



REPUBLIC OF KENYA



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**Kioko v Attorney General (Civil Appeal E017 of 2022)
[2026] KECA 500 (KLR) (13 March 2026) (Judgment)**

Neutral citation: [2026] KECA 500 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E017 OF 2022
AK MURGOR, KI LAIBUTA & GW NGENYE-MACHARIA, JJA
MARCH 13, 2026**

BETWEEN

MICHAEL KIOKO APPELLANT

AND

ATTORNEY GENERAL RESPONDENT

(Being an appeal from the Judgement and Decree of the High Court of Kenya at Mombasa (E. Ogola, J.) dated 19th April 2021 in Constitutional Petition No. 19 of 2019)

JUDGMENT

1. Michael Kioko (the appellant) filed Constitutional Petition No. 19 of 2019 in the High Court at Mombasa dated 18th February 2019. The appellant initiated the proceedings as a matter of public interest by dint of Articles 22(2) (c) and 258 of *the Constitution* which provide that every person has the right to bring proceedings claiming that a constitutional right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or that *the Constitution* has been contravened, or is threatened with contravention.
2. The appellant's contention was that Sections 162(a) and (c), 163 and 165 of the Penal Code, Cap 63 violate, limit and/or infringe Articles 10, 12(1) (a), 19, 24, 27, 28, 31, 32 and 33 of *the Constitution*. The appellant argued that, enforcement of the aforesaid provisions of the Penal Code by the State was likely to grossly violate an individual's right to privacy, dignity and freedom of expression. He thus prayed for a declaration that Sections 162(a) and (c), 163 and 165 of the Penal Code were in violation of Articles 10, 12, 19, 24, 27, 28, 31, 32 and 33 of *the Constitution*, and therefore null and void.
3. The respondent opposed the petition vide a Reply to Petition dated 2nd December 2020. The respondent's contention was that: the petition does not meet the test or threshold of a constitutional petition as enunciated in the case of Anarita Karimi Njeru vs. Republic (1979) KLR 154; that the petition was res judicata Petition No. 150 of 2016-EG & 7 Others vs. Attorney General; DKM & 9



Others (Interested Parties); Katiba Institute & Another (Amicus Curiae) where a three-judge bench determined that the impugned provisions of the Penal Code were constitutional; that the impugned provisions of the Penal Code were not discriminatory in any way since they applied to all persons irrespective of their race, religion, belief, culture, and social status; that ‘the offence defined in Section 165 of the Penal Code can only apply to the male person, and that the Section applies to all persons (sic) irrespective of their sexual orientation, hence not discriminatory’; that the petitioner did not demonstrate by evidence that the impugned provisions of the Penal Code violate Articles 32 and 33 of *the Constitution*; that the petition sought orders which contravened Article 45(2) of *the Constitution*, which requires that all provisions of *the Constitution* bearing upon a specific issue should be considered together; that the petitioner failed to discharge the burden of proof to establish that the impugned sections violated his fundamental rights and freedoms; and that the petition ought to be dismissed.

