REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL PETITION NO. 13 OF 2019

GEORGE OYENGO BARASA................................PETITIONER

VERSUS

REPUBLIC..RESPONDENT

RULING

1. **George Oyengo Barasa,** the petitioner herein, was convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code in the Chief Magistate's Court at Busia in criminal case No. 952 of 2008. He was sentenced to death. He appealed to the High Court and to the Court of Appeal. Both superior courts dismissed his appeals. His sentence was later commuted to life imprisonment. He now petitions this court to order that he be taken to the Siaya Principal Magistrate's court for resentencing following the decision of the Supreme Court in the case of Francis Karioko Muruatetu & another vs. Republic [2017] eKLR. His petition is based on the following grounds:

a) That the mandatory sentence meted on him is unconstitutional.

b) That the death penalty was declared unconstitutional.

2. The petitioner premised his petition on Articles 23, 165 (3) and 163(7) of the Constitution of Kenya.

3. 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.**

4. The petition pauses two legal issues. One is that of the doctrine of *functus officio*. The Black's Law Dictionary, Tenth (10th) Edition describes *functus officio a*s: -

> **[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"

5. 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 funtus officio after sentencing flies in the face of the doctrine of funtus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality. The petitioner had chances to urge his case before the superior courts when he appealed. Since his appeals were dismissed, it meant what he urging the court to do has no merits.

6. The second issue that is raised is that of retroactivity. The doctrine of retroactive application of the law is defined in **Black's Law Dictionary**, 7th Edition, as:

> **A legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect. The retroactive law is not unconstitutional unless it 1) is in the nature of an ex post facto law or a bill of attainder, 2) impairs the obligation of contracts, 3) divests vested rights, or 4) is constitutionally forbidden…Also termed retrospective law.**

7. **In the case of Khaemba Patrick Wanyonyi vs. Teachers Service Commission [2013] eKLR, Gikonyo J.** had this to say on the origins of this doctrine:

> **The concept of retroactive or retrospective law developed over time in the 1700s to cure the grave injustices occasioned by what was called the bill of attainder (1300-1600) on a person (attainder) who had been sentenced to death or declared an outlaw. Literally, all civil rights of the attainder were extinguished whether past, present and future, and could not perform any of the legal functions that he performed before the attainder.**

8. The Supreme Court in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** with regards to the general rule against retrospective application of the law stated:

> **As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it: (i) is in the nature of a bill of attainder; (ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden.**

9. In Criminal Law, the rule against retroactive application is provided for under Article 50 (2) (n) of the Constitution, 2010. The Article provides that:

> **Every accused person has a right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law.**

Conversely, an accused cannot benefit from a statute that was not in force when the crime and the trial took place except where such a statue explicitly allows retroactivity.

10. I therefore find that the petition herein lacks merit and the same is dismissed.

DELIVERED and SIGNED at BUSIA this 23rd day of January, 2020

KIARIE WAWERU KIARIE

JUDGE