



**Republic v Odingo (Criminal Case 5 of 2015)
[2023] KEHC 2022 (KLR) (20 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2022 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE 5 OF 2015**

**KW KIARIE, J
MARCH 20, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ARTHUR ONYANGO ODINGO ACCUSED

RULING

1. Arthur Onyango Odingo was convicted for the offence of murder contrary to section 204 of the [Penal Code](#). He was sentenced to death. He appealed to the Court of Appeal in criminal Appeal 32 of 2010 and his conviction was upheld. The court however remitted the matter for resentencing in line with the decision of the Supreme Court in the case of [Francis Karioko Muruatetu & another vs Republic \[2017\] eKLR](#). In doing so the Court said:

'Turning to the issue of sentence, it is true that mandatory death sentence in murder cases is now unconstitutional. The sentence was passed on June 28, 2016 before the Supreme Court pronounced itself in the Muruatetu case. In the circumstances, we are of the view that the appellant ought to be presented before the trial court for mitigation hearing and resentencing, taking into consideration all the relevant factors as spelt out by the Supreme Court, which we hereby so order.'

2. 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.
3. The firm of Okello Okoth Advocates for the accused submitted that I have jurisdiction to resentence. It was contended that this court is not functus officio.
4. 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*.

5. When the accused was before court on June 28, 2016, the original record shows that he was given a chance to mitigate. This is what he told the court through his advocate in mitigation before sentence (page 122) of the original record):

'The accused person is suffering from HIV AIDS and is on medical treatment. He is very remorseful for what happened. We ask for leniency to enable him to proceed with his normal life and treatment.'

6. The trial court indicated that it had considered the mitigation before proceeding to sentence the accused. The appellant was therefore given a chance to mitigate.

7. 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.'

8. 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.

10. *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.

11. The resentencing order without setting aside the sentence by the trial court pose 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.'

In *Raila Odinga & 2 Others vs 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.'

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'

12. Sentencing is a judicial exercise. Once a judge or 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 describes defines sentence as:

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



Remitting a matter to the trial court which had become funtus 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. 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 backward 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. Also termed retrospective law.'

14. In the case of *Khaemba Patrick Wanyonyi vs Teachers Service Commission [2013] eKLR*, Gikonyo J had this to say on the origins of this doctrine:

'The concept of retroactive or retrospective law developed over time in the 1700s to cure the grave injustices occasioned by what was called the bill of attainder (1300-1600) on a person (attainder) who had been sentenced to death or declared an outlaw. Literally, all civil rights of the attainder were extinguished whether past, present and future, and could not perform any of the legal functions that he performed before the attainder.'

15. The Supreme Court in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR* with regards to the general rule against retrospective application of the law stated:

'As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. Halsbury's Laws of England, 4th Edition Vol 44 at p 570). A retroactive law is not unconstitutional unless it: (i) is in the nature of a bill of attainder; (ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden.

16. In Criminal Law, the rule against retroactive application is provided for 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 explicitly allows retroactivity.

17. From the foregoing, I find that unless the sentence by the trial court is set aside, I have no jurisdiction to entertain the accused in resentencing.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

