



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION 257 OF 2019

IN THE MATTER OF: ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22(1) OF THE CONSTITUTION

AND

IN THE MATTER OF: ARTICLE 165 AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW

AND

IN THE MATTER OF: HIGH COURT CRIMINAL CASE NO. 12 OF 2006 AT NAIROBI.

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 50 (2) (P)

AND

IN THE MATTER OF; SECTION 333(2) OF THE CRIMINAL PROCEDURE CODE.

BETWEEN

JULIUS KAMAU MBUGUA.....APPLICANT

-VERSUS-

THE DPP.....RESPONDENT

RULING

1. The application herein is brought vide a chamber summons dated 4th October 2019, wherein the Applicant is seeking for several orders as stated therein. However, a glance of the same, it is clear that, the only substantive prayers are prayers; 3, 4 8 and 10. The other prayers, 1 and 2 are overtaken by events while the others are matters of submissions, being basically case law relied on in support of the application.

2. The main prayers are as reproduced here below: -

a. That, this Hon. Court be pleased to review the sentence I am serving 30 years downwards.

b. That, this Hon. Court makes a finding that the Law envisages that, the sentence should run from the date of arrest as opposed to the date of conviction (within the meaning of section 333(2) of the Criminal Procedure Code.)

c. That, this Hon. Court declares that my sentence ought to have run from the date of arrest.

d. Such other orders that the Court may deem fair and just.

3. The application is supported by the affidavit sworn by the Applicant dated; 4th October 2019, wherein he deposes that, he was charged in the High Court at Nairobi, with the offence of; murder contrary to section 203 as read with section 204 of the Penal Code. He was subsequently, convicted and sentenced to thirty (30) years imprisonment on 17th October, 2011.

4. The Applicant further averred that, the trial court has a duty to; “protect, promote, preserve and bring into reality the values and principles

that, inform the constitution.” That, Article 27 (1) of the Constitution of Kenya accords equal protection and benefit of the law to all persons. The Applicant appealed to the court to reduce the sentence so that he can take care of his children go to school.

5. However, the application was opposed by the Respondent and although the Respondent did not file any formal response to the application, the learned State Counsel, Ms Chege orally submitted and concurred that, the Applicant was charged with the offence of murder as aforesaid and sentenced to serve thirty (30) years in prison. However, there is nothing to warrant reduction of the sentence since the same was legal and proper. That given the nature of the offence, the application ought to be dismissed and the applicant serves the full term. The Applicant did not respond to the Respondent’s submissions.

6. Be that as it were, to put this matter in perspective, I shall address the historical background thereof. The Applicant was charged with the offence of; murder contrary to section 203 as read together with section 204 of the Penal Code vide High Court Criminal Case Number 12 of 2006; Republic –vs- Julius Kamau Mbugua. He was arrested on 7th December 2005 and arraigned in court the following day of 8th December 2005.

7. The information was read to him and he pleaded not guilty. The prosecution called nine (9) witnesses in support of its case. In a nutshell, it was the prosecution case that, the Applicant and the deceased were husband and wife respectively. That, on the 19th September, 2005, the Applicant returned home and demanded for money from the deceased to buy cigarettes. However, when the deceased did not to give him any money, a quarrel ensued and the accused hit the deceased on the head with a metal bar.

8. On realizing that, the deceased had become unconscious, the Applicant sent his children to call the sister in law in the neighborhood who assisted him to take care of the deceased, as a vehicle was sought to take her to hospital. However, she passed on before being attended to at the hospital. Subsequent a post mortem was carried out which revealed that, the cause of death was due to “brain contusion occasioned by head injury as a result of blunt force”. The Applicant was held as a suspect after investigation, arrested and charged accordingly.

9. At the close of the prosecution case, the trial court ruled that the Applicant had a case to answer and placed him on his defence. In a sworn statement he denied the offence and testified that, on the material date, he returned home from the funeral of his sister at Ol Kalou and found the deceased sleeping. That, the deceased told him she was feeling unwell. She had an injury on the leg occasioned by a fall from a tree. He promised to take her to the hospital the following day.

