



**Malley v Republic (Miscellaneous Criminal Application 142 of 2018)
[2022] KEHC 470 (KLR) (Crim) (20 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 470 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION 142 OF 2018
HI ONG'UDI, J
MAY 20, 2022
IN THE MATTER OF HCCCR 88/2005) AND IN THE MATTER OF CRA 14/2017
BETWEEN
FR. GUYO WAQO MALLEY APPLICANT
AND
REPUBLIC RESPONDENT**

RULING

1. Fr. Guyo Waqo Malley the applicant herein filed the chamber summons dated 8th March 2022 under Sections 333(2), 362, 354, 358 of the *Criminal Procedure Code* Cap 75 & Articles 50(1)(2) & 159 of the *Constitution*. It is supported by his sworn affidavit of even date.
2. His prayer is for the Court to review his sentence of 27 years and place him on probation. The request is based on his poor health. He has deponed that he has been in custody since 2005 and has developed numerous illnesses. He has visited Kenyatta National Hospital and Kiambu Level 5 Hospital for management of the health issues, but he has to improved.
3. He therefore prays to be given a non-custodial sentence for purposes of proper management. He availed to court a medical report form Kiambu County Referral Level 5 Hospital.
4. M/s Odembo for the applicant has submitted rehashing what the Applicant has deponed in his affidavit. She further submits that the applicant is due for an operation within the next 3 months, hence the need to be out of the prison. She urges the Court to place the applicant on probation.
5. M/s Odembo has referred to a number of decisions on re-sentencing by various courts. On the issue of jurisdiction she contends that the matter is properly before this court since it deals with violation



- of constitutional rights. Its her further contention that the applicant has a right to good health and treatment.
6. Mr. Achochi for the State (respondent) opposed the application arguing that it had no basis. Further that the medical assistance sought could be obtained from any Government hospital. He submits that there are no reports to confirm the various illnesses allegedly suffered by the applicant. Further that the author of the report presented was not before the court.
 7. Mr. Achochi argues that the applicant is not entitled for placement on probation which is for minor offenders. He has referred to the various courts where the applicant has been and wondered whether he would not be back here tomorrow.
 8. On the issue of jurisdiction he submits that this court has handled this matter before. It is therefore *functus officio*. Further that the doctrine of *res-judicata* is applicable since the parties involved are the same.
 9. The applicant and others were charged and convicted of the offence of murder of the late Bishop Luigi Locati. They were all sentenced to suffer death on 6th November 2014. The death sentence was later on commuted to life sentence for each by his Excellency the President of the Republic of Kenya.
 10. The applicant and the others vide a notice of motion dated 8th April 2018 and a chamber summons dated 4th January 2019 sought for re-sentencing in line with the first Supreme Court decision in Petition No. 15 & 16 of 2015 (consolidated) *Francis Karioko Muruatetu & another v. Republic* [2017] eKLR.
 11. Upon hearing the said application this court substituted the life sentence the applicant was serving with a sentence of twenty seven (27) years to run from the date he was first arraigned in Court. This ruling was delivered on 30th July 2021. The court also granted them leave to appeal the Ruling.
 12. I have given this history to confirm that his court has dealt with re-sentencing in this matter. This request is therefore a second one. Is it provided for in the law? The applicant has relied on several sections of the *criminal procedure* code but none of them speaks to the scenario prevailing here. Articles 50(1) & (2) have been duly complied with as he has been heard, and was even heard before. Article 159 is also not applicable as he is not complaining of any violation of any of the provisions thereunder. All he is seeking is for this court to give him a second bite of the cherry. Does the law allow this Court to handle the re-sentencing a second time or is the court *functus officio*?
 13. The Supreme Court of Kenya in the case defined what *functus officio* is in the case of *Raila Odinga & 2 others v. Independent Electoral Boundaries Commission & 3 others* [2013] eKLR where it states:-
 - (18) We therefore have to consider the concept of “*functus officio*,” as understood in law. Daniel Malan Pretorius, in “The Origins of the *functus officio* Doctrine, with Specific Reference to its Application in Administrative Law.” (2005) 122 SALJ 832, has thus explicated this concept:

“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 a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”
 - (19) 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” [emphasis supplied].

14. The same issue was also dealt with by the Court of Appeal in the case of *Telkom Kenya Limited vs. John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited* [2014] eKLR where the court stated:-

“The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit – based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”

15. A consideration of the above decisions reveals that once a court has performed all its duties in a particular case it becomes functus officio. This court did the review or re-sentencing of the applicant’s death sentence and gave him a lesser sentence. It’s assignment ended there. Being involved in “another re-sentencing over the same matter and applicant irrespective of the reasons given would result in giving orders through the back door which would amount to an illegality. Any grievances may only be addressed by the Court of Appeal or under the Section 46(1) & (4) of the *Prison Act*. The challenges the applicant is facing, notwithstanding I find the application to lack merit. The same is dismissed.

Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 20TH DAY OF MAY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG’UDI

JUDGE OF THE HIGH COURT

