Lwande v Republic (Miscellaneous Application 208 of 2024)
[2025] KEHC 9736 (KLR) (Crim) (12 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9736 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

MISCELLANEOUS APPLICATION 208 OF 2024

AB MWAMUYE, J

JUNE 12, 2025

BETWEEN

JOSEPH OTIENO LWANDE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

Introduction

1. This is an application dated 17/10/2024 by Joseph Otieno Lwande, the applicant to review or vary the life sentence imposed upon him. He seeks resentencing on constitutional grounds such as alleged denial of his rights to dignity and fair trial and reliance on *Criminal Procedure Code* provisions. The Respondent opposes the application, submitting that the Court lacks jurisdiction and that the matter is barred by finality. The respondent points out that the applicant has already raised the same issues in earlier proceedings; notably High Court Criminal Appeal No. 101 of 2007, Court of Appeal Criminal Appeal No. 33 of 2021, and a prior High Court decision No. 26 of 2024, all of which dealt with his conviction and sentence.

Background

2. The facts are that the applicant was tried and convicted of of Robbery with Violence vide Criminal Case No. 3135 of 2004 at Milimani Law court and sentenced to life imprisonment. He appealed against the conviction and sentence in the High Court (Criminal Appeal No. 101 of 2007) and subsequently to the Court of Appeal (Criminal Appeal No. 33 of 2021). In those appeals, the higher courts upheld the conviction and sentence. The applicant then filed a constitutional petition (High Court Misc. Application No. 26 of 2024) challenging his sentence or the trial process, which this Court disposed of after considering the same arguments. In essence, the applicant now repeats substantially the same

complaints that his sentence is excessive or unlawful and that his rights were infringed and seeks to use this application as a vehicle for resentencing. The respondent contends that these issues have been finally determined and that the applicant's only proper remedy (appeal or revision) has been exhausted. The application therefore raises issues of jurisdiction and abuse of process.

Issues for Determination

a. Whether the High Court has jurisdiction to entertain this application, or whether it is functus officio on the subject of the sentence.

b. Whether the doctrine of res judicata applies to bar the current application.

Analysis

3. The doctrine of res judicata embodies the public policy of finality in litigation. As the Courts have emphasized, there must be "an end to litigation" to prevent endless re-litigation of settled issues. In Satya Bhama Gandhi v DPP [2018] KEHC 6100 (Mativo J), it was reiterated that a final and conclusive judgment bars any subsequent attempt to revisit the same facts or rights: "if any judicial tribunal... delivers a judgment or ruling which is... final and conclusive, the judgment... is res judicata". Res judicata "halts the jurisdiction" of a court to try again a case already adjudicated. The essential ingredients are well-settled in the same case of Satya Bhama Gandhi v DPP [2018] KEHC 6100:

> " 13. The requirements for res judicata are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the 'determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case."

4. If those elements are satisfied, the issues decided become binding and cannot be opened anew.

5. Importantly, the doctrine applies with equal force even when constitutional claims are involved, albeit sparingly. The Supreme Court in John Florence Maritime Services Ltd v CS Transport [2021] eKLR reaffirmed that res judicata "applies to constitutional petitions" as it does to other litigation. This view was applied by this Court in Masolo Nyakundi v AG [2022] eKLR, where the applicant had "once again" raised the same complaint "fashioned as a constitutional petition". The Court in Masolo held that invoking constitutional provisions does not immunize a case from res judicata unless in the rarest and clearest cases. In Masolo, all of the petitioner's contentions had already been considered on appeal, and the Court noted that the petition "is founded on the same cause of action, same issues, same facts, and same circumstances" as the earlier cases. The proper course was to end the litigation; indeed, the Court in Masolo found "no unsettled issues to be determined" and dismissed the petition as unmerited.

6. In the present case, the same reasoning applies. The applicant is effectively seeking to relitigate his sentence through a fresh constitutional application, even though that sentence and the issues around it has been fully adjudicated on appeal and in the 2024 High Court ruling. This Court takes judicial notice that the matters raised in the current application were exhaustively canvassed in High Court Criminal Appeal No. 101 of 2007 and Court of Appeal Criminal Appeal No. 33 of 2021. Indeed, as in Masolo, the issues before us now are "in all four corners" the same issues decided in those earlier cases. The applicant made identical arguments in terms of sentencing discretion and constitutionality, and both appellate courts rejected them. There is simply no new fact or legal issue that distinguishes this application. The respondent correctly points out that the applicant's grievances could and should have

been addressed on appeal; any shortcoming in the trial (if any) has already been ruled on. Allowing this application to proceed would defeat finality.

7. Separate but complementary is the principle of functus officio in criminal appeals. A High Court judge who has heard an appeal on conviction and sentence becomes functus officio on those issues. Once this Court (as first appellate court) has dismissed the applicant's appeal, it cannot re-open the same sentence on another application. As Wananda J. held in Changwony v Republic [2024] eKLR, having "already pronounced itself on both conviction and sentence, [the High Court] is functus officio and bereft of the jurisdiction" to review that sentence. The only available remedy for the aggrieved party is to further appeal to the Court of Appeal, not a renewed application in the same High Court. The law "abhors" a judge sitting in review of a colleague's concurrent judgment on sentence. In Changwony, the petitioner had appealed to the magistrate's sentence to this Court (where it was affirmed) and then improperly returned by way of a criminal review. The Court held that such an attempt "flies in the face" of the doctrine of functus officio. The same is true here: the applicant effectively invites this Court to sit again on a matter it has conclusively determined. That is impermissible in law.

8. The applicant's submissions do not alter this outcome. He argues that he has shown mitigating factors being a first offender, remorse, poor health, etc. and invokes Articles 28 (dignity) and 50 (fair hearing) to urge leniency. He points to Section 362(1) of the *Criminal Procedure Code* as the basis for review. But any such submissions merely restate what was urged (and rejected) on appeal. The respondent correctly notes that Article 50(2)(g) of *the Constitution* grants an appeal to "a higher court as prescribed by law," which the applicant has already exercised. Section 362 of the CPC likewise limits High Court review to subordinate court proceedings, not appeals of its own judgments. In effect, the application is an indirect appeal. The Supreme Court and this Court have repeatedly held in Changwony that if an issue was or could have been raised in an appeal, a later petition will ordinarily be struck out.

9. In sum, the criteria for res judicata are plainly satisfied. There exists a former final judgment on the merits (the earlier appeal judgments and the High Court decision), on the same subject and cause (the validity of the applicant's conviction and sentence), involving the same parties. The applicant had ample opportunity to litigate his case and did so. Courts have no jurisdiction to entertain a "second bite at the cherry". To hold otherwise would undermine the finality that is fundamental to our justice system. Constitutional status of a claim does not make it immune from this doctrine. Indeed, as the High Court remarked in Masolo, allowing perpetual relitigating by recasting old arguments as constitutional grievances would clog the courts with redundant cases.

Conclusion

10. In the light of the applicant having canvassed the issues advanced in the current application before the High Court on Appeal in High Court Criminal Appeal No. 101 of 2007, before the Court of Appeal in Criminal Appeal No. 33 of 2021, and in the High Court in Constitutional Petition No. 26 of 2024, the Application dated October 17, 2024 which is the subject of this ruling is res judicata. Concurrently, the application herein is dismissed with no costs accordingly.

11. It is so ordered.

    File closed accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 12TH DAY OF JUNE 2025.

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BAHATI MWAMUYE

JUDGE