



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION NO 259 OF 2019

**IN THE MATTER OF: ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22(1)
OF THE CONSTITUTION**

AND

**IN THE MATTER OF: ARTICLE 165 AND ALL OTHER ENABLING POWERS AND
PROVISIONS OF THE LAW**

AND

IN THE MATTER OF: KCA CRIMINAL APPEAL NO.27 OF 2016 AT NAIROBI

AND

IN THE MATTER OF: HIGH COURT CRIMINAL APPEAL NO.2 OF 2014 AT NAIROBI

AND

IN THE MATTER OF: CRIMINAL CASE NO 1894 OF 2012 AT CM'S COURT AT KIBERA

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 50(2) (p) OF THE
CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: SECTION 333(2) OF THE CRIMINAL PROCEDURE CODE

AND

**IN THE MATTER OF: SECTION 46(1) (ii) OF THE PRISONS ACT CHAPTER 90 OF THE
LAWS OF KENYA**

BETWEEN

JOHNSON MWANGI KIAMAAPPLICANT

AND

THE DPP.....RESPONDENT

RULING

1. By an application dated 4th October 2019, the applicant is seeking for orders as follows: -

a) That, the Honorable court is urged to take into account the applicant's pre-trial period; in line with requirements of Section 333 (2) of the Criminal Procedure Code;

b) That, the Honorable Court declare that the applicant's sentence ought to have run from the date of arrest;

c) That, the Honorable court be pleased to review the sentence the applicant is serving of; 20 years' imprisonment;

d) That, the Honorable court be urged to grant the applicant Remission i.e. one-third of the sentence be deducted from the total sentence; within the meaning of Section 46 of the Prison's Act;

e) That, the Honorable court evaluates and analyse the circumstances surrounding the commission of the offense and the circumstances surrounding the applicant with a view of adjusting the sentence imposed downwards;

f) Such other orders that the Honorable court may deem fair and just.

2. The application is supported by the grounds thereto and an affidavit sworn by the applicant. In a nutshell, he deposes that he was charged with the offense of; Robbery with violence contrary to; Section 296(2) of the Penal Code in the Chief Magistrates Court, at Kibera vide Criminal Case No. 1894 of 2012. He was convicted and sentenced to death.

3. He appealed to the High Court vide Criminal Appeal No. 2 of 2014. The appeal was dismissed in its entirety. He then appealed to the Court of Appeal vide Appeal No. 27 of 2016, but there has been no communication from the Court of Appeal.

4. That, he then sought for re-sentencing and the matter was heard at the Chief Magistrate's court at Kibera and by a ruling dated 16th July 2019, the Chief Magistrate Court ordered that, he serves a custodial period of twenty (20) years to commence from the date, he was arrested on 10th April 2012. It is on this basis, that he requests the court to review the sentence.

5. The application was placed before the court on the 8th October 2019, whereupon the court ordered that, it be served for hearing inter parties with directions that a hearing date be fixed at the registry. On 24th November 2020, the applicant was not produced in court; as a result, the application was set for mention on 2nd December 2020. On that date, the parties were not present before the court. Subsequently the matter was fixed for hearing on 19th April 2021. In addition, the lower court file which had been ordered for had not been availed.

6. On the 19th April 2021, the court noted that the application had been pending for long and the Respondent had not responded thereto. The Court ordered the Honorable Deputy Registrar to serve the application upon the respondent who was given a seven (7) days within which to respond with leave to file submissions. On 3rd May 2021, the court realized that the lower court file been availed.

7. However, the respondent filed a response to the application on the 4th May 2021, based on the following as grounds of opposition;

a) That, this court lacks jurisdiction to entertain this application;

b) That, the court is functus officio as the matter was already heard and determined by the Court of

Appeal and a judgement entered in respect to the same;

c) That, the application is an abuse of the court process;

d) That, the application lacks merit, is ill- advised and the same be dismissed entirely.

8. I have considered the application in total and I find that, first and foremost, a perusal of the trial court's file; criminal case 1894 of 2012, reveals that, the applicant was indeed convicted on 21st December 2012 and sentenced to suffer death, in accordance with the law. He was given 14 days within which to appeal.

9. Apparently although the applicant avers that he appealed to the High Court vide Criminal Appeal No.2 of 2013, I have not had the benefit of the proceedings in that matter. I have only seen a letter dated 22nd January 2013, from Mr A. K Kithuki, PDR, to the Chief Magistrate at Kibera, requesting that the record of the lower court be forwarded to the High Court. If that is the case and as the applicant avers the appeal to the High Court was dismissed, then this court is *functus officio* in relation to this matter.

10. In that regard, Daniel Malan in his article on "The Origin of the *functus officio* doctrine", cited by the Supreme Court of Kenya in ***Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others [2013] eKLR*** cited states that;

"Courts in various jurisdictions have adopted that once a court has pronounced a final order it has no authority to correct, alter or supplement that order; the court's jurisdiction in the case having fully been exercised, its authority over the subject matter ceases". That this principle of finality recognizes that it would lead to intolerable uncertainty if courts could be approached to reconsider its final orders".

The doctrine of *functus officio* holds that once an arbitrator renders a decision regarding the issues submitted, he lacks any power to re-examine that decision

11. Similarly, in the Journal by the University of Queensland on "The Finality of Judicial Decisions", it is stated that, a court becomes *functus officio* in the following events;

a) A judicial tribunal, becomes functus officio in respect of decisions made by it before it becomes defunct;

b) The judicial tribunal's powers to revise its own decisions or to re-try any case after decisions made by it in the original trial have been rescinded.

12. In the same vein, the Court of Appeal in the case of; ***Telkom Kenya Limited vs John Ochanda [2014] eKLR***, stated that: -

"Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon...

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar; is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued."

13. Be that as it were, the applicant avers he has filed an appeal pending at the Court of Appeal. Therefore, evidently the applicant is filing multiple applications on a "chance" basis that, he will have the original sentence of death varied and/or reduced as much as possible. That, kind of conduct amounts to nothing less than abuse of the process of the court.

14. The upshot of this is that, in view of the fact that this court is *functus officio* and the Court of Appeal is seized of the appeal matter, this matter cannot be entertained by this court. Consequently, this

application is struck out for want of jurisdiction.

It is so ordered.

Dated, delivered virtually and signed on this 5th day of May, 2021.

GRACE L. NZIOKA

JUDGE

In the presence

Applicant in person

Ms Kibathi for the respondent

Edwin Court Assistant