



**Wanyonyi v Attorney General & another (Petition E002 of 2025)
[2026] KEHC 2429 (KLR) (26 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2429 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
PETITION E002 OF 2025
JN ONYIEGO, J
FEBRUARY 26, 2026
IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION**

BETWEEN

EDWARD MAKOKHA WANYONYI PETITIONER

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

JUDGMENT

1. The petitioner moved this court via a petition dated 18.08.2025 seeking for orders that:
 - i. A declaration that the sentence of 20 years violates article 27,28 and 50(2)(p) of *the constitution*.
 - ii. A declaration that section 389 provides the lesser and applicable sentence.
 - iii. An order substituting the 20-year sentence with 7 years from the date of conviction.
 - iv. Any other just relief.
2. The petition was supported by the affidavit sworn by the petitioner deposing that he is currently incarcerated at Machakos Main Prison having been convicted and sentenced to 20 years for an offence of attempted murder. That he preferred an appeal to the High Court at Garissa in Criminal Appeal No. 10 of 2020, which was dismissed by Hon. Justice Kariuki on 29.07.2020. Consequently, he appealed the decision of this court to the Court of Appeal via Criminal Appeal No. 31 of 2021 which was equally dismissed.
3. He has since moved this court contending that there exists a conflict within the provisions of the Penal Code regarding punishment for attempted offences. He drew the court's attention to Section 389, which stipulates that attempts to commit felonies are punishable by a term of imprisonment



not exceeding seven years. In contrast, he noted that Section 220 specifically addresses the offence of attempted murder and prescribes a sentence of life imprisonment. According to him, this inconsistency creates ambiguity in the law, since attempted murder is itself a felony, yet the two provisions prescribe markedly different punishments. He therefore urged the court to find that the disparity raises a constitutional issue, particularly in light of Article 50(2)(p) of *the Constitution*, which entitles an accused person to benefit from the least severe of the prescribed punishments.

4. The 2nd respondent, through a replying affidavit sworn on 24.10.2025 deposed that the petitioner had been charged, tried and upon conviction sentenced to 20 years' imprisonment. It was stated that the petitioner subsequently lodged an appeal before the High Court and thereafter before the Court of Appeal, both of which dismissed his appeals and thereby upheld the conviction and sentence imposed by the trial court. The respondent argued that this court, having already dealt with the petitioner's appeal, is *functus officio* and therefore, lacks jurisdiction to reopen the matter. It was further deposed that the present suit has been disguised as a constitutional petition, yet its true intention is to provide the petitioner with an avenue to reintroduce his case for determination despite having exhausted all appellate remedies. On that basis, the respondent urged that the petition be dismissed.
5. The 2nd respondent further deposed that the gravamen of the petition rests on Section 389 of the Penal Code, which the petitioner has deliberately misinterpreted in an attempt to mislead the court. It was urged that Section 389 merely provides guidance on sentencing for attempts to commit offences, whether felonies or misdemeanours, in circumstances where the law has not expressly prescribed a penalty for the attempt. The respondent maintained that this provision does not apply to the offence of attempted murder, since Section 220(b) of the Penal Code specifically provides for its punishment, namely life imprisonment. On that basis, the respondent argued that there exists no conflict between Sections 389 and 220 as alleged by the petitioner. It was further averred that the petition is frivolous, amounts to an abuse of the court process and thus ought to be dismissed.
6. In his further affidavit, the petitioner stated that the petition is properly before the court as it raised genuine constitutional issues involving the interpretation and enforcement of rights—not an appeal disguised in any form. He further stated that the respondents were wrong in claiming that he had misused the court process, asserting that he had already exhausted the appellate channels and was challenging not the conviction itself but the continued enforcement of an unlawful sentence arising from conflicting laws that violated his fundamental rights.
7. He urged that the petition raised a clear constitutional question regarding inconsistency between Section 220 and Section 389 of the Penal Code, which in his view, violated his right to equality, dignity and to benefit from the least severe punishment as protected in *the Constitution*. He also stated that Section 389 applied to all attempts to commit felonies or misdemeanours and that its maximum lawful sentence of seven years, conflicted with the life-imprisonment provision applied to attempted murder.
8. He maintained that the respondents' position—that Section 389 did not apply where another punishment existed—was misguided and that the conflicting sentencing provisions created an unconstitutional inconsistency offending the rule of law. He further contended that *the Constitution* invalidates any such inconsistent provisions.
9. He emphasized that his petition was not frivolous or an abuse of process but a legitimate constitutional challenge filed in good faith to safeguard his rights. He argued that continuing to enforce the life-imprisonment sentence violated his rights to equality, dignity, a fair trial and protection of the law. He thus urged the court to grant the relief sought being, a declaration that he was entitled to the lawful maximum sentence of seven years.
10. The petition was canvassed by way of written submissions.