4. The learned Judge (E. Ogola, J.) framed three issues for determination, namely: whether the petition was res judicata; whether the petition met the test of a constitutional petition as laid down in the case of Anarita Karimi Njeru; and whether the impugned sections were unconstitutional.
5. At the outset, we make an observation that the petition was determined based on the fact that it was found to be res judicata consolidated petitions- Petition No. 150 of 2016 EG & 7 Others vs. Attorney General and Petition No. 234 of 2016 -Kenya Human Rights Commission vs. Attorney General. Accordingly, the learned Judge did not go into the merit of the petition. At paragraph 24 of his judgement, the learned Judge observed what each of the consolidated petitioned sought to address. He observed that Petition No. 150 of 2016 EG & 7 Others vs. Attorney General (supra) ‘addressed the constitutionalism of Sections 162(a) and (c) and 165 of the Penal Code, and that it was founded on Articles 2, 19, 20, 21, 24, 25, 31, 43 and 259 of *the Constitution*’ while Petition No. 234 of 2016 -Kenya Human Rights Commission vs. Attorney General, was founded on Articles 27(4), 28, 29, 31, 32, 43 and 50 of *the Constitution* (the consolidated petitions). He then noted that, in the petition before him, the appellant sought to challenge the constitutionality of Sections 162(a) and (c), 163 and 165 of the Penal Code in relation to the right to human dignity guaranteed under Articles 28, the right to privacy under Article 31 and the right to freedom of conscience under Article 32 of *the Constitution*.
6. The learned Judge was of the view that the issues raised in the three petitions were identical save for the petition before him which sought a declaration that Section 163 of the Penal Code was unconstitutional, for which he held that the unconstitutionality of Section 163 was tied to the unconstitutionality of Section 162(a) and (c) of the Act, and that its alleged unconstitutionality cannot be determined in isolation. He accordingly dismissed the petition, holding that it was an abuse of the court process.
7. Aggrieved, the appellant filed this appeal which is founded on four (4) grounds, which we reproduce as follows:
 - i. that the learned Judge erred in law and in fact in finding that the Mombasa High Court Petition No. 19 of 2019 Michael Kioko vs. The Hon. Attorney General was res judicata;
 - ii. that the learned Judge erred in law and in fact in failing to reach a finding that Sections 162 (a) (c), 163 and 165 of the Penal Code, Cap 63 violate *the Constitution* of Kenya by denying and limiting the rights provided for under Articles 27, 28, 31, 32 and 33;



- ii. that the learned Judge was misguided in finding that the petitioner is trying to re-litigate a cause of action and issues which were directly and substantially in issue in a previous decided petition; and
 - iii. that the learned Judge erred in law and in fact by proceeding to strike out the entire petition with costs to the respondent.”
8. The appellant prayed that: the appeal be allowed; the ruling of the High Court (E.Ogola, J.) delivered on 19th April 2021 be set aside; the matter be remitted to the High Court for determination before a different Judge; and that each party bears its own costs of the appeal.
 9. At the plenary hearing of this appeal on 28th May 2025, learned counsel Mr. Maundu appeared for the appellant while learned State Counsel Mr. Penda Peter appeared for the respondent. Both counsel relied on their respective parties’ written submissions.
 10. The appellant’s submissions are dated 23rd May 2025 which, we note, are quite lengthy. Counsel isolated five (5) issues for determination, namely whether the learned Judge erred in law and in fact in finding that the Mombasa Petition was res judicata the consolidated petitions; whether the learned Judge erred in law and in fact in failing to reach a finding that Sections 162(a) and (c), 163 and 165 of the Penal Code violate *the Constitution* by denying and limiting the rights and freedoms provided under Articles 27, 28, 31, 32 and 33 of *the Constitution*; whether the provisions serve a legitimate State purpose; whether the limitation is rationally connected to that legitimate purpose; and, as regards the proportionality tests, whether a less restrictive means exists to achieve the same objective.
 11. We will only consider the limb of the submissions as to whether the learned Judge erred in finding that the petition before him was res judicata the consolidated petitions, as this was the only issue that he determined leading to the dismissal of the petition. As we do so, we take to mind that the issue as to whether the petition was res judicata the consolidated petitions was jurisdictional in nature and fell as a pure point of law which required to be addressed before other issues touching on the merit of the petition. Therefore, in the event we are of a contrary view, the petition would have to be remitted back to the High Court to be heard on merit on the substantive issues, which counsel for the appellant has addressed in the submissions.
 12. The appellant submitted that, in determining a plea of res judicata, the court is required to examine: the decision alleged to have settled the issues in question; the record of the previous case; and whether the parties are the same or litigating under the same title in the subsequent cases as was held by the Supreme Court in *John Florence Maritime Services Limited & Another vs. Cabinet Secretary, Transport & Infrastructure & 3 Others* (2021) KESC 39 (KLR). The appellant also relied on the decision of the superior court (the ELC) (Odeny, J.) in *Kazungu Karisa Hazizi & Another vs. Josephine Wanjiku Mwaghoti* (2022) KEELC 660 (KLR) which cited with approval the decision of ELC sitting in Kitale in *George Kamau Kimani & 4 Others vs. County Government of Trans Nzoia & Another* (2014) KEHC 4611 (KLR); and *Hasainiz Investment Limited vs County Government of Mombasa* (2022) KEELC 629 (KLR) (ELC at Mombasa) among others for the proposition that a plea of res judicata would be declined on the grounds that the pleadings of the previous suit were not produced in court so as to ascertain the claim that the matter currently before the court is res judicata; and that pleadings of, and evidence adduced in, the previous suit must be examined for a court to reach a proper determination on the plea of res judicata.
 13. The appellant submitted that no pleadings were produced in court in relation to the petition in *EG & 7 Others* (supra), and that, therefore, there was no basis upon which the learned Judge made a finding on res judicata without analysing the previous pleadings; that the learned Judge failed to comprehensively



