders that this Honourable Court be pleased to review its sentence on grounds that; he had learnt his lesson; he is elderly aged 75 years; he is remorseful and further, that his siblings depended upon him for sustenance. He urged that by this court allowing the application herein, the same would offer him an opportunity to regain his life and correct his mistakes. He thus urged this court to grant the prayers sought.
4. Directions were taken that the application be canvassed by way of written submissions.
5. The applicant in his oral submissions argued on 21.11.2023, urged this court to review his sentence noting that he is an old man aged 80 years. That he had been in lawful custody for a period of 5 years and therefore, it was only just and mete that this court allows the application herein.



6. Mr. Kihara, the learned prosecution counsel in rebuttal submitted that the application herein is incompetent as the issues raised had been determined by a court of equal jurisdiction to this court. The court was therefore urged that prior to sentencing, the applicant was given an opportunity to mitigate and therefore, allowing this application was tantamount to this court sitting on its own appeal. As a consequence, counsel urged this court to dismiss the application for the same was devoid of merit.
7. I have considered the application herein together with the submissions by both parties. The only issue for determination is whether the order for resentencing can be granted.
8. The applicant has invoked the resentencing jurisdiction of this court as was laid down by the Supreme Court in *Francis Kariuki Muruatetu & Another v Republic* Petition No. 15 and 16 of 2015 wherein 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...”
9. In the instant case, the applicant was afforded an opportunity to mitigate before sentencing. Although elderly, justice must be balanced. 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.
10. 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)].
11. From the foregoing, it is my finding that I have no jurisdiction to entertain the applicant's application in resentencing. In any event, the applicant should be grateful that he was given a more lenient sentence considering the seriousness of the offence.
12. For the foregoing reasons, the upshot of this court's decision is that the applicant's prayer for resentencing is hereby declined.

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

J. N .ONYIEGO

JUDGE

