

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL PETITION NO E004 OF 2023**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR  
FUNDAMENTAL FREEDOMS UNDER ARTICLE 19, 20, 22, 25, 27, 28,  
29, 50, 51, 159 AND 165 OF THE CONSTITUTION OF KENYA AND ALL  
THE OTHER ENABLING PROVISIONS OF THE LAW**

**AND**

**IN THE MATTER OF APPLICATION AND ENFORCEMENT OF SECTION  
333(2) OF THE CRIMINAL PROCEDURE CODE IN RELATION TO  
SENTENCES THAT HAVE NOT FACTORED THE TIME SPENT IN  
CUSTODY**

**AND**

**IN THE MATTER OF CONSTITUTIONAL INTERPRETATION OF SECTION  
46(2) CAP 90 OF THE PRISONS ACT IN RELATION TO COMPUTATION  
OF REMISSION OF SENTENCE**

**BETWEEN**

**DAVID WANJALA**

**WEPUKHULU.....PETITIONER/APPLICANT**

**VERSUS**

**REPUBLIC.....**

**RESPONDENT**

**Coram: Before Justice R. Nyakundi**

**MS Kirenge for the State**

**RULING**

- 1.** What is pending before me for determination is an undated Notice of Motion Application where the Petitioner/Applicant is seeking the following orders:
  - a. That the Petitioner/Applicant is seeking for resentencing contrary to section 4(1) of the Probation Offenders Act Cap 64 and the benefit of the least sentence under Article 50(2)(p) of the Constitution of Kenya 2010 and in reliance to section 362, 364(1)(b) and 365 of the Criminal Procedure Code, Cap 75.
  - b. That this Court be pleased to consider the sentencing policy guidelines 2016 published by the Kenya Judiciary and invoke the provisions of Article 165(3), a, b, d and 258(1) of the Constitution of Kenya 2010.
  - c. That the constitutionality of Article 27 does not discriminate in matters of law.
- 2.** The petition is based on the grounds on the face of it where the Petitioner/Applicant states as follows:
  - a. *That I know of my own knowledge that I was convicted and sentenced to 20-year imprisonment for the offence of manslaughter contrary to section 202 as read together with 205 of the Penal Code.*
  - b. *That I am seeking for resentencing under Article 50(2)(p) and section 4(1) of the Probation of Offender Act, Cap 64.*
  - c. *That this court has limited original jurisdiction, powers and discretion as contemplated under Article 23(1), 159(2) a & b, 165(3) a, b and 258(1) of the Constitution of Kenya 2010 to handle matters of this nature.*
  - d. *That my health has continued to worsen under the harsh prison conditions.*
- 3.** The Application is supported by the Annexed Affidavit sworn by DAVID WANJALA WEPUKHULU, the Petitioner/Applicant herein where he avers as follows:

- a. *That I know of my own knowledge that I was convicted and sentenced to serve 20 years' imprisonment for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code and I have served substantive part of the sentence (6 years).*
- b. *That I know plead to the Honourable Court to invoke the provisions of Article 50(2)(p) and sentencing policy guidelines 2016 and remit my sentence.*
- c. *That am seeking fresh sentence re-hearing pursuant to the recent high court ruling in the High Court at Machakos Petition NO. E017 OF 2021 by Hon. Justice George Odunga.*
- d. *That I humbly pray to be granted leave to appear before the court to explain my position.*

#### **Analysis and Determination**

4. I have read the application and the affidavit in support. I note that the Applicant petitioned to the High Court in ***Criminal Petition No 1 of 2020*** which relates to this petition. He had a right to move to court of appeal but it seems he opted to file yet another petition before the same court with concurrent jurisdiction like the one which entertained his first appeal. It is therefore necessary to place the question on jurisdiction in perspective. "John Beecroft Sauners in his treatise words and phrases legally Defined Vol. 3 at Page 113 reiterates the definition of the term "jurisdiction" as follows:

*"By jurisdiction is meant the authority which a court has to decide matter that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by like means. If no restriction or limits is imposed the jurisdiction is said to be unlimited. A limitation may be either as*

*to the kind and nature of the actions and matters of which the particular court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics. Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”*

(See also the Owners of Motor Vessel Lilian “S” v Caltex Oil Kenya Ltd. (1989) KLR1

5. The question therefore as distinctively presented by the applicant is whether such a judgement of a court of concurrent jurisdiction can be interfered with on the grounds stated in the notice of motion and annexed affidavit. In my considered view the criminal proceedings on the 1<sup>st</sup> Petition No.1 of 2020 ascertained that the facts which were the basis of that proceedings in the trial court were correct save for the issue of sentence. The foundation of it on the petition was that the Judge in session held that:

*“13. Needless to say that the offence of manslaughter with which the petitioner was charged does not carry a mandatory sentence; and that the Petitioner was not subjected to the discretionary maximum penalty either. As has been pointed out herein, if he believed that the 20 years’ imprisonment was harsh given the circumstances, then this **remedy ought to have been on appeal and not re-sentencing.**”*

6. Referring to the facts in the current motion there are no essential elements to invoke the jurisdiction of this court underpinned in Article 50(6) (a) & (b) of the Constitution. In *pari materia* in construing this application I am persuaded to import the provisions of Section 80 of the civil Procedure Act which expressly states as follows: That any person who considers himself aggrieved:

- a) *By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred or;*
- b) *By a decree or order from which no appeal is allowed by this Act May apply for a review of judgment to the court, which passed the degree or made the order, and the court may make such order thereon as it thinks fit.*

7. In Article 50 (6) (b) of the constitution review jurisdiction for a new trial before the High Court must meet the criterion of new and compelling evidence which has become available. So it would not be far-fetched to apply the principles from the realm of Civil Law in the case of **Turbo Highway Eldoret Limited-vs-synergy Industrial Credit Limited (2016) eKLR** in citing the case of **Rose Kaiza -vs- Angelo Mpanjiza (2009) eKLR** Sewe J held:

*“applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”*

8. Testing the application against the background of all other evidence on record in order to ascertain existence of new compelling evidence to

warrant a new trial on sentence that if not acted upon would adversely affect the rights and fundamental freedoms of the Applicant I find none at the moment. The argument being advanced by the Applicant is that his health has continued to worsen under the harsh prison conditions. I hold the view that the applicant having petitioned to the court of concurrent jurisdiction like the one I preside over, such issues on sentence were comprehensively dealt with on the merits. That is why I am persuaded to invoke the doctrine of res-judicata as a predominant doctrine of law to apply to the instant application.

9. Although, the doctrine of res-judicata generally is never applied in criminal cases but fundamentally, it is time courts supplant it in specific cases. Why do I say so? Of course any defendant to a criminal case who has exhausted his right of appeal and where questions of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. I am persuaded and convinced as I do here that the principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction.
10. From a comparative jurisprudence perspective on this same subject matter on the validity of res-judicata the court in **Hoystead v Commissioner of Taxation (1925) AC 155**, made the following observations:

*In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain*

*of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle— namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs.”*

- 11.** How should courts go about application of the doctrine of res-judicata? It is to look at the record and parties involved and determine the former criminal suit. Further the nature of the proceedings in the former trial duly examined to ascertain what particular issues were actually canvassed therein and adjudicated by a duly competent court or tribunal as established in Article 50 (1) of the constitution. Thereafter, the respective contentions of the parties the analysis, findings, and opinion on the merits of that court. It will be noted criminal trials in the spirit of the law are not be adjudicated ad infinitum. It appears due to the issuance of trending jurisprudence in criminal law more specifically on mandatory minimum sentences, which is quite distinct in law convicts are having a field day to agitate for fresh trials in the various courts in Kenya. It appears conclusively that the doctrine of exhaustion in our legal system correctly so seems to have taken a back seat.

**12.** I believe instances where the doctrine of re-judicata and exhaustion if applied will hook and line the legality, propriety, regularity, and justness of the criminal proceedings. The test fixed by the statute is that the former acquittal which Mutatis Mutandis applies to the former conviction and sentence. “There is a certain resemblance between the doctrines of res judicata and stare decisis, both are rules of public policy intended to maintain stability in human relations by giving repose to litigation, and both operate to prevent the constant reconsideration of settled question, but they operate in somewhat different fields and with different degrees of authority. The jurisdiction of this court is provided for under Article 165 and pursuant to that article, this court has unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; jurisdiction to interpret the Constitution and supervisory jurisdiction over subordinate courts and any other jurisdiction, original or appellate, conferred on it by legislation.

**13.** 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. 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.*

**14.** As the applicant had already petitioned the conviction and sentence, this court is bereft of jurisdiction to entertain the present application.

Conceding that the doctrine of res judicata is available in some criminal proceedings, the problem remains for the courts to determine the extent to which it may be applied, for the simple reason the cases and authorities cited in reference to criminal law are not in harmony as to the proper place of this plea as a bar in a criminal action. Consequently, from the above observations, this petition is dismissed for want of jurisdiction.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 29<sup>TH</sup> APRIL  
2025**

.....  
**R. NYAKUNDI  
JUDGE**