



**Mudogo v ODPP (Miscellaneous Application E006 of 2024)
[2025] KEHC 6205 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 6205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS APPLICATION E006 OF 2024**

**S MBUNGI, J
APRIL 30, 2025**

BETWEEN

BOAZ SAIYA MUDOGO APPLICANT

AND

ODPP RESPONDENT

RULING

1. The applicant herein filed a notice of motion application dated 2nd January 2024 seeking an order that, the court allows the applicant the benefits of section 14,12 of the CPC and 37 of the Penal Code by allowing the applicant's sentences in the two cases to run concurrently.
2. In his grounds, the applicant avers that the offences were committed in the same transaction and at the same time with similar facts, witnesses, and same place.
3. He further avers that he is a first offender, a relatively old man who has rehabilitated and reformed and is remorseful.
4. He opines that he should benefit from a less severe sentence as per the provisions of Article 25 (c) 50 (2)(p), 24 (1) (e), and relied in the cases of Peter Mbugua Kabui vs Republic criminal appeal No. 66 of 2015 eKLR, Ondiek vs. Republic 1981 KLR 530, and BMN vs. Republic criminal Appeal No. 97 of 2013 (2014) eKLR, and finally Paul Otieno Ndejwe vs. Commission General Prison /DPP Const. Cr. Petition No. 22 of 2019
5. In his supporting affidavit, the applicant stated that he was arrested and charged for the offense of attempted murder contrary to section 220 (a) of the penal code and Murder contrary to section 203 as read with section 204.
6. He claimed that for the offense of attempted murder, he was aggrieved by the decision of the trial court and at the appellate court, court of appeal, the life sentence was substituted to 20 years to run from the



date of his arrest 10/01/2014 while for the offense of murder which he was equally arrested for to run from the day of his arrest 10/1/2014.

7. He now prays that the sentences to run concurrently from the time of his arrest since the offences happened at the same transaction, the same time approximately.
8. The learned Counsel for the Respondent opposed the Application and prays that the court upholds the decision of the lower court.
9. He urged the Court to dismiss the Application.

Analysis and Determination

10. On perusal of the application and the submissions, the main issues for determination is whether: -
 - a. This court has jurisdiction to entertain the instant application.
 - b. The applicant is entitled to the orders for sentence review under Section 333(2) of the *Criminal Procedure Code*.
11. It is important to note that the applicant appealed to the High Court against conviction and sentence for the offence of attempted murder, as he has stated in his petition. In determining the appeal, the High Court considered the propriety of the sentence. The Court of Appeal equally confirmed his conviction for attempted murder and substituted a life sentence for 20 years' imprisonment
12. This means that the sentence imposed by the trial court has already been reviewed by this court. Thus the question whether this court has jurisdiction to review sentence already reviewed by a judge of equal jurisdiction and by a superior court being the court of Appeal.
13. The jurisdiction of the High Court is provided for under article 165 of *the Constitution* of Kenya 2010 and it includes unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretative jurisdiction; any other jurisdiction, original or appellate conferred on it by legislation and supervisory jurisdiction. The supervisory jurisdiction in criminal matters is expounded under Sections 362-364 of the *Criminal Procedure Code*.
14. The law abhors the practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This is because the rule of the thumb is that superior courts cannot sit in review/appeal over judgments of their peers of equal and competent jurisdiction, much less those courts higher than themselves.
15. The court that ought to deal with an issue arising out of the decision of this court is the Court of Appeal, as it is the one with jurisdiction under Article 164(3) of *the Constitution* and Section 379(1) of the *Criminal Procedure Code*. This is in appreciating the provisions of Article 50(2)(q) of *the Constitution* of Kenya 2010, which guarantees the right of a person if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law.
16. I note that the applicant had appealed to this court and later to the court of appeal of a superior jurisdiction and now seeks the court to review its decision to have the two rulings run concurrently.
17. There is no dispute that the parties are the same in all these proceedings, the same issues raised in both the earlier appeal and application and the present one, the applicant is mainly seeking review of the sentence under the stated provisions of Law.



18. In the case of Attorney General & another Vs ET [2012] eKLR, it was held as follows:

“The courts must always be vigilant to guard litigants against evading the doctrine of res judicata by introducing new causes of action 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 the form of a new cause of action wh, which has been resolved by a court of competent jurisdiction. In this case of Omondi Vs 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.” In that case, the court quoted Kuloba J (as he then was) in the case of Njanju Vs Wambugu & another, Nairobi HCC NO. 2340 OF 1991 (unreported) where he stated; “If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case cosmetic lift in every occasion he comes to court, then I do not see the use of the doctrine of res judicata”

19. Indeed, the applicant exercised his legal right and appealed to the Court of Appeal, which dealt with the matter as stated herein. The issues raised by the applicant would have been raised at the court of Appeal which reduced his sentence from life imprisonment to 20 years. It is not understandable, why he would file an appeal in this court when he was fully aware that, the court of appeal had already reviewed the file on the issue of sentencing and determined the matter.
20. I find that the application herein seeking orders of review of sentence is an abuse of the court process as it raises issues which had been substantially litigated and adjudicated upon by this court or which ought to have been raised in the earlier application, and the same is rejected.
21. In the foregoing, it is my finding that this application is misconceived and incompetent. It is hereby struck out with no orders as to costs.
22. It is hereby so ordered.
23. Right of Appeal 14 days.

DATED SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2025

S.N MBUNGI

JUDGE

In the presence of:

Court Assistant – Albright Sunguti

