



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CRIMINAL APPLICATION NO. E 045 OF 2019

(Coram: Odunga, J)

JULIA WANGECI GITHUA.....APPELLANT

VERSUS

COMMISSIONER GENERAL OF PRISONS.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

1. On 13th September, 2020, this Court in Petition No. 44 of 2019 held as follows:

“If I understand the petitioner correctly, her first limb of the argument is that the effect of Section 37 of the *Penal Code* and/or Section 92 (1) of the *Prisons Act* is that at the time of her sentencing she was deprived of the benefit of the period she was in custody. In other words, the period she was in custody must apply to all the three sentences so that the period to be served by her in each conviction must take into account the period she was in custody. To my mind such an interpretation with due respect is what is likely to lead to unfairness. It would mean that if at the time of her sentencing to say 5, 7 and 10 years respectively and she was in custody for 1 year, she would only serve 4, 6 and 9 years respectively. If the sentences were consecutive it would in effect mean that she would have been in custody for cumulative period of 17 years. On the other hand, her co-accused, if had been admitted to bond would serve 5, 7 and 10 years hence would have served cumulative period of 22 years merely because they were admitted to bail. While therefore I agree that the period spent in custody ought to be taken into account, it is my view that where the person was arrested the same day and faced different offences committed at different periods against different persons before different courts, unless the court determines otherwise, the period spent in custody cannot be applied in such a manner as to deem the period she was in custody to be more than the period actually spent. I therefore find the first limb of the argument unmerited. I however find that even in cases falling under Section 37 of the *Penal Code* and/or Section 92 (1) of the *Prisons Act* an accused person must benefit from the provisions of section 333(2) of the *Criminal Procedure Code* and since the benefit when it comes to sentencing ought to be given to the accused person, in taking into account the period spent in custody, it is the longest sentence that ought to be considered. In other words, in the example given above, it is the 10 years sentence that ought to be considered in taking into account the period spent in custody...The application of the deeming provision in the circumstances of the Petitioner is that all the sentences passed against the petitioner are to commence on the day when they were pronounced. In other words, the deeming effect renders consecutive sentencing untenable. It would in effect nullify those provisions that provide for consecutive sentencing. In effect the position being fronted by the Petitioner is that since the said provisions are inconsistent and the provisions of section 333(2) of the *Criminal Procedure Code* are latter in time, the provisions of Section 37 of the *Penal Code* and/or Section 92 (1) of the *Prisons Act* are deemed to have been repealed by the former. This apparent conflict in my view strictly speaking does not render the earlier enactments unconstitutional. To declare that an enactment has been impliedly repealed is not the same thing as saying that it is contrary to the Constitution. In my view, to hold that a person who commits a subsequent offence should only be subject to one sentence, would fly in the face of criminal justice system. One would imagine for example where a person serving a custodial sentence of say 3 years, commits an offence while in custody commits another offence and is sentenced to say one year having served only one year. Accepting the petitioner’s argument, the effect would be that the person would never be punished for the subsequent offence...a discretion given to the prison authorities to grant remission to those in custody for good behaviour. I do not see any reason why remission should not benefit the petitioner herein in respect of each of the three sentences she is serving if she is found to deserve the same due to her good behaviour since remission applies to the period of sentence to be served in a particular conviction...Therefore, nothing prevents the petitioner from petitioning the Commissioner General of Prisons to exercise his powers pursuant to the above provisions if she feels that her status constitutes special grounds for further remission over and above that contemplated under section 46(1) of the *Prisons Act*.

2. The Court proceeded to hold that:

“Therefore, in determining the issue whether Section 37 of the *Penal Code* and/or Section 92 (1) of the *Prisons Act* are unconstitutional, this court is enjoined to consider the purpose and effect of the two provisions. In my view the purpose of consecutive sentencing under the two sections is meant to achieve the objective of imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is committed. In this case different offences were committed on different occasions against different complainants. The Courts cannot be expected to turn a blind eye to some offences simply because the offender has been punished in respect of other offences. In determining whether the punishment already imposed on the offender suffices for the purposes of the subsequent offence the court is expected to take into account all the facts and circumstances of each case and it is for this reason that the trial courts are given discretion despite the said two provisions to decide whether or not the sentences would run concurrently. In other words, the two sections are not cast in stone. Whether or not that discretion is properly exercised is a matter for an appellate court and not a Constitutional Court.

3. The Court concluded:

“Therefore, having held that the period spent in custody should be directed at the longest sentence, since the Petitioner was arrested on 25th September, 2012 and the longest sentence she is serving is 10 years imposed upon her in Mavoko Criminal Case No. 658 of 2012, the period of the said sentence shall run from 25th September, 2012. Otherwise I find no merit in this Petition which I hereby dismiss but with no order as to costs.”

4. I have extensively set out the holdings in that judgement since the determinations therein have a bearing on the outcome of this Petition.

5. That Petition dealt with the sentences that the Applicant is/was serving in Criminal Case Nos. 658 of 2012 at Mavoko Law Court, Machakos Chief Magistrate’s Criminal Case No. 544 of 2012 and Machakos Chief Magistrate’s Criminal Case No. 1440 of 2012.

6. In this application, the Application seeks an order that this Court reviews her sentence and considers the time spent in custody under section 333(2) of the *Criminal Procedure Code* as regards Criminal Case No. 544 of 2012.

7. In the said judgement, this Court considered the applicability of section 333(2) to all the said three cases and found that the period spent in custody would be directed at the longest sentence which was 10 years imposed upon her in Mavoko Criminal Case No. 658 of 2012, whose sentence was directed to run from 25th September, 2012.

8. That being the position this Court is *functus officio* in so far as the application of section 333(2) aforesaid to Criminal Case No. 544 of 2012 is concerned. Dealing with the said principle, the Supreme Court in **Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR** 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** to the effect that:

“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.”

9. In **Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others [2018] eKLR**, the court observed as regards the doctrine of *functus officio* as follows:-

“I understand the doctrine, like its sister, the *res judicata* rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits. It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes. As was held by the court of Appeal in *Telkom Kenya Ltd vs John Ochanda*, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.”

10. Consequently, this application is incompetent and is hereby struck out.

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 29TH DAY OF NOVEMBER, 2021

G.V. ODUNGA

JUDGE

IN THE PRESENCE OF:

THE APPLICANT IN PERSON

MR NGETICH FOR THE RESPONDENT

CA SUSAN