

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL REVISION CASE NO. E032 OF 2025
(CONSOLIDATED WITH CRIMINAL REVISION CASE NO. E082 OF
2025)

FORMERLY COURT OF APPEAL CRIMINAL CASE NO. 91 OF 2015 AT
NAKURU

HIGH COURT CRIMINAL APPEAL NO. 35 OF 2014 AT NAKURU

MISC. CRIMINAL APPLICATION NO. E115 OF 2024

FROM ORIGINAL. CR. CASE NO. 982 OF 2013 AT CM'S COURT NAROK

IN THE MATTER OF ARTICLES 22(1), 23(1), 25(C), 50(P)(q), 159(2) and 165(3)
OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE SENTENCING POLICY GUIDELINES SECTION
7.18, 9, 9.1 & 9.2

AND

IN THE MATTER OF SECTION 333(2) OF THE CRIMINAL PROCEDURE
CODE CAP 75 LAWS OF KENYA

BETWEEN

FREDRICK ODHIAMBO ODHIAMBO.....1ST APPLICANT

JUMANNE LOLUSU MOLLE.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The matter before this Court is a recurrent application for the review of sentence, brought by the Applicants who have, with persistent regularity, sought to re-litigate a matter that has reached its legal finality.
2. The procedural history of this case began when the Applicants were originally arraigned before the Senior Resident Magistrate's Court at Narok in Criminal Case No. 982 of 2013. They were charged with the offence of robbery with violence, contrary to Section 296(2) of the Penal Code. Upon a full trial, the trial court (Hon. Sitati), found them guilty and sentenced them to death on 17th January, 2014.

3. Aggrieved by the conviction and sentence, the Applicants preferred appeals to the High Court at Nakuru via Criminal Appeal Nos. 35 and 36 of 2014. These were consolidated, and in a judgment delivered on 21st July, 2015, the High Court (Ongeri & Kiarie, JJ) dismissed the appeals in their entirety.
4. Still dissatisfied, the Applicants moved to the Court of Appeal in Criminal Appeal No. 91 of 2015. In a Judgment rendered on 2nd June, 2023, the Court of Appeal (F. Ochieng, L Achode and W.Korir JJA) found no merit in the appeal, subsequently upholding both the conviction and the sentence in respect to each of the appellants.
5. Seeking a reprieve from the death penalty, the Applicants filed Misc. Criminal Application Nos. 168 and 171 of 2023. On 11th June, 2024, this Court reviewed the death sentence and substituted it with a term of 35 years' imprisonment, effective from the date of arrest on 3rd August, 2013.
6. Notwithstanding this reduction, the Applicants filed Criminal Misc. Application No. E115 of 2024 seeking a further downward review. On 19th February, 2025, H. Ong'udi J (As she then was) declined the invitation, holding that the court was *functus officio* and struck out the application.
7. Despite this clear ruling, the Applicants have once again approached this Court seeking the same prayers for a further review.
8. The Respondent has vehemently opposed the application through a Replying Affidavit sworn on 31st October, 2025, by James Kihara, Prosecution Counsel. The Respondent characterises this application as a blatant attempt to exploit the court's benevolence and an abuse of the judicial process.
9. He emphasises that the 35-year sentence imposed on 11th June, 2024, is fair and proportionate, as it already accounts for the time spent in custody pursuant to Section 333(2) of the Criminal Procedure Code.
10. Furthermore, the Respondent argues that this Court lacks the jurisdiction to review a decision of concurrent jurisdiction made by this Court itself and a

court of concurrent jurisdiction (Ong'undi J), a position already affirmed by the striking out of the Applicants' previous application in February 2025.

11. He maintained that further revision would undermine the gravity of the offence of robbery with violence and the course of justice.

Applicants' submissions

12. On the onset, the applicants challenge the Respondent's objection on jurisdiction, maintaining that this Court is properly seized of the matter under Sections 362 and 364 of the Criminal Procedure Code, which empower the High Court to call for and examine the record of subordinate courts to satisfy itself as to the correctness, legality, or propriety of any sentence.

13. They further invoke Article 165(3)(b) of the Constitution, arguing that the Court retains inherent supervisory jurisdiction to intervene where a sentence is manifestly excessive or unjust. In this regard, they contend that their application is not an appeal against conviction, but a lawful request for sentence revision grounded in both statutory and constitutional authority, in light of evolving jurisprudence and their personal circumstances, including their age, rehabilitation, and time already served.

14. They further contend that the prosecution's claim that his only recourse lies in the Court of Appeal is inaccurate, as the High Court retains the authority to ensure justice is done, particularly when a sentence may be manifestly excessive.

15. The applicants emphasise that they have spent 13 years in custody and have actively participated in vocational training, spiritual growth, and counselling programs while imprisoned. They maintain that the current 35-year sentence is exceptionally long, lacks the element of mercy, and exceeds the average life expectancy for males in Kenya, which he notes is approximately 64 years.

