



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYANDARUA**

**MISCELLANEOUS CONSTITUTIONAL PETITION NO. E004 OF 2025**

**BETWEEN**

**PETER MAINA ROGISHO.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION..... RESPONDENT**

**RULING**

1. The petitioner herein moved the court by a petition dated 21 August 2025. He is seeking the following orders:
  - a) This application is to be certified as urgent and heard on a priority basis in the first instance. [Spent]
  - b) Pending the hearing and determination of this constitutional petition, this honourable court be pleased to stay, suspend, or set aside the conviction and/or sentence imposed upon the Petitioner in the criminal proceedings giving rise to this Petition.
  - c) This honourable court be pleased to grant the petitioner a conditional or absolute discharge pursuant to Section 35 of the Penal Code, or such other relief as the Court may deem fit.
  - d) The alternative and without prejudice to the foregoing, this honourable Court be pleased to substitute the custodial sentence with a non-custodial sentence pending the hearing and determination of the Petition.
  - e) further, additional, or consequential orders be made as this honourable Court may deem just and expedient in the circumstances.
  - f) The costs of this application be in the cause.

2. The application was premised on the following grounds:

- a) The criminal proceedings against the Petitioner arose from a long-standing land dispute over LR. No. Nyandarua/Miharati/Kipipiri/5182 between the petitioner and the complainant's family, and the charges were instituted as a consequence of that civil conflict rather than any genuine criminal conduct
- b) The petitioner is willing to call the witnesses to demonstrate the existence, nature, and history of the said land dispute. The prosecution of the petitioner was actuated by malice, vendetta, and an intention to settle personal scores, thereby rendering the criminal process an abuse of the court process and contrary to the principles of fair administration of justice
- c) The respondent, through the Office of the Director of Public Prosecutions (ODPP), violated the Constitution by permitting and sustaining a prosecution in which all the key prosecution witnesses were close family members of the complainant, without any independent or corroborative testimony, thereby undermining the Petitioner's right to a fair trial under Article 50 of the Constitution.
- d) The petitioner's constitutional right to a fair trial was further violated when the trial court admitted medical examination and expert evidence from a doctor who was a close relative of the alleged victim, thereby creating a clear conflict of interest, actual or perceived bias, and a breach of professional, ethical, and constitutional standards of impartiality.
- e) The petitioner is a married man with a settled family life. There was no evidence of prior conduct, disposition, or history suggesting any sexual interest in children. The allegation that he touched the private parts of a child was unfounded, fabricated, and unsupported by credible, independent evidence. or reliable evidence.
- f) Taken cumulatively, the foregoing violations demonstrate that the petitioner's conviction was the product of a fundamentally unfair, biased, and constitutionally defective process, warranting the intervention of this Honourable Court under Articles 22, 23, and 165 of the Constitution.
- g) The Petitioner is a seventy (70) year old man, of advanced age, who is battling serious and chronic health conditions, and whose continued incarceration or exposure

- to custodial punishment subjects him to inhuman, degrading, and disproportionate hardship, in violation of his inherent dignity as protected under Article 28 of the Constitution.
- h) The petitioner poses no danger to society, has no history of violence, and is physically and socially incapable of causing harm. The objectives of punishment, rehabilitation, deterrence, and protection of the public can be adequately achieved through non-custodial measures.
  - i) Granting the petitioner another chance in life through a non-custodial sentence, conditional or absolute discharge, would uphold the constitutional values of human dignity, proportionality, compassion, and justice, and better serve the ends of justice in the unique circumstances of this case.
3. The respondent raised a preliminary objection on the following grounds:
- a) This honourable court lacks jurisdiction to entertain the petition as framed, the same being an attempt to challenge a conviction and sentence that courts of competent jurisdiction have since determined; hence, the petition is res judicata following full trial and appeal and cannot be reopened through a constitutional petition.
  - b) The petition offends the doctrine of finality of litigation and is thus an abuse of court process.
  - c) The petitioner is improperly invoking the constitutional jurisdiction of this court as a backdoor substitute for the appellate process, having failed to pursue his right of further appeal before the court of appeal; and that this court cannot sit on appeal over decisions of concurrent jurisdiction under the guise of enforcement of fundamental rights.
  - d) Issues of sentencing, including mitigation on account of age and/ or proposing a non-custodial sentence, were matters properly within the trial court and the subsequent high court sitting as an appeal court, and they can thus not be re-litigated in a constitutional forum.
  - e) The allegation was malicious, and an abuse of court process is factual and was determined during trial and affirmed on appeal, and can hence not be revisited without offending settled legal principles.

- f) The petition does not meet the threshold of a constitutional petition as it fails to disclose with precision which specific rights have been violated and the manner of the alleged violation.
- g) The petition is frivolous, vexatious and a gross abuse of the court process.
4. A preliminary objection raises purely issues of law. The Court of Appeal in **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Limited (1969) EA. 696** (Sir Charles Newbold P) observed as follows:

*... A preliminary objection is like what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse issues. This improper practice should stop.*

5. On 1 April 2025, I delivered a judgment in Criminal Appeal No. 82 of 2023. The petitioner was the appellant. His appeal was dismissed in its entirety. When this court delivered its judgment on appeal, it ceased to have jurisdiction in this matter and was rendered *functus officio*. In **Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others [2013] EKLR**, the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled “**The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law**” (2005) 122 SALJ 832, which reads:

*...The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.*

At paragraph 19 in the Raila Case (Supra), the Court further stated:

*This principle has been aptly summarized further in Jersey Evening Post Limited v. A1 Thani [2002] JLR 542 at 550:*

*A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors, nor does it prevent a judicial change of mind, even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.*

6. If the applicants were dissatisfied with the decision of this court, the only option was to move to the Court of Appeal. Interestingly, the petitioner is asking me to review the sentence. Section 364 (5) of the Criminal Procedure Code restricts the revisional jurisdiction in the following as follows:

*When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.*

7. This option is not available to the petitioner. His option is either to appeal to the Court of Appeal or to petition the president under Article 133 of the Constitution, which provides:

**(1) On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by—**

- (a) granting a free or conditional pardon to a person convicted of an offence;**
- (b) postponing the carrying out of a punishment, either for a specified or indefinite period;**
- (c) substituting a less severe form of punishment; or**

**(d) remitting all or part of a punishment.**

**(2) There shall be an Advisory Committee on the Power of Mercy, comprising—**

**(a) the Attorney-General;**

**(b) the Cabinet Secretary responsible for correctional services; and**

**(c) at least five other members as prescribed by an Act of Parliament,  
none of whom may be a State officer or in public service.**

...

**(4) The Advisory Committee may take into account the views of the victims of the offence in respect of which it is considering making recommendations to the President.**

8. The petition is unfounded. The preliminary objection is upheld, and the petition is dismissed.

**Delivered and signed at Nyandarua, this 12<sup>th</sup> day of March 2026**

**KIARIE WAWERU KIARIE  
JUDGE**