Republic v Were (Anti-Corruption and Economic Crimes Case E008 of 2025) [2025] KEMC 115 (KLR) (26 May 2025) (Judgment)

Neutral citation: [2025] KEMC 115 (KLR)

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES CASE E008 OF 2025

CN ONDIEKI, SPM

MAY 26, 2025

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

PETER ONYANGO WERE ..... ACCUSED

JUDGMENT

Part I: Background

1. This Sentence straddles steps 7 and 8 highlighted in the Directions in this matter, dated 23rd May 2025.

2. On 6th February 2025, the Accused was arraigned in Court and charged with seven counts of offences as follows:

    a. Under Count I, the Accused was charged with the offence described as deceiving principal contrary to section 41(2) as read with section 48 of the *Anti-Corruption and Economic Crimes Act*, Cap 65 of the Laws of Kenya (hereinafter "ACECA"). The particulars of the offence are that on or about 27th October 2023 at the Independent Electoral and Boundaries Commission (hereinafter "IEBC") in Nairobi County within the Republic of Kenya, being a public officer employed by IEBC as an Assistant Elections Officer, to the detriment of the IEBC, he knowingly and intentionally deceived his principal by stating in his letter addressed to the CEO IEBC that he is a holder of a Bachelor of Business Management (Human Resource Management Option) Degree Certificate, Serial Number 170335 and that the Graduation Booklet of the 17th Graduation held on 17th December bears his name in response to a show cause letter, which information he knew to be false.

    b. Under Count II, the Accused was charged with the offence described as forgery contrary to section 345 as read with section 349 of the *Penal Code*, Cap 63 of the Laws of Kenya. The particulars of the offence are that on an unknown date and place within the Republic of Kenya,

with intent to deceive, the Accused forged a Bachelor of Business Management (Human Resource Management Option) Degree Certificate, Serial Number 170335 in the name of Were Peter Onyango purporting it to be a genuine document issued to him by Masinde Muliro University of Science and Technology on 17th December 2021, a fact he knew to be false.

c. Under Count III, the Accused was charged with the offence described as uttering a false document contrary to section 353 of the *Penal Code*, Cap 63 of the Laws of Kenya. The particulars of the offence are that on or about 31st October 2022, at IEBC in Nairobi County, the Accused knowingly and fraudulently uttered a false document namely a Bachelor of Business Management (Human Resource Management Option) Degree Certificate, Serial Number 170335 in the name of Were Peter Onyango purporting it to be a genuine document issued to him by Masinde Muliro University of Science and Technology on 17th December 2021, a fact he knew to be false.

d. Under Count IV, the Accused was charged with the offence described as forgery contrary to section 345 as read with section 349 of the *Penal Code*, Cap 63 of the Laws of Kenya. The particulars of the offence are that on an unknown date and place within the Republic of Kenya, with intent to deceive, the Accused forged undergraduate academic transcripts in the name of Were Peter Onyango, registration number BBM/08971/17 for years 1-4, purporting them to be genuine documents issued to him by Masinde Muliro University of Science and Technology on 9th November 2021, a fact he knew to be false.

e. Under Count V, the Accused was charged with the offence described as uttering a false document contrary to section 353 of the *Penal Code*, Cap 63 of the Laws of Kenya. The particulars of the offence are that on or about 31st October 2022, at IEBC in Nairobi County, the Accused knowingly and fraudulently uttered a false document namely undergraduate academic transcripts in the name of Were Peter Onyango, registration number BBM/08971/17 for years 1-4, purporting them to be genuine documents issued to him by Masinde Muliro University of Science and Technology on 9th November 2021, a fact he knew to be false.

f. Under Count VI, the Accused was charged with the offence described as forgery contrary to section 345 as read with section 349 of the *Penal Code*, Cap 63 of the Laws of Kenya. The particulars of the offence are that on an unknown date and place within the Republic of Kenya, with intent to deceive, the Accused forged a Graduation Booklet, purporting it to be a genuine document issued to him by Masinde Muliro University of Science and Technology on 9th November 2021, a fact he knew to be false.

g. Under Count VII, the Accused was charged with the offence described as uttering a false document contrary to section 353 of the *Penal Code*, Cap 63 of the Laws of Kenya. The particulars of the offence are that on or about 31st October 2022, at IEBC in Nairobi County, the Accused knowingly and fraudulently uttered a false document namely a Graduation Booklet bearing the name the name of Were Peter Onyango purporting it to be a genuine document issued to him by Masinde Muliro University of Science and Technology on 17th December 2021, a fact he knew to be false.

