



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL PETITION NO. 7 OF 2018

(Consolidating petition No. 7 of 2018 & Petition No. 26 of 2018)

BENARD OCHIENG.....1ST PETITIONER

REPHIUS OKINYI OKINYI.....2ND PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

RULING

1. Benard Ochieng and Rephius Okinyi Okinyi, the petitioners herein, were convicted for the offence of murder contrary to 203 as read with section 204 of the Penal Code. They were found guilty and upon conviction were sentenced to death by Hon. Justice Majanja. Apparently the petitioners were not satisfied with the conviction and the sentence. Strangely, instead of appealing, they petitioned this court for the review of the sentence.

2. The petitioners were represented by G.S Okoth & Company Advocates. Their petition is premised on the following grounds:

a) That following the decision of the Supreme Court in the case of **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**, death sentence is unconstitutional.

b) That the Constitution contemplates that all persons in Kenya are bound by the decisions of the Superior Court.

3. The petitioners premised their petition on Articles 22(1) 23 (1), 25(A), (C) (D) 165 258 and 259 of the Constitution of Kenya.

4. Article 22 spells out the right of every person to institute court proceedings in enforcing the Bill of rights while Article 23 of the Constitution of Kenya is on jurisdiction of enforcement of the Bill of Rights by the High Court. Since the Constitution of Kenya has not outlawed death penalty, the Bill of Rights must be enforced subject to the Constitution and other written laws. Article 26 (3) of the Constitution provides:

A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.

5. The petition herein raises an issue of the doctrine of *functus officio*. **The Black's Law Dictionary, Tenth (10th) 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 vs. 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.

6. 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 (10th) Edition** describes defines *sentence* as:

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

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. To that extent the decision of the Supreme Court in Francis **Karioko Muruatetu & Another vs. Republic [2017] eKLR** is erroneous. Is this decision binding on the lower courts? Article 163(7) of the Constitution of Kenya 2010 stipulates:

All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.

7. As a general rule, when superior courts decide on a matter then the lower courts are bound by the decision. This is the doctrine of the *stare rationibus decidendis* commonly referred to as *stare decisis*. This general rule has some exceptions two of which are:

- a) Per incuriam decisions; and
- b) Lapsed rule.

8. In the instant case, my interest would be to expound on *per incuriam* decisions because this is our concern herein. In the English decision in **Morelle vs. Wakeling [1955] 2 QB 3379** it was held that *per incuriam* decisions are those given in ignorance, or in forgetfulness of some inconsistent statutory provision, or some authority binding the Court concerned.

The **Black's Law Dictionary 10th Edition** defines *per incuriam* as:

Of a judicial decision, wrongly decided, because the judge or judges were ill informed about the applicable Law.

9. It is my humble opinion that the Supreme Court decision to order a trial court to attend to a matter, in re-sentencing, it had already become *functus officio*, is to create false jurisdiction on such a court. The Court of Appeal in the case of **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1** (Justice Nyarangi) while addressing the issue of jurisdiction stated:

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

10. For mysterious reasons, the petitioners herein forfeited their right to appeal but instead pursued an erroneous path. As I have observed hereinabove, this court lacks jurisdiction to review its decision (differently constituted). Their recourse was to appeal to the Court of Appeal. Their petition is accordingly dismissed.

DELIVERED and SIGNED at HOMA BAY this 15th day of April, 2021

KIARIE WAWERU KIARIE

JUDGE