



REPUBLIC OF KENYA



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**Muindu v General & another (Constitutional Petition E214 of 2024) [2025] KEHC 12556 (KLR)
(Constitutional and Human Rights) (10 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12556 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E214 OF 2024
AB MWAMUYE, J
SEPTEMBER 10, 2025
IN THE MATTER OF ARTICLES 2,3,10,19,20,21,22,23,24,25,28,48,50,51,165 AND 259
OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010
AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 27(1),28,29(A) (D) (F) ,39(1), ARTICLE 45(1) & (2), 50(2)
(P), AND 51(1) &3 OF THE CONSTITUTION OF KENYA ,2010.
AND
IN THE MATTER OF SECTIONS 70(1),72(1), 77(1) & (2), 79(1) 80(1) ,82(2) AND 84(1)
OF THE REPEALED CONSTITUTION
AND
IN THE MATTER OF THE PERSONS DEPRIVED OF LIBERTY ACT (ACT NO.23 OF 2014)
LAWS OF KENYA.
AND
IN THE MATTER OF THE CRIMINAL PROCEDURE CODE (CAP 75) LAWS OF KENYA.
AND
IN THE MATTER OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS.
AND
IN THE MATTER OF UNLAWFUL INCARCERATION OF THE PETITIONER
AND
IN THE MATTER OF THE BENEFIT OF THE LEAST SEVERE SENTENCE FOR THE
PETITIONER



BETWEEN

PETER MUINDU PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

JUDGMENT

Introduction and Background

1. This Petition arises from a unique historical context of Kenya’s constitutional development, particularly the transition from the repealed Constitution to the Constitution of Kenya, 2010. The Petitioner, formerly convicted and sentenced under Section 297(2) of the Penal Code, claims that he unlawfully served a custodial sentence exceeding the lawful statutory limit.
2. The Petitioner, having been convicted and sentenced to death in 1999, later pursued appeals up to the Court of Appeal, which affirmed his conviction. Subsequently, he filed Constitutional Petition No. 98 of 2018 at the High Court in Mombasa, where the Court found a conflict between Sections 297(2) and 389 of the Penal Code and ordered his release.
3. The present Petition seeks declarations and compensation against the Respondents for alleged violation of his rights under both the repealed Constitution and the Constitution of Kenya, 2010. He contends that the incarceration beyond seven years amounted to cruel, degrading treatment, violation of dignity, and denial of fair trial rights. He thus seeks the following reliefs from this court:
 - i. A Declaration that the conducts of the Respondents were contrary to and inconsistent with the provisions of Articles 10 (1) (a), (b), (2) (b) of the Constitution of Kenya, 2010.
 - ii. A Declaration that the Respondents violated the Constitutional rights of the Petitioner and in particular Articles 20 (1), (2), (3) and (4), 24(1), (2), (3), 25 (a) and (c), 27(1), 28, 29(a), (d) and (f), 35(2), 39(1), 48, 50(1) and 51(1), (2) of the Constitution of Kenya, 2010 formerly stipulated under sections (70(1), 72(1), 77(1), 77(2), 79(1), 80(1), 82(2) and 84(1) of the repealed Constitution.
 - iii. A Declaration that the Respondents violated the Constitutional rights of the Petitioner and that of Section 3 (1) (2) 5(1) (2) of The Persons Deprived of Liberty Act CAP 90A Laws of Kenya.
 - iv. A Declaration that no person should be convicted or imprisoned for a term more than what is prescribed by and in the laws of the Penal Code and that such incarceration occasioned to the Petitioner was unconstitutional and should be quashed and the record for the Petitioner should be restored.
 - v. A declaration that to the above declarations that the incarceration of the Petitioner for a period of 20 years by the Respondents for the offence of attempted robbery with violence was unconstitutional and for those reasons he is entitled to damages.



