



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC REVISION NO. E012 OF 2021**

**(FROM ORIGINAL CASE IN ANTI-CORRUPTION NO. 23 OF 2019)**

**GEORGE GICHURI KARUME.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. By the Notice of Motion dated 29<sup>th</sup> September, 2021 brought under a Certificate of Urgency of even date and which is supported by an affidavit sworn on even date the Applicant seeks orders as Follows:-

- a) That the Court be pleased to hear and determine this application for review of the imposed sentences;*
- b) That the Honourable Court be pleased to make an order to vary the sentence meted and discount time spent in remand pursuant to section 333(2) of the Criminal Procedure Code.*
- c) That the Court be pleased to make any other order which it deems fit and just.*

2. The application is brought under section 362 of the Criminal Procedure Code and is premised on grounds that :-

- a. By a Judgement dated 14<sup>th</sup> May, 2020, this Honourable Court upheld the sentences handed down by the magistrate's court.
- b. The learned magistrates court erred in law and fact by meting out consecutive sentences on account of offences arising from the same transaction.
- c. Settled practice obtains that a concurrent sentence be handed down when the offences form part of the same transaction.
- d. The applicant has already served a two-year sentence and is still being held at the Nairobi Remand and Allocation Maximum Security Prison.
- e. The Applicant is ready and willing to pay a fine of KSH. 1,000,000/= to the government in consideration of the reviewed sentence.
- f. The Applicant is of frail health and suffers from angina pectoralis. on three occasions the applicant has contracted the dreaded corona virus. With his pre- existing condition, he stands at great risk of a fatal attack given the crowded nature of prisons.
- g. The applicant's wife is similarly suffering from ulcerative colitis. This has placed the applicant's children in a state of anxiety as the cost of treating the condition has taken a toll on the family's finances.
- h. It is in the interest of justice that the matter be certified as urgent and the orders sought herein be granted.

3. The Respondent vehemently opposed the Application through its Grounds of Opposition dated 14<sup>th</sup> December 2021 in which it asserts firstly, that this court is *functus officio* as it cannot review its orders and secondly, that the Application is an abuse of the court process as the court has already rendered itself in an appeal on sentence.

### **Background**

4. The Applicant was charged, tried, convicted and sentenced as follows by the Anti-Corruption Court:

a. Count 1: Conspiracy to commit an economic crime contrary to Section 47(A) (3) as read with Section 48 of Anti-Corruption and Economic Crimes Act. He was sentenced to a fine of Kshs. 700,000 in default to serve 12 months' imprisonment, and in addition to pay a fine of Kshs. 280,000.

b. Count 3: Obtaining money by false pretenses contrary to Section 313 of the Penal Code in which he was sentenced to pay a fine of Kshs. 50,000 and in default to serve 6 months imprisonment.

c. Count 4: Making a false document contrary to Section 347 as read with Section 349 of the Penal Code in which he was sentenced to pay a fine of Kshs. 50,000 and in default to serve 6 months imprisonment.

d. Count 5: Uttering a false document contrary to Section 353 of the Penal Code in which he was sentenced to pay a fine of Kshs. 50,000 and in default to serve 6 months imprisonment

e. Count 6: Making a false document contrary to Section 347 as read with Section 349 of the Penal Code in which he was sentenced to pay a fine of Kshs. 50,000 and in default to serve 6 months imprisonment

f. Count 7: Uttering a false document contrary to Section 353 of the Penal Code in which he was sentenced to pay a fine of Kshs. 50,000 and in default to serve 6 months imprisonment.

5. Being aggrieved he filed an appeal which was heard and dismissed by Mumbi J, as she then was, in a judgment delivered on 14<sup>th</sup> May, 2020.

6. His present application seeks a review of the judgment of the trial court on the grounds stated on the face of the application.

7. The application was canvassed through written submissions.

### **Submissions of the Applicant**

8. Learned counsel for the Applicant submitted that as at the date of this Application, the Applicant had served more than 24 months out of the aggregate sentence of 39 months imprisonment. That the trial court imposed consecutive sentences in different counts despite the offences arising from the same transaction and that Section 14 (2) of the Criminal Procedure Code and Rule 7.13 of the Sentencing Policy Guidelines obligate the court to grant either consecutive or concurrent sentences depending on the circumstances under which the offences were committed. Counsel submitted that what determines a concurrent or consecutive sentence is whether the offences were committed in a common transaction. Counsel cited the *Court of Appeal decision in the case of Peter Mbugua Kabui v Republic [2016] eKLR* where the court held:

***“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act or transaction, then a concurrent sentence should be given.”***

9. Counsel stated that the Applicant committed all the offences over the same period of time between 11<sup>th</sup> May 2015 and 16<sup>th</sup> December 2015 and the actions were connected in criminality and the criminal intent to defraud. Counsel asserted that the same “transaction rule” defined as follows in the case of **Republic v Saidi Nsbuga S/O Juma and another [1941] eKLR EACA** :

***“If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose or by relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.”***

10. Counsel stated that this court has jurisdiction under **Section 362 of the Criminal Procedure Code** to review the sentence and that this court may call for and examine the records of the subordinate court for the purpose of satisfying itself on the correctness, legality or propriety of any finding, sentences or order. To support this submission Counsel cited the case of, **Ogalo s/o Owuora versus R.E.A CA 270**.

