



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: Hon. D. K. Kemei - J

MISC. CRIMINAL APPL. NO. E011 OF 2020

BONIFACE MAWILI JUMA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RE-SENTENCING

1. **Boniface Mawili Juma**, the Petitioner herein was charged with murder contrary to section 203 as read with section 204 of the Penal Code. He pleaded not guilty and the case proceeded to full hearing before this court. On 9.12.1993, this court convicted him for murder and sentenced him to death.

2. The Petitioner was aggrieved by the decision of the trial court and filed **Criminal Appeal No.75 of 2017** in the Court of Appeal against both the conviction and sentence on 29.3.2017. The Petitioner later withdrew the appeal under Rule 68 of the Court's rules on the 2/1/2020.

3. The Petitioner filed on 14.10.2020 a Petition before this court seeking re-sentencing pursuant to the Supreme Court's decision in **Petition NO.15 of 2015 Francis Karioko Muruatetu & Another vs Republic & 5 Others [2017] eKLR, William Okungu Kittiny vs R [2018] eKLR**.

4. The Petition is based on grounds that:-

*a. The Petitioner is likely to be affected adversely if the right to be heard is ignored, before the Attorney General moves to constitute an extra-judicial framework to award the Petitioners their already accrued remedy of resentencing as directed by the Supreme Court in **Francis Karioko Muruatetu & Another vs Republic & 5 Others [2017] eKLR**;*

b. It is within the Petitioner's constitutional right under Article 47 and 48 of the Constitution to fair administrative action and access to justice;

c. It is within the Petitioner's constitutional right under Article 22 of the Constitution to institute these proceedings on their own interest.

5. Mr. Mwangera appears for the Respondent. The Petitioner appears in person. The Petitioner filed written submissions on 10.6.2021. He has submitted that the High Court pursuant to Article 165(3) of the Constitution can invoke its original jurisdiction to resentence the accused person sentenced to death. According to the petitioner, the superior court decisions are binding to this court. He has submitted that he is before this court not on appeal but on review of the earlier decision on sentence and relies on the Supreme Court decision of Muruatetu (supra). On the importance of mitigation, the Petitioner placed reliance on the case of **Joseph Kaberia Kahinga & 11 Others vs Attorney General [2016] eKLR** and **John Muoki Mbathya vs R Criminal Appeal No.72 of 2007**.

6. On the part of the respondent, it has been submitted that the Petitioner should first exhaust his right of appeal to the Court of Appeal pursuant to Article 50 (2), 164(3) as read with Article 165(6) of the Constitution. Further that this court is *functus officio* since it will be a second appeal to the High Court. Reliance is placed on the case of **Telkom Kenya Ltd vs John Ochanda (Suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Ltd) [2014] eKLR** and **Raila Odinga & 2 Others vs IEBC & 3 Others [2013] eKLR**. Learned counsel for the Respondent urged the court to dismiss the application *in limine*.

7. I have considered the submissions by Petitioner and the respondent. The issue for determination is whether the application has merit.

8. It was submitted for the Respondent that this court is *functus officio*. The Supreme Court in **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** stated that:

“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 or adjudication must be taken to a higher court if that right is available.”

9. It follows therefore that the court will not be *functus officio* only when it’s called upon to correct clerical errors in the judgement. The Petitioner has not demonstrated that there are clerical errors that warrant the court’s intervention. The law as at the time of sentencing was death. This court having made its final determination cannot sit on appeal and rehear this matter. It is *functus officio*.

10. I associate myself with the ***Kiarie Waweru Kiarie J.*** in the case of ***Joseph Maburu alias Ayub v Republic [2019] eKLR*** where the learned Judge stated that:-

“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 judgement 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 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.”

11. It is noted that this court has already convicted and sentenced the Petitioner. The Petitioner was expected to move to the Court of Appeal for redress if aggrieved. The Petitioner had lodged an appeal to the said appellate court but later withdrew it. As the said appellate court is yet to be approached by the Petitioner, then I find that he is not barred from lodging his appeal even out of time as long as sufficient reasons are given for the delay. The said appellate court has the requisite jurisdiction to entertain the applicant’s requests.

12. In the result, it is my finding that the Petitioner’s application filed on 14/10/2020 lacks merit. The same is dismissed.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 8TH DAY OF JULY, 2021.

D. K. KEMEI

JUDGE