11. The petitioner in his submissions distilled the following issues for determination:
 - i. Whether this court has jurisdiction to determine a constitutional challenge to a sentence after the appellate process has been exhausted.
 - ii. Whether the petitioner has demonstrated a real and justiciable constitutional question arising from the conflict between section 220(b) and section 389 of the Penal Code.
 - v. Whether the inconsistency between the two provisions violate the petitioner's rights under articles 27,28 and 50(2)(p) of *the constitution*.
12. On the first issue, the petitioner argued that this court has jurisdiction to determine alleged violations of rights under article 165(3)(b). That the said jurisdiction is neither ousted nor diminished by the fact that the petitioner previously appealed his conviction as it is within the legal realm that constitutional claims survive the appellate process when they raise issues distinct from the merits of conviction. To that end, reliance was placed on the case of Mwangi vs Director of the Public Prosecution, constitutional Petition 159 of 2019 [2021] KEHC 113 (KLR) where the court acknowledged that a constitutional challenge to a sentence arising from a statutory conflict is justiciable even after appeals have been concluded. That the court noted that:

‘the apparent conflict in the law may only be resolved by parliament, but constitutional rights, including the right to the least sever punishment remain enforceable by the courts.’
13. That the petitioner is not appealing his conviction but instead challenging the constitutional validity of a statutory conflict affecting his sentence and the same squarely lies within this court's mandate.
14. On the second issue, the petitioner submitted that the present suit raises genuine, substantial and justiciable constitutional questions warranting the Court's determination. Counsel argued that the doctrine of legality, which is central to Articles 27, 28, 50(1), and 50(2)(p) of *the Constitution* requires that criminal sanctions be framed in a manner that is clear, consistent, predictable and non-arbitrary. It was further urged that where two statutory provisions prescribe fundamentally divergent sentences for the same category of conduct—one authorizing a penalty up to life imprisonment and the other expressly limiting punishment to a maximum of seven years for attempts to commit felonies punishable by death or life imprisonment—a constitutional issue necessarily arises. In particular, the petitioner contended that uncertainty as to which provision governs and the potential imposition of the harsher penalty, implicates and may infringe upon the rights of an accused person under *the Constitution*.
15. The petitioner contended that the offence of attempted murder is punishable by life imprisonment and therefore falls squarely within the statutory definition in question. It was urged that the offence herein constitutes an attempted felony to which section 389 applies by its plain wording. Reliance was placed on the case of Evanson Muiruri Gichane vs Republic, Criminal Appeal No. 277 of 2007 where the court held that:

“We have considered this ground of appeal and submissions...and we are of the view that indeed there may be a contradiction between sections 297(2) and 389 of the Penal Code... The appellant was convicted of an offence punishable by death. In terms of section 389 of the Penal Code the appellant shall not be liable to imprisonment of a term exceeding seven years...The apparent conflict in the law may only be resolved by parliament. But the appellant is entitled to the less punitive of the two sentences”.
16. It was contended that in the matter above, the Court substituted the death sentence with a term not exceeding seven years. Counsel urged that the reasoning adopted therein applies with equal force to



the offence of attempted murder, which, like attempted robbery with violence, is an attempted felony punishable by death or life imprisonment. To that end, the petitioner argued that the foregoing finding is equally applicable to the present case and therefore this Court ought to be persuaded to revise the petitioner's sentence to the least possible punishment, which in this instance is 7 years.

