



**Mwangi v Republic (Miscellaneous Criminal Petition E089 of 2021)  
[2022] KEHC 14704 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14704 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS CRIMINAL PETITION E089 OF 2021  
MW MUIGAI, J  
OCTOBER 27, 2022  
ARISING FROM KAJIADO CRIMINAL CASE NO. 653 OF  
2012 & MACHAKOS CRIMINAL APPEAL NO. 70 OF 2013**

**BETWEEN**

**JOSEPH MWANGI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The applicant herein Joseph Mwangi was charged in the Kajiado Principal's Magistrate Criminal Case No 653 of 2012 with the offence of defilement contrary to section 8(1) as read with section (3) of the *Sexual offences Act* No 3 of 2006 and convicted to serve a period of 20 years imprisonment on February 22, 2013.
2. Aggrieved by the conviction and sentence the applicant filed an appeal in this court being Machakos Criminal Appeal No 70 of 2013 and the appeal was dismissed and the conviction and sentence upheld.

**Chamber summons dated December 3, 2021**

3. Aggrieved by the sentence, the applicant on 3<sup>rd</sup> December, 2021 filed in court a petition under certificate of urgency seeking the following prayers:-
  - a. That this court issue orders for special hearing of this application for resentencing pursuant to the Supreme Court decision in *Evans Wanjala Wanyonyi -vs- Republic [2019] eKLR, Court of Appeal Criminal appeal No 312 of 2018 at Eldoret* .



- b. That the sentence already served be warranted as sufficient and this court set aside the sentence of twenty (20) years with the sentence so far served.
- c. That the applicant be present during the hearing of this application.

### **Replying affidavit**

4. The respondent filed their replying affidavit on February 21, 2022 sworn by Mr Mwongera deposing as follows:-
  - a. That the applicant was convicted and sentenced to serve 20 years' imprisonment.
  - b. That the applicant appealed to the High Court in HCRA No 70 of 2013, whereupon the appeal was dismissed and both the conviction and sentence upheld.
  - c. That the applicant should first exhaust his right of appeal to the Court of Appeal.
  - d. That the doctrine of *functus officio* bars this court from proceeding with this matter since it heard and substantively dealt with the appeal.
  - e. That this application lacks merit and should be dismissed in its entirety.
5. The Applicant filed his written submissions on January 12, 2022 and the respondent filed theirs on July 27, 2022.

### **Applicant's written submissions**

6. That the Court of Appeal in the case of *Evans Wanjala Wanyonyi* gave the specifically the guidelines given at clause 70 & 71 which provided 8 (eight) tests to be applied by the courts when resentencing:
  - a. Age of the offender
  - b. Being a first offender
  - c. Whether the offender pleaded guilty
  - d. Character and record of the offender
  - e. Commission of the offence in response to gender –based violence
  - f. Remorsefulness of the offender
  - g. The possibility of reform and social re-adaptation of the offender
  - h. Any other factor that the court considers relevant
7. The applicant submitted that he regrets the unfortunate incident as he caused a lot of agonies to the complainant and his entire family too and he is remorseful. He has made peace with himself and with God. That for the few years that he has been in prison he has acquired skills for personal development as well as helping my fellow inmates. He has acquired certificates in painting grade I, II & III as well as certificate in sign writing grade II & III. He prays that he be given a second chance so that he go back home and mentor his 2 children as well as provide for his immediate family and his ailing mother.
8. Reliance was made in the case of *Evans Wanjala Wanyonyi –vs- Republic* [2019] eKLR held:

' In this appeal, guided by the merits of the Supreme Court decision in *Francis Karioko Muruatetu & another – v- Republic* (supra) and persuaded by the decisions of this court



in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal No 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years with effect from the date of sentence by the trial court on September 18, 2015.'

9. The applicant further prays that this court sentences him to a term equivalent to the number of years he has served or any other appropriate sentence the court will consider fit but be persuaded by his submissions herein in.

### **Respondent's submissions**

10. The respondent submitted that this court has already dealt with this matter vide HCRA No 70 of 2013 whereby the appeal was dismissed and conviction and sentence upheld therefore the applicant should first exhaust his right of appeal to the Court of Appeal. This court is therefore functus officio.

11. Reliance is made 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* the court observed thus;

' Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19<sup>th</sup> Century.'

12. Once a court becomes functus officio the only orders it can grant are review orders which are an exception to the functus officio doctrine. This was aptly summarized in the case of *Jersey Evening Post Limited –vs- Al Thani [2002] JLR 542 at 550* which was cited and applied by the Supreme Court in *Raila Odinga & 2 others –vs- IEBC & 3 Others [2013] eKLR* that:

' 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'

### **Determination**

13. The court perused the court file High Court Criminal Appeal 70 of 2013, where the appellant appealed against conviction and sentence against the trial in Kajiado Criminal Case 653 of 2012.

14. By judgment delivered on July 21, 2015 by Hon P Nyamweya J (as she then was) where the conviction and sentence were upheld.

### **Section 333(2) Of the Criminal Procedure Code**

15. In this court the applicant sought that the sentence of 20 years imprisonment be computed in compliance of section 333(2) of *Criminal Procedure Code* by taking into account the period the applicants spent in custody during trial upto the date of sentencing.



16. The Judiciary Sentencing Policy Guidelines at paragraph 7.10 and 7.11 are to the effect that the proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial.

#### Review/revision

The Criminal Procedure Code provides;

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.

364. Powers of High Court on revision

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

17. The High Court is vested with appellate and supervisory jurisdiction over matters heard and determined by the magistrates' court.
18. The instant case, the appeal was heard and determined in the High Court as the court of 1<sup>st</sup> appellate court. The 1<sup>st</sup> appellate court is of similar, competent and concurrent jurisdiction as this court. Therefore, the court cannot revise or amend its judgment or ruling after pronouncement and delivery. The court cannot legally interfere with the judgment or ruling of the trial court of equal and similar jurisdiction as is the case herein. In short, this court lacks jurisdiction to entertain the question of conviction and resentencing, the computation of sentence provided by section 333(2) CPC in a matter heard and determined by a similar court and lacks appellate powers to hear and determine the appeal.
19. For these reasons, outlined above section 333(2) criminal procedure code though mandatory, is to be applied on a case by case basis taking into account the jurisdiction of the court availability of the original record and confirmation that the applicant was/is in custody for a determinate period before sentencing.

#### Disposition

1. This court is functus officio over its own decisions and the applicant should move to the Court of Appeal.



2. The application is dismissed.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 27<sup>TH</sup> DAY OF OCTOBER 2022  
(VIRTUAL/PHYSICAL CONFERENCE).**

**M.W MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

JOSEPH MWANGI - APPLICANT

MWONGERA - FOR THE RESPONDENT

GEOFFREY/PATRICK - COURT ASSISTANT (S)

