



**Kigen v Republic (Criminal Miscellaneous Application
E017 of 2025) [2026] KEHC 4447 (KLR) (30 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 4447 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL MISCELLANEOUS APPLICATION E017 OF 2025**

JK SERGON, J

MARCH 30, 2026

BETWEEN

EDWARD KIPROTICH KIGEN APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant, Edward Kiprotich Kigen, was originally charged, tried, and convicted in Kericho Magistrate's Court Criminal Case No. SO 26 of 2017 for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. He was sentenced to life imprisonment.
2. Being dissatisfied with both the conviction and sentence, the Applicant appealed to this Court in Criminal Appeal No. 45 of 2017. The appeal was dismissed in its entirety, upholding both the conviction and the life sentence.
3. The Applicant further appealed to the Court of Appeal at Nakuru in COACRA No. 62 of 2018. The Court of Appeal similarly dismissed the appeal, affirming the decision of the lower courts.
4. I have noted that the applicant has erroneously indicated that he was originally tried at Kericho Chief Magistrate's Criminal case no. 56 of 2012, high court criminal appeal no 218 of 2013 and Court of Appeal criminal appeal no. 62 of 2018 at Kisumu, which errors I have perused the file and corrected accordingly.
5. The Applicant has now returned to this Court by way of a Notice of Motion dated 30th January 2025, filed in Misc. Application No. E017 of 2025, seeking a review of his sentence. He argues that the life imprisonment sentence imposed on him contravenes his constitutional rights under Article 50(2)(p) and (q) of *the Constitution* of Kenya, 2010. He further submits that under Article 165(3)(b) of *the*



Constitution, this Court has jurisdiction to hear and determine matters involving alleged violations of fundamental rights and freedoms.

6. The Applicant relies on Sections 216 and 389 of the Criminal Procedure Code which require courts to consider mitigation before passing sentence, and the Judiciary Sentencing Policy Guidelines 2016 which emphasize proportionality in sentencing. The Applicant pleaded with this Court for leniency, and that he has no other pending matters before any court.
7. Miss. Maundu, learned Prosecution Counsel, opposed the application. She submitted that the Applicant has exhausted all appellate avenues, having appealed to both the High Court in Criminal Appeal No. 45 of 2017 and the Court of Appeal in COACRA No. 62 of 2018. She urged the Court to dismiss the application.
8. Having considered the application, the supporting affidavit, the submissions by both parties, the following issues arise for determination;
 - a) Whether this Court has jurisdiction to review the sentence imposed by the trial court and affirmed by the High Court and Court of Appeal.
 - b) Whether the life sentence imposed on the Applicant violates his constitutional rights under Article 50(2)(p) and (q).
 - c) What orders should be made?
9. The Applicant's conviction and sentence were affirmed by this Court (sitting as the first appellate court) in Criminal Appeal No. 45 of 2017, and subsequently by the Court of Appeal in COACRA No. 62 of 2018. The appeals were heard and determined on their merits.
10. The Applicant now invites this Court, through Misc. Application No. E017 of 2025, to revisit and review the very sentence that was upheld in Criminal Appeal No. 45 of 2017. This Court must consider whether it has the jurisdiction to do so.
11. The doctrine of finality in litigation is a fundamental principle of our justice system. A matter that has been conclusively determined by a competent court should not be reopened except in the clearest of cases. As the Supreme Court stated in *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR ;

“A court is functus officio 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 finally concluded, and the court is functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality.”
12. This Court is functus officio. It has already discharged its mandate in Criminal Appeal No. 45 of 2017. The Applicant cannot return to this Court through Misc. Application No. E017 of 2025 to re-litigate the same issues under the guise of a constitutional application.
13. In *Josephat Wambua Mbuvi v Republic* [2020] eKLR , the court held;

“From the import of the functus officio doctrine this court cannot consider the application for resentencing... Most importantly the matter has already been handled by the Court of Appeal and there is no known law that affords this court with the jurisdiction to supervise the decision of a superior court.”



14. Furthermore, the decision the Applicant seeks to review is not only that of the trial court but also the decisions of the High Court (in its appellate capacity) and the Court of Appeal. In *Salesio Nyaga Namu v Republic* [2021] eKLR , the court held;

“The jurisdiction of this court is provided for under article 165(3) of *the Constitution...* Under the said article, this court does not have jurisdiction to review/revise a decision of a court of concurrent jurisdiction. The revisionary jurisdiction of this court is only limited to proceedings of subordinate courts (see section 362-365).”

