



**Republic v Ongore (Criminal Case 21 of 2013)
[2023] KEHC 2242 (KLR) (20 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2242 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE 21 OF 2013
KW KIARIE, J
MARCH 20, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

KENNEDY OGIRE ONGORE ACCUSED

RULING

1. Kennedy Ogire Ongore was charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. He was tried and this court (Majanja J) found him guilty, convicted him and sentenced him to death as provided for under section 204 of the *Penal Code* on April 11, 2016.
2. He was dissatisfied with both conviction and the sentence. He appealed to the Court of Appeal where the conviction was upheld. However, the Court of Appeal directed that the matter be remitted to this court for resentencing for he was not accorded an opportunity to mitigate. This is what the court said:

"We have considered the record of the trial court. The appellant was convicted on April 6, 2016 and sentenced on April 11, 2016, prior to the decision of the Supreme Court in *Muruatetu* and was not given an opportunity to mitigate. The Supreme Court directed that a person convicted of the offence of murder should be given an opportunity before the court considers the guidelines on sentencing set in *Muruatetu*."
3. The Court of Appeal did not set aside the sentence by Majanja J before remitting this case to this court for resentencing. This therefore prompted me to invite submissions on the issue of resentencing and whether this court has jurisdiction to do so. Both counsel filed their submissions.
4. Ms Namusubo Pamela Janet, for the accused submitted that I have jurisdiction to resentence. She relied on the case of *Michael Kathekwa Laichena & Another vs Republic* [2018] eKLR.



5. Mr Justus Ochengo on the other hand submitted that the decision of the Supreme Court is *per incuriam* for it could not donate jurisdiction to a court which jurisdiction that court did not possess. He also argued that if this court embarks on resentencing, it will be in breach of the doctrine of *functus officio*.
6. When the accused was before court on April 11, 2016, the original record shows that he was given a chance to mitigate. This is what he told the court in mitigation before sentence (page 195) of the original record):

Accused: I wish the court to consider that I have been in remand for 7 years and I have been charged with an offence I never committed.
7. I have noted that the typed proceedings omitted what the prosecutor and the accused told the court on April 11, 2016. Had the record been correctly captured, I am persuaded that the Court of Appeal will not have remitted the file for resentencing.

The appellant was therefore given a chance to mitigate.
8. The Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR stated:

"[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.
- c. The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same.
- d. We direct that this Judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law, to give effect to this judgment on the mandatory nature of the death sentence and the parameters of what ought constitute life imprisonment."

This is the basis on which the Court of Appeal remitted this matter to this court.



9. It was submitted by the prosecution counsel that the doctrine in *Muruatetu* was *per incuriam*. I do not agree with this view. *Per incuriam* is defined in [Black's Law Dictionary](#) Tenth Edition as:

"Per incuriam: of a judicial decision wrongly decided, usually because the judge or judges were ill-informed about the applicable law:

"As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam*, must in our judgment, consistently with the *stare decisis* rule which is an essential part of our law, be of the rarest occurrence". Rupert Cross & JW Harris, *Precedent in English Law* 149 (4th edition 1991)"

The doctrine of *per incuriam* does not therefore apply in this case.

10. The issue of resentencing poses a question on 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.

In [Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others](#) [2013] EKLRL 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.

At paragraph 19 in 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"



11. Sentencing is a judicial exercise. Once a judicial officer has pronounced a sentence, he/she becomes *functus officio*. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. *Black's Law Dictionary* Tenth (10th) Edition defines sentence as:

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

12. In Criminal Petition No 13 of 2019 *George Oyengo Barasa vs Republic* when faced by a similar issue of resentencing, I made the following observations:

"Remitting a matter to the trial court which had become *functus officio* 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."

13. I agree with the court in the case of *Stephen Mugendi Ndwiga v Republic* [2021] eKLR where lady Justice Lucy Njuguna stated that:

"It is my considered view that this court cannot review a judgment of Hon S Chitembwe J and in doing so resentence the petitioner herein while invoking the dictum in Muruatetu's case despite the change in law. Doing so would be tantamount to reopening the matter and applying the judicial decision retrospectively. Further this court is bereft of jurisdiction to review the said judgment as doing so would be tantamount to sitting as an Appellate court on the judgment of the Learned Judge and which act the law abhors.

21. In the same breath, this court cannot review the said judgment and in doing so take into account the time the petitioner had spent in custody. The same ought to have been dealt by Hon Chitembwe J as the first appellate court. Failure by the said first appellate court to consider the said period cannot be rectified by this court as the same shall be akin to reviewing the decision of a court of concurrent jurisdiction."

14. Jurisdiction is a creature of statute and cannot be conferred by the superior courts. As far as am aware, the *Criminal Procedure Code* has not been amended to address the issue of resentencing. The Supreme Court in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR stated as follows:

"68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

15. I therefore find that I have no jurisdiction to address the issue of resentencing in this matter.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF MARCH 2022

KIARIE WAWERU KIARIE

JUDGE

