



REPUBLIC OF KENYA



**Opany & 2 others v Republic (Miscellaneous Civil Application
E061 of 2024) [2025] KEHC 2305 (KLR) (18 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2305 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E061 OF 2024
S MBUNGI, J
FEBRUARY 18, 2025**

BETWEEN

PAUL NYANGWESO OPANY 1ST APPLICANT

FREDRICK NYANJE 2ND APPLICANT

DAVID ONYANGO 3RD APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicants were jointly charged with the offence of Robbery with violence contrary to section 296(2) of the *Penal Code*.
2. They were tried convicted and sentenced to death imprisonment.
3. They filed an appeal in this court *Vide* HCCRA No. 37 of 2005 and 38,39 of 2005, which appeal was heard and determined. The high court dismissed their appeal for lack of merit.
4. They stated that they have not appealed anywhere since the file has been traced without any success which made them not to pursue the hearing in court of Appeal and now come for re-hearing in sentence only.
5. They have filed a notice of motion application seeking that the court considers to re-hear and determine their sentence for they are remorseful, repentant and ready to settle rightfully in the society. They have gone through rehabilitation and that they are first offenders.
6. They stated that they have not appealed anywhere since the file has been traced without any success which made them not to pursue the hearing in court of Appeal and now come for re-hearing of sentence only.



Analysis and determination

7. In *Musau v Republic* (Criminal Miscellaneous Application E021 of 2023) [2024] KEHC 2532 (KLR) (13 March 2024) “ Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court’s power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.
8. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in it’s entirely so as to arrive at appropriate sentence. The Court of Appeal *Thomas Mwambu Wenyi v Republic* [2017] eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira v State of Maharesbtra* at paragraph 70-71 where the court held the following on sentencing: “Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.
9. The applicants were sentenced to death by the trial court in Kakamega Chief Magistrates Court Case No. 666 of 2004. By way of appeal to the High Court, the applicants appealed against both conviction and sentence. The high court dismissed the appeals. The Appeal to the Court of Appeal where the hearing is pending.
10. The applicants have again approached this court praying for a lenient sentence.
11. The respondent submitted that this court cannot review the applicant’s sentence since it is functus officio, thus it lacks jurisdiction.
12. The Court of Appeal in the case of *Telkom Kenya Limited vs John Ochanda* [2014] eKLR, stated that: -

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon...

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar; is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”
13. The applicants herein exercised their right of appeal to the High court on both conviction and sentence. The Appeal against conviction and sentence was dismissed. I agree with the respondent, this court already pronounced itself on the issue of sentence and is thus, functus officio. The only remedy to the applicant, if dissatisfied with their sentence, is to proceed by way of appeal to the Court of Appeal.
14. I therefore find this application has no merit, it is dismissed.
15. Right of appeal 14 days explained.



DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF FEBRUARY, 2025.

S.N MBUNGI

JUDGE

In the presence of :

Osoo for ODPP

Court Assistant – Elizabeth Angong'a

Applicants, absent- the accuseds are in custody serving sentence.

