



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**MISC. CRIMINAL APPLICATION NO 42 OF 2019**

**CHARLES CHERUIYOT.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original judgement of Hon. Justice Mr. J. M. Bwonwong'a, delivered on*

*29/11/2017 in the High Court at Narok in Criminal Case No 20 of 2017,*

*Republic v Charles Cheruiyot)*

**RULING**

**The case for the applicant.**

1. Pursuant to the provisions of articles of 2 (5), 20 (3), 23 (1), 27 (2), 28, 50 (1) 7 (2) (Q), 51 (1), 52, 159 (1), (2) (a), (b), (d) (e) and 165 of the 2010 Constitution of Kenya, section 137L and 333 (2) of the Criminal Procedure Code, the applicant applied under certificate of urgency for the following orders.

1. *spent*
2. an order that this court reviews its order on sentence dated 29/11/2017
3. an order that this court imposes a non-custodial sentence upon the applicant

2. The application is supported by twenty-three (23) grounds that are set out on the face of the notice of motion dated 4<sup>th</sup> October 2019.

3. In a coalesced form the major grounds are as follows. That the court erred in law and fact in failing to appreciate the applicant's mitigation, that the sentence is manifestly excessive, that the applicant was a first offender, that the court should have called for a pre-sentencing report and that the court ignored the objectives of sentencing.

4. In the forty-five (45) paragraphs supporting affidavit of the applicant, the applicant has deposed to the same matters raised in the grounds in support of the motion and the circumstances of the offence as contained in the judgement.

**Submissions of the applicant**

5. Applicant's counsel cited article 159 (2) (d) and (e), which mandates the court to apply substantive justice without undue regard to technicalities. Counsel also cited article 165 (3) (a) of the 2010 Constitution, which clothes this court with inherent powers in exercise of its original jurisdiction in both civil and criminal matters. Counsel further cited the Canadian case of *Mistreal Trust Co v Churchill Forest Industries (Manitoba) [1971] 21 DLR 3<sup>rd</sup> Ed at page 75*, in which the court explained that inherent powers of the court are residuary powers that a court may draw upon as necessary whenever, it is just or equitable to do so in order to ensure the observance of the due process to prevent improper vexation or operation and to do justice between the parties and to secure a fair trial. Finally, counsel cited other authorities which restate the same principles. It is unnecessary to cite them here.

**The case for the respondent.**

6. In response to the application the respondent has filed a preliminary objection stating that this court has no jurisdiction to entertain and determine the instant application; because it is *functus officio*. Counsel cited ***Raila Odinga & 2 others v IEBC & 3 Others (2013) EKL*** in which the Supreme Court explained the principle of *functus officio* as one of the mechanism by which the law gives expression to the rule of finality; and by virtue of that principle a court which has rendered a decision cannot review or vary its decision.

7. In addition to the foregoing, counsel cited another Canadian case of ***Chandler v Alberta Association of Architects (1989) 2 SCR 848***, which traced the origin of the said principle to ***in re St. Nazaire Co. (1879) 12 Ch. D. 88***. The basis for it was that the power of the court to rehear a case was transferred by the Judicature Acts to the appellate division. Finally, counsel also cited **section 379 (1) of the Criminal Procedure Code (Cap 75) Laws of Kenya**, which gives a right of appeal to the Court of Appeal, to a person convicted on a trial held by the High Court and sentenced to death, or imprisonment for a term exceeding twelve months or to a fine exceeding two thousand shillings.

8. Based on the foregoing, prosecution counsel has submitted that since the applicant was sentenced to 16 years' imprisonment in respect of manslaughter, following a trial held by the High Court, he should have appealed to the Court of Appeal. She further submitted that the instant application is an abuse of the court process and should be dismissed.

#### **ISSUES FOR DETERMINATION.**

9. I have considered the affidavit evidence and submissions of counsel for the applicant. I have also considered the submissions of counsel for the respondent in support of the preliminary objection.

1. Whether or not this court can resort to its inherent powers to interfere with the sentence imposed.
2. Whether or not this court is *functus officio*.
3. Whether or not the application is an abuse of the court process

#### **ISSUE 1.**

10. I find as persuasive the proposition according to ***Mistreal Trust Co v Churchill Forest Industries (Manitoba), supra***, that inherent powers of the court are residuary powers that a court may draw upon as necessary whenever, it is just or equitable to do so in order to ensure the observance of the due process to prevent improper vexation or operation and to do justice between the parties and to secure a fair trial. I also find as persuasive the proposition according to ***Raila Odinga & 2 others v IEBC & 3 Others, supra***, that the principle of *functus officio* is one of the mechanism by which the law gives expression to the rule of finality; and by virtue of that principle a court which has rendered a decision cannot review or vary its decision.

11. The issue before the court is whether this court can resort to its inherent and other powers to hear and determine the instant application. The cases cited do not assist the court as to whether or not inherent powers are applicable in this application. This court has had occasion to resort to its inherent in the case of ***Wilfred Kikaet Kuyo v Letulal Ole Masikonde & 2 Others Election Petition Appeal No. 3 of 2018 at Narok***. In that case the court used its inherent powers to grant an order of stay of execution to the applicant in order to enable him exercise his right of appeal. The court therein also pronounced itself on the extent and scope of the application of the court's inherent powers, after seeking guidance from other authorities. Therein the court also pointed out that those powers may be used where there is a lacuna in the applicable law. Furthermore, I also pointed out that those powers cannot be used to defeat the express provisions of the applicable statutory law.

12. It is settled law that the inherent powers of the court cannot be resorted to where there are statutory provisions to meet the justice of the case. In the instant application the provisions of **section 379 (1) of the Criminal Procedure Code (Cap 75) Laws of Kenya**, provide a right of appeal to the Court of Appeal, to the applicant. That is the right he should exercise. Invocation of this court's inherent powers will be in conflict with those statutory powers. It therefore follows that this court cannot in law resort to its inherent powers.

#### **ISSUE 2.**

13. This court is allowed to correct errors that are apparent on the face of the record in particular as they relate to warrants. **See section 346 of the Criminal Procedure Code**. The issues raised by the applicant such as that the sentence was excessive, that the mitigation of the applicant was not considered and that the court should grant a non-custodial sentence are issues that may be raised in the Court of Appeal, not in this court. To do so will amount to defeat the principle of finality as pronounced in ***Raila Odinga & 2 others v IEBC & 3 Others, supra***. This court cannot entertain and determine this application as it will amount to inviting this court to sit in appeal over its judgement. This will in turn introduce fluidity in the administration of the criminal justice, which is undesirable. This court is therefore *functus officio*.

#### **Issue 3**

14. Furthermore, I find that the application is an abuse of the court process.

15. In the premises, I hereby uphold the preliminary objection that this court lacks jurisdiction to hear and determine the instant application. Additionally, the application also fails on its merits.

16. The upshot of the foregoing is that the application fails and it is hereby dismissed in its entirety.

**Judgement signed, date and delivered in open court at Narok this 17<sup>th</sup> day of December, 2019 in the presence of**

**Mr. Kambo for the applicant and Ms. Nyaroita for the respondent.**

**J. M. Bwonwong'a**

**Judge**

**17/12/2019**