- vi. An Order pursuant to the above declarations for adequate compensation in the form of damages; general and exemplary for the unlawful deprivation of his Constitutional rights and other written laws by the Respondents to be borne by the Respondents both jointly and/or severally.
- vii. Any other relief that this Honourable Court shall deem fit by dint of Article 23 (3) of the Constitution of Kenya, 2010 and are just to grant in the circumstances.
- viii. Costs of this petition.

Petitioner's Case

4. The Petitioner argues that his conviction and detention under Section 297(2) of the Penal Code amounted to gross violations of his rights under Articles 26, 27, 28, 29, 39, 45, 47, 48, 50, and 51 of the Constitution, 2010. He maintains that the conflicting provisions of Sections 297(2) and 389 created ambiguities, and the Respondents failed to safeguard his right to benefit from the least severe sentence under Article 50(2)(p).
5. The Petitioner avers that he endured years of psychological torture and indignity while on death row and in solitary confinement. He pronounces the experience as cruel, inhuman, and degrading treatment contrary to Article 29 of the Constitution. He asserts that this ordeal was exacerbated by the Respondents' neglect in ensuring the law was interpreted consistently with constitutional guarantees.
6. The Petitioner further avers that by virtue of the supremacy of the Constitution, the Respondents were duty-bound to protect his dignity and liberty. He maintains that the Respondents' officers actively facilitated his prolonged incarceration and, by so doing, breached their obligation to uphold the Bill of Rights.
7. He claims that the wrongful conviction and lengthy detention deprived him of his youth, livelihood, and family life. He argues that the rights violated are non-derogable, and therefore, no statutory defence is available to the Respondents.
8. The Petitioner urges that the Mombasa Petition did not conclusively address the issue of damages for violation of his rights and that this Petition is properly before this Court under Article 165(3)(b).

1st Respondent's Case;

9. In response to the Petition, the 1st Respondent filed its Grounds of Opposition dated 23rd May, 2024. The 1st Respondent contends that the Petition is res judicata, the issues having been conclusively determined in Mombasa Constitutional Petition No. 98 of 2018; Peter Muindi & another v Director of Public Prosecutions [2019] eKLR. It is argued that the Petitioner is seeking to relitigate issues already determined, and the Petitioner's claim is an afterthought which imperils the sacrosanct principle on prudent use of judicial resources.
10. Further, it was argued that the Petition is an abuse of process as the Petitioner ought to have sought damages in the earlier proceedings. The 1st Respondent maintains that the Petitioner served a lawful sentence under a valid statutory framework and no liability can attach to the State and thus urged this Honourable Court to dismiss the petition with no orders as to costs.

2nd Respondent's Case;

11. The 2nd Respondent opposed the Petition through a Preliminary Objection dated 21st May, 2024 and Grounds of Opposition dated 22nd May, 2024. The 2nd Respondent averred that the Petition



is frivolous, misconceived, and incompetent. It is urged that the Petition is barred by res judicata, having been conclusively adjudicated in the Mombasa Petition No. 98 of 2018. The 2nd Respondent further contends that the reliefs sought are not justiciable against it since no unlawful act has been demonstrated on its part.

12. The Petition was canvassed by way of written submissions and all parties complied by filing their respective submissions.

