John v Republic (Criminal Appeal E094 of 2023)
[2025] KECA 45 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 45 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E094 OF 2023

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JANUARY 24, 2025

BETWEEN

MICHAEL PETERS JOHN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the Ruling of the High Court at Voi (Dulu, J.) delivered on 20th June 2023 In Criminal Miscellaneous Application No. E059 of 2022)

JUDGMENT

1. The appellant was charged with the offence of attempted Murder contrary to section 220(9) of the Penal Code. The particulars of the offence were that, on 28th May 2018 at Mazeras Village within Taita Taveta County, he attempted to cause the death of Josephine Kache by stabbing her with a knife in the stomach and dragging her to the railway.

2. The appellant pleaded not guilty and the matter proceeded to hearing. Upon considering the evidence the trial magistrate convicted him of the offence and sentenced him to serve 15 years imprisonment.

3. Aggrieved, the appellant filed an appeal to the High Court, which dismissed the appeal and upheld both the sentence and conviction.

4. Once again, the appellant was dissatisfied and filed an application to the High Court seeking orders for a declaration that the lower court and the High Court violated his rights to a fair hearing by failing to award him the least possible sentence pursuant to Article 50 (2) (p)(q) of the *Constitution*; that the Court grant him relief pursuant to Article 23(3) of the *Constitution* and for orders that the benefit of the least possible sentence as prescribed by section 389 of the Penal Code as read with Article 50(2) (p) of the *Constitution* be applied to him; that the court be pleased to invoke the provisions of section 333(2) of the Criminal Procedure Code and compute the period spent in remand custody from 30th

May 2018 to 6th August 2019 (1 year, 2 months 7 days) pursuant to the decision in Vincent Sila Juma & 87 Others vs Kenya Prisons Service & 2 Others (2021) eKLR.

5. The application was based on the grounds that he was convicted of the offence of attempted murder and that he ought to have benefited from the least possible sentence as prescribed by section 389 of the Penal Code, which provides that any person who attempts to commit a felony or a misdemeanor is guilty of an offence and is liable, if no other punishment is provided, to one- half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment, he shall not be liable to imprisonment for a term exceeding 7 years.

6. The High Court, upon considering the application in a ruling delivered on 20th June 2023 (Dulu,J.), held that it had no jurisdiction to entertain the application for review of the sentence as it had already delivered its judgment on the appellant's appeal and that the appellant ought to have moved the court by way of a proper Constitutional Petition and not by way of an application in an already determined appeal. The trial Judge stated thus:

> "...what the applicant is trying to do is come to this court to determine again a sentence which was meted to him by the trial court and upheld by the High Court on appeal. In my view if the applicant thinks that the trial magistrate and the High Court on appeal did not consider all the factual and statutory parameters in sentencing him that is a ground of appeal to the Court of Appeal, not coming to this court purportedly as a claim for validation of the *Constitution*"

7. And with that, the High Court dismissed the appellant's application which is what has prompted this appeal.

8. The appellant's grounds of appeal filed pursuant to section 64(2) of the *Appellate Jurisdiction Act* were that: the learned Judge was in error in law by holding that the court could not entertain the application because he had not exhausted his appeal to the Court of Appeal, yet the High Court failed to appreciate that he had not lodged an appeal to this Court and had no desire to do so; in failing to appreciate that, pursuant to Articles 20, 22, 23 and 165 of the *Constitution*, the High Court has jurisdiction to redress a violation that arises from the operation of law through the system of courts, even if the case was heard by the 1st appellate court; in failing to appreciate that there was a conflict between the sentences provided under section 220 and section 389 of the Penal Code for an offence of attempted murder; in failing to appreciate that contravention by the State of any of the protective provisions of the *Constitution* is prohibited, and that the High Court is empowered to redress such contravention; and in failing to appreciate that, under Article 50(2)(p), every accused person has the right to a fair trial, which includes the right to the benefit from the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

9. When the appeal came up for hearing on a virtual platform, learned counsel Ms. Adoyo appeared for the appellant and informed the Court that she had filed written submissions on which she would be relying in their entirety.

10. In his submissions, the appellant stated that he is not challenging his conviction, but that he was challenging the legality of the enactment and the application of the sentence imposed and the conflict between sections 220 and 389 of the Penal Code; that the matter before this Court is borne out of a Constitutional Petition filed by the appellant in the High Court seeking a declaration that there is a conflict between section 220 and section 389 of the Penal Code and that the High Court ought not to have relied on procedural technicalities when determining issues relating to violation of rights and

fundamental freedoms and that, in this case, the High Court was in error in declaring that, since the Petition was not correctly drafted, then the same cannot be considered for determination.

