Longole v Republic (Criminal Miscellaneous Application E005 of 2024) [2025] KEHC 10309 (KLR) (12 June 2025) (Ruling)

Neutral citation: [2025] KEHC 10309 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARALAL

CRIMINAL MISCELLANEOUS APPLICATION E005 OF 2024

AK NDUNG'U, J

JUNE 12, 2025

BETWEEN

LONGIDAI LONGOLE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. By way of a Notice of Motion dated 7th October, 2023, the Applicant sought orders seeking revision of sentence following his conviction and sentence for Robbery with violence Contrary to Section 296(2) of *Penal Code* in Criminal Case No.86 of 2008 at Maralal Law Courts wherein he was sentenced to Death.

2. He specifically seeks orders that ;-

    1. The Honourable Court be pleased to award him a lenient definite sentence in Counts 1 and 2 as provided for under Article 50(2),(p),(q) of the *Constitution*.

    2. That the Honourable Court be pleased to order that the sentences to be awarded in Counts 1, 2, 3 and 4 to run concurrently.

    3. That the Honourable court be pleased to invoke the provisions of Section 333(2) of the *Criminal Procedure Code* to consider the period spent in remand custody

3. The application is supported by the Applicant's affidavit in which he depones that he was charged and convicted for the offence of robbery with violence contrary to section 296(2) of the *Penal Code* and sentenced to death in each count in criminal case no. 86 of 2006 at Maralal Law courts.

4. That, his first appeal to the High Court was dismissed in its entirety vide criminal appeal 110.193 of 2011 at Nakuru High Court and his second appeal to the Court of Appeal at Nakuru was dismissed in

its entirety vide criminal appeal no.151 of 2012 at Nakuru hence his application for sentence rehearing only in this matter.

5. He adds that this court has jurisdiction to hear and determine this application under Article 165(3) (b) of the *Constitution* of Kenya 2010.

6. In response to the application, counsel for the Respondent raised a preliminary objection (PO) on ground that the entire petition is bad in law for the reason that this court lacks jurisdiction to hear and determine this petition in view of Article 164(3)(a) as read with Article 165(6) of the *Constitution* of Kenya.

7. The PO was canvassed by way of written submissions.

8. I have considered the Application PO raised and submissions made. Of determination is whether this court is clothed with the necessary jurisdiction to adjudicate over the issues raised.

9. Borrowing from the civil jurisdiction of this court on the relevant issue on the place of preliminary objections in litigation (which applies the same way in the criminal jurisdiction), am guided by the words of Law, J.A. in *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* (1969) EA 696 where he stated;

> "So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration....."

10. Ojwang, J (as he then was) in *Oraro v Mbaja* (2005) KLR 141 put it thus: -

> A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...."

11. In the instant application it is a fact agreed by both divides that the applicant was tried, convicted and sentenced for the offence of robbery with violence. He lodged an appeal before this court and not finding success there moved further as per his entitlement in law to the court of appeal, where, again, the appeal failed.

12. The preliminary objection raised is well taken since it raises a pure point of law answering the question whether this court has jurisdiction in the matter following the history of the applicant's trial as encapsulated above. So what is jurisdiction?

13. By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics. Where a Court takes upon itself to exercise a jurisdiction which it

does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

14. That jurisdiction is so central in judicial proceedings is a well-settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

> "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings..."

15. The next question to ponder is the source of jurisdiction. The Supreme Court of Kenya in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & others* (2012) eKLR stated as follows: -

> "A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

16. I have deliberately found it necessary to expound on this aspect of law relating to preliminary objections and the jurisdiction of courts alive to the avalanche of post appeal criminal applications that continue to inundate our courts in total disregard of the court's jurisdiction or lack thereof.

17. It is without a doubt that the applicant was arraigned before a magistrate court where he was tried, convicted and sentenced to death. He appealed to this court sitting at Nakuru *vide* HCCRA 191 of 2011. This court upheld both the conviction and sentence. The Applicant appealed the decision of this court to the Court of Appeal which court upheld the conviction and sentence.

18. By asking this court to re-look at the matter, the application is not only unprocedural but illegal.

19. Granted, this court has immense powers and that is demonstrated the wide jurisdiction espoused at Article 165(3) as follows;

> "(3) Subject to clause (5), the High Court shall have—(a)unlimited original jurisdiction in criminal and civil matters;
>
> (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
>
> (c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a

person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation."

20. Despite this wide discretion, the same still has limits. The High court has no jurisdiction to resentence in a matter heard by it. In the case of *John Kagunda Kariuki v R* (2019) eKLR J. Ngugi, J (as he then was) stated that;

> " In other words persons whose appeals have been heard in the High court are not entitled to file fresh applications for resentencing in accordance with the new decisional law .To reach a different conclusion would lead to a ungovernable situation where all previously sentenced prisoners would seek review of their sentences .If the petitioners appeal have already been heard by the High Court they cannot return to the High Court seeking review of sentences, they can make an argument for reduced sentence at the Court of Appeal."

