



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL PETITION NO. 2 OF 2018

JOHN NYONGESA ODUOR1ST PETITIONER

FRANCIS JUMA ODUOR2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. John Nyongesa Oduor and Francis Juma Oduor, the petitioners herein, were convicted for the offence of murder contrary to section 204 of the Penal Code in the High Court of Kenya at Busia in criminal case No. 7 of 2008. They were sentenced to death. They appealed to the Court of Appeal in criminal Appeal 95 of 2014. Their appeal was dismissed. They now petition this court to resentence them.

2. The petitioners were represented by the firm of J.P Makokha & Company Advocates. Their grounds can be summarized as follows:

- a. That upon their appeal the court of Appeal substituted the imprisonment term with death penalty arguing that the sentenced of the High Court was illegal.
- b. That the court while sentencing the petitioners with the death sentence failed to appreciate that the 1st petitioner was a first offender.
- c. That the petitioners had young families at the time of the commission of the offence.
- d. That the offence was committed due to provocation.

3. The petition was opposed on the following grounds:

- a. That the petitioners have not shown new and compelling evidence that became available after the trial and the appeal.
- b. That the sentence imposed by the court of appeal was legal.

4. The petitioner premised his petition on Articles 22, 25, 25B [sic], 26A [sic], 35, 48, 50(6) 51,159 & 165 of the Constitution of Kenya.

5. Article 22 of the Constitution of Kenya is on the right to institute court proceedings where there is a claim that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. 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.

6. In their submissions the petitioners relied on the **case of Francis Karioko Muruatetu & another vs. Republic [2017] eKLR**. This decision has not only been misunderstood, but has posed two legal issues.

7. One is that 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] 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. Sentencing is a judicial exercise. Once a judge or 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.

9. The petitioners herein in asking this court to resentence them are asking me to sit on appeal on a sentence by the Court of Appeal. Secondly, even if we assume that the sentence was meted out by the High Court [which was not] this would offend the doctrine of *functus officio*. If the petitioners were dissatisfied by the decision of the Court of Appeal, the right court for them to approach is the Supreme Court.

10. 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.

11. 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.

12. 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.

13. 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 statute explicitly allows retroactivity.

14. 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