11. Counsel also cited Article 50 (2) of the Constitution and argued that every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishment.

### **Submissions of the Respondent**

12. On her part learned Counsel for the Respondent started by rehashing the historical background of this matter. Counsel then submitted that this Honourable court is *functus officio* and this application is an abuse of the court process since the issues raised were determined by a court of similar or concurrent jurisdiction. Counsel stated that the issue of sentence was determined through the judgment of, Mumbi J, as she

then was, in *Criminal Appeal No. 28 of 2019 George Gichuri Karume v Republic* and this court cannot therefore render itself on the same issues. Counsel also submitted that the particulars enumerated in the charge sheet were committed on diverse dates against different complainants and the same cannot therefore be reviewed under Section 362 of the Criminal Procedure Code. Counsel contended that the sentences imposed upon the Appellant were legal and that the trial court considered all the applicable principles before imposing those sentences. Counsel relied on the case of *Simon Nyoike Gakuo v Republic [2019] eKLR*.

13. Counsel averred that however should this court be of the opinion that the sentences imposed upon the Applicant form part of a similar transaction and considers the period spent in remand as sufficient, the court should make a determination on the payment of fine by the Applicant.

#### Issues for determination

14. The following issues arise for determination:

*a. Whether this court has jurisdiction to hear and determine this Application; and*

*b. Whether the Applicant has met the threshold for the grant of the reliefs sought.*

#### Analysis and determination.

15. The preliminary issue arising in this application is whether this court has jurisdiction to hear and determine the Application. The Applicant argues that this court has jurisdiction under Section 362 of the Criminal Procedure Code to review the orders of the trial court. **Section 362 provides:**

#### Revision

##### **362. Power of High Court to call for records**

*The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. [Emphasis mine]*

16. I have considered the issue of jurisdiction carefully and my findings are as follows:- Section 362 of the Criminal Procedure Code reproduced above only provides for revision in respect of orders of a subordinate court where the Applicant has not preferred an appeal against the trial court's Judgment. No provision is made for the High Court to revise or review its own Judgment. Once The High Court has exercised its powers on appeal it becomes "*functus officio*" and has no authority to revise its own orders. The court cannot sit on a further revision of its own orders, as the appropriate forum to challenge the decision is to appeal or to seek a review into a higher court. In the case of *Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 others [2013] eKLR* the Supreme Court discussing the aforesaid doctrine stated as follows:

*17. "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 or adjudication must be taken to a higher court if that right is available." (emphasis mine).*

18. The Supreme court continued further to cite with approval an excerpt from an article by Daniel Malan Pretorius "**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."*

19. The issue of the sentences imposed by the learned trial magistrate having been canvassed before Mumbi J, as she then was, and the appeal thereof having been determined this court has no jurisdiction to re-open the same the reason being that I have no jurisdiction to revise or review the judgment of a court of equal or concurrent jurisdiction. The applicant's recourse would be to appeal or to seek a review in the Court of Appeal as provided in Article 50 (2) (q) of the Constitution.

20. On the issue of time spent in remand it is my finding that whereas this was the gist of the applicant's Notice of Motion, and whereas this court is obligated under Section 33 of the Criminal Procedure Code to consider the time spent in remand before sentencing an accused person, the Applicant seems to have abandoned this line of argument and instead pursued the line of severity of sentence. Be that as it may I find that even then the issue of Section 33 of the Criminal Procedure Code ought to have been ventilated before Mumbi J, during the hearing of the appeal. Moreover, the issue of the severity and legality of the sentences were dealt with by the judge and it would be wrong for me to revisit the same.

21. In the upshot I find no merit in this application and the same is dismissed.

**Dated, signed and delivered virtually this 7<sup>th</sup> day of April, 2022.**

**Hon. E.N Maina**

**Judge**

**In the presence of:-**

***Miss. Ndombi for the state/Respondent***

***Mr. Onyango Holding brief for Mr. Allamano for the Applicant***

***The Applicant appearing virtually from Nairobi Industrial Area Prison.***

***Hope Joe – Court Assistant.***