3. On 23rd May 2025, the learned prosecution counsel, the Accused and learned counsel watching brief for EACC, Ms. Wanjohi, intimated to this Court that parties have since entered into a Plea Agreement in this matter and the Court issued directions accordingly.

4. On 26th May 2025 - in accord with step 4 pursuant to sections 137H(1) and 137J of the CPC outlined in the Directions dated 23rd May 2025 – this Court accepted and adopted the Plea Agreement as a Judgment of this Court.

5. Invariably, acceptance of the Plea Agreement constitutes a Judgment of the Court and what logically follows after the Judgment is a sentence. See the implication carried in the marginal note of section 137L of the CPC. See also section 137H(2) of the CPC which provides that "Where a plea agreement entered into in accordance with section 137A(a) is accepted by the Court in accordance with this section, the Court shall proceed to convict an Accused person accordingly."

6. Accordingly – Counts II, IV and VI having been withdrawn by the DPP under section 137A(1)(b) of the CPC, in accord with step 5 pursuant to section 137H(2) of the CPC and rule 10 of the Criminal Procedure (Plea Bargaining) *Rules No. 47 of 2018* - this Court proceeded to record a plea of guilty on Counts I, III, V and VII as agreed in the plea agreement.

7. Further – in accord with step 6 pursuant to section 137H(2) of the CPC and rule 10 of the Criminal Procedure (Plea Bargaining) Rules, No. 47 of 2018 - this Court proceeded to convict the Accused for Counts I, III, V and VII as agreed in the plea agreement for the following offences:

    a. deceiving principal contrary to section 41(2) as read with section 48 of the *Anti-Corruption and Economic Crimes Act*, Cap 65 of the Laws of Kenya (hereinafter "ACECA") as charged under Count I.

    b. uttering a false document contrary to section 353 of the *Penal Code*, Cap 63 of the Laws of Kenya as charged under Count III.

    c. uttering a false document contrary to section 353 of the *Penal Code*, Cap 63 of the Laws of Kenya as charged under Count V.

    d. uttering a false document contrary to section 353 of the *Penal Code*, Cap 63 of the Laws of Kenya as charged under Count VII.

Part II: Broad Principles Applicable to Sentencing Generally

8. A discretionary power is reposed upon this Court by section 137I of the CPC that upon conviction, the Court may invite the parties to address it on the issue of sentencing in accordance with section 216 of the CPC. Section 137I of the CPC provides that "(1) Upon conviction, the Court may invite the parties to address it on the issue of sentencing in accordance with section 216. (2) In passing a sentence, the Court shall take into account— (a) the period during which the Accused person has been in custody; (b) a victim impact statement, if any, made in accordance with section 329C; (c) the stage in the proceedings at which the Accused person indicated his intention to enter into a plea agreement and the circumstances in which this indication was given; (d) the nature and amount of any restitution or compensation agreed to be made by the Accused person. (3) Where necessary and desirable, the Court may in passing a sentence, take into account a probation officer's report."

9. Section 216 of the *Criminal Procedure Code* commands this Court to, before sentencing, invite the Accused to give evidence relative to properly informing the Court to pass an appropriate sentence. It reads thus: "The Court may, before passing sentence or making an order against an Accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made." In Edwin Otieno Odhiambo vs. R, Nairobi Cr. App. No. 359 of 2006, it was held that in sentencing, if the Court fails to take into account mitigating circumstances, the chances of not coming up with an appropriate sentence were enhanced.

10. Every Accused person has the right to a fair trial, guaranteed under Article 50 (2) of the *Constitution*. This right is absolute Courtesy of Article 25(c) of the *Constitution*. Sentencing is part of the trial contemplated by Article 50(2) of the *Constitution* and for this reason, the Accused is entitled to fair sentencing (which embrace the principles of fair trial). It follows that before passing a sentence or making an order against an Accused person under section 215 of the *Criminal Procedure Code*, the Accused must be heard and the Court should receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made. See section 216 of the CPC read in the context of the Supreme Court of Kenya holding in Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] KESC 2 (KLR), at paragraphs 41-44; Wachira & 12 others vs. Republic & 2 others [2022] KEHC 12795 (KLR), per Mativo, J.; Joshua Gichuki Mwangi vs. Republic [2022] eKLR, per Karanja, Kiage & Mohammed, JJA, et alia.

