



**Nashingwa v Republic (Criminal Miscellaneous Application
E066 of 2024) [2025] KEHC 8145 (KLR) (11 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8145 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION E066 OF 2024**

JN KAMAU, J

JUNE 11, 2025

BETWEEN

EVERLINE NASHINGWA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein was charged with the offence of stealing contrary to Section 268(1) as read with Section 275 of the *Penal Code*. She pleaded guilty to the charge and was convicted on her own plea of guilty and sentenced to four (4) years imprisonment.
2. On 24th May 2024, she filed a Notice of Motion application dated 18th October 2024 (sic) seeking a review of her sentence. She relied on the unlimited jurisdiction of this court as envisaged in Article 165(3)(a) of *the Constitution* of Kenya, 2010 and sought a probation or non-custodial sentence in pursuance of the order of decongestion of prisons.
3. She placed reliance on the case of Petition No 97 of 2021 Edwin Wachira & 9 Others (eKLR citation not given) where the court granted probation orders to sexual offenders and advocated for the court's discretion on minimum mandatory sentences in the *Sexual Offences Act* No 3 of 2006 and equality of protection in law by the state pursuant to Article 27 of *the Constitution* of Kenya. She also relied on the case of Kenneth Mwangi Mahugu vs Republic No 25 of 2016 (eKLR citation not given) where the court gave guidelines on how to arrive at a custodial or non-custodial sentence where the court had discretion.
4. She urged the court to impose on her a non-custodial sentence and in this regard, she cited the case of Samson Boyii Nkulet vs Republic [2019]eKLR without highlighting the holding she was relying on therein.



5. She invoked Section 4(1) and (2) of the Probation Offender's Act Cap 64 (Laws of Kenya) and pointed out that she was a first offender who had been socially re-adapted and was very remorseful.
6. Her Written Submissions were dated 27th February 2025 and filed on 10th March 2025 while those of the Respondent were dated and filed on 22nd May 2025. The Ruling herein is based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS.

7. The Applicant sought for leniency citing Article 50(2)(p) and (q) of *the Constitution* of Kenya, Section 26(2) of the *Penal Code*, Sentencing Policy Guidelines Revised 2023 and the *Probation of Offenders Act* Cap 64. She submitted that as from the beginning of her matter, she displayed a remorseful attitude, pleaded guilty and requested for leniency. She pointed out that the Probation Report at the Trial Court was not favourable and therefore was not fit for a non-custodial sentence. She, however, argued that there was no offender who could not reform. She pointed out that she had reformed, rehabilitated and was ready to be re-integrated back to the society.
8. She invited the court to appreciate that while convicting and sentencing an accused person, the core objective was to rehabilitate the offender and not to serve the entire sentence to completion. She added that she was also alive to the fact that our jurisdiction has appreciated the importance of judges and magistrates exercising their discretion on sentencing depending on the circumstances of the cases and any internal and external factor that they may deem fit to consider while sentencing.
9. She placed reliance on several cases among them, the case of Evans Wanjala Wanyonyi vs Republic Criminal Appeal No 174 of 2015 (eKLR citation not given) where the court set aside a term of twenty (20) years imprisonment and substituted with a ten (10) years imprisonment and Dennis Kibaara vs Republic[2019]eKLR where the court substituted the Appellant's twenty (20) years imprisonment with a sentence of five (5) years imprisonment.
10. She submitted that essential rationale for sentencing was rehabilitation as was held in Francis Kariokor Muruatetu & Another (eKLR citation not given) and under policy direction 4.1 of the Sentencing Guidelines Policy 2015.
11. She stated that she had fully embraced the rehabilitative programs being offered while in prison. She pointed out that she had acquired a certificate in Theology-Diploma AFCM I, Certificate in RODI Kenya, Certificate in Drug Abuse and had a Recommendation Letter from the Prison. She believed that with the knowledge and experience acquired, she was ready to be re-integrated back to society.
12. She added that she was a single mother of two (2) children and their sole bread winner. She sought for a second chance in life to take care of her children and to contribute to the society and participate in nation building as a law-abiding citizen as she had earned skills to enable her earn a living apart from serving the community.
13. She relied on Article 23(3) of *the Constitution* of Kenya which empowered this court to grant reliefs and pleaded that it holds that she had served sufficient time based on the rehabilitative programs she had undertaken, the above cited cases and her mitigating factors.
14. On its part, the Respondent invoked Section 275 of the *Penal Code* and placed reliance on the cases of Shadrack Kipchoge Kogo vs Republic Criminal Appeal No 253 of 2003 (eKLR citation not given) and Benard Kimani Gacheru vs Republic [2002]eKLR where it was held that sentencing was the discretion of the trial court and that an appellate court would not interfere with sentence unless that sentence was



- manifestly excessive in the circumstances of the case or that the trial court overlooked material factor or acted on a wrong principle.
15. It further cited the case of *Republic vs Jagani & Another* (2001) KLR 590 where it was held that the purpose of sentence was deterrence, rehabilitation and reparation for harm done to victims and the society in general. It submitted that sentence meted by the Trial Court was proper as the Probation Report indicated that the Applicant was a habitual offender hence not suitable for a non-custodial sentence.
 16. It was emphatic that the Trial Court took into account the evidence, the nature of the offence, the circumstances of the case, the relevant factors and the legal principles in arriving at the sentence. It added that the sentence also needed to act as a deterrence to the Applicant and others. It pointed out that she had not adduce any material evidence to show that she had been rehabilitated. It was categorical that the sentence that was meted upon her was proper and that the Trial Court did not overlook some material factor or acted on a wrong principle. It urged this court to dismiss her application.
 17. It was trite that sentencing was at the discretion of the trial court and an appellate court could only interfere with the sentence under very specific circumstances. This position was re-emphasized by the Court of Appeal in *Benard Kimani Gacheru vs Republic* (Supra).
 18. Be that as it may, the power of the court to exercise revisionary jurisdiction is provided for under Section 362 of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya which states that:-

“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.”
 19. In the present case, the Applicant pleaded guilty to the offence of stealing contrary to section 268 (1) as read with section 275 of the [Penal Code](#) Cap 63 (Laws of Kenya). Section 275 of the [Penal Code](#) sets out the penalty for stealing as follows:-

“Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.”
 20. The Trial Court sentenced her to four (4) years imprisonment. To the mind of this court, this was excessive in the circumstances and illegal as the law provided for a maximum of three (3) years imprisonment. However, bearing in mind that she was a habitual offender as per the Trial Court’s proceedings, this court found and held that the maximum sentence of three (3) years was adequate in the circumstances of the case.
 21. Taking into account the remission period of one third (1/3), it was evident that the Applicant had since completed her sentence. Directing her to serve probation for the remainder of her sentence would be illegal and have no basis under the law.

DISPOSITION.

22. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s application dated 18th October 2024 and filed on 24th May 2024 was merited and the same be and is hereby allowed.



23. Although the Applicant's conviction was safe and the same be and is hereby upheld as it was safe, her sentence of four (4) years imprisonment be and is hereby set aside and/or vacated as it was illegal and the same be and is hereby substituted with a sentence of three (3) years imprisonment.
24. Bearing in mind the remission period of one third (1/3) of the sentence of three (3) years, it was evident that the Applicant had since completed her sentence. In that regard, it is hereby directed that the Applicant be and is hereby released from custody forthwith unless she be held for any other lawful cause.
25. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **11th** day of **June** 2025

J. KAMAU

JUDGE

