SNA v Republic (Miscellaneous Criminal Application 20 (E021) of 2023) [2024] KEHC 1390 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1390 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

MISCELLANEOUS CRIMINAL APPLICATION 20 (E021) OF 2023

TA ODERA, J

FEBRUARY 7, 2024

FROM ORIGINAL HCCR. CASE NO. 3357 OF 2016 AT KISII

BETWEEN

SNA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant was charged with the offences of defilement contrary to section 8(1) of the *Sexual Offences Act* and an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. He was charged with a second count of deliberate transmission of HIV contrary to section 26(1) of the *Sexual Offences Act*. He was tried and convicted of the first count of defilement and sentenced to 10 years' imprisonment.

2. Being dissatisfied with the sentence passed by Kisii CM's Court in MCCS/O Case No. 3357 of 2016, he has now filed an application for sentence review.

3. The grounds are: (reproduced verbatim)

    1. That I pray for this hon. court to consider my mitigation and submission based in this application.

    2. That the sentence meted against the applicant was very harsh and excessive in the circumstances.

    3. That your ladyship I beg this honourable court to consider my request and reduce the sentence of 10 years to any lesser jail term or set me free on probation basis.

4. That your ladyship I was the only breadwinner as I have children who are orphans who fully depended on me.

5. That your ladyship I promise to abide with the rules that may be put on me to follow if this appeal may be determined for non-custodial sentence.

4. The respondent opposed the application and submitted that the charges attracted life imprisonment hence the sentence of 10 years was lenient in the circumstances.

5. The applicant sought for the period spent in remand to be considered as the trial court failed to factor that in.

Determination

6. As I was perusing the file, I noted that the Applicant had appealed against the sentence in Kisii HCCR Appeal No. 36 of 2020. He appealed against the conviction and sentence handed by the trial court.

7. Vide a Judgment delivered by this court on March 17, 2021, this court (differently constituted), held that the sentence pronounced by the trial court was very lenient in the circumstances. The appeal was found to be lacking in merit and was dismissed.

8. What then should become of the present application?

9. Having determined the issue of sentencing, I find that this court is *functus officio* in as far as the issue of sentencing and conviction is concerned.

10. The principle of *functus officio* was explained in great detail by the Court of Appeal in the case of *Telkom Kenya Limited v John Ochanda (Suing on His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited* [2014] eKLR. The Court of Appeal held 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 ago as the latter part of the 19th Century. In the Canadian case of *Chandler v Alberta Association of Architects* [1989] 2 SCR 848, Sopinka J. traced the origins of the doctrines as follows (at p 860);
>
> "The general rule that a final decision of a court cannot be re-opened 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:
>
> 1. Where there had been a slip drawing it up, and,
>
> 2. Where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd v JO Rose Engineering Corp* [1934] SCR 186"
>
> The Supreme Court in *Raila Odinga v IEBC* 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 of the principle in finality. According to this doctrine,

> a person who is vested with adjunctive 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."

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgement has been entered a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in *Jersey Evening Post Ltd vs Ai Thani* [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

> "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 concluded, and the court is functus, when its judgement 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 adjunction must be taken to a higher court if that right is available."

11. Similarly, the matter of the sentence meted out was heard and concluded by this Court although differently constituted. Therefore, this Court is *functus officio*. This court is barred from rehearing the issue of sentencing. I therefore cannot entertain the prayer of granting a lenient sentence or otherwise.

12. In conclusion, I find that the application lacks merit and I proceed to dismiss the application.

13. There shall be no order as to costs.

DATED, DELIVERED AND SIGNED AT KISII THIS 7TH DAY OF FEBRUARY 2024.

TERESA ODERA

JUDGE

In the presence of:

Mr. Koima for the State

The Accused Person/Applicant in person

Oigo - Court Assistant