



REPUBLIC OF KENYA



KENYA LAW
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**CMW v Republic (Petition 506 of 2019) [2023] KEHC 987 (KLR)
(Constitutional and Human Rights) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 987 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 506 OF 2019

GL NZIOKA, J

FEBRUARY 8, 2023

BETWEEN

CMW PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The petitioner filed the subject a petition herein on December 18, 2019, premised on the provisions of; article 3, 10, 22, 23(1), 25 (a) (c) & (d), 27(1), 28, 50, 52, 53(1)(f), 133, 159, 160(1), 165, 258 and 259 of the Constitution of Kenya (herein “the Constitution”), and section 25 (2) and (3) of the Penal Code.
2. The petitioner is seeking for orders as here below reproduced:
 - a. That the honourable court may be pleased to note that the initial trial at the High Court was conducted in violation of my fundamental rights provided under article 51(1)(3) and 260 of the Constitution 2010.
 - b. That the honourable court may be pleased to assist the petitioner to have her case reviewed and order a reasonable directive in respect of article 23(2)(f) and section 167 of the Criminal Procedure Code.
3. The petition was supported by an affidavit sworn by the petitioner wherein she avers that she was convicted over the offence of murder under section 203 as read with section 204 of the Penal Code and sentenced to be detained at the President’s pleasure.
4. That at the time of the trial she was suffering from a mental illness due to hormonal imbalance triggered by child birth. However, she recovered from her illness and followed the proceedings throughout the



- trial, but did not accord her a fair trial as required under article 133 and 165 of the Constitution. Further, she did not enjoy the protection and benefit of the section 9 and 210 of the Penal Code.
5. That the court has no power to order for hospitalization of an accused person in a mental hospital but leaves the matter to the interior and president.
 6. Pursuant to the aforesaid she seeks that the court issue an order to the prison administration to take her for psychiatric mental assessment to enable her benefit from an evaluation of her current mental status as prescribed in law.
 7. However, the respondent opposed the petition vide grounds of opposition that state: -
 - a. The application herein is untenable and should be dismissed.
 - b. The orders sought herein cannot be granted as prayed as the article 52 does not provide of any right.
 - c. The applicant herein should move the court vide an appeal, revision or application and not a petition as the same is addressed to the constitutional and human rights division.
 - d. The applicant has not properly invoked this court's jurisdiction in her cited statutes.
 - e. Article 23 (2)(f) provides for judicial review application.
 8. The petition was disposed of by way of written submissions. The petitioner literally reiterated the averments in the affidavit in support of the application, save to add that, she has been mentally stable since 2016 without dependence on drugs.
 9. That, the Supreme Court in the case of Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 Others (Amicus Curiae) (2021) eKLR gave the court power to re-sentence a convict over the offence of murder under section 203 as read with section 204 of the Penal Code.
 10. Further, in the Petition 226 of 2020 Mrima J held that the trial court has powers to make appropriate orders and directions on a person's mental stability and number of years spent in prison. Furthermore, in the case of Rose Serenoi Kipukel v Republic Miscellaneous Criminal No 5 of 2020 the court released an applicant who had been committed to serve sentence at the President's pleasure but had since become mentally stable
 11. The petitioner stated that she is a first offender and remorseful and contrite of the offence. Further, she is rehabilitated following training and acquisition of skill from industrial, religious counselling and guidance training. Furthermore, she has been in prison since her arrest in 2015 thus a total of eight (8) years and is potential for re-integration in the society. She urged the court to release her and grant her a second chance in life.
 12. However, the respondent raised the issues of; whether the court has jurisdiction to entertain the petition and whether the application is merited. It was that the court has no jurisdiction to hear and determine the application as it is *functus officio* and therefore the petitioner should have moved the court by way of an appeal, revision or application. Reliance was placed on decision of the case of Jeremiah Mwita Range v Republic [2020] eKLR where the court struck out an application that challenged the final decision of a court of parallel jurisdiction.



13. Further section 364 of the [Criminal Procedure Code](#) gives the High Court revisionary powers in proceedings before subordinate courts. That, the charge against the petitioner was murder determined by the High Court and therefore this court lacks the jurisdiction for review its own orders. The respondent urged the court to dismiss the petition. Reliance was based on the Court of Appeal decision in [Telkom Kenya Limited v John Ochanda](#) [2014] eKLR. '*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.'