17. Further reliance was placed on the case of Felix Ochieng' Omolo vs Attorney General & another [2018] eKLR where the court explained that:

‘What punishment is offered for the offence of attempted robbery with violence? Section 297(2) on the one hand provides the death sentence while section 389 provides for a sentence... not exceeding seven years... There is clearly a conflict between the two sections as to the sentence that should be meted out.’

18. The petitioner submitted that the Court's reasoning in the earlier decision did not turn on the peculiar nature of the offence of robbery, but rather on the existence of a statutory conflict and the definition of a felony. It was urged that the same conflict is present in the instant matter in that, section 220(b) prescribes a sentence of up to life imprisonment, whereas section 389 expressly caps punishment at seven years for attempted felonies of this nature.
19. On the third issue, the petitioner submitted that the conflict between sections 220 and 389 of the Penal Code creates arbitrary disparities in sentencing for attempted felonies, including attempted murder. It was urged that such disparities offend Article 27 of *the Constitution* on equality and freedom from discrimination, in as much as individuals convicted of identical conduct are subjected to radically different sentencing regimes. Counsel further argued that Article 50(2)(p) guarantees an accused person the right to the benefit of the least severe of the prescribed punishments. In this regard, it was contended that section 389 prescribes a maximum of 7 years' imprisonment for attempted felonies, whereas section 220 prescribes a sentence up to life imprisonment, thereby giving rise to a constitutional violation.
20. From the foregoing, the petitioner submitted that he is entitled to benefit from the lesser sentence. In support of this position, reliance was placed on the decision in *Omolo vs Attorney General*, wherein the Court held that where two conflicting sentences exist, the accused “is entitled to the less punitive of the two.” Counsel further urged that this principle is consistent with Rawls' theory of justice, which teaches that “justice is the first virtue of social institutions.” In conclusion, the petitioner prayed that this Court be persuaded to allow the suit as prayed.
21. The second respondent submitted that the petitioner was charged with the offence of attempted murder, duly convicted, and sentenced to a term of twenty years' imprisonment. It was further submitted that the petitioner thereafter lodged an appeal before this Court, and subsequently before the Court of Appeal in Nairobi, challenging both conviction and sentence, but the appeals were dismissed.
22. It was submitted that the petitioner had the opportunity, during proceedings before the High Court, to raise issues relating to alleged violations of his rights. The High Court, having duly considered the petitioner's submissions and proceeded to uphold the trial court's determination. It was further averred that the High Court had the mandate to evaluate the evidence presented and arrive at its own conclusion, which it did. Consequently, it was argued that this Court is now *functus officio*, having already exercised its jurisdiction in respect of the matter and therefore, cannot reopen or re-litigate



issues that were conclusively determined. To that end, reliance was placed on the case of *Kabansora Millers Ltd vs Nyangena* [2025] KEHC (KLR) where the court held that:

“The *functus officio* principle serves to ensure finality in judicial decisions and prohibits courts from revisiting matters already conclusively determined except where expressly permitted by law. It promotes judicial efficiency, certainty and the integrity of the judicial process”.

23. Additionally, the second respondent submitted that the appellant was charged with the offence of attempted murder and, under the relevant section, the prescribed sentence is expressly life imprisonment, notwithstanding that the trial court exercised its discretion in imposing a term of twenty years’ imprisonment. It was contended that the gist of the petition herein rests upon section 389 of the Penal Code, which the petitioner has deliberately misinterpreted in an effort to mislead the Court. Counsel argued that the section confers discretion in sentencing for attempts to commit offences, whether felonies or misdemeanours.
24. Specifically, it was submitted that section 389 refers to attempts to commit offences in cases where the sentence for the attempt has not been expressly prescribed. On this basis, the respondent maintained that no constitutional issue arises in the present suit warranting the Court’s determination. It was therefore argued that the petition is devoid of merit, the remedies sought are undeserved, and consequently, the same ought to be dismissed.
25. I have considered the petition herein, the response thereto and the submissions by both parties. In my opinion, the issues for determination are as follows:
 - i. Whether Section 389 of the Penal Code applies to the offence of attempted murder, or whether Section 220(b) exclusively governs its punishment.
 - ii. Whether there exists a conflict or ambiguity between Sections 389 and 220 of the Penal Code in relation to sentencing for attempted murder.
 - iii. Whether this court is *functus officio*, having already dealt with the petitioner’s appeal, and therefore lacks jurisdiction to entertain the present petition.
26. The petitioner has urged that jurisdiction is neither ousted nor diminished by the fact that the petitioner has previously appealed his conviction. That the Kenyan legal realm has consistently held that constitutional claims survive the appellate process when they raise issues distinct from the merits of conviction.
27. In regards to the question whether Section 389 applies to attempted murder or whether Section 220(b) exclusively governs its punishment, I wish to reproduce Section 389 of the Penal Code for avoidance of doubt; It provides as follows:

“Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years”.
28. The section under which the petitioner was charged provides as follows:

Attempt to murder Any person who—

 - (a) attempts unlawfully to cause the death of another; or



- (b) with intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life, is guilty of a felony and is liable to imprisonment for life.
29. It is not controverted that the petitioner was tried, convicted and consequently sentenced to 20-year imprisonment. The Court of Appeal in *Sutse vs Republic* (2022) KECA 678 (KLR) and in *Michael Kimani Kungu vs Republic* (2020) KECA 584. The Court observed that: -
- “As regards sentence, the appellant contends that the death sentence meted on him was excessive since the offence of attempted robbery with violence is dealt with under Section 389 of the Penal Code and is punishable by seven (7) years imprisonment. The respondent counters this argument by stating that Section 389 can only be invoked in instances where the accused person commits a felony or misdemeanor and no sentence is provided under the Section he is charged under.
- However, this is not the case here given that the Section under which the appellant was charged provides that the punishment for attempted robbery with violence is death. Section 297(2) of the Penal Code under which the appellant was charged provides inter alia:
- “If the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”
- Section 389 of the Penal Code on the other hand provides that:...
30. The Court concluded by stating that: -
- “A plain reading of Section 389 shows that it was intended to apply to matters where no other punishment was expressly prescribed in the Penal Code. Section 297(2) of the Penal Code under which the appellant was charged provides for a specific penalty for attempted robbery with violence hence it is ousted from the remit of Section 389 of the Penal Code. It is worth noting that at no given time during trial did the appellant contend that he had been charged under the wrong provisions of the law, he knew all along the charge he was facing and the penalty it carried. He therefore cannot then ask this court to review his sentence in light of Section 389 of the Penal Code”.
31. The logic above is readily applicable to the facts of this case. The petitioner was convicted under Section 220 of the Penal Code for the offence of attempted murder which attracts a maximum sentence of life imprisonment. He was awarded 20 years’ imprisonment. The Court is unpersuaded by the argument that this being a court wherein fundamental rights when violated may be restored; that the court ought to find that the appellant was entitled to benefit from a sentence under Section 389 of the Penal Code in the circumstances of this case.
32. The foregoing is further supported by the fact that this Honourable Court derives its jurisdiction principally from Article 165(3) of *the Constitution*, which vests in it unlimited original jurisdiction in both criminal and civil matters. Article 165 clearly delineates the scope of this Court’s authority, setting out what it may and may not do.
33. However, by virtue of Article 165(6), this Court is expressly precluded from exercising supervisory jurisdiction over superior courts. Accordingly, while the Court is empowered to intervene in matters



implicating fundamental rights and freedoms, it must do so strictly within the bounds of jurisdiction conferred by *the Constitution* and statute. Article 165(6) of *the constitution* provides that:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

34. It is not controverted that the petitioner unsuccessfully appealed his conviction and sentence before this court and subsequently at the Court of Appeal. By dint of Article 165(6) therefore, this Court lacks the jurisdiction to reopen the matter to relook at the sentence. [See the Supreme Court in the case of Francis Karioko Muruatetu & Ano. vs Republic, Petition No. 15 of 2015 (as consolidated with petition No. 16 of 2015)].

35. In light of the foregoing, I dismiss the suit herein for want of jurisdiction and lack of merit.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS DAY OF 26TH DAY OF FEBRUARY 2026

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J. N. ONYIEGO

JUDGE