16. To support their argument in urging the Court to adopt a reform-oriented approach, the Applicants place reliance on ***Douglas Muthaura Ntoribi v Republic [2018] KEHC 6862 (KLR)*** where the Court acknowledged that every person convicted of serious offences are capable of rehabilitation, and that sentencing must not lose sight of the offender's potential for reform. They draw from this authority to argue that their conduct while in custody—demonstrated through participation in rehabilitative programmes and good discipline, attests to their reformation and supports a reduction of sentence.
17. The Applicants further rely on the decision in ***Mchunu and Another v S (AR24/11) [2012] ZAKZPHC 6 (10 February 2012)***, emphasising the principle that punishment must strike a balance between deterrence, retribution, and rehabilitation. They invoke this case to underscore that a sentence should not be so severe as to extinguish the possibility of reintegration into society, particularly where there is evidence of genuine reform.
18. In addition, they cite ***Sammy wanderi Kugotha v Republic [2021] eKLR***, where the Court reiterated the need for proportionality in sentencing, holding that punishment must fit not only the offence but also the offender. The Applicants use this authority to contend that their continued incarceration, despite the period already served and their demonstrated rehabilitation, renders the sentence disproportionately harsh.
19. They also rely on ***Ali Abdalla Mwanza v Republic, Criminal Appeal No. 256 of 2012-Mombasa***, which they invoke for the proposition that courts, in appropriate circumstances, may interfere with or revise sentences where they are found to be excessive or where mitigating factors were not adequately considered. They argue that their case falls within this category, given the length of the sentence imposed and the substantial time already served.

20. In conclusion, guided by the foregoing authorities, the Applicants urge this Court to find that it has jurisdiction and to exercise its discretion in their favour. They pray that the Court considers their demonstrated reform, the time already served, and the principles of proportionality and rehabilitation, and consequently revises the sentence downward, preferably to a non-custodial one.

Analysis and Determination

21. The only issue falling for determination is whether this Court can properly assume jurisdiction to undertake a further review of the Applicants' sentence, in light of the procedural history and prior determinations on record.

22. The revisionary power of the High Court is drawn from its supervisory jurisdiction grounded in Article 167(6) & (7) of the Constitution, which provides:

“(6) 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. (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

23. Section 362 of the Criminal Procedure Code provides as follows on the High Court's revisionary criminal jurisdiction:-

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

24. It follows therefore that the High Court only has revisionary powers over decision made by the subordinate courts and not courts of concurrent jurisdiction.
25. It is not in dispute that the Applicants have traversed the full hierarchy of criminal adjudication. Their conviction and sentence were affirmed by both the High Court and the Court of Appeal. Thereafter, this Court, upon a substantive application for resentencing, exercised its discretion and substituted the death sentence with a custodial term of thirty-five (35) years' imprisonment.
26. That determination was itself subjected to a subsequent challenge before a Court of concurrent jurisdiction, which unequivocally declined to entertain the matter because the Court was functus officio. Undeterred, the Applicants have once again approached this Court seeking identical relief.
27. Therefore, in determining whether the current Application is tenable, this Court must be guided by the doctrines of functus officio, finality of litigation, and the proper scope of its revisionary jurisdiction.
28. The doctrine of functus officio is a well-established principle that bars a court from reopening a matter once it has rendered a final decision, save for limited exceptions provided by law. It serves the critical purpose of ensuring certainty in judicial proceedings and protecting the integrity of court decisions from endless re-litigation.
29. In the present case, the record demonstrates that the question of sentence was conclusively addressed when this Court reviewed and substituted the death sentence with a definite custodial term of 35 years. That determination marked the exhaustion of this Court's jurisdiction in respect of sentencing.
30. The subsequent application before Ong'udi J (As she then was), which was struck out for want of jurisdiction, only served to reaffirm that position. To now entertain a similar application would amount to sitting on appeal over a decision of a Court of concurrent jurisdiction.

31. While the Applicants have urged this Court to adopt a rehabilitative and proportionate approach to sentencing, relying on authorities such as *Douglas Muthaura Ntoribi v Republic* (Supra) and *Ali Abdalla Mwanza v Republic* (Supra), those decisions, properly understood, speak to the principles guiding sentencing discretion at the point of determination. They do not, however, confer upon a court an open-ended jurisdiction to repeatedly revisit and revise sentences that have already been conclusively determined. Indeed, the principles of proportionality and rehabilitation must operate within the confines of jurisdictional limits and established procedural safeguards.
32. Similarly, the Applicants' invocation of this Court's revisionary powers under sections 362 and 364 of the Criminal Procedure Code is misplaced. Those provisions are intended to enable the High Court to supervise subordinate courts, not the court of concurrent jurisdiction.
33. Accordingly, the Respondent's contention that this application constitutes an abuse of the court process is, in the circumstances, well-founded. The Applicants have persistently sought to re-agitate a matter that has been fully and finally determined, despite clear and unequivocal pronouncements by competent courts. Such conduct undermines the orderly administration of justice and diverts judicial resources from deserving cases.
34. The matter before this Court is a recurrent application for the review of sentence, brought by the Applicants who have, with persistent regularity, sought to re-litigate a matter that has reached its legal finality.
35. From the history highlighted herein is troubling. While the doors of justice remain open to all, they are not a revolving door for the re-adjudication of settled issues.
36. The Applicants' conduct in filing successive, repetitive applications for the same relief, following determinations by High Court differently constituted is a deliberate abuse of the court process.

37. Such manoeuvres not only strain judicial resources but also undermine the principle of finality in litigation.

38. The matter having been conclusively determined, and the Court being functus officio, the present application is incompetent and amounts to an abuse of the court process.

39. In the premises, this Court finds that it lacks jurisdiction to entertain a further review of the sentence. The Applicants' application is therefore dismissed.

Dated, signed and delivered at Nakuru this 27th Day of April, 2026.

**PATRICIA GICHOHI
JUDGE**

In the presence of:

Fredrick Odhiambo Odhiambo- 1st Applicants

Jumanne Lolusu Molle -2nd Applicant

Ms Mwaura for Respondent

Erickson- Court Assistant