10. However, her condition deteriorated and he sought for help to take her to hospital but unfortunately, she passed on before reaching the hospital. That he informed his in-laws of the death incident, but he was not allowed to bury the deceased. She was buried at her parents’ home. The Applicant called his elder son as his witness. He testified that, the deceased had an injury on her leg and a few days before her death, he had given her Kshs 200 and had been attended to, at Thika District Hospital. A few days later he heard that she had died.

11. The trial court evaluated the evidence adduced and concluded that, the prosecution had proved its case beyond reasonable doubt, based on the evidence of the Applicants’ two children who witnessed the incident and corroborated by the post mortem report that, the cause of death was injury on the head and not the leg. The trial court, thus concluded that, the acts of the Applicant hitting deceased’s head with a metal bar constituted malice-aforethought as defined in section 206 of the Penal Code and convicted him, vide a judgment delivered on 18th October, 2011.

12. In mitigation, the Applicant pleaded for a non-custodial sentence being a first offender with no record of previous criminal convictions and since he had been in custody since 2006. That, he has a family of six (6) children and was remorseful. He requested for leniency, saying that, this was an isolated incident. Further, he did not flee after the incident. He assisted in getting a vehicle to take the deceased to hospital and informed the in-laws in good faith about the incident.

13. Having considered the mitigation, the trial court, sentenced the Applicant to serve thirty (30) years imprisonment, with a right of appeal within fourteen (14) days.

14. Apparently during the hearing of the case, the Applicant filed a petition challenging the validity of the charge on the ground that he had been held in custody for a period of a hundred and seven (107) days before he was charged, thus violating his constitutional rights. The Petition was canvassed and the trial court rendered a ruling thereon on 16th November, 2008, dismissing the same and placing the Applicant on his defence. The Applicant subsequently appealed against that ruling but the court of Appeal through a detailed ruling dated 8th October 2010, dismissed the appeal.

15. Similarly, after the judgment, the Applicant filed a notice of appeal under Rule 58 the Court of Appeal Rules and grounds of appeal in the Court of Appeal on; 25th October, 2011, against sentence and conviction. It suffices to note that, one of the grounds relied was that, the sentence meted herein was excessive. However, there is no evidence availed as to whether the appeal was ever pursued, withdrawn and/or abandoned.

16. Be that as it were, on 25th October 2012, the Applicant filed what is described as a “second appeal” in the Criminal Division of the High Court, under; “Rule 110 of the Court of Appeal”, alongside a memorandum of appeal. Again the status of that “appeal” is not clear.

17. In the same vein, while the revision application herein was pending, the Applicant filed another application for revision of sentence vide High Court Criminal Revision No. E102 of 2010. Apparently, the parties herein did not draw the court’s attention to all these matters and the same was noted as the court was dealing with the subject application herein. It therefore suffices to note that, the Applicant has numerous applications and/or appeal relating to the subject matter herein.

18. Be that as it may, to revert back to the matter herein, the Applicant has invoked the provisions of; Article 22(1), 50 (2) (p) and 165 of the Constitution of Kenya, 2010 and Section 333 (2) of the Criminal Procedure Code. Basically the Applicant is challenging the sentence. In

that regard the primary provisions of section 333(2) of the Criminal Procedure Code, states that: -

“(2) Subject to the provisions of section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

19. However, the main provisions for revision of sentence under the Criminal Procedure Code is provided for under sections 362 and 364 of the Criminal Procedure Code. These provisions provide that;

362 (2) “The High Court may call 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 subordinate court”.

364 (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;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order”.

20. From the above provisions it is clear that, the power of the court there-under is bestowed upon the High Court pursuant to the provisions of; section 165 of the Constitution of Kenya, 2010. The subject provisions give the High Court “supervisory jurisdiction over inter alia subordinate courts” and stipulates as follows: -

“165 (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice” (emphasis added).

