



**Wanjiru v Republic (Criminal Miscellaneous Application
E030 of 2023) [2025] KEHC 9108 (KLR) (23 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION E030 OF 2023**

JN KAMAU, J

JUNE 23, 2025

BETWEEN

NAOMI WANJIRU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The Applicant herein was charged with three (3) Counts. Count I was in respect of the offence of possession of firearm contrary to Section 89(1) of the [Penal Code](#), Count II related to the offence of possession of ammunitions contrary to Section 89(1) of the [Penal Code](#), and Count III was for the offence of consorting with a person in possession of ammunition contrary to Section 89(2) of the [Penal Code](#).
2. She was convicted and sentenced to ten (10) years imprisonment each on Count 1 and Count II and three (3) years imprisonment on Count III. The Trial Court ordered that the sentences run concurrently.
3. On 6th July 2023, she filed the undated application herein for review of sentence. She averred that she was a first offender and remorseful for having committed the offence. She stated that she had been rehabilitated and had learnt her lesson through incarceration and wished to reform and re-correct her past. She sought the court's leniency. She urged the court to exercise its discretion and jurisdiction and consider her mitigation in reviewing her sentence.
4. Her undated Written Submissions were filed on 12th June 2024 while those of the Respondent were dated 14th October 2024 and filed on 15th October 2024. This Ruling is based on the said Written Submissions which both parties relied on in their entirety.



Legal Analysis

5. The Applicant regretted the events that led to the offence and expressed remorse for the same. She pointed out that she was arrested with her husband who was the 1st Accused person in the lower court leaving their two (2) children destitute. She sought the court's mercy to be placed on probation so that she could raise her young children. She asserted that her and her husband's folly should not affect the future of their children which was their fundamental freedom and right under Article 53 of the [Constitution of Kenya](#), 2010.
6. She contended that the severity of a sentence depended on the circumstances of each case and that consideration was placed on the nature of the offence, the offender and the purpose of the sentence. She pointed out that offenders were victims of social, political, economic and psychological forces in society and therefore, sentencing should have the goal of salvaging and rehabilitating and treating them with compassion and understanding.
7. She referred this court to Section 4(1) and (2) of the [Probation of Offenders Act](#) Cap 64 (Laws of Kenya). She argued that although there was lack of faith in the judicial system in meting of appropriate sentences, the judicial system provided for an appellate process for parties who were dissatisfied with the decision of the lower court.
8. She further submitted that she was arrested and charged in 2018, convicted on 17th July 2019 and sentenced on 31st July 2019. She urged the court to consider Section 333(2) of the [Criminal Procedure Code](#) while reviewing his sentence.
9. On its part, the Respondent submitted that persons who had not been convicted in our criminal justice system were presumed innocent and should be treated as such until such a time when Judgment was pronounced by the court and a verdict of guilty and conviction passed.
10. In this regard, it placed reliance on the case of [Abamad Abolfatbi Mohammed & Another v Republic](#) [2018]eKLR where it was held that by dint of Section 333(2) of the [Criminal Procedure Code](#), courts were obliged to take into account the period that accused persons spent in custody before they were sentenced.
11. It contended that although the Trial Court had indicated that it had took into account the period the Applicant spent in remand, it did not proceed to state when the sentence should commence. It was not opposed to the Applicant's prayer under Section 333(2) of the [Criminal Procedure Code](#) being granted.
12. It cited Section 329 of the [Criminal Procedure Code](#) and submitted that the Trial Court took into account the evidence, the gravity of the offence and the circumstances of the case in arriving at the appropriate sentence. It added that the court called for a Probation Office's Report and considered her a first offender.
13. It further submitted the objectives of sentencing under the [Sentencing Policy Guidelines](#) 2023, Section 89(1) and (2) of the [Penal Code](#) and argued that the fact that the Applicant knew of the existence of the firearms and ammunitions on the part of the 1st Accused person who was her husband and did not take any steps to report to the relevant authorities but associated with him in keeping it, posed a threat to the community. It was its contention that the sentence meted upon her was proper and this court should not interfere with the same.
14. It was trite law that sentencing was at the discretion of the trial court and an appellate court could only interfere with the same under very specific circumstances. This position was re-emphasised by the Court of Appeal in [Benard Kimani Gacheru v Republic](#)[2002]eKLR.



15. 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.”

