Muliga v Republic (Miscellaneous Criminal Application E003 of 2026) [2026] KEHC 6220 (KLR) (11 May 2026) (Ruling)

Neutral citation: [2026] KEHC 6220 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

MISCELLANEOUS CRIMINAL APPLICATION E003 OF 2026

RN NYAKUNDI, J

MAY 11, 2026

BETWEEN

DENNIS MULIGA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. What is pending before this Honourable Court for determination is a Notice of Motion Application dated 19th day of January 2026 where the Applicant is seeking the following orders: -

    a. That this Honourable Court be pleased to review, vary and/or reduce the thirty (30) year sentence imposed upon the Applicant in Muliga & another v Republic (Criminal Appeal 101 of 2019) KEHC 14245 (KLR) to a lesser and more lenient term of imprisonment.

    b. That the period already served by the Applicant while in custody as from 29.11.2018 be taken into account pursuant to section 333(2) of the Criminal Procedure Code.

    c. That the Honourable Court do make such other or further orders as may be just and expedient in the circumstances.

2. The Application is made on the following grounds on the face of it among others: -

    a. That the Applicant was convicted and sentenced to thirty (30) years imprisonment by the Senior Resident Magistrate's Court at Hamisi in Criminal Case No. 1317 of 2018, which sentence was upheld by the High Court at Kakamega in Muliga & another v Republic (Criminal Appeal 101 of 2019) KEHC 14245 (KLR).

    b. That the Applicant lodged an application seeking extension of time to appeal to the Court of Appeal at Kisumu vide COACRAPPL/E111/2024 which was dismissed by the Court.

c. That this Honourable Court is therefore properly seized of jurisdiction under Articles 165(3)(a) and 50(6) of *the Constitution*, and Sections 362 and 364 of the Criminal Procedure Code, to review the propriety and fairness of the sentence imposed.

d. That the Applicant has undergone extensive rehabilitation while in custody, as evidenced by theological and correctional certificates earned during his imprisonment, demonstrating genuine reformation and reintegration potential.

e. That his current Earliest Possible Date of Discharge (E.P.D.) is 13th September 2039, a period of thirteen (13) years away, which is manifestly long and disproportionate when considered alongside his demonstrated rehabilitation.

f. That the sentence of thirty (30) years is manifestly excessive and contrary to the evolving jurisprudence on proportionality, human dignity and the rehabilitative purpose of sentencing.

g. That the Court in Ali Abdalla Mwanza v Republic eKLR recognized that, where a term sentence exceeds the national life expectancy (approximately 67 years), it is manifestly excessive, and reduction is warranted to ensure that punishment does not amount to a life sentence by default.

h. That in Vinter and Others v United Kingdom (Applications Nos. 66069/09, 130/10 and 3896/10), the European Court of Human Rights emphasized that continued detention must remain justifiable throughout the sentence and should be subject to review in light of changing circumstances and the rehabilitative progress of the prisoner.

i. That the Applicant's continued incarceration without the possibility of early review or re-sentencing offends the principles of human dignity, fair trial, proportionality, and progressive realization of human rights under *the Constitution* and international human rights instruments to which Kenya is a party.

j. That it is in the interest of justice, equity, and humanity that this Honourable Court reviews and reduces the sentence to a term that reflects rehabilitation, deterrence, and reformation rather than retribution.

3. The Application was supported by the annexed affidavit sworn by the Applicant whose deponents echo the grounds in support of the Application.

Analysis and Determination

4. I have carefully considered the Application and the supporting affidavit and. In my considered view, the following issue arise for determination: -

   Whether the present application is barred by the doctrine of res judicata?

5. A perusal of the record herein reveals that the Applicant had previously challenged both conviction and sentence before the High Court at Kakamega in Muliga & Another v Republic (Criminal Appeal No 101 of 2019) [2022] KEHC 14245 (KLR) where the sentence of thirty (30) years imprisonment imposed by the trial court was considered and upheld. The Applicant thereafter moved to the Court of Appeal vide COACRAPPL/E111/2024 seeking extension of time to appeal against the said judgment, which application was dismissed.

6. The Applicant has now returned before this Court seeking review and reduction of the very sentence that was conclusively considered and affirmed by the High Court on appeal. In essence, the Applicant

is inviting this Court to reopen and reconsider issues relating to sentence propriety, proportionality and fairness that have already been judicially determined.

7. The doctrine of res judicata is anchored under Section 7 of the *Civil Procedure Act* which provides that no court shall try any suit or issue in which the matter directly and substantially in issue has already been directly and substantially in issue in a former suit between the same parties, litigating under the same title, and which has been heard and finally determined by a court of competent jurisdiction. Specifically, section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya defines the doctrine of Res Judicata in the following terms: -

> " 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."

8. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms: -

   a. "Explanation. (1) - The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

   b. Explanation. (2) - For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

   c. Explanation. (3) - The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other."

9. The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is: -

   a. The suit or issue was directly and substantially in issue in the former suit.

   b. That former suit was between the same parties or parties under whom they or any of them claim.

   c. Those parties were litigating under the same title.

   d. The issue was heard and finally determined in the former suit.

   e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

10. This court has a duty to guard against the tendency to evade the doctrine of res judicata. In the case of Attorney General & Another ET v (2012) eKLR it was held that: -

> " The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that

"parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit".

11. Although codified under civil law, the doctrine is equally applicable in criminal and constitutional proceedings where circumstances so demand in order to prevent abuse of court process, multiplicity of proceedings and endless litigation. Courts have consistently held that there must be finality to litigation and that parties ought not to continuously reopen matters already conclusively adjudicated upon.

12. Applying the foregoing principles to the present Application, it is evident that the parties herein are substantially the same. The question relating to the legality, propriety and extent of the Applicant's sentence was directly in issue before the appellate court in Muliga & Another v Republic. The appellate court considered the sentence and upheld it. That determination was final unless upset by a superior court.

13. The Applicant does not challenge the legality of the conviction but merely seeks reduction of sentence. The question therefore is whether this Court can sit on appeal or review over its own sentence. Notably, Article 50(2)(p) as read with 50(2)(q) of the Constitutions provides this court with jurisdiction to review a sentence as follows: -

> (2) Every accused person has the right to a fair trial, which includes the right: -
> (p)to the benefit of 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; and
>
> (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

14. Similarly, Sections 362 and 364 of the Criminal Procedure Code donate revisionary jurisdiction to the High Court over subordinate courts only. Section 364(5) of the Criminal Procedure code provides as follows: -

> (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

15. The Applicant cannot therefore re-litigate the issue of sentence before another High Court Judge under the guise of sentence review or revision. To permit such a course would amount to this Court sitting on appeal over a judgment of a court of concurrent jurisdiction, which is impermissible in law.

16. The Applicant's reliance on rehabilitation, prison reform, human dignity and restorative justice does not alter the substance of the dispute before Court. These are matters that either were considered or ought to have been raised during the appellate proceedings. A litigant cannot evade the doctrine of res judicata merely by introducing new arguments or rephrasing the relief sought.

17. Equally, Article 159(2)(d) of *the Constitution* cannot be invoked to defeat substantive legal doctrines. The constitutional command that justice be administered without undue regard to procedural technicalities was never intended to aid repetitive litigation or reopen matters already conclusively determined by competent courts. The Court further notes that the Applicant unsuccessfully sought extension of time before the Court of Appeal. Having failed to secure relief before the superior appellate court, the Applicant cannot now revert to the High Court seeking substantially similar orders. Litigation must come to an end.

18. Consequently, I find and hold that the present Application is res judicata as the issue of sentence was conclusively determined in Muliga & Another v Republic and cannot be reopened before this Court. In the premises, the Notice of Motion Application dated 19th January 2026 lacks merit and is hereby dismissed.Bottom of Form It is so ordered.

DATED, SIGNED AND DELIVERED AT VIHIGA THIS 11TH DAY OF MAY 2026

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R. NYAKUNDI

JUDGE