



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CRIMINAL APPLICATION NO. E330 OF 2020**

**MUSA ADIKA MUDAVILA.....APPLICANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**RULING**

1. The applicant herein was arraigned before the High Court in Nairobi, vide criminal case number 85 of 2013, charged with the offence of; murder contrary to section 203 as read with section 204 of the Penal code (cap 63) Laws of Kenya.

2. He was tried and convicted vide a judgment delivered on 7<sup>th</sup> December, 2015, and subsequently, to suffer death. By a memorandum of appeal dated 17<sup>th</sup> February, 2017, he appealed against the conviction and sentence.

3. On 24<sup>th</sup> April, 2020, the Court of Appeal vide Criminal Appeal No. 76 of 2017, dismissed the appeal against sentence but set aside the death sentence and substituted it with a thirty (30) years imprisonment sentence with effect from the date of conviction.

4. By undated chamber summons application, filed in court on; 11<sup>th</sup> December 2020, and supported by the affidavit sworn by the applicant, he is seeking for orders as here below reproduced: -

*a) That, this Honourable court is urged to find that the Police had exceeded their mandate by unlawfully releasing a vital exhibit (the motor vehicle in question) that was never ascertained by the court to be existing and which had not been formally produced before court as required by law;*

*b) That, if the Honourable court finds the foregoing to be the case, the Honourable court is further urged to follow in the footsteps of finding in the case of: Joseph Njaramba Karura vs Republic (1982-88) KAR 1165 and in the case of Director of Public Prosecutions vs Marias Pakine Tenkewa T/A Naresho Bar Restaurant (2017) eKLR;*

*c) That, the issues raised emanate from Judgement delivered on; 24<sup>th</sup> of April 2020. at Nairobi-Kenya Court of Appeal, C.A. Application No. 76 of 2017;*

*d) That, the consequence upon this application is to find options open to me as the Applicant;*

*e) That, this Honourable court be pleased to give such consequential further or other orders as it deems just;*

*f) That, the cost of this application be provided for.*

5. However, the application was opposed by the Respondent vide grounds of opposition dated 4<sup>th</sup> June, 2021, in which it is stated:

*a) That, the Application raises no Constitutional issue that would call for the High Court's interpretive jurisdiction;*

*b) That, the issues raised in the Application are not constitutional issues;*

*c) That, the issues raised in the Application were settled by the trial court and on Appeal by the Superior court;*

*d) That, there is no issue that has been raised which may not have been dealt with by the trial and or appellate court;*

*e) That the Application is frivolous, vexatious, an abuse of court process and should accordingly be dismissed.*

6. I have considered the application in the light of the materials placed before the court and I note that, first and foremost, from the face value, the application herein is indicated as, having been filed in the “Constitutional and Human Rights Division”. Therefore, how it ended up in the “Criminal Division”, of the High Court is not clear. In fact, to buttress that fact, the applicant has premised the application on the constitutional provisions of; Articles; 22, 23, 159 (2) (d), 47(1), (2), and the Interpretation and General Provisions Act, (cap 2) Laws of Kenya.

7. He has also filed a further document entitled “Application” and in which he states as here below reproduced; -

*a) That, Article 159 (2) (d) of the Constitution of Kenya; 2010 empowers the court to make orders prayed for, which are necessary for ends of justice, to give effect to the overriding objectives of a just resolution and to prevent an abuse of the process of the court by lack of the jurisdiction and an illegality arising out of acknowledged absence of jurisdiction;*

*b) That, under Article 47 (3) (1) of the Kenyan Constitution, Parliament shall enact legislation to give effect to the rights in Clause 1 and that legislation shall provide for Review of Administrative Action by court or if appropriate and (b) promote efficient administration (2). If the right of fundamental freedoms of a person has been or is likely to be adversely affected by Administrative Action the person has a right to be given written reason for the action;*

*c) That, the Appellate Jurisdiction Act, Chapter 9 (No 12 of 2012) Sec. 3-Jurisdiction Court of Appeal, for the purpose and incidental to hearing and determination of any appeal in exercise of the jurisdiction conferred by this Act;*

*d) That, the principle of Stare decisis, is important in administration of Justice for certainty, predictability, uniformity and stability in application of law. The Court cannot depart from decision which has Constitutional and statutory foundation but;*

*a) Error per incuriam*

*b) Conflicting decision and overriding the other*

*c) Against the law*

*a) The need to maintain confidence in administration of justice made it imperative that, there should be a remedy in a case where bias has been established, and might justify the court of appeal in taking the exceptional course of re-opening proceedings which had already been determined;*

*b) That, the issues to be addressed by the Hon. Court are thus:*

*i. Whether the Police had exceeded their mandate by unlawfully releasing a vital exhibit (the motor vehicle) that was never ascertained by the Court to be existing;*

*ii. Whether and article which had not been formally produced before Court as required by law can be the basis of a conviction; kindly see the case of; Keneth Nyaga Mwigie vs Austin Kiguta & 2 Others, Civil Application No. 140 of 2008.*

8. It is therefore clear from the aforesaid, that this matter should have been heard in the Constitutional and Human Rights Division of the High Court. In fact, none of the provisions invoked herein gives this court the jurisdiction to hear and determine this matter. The High Court draws its jurisdiction from; Article 165(3) of the Constitution of Kenya, 2020, which provides that: -

*“(3) Subject to clause (5), the High Court shall have:*

*a) Unlimited original jurisdiction in criminal and civil matters;*

*b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;*

*c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;*

*d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*

*(i) the question whether any law is inconsistent with or in contravention of this Constitution;*

*(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*

*(iii) any matter relating to Constitutional powers of State organs in respect of county governments and any matter relating to the Constitutional relationship between the levels of government; and*

*(iv) a question relating to conflict of laws under Article 191; and*

(e) any other jurisdiction, original or appellate, conferred on it by legislation”.

9. Jurisdiction is key to hearing any matter and in the celebrated case of; Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989), the court thus stated: -

*“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”*

10. As a consequence of the aforesaid, this court downs its tool of trade. However, it suffices to also note that, his matter having been heard in the High Court in the first instant and the applicant having exercised his right to appeal, the High court became *functus officio*.

11. An author, Daniel Malan Pretorius, in an article; “The Origins of the *functus officio* doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, which articles was cited by the Supreme Court of Kenya, in Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others [2013] eKLR stated that

*“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.”*

12. The upshot is that, the application is struck out due to want of jurisdiction and/or ground that, the court is *functus officio*.

13. It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 13TH DAY OF SEPTEMBER, 2021**

**GRACE L NZIOKA**

**PRESIDING 3JUDGE**

In the presence of:

Applicant in Person

Ms Chege for the Respondent

Edwin Ombuna - Court Assistant.