Odhiambo v Republic (Miscellaneous Application E083 of 2023)
[2025] KEHC 16119 (KLR) (Crim) (3 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16119 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

MISCELLANEOUS APPLICATION E083 OF 2023

AM MUTETI, J

NOVEMBER 3, 2025

BETWEEN

ERASTUS NGURA ODHIAMBO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant has by way of a Chamber Summons expressed to be brought under Articles 10(2) (b) , 19,22,(1) , 23(1) , 25(a) , 28, 29, 47, 50, 165 (3) (b) (d) of *the Constitution* as read together with Sections 26 (2) and 35 of the Penal Code as well as Section 333(2) of the Criminal Procedure Code dated 12th March 2023 moved this court for the grant of the following ORDERS;-

    i. That the applicant with the guidance and protection of Article 22 on whose strength I institute these proceedings. I wish for the court's audience since it has jurisdiction to hear this matter and for the very much needed reprieve all in the interest of justice.

    ii. That this application is based on Article 50 (6) hoping to bring to the court's attention of the new and compelling evidence. The court to take cognizance that at the earlier instances that the applicant mitigated, he had not completed his Masters and now intends to bring it to this court's attention amongst other new developed mitigating factors. He does not wish a second bite at the cherry rather he brings it in the interest of justice and that alone.

    iii. That strongly based on recognition and protection of human rights to preserve dignity of individuals as provided for in Article 19 of *the Constitution* of Kenya 2010. This is in respect to the applicant and also giving regard to the offence in the instant matter. The applicant humbly before this court seeks protection of his human rights with light to a fresh redress to this matter

iv. That the petitioner having gone through the appellate court, seeks to persuade this court to grant him an audience as provided for in Article 165 as read with Article 159 (2) (d) and supported by Protus Buliba Shikuku and Tom Martin Kibisu (supra).

v. That the court be pleased to hold that murder falls in the precinct of the *Probation of Offenders Act* to enjoy the fruits of Articles 47 of *the Constitution* of Kenya, 2010. In furtherance to the forgoing, the applicant hopes to persuade this court to consider probation as a remedy in this matter which serves as a win, win to both victims and beneficiaries of this matter.

vi. That such other orders that the court may deem fair and just.

2. The application was premised on the following grounds THAT: -

a. The applicant posits that since he is charged under the impugned Sections and as per ratio of Application No. 3 of 2014 above, he invites the Hon. Court to hold that since the court has discretion to mete any sentence after satisfying itself on the merits of Article 50(6) of *the Constitution* of Kenya 2010 among other circumstances, to re-consider his sentence on further mitigation.

b. The applicant posits that the continuing detention of a prisoner should be due to legitimate penological grounds which include punishment, deterrence, public protection and rehabilitation. The mitigating circumstances that led to discretional sentence of 20 years in this matter are not static and have shifted in the course of the sentence. Therefore, it is only by carrying out a further mitigation rehearing of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.

c. The Respondents are bound by the provisions of *the Constitution* and the written law and to act in defense of the same. Section 7(1) of the Sixth Schedule to *the Constitution* contemplates that all laws in force before the promulgation of *the constitution* have to be brought into conformity with *the Constitution* either through new substantive legislation or amendments.

3. The applicant secured an affidavit sworn on 9th of June 2025 by one Jamleck Irungu Karanja the father of Linda Wanjiku Irungu(deceased) who was the primary victim of the murder.

4. The deceased's father deponed as follows:-

" 1. That, I am a male adult Kenyan citizen duly competent to make an oath.

2. That, I am the father of Linda Wanjiku Irungu, the victim of the offence for which Mr. Erastus Ngura Odhiambo was convicted of on 1st August 2018.

3. That, Erastus was tried, convicted and sentenced to a 20 year custodial sentence on 1st August 2018.

4. That, Linda and Erastus had a son named Billy Odhiambo Ngura and I have been the custodian of the son since he was 1 year old, when my daughter, Linda passed on and Erastus was taken into custody.

5. That, I had sent a representative of the family upon Erastus Odhiambo's request to visit him in Kamiti Medium Prison, where he personally and passionately expressed his remorse to me and the family and I feel that he deserves a second chance to make things better and take responsibility for his young kids, family, and other third party obligations.

6. That, we have resolved as a family to pursue a reconciliatory approach with Erastus' family for the sake of cohesive coexistence and healing.

7. That, we have forgiven him and hold nothing against him.

8. That, we are ready to accept him back to undertake his societal responsibilities

9. That, I request the court to consider releasing Erastus at the earliest opportunity so he can resume his normal life and, more importantly, become a better person.

10. That, I have not been coerced into making this oath.

11. That, what I have stated herein is true to the best of my knowledge information and belief."

5. The court also heard the deponent when he appeared at the hearing of this application.

6. On the strength of the affidavit by the deceased's father the applicant pleaded with this court to consider reopening his case and grant him an alternative sentence in order to enable him reunite with the rest of society and take care of the issue of their marriage with the deceased.

7. The application was strenuously opposed by the state through Ms Ogega Principal Prosecution Counsel who argued that this court has no jurisdiction to reopen the matter since the applicant had already exhausted his right of appeal to the Court of appeal and had also unsuccessfully petitioned the High court through Constitutional Petition No. E076 of 2022.

8. According to Ms Ogega, the instant application is an attempt to pursue post judgment alternative dispute resolution mechanisms.

9. The applicant on the other hand pleaded with the court to entertain his application and give him a second chance since the deceased's family had already forgiven him.

10. This court has examined the application and the objection thereto.

11. It is clear that the applicant is ingeniously attempting to invoke the provisions of Article 159 (2) (d) of *the Constitution* by arguing that since the two families are now reconciled, the court should be able to consider allowing post-judgment alternative dispute resolution. The deceased's father in his affidavit has equally pleaded with the court to consider releasing the applicant.

12. *The Constitution* of Kenya under Article 159 (2) (d) encourages the use of alternative justice mechanisms in the resolution of disputes whether criminal or civil in nature. *The constitution* discourages the use of alternative justice resolution mechanisms in cases where the proposed mode of settlement of the dispute is repugnant to justice and morality. It is important to note that for a party to invoke the use of alternative dispute resolution the dispute sought to be resolved must be live.

13. A party who wishes to engage in the resolution of a dispute of a criminal nature outside the traditional adversarial systems provided in our law must do so timeously and before judgment is pronounced by a court of law. The affidavit of the deceased's father would have been very useful had it been placed on record during the trial.

14. The applicants move at this stage amounts to shutting the stable after the horse has already bolted. The court has already pronounced itself with finality on the sentence. The court in Kigula Vs Republic (2009) UGSC 6 at page 41 declared that sentencing is part of the criminal trial. It follows therefore that

whomsoever wishes to benefit from the discretion of a court in sentencing as a result of reconciliation with the victims must do so before the court discharges its function in sentencing.

15. Arthur, L, in his Article Does Case Management Undermine the Rule of Law in the Pursuit of Access to Justice? (2011) 20(4) JJA 240, 241 states ''Notwithstanding improvements to the delivery of adjudication, the outcome of litigation in many cases will be uncertain, more time consuming and more expensive than settlement. For this reason, judicial emphasis on early settlement simply reflects party aversion to litigation risk while at the same time preserving judicial resources for cases which require intensive pre-trial judicial management.''

16. It is precisely for the reasons highlighted in the article quoted above that parties who wish to invoke Alternative Dispute Resolution or intend to pursue Alternative Justice Systems to resolve legal disputes must do so before the courts engage fully with the matter and pronounces judgment.

17. Alternative Dispute Resolution is only applicable before the final judgment is pronounced. Immediately a judgment is delivered in a criminal trial the accused loses the opportunity to pursue ADR since there is no dispute to resolve anymore. The guilt of the accused is already determined thus putting the matter beyond negotiation by the parties.

18. To the same effect is the following observation by Justice Andrew Greenwood: Greenwood, AP, ADR Processes and Their Role in Consensus Building (2010) 21 ADRJ 11, 15.

> " My own view is that there is a natural balance between the role of the courts, the 'institution' of litigation and the many structured ADR paths to resolving a conflict between citizens which might be elevated to a dispute or, ultimately, to an actual piece of litigation. There is a natural progression in the evolution of disputes. Many disputes can and should be settled early, quickly and efficiently without recourse to court processes. Other disputes may commence their lives with a formal application to the court and a statement of the material facts supporting a particular claim. Steps can be taken to ensure that the issues in such matters are properly framed and key documents exchanged so that the ADR process has the best chance of bringing about a solution." (emphasis mine)

19. A party who wishes to have his case settled through other means other than the traditional adversarial system, must make the decision to invoke the process of ADR in good time in order to avoid having the matter go through the formal court process and a final judgment is rendered only for them, to seek to reopen it long after the final judgment. Unlike civil cases, once a conviction and sentence has been pronounced, the options available to an accused person are limited to an appeal or a revision.

20. The applicant in this case admits that he has gone through the appellate process and lost. As it were, the, matter is beyond resolution by way of alternative resolution.

21. Post judgement ADR is not tenable in a criminal matter because it has the effect of undoing that which a court of law has already determined and to allow such practice would be akin to allowing victims of a crime and accused persons to negotiate post judgment settlement that would render the judgment of the court meaningless. The Constitutional framers of Article 159 cannot have contemplated such maneuvers being undertaken by litigants to try and undo the work of the courts.

22. To allow that, would be a recipe for chaos in the criminal justice system since persons aggrieved with the decisions of the court would engage in cutting deals with victims of a crime with the aim of defeating the criminal justice process.

23. The place of sentencing in criminal law would be whittled down and persons charged with criminal offenses would not be keen to pursue ADR initiatives such as plea bargain, deferred prosecution or

diversion which are useful mechanisms for reducing the ever-growing backlog of criminal cases in our courts.

