



**Wafubwa & another v Republic (Criminal Revision E181 of 2025)
[2025] KEHC 13197 (KLR) (17 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL REVISION E181 OF 2025
WM KAGENDO., J
SEPTEMBER 17, 2025**

BETWEEN

NERVIN NYONGESA WAFUBWA 1ST APPLICANT

HASSAN HUKA GUYO 2ND APPLICANT

AND

REPUBLIC RESPONDENT

(Revision of sentence in Criminal Case No. E642 of 2023 at the Chief Magistrates Court Mombasa on 7th April, 2025 by Hon. D.O. Odhiambo(SRM))

RULING

1. By way of a letter through counsel for the 2nd applicant, the applicants seek this Honourable Court to exercise supervisory jurisdiction and do satisfy itself on the legality, propriety and/or regularity of the proceedings and decision and thereby prays for orders;
 1. That this Honourable Court be pleased to Review the sentence of the accused to non-custodial sentence.
 2. That it is in the interest of justice for the orders sought be granted as the Prosecution shall not suffer prejudice if the orders for Revision sought are granted.
 3. That the court be pleased to grant any other appropriate orders for Revision as it may deem fit. The applicant seeks a sentence review based on the sentence review reports on record. They argue that they were sentenced on 1st April, 2025 and as the time of the institution of the instant review, they have served two (2) weeks of the four (4) year sentence. That, they are the sole breadwinners in their families and have been suffering mental and physical anguish, thus this court should exercise its superiority powers and order the revision of the sentence to a non-



custodial sentence, and be placed on community service, as they ready to abide to the rules and conditions issued.

Analysis and Determination

2. I have considered the application, noting that the same is not opposed by the respondent, subject to the confirmation of the time spent in custody. Indeed, Article 50 (2) (p) (q) of the COK gives the Court the general power to review the decisions of the subordinate courts;

“ ...

- (2) if convicted, to appeal to, or apply for review by, a higher court as prescribed
- (q) by law.”

3. Equally, this court’s revisionary jurisdiction is provided for under Section 362 of the Criminal Procedure Code.

“ 362. 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.”

4. Regarding the 1st applicant, his Sentence Review report was positive. The probation officer noted that the 1st applicant was a father of four (4) where the youngest was one (1) year old, as at the time of imprisonment. Further, that the 1st applicant was yet to receive formal skills training, although he was undergoing counselling to curb his criminal activities. That, the local authorities in Mikindani are familiar with the offender and his family and expressed their readiness to support his rehabilitation and reintegration into the community which has no resentment against him. It was thus recommended that a probation order supervised by the Mombasa County Probation Station, would be suitable.

5. Similarly, the 2nd applicant’s sentence review report was positive. It was reported that the 2nd applicant is the sole breadwinner and a father of three (3) children where the eldest is a grade one 1 student and the youngest a four (4) year old boy whilst he also takes care of his sister-in-law’s daughter who is a grade three (3) pupil. That, as part of his rehabilitation the 2nd applicant was engaged with cleaning within the prison, and his family is ready to receive him and aid in his rehabilitation. The probation officer therefore recommended a non-custodial sentence coupled with community service at Jomvu Kuu Chief’s Office.

6. In *Kimutai vs Republic* [2024] KEHC 6871 (KLR) the court listed the considerations to appreciate when determining a custodial and non-custodial sentencing as follows:

7. In determining whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -

Gravity of the offence: - sentence of imprisonment should be avoided for misdemeanour.

Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.

Character of the offender: - non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.



Protection of the community: - where the offender is likely to pose a threat to the community.
Offender's responsibility to third parties: - where there are people depending on the offender. Further, in the case of Republic v Felix Madalitso Keke Confirmation Appeal No. 404 of 2010 (unreported) where the court held as follows:

8. Considerations of the public interest when sentencing offenders must go beyond considerations of deterrence; there is always the consideration that the public whose interest the sentence wants to serve includes the prisoner before the court at first instance. It is in the public interest that sentences are passed which are not cruel, degrading and inhuman. Harsh or lenient sentences may not necessarily serve the public interest; they are likely to have an opposite effect. While sentences must fit the crime, the offender and the victim, they must also fit and cohere with overall sentencing goals, justice, reformation, restoration and rehabilitation. Our sentences may not be in the public interest if they only succeed in instilling crime and fail in bringing the prisoner a better person in society""s continuum."
9. In the instance the applicants were charged, convicted and sentenced with the offence of stealing motor vehicle parts contrary to section 268 (1) as read with section 279 (g) of the Penal Code, which particulars are that on 7th May, 2023 along Mombasa Airport road, the accused jointly stole one front module; PLD, two accelerator pedal from motor vehicle reg. no. KBX 325T all valued at kshs.505,000/=.
10. Sec 268 (1) of the Penal code provides that;

A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
11. Commensurately, under Sec 279 (g) if the offender, in order to commit the offence, opens any locked room, box, vehicle or other receptacle, by means of a key or other instrument, the offender is liable to imprisonment for fourteen years.
12. From the onset the offense is not a misdemeanor. However, it is not lost to me that the applicants during trial confessed and admitted their guilt, thereby pleading for mercy and forgiveness, which mitigations the trial court considered and, in its discretion, sentenced them to four (4) years in prison. In fact, as at the making of this decision, the applicants had served somewhat five (5) months of their four (4) year sentence.
13. In my view, the applicants' admission and confession of their faults, not only on arrest, trial but in the present applications, demonstrates remorse and a realization of their wayward ways.
14. For what is worth, among the prime objectives of the criminal law is imposition of appropriate adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the way the crime is done. whereas there is no straight blanket formula for sentencing an accused person on proof of crime, the courts have adopted the twin objectives as deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the court must keep in mind the gravity of the crime, motive for the crime nature of the offence and all other attendance circumstances.
15. In this instance, it is not lost to me that the factual realities herein of the severity of the offence. Having taken into account the circumstances of the case and the fact that the applicants have not served a considerable part of their sentence, I am of the considered opinion that a sentence combining both custodial and non-custodial sentence will achieve the objective of both deterrence and rehabilitation.



16. Having taken further into account the doctrine of proportionality in sentence and the fact that the 1st and 2nd applicants have a balance of three (3) years and seven (7) months in their custodial sentence, I have come to the logical conclusion that the sentences should be reviewed and served as follows: -
- a. Twelve (12) months imprisonment from the date of sentencing by the trial court, to act as deterrence and retribution.
 - b. Two (2) years thereafter on probation for rehabilitation and reintegration of the 1st and 2nd applicants into society to be supervised through the Mombasa and Kisauni Probation Offices, respectively.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 17TH DAY OF SEPTEMBER, 2025.

W.K. MICHENI

JUDGE

In the presence of;

For the Appellant(s).....in person

For the Respondent.....Mr Ngiri and Mr Sirima

Court Assistant.....Ms Bebor

Signed By/For:

HON. LADY JUSTICE WENDY MICHENI

THE JUDICIARY OF KENYA.

