



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**MISC CRIMINAL APPLICATION NO. E325 OF 2020**

**NJONJO GITONO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON SENTENCE**

1. The background facts of this matter reveals that, the applicant was charged with the offence of murder contrary to; Section 203 as read together with section 204 of the Penal Code of Kenya. It was the prosecution's case that, on 5<sup>th</sup> day of April 2019, he murdered Regina Nyambura, his wife at Ngorongo Village in Gatundu District, within Central Province.

2. The case was fully heard before Hon. Lady Justice J. Lessit who delivered the judgment on 22<sup>nd</sup> July 2010, and found the applicant guilty as charged, convicted him and sentenced him to suffer death.

3. However, the applicant was dissatisfied with the decision and lodged an appeal before the Court of Appeal, vide undated petition of appeal in Criminal appeal number 512 of 2010. The appeal was against conviction and sentence. Upon hearing the same, the court set aside the conviction on the charge of; murder and substituted it with a conviction on a lesser charge of manslaughter. The sentence of death was equally set aside and substituted with a sentence of twenty (20) years imprisonment from the date of conviction. The decision of the court of appeal was rendered vide a judgment delivered on 22<sup>nd</sup> March 2019.

4. Subsequently, the applicant filed a petition dated 20<sup>th</sup> November 2020, in the Constitution and Human Rights Division of the High Court seeking;

*a) That, the court declares that the failure to hear the petitioner in mitigation and failure to include the time spent in custody is a violation of the petitioner's right to a fair trial*

*b) That, the court orders that the petitioner be heard in mitigation as required under Section 216 and 329 of the Criminal Procedure Code.*

*c) That the court orders that the petitioner's sentence runs from the date of arrest which is 27<sup>th</sup> July 2009.*

5. On 1<sup>st</sup> December 2020, the Hon court observed and ordered as follows:

*a) That, the Petitioner is seeking resentencing.*

*b) That, this is a matter for Milimani Criminal Division and the Petition is transferred to Milimani Criminal Division for appropriate action*

*c) That, the matter be mentioned before Presiding Judge Criminal Division Milimani on 18<sup>th</sup> January, 2021, and mention and notice to issue.*

6. As a result of the aforesaid, the matter was transferred to the criminal Division of the High Court and given a file number; E325 of 2020. At the hearing of the matter on 18<sup>th</sup> January 2021 the learned Counsel for the applicant cum Petitioner, told court that, the Petitioner is

seeking for re-sentencing only.

7. The Respondent on its part applied for the Probation Officers' report on sentence to be filed; with particular focus on the victim's family. The report was later filed and the defence counsel offered what he described as "mitigation". He stated that, the applicant is remorseful, and that, he did not anticipate the altercation would result in death.

8. That he has tried to reach out to the deceased relatives but has been unsuccessful. He regrets the incident and states that his judgment was impaired by the fact of intoxication. Further, he has been rehabilitated and has taken various courses acquired skills which he will use once released. That, the time he spent in custody has not been considered. Finally, if the pre-sentence report indicates that, the community is not able to take him back, he shall find a way to reintegrate him in the society.

9. However, the Respondent submitted that despite the fact that, the applicant is remorseful; his security is not granted as the area Chief has indicated that, he is not welcome back in the community. Neither, has the mother in-law forgiven him. That, if the court grants him a non-custodial sentence he will have to get somewhere else to stay.

10. I have considered application in total and I find that, there is no dispute that, the applicant applied and had his appeal heard on both conviction and sentence and determined. The very question that arises, is whether this court has the jurisdiction to review orders given by the Court of Appeal.

11. The jurisdiction of an appellate court is superior to the trial court's jurisdiction. It therefore follows that, once a court of a superior or higher jurisdiction has pronounced itself on an issue, that issue can only be escalated to another court of higher or superior jurisdiction. In this case, to the Supreme Court.

12. Further, once a court has pronounced itself on the issue, it becomes *functus officio*, which recognizes the fact that, 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 (See, **Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others (2013) e KLR**). Thus the law gives expression to the principle of finality.

13. Therefore, in criminal cases, a judge has jurisdiction over an outstanding charge up to the point where the charge has been resolved by way of a stay, withdraw, dismissal, acquittal, or sentencing. Thus the doctrine of *functus officio* refers to the principle that a court no longer has jurisdiction to change any decisions once a charge has reached its ultimate conclusion.

14. That, in the case of a conviction being entered, the judicial role of the judge ends once a sentence has been imposed. After that, any changes to or issuance of orders are "ministerial or administrative act[s]"(See *R v Melvin*, [2005 NSSC 368 \(CanLII\)](#)).

15. Further as stated in; *Re St. Nazaire Co (1879), 12 Ch. D. 88 (UK)* this common law rule states that, the final judgement of a court

cannot be reopened. The purpose of the doctrine is to provide finality of court judgments to allow for potential review by an appellate level of court.

16. Indeed, under Article 165(6) of the Constitution of Kenya, the High court has supervisory powers over the subordinate but not superior courts.

17. However, even if the court were to consider the matter on merit, it is clear that, from the prayers in the Petition dated 20<sup>th</sup> November 2020, the applicant is raising Constitutional issues, wherein he cites the provisions of; Section 216 and 329 of the Criminal Procedure Code and which cannot be a subject of the provisions of; Section 333(2) of the Criminal Procedure Code.

18. From the above provisions cited, the court referred to; that passes sentence, means the trial court and/or the appellate court. In that case, these provisions were relevant here before, the High Court before it passed the death sentence and/or the Court of Appeal before passing the twenty (20) years imprisonment.

19. Even then, the High Court's jurisdiction was extinguished when the appeal thereof, was heard and determined by the Court of appeal. Moreover, the applicant had an opportunity to raise the issues raised herein, before the Court of Appeal, when arguing the appeal. If that opportunity was lost, and/or he was not heard on the same, he can only go back to that court or the Supreme Court.

20. Finally, I have considered the pre-sentence report for whatever reason it may serve, the mitigation of the applicant and I find that, first and foremost, there was no indication under the paragraph of "source of information" that the relatives of the deceased were interviewed. Secondly, the attempted reconciliation with the deceased's family has not materialized. Thirdly, the applicant's own son has stated clearly that, he does not want to have anything to do with the applicant as the applicant robbed him of his mother's love. Further the area Chief states clearly that if released on a non-custodial sentence, he may not be welcome in the residential area. It is also indicated that, the mother of the deceased wants the offender jailed.

21. The upshot of the aforesaid is that, I find the court has no jurisdiction to entertain this matter and even if it had, based on the subsequent facts after sentence, there is no merit in the application. I therefore decline to grant any of the orders sought.

It is so ordered.

**DATED AND DELIVERED VIRTUALLY DATED AND SIGNED ON THIS 2ND DAY OF JUNE**

**2021.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Applicant in person

Ms Chege for the Respondent

Edwin Ombuna; Court Assistant