11. Sentencing is a discretionary power of the Court. However, the discretion should be exercised judiciously, the direction which should be dictated by the purposes of sentencing, evidence adduced by the prosecution for or against the Accused; evidence adduced in mitigation by the Accused and diverse principles enunciated thereon by superior Courts. In Shadrack Kipchoge Kogo vs. Republic (2015) eKLR, the Court of appeal restated the time-tested proposition of law that sentencing is a discretionary power of the Court which ought to be exercised judiciously, taking account relevant factors. See also the Court of Appeal decision in Ogolla s/o Owuor vs. Republic (1954) EACA 270 and Bernard Kimani Gacheru vs. Republic (2002) eKLR.

12. Since discretion in this regard is like an obstinate ass, the Privy Council in Spence vs. The Queen; Hughes vs. the Queen (Spence & Hughes) (unreported, 2 April 2001) (Byron CJ) was of the view that: "In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty."

13. The principal purpose of a sentence is to: (a) punish the offender for his/her criminal conduct in a just manner (retribution); (b) deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences (deterrence); (c) enable the offender reform from his criminal disposition and become a law abiding person (rehabilitation); (d) address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met (restorative justice); (e) promote a sense of responsibility through the offender's contribution towards meeting the victims' needs; (f) protect the community by incapacitating the offender (community protection); and (g) communicate the community's condemnation of the criminal conduct (denunciation).

14. Some of the principles which act as guiding rays include proportionality, appropriateness, adequacy, rehabilitation and deterrence. In the High Court decision in Mareen Kathure v Republic [2018] KEHC 8301 (KLR), Gikonyo, J. restated the purpose of sentencing afore-outlined and further set out some principles in sentencing in the following words: "Imposition of punishment is a matter for the discretion of the Court. Except, the Court must consider the facts and circumstances of each case in order to impose punishment... Thus, in exercising its discretion in sentencing, the Court should bear in mind the principles of proportionality, deterrence and rehabilitation. In assessing proportionality, take into account mitigating and aggravating factors, the impact of the crime on the victims and the need to make any order for compensation or forfeiture. I need not remind that victims of crime now occupy rightful position in the *Constitution*...That is not to say, however, that prison terms cannot be imposed

alone where there is an option of fine if it is the most appropriate sentence in the circumstances of the case."

15. In the Supreme Court of India decision in Alister Anthony Pareira vs. State of Maharashtra, (2012) 2 S.C.C. 648, cited and adopted in Mareen Kathure vs. Republic [2018] eKLR, by Gikonyo, J., it was held that a sentence should be: "...appropriate, adequate, just and proportionate... commensurate with the nature and gravity of the crime and the manner in which the crime is done... motive for the crime, nature of the of the offence and all other attendant circumstances."

16. In R vs. Scott (2005) NSWCCA 152 Howie, Grove and Barr JJ stated: "There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender."

17. In a New Zealand decision, R vs. AEM (200) it was stated that: "... One of the main purposes of punishment...Is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment."

18. In R vs. Harrison (1997) 93 Crim R 314 it was stated: "Except in well- defined circumstances such as youth or mental incapacity of the offender...Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the Courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may who otherwise would be tempted by the prospect that only light punishment will be imposed."

19. Although this Court is alive to the legal position that section 137I of the *Criminal Procedure Code* is applicable to Plea Agreements, I find it strongly persuasive as to some of the key factors to consider when sentencing. It requires that a Court may invite the parties to address it on the issue of sentencing and in particular, receive considerations relevant to the evidence contemplated in section 216 thereof including the period spent in custody; the victim impact statement; the stage at which the Accused decided to enter into plea; the nature and amount of restitution or compensation agreed and a probation officer's report. The text thereof reads thus: "(1) Upon conviction, the Court may invite the parties to address it on the issue of sentencing in accordance with section 216. (2) In passing a sentence, the Court shall take into account— (a) the period during which the Accused person has been in custody; (b) a victim impact statement, if any, made in accordance with section 329C; (c) the stage in the proceedings at which the Accused person indicated his intention to enter into a plea agreement and the circumstances in which this indication was given; (d) the nature and amount of any restitution or compensation agreed to be made by the Accused person. (3) Where necessary and desirable, the Court may in passing a sentence, take into account a probation officer's report."

