



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Okoth (Criminal Case 60 of 2013)  
[2022] KEHC 13020 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13020 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL CASE 60 OF 2013  
KW KIARIE, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**NICHOLAS OKOTH ..... ACCUSED**

**RULING**

1. This is a case with a very interesting twist. Nicholas Okoth was charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. He was tried and this court (Majanja J.) found him guilty, convicted him and sentenced him to death as provided for under section 204 of the *Penal Code*.
2. He was dissatisfied with both conviction and the sentence. He appealed to the Court of Appeal where the conviction was upheld. However, the Court of Appeal directed that the matter be remitted to this court for resentencing. This is what the court said:  
  
Regarding sentence, we direct that this matter be remitted to the High Court for the taking of mitigation and resentencing in accordance with the decision of the Supreme Court in Muruatetu. This matter shall be mentioned before the High Court at Homa Bay within fourteen (14) days of the date hereof for the purposes of fixing a date for an expeditious resentencing hearing.
3. When this matter came up for mention, I invited submissions on the issue of resentencing and whether this court has jurisdiction to do so. The counsel for the accused opted to rely on the record while the prosecution counsel filed submissions.
4. I may not know why the Court of Appeal decided to remit this matter for mitigation. On June 27, 2016, Mr. Osoro the advocate for the accused mitigated on behalf of the accused and informed the trial court that:



The accused is a first offender. He is remorseful. He has a young family and is the breadwinner. I pray for leniency.

5. The Supreme Court in the case of [Francis Karioko Muruatetu & another v Republic](#) [2017] eKLR stated:

[112] Accordingly, with regards to the claims of the petitioners in this case, the court makes the following Orders:

- a. The mandatory nature of the death sentence as provided for under section 204 of the [Penal Code](#) is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under article 26(3) of [the Constitution](#).
  - b. This matter is hereby remitted to the High Court for re- hearing on sentence only, on a priority basis, and in conformity with this judgment.
  - c. The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same.
  - d. We direct that this Judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law, to give effect to this judgment on the mandatory nature of the death sentence and the parameters of what ought constitute life imprisonment.
6. This is the basis on which the Court of Appeal remitted this matter to this court.
7. The issue of resentencing poses a question on the doctrine of *functus officio*. The [Black's Law Dictionary](#), Tenth (10<sup>th</sup>) Edition describes *functus officio* as:

[having performed his or her office]” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.

In [Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others](#) [2013] eKLR the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, [“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.

At paragraph 19 in the [Raila Case](#) (Supra) the court further stated:



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”

8. Sentencing is a judicial exercise. Once 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 one. *Black's Law Dictionary Tenth* (10<sup>th</sup>) Edition defines sentence as:

The judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer.

9. In Criminal Petition No.13 of 2019 *George Oyengo Barasa v Republic* when faced by a similar issue of resentencing, I made the following observations:

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. This is an illegality.

10. I agree with the court in the case of *Stephen Mugendi Ndwiga v Republic* [2021] eKLR where lady Justice Lucy Njuguna stated that:

It is my considered view that this court cannot review a judgment of Hon. S. Chitembwe J. and in doing so resentence the petitioner herein while invoking the dictum in Muruatetu's case despite the change in law. Doing so would be tantamount to reopening the matter and applying the judicial decision retrospectively. Further this court is bereft of jurisdiction to review the said judgment as doing so would be tantamount to sitting as an Appellate court on the judgment of the Learned Judge and which act the law abhors. 21. In the same breath, this court cannot review the said judgment and in doing so take into account the time the petitioner had spent in custody. The same ought to have been dealt by Hon. Chitembwe J. as the first appellate court. Failure by the said first appellate court to consider the said period cannot be rectified by this court as the same shall be akin to reviewing the decision of a court of concurrent jurisdiction.

11. Jurisdiction is a creature of statute and cannot be conferred by the superior courts. As far as am aware, the Criminal Procedure Code has not been amended to address the issue of resentencing. The Supreme Court in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR stated as follows:

68) A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

12. I therefore find that I have no jurisdiction to address the issue of resentencing in this matter.

**DELIVERED AND SIGNED AT HOMA BAY THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2022**

**KIARIE WAWERU KIARIE**



**JUDGE**