16. Notably, the Applicant was convicted under Section 89(1) and (2) of the [Penal Code](#) Cap 63 (Laws of Kenya) which provide as follows:-

1. Any person who, without reasonable excuse, carries or has in his possession or under his control any firearm or other offensive weapon, or any ammunition, incendiary material or explosive in circumstances which raise a reasonable presumption that the firearm, ammunition, offensive weapon, incendiary material or explosive is intended to be used or has recently been used in a manner or for a purpose prejudicial to public order is guilty of an offence and is liable to imprisonment for a term of not less than seven years and not more than fifteen years.
2. Any person who consorts with, or is found in the company of, another person who, in contravention of subsection (1), is carrying or has in his possession or under his control any firearm or other offensive weapon, or any ammunition, incendiary material or explosive, in circumstances which raise a reasonable presumption that he intends to act or has recently acted with such other person in a manner or for a purpose prejudicial to public order, is guilty of an offence and is liable to imprisonment for a term not exceeding five years.

17. The Applicant sought that this court reduces the sentence that was meted on her and to substitute it with a non-custodial sentence, preferably a Probation Order.

18. The Trial Court sentenced her to ten (10) years imprisonment under Section 89(1) of the [Penal Code](#) and three (3) years imprisonment under Section 89(2) of the [Penal Code](#). To the mind of this court, the Trial Court was lenient in the circumstances as it had the option of sentencing her up to fifteen (15) years imprisonment and/or up to five (5) years imprisonment but instead meted lesser sentences in the respective Courts.

19. [Probation of Offenders Act](#) gave courts the option of placing offenders on probation. An offender could be placed under the supervision of a probation officer for not less than six (6) months but not exceeding three (3) years. The court was under an obligation to explain to the offender the terms of a probation order when the same was imposed. An offender was required to comply strictly with the terms of the probation order the breach of which would attract a range of sanctions that were outlined in the [Probation of Offenders Act](#). If an offender committed an offence during the probation term, the offender became liable to be sentenced for the original offence.

20. The issue of probation was also dealt with in the [Sentencing Policy Guidelines](#), 2023. The same provides as follows:

2.5.2 When deciding on whether to place an offender on probation, Section 4 (i) of the [Probation of Offenders Act](#) calls upon the court to have regard to the following information, typically contained in a pre-sentence report:

- i. Age
- ii. Character



- iii. Antecedents
- iv. Home surroundings
- v. Health or mental condition of the offender
- vi. The nature of the offence
- vii. The victim impact statement
- viii. Any extenuating circumstances in which the offence was committed

2.5.3 The court must be satisfied of the offender's willingness to comply with the provisions of the probation order for it to impose the order.

21. This court considered the mitigation advanced by the Applicant and noted that the analysis of the facts of the instant case may have warranted a non-custodial sentence for the remaining part of her sentence as she was remaining about two (2) years to complete her sentence. In addition, she was a first offender and had expressed remorse.
22. However, the procedure for Probation was very specific and could not obtain in a case of this nature. Consorting with a person who had a firearm was not a simple matter as a firearm had the potential of causing serious and at times fatal injuries to members of a community. The Applicant's reprieve could only come through clemency in the appropriate Power of Mercy Committee. The other procedure was for her name being forwarded to court through Prisons for consideration during revision. This court's hands were tied as far as re-sentencing the Applicant to Probation as she had sought.
23. Going further, this court looked at Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) which provides that:-

“Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody (emphasis court)”.
24. This duty is also contained in the *Judiciary Sentencing Policy Guidelines* where it is provided that: -

“The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
25. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in the case of *Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR.
26. The Charge Sheet showed that the Applicant was arrested on 19th August 2018 and remained in custody until she was sentenced on 31st July 2019. A reading of the proceedings of the Trial Court



showed that it did not take into account the time that he spent in remand before sentencing him. This court was therefore persuaded that this was a suitable case for it to exercise its discretion and grant the orders sought.

Disposition

27. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application filed on 6th July 2023 was not merited and the same be and is hereby disallowed.
28. However, for the avoidance of doubt, the period between 19th August 2018 and 30th July 2019 to be taken into account when computing her sentence in accordance with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
29. It is so ordered

DATED AND DELIVERED AT VIHIGA THIS 23RD DAY OF JUNE 2025

J. KAMAU

JUDGE