14. I have considered the petition and wish to clarify at the outset that the matter herein was originally filed in the Constitution and Human Rights division of the High Court. It was then transferred to the Criminal division. The court then invited the petitioner to consider whether she was going to proceed with the petition as framed in view of the fact that, the matter dealt with in the Criminal division are basically criminal appeals and applications. She remained adamant she would.
15. Having heard the matter, the issues that have arisen for determination are whether the court has jurisdiction to hear the matter and whether the petition is merited. The challenge on jurisdiction is based on the argument that this court is "*functus officio*". On that issue this court has in the case of; [Lucy Wangari Mubia v Republic](#) [2022] eKLR pronounced itself as follows;

- “ 15. *Functus officio* is a latin expression that translates to; “having performed his or her office.” 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:

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).

16. 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.

17. This is contrary to the Lyrics to the song; “Mistake” from the popular children’s cartoon Shimmer and Shine enlighten:

“When we make a big mistake.

Don’t fret, let’s celebrate

Cause we’ll get another try (Oh yeah)



We'll do better next time”.

16. Pursuant to the aforesaid, this court became “*functus officio*”, when the final decision in the murder case was rendered and the petitioner ordered to be detained at the President’s pleasure. As such this court has no power to review its own decision and the matter can only be a subject of appeal to the Court of Appeal.
17. Be that as it were, even if the court were to consider the matter as pleaded, in the light of the alleged violation of the petitioner’s rights, the same is hinged on the validity of court order that she be detained the Presidential pleasure.
18. The jurisdiction of this court to deal with constitutional issues is provided for under article 165 (3) (b) and (d) that provides the court has jurisdiction to determine the question as to whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened and to hear any question respecting the interpretation of this [Constitution](#) including the determination of; the question whether any law is inconsistent with or in contravention of this [Constitution](#);
19. The question that arises is whether an order under section 166 of the [Criminal Procedure Code](#) amounts to a punishment, as envisaged under the law. In that regard this court has in the case of; [Lucy Wangari Mubia v Republic](#) [2022] eKLR that: -
 - “ 38. Furthermore, a question arises, as to whether an order made under the subject provisions of; section 166 (1) of the [Code](#), amounts to a punishment, as stipulated under; section 24 of the [Penal Code](#). It suffices to note that, the provisions of; section 166 (1) of the [Code](#), refers to the order as; “a special finding” and not a punishment or a sentence.
 39. The various punishments, that a court can mete out upon conviction of an accused person, are set out under; Part VI of the [Penal Code](#), (cap 63), Laws of Kenya, and in particular; section 24 thereof; wherein it is stipulated: -

“The following punishments may be inflicted by a court—

 - (a) death;
 - (b) imprisonment or, where the court so determines under the [Community Service Orders Act](#), 1998, community service under a community service order;
 - (c) detention under the Detention Camps Act;
 - (d) deleted by Act No 5 of 2003, s. 3;
 - (e) fine;
 - (f) forfeiture;
 - (g) payment of compensation;
 - (h) finding security to keep the peace and be of good behaviour;
 - (i) any other punishment provided by this Code or by any other Act.
 40. It therefore follows that, the order made pursuant to the provisions of; section 166 (1) of the [Code](#) is not a punishment and/or a sentence as envisaged under



the law. As such, prayer (4) of the application seeking that, the applicant be released on the sentence served so far, is not tenable.”

20. Pursuant to the aforesaid it is my considered view that an order of the court under the provisions of section 166 of the *Criminal Procedure Code* does not amount to infringement of the petitioner’s constitutional rights. But even if there was violation, there are no prayers in the petition for a remedy for enforcement of the alleged violation of rights.
21. To the contrary, the order sought for revision, review or re-sentencing is not founded on the provisions of *inter alia* section 362 and 364 of *Criminal Procedure Code* and relate to matter from the subordinate court and not the High Court as herein. In that regard, this court has no jurisdiction to issue an order for the prison authority take the petitioner for current mental assessment and even if the order is issued, what purpose will it serve.
22. The upshot of all thus is that, the petition struck out for want of jurisdiction or dismissed as lacking in merit.
23. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 8TH FEBRUARY, 2023.

GRACE L. NZIOKA

JUDGE

In the presence of

Mr. Mwangi holding brief for Ms Ngechu

Mr. Kiragu for the state

Ms Ogutu-Court Assistant