20. The period taken in custody is not a discretionary power of the Court to consider but rather a mandatory period to account for in sentencing. Section 333 of the *Criminal Procedure Code* provides that subject to the provisions of section 38 of the *Penal Code*, 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 the 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. The text of section 333 of the CPC aforesaid reads: "(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any

prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death. (2) 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."

21. In Vincent Sila Jona & 87 others vs. Kenya Prison Service & 2 others (2021) eKLR. it was held that the period spent in custody by an Accused person should be taken into account during the imposition of sentences, other than the sentence of death.

22. In the High Court decision in Muia Kivindyo vs. Republic (2019) eKLR, D.K. Kemei, J. held that the trial Court has an obligation to take into account the period of time spent in custody as part of the time served in sentencing. His Lordship rendered himself thus: "5. I have considered the submissions made before me in this appeal. The singular issue to be determined is whether the Court may make a downward review of the sentence by the trial Court. 6. Section 333(2) of the *Criminal Procedure Code* provides that: (2) Subject to the provisions of section 38 of the *Penal Code* 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. 7. It is therefore clear that the foregoing provision imposes an obligation on the trial Court to take into account the period an Accused has spent in remand in the determination of an appropriate sentence. Failure to comply with the foregoing provision renders the subsequent sentence a contravention of the law....10. The trial magistrate is vested with wide discretion which an appellate Court can only interfere with, if it occasioned a failure of justice, and justice will apply both ways to the victim and to the Accused. In the instant appeal a miscarriage of justice has occurred to the applicant since the period spent in custody was not factored and this warrant a need to interfere with the sentence, of 3 years. I find an illegality of principle when the learned magistrate sentenced the appellant to 3 years imprisonment instead of discounting one year spent in custody. As the maximum sentence for the offence is three years imprisonment the applicant ought to have been sentenced to two years imprisonment." Similarly, in Ahamad Abolfathi Mohammed & Another vs. Republic (2018) eKLR where the Court of Appeal held that: "The second is the failure by the Court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*. By dint of section 333(2) of the *Criminal Procedure Code*, the Court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial Court. With respect, there is no evidence that the Court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the Court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the *Criminal Procedure Code* was introduced in 2007 to give the Court power to include the period already spent in custody in the sentence that it metes out to the Accused person. We find that the first appellate Court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012." Also, in the Court of Appeal decision in Bethwel Wilson Kibor vs. Republic (2009) eKLR expressed itself as

follows: "By proviso to section 333(2) of *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

23. In regard to the degrees of offenders, first offenders are the most favourite children of the law and in that light, a lot of judicial ink has been shed in their favour. For instance, Madan, J. (as he then was), had occasion to give directions to subordinate Courts to the effect that where fine is an option, it should be given priority irrespective of an Accused person's earning capacity unless the circumstances of the case irresistibly preclude this mode of punishment. In Mita vs. R (1969) E.A., where Madan, J. (as he then was) stated that "Before passing sentence the learned Magistrate pointed out that the appellant was a first offender, [who] appeared sorry and repentant. He added that this was, however, a very violent and unattractive act, although the appellant may have been provoked by the attempt to expel her from the premises ...The learned Magistrate ended up by saying he did not think a fine would serve any purpose as the appellant appeared to be earning a lot of money ...With respect I think the learned Magistrate did not assign enough emphasis to the appellant's contrite condition and the fact that she was a first offender ...I am also of the opinion that the learned Magistrate misdirected himself when he said the act of biting a man's face is hardly justifiable. At no stage has the appellant tried to justify her act ...I think irrespective of an Accused person's earning capacity it is not wrong to impose a fine unless the circumstances of the case irresistibly preclude this mode of punishment which is not the case here... I think the interests of justice will be met if I set aside the sentence of imprisonment and substitute therefor a fine of Kshs.400/=; in default, two months' imprisonment."

24. The reasoning in Mita case (supra) was adopted by Mwera, J. (as he then was) in Annis Muhidin Nur, High Court at Nairobi, Criminal Appeal No. 98 of 2001 stated this policy in sheer simplicity as follows: "... unless circumstances obtain which irresistibly [impede] a trial Court from imposing a fine first where the law provides for a fine in default of a prison term, the option of a fine must be visited first. This is a sound and tested principle in the art of sentencing ..."

