Lusaka v Republic (Criminal Appeal (Application) 3 of 2019) [2023] KECA 1071 (KLR) (24 August 2023) (Ruling)

Neutral citation: [2023] KECA 1071 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL (APPLICATION) 3 OF 2019

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

AUGUST 24, 2023

BETWEEN

WILLIAM LUSAKA .... APPLICANT

AND

REPUBLIC .... RESPONDENT

(Being a review of the Judgment of the Court of Appeal at Nyeri (Githinji, Nambuye & Musinga, JJ.A.) dated 25th July 2019.) in Criminal Appeal No. 108 of 2017)

RULING

1. The applicant, William Lusaka was jointly with another charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars were that on September 8, 2012 at Kiromwati Sub location of Luciuti Location in Igembe North District within Meru County, they jointly murdered Kangethu M'Mukira. Both denied the charge. They were tried by the learned (R.P.V. Wendoh, J.), convicted and on July 19, 2014 each sentenced to suffer death. Being aggrieved by the conviction and sentence, they appealed to this Court. The appeal was heard by the Court (E.M. Githinji R.N. Nambuye and D.K. Musinga, JJA), and on July 25, 2019 the conviction was upheld. The death sentence was set aside and substituted with a prison sentence of 15 years for each.

2. The applicant has now returned to this Court with a notice of motion dated August 21, 2019, as amended, in which he seeks that: -

   a. the Court be pleased to order that the time he had spent in remand custody be computed into his sentence as provided under section 333(2) of the *Criminal Procedure Code*;

   b. the court does review his remaining sentence under section 4 of the *Probation of Offenders Act* (Cap. 64); and that

c. there be an order for a non-custodial sentence on the remaining sentence after allowing the review.

3. In the grounds and affidavit in support of the application, the applicant's case was that he had intended to challenge the judgment of this Court in the Supreme Court but that had been overtaken by events; that he was arrested on April 19, 2014, and convicted and sentenced on July 19, 2017, and the period had apparently not been considered during the sentence to 15 years as was required by section 333(2) of the Criminal Procedure Code; and that this is why he was making the present plea, and also seeking that he be allowed a non-custodial sentence in respect of his term that is left to be served.

4. The application was opposed by the replying affidavit dated April 5, 2021 and sworn by Ms. Nanjala of the ODPP. Her response was that this Court did not have the jurisdiction to hear and determine the application; that this Court had become functus officio following the judgment that determined the applicant's appeal.

5. When the parties appeared before us for the hearing of the application, the applicant was not represented. The State was represented by the learned counsel, Mr. Naulikha. The parties had filed written submissions which they informed the Court that they were relying on. Mr. Naulikha submitted that this Court had heard and determined the appeal by the applicant, and therefore did not have any further jurisdiction to entertain the case; that this Court was now functus officio. On this principle, the learned counsel referred us to the decision in *Menginya Salim Murgani –v- Kenya Revenue Authority* [2014]eKLR in which it was observed that:

> " It is a great principle of law that a court after passing judgment, becomes funtus officio and cannot revisit the judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law."

6. The learned counsel submitted that this Court while alive to the fact that there must be an end to the litigation as well as the need to balance the interests of the parties, should be hesitant to review its own judgment especially where no new issues had arisen that may ultimately affect the cause of justice. He contended that the only occasion when the Court can review its judgment was when that was required to correct any errors of clerical or arithmetic nature in the judgment which have arisen from accidental slip or omission under Rule 37 of the Court of Appeal Rules, 2022. The Rule provides as follows:-

> " (1) A clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission may, at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court, either of its own motion or on the application of any interested person so as to give effect to the intention of the Court when judgment was given.
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> (2) An order of the Court may be corrected by the Court at any time, either of its own motion or on the application of any interested person—
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> (a) if it does not correspond with the judgment it purports to embody; or
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> (b) where the judgment has been corrected under sub-rule (1), if it does not correspond with the judgment as so corrected."

7. The only other occasion, he urged us, was when the Court invokes its residual power to review its decision, to which there is no appeal, to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice (See *Benjoh Amalgamated Ltd & Another –v- KCB* [2014]eKLR).

8. The applicant agreed that, first, he had no legal grounds to approach the Supreme Court to challenge the decision of this Court that has aggrieved him. He, secondly, agreed with the learned counsel that this Court was essentially functus officio. However, he still thought that we could review the sentence of 15 years to grant him a non-custodial sentence of the balance of this sentence, given that the court had not factored the period he was in custody awaiting trial in computing the sentence.

9. We have anxiously considered this application. The Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, while discussing the question of jurisdiction, observed as follows:

> "
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> "(29) Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):
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> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.""

10. The respondent's argument was that, this Court having heard and determined the applicant's appeal against sentence, has become functus officio. In other words, it lacks the jurisdiction to hear the merits of this application that seeks the review of the decision on sentence. In *Raila Odinga & 2 Others* (Petition 5, 4, and 3 of 2013) [2013] KESC 8 KLR (Civ), the Supreme Court considered the question of what amounts to "functus officio" when it cited Daniel Malan Pretorius in "*The Origins of Functus Officio Doctrine, with Specific Reference to its Application in Administrative Law*." [2005] 122 Salj 832 in which the doctrine was explained in the following terms:-

> "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 power 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 decision cannot be revoked or varied by the decision maker."

11. The Supreme Court, while quoting *Jersey Evening Dust Limited –v- Al Thani* [2002]JLR 542, was of the considered view that the doctrine does not prevent the court from correcting clerical errors; that proceedings are only fully concluded, and the court becomes functus officio, when its judgment or order has been perfected. Once the proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its decision on adjudication must be taken to a higher court, if that right is available.

12. We have taken note of Benjoh case in which this Court rendered itself as follows:-

> "The jurisprudence that emerges from the case law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustices with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).

13. Under Article 163(4) of the Constitution, not all intended appeals are from the Court of Appeal to the Supreme Court (*Lawrence Nduttu & 6000 Others –v- Kenya Breweries & Another*, Petition No. 3 of 2012)[2012]eKLR).

14. Indeed the applicant initially wanted the matter certified so that he could appeal to the Supreme Court, but he chickened out, as it were. He conceded that his grievance could not bring him under Article 163(4) (b) of the *Constitution*. He chose, instead, the present application. Our concern, however, is that there is no public interest in the request. No fraud or bias was alleged, or demonstrated. The applicant was heard by the High Court and, on appeal, by this Court. He had the opportunity to ask, under section 333(2) of the Criminal Procedure Code, for the period he says he was in remand custody pending trial to be considered in sentencing. He did not raise the issue in either Court. There is no claim that the sentence that was meted out for the offence was illegal. In these circumstances, we find that the justice of the matter demands that we do not disturb the sentence that was rendered by this Court on July 25, 2019. This is because we are functus officio, and lack the jurisdiction to review the sentence.

15. In conclusion, we find that the preliminary objection taken by the respondent in regard to jurisdiction is merited. The objection is sustained, in which case the application by the applicant is dismissed on account of being misconceived and incompetent.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF AUGUST 2023.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

...

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR