Kipsang v Republic (Miscellaneous Criminal Application E163 of 2024) [2026] KEHC 4299 (KLR) (31 March 2026) (Ruling)

Neutral citation: [2026] KEHC 4299 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION E163 OF 2024

RN NYAKUNDI, J

MARCH 31, 2026

BETWEEN

ISMAEL KIPSANG ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Before this court is an application by the applicant seeking the following orders: -

    a. Spent.

    b. That, the applicant is seeking review of his sentence to run concurrently under Section 14(3) of the *CPC*.

    c. That, this honorable has the power bestowed by the *Constitution* and the law under Article 165(3) to entertain applications of this nature and award a redress.

    d. That the applicant begs to be present during the hearing and determination of this application.

2. In support of the application is the supporting affidavit of the applicant who deponed as follows:

    a. That I am a male adult Kenyan Citizen of sound of mind versed with the fact of this matter and hence competent to swear this affidavit.

    b. That I was charged with 2 counts, tried, convicted and sentenced to serve 3 years' imprisonment for the first count for the offence of defilement contrary to section 8(1) as read with 8(2) of the *SOA* No. 3 of 2006 by Hon. Wairimu on 14th December 2020 and 10 years' imprisonment for the second count for the offence of defilement contrary to section 8(1) as read with 8(2) of the *SOA* No. 3 of 2006 by Odenyo on 31st January 2022.

c. That I am seeking sentence review in accordance to section 14(3) of the *CPC* for sentence to run concurrently.

d. That I am first offender seeking leniency of the court.

e. That I am first offender, remorseful, repentant and reformed and rehabilitated person and I have learned the incarceration and pray to be allowed by the honorable court to play role model in the society.

Decision

3. This matter has been decided by a competed court presided over by this court vide a ruling dated 16th October 2024. This court borrows a doctrine of *res judicata* expressly section 77 of the *Civil Procedure Act* whose import is that a matter finally decided by a competent court cannot again be litigated by the same parties. This doctrine emphasizes finality in litigation and it prohibits back door appeals and applications under the guides of interest of justice. This is an abuse of the court process by the applicant.

4. The principle of *res judicata* was considered in the case of *Henderson v Henderson* (1843) 3 Hare 100 at page 115 Wigham VC where the Court explained the principle as follows:

> "…..where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

5. In the second limb of this doctrine the Privy Council decision of *Yat Tung Investment Company Ltd vs Dao Heng Bank Ltd* [1975] AC 581, Lord Kilbrandon said that: -

> "But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The *locus classicus* of that aspect of *res judicata* is the judgment of Wigram VC in *Henderson v Henderson* [1843] 3 Hare 100, 115, where the judge says: -
>
> > "… where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject

of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." The shutting out of a "subject of litigation" - a power which no court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule... The Vice-Chancellors phrase "every point which properly belonged to the subject of litigation" was expanded in *Greenhalgh v. Mallard* [1947] 2 All ER 255, 257, by Somervell LJ.: -

> "*res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

6. It is obvious to this court that the applicant has been re-litigating on the same issue of sentence review without any compelling evidence material. This is an abuse of the process. It is in the interest of public policy, in the administration of justice, whether civil or criminal, that there should be finality to litigation, and that no person should be subjected to proceedings in a court of law at the instance of the same individual more than once in relation to the same facts in issue. This is what the applicant has sought to do against the State. This Court cannot allow litigants or applicants to engage in an abuse of the court process. Accordingly, the application is dismissed for want of merit pursuant to Section 382 of the *Criminal Procedure Code*. It is so ordered.

DATED, SIGNED AND DELIVERED VIA CTS AND E-MAIL AT ELDORET THIS 31ST DAY OF MARCH, 2026.

.....

R. NYAKUNDI

JUDGE

Representation:

M/s Sidi Kirenge for the State.