25. Talking about imposing stiffer fines (where circumstances call for it) in place of custodial sentences for first offenders, Makhandia, J. (as he then was) in Hamdi Hale Ahmed vs. Republic, Criminal Appeal No. 19 of 2007, citing in approval the principles laid in James vs. Reg. (1950) 10 EACA; Nilsson vs. Republic (1970) E.A. 599; and Wanjema vs. Republic (1971) EA 493, stated as follows: "I do not think ... that was good-enough reason to tilt [the learned Magistrate's] hand towards a custodial rather than a non-custodial sentence. The same result can be obtained by imposing stiffer fines. The record also [reveals] that the learned Magistrate did not even consider the appellant's mitigation and the fact that he was a first offender. The appellant having been a first offender, a foreigner and considering our already over-stretched prison facilities, I would imagine that the most appropriate sentence would have been a fine and a repatriation order. Why should the Government be called upon to maintain a person in prison who is bound to be repatriated on completion of the prison [term]? Does it not make more sense that such a person be fined and repatriated forthwith, rather than the Government being called upon to spend the meagre resources on him in prison."

26. Following the reasoning by Makhandia, J. (as he then was), in Khali Abdiaziz Mohammud & 2 Others vs. Republic (2007) eKLR, J.B. Ojwang (as he then was), added his voice to the reasoning that first

offenders should not be disproportionally punished by saying as follows: “It is clear too from other High Court decisions, as I have noted from the judgment of Makhandia, J aforesaid, that there is now a trenchant body of jurisprudence on sentencing, which carries a policy discouraging overkill in the imposition of prison terms, where the outcome of a prison term, far from inuring to the benefit of Kenya and Kenyans, merely dispenses vengeful penalty against aliens. Rather than teaching-a-lesson to an alien who will in any event depart, the policy of the law should be no more than to discourage a repeat of the offence; and the positive element in this policy will be advanced by allowing the alien to return to his own country with the good-will to be law-abiding there, among his compatriots.”

27. In Joseph Simiyu Mukwei vs. Republic (2017) eKLR, S. Githinji, J. added his voice too. His Lordship reasoned that where an offence has an option of a fine and the offender is a first offender, then it is prudent and fair to consider fine as the first option and further argued that since fine counts a revenue to the state, it should be born in mind that when one is imprisoned in circumstances where the prisons are congested, it a custodial sentence is a burden to the state and the tax payer. His Lordship stated that “On the sentence, there could be an issue. The circumstances under which the offence was committed, the nature of injuries sustained by the complainant and appellant's Mitigation, should at least have been weighed to give him a fine option. Given that our prisons are congested, custodial sentence is a burden to the state and the tax payer, where an offence is fineable, and the convict is a first offender, and there are no other aggravating circumstances, it’s always prudent and fair to consider fine as an option. Fine when paid is an income, while jail sentence is an expense to the state...”

28. Imprisonment should be meted out in only cases where it is absolutely necessary to do so on basis of sound and legitimate penological grounds which include punishment, deterrence, public protection and rehabilitation. In determining the Francis Karioki Muruatetu case (supra), the Supreme was guided by the reasoning in inter alia the decision in Vinter and others vs. the United Kingdom (Applications nos. 66069/09, 130/10 and 3896/10) in which the Court held that: “111. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognised by the Court of Appeal in Bieber and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated. 112. Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in Wellington – a poor guarantee of just and proportionate punishment.”

29. And what are the factors to consider in determining the appropriate custodial sentence? In Benson Ochieng & Another vs. Republic (2018) eKLR, J. Ngugi, J. laid down the following guideline: “Re-phrasing the Sentencing Guidelines, there are four sets of factors a Court looks at in determining the appropriate custodial sentence after determining the correct entry point (which, as stated above, I have determined to be fifteen years imprisonment). These are the following: a. Circumstances Surrounding the Commission of the Offence: The factors here include: i. Was the Offender armed? The more dangerous the weapon, the higher the culpability and hence the higher the sentence. ii. Was the offender armed with a gun? iii. Was the gun an assault weapon such as AK47? iv. Did the offender use

excessive, flagrant or gratuitous force? v. Was the offender part of an organized gang? vi. Were there multiple victims? vii. Did the offender repeatedly assault or attack the same victim? b. Circumstances Surrounding the Offender: The factors here include the following: i. The criminal history of the offender: being a first offender is a mitigating factor; ii. The remorse of the Applicant as expressed at the time of conviction; iii. The remorse of the Applicant presently; iv. Demonstrable evidence that the Applicant has reformed while in prison; v. Demonstrable capacity for rehabilitation; vi. Potential for re-integration with the community; vii. The personal situation of the Offender including the Applicant's family situation; health; disability; or mental illness or impaired function of the mind. c. Circumstances Surrounding the Victim: The factors to be considered here include: i. The impact of the offence on the victims (if known or knowable); ii. Whether the victim got injured, and if so the extent of the injury; iii. Whether there were serious psychological effects on the victim; iv. The views of the victim(s) regarding the appropriate sentence; v. Whether the victim was a member of a vulnerable group such as children; women; Persons with disabilities; or the elderly; vi. Whether the victim was targeted because of the special public service they offer or their position in the public service; and vii. Whether there been commitment on the part of the offender (Applicant) to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime."