20. An application like the one before court is a clear attempt to litigate piecemeal. Once the Applicant exercised his constitutional right to appeal to this court, he ought to have raised all his grouses at once. All infractions and/or omissions by the trial court ought to have been placed before the court for consideration. This includes all areas of aggrievement by the decision of the trial court, including for example, the question whether the trial court considered the application of Section 333(2) of the *Criminal procedure code*.

21. Upon pronouncing itself on appeal, this court became functus officio and any discomfort with this court's finding would again by constitutional edict find themselves before the Court of Appeal and in this matter the Applicant did exercise this right.

22. *Functus officio* is a latin phrase meaning "having performed one's office or duty or having fulfilled their function. It signifies that a person or entity (in our case a court) has completed their task or authority in a specific matter and no longer has the power to act further in that regard. In this particular case the High Court is barred from proceeding with this application, since it heard and substantively adjudicated the first appeal.

23. 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 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 v Alberta Association of Architects* [1989] 2 S.C.R 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);
>
> While this court is vested with adjudicative powers, once a court becomes functus officio, the only orders it can grant are review orders which are an exception to the functus officio doctrine. This was aptly summarized in the case of *Jersey Evening Post Ltd v Al Thani* [2002] JLR 542 at 550 which was cited and applied by the Supreme Court in *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 others* ['20131 eKLR that:
>
> > " "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 frilly 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 or adjudication must be taken to a higher court if that right is available."

24. This application on the other hand offends the hierarchical establishment of courts. It seeks that this court sits on appeal over a decision arrived at by the court of Appeal. The court of Appeal heard the Applicant and made a determination on all issues he placed before it.

25. The law abhors that practice of a Judge sitting to review a Judgment or decision of another Judge of concurrent jurisdiction. This is because the rule of the thumb is that courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts of higher Jurisdiction than theirs.

26. Thande J in *Ngao v Republic* (Petition E017 of 2023) [2024] KEHC 2008 (KLR) (1 March 2024) (Judgment) and quoting from relevant case law put the matter clearly thus;

> " At the helm of the Court system in Kenya is the Supreme Court followed by the Court of Appeal. This Court falls below the Court of Appeal. After the Applicant's appeal in this Court was dismissed, he appealed to the Court of Appeal and the same was dismissed. That decision of the Court of Appeal is binding on this Court. In light of this, to entertain this matter in respect of which the Court of Appeal has pronounced itself, no matter how compelling the arguments placed before it, would be to violate the constitutional judicial hierarchical norm. In this regard, I am guided by the holding in the case of *Kenya Hotel Properties Limited v Attorney General & 5 others* [2020] eKLR, where the Court of Appeal stated:
>
> > As we stated at the beginning of this judgment this appeal is disturbing. The multiplicity of endless proceedings around the same dispute does not bode well for the administration of justice...Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the Court

there was being asked to annul, strike out, reverse or rescind a judgment of this Court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. The Constitution itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts.

Moreover, under Article 164(3) of the *Constitution*, this Court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant sought as against a decision of this Court to quash or annul them, or that it could purport to direct this Court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant's submission that the issue pits supremacy of the courts against citizens' enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing. It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong; without jurisdiction it would be embarking on a hopeless adventure to nowhere.

10. This finding of the Court of Appeal was affirmed by the Supreme Court in *Kenya Hotel Properties Limited v Attorney General & 5 others* (Petition 16 of 2020) [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment), which stated:

55. We need to emphasize and reiterate that Mutunga CJ did not in any way state that the High Court may in any way, purport to overturn or order final decisions issued by higher courts than itself to start de novo, especially on appeals that have been finally concluded by the highest court at the time. Furthermore, the concurrence by Mutunga SCJ cannot override the judgment by the majority, despite what the appellant chooses to submit. As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those court higher than themselves".

27. In our present case, the Applicant rightly approached the Court of Appeal which was the court legally empowered to deal with an issue arising out of the decision of this court. That jurisdiction is found under Article 164(3) of the *Constitution* and Section 379(1) of the *Criminal Procedure Code*. This is in appreciating the provisions of Article 50(2) (q) of the *Constitution* of Kenya, 2010 which guarantees the right of a person if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law.

28. From whichever prism one looks at the matter, whether in enforcement of fundamental rights and freedoms or on the propriety of the sentence, once the Court of Appeal pronounced itself on the matter, this court lacked any legal standing upon which it could adjudicate on the matter further.

29. As observed earlier in this ruling, a court of law can only exercise jurisdiction as conferred upon it by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

30. In the end, I must find and hold that the preliminary objection herein has merit and is allowed. With the result that the application is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF JUNE 2025

A.K. NDUNG'U

JUDGE