



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mwavughanga v Republic (Criminal Appeal (Application)
E025 of 2024) [2025] KECA 250 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 250 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL (APPLICATION) E025 OF 2024
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
FEBRUARY 21, 2025**

BETWEEN

HERMAN MWERO MWAVUGHANGA APPLICANT

AND

REPUBLIC RESPONDENT

(An application against the ruling of the Court of Appeal at Mombasa (Gatembu, Lesiit & Odunga, JJ.A) delivered on 8th December 2023 in CRA No. 111 OF 2022)

RULING

1. In an undated application, the applicant, Herman Mwero Mwavughanga seeks to be granted a resentencing pursuant to the determination of his appeal by this Court.
2. The applicant's Motion is brought on the grounds set out on the face of the Motion, where it is contended that by reason of the new Judiciary Sentencing Guidelines, 2023, finalized cases can be re-opened for resentencing; that this Court is constitutionally mandated to interpret *the Constitution*, having due regard for the fundamental rights and protections and evolving standards of decency that mark the progress of a mature society, as required by Article 28 of *the Constitution*; that, further, this Court be pleased to embrace Article 27(1) and 2. of *the Constitution* in respect of the decision of Ali Abdullah Mwanza vs Republic Court of Appeal, CRAPP No.259 of 2012 on equal treatment, protection and benefit of the law with regard to his age of 42 years.
3. The application is supported by the affidavit sworn by the applicant in which he reiterates the grounds on the face of the application and further deposes: that he was the accused person before the Senior Resident Magistrate's court at Wundanyi in Criminal Case No. 317 of 2013, where he was sentenced to life imprisonment before Hon. Chesang (Mrs.) Ag SRM on 15th October 2013; that he filed an appeal to the High Court, being Criminal Appeal No. 163 of 2014 at Voi which appeal was dismissed; that, following his appeal to this Court in Mombasa Criminal Appeal No.111 of 2022 (Gatembu, Lesiit &



- Odunga JJ.A.), in a judgment delivered on 8th of December, 2023, the life sentence imposed by the trial court was substituted for a sentence of 35 years; that he is now seeking equal treatment as applied in the case of Ali Abdallah Mwanza vs Republic, Court of Appeal Criminal Appeal No.259 of 2012 at Mombasa; and that this Court should determine this application in his favor.
4. As a brief background, the applicant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the charge were that the applicant, on 23rd August 2013, at a village in Taita Taveta County, intentionally and unlawfully caused his penis to penetrate the vagina of CM, a child aged 9 years. He was also charged with an alternative count of committing an indecent act contrary to section 11(1) of the *Sexual Offences Act*. He pleaded not guilty and, after the hearing, the trial Magistrate convicted him of the offence and sentenced him to serve life imprisonment, which sentence was upheld by the High Court and reduced to 35 years by this Court. He is now before us seeking a resentencing by this Court.
 5. When the application came before us on a virtual platform, the applicant, who was in person, relied on his submissions which to a large extent reiterated the contents of the Motion. For their part, learned counsel for the respondent Ms. Ongeti filed written submissions wherein it was submitted that this Court had delivered its judgment in respect of the applicant's appeal and was therefore functus officio; that the Court had performed all its duties and that, unless there was a clerical correction to be undertaken, there was nothing further for this Court to do; that, if the applicant is of the view that the sentence is illegal, he can appeal to the Supreme Court. Counsel concluded by asserting that litigation must come to an end.
 6. We have carefully considered the record, submissions by counsel, the authorities cited and the law. Given the circumstances, where this Court having already heard the applicant's appeal against the decision of the High Court and rendered a Judgment on 8th December 2023, of pertinence for introspection at this juncture is whether this Court has jurisdiction to determine the Motion now before us seeking resentencing, or whether pursuant to rendering its decision, this Court is functus officio.
 7. 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 defined 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."
 8. 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 is 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. Basically, the crux of the applicant's application is an invitation to this Court to review the sentence in a judgment that has already been delivered. In effect, this would be tantamount to this Court sitting on appeal on its own decision. An appeal against a decision of this Court can only be heard and determined



by the Supreme Court by dint of Article 162 of the Constitution. But, this Court having rendered a decision on conviction and sentence of the applicant, it is functus officio.

10. Having said that, the applicant's argument is that, by virtue of clause 4.8.18 of the new Judiciary Sentencing Guidelines, 2023, finalized cases can be re-opened for resentencing.

Clause 4.8.18 entitled, "Jurisdiction" provides:

Resentencing cases shall be handled by the 'Sentencing Court'— example if the last court that sentenced the convict was the Court of Appeal, then the sentencing hearing shall be handled at the court of appeal and not a lower court..."

11. What the applicant has omitted to disclose, and has therefore cited the above clause out of context is that, the clause is with reference to the resentencing hearings, and procedures of resentencing following the Supreme Court decision in the Muruatetu I and II cases- See Francis Kirioko Muruatetu & Another vs Republic [2017] eKLR and Francis Kirioko Muruatetu & Another vs Republic Katiba Institute & 5 Others (Amicas Curiae) [2021] eKLR.

12. In particular, Clause 4.8.1 of the Sentencing Guidelines provides:

... the import of the decisions is that all offenders convicted of murder who have been subject to the mandatory death penalty and desire to be heard on sentence are entitled to resentencing hearing for consideration of mitigation."

13. In other words, pursuant to Muruatetu I and II, persons convicted of murder and who have been subject to the mandatory death penalty are eligible to apply for resentencing in the manner set out in the Sentencing Guidelines, 2023. Where such resentencing is sought, clause 4.8.18 of the Guidelines clarifies that this Court has jurisdiction to resentence the offender.

14. In the instant case, the applicant was convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#), and not for the offence of murder. He is therefore not eligible for resentencing as sought in the application.

15. As enunciated 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."

16. 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.”

17. On authority of the afore-cited cases, we lack jurisdiction to entertain the resentencing application and must consequently down our tools.

18. In sum, the applicant’s application is without merit and is hereby dismissed.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY 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 the true copy of the original

Signed

Deputy Registrar