Petitioner's Submissions

13. In his written submissions dated 28th October, 2024, the Petitioner submitted that his claim is not an appeal, nor is it barred by the doctrine of res judicata. Instead, it flows from the High Court's pronouncement which, while quashing his death sentence, did not offer redress for the violation of his rights already occasioned. He contends that the Court's failure to address the question of compensation does not extinguish his entitlement to redress. The Petitioner thus asserts that the matter before this Court is distinct and arises directly from constitutional breaches which remain unremedied.
14. On jurisdiction, the Petitioner invokes Article 165(3) of the *Constitution*, which empowers the High Court to determine whether rights and fundamental freedoms have been denied, violated, infringed, or threatened. He argues that his petition fits squarely within this jurisdiction since it challenges violations of rights to a fair hearing, liberty, and to benefit from the least severe punishment. Articles 21 and 23, he contends, mandate the Court to grant appropriate reliefs for such infringements. The Petitioner therefore submitted that this Court is clothed with jurisdiction to interrogate the violations and grant the remedies sought.
15. Turning to the alleged rights violations, the Petitioner cited multiple provisions of the *Constitution*, including Articles 2, 3, 10, 20, 25, 28, 29, and 50. He submitted that his detention under an unlawful and excessive sentence subjected him to degrading and inhumane treatment, contrary to both the *Constitution* and the *Persons Deprived of Liberty Act*. He specifically relies on the right under Article 50(2)(p) to benefit from the least severe prescribed punishment, asserting that the 13 additional years served beyond the statutory maximum of 7 years under Section 389 of the Penal Code constituted arbitrary and unconstitutional detention. In support of his claim, the Petitioner relied on the decision of *Dominic Arony Amolo v Attorney General* [2003] eKLR, where damages were awarded for unlawful detention.
16. It was also submitted that the matter raises issues of great public importance, as the conflicting provisions of the Penal Code risk perpetuating further violations of constitutional rights for other accused persons. Relying on the decision on *Eric Gitari v Attorney General & another* [2016] eKLR, he argues that substantial questions of law are engaged, including the conflict between statutory provisions, the scope of constitutional rights protection, and the nature of remedies for their breach.
17. Further, it was his submission that a matter touching on potential violation of constitutionally enshrined rights is a matter of public importance as those rights are an individual's rights not granted by the State and serve as the foundation of laws of this Republic. He therefore prays for declarations, damages, and costs, submitting that the Respondents' failure to prevent and rectify his unlawful imprisonment squarely entitles him to relief from this Honourable Court.

1st Respondent's Submissions

18. The 1st Respondent, in its written submissions, framed two central issues for determination by this Court: whether the petition is barred by the doctrine of res judicata and whether the Petitioner is entitled to damages. On the first issue, it was argued that the petition seeks to reopen questions already



- adjudicated upon in a prior petition filed before the Mombasa High Court. Reliance was placed on binding authorities, including the Supreme Court decision in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR and *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR), which outlined the essential ingredients for res judicata.
19. It was submitted that Section 7 of the *Civil Procedure Act* firmly bars courts from entertaining suits in which issues have been directly and substantially in issue in former suits between the same parties. To reinforce the applicability of this doctrine even in constitutional litigation, reliance was placed on *William Kabogo Gitau v Ferdinand Ndung'u Waititu* [2016] eKLR, where the Court held that res judicata is equally applicable to constitutional petitions, save for cases where fresh and continuing violations of rights are demonstrated. The Respondent stressed that in the instant case, no new or continuing violations had been shown, as the issues raised mirror those adjudicated in *Peter Muindu & another v Director of Public Prosecutions* [2019] eKLR before the Mombasa High Court. Given that the prior decision emanated from a court of competent jurisdiction under Article 165(3)(a) of the *Constitution*, and no appeal or review has been lodged, this Court is urged to find that the petition is res judicata.
 20. On the second issue concerning damages, it was argued that the Petitioner cannot be entitled to compensation for alleged wrongful imprisonment spanning twenty years. It was submitted that the conviction was secured under a valid legal framework through a lawful process where the standard of proof was beyond reasonable doubt. Further, the Respondent clarified that the power to institute criminal proceedings, previously held by the 1st Respondent, now rests solely with the 2nd Respondent under Section 5(b)(i) of the *Office of the Director of Public Prosecutions Act* and Article 157(6) of the *Constitution*. The imprisonment was therefore a lawful consequence of a judicial determination, not an arbitrary or unconstitutional act attributable to the Respondents.
 21. The 1st Respondent also invoked the equitable doctrine of laches, contending that the Petitioner is guilty of unreasonable delay in seeking damages. It was submitted that the Petitioner had ample opportunity to raise the issue of compensation during the resentencing proceedings but failed to do so. Since the claim is neither based on newly discovered facts nor continuing violations, it amounts to an abuse of process. The 1st Respondent relied on the persuasive authority from the Privy Council in *Tamara Merson v Drexel Cartwright and Ag (Bahamas) Privy Council Appeal No. 61 of 2003*, where it was held that constitutional damages are primarily vindicatory rather than punitive and that in appropriate cases, a declaratory order may suffice without any monetary award.
 22. In furtherance of the principle of justiciability, the Respondent relied on the decisions of *Wanjiru Gikonyo & 2 Others v National Assembly of Kenya & 4 Others* and *Matalinga and others v Attorney General* [1972] E.A. 578, to argue that courts are enjoined to decide only real, ripe, and substantial controversies. It was submitted that the instant Petition is not justiciable, lacks substantive constitutional foundation, is res judicata and an abuse of court process and ought to be dismissed.

2nd Respondent's Submissions

23. The 2nd Respondent in its submissions contends that the instant Petition is barred by the doctrine of res judicata and further that this Honourable Court is bereft of jurisdiction to re-adjudicate on matters already conclusively determined by a court of concurrent jurisdiction. It was submitted that the issues raised herein had previously been ventilated and resolved in Mombasa High Court Constitutional Petition No. 98 of 2018, wherein the Petitioner and the 2nd Respondent were parties. The Respondent asserts that the Petitioner is merely attempting to reopen settled questions flowing from Criminal Case No. 221 of 1999 at Mombasa Law Court, in which the Petitioner was an accused person, and which



culminated in constitutional litigation previously determined in his favour. To allow the Petition, it is argued, would be tantamount to subjecting the same cause of action to repetitive litigation contrary to the well-settled principles of finality. The Court is thus urged to find that the Petition offends the doctrine of res judicata.

24. It was argued that the High Court at Mombasa, in Petition No. 98 of 2018, exercised its mandate under Article 23 of the *Constitution* to determine issues of alleged violation of the Bill of Rights. The court framed issues including its jurisdiction, the constitutionality of sections 297(2) and 389 of the Penal Code, and whether the conflict infringed on the rights of the Petitioner under Article 50. In a considered judgment, the court declared a conflict between the provisions, held that the Petitioner's rights had been violated, and directed his release having already served a sentence in excess of the lesser penalty provided under section 389. It is the Respondent's contention that this determination squarely addressed the issues the Petitioner now seeks to re-litigate. Consequently, it is argued that the present Petition is unnecessary and barred.
25. It was also submitted that the doctrine of res judicata applies with equal force to constitutional litigation. Reliance is placed on decision of William Kabogo Gitau v Ferdinand Ndung'u Waititu [2016] eKLR, wherein the court affirmed that the principle is applicable even in constitutional matters, though caution must be exercised to avoid unjustly locking out genuine claims of continuing violations.
26. Further, it was submitted that once issues have been conclusively determined, the parties are bound, and the courts must decline to reopen them. The doctrine, as reiterated in Kenya Commercial Bank Limited v Muiiri Coffee Estate Limited & another [2016] eKLR, is a substantive principle of law designed to give effect to finality of litigation.
27. In further support, reliance was placed in the case of Silas Make Otuke v Attorney General & 3 others [2014] eKLR, which affirmed that the availability of constitutional remedies does not oust the application of res judicata. Additionally, it was argued that the rationale behind the doctrine, as observed in Kamunye & others v Pioneer General Assurance Society Ltd [1971] EA 263, is to protect the judicial process from abuse, prevent multiplicity of suits, and conserve judicial time and resources.
28. On the issue of jurisdiction, the 2nd Respondent submitted that the High Court has jurisdiction to enforce fundamental rights and freedoms, but contends that such jurisdiction does not extend to reviewing decisions already rendered by a court of concurrent jurisdiction. It is submitted that to entertain the instant Petition would effectively render this Court an appellate forum over its counterpart in Mombasa, which is impermissible. It was argued that, the Petitioner, if aggrieved, ought to have invoked his right of appeal under Article 50(2)(q) of the *Constitution*, to the Court of Appeal and, if necessary, the Supreme Court. The failure to follow that constitutional route cannot be cured by instituting fresh proceedings in another High Court.
29. It is thus argued that this Court lacks jurisdiction to interrogate the same questions afresh. Reliance was placed on Kenya Hotel Properties Ltd v Attorney General & 2 Others; Willesden Investments Limited & 2 others (Interested Parties) (Constitutional Petition 438 of 2018) [2018] KEHC 3255(KLR) where it was reiterated that jurisdiction flows from the *Constitution* or statute and cannot be assumed or expanded through judicial innovation. This Honourable Court was thus urged to dismiss the instant Petition.

Analysis And Determination;

30. Having carefully considered the pleadings, responses, submissions and authorities relied by the parties, this court identify following issues for determination:



- i. Whether this court has jurisdiction over the proceeding herein.
 - ii. Whether this proceeding is res judicata.
31. I shall, however, invert the order of analysis and begin with Issue Two. The outcome of my determination on that issue will inform whether it is necessary to consider Issue One.

I. Whether this proceeding is res judicata

32. The doctrine of res judicata is by no means a novel concept. It has been the subject of extensive judicial interpretation and is now firmly settled in our legal jurisprudence. Res judicata serves two fundamental purposes in the administration of justice. First, it prevents the multiplicity of suits, thereby avoiding an undue burden on the judicial system and sparing parties the unnecessary costs of litigating matters that could, and should, have been resolved in a single proceeding. Second, it ensures finality in litigation by barring parties from re-litigating issues previously determined, even if presented under the guise of new pleadings or reformulated causes of action. The substantive law governing res judicata is codified under Section 7 of the *Civil Procedure Act*, Cap. 21, Laws of Kenya, which provides that:

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.

33. I do not intend to re-invent the wheel. I find it apt to adopt and rely on the classic and oft-cited dictum of Wigram V-C, in *Henderson vs Henderson* (1843) 67 ER 313 as it summarizes res judicata as follows:

“where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

34. The pertinent question, therefore, is whether the present case is res judicata. The doctrine, being jurisdictional in nature, requires a careful and thorough inquiry. Unless the answer is abundantly clear, a court faced with a plea of res judicata must closely examine the judgment said to have conclusively determined the issues in question, alongside the entire pleadings in both the previous and the current suit. This inquiry is necessary to determine: (i) the precise issues that were actually and conclusively determined in the earlier suit, and (ii) whether those issues are identical to the ones raised in the subsequent suit. Additionally, the Court must establish that the parties in both suits are the same or litigating under the same title, and that the earlier decision was rendered by a court of competent jurisdiction.
35. The applicable test for res judicata was succinctly summarized in *Bernard Mugo Ndegwa vs James Nderitu Githae and 2 others* [2010] eKLR, as follows that:



- 1) The matter in issue is identical in both suits; 2) the parties in the suit are the same; 3) sameness of the title/claim; 4) concurrence of jurisdiction; and 5) finality of the previous decision.
36. The provision is on the fundamental doctrine that there should be an end of litigation. The doctrine of res judicata may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estoppel. The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.
37. The Black's law Dictionary 10th Edition defines "res judicata" as

"An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."
38. It is a well-established principle that a party may not commence more than one action in respect of the same or substantially similar cause of action. The rationale behind this principle is to ensure that the Court resolves all matters in dispute in a single action, thereby preventing a multiplicity of suits which may result in inconsistent judgments and unnecessary expense to the parties. Courts are therefore enjoined to determine all issues comprehensively in one proceeding, where practicable, in order to advance the objectives of judicial economy and finality.
39. In the instant Petition, the Petitioner concedes that he was the Petitioner in Mombasa Constitutional Petition No. 98 of 2018, a matter which conclusively addressed the constitutionality of the provisions of Sections 297(2) and 389 of the Penal Code, and found that his constitutional rights had been violated. The Court in that matter granted the relief of release from custody, which, at the time, was the most efficacious and appropriate remedy available. This Court must therefore interrogate whether the Petitioner can reopen the matter by seeking damages. The Respondents contend that the Petition is res judicata, having been conclusively determined in Mombasa Constitutional Petition No. 98 of 2018.
40. The doctrine of res judicata is typically invoked as a defence to a suit or cause of action on the ground that the legal rights and obligations of the parties have already been determined by a prior judgment. Such a judgment may have resolved both questions of law and fact as between the parties. Put differently, a plea of res judicata will succeed where it is established that: the issues in dispute were directly and substantially in issue in a former suit; the parties in both suits are the same or are litigating under the same title; the previous suit was heard and finally determined; and the court that rendered the earlier decision was one of competent jurisdiction.
41. In this regard, the Court of Appeal held in *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] KECA 447 (KLR), that:

“

“[F] or the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

 - a) The suit or issue was directly and substantially in issue in the former suit.
 - b) That former suit was between the same parties or parties under whom they or any of them claim.



- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

The Court went on to state on the role of the doctrine:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

42. Similarly, the Supreme Court in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (supra), clarified the elements of res judicata. The court underscored that:

“For res judicata to be invoked in a civil matter the following elements must be demonstrated: a) There is a former judgment or order which was final ;b) The judgment or order was on merit; c) The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and d) There must be between the first and the second action identical parties, subject matter and cause of action.(See *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] eKLR and See the decision of the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others* Civil Appeal 110 of 2011 (2013) eKLR)”

43. Applying the established test to the present circumstances, it is evident that all the requisite elements of res judicata are satisfied. First, there was a final judgment rendered in Mombasa Constitutional Petition No. 98 of 2018. Second, the judgment was issued on merit, following full submissions and judicial consideration of the constitutionality of Sections 297(2) and 389 of the Penal Code, and the impact thereof on the Petitioner’s rights. Third, the High Court in Mombasa was properly seized of the matter and had jurisdiction pursuant to Articles 23 and 165(3)(b) of the *Constitution* to determine allegations of infringement of fundamental rights and freedoms. Fourth, the parties in both proceedings are the same the Petitioner on one hand, and the State, through the Respondents, on the other. Fifth and finally, the cause of action in both petitions is materially identical, being grounded in the Petitioner’s incarceration pursuant to Section 297(2) of the Penal Code. On this basis, I am satisfied that the present Petition falls squarely within the ambit of res judicata.
44. The Petitioner argues that damages were not expressly considered in the Mombasa Petition, and therefore this Petition is not res judicata. However, the principle is clear that a litigant must pursue all reliefs available in a given suit and cannot split causes of action.
45. Courts must remain vigilant to prevent litigants from circumventing the doctrine of res judicata through procedural tactics such as reconstituting parties or modifying the framing of pleadings. The mere addition or subtraction of parties in a suit that is substantially or directly related to a previously



determined suit and which raises the same subject matter does not transform it into a fresh cause of action. On the contrary, such manoeuvres only serve to highlight an abuse of the court process and may, where appropriate, result in the premature termination of the suit through a properly raised preliminary objection. The doctrine of res judicata is intended to protect the integrity of the judicial process by precluding repetitive litigation of concluded matters under the guise of new configurations of parties or issues.

46. In the case of *E.T vs Attorney General & another* (2012) eKLR, it was held that:

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi Vs National Bank of Kenya Limited and Others* (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of *Njangu Vs Wambugu and another Nairobi HCCC No.2340 of 1991* (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’ (Emphasis added)

47. The doctrine of res judicata is a principle of substantive law, fundamentally asserting that once a court has settled the legal rights of the parties, that ruling serves as a definitive declaration regarding those rights. It seems that the principle of res judicata is applicable to all types of matters, including those concerning constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of *Hon. Norbert Mao v. Attorney-General, Constitutional Petition No. 9 of 2002; [2003] UGCC3*, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under Article 137 of the Uganda Constitution, and for redress under Article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under Article 50, seeking similar relief; and Judgment had been given in *Hon. Ronald Reagan Okumu v. Attorney- General, Misc. Application No.0063 of 2002, High Court HCT 02 CV MA 063 of 2002*. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner’s pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.

