



**Kipkemboi v Republic (Criminal Revision E114 of 2024)
[2025] KEHC 13736 (KLR) (2 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 13736 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E114 OF 2024
RN NYAKUNDI, J
OCTOBER 2, 2025**

BETWEEN

EXAVIER KIPKEMBOI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Before this court is a Notice of motion brought under Article 379(4) 356 & 357 CPA 75, 165 (3) (a) & (b) 50(2) 9q) 27, 28, 326 & 216 of the CPC and any other enabling law seeking the following orders:
 - a. That the petitioner is seeking for sentence review in accordance to Article 50(2) (p) (q) of custodian and section 362 & 364of the Criminal Procedure Code.
 - b. Spent
 - c. That the applicant will be seeking a declaration by the court that his application has merit and qualifies to be heard
2. It is supported by an affidavit sworn by Exavier Kipkemboi which states as follows:-
 - a. That I am a Kenya citizen adult male of sound mind hence competent to swear this affidavit
 - b. That I was charged with the offence of defilement contrary to Section 8(1) as read with 8(4) of the sexual offence act No 3 of 2006 and I was convicted to serve 15 years imprisonment
 - c. That the sentence meted upon me is harsh and excessive against my mitigation
 - d. That I a now approaching this honourable court to kindly review my 15 years sentence to a lesser and more lenient sentence



- e. That this hon court has competent, unlimited jurisdiction to hear and determine this application under the provisions of article 165(3) (b) of the constitution of Kenya 2010
- f. That I am remorseful, repentant, reformed and rehabilitated as I have learned hard lesson while in custody and now beg for leniency
- g. That I do beg that I be accorded to benefit with the provisions of Art 50(2) (q) of the constitution of Kenya 2010
- h. That it is my humble prayer that I be granted a fair opportunity to argue my petition.

Decision

3. The applicant has moved the court once again on review of sentence when in essence on 4th day of June 2025 this court determined the same application and ruled as follows: Considering all these principle and guidelines I hereby reduce the sentence of the offender from 15 years to 12 years in the circumstances. The period shall take into account any period spent in custody.
4. The impugned sentence incorporated the period spent in remand custody with effect 17th September 2018 to 14th January 2019 under section 333 (2) of the CPC. This application on record is res judicata. For a matter to be res judicata it must be one on which the Court has previously exercised its judicial mind and has, after argument and consideration, come to a conclusion on the contested matter and for this reason a matter is said to have been “heard and finally decided” notwithstanding that the former suit was disposed of by a decree on an award. Whether a matter was directly and substantially in issue in a former suit is to be determined by reference to the plaint, the written statement, the issues and the Judgment and the test of res judicata is the identity of the issue and not the identity of the property involved in the former suit. To determine the question whether a matter is or is not res judicata the Court must look at the cause of action and the relief claimed. The cause of action and the relief claimed must have been in issue directly and substantially to maintain a plea of res judicata. However, a matter cannot be said to be “directly and substantially” in issue in a suit unless it was alleged by one party and denied or admitted expressly or impliedly by the other and it is sufficient if the matter was in issue in substance. A matter is in issue if the Court considers the adjudication of the issue to be material and essential to its decision and a matter is also “directly and substantially” in issue if it is one which might or ought to have been made a ground of attack by the plaintiff to substantiate the relief claimed or made a ground of defence by the defendant against the claim against him. A party cannot in a subsequent proceeding raise a ground of claim or defence, which upon the pleadings or the form of issue was open to him in the former case. See Halsbury's Laws of England 3rd edition page 186.
5. What are the pertinent reasons why I consider this matter be to res judicata.
 - a. There is a previous application as between the Republic and the applicant on the same subject matter
 - b. The issue of review of sentence was litigated and a decision made on the merit.
 - c. This court when determining the issue of review of sentence was competent and properly constituted under Art 50 (1) of the constitution.
 - d. The doctrine of res judicata applies fundamentally to the shutting out of litigation by convicts who try to invoke the jurisdiction of the court even when they have exhausted the right of appeal to the apex court.



- e. It is for these reasons I strike out the application for being vexatious and scandalous within the scope of an abuse of the court process.
6. The application for review of sentence under Article 50 (2) P & (q) of *the constitution* as read with Section 362 and 364 of CPC lacks merit. The earlier judgement affirmed with no further orders for the benefit of the appellant.

SIGNED, DATED AND ELIVERED AT ELDORET VIA CTS AND EMAIL THIS 2ND OCTOBER, 2025

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R. NYAKUNDI

JUDGE