11. The appellant submitted that, by the definition specified under section 220 of the Penal Code, attempted murder is a felony as provided by section 389, and that the punishment that ought to be meted is imprisonment for a term not exceeding 7 years imprisonment; that the conflict between sections 220 and 389 of the Penal Code violates the appellant's rights under Articles 26, 27, 28 and 50(2) (p) of the *Constitution*; that the appellant having been convicted on 6th August 2019 and sentenced to serve a sentence in excess of 7 years imprisonment; that the 15 year sentence imposed by the trial court should be reduced to 7 years imprisonment as provided under section 389 of the Penal Code which is the least severe of the prescribed punishments pursuant to Article 50(2) (p) of the *Constitution*.

12. On their part, learned prosecution counsel for the State, Ms. Mutua also filed written submissions in which the appeal was conceded. It was submitted that the appellant having been charged with an attempted offence if, that offence is one punishable by death or life imprisonment, he shall not be liable to imprisonment for a term exceeding 7 years.

13. Counsel submitted that the sentence of 15 years meted out by the trial Court and upheld by the first appellate Court contravened the provisions of section 389 of the Penal Code, and that both the trial court and the 1st appellate court misdirected themselves during sentencing and the subsequent confirmation of the sentence respectively by not applying the correct provisions of the law regarding penalty for attempted offences where the sentence provided for is either death or life imprisonment.

14. As this is a first appeal, this Court is mandated to re-evaluate and re- analyze the evidence that was before the trial Court, while bearing in mind that it did not have occasion to see or hear the witnesses.

15. In the case of Chiragu & another vs Republic [2021] KECA 342 (KLR), this Court stated that:

> " However, before we grapple with grounds of appeal aforesaid, we must remind ourselves that this being a first appeal from the judgment of the High Court, by dint of section 379 of the CPC and guidance provided in the famous case of Okeno V. R. [1972] EA 32, we are expected to subject the entire evidence tendered in the trial court to fresh and exhaustive examination so as to reach our own independent conclusions as to the guilt or otherwise of the appellants. In doing so, we must however give due allowance to the fact that we neither saw nor observed the witnesses as they testified. Accordingly, we must give way to the findings of facts and demeanor of witnesses by the trial court. See also Erick Otieno Arun V. Republic [2006] eKLR.

16. Having carefully considered the record, submissions by counsel, the authorities cited and the law. The central issue for consideration at this juncture is whether the trial Judge had jurisdiction to determine the appellant's application for review of his sentence.

17. The jurisdiction of the High Court is provided for under Article 165 of the *Constitution* and includes unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretive jurisdiction; any other jurisdiction, original or appellate, conferred on it by any legislation; and supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

18. The provision does not clothe the court with a jurisdiction to review its own decisions. Further, the revisionary jurisdiction of the court under sections 362 and 364 of the Criminal Procedure Code is limited only to proceedings from subordinate courts.

19. Essentially, the crux of the applicant's miscellaneous application was an invitation to the High Court to review the Judgment and sentence that had already been delivered. In effect, this would be tantamount to sitting on appeal on its own decision. An appeal against an order granted by the High Court can only be heard and determined by this Court by dint of Article 164(3)(a) of the *Constitution*. As such, the High Court was rendered functus officio following delivery of the Judgment and sentence.

20. The doctrine of functus officio is one of the expressions in law on the principle of finality and, according to Black's Law Dictionary (Ninth), Edition it is defines as:

> " [having performed his or her office]" (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."

21. The Supreme Court in Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 others [2013] eKLR held 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."

22. In his application, the appellant sought specific prayers in which he challenged his sentence. The prayers are for a declaration that the courts failed to award him the least possible sentence pursuant to section 389 of the Penal Code as read with Article 50 2 (p)(q) of the *Constitution*, and for further orders invoking the provisions of section 333(2) of the Criminal Procedure Code to compute the period spent in remand custody from 30th May 2018 to 6th August 2019 (1 year, 2 months 7 days) pursuant to the decision in Vincent Sila Juma & 87 Others vs Kenya Prisons Service & 2 Others (2021) eKLR. In effect, the orders sought were for the High Court to review the sentence that had issued a final determination on his first appeal, which would mean that the court would be sitting on appeal from its own decision.

23. Indeed, the High Court having rendered its decision in the appellant's appeal, it became functus officio, and therefore lacked jurisdiction to entertain the sentence review application.

24. As stated in the Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR:

> " By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where

a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

25. And in the case of Samuel Kamau Macharia vs Kenya Commercial Bank Limited and 2 Others [2012] eKLR the Supreme Court held that:

> "(68) A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

26. Bearing in mind the edicts outlined above, we cannot fault the High Court for rightly declining to entertain the applicant's application, and for aptly downing its tools as a consequence.

27. In sum, the appeal is without merit and is hereby dismissed.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF JANUARY 2025.

A.K MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR