Gichiri v Republic (Miscellaneous Criminal Application E162 of 2021) [2023] KEHC 174 (KLR) (5 January 2023) (Ruling)

Neutral citation: [2023] KEHC 174 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

MISCELLANEOUS CRIMINAL APPLICATION E162 OF 2021

GL NZIOKA, J

JANUARY 5, 2023

BETWEEN

ISAAC NJOGU GICHIRI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. By an application filed in court on, October 22, 2021, the applicant is seeking for review of the sentence meted out against him *vide* criminal case No 2082 of 1998, at the Chief Magistrate's Court at Naivasha. He prays that, the court be pleased to revise the sentence to a definite lenient one as provided under; article 50 (2) (p)(q) of the *Constitution* of Kenya, and take into account the provisions of section 333(2) of the *Criminal Procedure Code*.

2. The application was served but no response was filed. However, I note from the materials placed before the court that, the applicant was arraigned before the Chief Magistrate's Court charged with the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*. He was subsequently convicted and sentenced to suffer death.

3. However, he subsequently appealed against the trial court's decision *vide* High Court Criminal Appeal No 628 of 2004, but the appeal was dismissed in its entirety. He then moved to the Court of Appeal, *vide* Criminal Appeal No 118 of 2005, and similarly the appeal was found to have no merit and dismissed.

4. The applicant subsequently, filed Miscellaneous Criminal Application No 19 of 2019 and Misc Criminal Application No 78 of 2019, both applications were seeking for re-sentencing following the decision in the matter now famously referred to as "Muruatetu" case. However, the court ordered and closed the file holding Miscellaneous Criminal Application No 19 of 2019.

5. The re-sentencing application in Misc Criminal Application No 78 of 2019, was heard and a decision rendered on the September 24, 2021, whereby the court held that, it had no jurisdiction to re-sentence the applicant and dismissed the application. The applicant has once again filed the current application for sentence review.

6. In my considered opinion, once the appeal was heard in this court and a final decision rendered, this court became *functus officio*. The principle of *functus officio* is a latin expression that translates to; "having performed the function of his or her office, the decision maker has no power to re-open the matter"

7. According to Ulpian, after a judge has delivered his judgment, he immediately ceases to be the judge:

> " hoc jure utimur ut judex qui semel vel pluris vel minoris condemnavit, amplius corrigere sententiam suam non posset; semel enim male vel bene officio functus est." (see Alexandr Koptev, "Digestae Justinian" The Latin Library at book 42, Title 1, Note 55, online:
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> The gist of Ulpian's words is: "[A] judge who has given judgment, either in a greater or a smaller amount, no longer has the capacity to correct the judgment because, for better or for worse, he will have discharged his duty once and for all." (see Translation in Daniel Malan Pretorius, "The Origins of the Functus Officio Doctrine, with Specific Reference to Its Application in Administrative Law" (2005) 122:4 SALJ 832 at 836).

8. The law of *functus officio* thus dictates that, decision-makers; judges, administrative officials, or arbitrators, cannot as a general rule re-open their decisions to correct a mistake. There is no opportunity for them to; "do better next time" in the same case because there will be no next time. They must get it right the first time, for that will be their only time.

9. Further, in the journal by the University of Queensland, on "*The Finality of Judicial Decisions*", it is stated that, a court becomes *functus officio* in the following events;

    a) A judicial tribunal, becomes *functus officio* in respect of decisions made by it before it becomes defunct;

    b) The judicial tribunal's powers to revise its own decisions or to re-try any case after decisions made by it in the original trial have been rescinded.

10. In the same vein, the Court of Appeal in the case of; *Telkom Kenya Limited v John Ochanda* [2014] eKLR, stated that:

> " 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...
>
> 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 judgment has been entered and a decree thereon issued."

11. Furthermore, having returned to court for re-sentencing and been advised that, the court has no jurisdiction, the filing of this application amounts to an abuse of the court process and therefore I strike out the application herein accordingly for want of jurisdiction and/or for being an abuse of the court process.

12. It is so ordered.

Dated, delivered and signed on this 5th day of January 2023

GRACE L NZIOKA

JUDGE

In the presence of:

Applicant in person virtually

Mr. Michuki for the Respondent

Ms Ogutu-Court Assistant