24. The purpose of criminal law is to maintain order, prevent and punish crime and protect society. The penalties that criminal courts impose are geared towards deterring future offenders, rehabilitating offenders, and they also serve as a retribution for victims. For this reason. once an accused person has gone through the rigors of a criminal trial without exercising the option of alternative dispute resolution then the accused person should be prepared to live with the consequences of his decision.

25. The trial of the accused person in this case opened on the 12th of October 2015 when the first prosecution witness took to the stand. The matter proceeded up to the 17th April 2018 when the matter was reserved for judgement. During the entire period of the trial there was no attempt by the accused person to seek either a plea bargain on the matter or invoke any form of justice resolution mechanisms in fact, the applicant denied shooting the deceased even when he testified in his own defense. The applicant did not take responsibility for the crime thus punishment was called for and justified.

26. The Court of Appeal in Erastus Ngura Odhiambo vs Republic in Criminal Appeal No. 115 of 2018 in dismissing the applicants appeal made the following remark '' the appellant appears to be part of a growing number of young persons who enjoy affluence and think that human life has no value.'' That is a powerful statement coming from a superior court. The goal of deterrence therefore must be given its full effect in considering the instant application. This court is clear in its mind that even if the court had jurisdiction to entertain the instant application, the sentiments of the court of appeal would have swayed this court to reach a finding that the applicant deserves to serve the full term imposed against him notwithstanding what the father- in- law thinks or wishes.

27. The duty to punish crime is for the state in order to maintain law and order. Taking of human life in a callous manner as happened in this case cannot and must never be encouraged. The value of life must be respected by all civilized members of society.

28. It is clear that there was no intention whatsoever on the part of the applicant to pursue the path of reconciliation during the period of the trial. The awakening seems to have been brought about by the sentence imposed by the court.

29. It is the view of the court the belated attempt to invoke the provisions of Article 159 (2) (d) of *the Constitution* is as a result of the applicant's realization that the law finally caught up with him that he is bound to serve the prison term of 20 years that was imposed upon him. It is unfortunate that this attempt has come as an afterthought.

30. The affidavit by the deceased's father came too late in the day and although the applicant argued that he intended to reunite with the only child of their union, the deceased's father was emphatic that he intended to continue taking care of the minor until he attains 15 years of age.

31. It is therefore clear that the so -called reconciliation had not been wholeheartedly arrived at and the fact that the parties did not engage during the trial, coupled with the deceased's father's confession that he is still bitter with the applicant, renders the purported settlement inconclusive.

32. It is important to mention here that good faith and honesty in settling disputes through alternative mechanisms is key to the success of such initiatives.

33. The court is however inclined to decline the application for the reason that it lacks the jurisdiction to entertain it.

34. The court agrees with the state that this application cannot be entertained at this stage because this court has no jurisdiction to review the judgment of a judge of concurrent jurisdiction and similarly this court cannot review the decision of the Court of appeal which affirmed the applicant's conviction and sentence. The hierarchy of courts as set out under Article 162 of *the Constitution* must be respected and upheld.

35. In Owners of Motor Vessel "Lillian S" Vs. Caltex Oil (Kenya) Ltd (Civil Appeal 50 0f 1989) [1989] KECA 48 (KLR) (17TH Nov. 1989) (Judgment) Nyarangi, JA held that jurisdiction is everything and without it a court cannot take any one more step in a proceeding. The court would be acting in futility if it were to entertain proceedings knowing too well that it lacks jurisdiction to entertain the matter.

36. Consequently, this court finds that the application is incompetent and a non- starter. It is hereby struck out.

37. It is so ordered.

To the same effect is the following observation by Justice Andrew Greenwood:47

My own view is that there is a natural balance between the role of the courts, the 'institution' of litigation and the many structured ADR paths to resolving a conflict between citizens which might be elevated to a dispute or, ultimately, to an actual piece of litigation. There is a natural progression in the evolution of disputes. Many disputes can and should be settled early, quickly and efficiently without recourse to court processes. Other disputes may commence their lives with a formal application to the court and a statement of the material facts supporting a particular claim. Steps can be taken to ensure that the issues in such matters are properly framed and key documents exchanged so that the ADR process has the best chance of bringing about a solution. Greenwood, AP, ADR Processes and Their Role in Consensus Building (2010) 21 ADRJ 11, 15.

(R v Gladue [1999] 1 S.C.R. 688). The majority of the Court of Appeal, in dismissing the accused's appeal, also does not appear to have considered many of the relevant factors. However, the Supreme Court held that three years imprisonment in her circumstances was not unreasonable. According to Rudin:

The Court said that s. 718.2(e) offered sentencing judges a chance to address these issues by looking to more restorative sentencing options when sentencing Aboriginal people. In order to change the way Aboriginal people were sentenced, the court needed to know about the particular circumstances that brought the Aboriginal offender before the court and the types of options that might be available when passing sentence. The decision of the Supreme Court was seen as a groundbreaking one that provided some hope that the over representation of Aboriginal people in prisons might finally be addressed (Rudin, 2006: 1).

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF NOVEMBER 2025.

A. M. MUTETI

JUDGE.

In the presence of:

Habiba: Court Assistant

Applicant in person

Ms Ogega for the Respondent