



**Nyangiro v Republic (Miscellaneous Criminal Application
E025 of 2024) [2024] KEHC 12509 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12509 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
MISCELLANEOUS CRIMINAL APPLICATION E025 OF 2024**

**KW KIARIE, J
OCTOBER 17, 2024**

BETWEEN

TIBERIUS ODODA NYANGIRO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Tiberius Ododa Nyangiro, the petitioner herein, moved the court through a Notice of Motion dated the 22nd day of May 2024. It was brought under Articles 2, 10, 22, 23, 25, 50 and 165 of the Constitution. He v seeking the following orders:
 - a. This application be certified as urgent and apt for hearing on a priority basis and ex parte in the first instance.
 - b. This honourable court should be pleased to review the sentence imposed on the applicant and find that the 14 years the applicant has been in custody sufficient in the circumstance and forthwith order his immediate release from custody unless otherwise lawfully held.
 - c. Any other order the court will deem just and fit in the circumstances.
 - d. Costs be in cause.
2. The application was premised on the following grounds:
 - a. That the applicant herein was convicted for the offence of murder of the late Felix Ouma Odhiambo and sentenced to death on the 6th October 2014 under orders made by learned Justice D.S. Majanja in proceedings that commenced on the 20th August 2010 before Learned Justice Musinga (as he then was).



- b. That the applicant, who is currently elderly and sickly, has been in custody since 2010 and has since had his death sentence committed to life imprisonment by the President as a consequence of his remarkable reforms, outstanding performance and remorsefulness during the many years he has been incarcerated.
- c. That the applicant herein and his family have since reconciled with the family of the deceased in a process that was facilitated by the Chief of Gembe North Location and showed deep remorse for his actions and incarcerations that resulted in the death of the late.
- d. That the applicant is a family man who, at the of his arrest, conviction, and sentencing, was married to four women, two of whom are now deceased, with a total of twenty-five children and numerous grandchildren who have been deprived of bread and company of their husband, father, and grandparent because of his current incarceration.
- e. That applicant herein has aged tremendously and is currently undergoing treatment for prostate cancer and TB bronchiectasis at the Kenyatta National Hospital in the hope of full recovery from the illness.
- f. That on the 6th October 2014, when Justice D.S. Majanja passed the death sentence to the Applicant, the famous Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* declaring the mandatory death sentence under section 204 of the penal code had not been rendered, and as such the mitigating circumstances were not considered by the learned Judge.
- g. This honourable court is thus invited to reconsider the sentence mentioned to the applicant and accord him a second chance in life with his family and loved ones as a reformed man in his twilight years.
- h. The applicant has used the years in custody to grow and transform himself spiritually. As a result, on 18 December 2020, Prison Fellowship Kenya awarded him a certificate of completion, signifying his successful completion of the discipleship training on growing and maturing in Christ.
- i. That on the 19th of August 2020, the applicant herein was awarded a certificate by the Emmaus Bible School as a demonstration of his successful completion of the study of the foundational bible study series.
- j. On the 5th of February 2021, the applicant completed her Diploma in Bible Correspondence courses at the Emmaus Bible School and was awarded a certificate confirming the same.
- k. That on the 22nd of April, 2023, the applicant herein was officially baptised at Kamiti Main prison and awarded a baptism certificate by the Seventh Day Adventist Church.
- l. That the applicant has consistently sought spiritual growth and mentorship from the Chaplain in charge of Kamiti Pastor Stephen M. Nyaosi, who, in his letter dated 3rd November 2023, has recommended his reintegration back into the community.
- m. That the convict/applicant is currently serving an unconstitutional sentence after Justice Professor Dr. Nixon Sifuna declared life imprisonment as an unconstitutional sentence.
- n. That the applicant has reformed and is deeply remorseful of his actions as he has had approximately fifteen years to reflect on his actions and deeds as prescribed under the



sentencing policy guidelines 2015. Thus, it does not serve any other meaningful purpose to continue with such detention of a man who has been rehabilitated.

3. The respondent opposed the application on the following grounds:
 - a. The application is vague, misconceived, improperly filed in court, and an open abuse of the court process.
 - b. That the application herein raises no substantive constitutional issue for determination.
 - c. The applicant must demonstrate how the respondent has infringed his rights.
 - d. That the applicant must demonstrate in a precise manner the injustice and violation of constitutional rights.
 - e. That there is no constitutional right and/or provision that has been violated that relates to the mandate and functions of the respondents.
 - f. That the applicant was accorded a fair trial in compliance with Article 50 of the Constitution by the trial court. Otherwise, he had a chance to appeal if he was not satisfied with the sentence by the trial court. That the application content is for re-sentencing brought under the guise of revision and thus brought under the wrong provisions of the law.
 - g. That the applicant is seeking a review of the sentence imposed on him by the trial court instead of resentencing.
 - h. That the applicant herein offends the doctrine of general presumption of constitutionality of an act of parliament.
 - i. That the orders sought are, therefore, not tenable against the respondent as the applicant needs to show how the respondent has a duty in the matter raised.
 - j. That the applicant has not demonstrated that he has a Pima facie case. Thus, there is no basis for the grant of the relief sought.
 - k. That the application is without merit and an abuse of the court process and should, therefore, be dismissed.
4. The Supreme Court of Kenya, in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, made orders as follows:
 - (112) Accordingly, with regards to the claims of the petitioners in this case, the Court makes the following Orders:
 - a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.
 - b) This matter is hereby remitted to the High Court for re-hearing on sentence only, on a priority basis, and in conformity with this judgment.

In the preceding paragraph, the Court had said:

 - (111) It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and the appropriate sentence befitting the offence committed by the petitioners. For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two



petitioners herein. In the meantime, existing or intending Petitioners with similar cases ought not to approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case.

5. The resentencing order without setting aside the sentence by the trial court poses two legal issues. One is that of the doctrine of *functus officio*. The [*Black's Law Dictionary*](#), tenth (10th) Edition describes *functus officio* as: -

[having performed his or her office]” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.

6. In [*Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others*](#) [2013] eKLR, the Supreme Court 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 which reads:

...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.

In paragraph 19 of the Raila Case (*Supra*), the Court further stated:

This principle has been aptly summarized further in [*Jersey Evening Post Limited v. A1 Thani*](#) [2002] JLR 542 at 550:

“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 fully 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 on adjudication must be taken to a higher court if that right is available.”

7. Sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, they become *functus officio*. If the sentence is illegal or inappropriate, the only court to address it is the appellate one. [*Black's Law Dictionary*](#) Tenth (10th) Edition describes defines sentence as:

The judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer.

8. Remitting a matter to the trial court after sentencing flies in the face of the doctrine of *functus officio*. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality.



9. The second issue that is raised is that of retroactivity. The doctrine of retroactive application of the law is defined in *Black's Law Dictionary*, 7th Edition, as:

A legislative act that looks backwards or contemplates the past, affecting acts or facts that existed before the act came into effect. The retroactive law is not unconstitutional unless it 1) is in the nature of an ex post facto law or a bill of attainder, 2) impairs the obligation of contracts, 3) divests vested rights, or 4) is constitutionally forbidden...It is also termed retrospective law.

10. My understanding of the decision in *Muruatetu* (*supra*) is that the Supreme Court did not intend it to be retroactive. This can be discerned from the following statement:

The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case.

11. In criminal law, the rule against retroactive application is provided under Article 50 (2) (n) of the *Constitution*, 2010. The Article provides that:

Every accused person has a right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law.

Conversely, an accused cannot benefit from a statute or legal position that was not in force when the crime and the trial took place except where such a statute or legal decision explicitly allows retroactivity.

12. The applicant has directed his application to the wrong forum. The *Constitution* of Kenya has provided in Article 133(1) as follows:

On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by—

- (a) granting a free or conditional pardon to a person convicted of an offence;
- (b) postponing the carrying out of a punishment, either for a specified or indefinite period;
- (c) substituting a less severe form of punishment; or
- (d) remitting all or part of a punishment.

13. From the preceding analysis, I have no jurisdiction to grant the orders sought in the application. I accordingly strike it out with no orders as to costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 17TH DAY OF OCTOBER 2024

KIARIE WAWERU KIARIE

JUDGE

