



REPUBLIC OF KENYA



KENYA LAW
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**Asiago v Republic (Criminal Revision E045 of 2022)
[2023] KEHC 19983 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19983 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL REVISION E045 OF 2022**

**WA OKWANY, J
JULY 13, 2023**

BETWEEN

ENOCK GISAIRO ASIAGO APPLICANT

AND

REPUBLIC RESPONDENT

(From the Original Conviction and Sentence of Hon. Lady Justice E. N. Maina dated 22nd July 2021 in the original Nyamira High Court Criminal Case No. 11 of 2020)

RULING

1. The Applicant was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The Particulars on the Information dated July 3, 2020 were that on the 13th day of May 2020, at Bosiago Village of Bonyunyu location, Masaba North sub-county within Nyamira County murdered Irene Kemunto.
2. The trial proceeded before Maina J. At the close of the trial, the Applicant was convicted of the lesser offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. He was thereafter sentenced to serve 15 years' imprisonment.
3. The Applicant filed the instant Application on December 16, 2022 seeking a revision of the sentence. The Application is brought under Articles 24 (1) (e) and 50 (2) (p) of the Constitution 2010 and is supported by the Applicant's affidavit dated September 5, 2022.
4. The Applicant raises 11 grounds as follows: -
 - (1) That he was sentenced and convicted of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code and subsequently sentenced to 15 years imprisonment.



- (2) That he applies to this Court for leniency, mercy, grace and consideration of his mitigation to mete out a less severe sentence than the current one.
- (3) That the Court be pleased to reduce the 15 years jail sentence to a less severe one pursuant to Articles 24 (1) (e) and 50 (2) (p) of the Constitution 2010 upon mitigation.
- (4) That he has school-going children from Primary to Secondary who fully depend on him for their education and basic needs as a parent.
- (5) That his piece of land (farm) has now been grabbed by his brother who is neither helping him nor his children.
- (6) That his children are severely suffering in the hands of neighbours irreparably.
- (7) That his wife had forgiven him and withdrawn the case from the Court and pleaded for diversion.
- (8) That the Court be pleased to allow the diversion policy and divert the case from the court process and allow the matters to be settled out of Court on merit and through agreed structures pursuant to Diversion Policy Guidelines of the Office of DPP.
- (9) That he was a first offender profusely remorseful, rehabilitated and socially readapted.
- (10) That the honourable Court has powers to hear, determine and allow and issue consequential orders about the same.
- (11) That the Applicant has been under rehabilitation and reform structure with 'Affirmed Spiritual Transformation' documents at Emmaus Bible School both with diploma, Discovery and Prisoner's Journey and is also an active member of the SDA Church.

5. At the hearing of the Application, the Applicant urged the Court to review his sentence and consider his mitigation for a less severe sentence to enable him to be reunited with his family.
6. The Applicant submitted that he has young children who are suffering in his absence and that one of children had sustained cut wounds. He submitted that his land had been grabbed by family members who also demolished his house and stole his property.
7. The Prosecution (Respondent) opposed the Application on the grounds that the matter had been heard and determined by the High Court which was the trial court. It was submitted that this Court should not sit on its own appeal or revise a sentence that it had passed. It was argued that the only recourse for the Applicant was at the Court of Appeal.
8. In a rejoinder, the Applicant stated that his plea was purely based on the fact that he had many problems at the family level as his children had no one to fend for them.
9. I have perused the judgement rendered by Maina J and it is clear to me that the Court correctly exercised its jurisdiction and meted out a lawful sentence. I find that this court became *functus officio* as submitted



by the Respondent. In the case of *Jersey Evening Post Limited v Al Thani* [2002] JLR 542 at 550 it was held thus: -

“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.”

10. Daniel Malan Pretorius aptly explained the principle of *functus officio* in his article, ‘*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law*’, [2005] 122 SALJ 832 as follows: -

“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 a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

11. My finding is that the Applicant was tried, convicted and sentenced by a court of equal/concurrent status and competent jurisdiction. It thus follows that this Court became *functus officio* the moment the said judgment was delivered and sentence passed. This Court lacks jurisdiction and I am precluded from interfering with the decision of my predecessor Maina J.
12. My take is that the only recourse available to the Applicant, if he is aggrieved with either the conviction or the sentence, is to appeal to the Court of Appeal.
13. In sum, I find that the application is not merited and I accordingly dismiss it.
14. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 13TH DAY OF JULY 2023.

W. A. OKWANY

JUDGE

