



**Gibaye & another v Republic (Petition E14 & E015 of 2022  
(Consolidated)) [2023] KEHC 1663 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1663 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
PETITION E14 & E015 OF 2022 (CONSOLIDATED)**

**RPV WENDOH, J**

**MARCH 9, 2023**

**BETWEEN**

**FABIAN GIBAYE ..... 1<sup>ST</sup> PETITIONER**

**VICTORIA GATI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Boke Chacha, Fabian Gibaye, Mbingiri Joshat Ghati and Victoria Gati were convicted for the offence of Grievous Harm contrary to Section 234 of the *Penal Code*, by the Resident Magistrate Kehancha on 1/10/2012 and were sentenced to 14, 30, 20 and 30 years imprisonment respectively.
2. In Criminal Appeal 244, 229, 230 and 235 of 2022 they appealed to the High Court at Kisii and on 8/1/2015, Justice Muriithi dismissed their appeals both on conviction and sentence.
3. Fabian Gibaye (2<sup>nd</sup> Accused) and Victoria Ghati (4<sup>th</sup> Accused) through the firm of Nyagesoa Advocates, have filed Constitutional Petitions E014 of 2022 and E015 of 2022 which were consolidated. The petitioners basically seek a review of the sentence for reasons that the petitioners have served a substantial part of the sentence. Counsel went on to list other mitigating factors. The counsel relied on the Supreme Court decision in *Francis Karioko Muruatetu v Republic* (2017) eKLR.
4. The Petitions were opposed by the ODPP, Mr. Mulama filed a Preliminary Objection to the effect this court has no jurisdiction to hear the petition because this court is *functus officio* this matter and it is *Res judicata*. Counsel also filed written submissions in support of the grounds of objection.



5. The first question this court asks is whether the matter is *functus officio*. [\*Jowitt's Dictionary of English Law\* 2 Edition](#) defines functus office as:

“Functus officio is (having discharged his duty), an expression applicable to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted.”

6. In [\*Jane Nambuye Manyonge v Republic\*](#) (2021)eKLR, the court observed:-

“The moment the matter was heard and determined by the High Court, the court became *functus officio*. The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. That once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive, as stated in the “*Application in Administrative Law*,: (2005) 122 SALJ 832.”

7. Functus officio deals with the principle of finality, that once a court has made of decision on a matter, the same is final and is conclusive as regards that court and one can only appeal to a higher court. In this case, the petitioners had appealed the trial court’s decision to the High Court, a court of concurrent jurisdiction. If they are dissatisfied with the High Court’s decision, they should appeal to Court of Appeal. This court has no jurisdiction to review the judgment of J. Muriithi.

8. Further to the above, it was submitted that the matter is res judicata. The doctrine of *Res judicata* is defined in Section 7 of the [\*Civil Procedure Act\*](#). It states:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

9. This is a Constitutional Petition. In [\*John Florence Maritime Services Ltd v Cabinet Secretary Transport and Infrastructure & 3 Others\*](#) (2021)eKLR the Court of Appeal affirmed that the doctrine of Res Judicata applies to Constitutional petitions.

10. The petitioners purported to rely on the Muruatetu case. In the said case, the Supreme Court held that the ‘mandatory’ death sentence under Section 204 of the [\*Penal Code\*](#) was unconstitutional. The said court did not do away with the death sentence. The case did not declare any other law providing for mandatory sentence as an unconstitutional. It did not declare as unconstitutional the death sentence. The court was left with a discretion whether sentence to death or any other sentence. Sentence is an exercise of discretion which has to be exercised judiciously within the law of the land and the [\*Constitution\*](#). The High Court upheld the trial court’s sentence having considered the law and the aggravating circumstances of the case. There would be no basis for this court to interfere with the said sentences.

11. In any event, the same court i.e. High Court had dealt with the matter which involves the same parties and same issues. The Appeal has already been dismissed by the High Court and is therefore res judicata and therefore this court has no jurisdiction to deal with this matter. If the petitioners have any grievances, the proper forum to approach is the Court of Appeal, but not come back to the High Court.

In the end, I find no merit in the petition. It is hereby dismissed.



**DATED, DELIVERED AND SIGNED AT MIGORI THIS 9TH DAY OF MARCH, 2023**

**R. WENDOH**

**JUDGE**

Judgment delivered in the presence of

Kosgei for the State.

Petitioners present virtually.

Evelyne Nyauke – Court Assistant

