

**IN THE COURT OF APPEAL
AT MOMBASA**

(CORAM: GATEMBU, MURGOR & NYAMWEYA,

JJ.A.) CRIMINAL APPEAL NO. E056 OF 2024

BETWEEN

BARIS WAYU MATAGUDA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Mombasa (A. Ong'injo, J.) dated 19th January 2024

in

HC CR. Revision No. E156 of 2023)

JUDGMENT OF THE COURT

1. In a ruling delivered on 19th January 2024, the High Court at Mombasa (**A. Ong'injo, J.**) dismissed a request by the appellant, Barisa Wayu Mutaguda, by his letter dated 28th August 2023, to review his sentence to serve 40 years jail term meted out to him by the trial court upon his conviction for the offence of murder. Aggrieved by the decision declining revision, the appellant lodged this appeal.
2. The background in brief is that the appellant was charged with the offence of murder before the High Court, in Criminal Case No. 6 of 2008. He was tried and convicted

by the High

Court (**M. Odero, J.**) in a judgment delivered on 20th September 2012. He was thereafter sentenced to serve 40 years in jail.

3. Dissatisfied with the conviction and sentence, the appellant appealed to this Court, being Criminal Appeal No. 376 of 2012. Upon hearing and considering that appeal, this Court confirmed the conviction as well as the sentence in a judgment delivered on 27th February 2014. The matter did not end there as one might have expected.
4. The appellant thereafter returned to the High Court. By his letter dated 28th August 2023, the appellant sought a review of what he termed as the harsh sentence of 40 years and prayed that it be substituted with a non-custodial sentence. That request, as already indicated was declined by the High Court. In declining the invitation to review the sentence, the learned Judge of the High Court held that that court did not have jurisdiction to revise the orders of the trial court or of this Court which had earlier upheld the conviction and sentence. And hence, the present appeal.
5. We heard the appellant's appeal on 15th July 2025. The appellant appeared by video link from Kamiti Prison and

was

represented by learned counsel **Ms. Wanjiku Gituire**. Learned Prosecution Counsel **Mr. Kariuki** appeared for the respondent. Counsel relied on their respective written submissions which we have duly considered.

6. In support of the appeal, it was urged that the appellant has spent 17 years in prison and is entitled to reduction of the 40-year sentence meted on him; that the appellant should be placed under probation under Section 4(2) of the Probation of Offenders Act CAP 64 and the jail term should be substituted with a non-custodial sentence; and that the appellant is reconciled with the family of the deceased.
7. In opposition to the appeal, counsel cited the decision of this Court in the case of **Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates vs. Salama Beach Hotel Limited & 3 others (2017) KECA 578 (KLR)** for the argument that this appeal is *res judicata*. It was urged that this Court having heard the appellant's earlier appeal, namely, Criminal Appeal 376 of 2012, and rendered judgment on 27th February 2014 dismissing that appeal, and upholding the appellant's sentence; it has no jurisdiction to

entertain the present appeal.

8. Having considered the appeal and the submissions, the critical issue arising for determination is whether the Court has jurisdiction to entertain this “appeal” having already heard and determined the appellant’s earlier appeal. As the Supreme Court of Kenya stated in the case of **In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR)** :

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel „Lillian S” v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

9. It bears repeating that this Court already heard and determined the appellant’s appeal against conviction and sentence and affirmed both. In the case of **Murgani vs. Kenya Revenue Authority (Civil Application 4 of 2014) [2014] KESC 2 (KLR)** the Supreme Court stated that:

“It is a general principle of law that a Court after passing Judgment, becomes functus officio and cannot

revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law”.

10. Once this Court dismissed the appellant’s previous appeal over the same matter, apart from the matter being *res judicata* (See **John Florence Maritime Services Limited & Another vs. Cabinet Secretary, Transport and Infrastructure & 3 Others [2021] eKLR**), the Court became *functus officio*.

11. Based on the foregoing, the Court lacks jurisdiction to again review the sentence. The appeal fails and is dismissed.

Dated and delivered at Mombasa this 27th day of February 2026.

S. GATEMBU KAIRU, FCIArb, C.Arb.

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JUDGE OF APPEAL

A.K. MURGOR

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed
DEPUTY REGISTRAR