



Lokwawi alias Blackie v Republic (Miscellaneous Criminal Appeal E076 of 2023) [2024] KEHC 3726 (KLR) (4 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3726 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS CRIMINAL APPEAL E076 OF 2023
RN NYAKUNDI, J
APRIL 4, 2024**

BETWEEN

SIMON LOKWAWI ALIAS BLACKIE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The application dated 23rd June, 2023 and filed on the same date is seeking sentence review. The applicant was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars were that on 27th August, 2016, the Applicant murdered Patrick Lokol Edapae. At the end of the trial, the applicant was convicted and sentenced to suffer death.
2. The applicant dissatisfied with the sentence, filed an application seeking review of sentence which was determined by this court *vide* its ruling dated 6th July, 2021. The applicant is now approaching this court *vide* the instant application and he seeks review of the reviewed sentence of 30 years that he is currently serving on grounds that he did not appeal to the court of appeal and that the court should consider his mitigation.

Analysis And Determination

3. I have considered the application and the grounds relied upon by the applicant. It is my considered opinion that the issue which I need to decide on is whether the instant application is merited.
4. This court heard the applicant's application on resentencing, which application was merited and the death sentence issued by the court was substituted with a 30 years' imprisonment sentence. 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 that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than



themselves. The only time that this court can review a sentence imposed upon by a court is where such sentence was imposed by a subordinate court (as per section 362 of the [Criminal Procedure Code](#))

5. In [Samuel Kamau Macharia & Another –vs- KCB & 2 Others](#) App. No. 2/2011, the Supreme Court of Kenya made it clear that a Court of law can only exercise jurisdiction as conferred by the [constitution](#) or other written law and cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law, and that a court cannot expand its jurisdiction through judicial craft. And as it is trite, a court of law ought to down its tools in respect of the matter when it holds the opinion that it is without jurisdiction.
6. It is not only the issue of jurisdiction which is apparent in this case, but also the doctrine of *res-judicata* though primarily it is more applicable in civil law. It is my considered view that it applies *mutatis mutandis* in the realm of criminal law. It is a fundamental doctrine of all courts that there must be an end to litigation. Ordinarily it is treated as a branch of the law of estoppel. In [Gordon Stewart –vs – Independent Radio Company Limited and Wilmot Perkins](#) [2012]JMCA Civ.2 where in this persuasive authority the court stated as follows on the doctrine:

“The doctrine of *res judicata* is to protect courts from having to adjudicate more than once on issues arising from the same cause of action and to protect the public interest that there should be finality in litigation and that justice be done between the parties”.

In the same breadth the dicta of *Diplock LJ in Thoday – vs – Thoday* [1964]P 181 is also relevant to this question before this court.

“Estoppel merely means that, under the rules of the adversary system of procedure upon which the common law of England is based, a party is not allowed, in certain circumstances, to prove in litigation particular facts or matters which, if proved, would assist him to succeed as plaintiff or defendant in an action [Estoppel *per rem judicatam*] is a generic term which in modern law includes two species. The first species, which I will call ‘call of action estoppel, is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence of existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e. judgment was given upon it, it is said to be merged in the judgment, or for those who prefer Latin, transit in *rem judicatam*. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped *per rem judicatam*... the second species, which I will call ‘issue estoppel,’ is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled.. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not , or deny that it was fulfilled if the court in the first litigation determined it was ...”

See also the principles on the doctrine of *res-judicata* as developed within our own jurisdiction based on the same strength of the above case law [Communication Commission of Kenya & 5 others – vs – Royal Media Services Limited & 5 others](#) [2014]eKLR, [John Florence Maritime Services Limited & Another – vs – Cabinet Secretary for Transport and Infrastructure & 3 others](#) [2015]eKLR.

7. What happened in this case? The applicant was charged with the offence of murder contrary to section 203 as read with section 204 of the [penal code](#). The particulars of the offence are that on the 27th day of



August, 2016 at Sale Yard Area, Lodwar sub-location in Turkana Central sub-county within Turkana County murdered Patrick Lokol Edapae. As a consequence therefore the prosecution summoned four (4) witnesses to discharge the burden of proof of beyond reasonable doubt against the applicant for the aforesaid offence. He was placed on his defence to tender evidence in rebuttal to the prosecution's case. The trial court considered the matter wholly in so far as the charge and the evidence is concerned arriving at a conclusion that the offence of murder had been proved beyond reasonable doubt as against the accused person. He was therefore found guilty, convicted and sentenced to suffer death on 19th June, 2021. Being aggrieved with the sentence he lodged an application for resentencing before Wakiaga J. in the knowledge and wisdom of the learned judge he pronounced himself to the application as follows:

'I therefore allow the application herein and review the death sentence passed against the accused and substitute the same with an imprisonment term of 30 years from the date when the accused first appeared before this court taking into account the provision of section 333 (3) of the Criminal Procedure Code.

8. Such is the case here that the applicant is again invoking the jurisdiction of this court on the same set of facts. I concede that *res-judicata* is available in criminal proceedings the only problem in my view which remains is for the courts to determine the extent to which it may be applied. I consider the basic rules in civil law are structurally the same for either for the prosecution or defence more particularly in the scope of re-sentencing. I am of the strong view that a question of fact or law put in issue and directly determined by a court of competent jurisdiction cannot be afterwards be disputed between the same parties. That is actually what the applicant has done and it is self-evident from the record. The doctrine is of such a great moment as of now to be construed as applicable in the elements of criminal proceedings to give effect to the character of truth or finality in such matters as this one.
9. In the circumstances of this case, the applicant is clearly engaging in abuse of the court process. Consequently, the Applicant cannot approach the High Court again for a review of the sentence, which has already been reviewed by this court. His only recourse is to file an appeal to the Court of Appeal. In the end, the Application dated 23rd June, 2023 lacks merit and is hereby dismissed.
10. Orders accordingly.

DELIVERED, DATED AND SIGNED AT LODWAR THIS 4TH DAY OF APRIL, 2024.

R. NYAKUNDI

JUDGE

In the presence of;

Mr. Onkoba for the state

Applicant in person

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