Wanjiru v Republic (Miscellaneous Criminal Application E057 of 2025) [2025] KEHC 10191 (KLR) (15 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10191 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION E057 OF 2025

RN NYAKUNDI, J

JULY 15, 2025

BETWEEN

GEORGE NJAHI WANJIRU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Before this court is an application dated 10.4.2025 in which the Applicant is seeking the following orders: -

    a. That the application is founded on section 4 of the *probation act* of the L.O.K and other enabling provisions of laws

    b. That the applicant is seeking for orders to substituted his custodial sentence with a non-custodial sentence in reliance on his post sentence mitigations following his incarceration for the remainder of his custodial sentence of 3 years

    c. That the applicant is seeking for orders to substitute his custodial sentence with a non-custodial sentence by shifting on sentence objective that is tormenting deterrence, retribution (custodial) to the less tormenting objectives rehabilitation, re-integration possibly (non-custodial) on the applicant

    d. That the applicant is seeking for any other order that it may deem fit with the changed attitude of applicant and circumstances of this case

    e. That the applicant is praying to be present during the determination of this application.

2. The Application is supported by the annexed affidavit sworn by the applicant who avers as follows;

1. That I was charged with defilement c/sec 8 (1) A.R.W sec 8 (2) of the *S.O.A* NO.3 of 2006, was convicted and sentenced to life by CM's court at Eldoret by Hon. Obulutsa on 11/12/2015.

2. That, the applicant was dissatisfied with the above decision and filed appeal no.173 of 2015 at the High Court Eldoret which was dismissed By Hon. Lady Justice Githua J on 25th May 2017.

3. That, the applicant filed appeal no.175 of 2017 at the Kenya Court of Appeal at Eldoret which was successful on sentence where the life sentence was set aside and substituted with a sentence of 20 years on 28/06/2019 by Lady Justices H. Okwengu J. Mohammed and His Lordship E.M. Githinji J

4. That, the applicant filed a criminal petition no. E077 of 2024 on period spent in pre-trial custody at Eldoret which was successful as Hon. Justice Nyakundi allowed the application on 25th March 2025

5. That, the applicant has filed the present miscellaneous application for a prayer to substitute his custodial sentence to a non-custodial sentence (probation) or otherwise on the grounds:

    a. That, the applicant has thoroughly been deterred and corrected by the punishment imposed on him of the life imprisonment and now substituted to 20 years. The tormenting objective of these sentences has already served its purposes and its my prayer to the court to consider shifting to the less tormenting sentence objectives preferably a rehabilitation and re-intergration objective through non-custodial on the fact l am remaining with 3 years to completion of my custodial sentence.

    b. That he is praying that the Hon. court to consider issuing a probation order in his favour based on his post sentence mitigation factors. First he has served 10 years & 8 months to date. He is now reformed and rehabilitated and its demonstrated by him becoming born again and has done five (5) biblical courses with certification. He has acquired grade III in both motor vehicle mechanic and motor vehicle electrical which has certificates. He is a talented football player for convicts' team and a dependable player being a leading scorer. Has a recommendation from Prison Authority. Has taken responsibility of the offence and pray the court grants him a second chance on his life as he came to prison as a teenager with brilliant future which is being ruined by the lengthy sentences.

    c. That, this court has jurisdiction to alter the nature of my sentence in accordance to the changing circumstances of my case including finding time already served as sufficient punishment or otherwise.

6. That, what I have deponed herein is true to the best of my knowledge, information and belief.

Decision.

3. The applicant in this matter has navigated the litigation landscape from the primary court to the High Court including the Kenya Court of Appeal. This court sitting on appeal with a determination dated 20th May 2024 pronounced itself as follows:

    a. The question for this court is to ensure that an accused person tried, convicted and sentenced to a custodial sentence he or she ought to be accorded a fair trial and the sentenced so imposed to capture the spirit of the law under section 333(2) of the *CPC*. I don't think it will be an overreach for this court to state that the custodial sentence passed against a convict who has

been in pre-trial remand without incorporating the above provisions may be considered illegal. What is material to the decision are the principles in *Rwabugande case* (supra)

b. Form the above discussion there is certainly evidence to show that section 333(2) of the *CPC* was not complied with by the trail court and subsequent superior court which reviewed the life imprisonment sentence and had it substituted to a determinable period of twenty years. In this respect, the committal warrant to prison be amended with a commencement date of 20th September 2014

c. It is so ordered

4. He was also further aggrieved with the decision of the High court and the Court of Appeal heard and determined both conviction and sentence and ruled as follows:

a. As sentencing is an exercise of judicial discretion the trial magistrate ought to have properly exercised his discretion. For this reason, we find that the learned judge erred in failing to address the appropriateness of the sentence of life imprisonment. Taking into account that the victim was an innocent child of 8 years and that the mitigation offered by the appellant did not provide any justification for the trial court exercising leniency, a prison term of 20 years imprisonment rather than the sentence of life imprisonment would have been appropriate

The upshot of the above is that we dismiss the appeal against conviction, but allow the appeal against sentence to the extent of setting aside the sentence of 20 years' imprisonment.