21. Therefore the High Court has no supervisory jurisdiction over itself as a superior court or any other superior court. The rationale is clear, that once a court has pronounced its final decision in the matter, the court becomes *functus officio*. That, once a judgment has been given, the judge is *functus officio*: He has no power to make changes in his decision, which can only be questioned by others presiding in the further courts of appeal.

22. In that regard, in *Chandler v Alberta Association of Architects*, (1989) 2 SCR 848, Justice Sopinka wrote in relation to the principle of *functus officio*, as follows: -

"The general rule (is) that a final decision of a court cannot be reopened....

"The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions: where there had been a slip in drawing it up, and where there was an error in expressing the manifest intention of the court."

In the context of “[criminal law](#)”, Ruby, C. and others, *Sentencing, 7th Edition* (Toronto: LexisNexis, 2008).

wrote:

"The expression *functus officio* means having discharged a duty”.

"When used in relation to a court, it may also mean whose duty or authority has come to an end.

"Once a court has passed a valid sentence after a lawful hearing, it is *functus officio* and cannot re-open the case."

23. However, it is noteworthy that most litigants who lose their case try to re-engage the court by citing an error on a point or new evidence, due misunderstanding of the finality of a judicial decision. Thus to promote finality of judicial decisions which would otherwise be subject to applications to reopen the case by all disappointed litigants, once a decision is issued, the judge loses his/her authority to further rule on it. He/she is without authority; no longer seized of the [litigation](#); *functus officio*. This leaves the litigant with the sole recourse of an [appeal](#).

24. Indeed, *functus officio* is commonly described as “a rule about finality”, as held in; *Capital District Health Authority vs Nova Scotia Government and General Employees Union, 2006, NSCA*. The motivating rationale behind the *functus officio* doctrine is no different than that for *res judicata* and other finality doctrines, as stated in; *Corlac Inc v Weatherford Canada Ltd, 2012, FCA 261*, and the public interest in the finality of authoritative decisions as *Reekie v Messervey (1990) 1 SCR, at 222–23, 66 DLR (4th) 765 [Reekie]*. As Justice Southin of the British Columbia Court of Appeal *Mayer v Mayer Estate, 83 BCLR (2d) 87, (1993) Can LII 686* said,

“When a question, be it legal or political, has been stirred and stirred again, there must come a time when all concerned must accept the decision of those with power to decide and move on to the next question. If that be not so, our society will come to a standstill.”

25. Finally, if there was no doctrine of finality, in decision making, the public would rightly lose respect in the justice system that does not respect the finality of proceedings, and fails to place clear limits on judges and administrative decision-makers’ ability to change their minds, unravel their own decisions and make new ones. In a nutshell, finality of decisions brings order, security, economy and peace of mind for all involved.

26. To revert back to the matter herein, just as the subordinate courts do not review their own decisions: conviction and/or revision of sentence, by analogy the High Court cannot do so nor even review sentence meted by any other superior court. The provisions of section 364 (5) of the Criminal Procedure Code also states that: -

“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”

27. In the given circumstances the court has no jurisdiction to determine this matter and therefore the subject application herein is incompetent for want of jurisdiction and is accordingly struck out. In that case, I shall not delve into the merits of the matter and all legal authorities cited by the Applicant are preserved for the appeal (if need arises) Thus, the Applicant recourse in challenging the sentence lies in the Court of Appeal, and as already stated herein there seems to be an appeal “lying” therein.

28. Finally, before I pen off, the Applicant seems to be in the habit of filing applications and/or appeals and abandoning them. That conduct of proceedings is “bad”, unacceptable for all intent and purpose and amounts to abuse of court process. The Applicant should pursue the appeal already filed (if it has not been determined) and not file a fresh one.

29. Those then are orders of the court.

Dated, delivered and signed on this 22nd day of February 2021, virtually.

GRACE L NZIOKA

JUDGE

In the presence of:

Applicant in person

Mr Mutuma for the Respondent

Kandoro - Court Assistant