15. What the Applicant is seeking therefore is for this Court to review the decision of a court of concurrent jurisdiction (itself in Criminal Appeal No. 45 of 2017). This Court is bereft of any jurisdiction to review the said decision as doing so would be tantamount to sitting as an Appellate court on the judgment of another judge of concurrent jurisdiction.

16. Article 50(2)(p) provides that an accused person has the right "to benefit from the least severe of the prescribed punishments for an offence if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing."

17. The Applicant was convicted in SO 26 of 2017. There has been no change in the prescribed punishment for defilement under Section 8(2) of the *Sexual Offences Act* since the time of his sentencing. The punishment remains life imprisonment. This provision does not assist the Applicant.

18. Article 50(2)(q) provides that a convicted person has the right "to have the conviction and sentence reviewed by a higher court as prescribed by law." The Applicant exercised this right. He appealed to the High Court in Criminal Appeal No. 45 of 2017 and to the Court of Appeal in COACRA No. 62 of 2018. His conviction and sentence were reviewed by higher courts as prescribed by law. Both courts affirmed the sentence.

19. The right under Article 50(2)(q) is not an unlimited right to have a sentence reviewed multiple times. It is a right to one review by a higher court. The Applicant has already had two such reviews. He cannot invoke this provision to seek yet another review by the same court that already dismissed his first appeal.

20. Sections 216 and 329 of the Criminal Procedure Code require courts to consider mitigation before passing sentence. The trial court in SO 26 of 2017 had the opportunity to consider the Applicant's mitigation before imposing the life sentence. The appellate courts also had the opportunity to consider the sentence on appeal.

21. In *Salesio Nyaga Namu v Republic* (supra) , the court addressed a similar argument under Sections 216 and 329, noting;

“Section 216 relates to mitigation before the subordinate courts. Section 329 on the other hand deals with mitigation in the High Court. As I have already noted, the applicant herein was offered an opportunity to mitigate before sentencing and the trial court considered the said mitigation.”

22. The Applicant was offered an opportunity to mitigate before the trial court, and both appellate courts considered the propriety of the sentence. No violation of Sections 216 or 329 has been demonstrated.

23. The Sentencing Policy Guidelines 2016 provide guidance to courts on the principles of sentencing, including proportionality. However, these guidelines do not override the clear provisions of the *Sexual Offences Act*. The guidelines themselves recognize that courts must sentence within the parameters set by the law.



24. Moreover, the guidelines emphasize the seriousness of sexual offences against children and the need for deterrent sentences. This Court cannot ignore the legislative intent behind Section 8(2) of the *Sexual Offences Act*.
25. This Court cannot overlook the nature of the offence for which the Applicant was convicted. He was found guilty of defiling a young child in SO 26 of 2017. Such offences strike at the very heart of our society's commitment to protect its most vulnerable members. The sentence of life imprisonment reflects the gravity of the offence and serves the legitimate purposes of deterrence, retribution, and denunciation.
26. The Applicant has not presented any new or compelling evidence to warrant a review of his sentence. His application is based on the same facts and arguments that were considered and rejected by the appellate courts in Criminal Appeal No. 45 of 2017 and COACRA No. 62 of 2018.
27. This application, though filed as Misc. Application No. E017 of 2025, is in substance an attempt to mount a third appeal disguised as a constitutional application. The Applicant has exhausted his right of appeal. He cannot use a miscellaneous application to achieve what he cannot achieve through the appellate process.
28. The Court of Appeal in *Njuki v Republic* [2002] eKLR held that where an appeal has been heard and determined, the High Court cannot entertain a fresh application for review of the same conviction and sentence. To do so would be to usurp the jurisdiction of the Court of Appeal and undermine the hierarchy of courts.
29. For the reasons set out hereinabove, the Applicant's Notice of Motion dated 30th January 2025 is found to be without merit and is hereby dismissed in its entirety.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 30TH DAY OF MARCH, 2026

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J. K. SERGON

JUDGE

In the presence of:

C/Assistant – Rutoh/Naomi

Prosecutor – Ogutu

Applicant – No Appearance

