



**Mbugua v Director of Public Prosecutions (Petition E238 of 2023)
[2025] KEHC 2634 (KLR) (Constitutional and Human Rights) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2634 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E238 OF 2023
LN MUGAMBI, J
MARCH 6, 2025**

BETWEEN

STEPHEN NJAU MBUGUA PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

RULING

Introduction

1. The petition dated 4th July 2023 was amended on 12th April 2024. The petitioner wants this Court to declare that the sentence of life imprisonment being served by him post the Supreme Court Judgment in Francis Karioko Muruatetu & Another vs Republic [2017] eKLR violates Article 27 of *the Constitution* and to thus commute his sentence for the period that has already been served and set him free.
2. The respondent filed a Notice of Preliminary Objection dated 14th September 2023 objecting to the instant petition on the following grounds:
 - i. This Court is in want of jurisdiction for reasons that the petitioner in his own pleadings at paragraph 3, 4, and 5 of the Petition shows that the High Court and Court of Appeal have had appeals from the petitioner and all were dismissed.
 - ii. The petitioner preferred an appeal to the High Court of Kenya vide a consolidated Criminal Appeal No. 300 and 301 of 2008 and the appeal was dismissed on 19th December, 2013.
 - iii. Dissatisfied with the decision of the High Court, the petitioner preferred an appeal to the Court of Appeal vide Court of Appeal No. 72A and 72B of 2015 and the appeal was dismissed.



- iv. Further the petitioner filed application for resentencing vide Miscellaneous Application No. 27 of 2020 and the same was dismissed.
- v. This petition is therefore, vexatious, frivolous and an abuse of the court process.
- vi. The petition discloses no cause of action as against the respondent and the orders sought are therefore not tenable against the respondent.
- vii. The reliefs sought by the petitioner have no basis and merit in law worth adjudication by this Court.

Respondent's submissions

3. Senior Principal Prosecution Counsel, Achochi Henry filed submissions dated 1st October 2024 in support of the respondent's objection.
4. Counsel stated that the petitioner was convicted and sentenced in Criminal Case No.2302 of 2006. The petitioner appealed the decision therein and the High Court dismissed his appeal in Criminal Appeal No.300 and 301 of 2008 on 19th December 2013. The petitioner further proceeded to Court of Appeal vide Court of Appeal No.72A and 72B of 2015. Similarly, this appeal was also dismissed.
5. In light of this, Counsel submitted that the petitioner's appeal in the criminal case had been determined with finality.
6. Considering this, it was submitted on behalf of the Respondent that the petition as pleaded offends the doctrine of res judicata under Section 7 of the *Civil Procedure Act*. Counsel relied on *Musankishay Kalala Paulin v Director Criminal Investigations & 4 others [2022] eKLR* where it was held that:

“We reaffirm our position as in the *Muiri Coffee* case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively...”
7. Similarly, the case of *Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991* (unreported) was also relied upon.
8. It was argued that the Petition raises similar issues as in the appeals before the High and Court of Appeal that were conclusively determined and that the petitioner is merely giving his prayers a cosmetic face lift by changing the phrases while the prayers are similar. As such, Counsel urged that the petition ought to be dismissed.

Petitioner's Submissions

9. The petitioner in response filed submissions dated 1st November 2024 through the firm of Swaka Advocates. Counsel sought to discuss three issues: whether the doctrine of res judicata applies to this matter; whether the petitioner's rights have been violated and whether the preliminary objection raised by the respondent has merit.
10. On the first issue, Counsel submitted that the doctrine of res judicata is not applicable as the issues raised by the respondent are distinct from the issues that were previously determined.