analyse all the requirements set out under Section 7 of the *Civil Procedure Act*, which provide for the elements of res judicata so as to determine whether they applied to the case of EG & 7 Others (supra); and that it was erroneous for the trial court to fail to analyse the manner in which the violations pleaded were argued so as to establish whether the threshold under Section 7 of the *Civil Procedure Act* was satisfied.

14. It was the appellant's further submission that, in petitions challenging the constitutionality of statutory provisions, similar cases may still be instituted provided that they raise different constitutional dimensions as was held by the High Court in *Mercy Muneo Kingoo & Another vs. Safaricom Limited & Another* (2016) KEHC 2206 (KLR), which cited with approval the reasoning by the Court of Appeal-UK (Civil Division) in *Zurich Insurance Company PLC vs. Colin Richard* (2011) EWCA Civ 641; and that the trial court ought to have been reluctant to apply the bar of res judicata and that, instead, it should have examined all the pleadings, evidence and the record in the petitions purported to have been determined in view of the fact that the latter were hinged on a different constitutional dimension.
15. The appellant contended that the bar of res judicata in constitutional petitions should be invoked in the rarest of the cases as was held by the Supreme Court in the *John Florence Maritime Services Limited & Another* (supra) case where the Court in part stated that: 'However, we must hasten to add that [res judicata] should only be invoked in constitutional litigation in the clearest of cases. It must be sparingly invoked, and the reasons are obvious, as rights keep on evolving, mutating, and assuming multifaceted dimensions.....'; and that, it (res judicata) should only be invoked 'where there is potential for substantial injustice if a

court does not hear a constitutional matter or issue on the merits....before a court arrives at such a conclusion, it must examine the entirety of the circumstances as well as address the factors for and against the exercise of such discretionary power.'
16. According to the appellant, the standard established by the Supreme Court (above) was not met in this instance, and we were accordingly urged to allow the appeal.
17. In the respondent's submissions dated 18th May 2025, he discounted the appellant's assertion that constitutional petitions are not subject to the doctrine of res judicata; that the doctrine of res judicata is not raised as a mere technicality but, that, it must be viewed as part of tools that facilitate administration of substantive justice; that constitutional petitions are not exempt from the rule of res judicata; that the appellant had the onus of proving that the instant case was exempt from being subjected to the bar of res judicata as was held by the Supreme Court in *John Florence Maritime Services Limited* (supra); and that, in this instance, the appellant did not demonstrate what exceptional circumstances existed to warrant the trial court to exercise its discretion in waiving the application of the doctrine of res judicata.
18. According to the respondent, the subject petition is distinguishable from the previous petitions in terms of the set of facts as well as the legal grounding on which it was anchored, being the alleged contravention of Articles 28, 31 and 32 of *the Constitution*; that this was an issue that had been publicly litigated by other parties in the previous petitions, including *Katiba Institute* (as Amicus), who did so in furtherance of public rights which all parties interested in the petitions claimed; and that the appellant could not have been allowed to relitigate on matters that had already been determined, yet they could have participated in those matters if they so wished. To buttress this submission, reliance was placed on the case of *Mercy Muneo Kingoo & Another vs. Safaricom Limited & Another* (supra) as cited in the decision of *John Florence Maritime Services Limited* (supra).
19. In view of the foregoing submissions, we were urged to dismiss the appeal with costs.