48. From the above, the argument that compensation was left open is unsustainable. The Mombasa Court expressly invoked Article 23(3) of the *Constitution*, which empowers courts to grant declarations, injunctions, and compensation. By not seeking compensation then, or the court not granting compensation, the Petitioner cannot now re-litigate on the same factual matrix.

49. The Petitioner invites this court to treat constitutional litigation with flexibility. Courts have affirmed that the doctrine of res judicata applies with equal force to constitutional petitions. In the case *Silas Make Otuke v Attorney General & 3 others* (supra), the Court affirmed that constitutional petitions are subject to the doctrine of res judicata. Similarly, in *Kenya Commercial Bank Limited v Muiri Coffee*



Estate Limited & another (supra), it was held that res judicata applies across all categories of litigation, including constitutional claims. The supreme court thus stated:

“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.”

50. In *William Kabogo Gitau v Ferdinand Ndung'u Waititu* [2016] eKLR, the court affirmed that while caution must be exercised, res judicata “applies with even force to constitutional litigation.” The caution is to avoid shutting out fresh violations, not to permit duplication of suits on the same facts. In this case, there is no continuing violation. The Petitioner was released by virtue of the Mombasa Petition. The claim for damages is not a new violation but arises from the same facts already adjudicated.
51. Importantly, the Petitioner’s current claim is based on the same cause of action, his conviction, sentence, and incarceration. The only new relief sought is damages, but the underlying issue remains identical. This Court would in effect be sitting on appeal over a decision of a court of concurrent jurisdiction, contrary to established principles of jurisdiction. In *Greenhalgh vs Mallard (1)* (1947) 2 All ER 257, Somervell L. J stated “Res judicata covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.” All the facts raised in this case, including the alleged violation of constitutional rights or violation of statutory provisions are matters that were raised in the previous proceedings. In fact, all the matters raised herein including violation of Articles 27, 28, and 50 (2) (p) rights were raised and considered in the said Petition. The case is founded on the same cause of action, same issues, same facts, and same circumstances.
52. It is settled law that a litigant cannot be permitted to re-litigate a matter that has already been the subject of a final judicial determination. Once a court of competent jurisdiction has conclusively resolved an issue, that decision binds the parties and estops them from raising the same issue in subsequent proceedings, even where the reliefs sought or the precise causes of action may differ. The core objective is to prevent the repetition of suits between the same parties, shield defendants from vexatious multiplicity of proceedings, and forestall the risk of conflicting judicial pronouncements on the same subject matter.
53. Moreover, the principle of finality in litigation is essential to ensure consistency and stability in judicial decisions. Allowing every litigant who did not seek damages in an earlier constitutional petition to re-litigate the same matter would inundate the courts with repetitive and endless petitions. Such a practice would undermine the fundamental values of efficiency, certainty, and orderly adjudication enshrined in Article 159(2)(b) of the *Constitution*, which mandates that justice shall be administered without undue delay.
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. The Court therefore finds that the Petition is barred by the doctrine of res judicata. The Petitioner already obtained relief through his release in the Mombasa Petition. His failure to pursue damages at



that stage does not justify reopening the matter. The Petition amounts to an impermissible collateral attack on a final decision of a court of concurrent jurisdiction.

56. From the foregoing, the Court concludes that the second issue, which confirms the relevance of the doctrine of res judicata, is decisive for the entire case. Since res judicata functions as a jurisdictional impediment, it follows that the Court is stripped of its jurisdiction under the first issue to reopen or re-litigate a matter that has already been definitively resolved. As a result, the Court determines that it does not have the jurisdiction to address the current proceedings, as they are barred by the doctrine of res judicata.
57. Consequently, this court finds the Petition to lack merit, which accordingly is dismissed in its entirety with no orders as to costs.

File closed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF SEPTEMBER 2025.

BAHATI MWAMUYE

JUDGE

In the presence of: -

Counsel for the Petitioner –Ms. Nkonge

Counsel for the 1st Respondent – No appearance

Counsel for the 2nd Respondent –Mr. Mulati

Court Assistant –Ms. Lwambia