11. Counsel stressed that this petition concerns the violation of the petitioner's constitutional rights which transcends the prior criminal appeals. Counsel identified that the jurisdiction to entertain such violations is vested in this Court in view of Article 22, 23 and 165 of *the Constitution*.
12. Reliance was placed in *State of Haryana & rs v MP Mohla (2007) 1 SCC 457* where the Supreme Court of India held that:

“The dispute between the parties has to be decided in accordance with law. What, however, cannot be denied or disputed that a dispute between the parties once adjudicated must reach its logical conclusion. If a specific question which was not raised and which had not been decided by the High Court the same would not debar a party to agitate the same at an appropriate stage, subject, of course, to the applicability of principles of res judicata or constructive res judicata. It is also trite that if a subsequent cause of action had arisen in the matter of implementation of a Judgment a fresh writ petition may be filed, as a fresh cause of action has arisen.”
13. Equal dependence was placed in *William Kabogo Gitau v Ferdinand Ndung'u Waititu [2016] eKLR*, *Aggrey Chiteri v Republic [2016] eKLR* and *Edward Okongo Oyugi & 2 others v Attorney General [2016] eKLR*.
14. On the second issue, Counsel submitted that it was evident that the petitioner's rights under Articles 27, 28, and 29 of *the Constitution* had been violated. This is because the petitioner was subjected to differential treatment, as his co-accused was released following the *Muruatetu* case (supra), while he remained incarcerated.

Analysis and Determination

15. It is my considered view that the issue that arises for determination is:

Whether this Petition Offends the doctrine of res judicata.
16. The fact of the existence of the criminal case that gave rise to the sentence against the Petitioner and thereafter attracted an appeal at the High Court and the Court of Appeal without success and which therefore forms the subject of this Petition is not disputed by the Petitioner.
17. Res judicata is a jurisdictional issue. It applies to bar the Court from hearing a case that has been litigated conclusively on merits before another Court of competent jurisdiction. It precludes both the cause of action estoppel, which bars identical suits from being relitigated and also what is known as issue based estoppel which prevents relitigation of similar issues that formed part of the suit between the parties or their representatives even if the cases be different.
18. This doctrine is provided for under Section 7 of the *Civil Procedure Act*, CAP 21 as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”



19. The Supreme Court in *Kenya Commercial Bank Limited & another v Muiri Cofee Estate Limited & 3 others* [2016] KESC 6 (KLR) stated as follows in regard to res judicata:

“(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights...”

20. Likewise, the Supreme Court in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR) (Civ) opined as follows:

“54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

55. It emerges that, contrary to the respondent’s argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of Article 159 of *the Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.”

21. The Court went on to observe that:

“59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

1. There is a former Judgment or order which was final;
2. The Judgment or order was on merit;
3. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
4. There must be between the first and the second action identical parties, subject matter and cause of action.”

22. The respondent contended that the petitioner’s case had been heard and determined and appeals filed and disposed before the High Court and the Court of Appeal as well as a subsequent application before the Magistrates Court. This information is not disputed by the petitioner and is confirmed in his supporting affidavit at paragraphs 2, 4 and 7.

23. The petitioner however contends that, following the holding by the Supreme Court in the *Muruatetu* case (*supra*), he lodged an appeal before the Court of Appeal which was dismissed. On the other hand, he depones at paragraph 8 that his co -accused in Criminal Case No.2306 of 2006 filed a similar application seeking a resentencing and was successful.



24. As a result, he filed a resentencing application being Miscellaneous Application No.27 of 2020.This too was dismissed by the Magistrates Court. He thus contends that his right to equal treatment under the law which was accorded to his co-accused has been denied hence this petition.
25. This petition though masked as violation of the constitutional rights by the Petitioner, its main motivation is to seek the resentencing in light of the Supreme Court decision in Muruatetu case.
26. That issue that has however been determined in the various applications and appeals as already alluded to with dismissal being the constant denominator. It is thus unacceptable for the petitioner to camouflage the real intention of seeking resentencing by disguising it as violation of his constitutional rights.
27. That is an issue in the prior litigation that has been addressed with finality on merits hence is barred by the doctrine of res judicata. The preliminary objection is upheld and this Petition is thus struck out.
28. Each Party shall bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF MARCH, 2025.

L N MUGAMBI

JUDGE

