Mutekhele v Republic (Miscellaneous Application E021 of 2023)
[2023] KEHC 23414 (KLR) (13 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23414 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

MISCELLANEOUS APPLICATION E021 OF 2023

DK KEMEI, J

OCTOBER 13, 2023

BETWEEN

ZADOCK WAMALWA MUTEKHELE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant herein Zadock Wamalwa Mutekhele filed an application on 12.10.2022 at Kisumu High Court which was later transferred to this court. The applicant seeks two prayers namely, review of sentence of 20 year imprisonment to a lesser period and that the period spent in custody from 7/12/2013 to the time of sentence be factored.

2. The Application is supported by an unsworn affidavit of the Applicant and filed on even date. The Applicant's gravamen is inter alia; that he had been convicted for the offence of murder contrary to Section 203 as read with Section 204 wherein he was sentenced to serve 20 years imprisonment; that the period spent in custody from 7/12/2023 was not factored in the sentencing; that he now seeks a lesser period and/or non- custodial sentence and further the sentence so reviewed should factor the period spent in custody.

3. The Respondent did not file a replying affidavit to the application. However, the parties agreed to canvass the application via either written or oral submissions. The applicant filed submissions on 29/6/2023 while the respondents counsel opted to present oral submissions.

4. The Applicant in his submissions submitted that the period spent in custody under Section 333(2) of the Criminal Procedure Code was not considered during the imposition of the sentence. It was also submitted that the applicant has since reformed while in prison and been issued several certificates of achievement. It was finally submitted that the applicant is a victim of high blood pressure and mild stroke coupled with the burden of being the sole breadwinner for his family.

5. Miss Mukangu Learned Counsel for the Respondent opposed the review of sentence on ground that this court lacks jurisdiction to entertain he matter in that Article 165 (b) of the *Constitution* does not confer this court with power to supervise the court of Appeal. It was submitted that the applicant upon being convicted and sentenced by this court appealed to the court of Appeal which determined his appeal and hence this court is already functus officio. It was also submitted that the issue of section 333(2) of the criminal procedure code does not apply since the applicant had been out on bond during his trial and the sentence has already been dealt with by this court and the court of Appeal. It was finally submitted that the application of the principles in Muruatetu case is misplaced since the applicant's mitigation was duly considered and hence the fact he was not sentenced to death.

6. I have given due consideration to the application and the oral submissions. It is not in dispute that the applicant upon being convicted and sentenced by this court he lodged an appeal to the court of Appela. It is also not in dispute that the court of Appeal has since dismissed the applicants appeal vide its judgment dated 25.3.2022. That being the position, I find the only issue for determination is whether the application has merit.

7. It is trite law that a court cannot rehear a matter that it had herd and detemrie4nd previously. This is consistent with the doctrine of *functus officio*. The term functus officio is defined at page 840 of *Jowitt's Dictionary of English Law* 2nd Edition.

> " Functus officio (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".
>
> The functus officio doctrine was dealt with by the court of Appeal in *Telkom Kenya Ltd v John Ochanda (suing on his own behalf and on behalf of 996 former employers of Telkom Kenya Limited* (2014) eKLR where Githinji , Karanja and Kiage TTA Observed this:
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> > "Functus Officio is an enduring principle of law that prevents the re-opening a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition form as long as the latter part of the 19th Century. In the Canadian case of *Chandler v Alberta Association of Architects* (1989) 25.C.R 848, Sopinka J traced the origins of the doctrine as follows 9 at page 860):
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> > > "The General rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *Re St Nazaire Co* (1879)12 CH. D. 88. The basis for it was that the power to rehear was transferred by the *Judicature Act* to the appellate division. The rule applied only after the formal judgement had been drawn up. Issued and entered, and was subject to two exceptions:
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> > > 1. Where there had been a slip in drawing it up and,
> > >
> > > 2. Where there was an error in expressing the manifest intention of the court. *Paper Machinaer Ltd v J.O. Rose Engineering Corp.* (1934) S. C R. 186".

8. The Supreme Court in *Raila Odinga & others v IEBC & 3 others* (2013) eKLR cited with approval on ecerpt from an article by Danile Malau Pretorious entitled, " *The Origins of the Functus Officio*

Doctrine , with special reference to its Application in Administrative law (2005)122 SAL J 832 in which the learned author stated;

> " .... 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 toa superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker".

9. In the matter before me, the applicant has clearly informed that he was convicted and sentenced by this court and orde4red to serve twenty (20) years imprisonment and that he subsequently lodged an appeal to the court of Appeal which appeal was dismissed and that the conviction and sentence of this court was affirmed . The conduct of the applicant in approaching this court has the effect of disrupting the hierarchy of courts. This court's hands are already tied by the doctrine of functus officio. The court duly received the applicants mitigation and thereafter sentenced him to serve twenty years imprisonment instead of the death sentence. Hence the applicants invitation to the revision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic* (2017) eKLR is belated and unhelpful since this court passed the sentence in full guidance of the Supreme Courts decision in the aforesaid case. Again, this court had already made its determination and that the crux of the criminal application by the applicant herein is an invitation to this court to purport to alter a decision that has been passed and which would be tantamount to an appeal. It is instructive that the applicant is fully aware that an appeal against an order granted by the High Court can only be heard and determined by the court of Appeal by dint of Article 164 (3) (a) of the *Constitution* of Kenya. This court is already functus Officio in this regard. As the court of Appeal has already dealt with the matter the only recourse for the applicant is to approach the said court for redness.

10. In the result it is my finding that the applicant's application filed on 12.10.2022 lacks merit. The same is dismissed.

DATED AND DELIVERED AT BUNGOMA THIS 13TH DAY OF OCTOBER, 2023

D KEMEI

JUDGE

In the presence of :-

Zaddock Wamalwa Mutekhele Applicant

Miss Mwaniki for Respondent

Kizito Court Assistant