20. This is a first appeal. Our mandate as a first appellate court is to re-appraise the evidence and to draw inferences of fact. This court in *Geoffrey Muthinja & another vs. Samuel Muguna Henry & 1756 others* (2015) KECA 304 (KLR) elaborated on this mandate as follows:

“As this is a first appeal, our mandate is a broad one and involves, by dint of Rule 29

- (1) (now Rule 31 (1) of the Court of Appeal Rules, a fresh and exhaustive examination, re-evaluation and re-analysis of the entire record with a view to drawing our own inferences and making our own independent conclusion, on all the material before us. We pay a measure of deference to the findings of the first instance Court but are free to depart from them in appropriate cases, where they are founded on no evidence, constitute a misapprehension of the law or are plainly wrong. The latitude to depart is wider where, as in this case, there was no trial involving the taking of viva voce evidence in which case the first instance Judge would have had the added advantage of hearing and seeing the witnesses and so would have been better placed to judge their credibility and make a more informed judgment on the veracity of the opposing cases.”

21. We have carefully considered the record of appeal, the parties’ written submissions, the authorities cited in support thereof and the law. The main issue that falls for our consideration is whether the learned Judge erred in finding that the appellant’s petition was res judicata the consolidated Petitions No. 150 of 2016 EG & 7 Others vs. Attorney General and Petition No. 234 of 2016 -Kenya Human Rights Commission vs. Attorney General in the absence of scrutiny of pleadings. It suffices to state that, after the consolidation, the petition was referred to as Petition No. 150 of 2016-EG & 7 Others vs. Attorney General; DKM & 9 Others (Interested Parties); Katiba Institute & Another (Amicus Curiae).

22. The principle of res judicata is statutorily anchored under Section 7 of the *Civil Procedure Act* which provides as follows:

7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

23. Res judicata is a legal doctrinal shield that precludes continued litigation after a final court order on the same case, the same issues and between the same parties. The inquiry as to what entails the ‘same issue’ is whether an issue of fact or law prominently featured in the previous judgement. It is defined by the Black’s Law Dictionary 10th edition as:

“An issue that been definitively settled by judicial decision; An affirmative defence barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been

--- but was not---raised in the first suit”



24. This Court in *Clement Kung'u Waibara vs. Anne Wanjiku Kibeh & Another* (2020) KECA 572 (KLR) held that:

“The principle of *res judicata* allows a party to litigate the subject matter between the same parties only once. Litigation over the same subject matter must come to an end once it has been finally determined on merits by a court of competent jurisdiction. Essentially, *res judicata* is a principle of law that seeks to ensure that there is conclusiveness in litigation – litigation must come to an end as it is often said.”

25. A party who seeks to rely on the plea of *res judicata* must establish that: the cause of action is the same as the one being litigated; the relief being sought is the same; it is between the same parties; and that the previous matter was decided by a court of competent jurisdiction.

26. The Supreme Court in *John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport and Infrastructure & 3 Others* (*supra*) and referred to by both parties, settled the elements that constitute a plea of *res judicata* as follows:

“86. We restate the elements that must be proven before a court may arrive at the conclusion that a matter is *res judicata*. For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:

- a. There is a former Judgment or order which was final;
- b. The Judgment or order was on merit;
- c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d. There must be between the first and the second action identical parties, subject matter and cause of action.”

27. With the above principles in mind, we shall now examine whether the plea of *res judicata* was properly applied by the trial court.

28. The dispute in the appellant’s petition was centred around the impugned provisions of Section 16 (a) and (c), 163 and 165 of the Penal Code in relation to the right to human dignity as guaranteed under Articles 28, 31 and 32 of *the Constitution*. The consolidated petitions as observed by the trial court challenged Sections 162(a) and (c) and 165 of the Penal Code, which the petitioners therein contended violate, limit and/or infringe Articles 2, 10, 12 (1) (a), 19, 20, 21, 24, 25, 27, 28, 31, 32, 33, 43 and 259 of *the Constitution*.

