REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

MISCELLANEOUS CRIMINAL APPL. NO.158 OF 2019

JAMES MASOMO MBATHA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant approached this court *vide* a chamber summons filed on 9.10.2019. The Application seeks two substantive prayers: First, he seeks for an order reviewing the sentence and secondly an order for resentencing pursuant to the Supreme Court decision in Petition 15 of 2015; Francis Karioko Muruatetu and another Vs R (2017).

2. The application is grounded on the supporting affidavit of the Applicant filed on 9th October, 2019 in which the applicant averred that his first appeal to the Court of Appeal was dismissed on 8.5.2015 and that he sought for resentencing pursuant to the decision in Francis Karioko Muruatetu.

3. The applicant contends that this application was within his constitutional rights as espoused in articles 47, 48 and 22 of the Constitution of Kenya, 2010 and that he is entitled to resentencing.

4. The ODPP, which was served with the application, filed no response to the application.

5. The application was canvassed vide oral submissions that were made on 9.6.2020. It was submitted by the applicant that it was not his wish to do the heinous act. He submitted that the act was occasioned by circumstances beyond his control and he pleaded for leniency. He indicated to the court that he was remorseful and sought that the sentence be reviewed in line with the decision of the Supreme Court in **Francis Karioko Muruatetu & Another v R (supra).** The applicant pointed out that he had been rehabilitated while in prison and had certificates that spoke to that fact.

6. Counsel for the state reminded the court that four lives were lost as a result of the action of the applicant but however was not opposed to the application.

7. Before I proceed to analyse the application, I would wish to point out the background to the instant application. The applicant was sentenced to death after being convicted of murder in **Machakos High court Criminal case 13 of 2007**. Dissatisfied with the decision, the applicant filed an appeal to the **Court of Appeal vide Criminal Appeal No.164 of 2013**. The appeal was heard by the Court of Appeal and a judgement rendered by a three Judge Bench of Waki, Warsame and Musinga JJA on 8.5.2015 where the appeal was dismissed and the death sentence was affirmed in respect of each of the counts of murder. The applicant was also sentenced to life imprisonment in respect of the count of attempted murder and that the sentences in respect of the 2nd to 4th counts were left in abeyance as was held by the trial court. The applicant then approached this court vide application filed on 21.1.2019 where he sought a review of the life sentence that was meted upon him. This court found on the issue of resentencing that the jurisdiction to resentence the applicant was vested with the Court of Appeal. The applicant then filed the instant application that had been placed before the learned Hon. Justice Odunga who noted that an earlier application had been placed before me and which had been determined and who directed that the instant application be placed before me.

8. It is against the above background that I find the issue for determination is whether this application has merit.

9. It is trite law that a court cannot rehear an application that it had heard and determined previously. This is consistent with the doctrine of

functus officio.

10. The term functus officio is defined at p.840 of **Jowitt's Dictionary of English Law 2nd Ed**.:

> "**Functus officio (having discharged his duty), an expression applicable to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted".**

11. The *functus officio* principle was dealt with by the Court of Appeal in **Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) (2014) eKLR** where Githinji, Karanja & Kiage JJ.A observed thus:

> **"Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19th Century. In the Canadian case of *Chandler vs. Alberta Association of Architects [1989] 2 S.C.R 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);***
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> **"The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in re St. Nazaire Co. (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:**
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> **1. Where there had been a slip in drawing it up, and,**
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> **2. Where there was an error in expressing the manifest intention of the court. Paper Machinery Ltd. vs. J.O. Rose Engineering Corp. [1934] S.C.R. 186"**

12. 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** in which the learned author stated**;**

> **…"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."**

13. In the matter before me, the applicant in his own words admitted that the appeal was heard and a sentence passed on him. The applicant was however dishonest in not informing the court that his earlier application for review of sentence was dismissed and opted to approach the court with a fresh application that was in essence the same as the earlier application that was heard and determined vide ruling delivered on 8.7.2019. The Court of Appeal had already handled the appeal and given its judgement in respect of the same, and thus an attempt to revisit the decision of the court of appeal would be disrespectful to the hierarchy of courts; save of course in the instance where the Court of Appeal expressly directed that this court conduct a resentence hearing for the applicant. In addition, this court had also made its determination and the crux of the criminal application is an invitation to the court to purport to alter a decision that has been passed and this would be tantamount to an appeal. An appeal against an order granted by the High Court can only be heard and determined by the Court of Appeal by dint of **Article 164(3) (a)** of the Constitution of Kenya. This court is *functus officio* in this regard.

14. In light of the above analysis, the only recourse available to the Applicant in this case would be to appeal against this court's ruling dated 8.7.2019 in the Court of Appeal.

15. In the circumstances, it is my conclusion that the Application filed on 9.10.2019 is devoid of merit. It is hereby dismissed in its entirety.

It is so ordered.

Dated and delivered at Machakos this 22nd day of June, 2020.

D. K. Kemei

Judge