



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL PETITION NO. 24 OF 2018

SUNDAY OLISE OTIENO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Sunday Olise Otiemo, the petitioner herein, were convicted for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He was sentenced to death. He appealed to the Court of Appeal in Kisumu Criminal Appeal No.22 of 2014. However he withdrew his appeal on 18th day of June, 2019. He has petitioned this court to review his sentence.
2. The petitioner was represented by R. Kiprono Advocates. His petition is premised on the ground that following the decision of the Supreme Court in the case of **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**, the mandatory sentence is unconstitutional. He is therefore praying for an order for resentencing.
3. The petitioner premised their petition on Articles 21(1) 25 (c) & 159 of the Constitution of Kenya.
4. The petition was opposed by the state on grounds that this court is *functus officio*.
5. The **Muruatetu** case is the most misapplied and at times I am tempted to believe that it is deliberate. At paragraph 112 the Supreme Court summarized its orders which captured their decision as follows:

[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. 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** defines sentence as:

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

When the petitioner asks this court to re-sentence him, he seeks to cloth it with jurisdiction it does not have. This flies in the face of the doctrine of *functus officio*. This court cannot arrogate itself with the jurisdiction of the Court of Appeal. This is an illegality. He ought to have urged the Court of Appeal on this issue but he chose to withdraw his appeal.

7. In **Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others [2013] EKL**R 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. This court (differently constituted) became *functus officio* the moment it pronounced itself on this matter. I therefore lack jurisdiction to entertain the petition. I accordingly dismiss it.

DELIVERED AND SIGNED AT HOMA BAY THIS 23RD DAY OF JUNE, 2021

KIARIE WAWERU KIARIE

JUDGE