29. We observe that, indeed, the pleadings of the consolidated petitions were not produced before the trial court as they also do not form part of this Court’s record. Be that as it may, at paragraph 24 of the impugned judgement, the learned Judge stated that he had also looked at the consolidated constitutional petitions, and that he proceeded to outline what their particulars were. It then goes without saying that the learned Judge could not have plucked the particulars of the consolidated petitions from the air, but that he went out of his way to look for, and interrogate, the facts in them before arriving at the finding that the matters pleaded therein were similar.

30. More importantly is that the appellant is not denying the existence of the consolidated petitions. His only complaint is that the pleadings were not produced before the trial court for scrutiny. This is



certainly not a convincing argument that warrants a rejection of a proposal that a matter is not res judicata. The learned Judge, in holding that the petition before him was res judicata, stated:

“26. In the instant case, for a Petition to be res judicata, the subsequent Petition must raise similar or substantially similar issues to those in former Petition; the petition must be between the same parties or their representatives and relate to the same subject matter and the cause of action or issues must have been conclusively determined by a Court of competent jurisdiction. It is noteworthy that the central issue for determination in this Petition and the former Petition is the issue of unconstitutionality of Section 162(a) and (c) of the Penal Code. It is the view of this Court that the cause of action and issues raised in the instant Petition are identical to those in the earlier proceedings save for the prayer seeking to declare Section 163 of the Penal Code unconstitutional, both Petitions having been brought in public interest and against the Respondent, and having involved in the same subject matter. In such a case, the bar to litigating the cause of action sought herein is absolute unless fraud or collusion is alleged which is not the case herein.

27. On the alleged unconstitutionality of Section 163 of the Penal Code, it is clear that the said issue is tied to the unconstitutionality of Section 162(a) and (c) of the Penal Code and the same cannot be determined in isolation.

27. Accordingly, it is my considered view that applying the stated law to the facts before me, it is clear that entertaining the instant Petition initiated by the Petitioner amounts to re – opening a matter that was adjudicated and determined by a Court of competent and concurrent jurisdiction. The Petitioner is simply trying to relitigate a cause of action and issues, which were directly and substantially in issue in a previous decided Petition. The court has a duty to stop such abuse of the court process.”

31. The foregoing excerpt is a testament that the good Judge ably considered what the substratum of the already decided petitions and of the petition before him were, and rightly came to the conclusion that the petition before him was res judicata.

32. In *John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport and Infrastructure & 3 Others* (2015) KECA 472 (KLR), this Court rejected the proposition that a plea of res judicata cannot be raised in a constitutional petition by making a finding that:

“In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly



invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.” (emphasis ours)

33. It is neither here nor there that it is different parties who initiated the different petitions. The bottom line remains that the issue of the impugned provision of the Penal Code, even if it is only one provision which was not pleaded in the consolidated petitions, was addressed on the basis of the backdrop of the alleged violations of the particularised Articles of *the Constitution*. The substratum of the petitions being the impugned Sections 162 (a) and (c), 163 and 165 of the Penal Code, viewed holistically is one and the same, which we find the three-Judge bench in its decision of 24th May 2019 (arising from the consolidated petitions), sufficiently addressed itself on.
34. We think we have said enough to demonstrate that we have nothing upon which to fault the decision of the learned Judge. He rightly, and based on properly legal principles, held that the subject petition was res judicata the consolidated petitions. Accordingly, we find that this appeal has no merit and is hereby dismissed. Accordingly, we uphold the Judgment of Ogola, J. in Mombasa High Court Constitutional Petition No. 19 of 2019 delivered on 19th April 2021. In view of the nature of the dispute, we order that each party bears their own costs of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MARCH, 2026.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original
signed

DEPUTY REGISTRAR

