

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
MISC CRIMINAL APP. NO. E103 OF 2024

NICHOLUS ODHIAMBO ALIAS OMER A.....
.....APPLICANT

VERSUS

REPUBLIC.....
RESPONDENT

Coram: Before Justice R. Nyakundi

M/s Sidi for the State

RULING

1. Before this court is an application dated 4th day of September 2024 seeking the following orders:
 - a. *Spent.*
 - b. *That the honorable court be pleased to grant a mitigation and resentencing hearing.*
2. Which application is based on the following grounds:
 - a. *That the applicant was charged before the CM's Court in Kapsabet vide Criminal Case No. 2705 of 2016 with the offence of Robbery with violence contrary to Section 295 as read with 296 of the penal code.*
 - b. *That the applicant was then tried and sentenced to death on 31st October 2018.*
 - c. *That the applicant being dissatisfied with the conviction and sentence imposed by the Magistrate Court then lodged an appeal to the High Court at Eldoret vide Cr. Appeal No. 103 of 2018 which was later dismissed on 9th May 2019 by Hon. H.A Omondi.*
 - d. *That the applicant then subsequently lodged a second appeal before the court of Appeal at Eldoret vide Cr. Appeal No. E066 of 2022 which was equally dismissed on 21st June 2024.*

- e. *That the applicant having exhausted all avenues of appeal hereby moves this court for a mitigation and resentencing hearing.*
- f. *That the applicant has been in prison since 16th August 2016 and has undergone various rehabilitation programs in prison.*
- g. *That the applicant prays that the Hon. Court review his sentence to a lenient sentence putting into account the time he has served since 2016 as enshrined in Section 333(2) of the CPC.*
- h. *That if there is any other sentence the court prefers, the applicant prays that he be ordered to serve the remaining sentence under community service probation.*
- i. *That other mitigating factors will be produced during the hearing of the matter.*

Decision

3. From this application and the record as pleaded in the affidavit the applicant has sought remedies both at the High Court and finally the court of appeal. The issues which were being canvassed relate to both conviction and sentence. This court is being asked to invoke Article 165(6) of the constitution 2010, Rule 21 Practice and Procedures in the High court Rules 2021. To exercise discretion to grant leave for fresh mitigation and an order for resentencing hearing.
4. Jurisdiction of a court is everything as provided for in the following cases:
 - a. ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others (2012) eKLR***: established the fundamental principle that a court's jurisdiction flows from the constitution or legislation, and without it, a court has no power to take away further steps.
 - b. ***Gatirau Peter Munya v Dickson M. Kithinji & Others (2014)***: set guidelines for appellate jurisdiction under Art 163(4) (a), clarifying that cases must involve the interpretation or application of the constitution.
5. It is apparent to this court that the issues have already been determined by the court of appeal and if there is a substantive constitutional issue nothing could be easier for him to seek leave to have it determined by the Supreme court. Based on the decisions of both the

High Court and Court of Appeal the legal principles establish in the doctrine of res judicata in Section 7 of the CPA applies mutatis mutandis to the branch of criminal law.

- ***Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR):*** This case clarified the application of res judicata, particularly concerning land titles and public land. The court held that illegally obtained titles to public land are not protected by res judicata.
- ***John Florence Maritime Services Ltd & another v Cabinet Secretary for Transport & Infrastructure & 3 others [2021] KESC 39 (KLR):*** This decision distinguished between Judicial Review and Constitutional Petitions, noting that a judgment in a Judicial Review application typically does not constitute a final judgment on the substance of a rights violation as examined in a Constitutional Petition.
- ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018] eKLR:*** This case highlighted the principle of finality in litigation, citing the public interest served by res judicata.

6. The Supreme Court jurisprudence has emphasized that the doctrine of res judicata serves the public policy goal of bringing finality to legal disputes. It requires the presence of five conjunctive elements for it to apply; a former suit, a final judgement on the merits by a competent court, identical parties, and the same subject matter.
7. From the perspective of the above principles and the facts of this application there is no new compelling evidence under Art 50(6)(a)(b) of the constitution to reopened a retrial on the issue of sentence as agitated and submitted by the applicant. The application is dismissed for being res judicata and want of merit.

GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 9TH DAY OF MARCH 2026

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R. NYAKUNDI
JUDGE