Those shall be orders of the court

5. Undoubtedly the applicant has been re-litigating on this same issue within the entire spectrum of our legal system. Through some kind of oversight the superior courts have exercised jurisdiction rightly so under the *constitution* but a kind of misinterpretation from the applicant is crystal clear from the two judgment one from the High Court delivered 20th May 2024 and surprisingly so without notice the Kenya Court of Appeal heard his appeal on the merit on a judgment dated 28th June of 2019.

6. The applicant even went further to file for a resentencing framework before this very same court. First and foremost, the entire procedural law paints an applicant who is guilty of abusing the court process by filing a multiplicity of appeals and applications at various forums under the guides of seeking justice. The snapshot of this proceeding on mention of the doctrine of res judicata as expressly provided for in the realm of civil law under section 7 of the *CPA* also applicable in para materia criminal branch of law the matter between the applicant and the state cannot be re-litigated again between the very parties bound by the previous decision

7. The doctrine of res judicata generally applies only where a given matter falls for decision twice within one and the same legal context. Generally, this means that the doctrine applies only where the parties and the question at issue are identical in the prior and subsequent proceedings. Where this is the case a decision that qualifies as a res judicata is both conclusive and preclusive in subsequent proceedings. It is conclusive because it is final and binding upon the parties. A party may invoke an earlier decision in subsequent proceedings to develop its case (positive res judicata effect). It is preclusive because it bars the re-litigation of a matter that has already been finally decided in prior proceedings (negative res judicata effect)

8. The learned author in *ILA Interim Report* pertinently expressed himself on this doctrine in so far as the fair of administration of justice is concern to the effect that:

> "Without finality of decision, litigants and indeed the legal system as a whole would be exposed to may hazards: that a dispute might continue to drag on; greater legal expense and delay might result; scarce judge-time might be spent re-hearing the matter; inconsistent decisions might follow; litigation would cease to be a credible means of settling disputes; the victorious party in the first case would be deprived of the legitimate expectation that the first action would not be merely a dress rehearsal for further contests."

9. Lord Diplock weighed into the matter on the test of finality on litigation may be civil, criminal, family, commercial etc. in the case of *DSV Silo-und V erwaltungsgesellschaft mbH v Owners of the Sennar and 13 other ships. The sennar (No. 2)* [1985] in which he stated that:

> "It is often said that the final judgment [...] must be 'on the merits'. The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it had jurisdiction to adjudicate on an issue raised in the cause of action to which the particular set of facts gives rise, and that its judgment on that cause of action is one that cannot be varied, reopened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction."

10. Looking at this matter at hand and the previous decision made on the same cause of action at the various level of courts any further re-litigation is rendered mute for res judicata purposes. This an applicant who attempts to pollute the steam of justice with tainted hands as stated by the Supreme Court of India in *Chandra Shashi v Anil Kumar Verma* [(1995) 1 SCC 421] thus:

> "The steam of administration of justice has to remain unpolluted so that purity of court's atmosphere may give vitality to all the organs of the State. Polluters of judicial firmament are, therefore, required to be well taken care of to maintain the sublimity of court's environment; so also to enable it to administer justice fairly and to the satisfaction of all concerned.
>
> Anyone who takes recourse to fraud, deflects the course of judicial proceedings; or if anything is done with oblique motive, the same interferes with the administration of justice. Such persons are required to be properly dealt with, not only to punish them for the wrong done, but also to deter others form indulging in similar acts which take the faith of people in the system off administration of justice."

11. In sum this application raises arguments that merely re-articulate ones raised before and decided against him on the merits. The applicant's attempt to style a justiciable issue when there is none to me is an abuse of the process of the court. This application is dismissed under section 382 of the CPC.

DATED SIGNED AND PUBLISHED VIA CTS AT ELDORET THIS 15TH DAY OF JULY 2025

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R. NYAKUNDI

JUDGE