Part III: Principles which Govern Sentencing Upon a Plea Agreement

30. Only after a person has been charged and before Judgment is rendered, a prosecutor and an Accused person or his representative may negotiate and enter into a written agreement regarding either reduction of a charge to a lesser included offence or withdrawal of the charge or a stay of other charges or the promise not to proceed with other possible charges. Section 137A of the *Criminal Procedure Code* (CPC) provides that "(1) Subject to section 137B, a prosecutor and an Accused person or his representative may negotiate and enter into an agreement in respect of— (a) reduction of a charge to a lesser included offence; (b) withdrawal of the charge or a stay of other charges or the promise not to proceed with other possible charges. (2) A plea agreement entered into under subsection (1)(a) or (b) may provide for the payment by an Accused person of any restitution or compensation. (3) A plea agreement under subsection (1) shall be entered into only after an Accused person has been charged, or at anytime before judgement. (4) Where a prosecution is undertaken privately no plea agreement shall be concluded without the written consent of the Director of Public Prosecutions."

31. Before sentencing the Accused following a Plea Agreement, the Court may invite the parties to submit on the appropriate sentence and in that regard, the period the Accused person has been in custody, a victim impact statement, circumstances of the offence, the nature and amount of any restitution or compensation agreed, if any, and a probation officer's report, if any, shall be taken into consideration. Section 137I of the CPC provides that "(1) Upon conviction, the Court may invite the parties to address it on the issue of sentencing in accordance with section 216. (2) In passing a sentence, the Court shall take into account— (a) the period during which the Accused person has been in custody; (b) a victim impact statement, if any, made in accordance with section 329C; (c) the stage in the proceedings at which the Accused person indicated his intention to enter into a plea agreement and the circumstances in which this indication was given; (d) the nature and amount of any restitution or compensation agreed to be made by the Accused person. (3) Where necessary and desirable, the Court may in passing a sentence, take into account a probation officer's report."

32. Adoption of a Plea Agreement by the Court is deemed a Judgment of the Court and it saves judicial time since the rigour of hearing witnesses and writing a Judgment is avoided. What then follows after the Judgment is a sentence. That explains why this covers both the said Judgment by plea agreement and a sentence. Just like in the civil process where such judgments are deemed final and not amenable to appeal, unless set aside on account of a factor which is capable of vitiating a contract, in the criminal

process too, such judgments are final with the exception of severity or legality of the sentence. Section 137L of the *Criminal Procedure Code* (hereinafter "the CPC") provides for finality of such judgements as follows: "(1) Subject to subsection (2), the sentence passed by a Court under this Part shall be final and no appeal shall lie therefrom except as to the extent or legality of the sentence imposed. (2) Notwithstanding subsection (1), the Director of Public Prosecutions, in the public interest and the orderly administration of justice, or the Accused person, may apply to the Court which passed the sentence to have the conviction and sentence procured pursuant to a plea agreement set aside on the grounds of fraud or misrepresentation. (3) Where a conviction or sentence has been set aside, under subsection (2), the provisions of section 137J shall apply mutatis mutandis." See Omini & another vs. Republic (Criminal Appeal E140 of 2023) [2023] KEHC 22684 (KLR) (Crim) (22 September 2023) (Judgment).

33. Granted that the spirit of a plea agreement is either to achieve reduction of a charge to a lesser or withdrawal of the charge or achieve a stay of other charges or secure a promise not to proceed with other possible charges, and not certainly to clip the sentencing discretionary power of the Court, even in sentences upon a plea agreement, the Court exercises the same discretionary power similar to the power exercised in other sentencing instances. However, the reconciliatory tone struck by the agreement should weigh heavily on that discretion. See section 137I of the CPC as construed in Republic vs. Emmanuel Cheruiyot Rotich [2022] eKLR; Republic vs. Isaac Wanjala Murumba [2021] eKLR; Republic vs. Njaramba (Criminal Case 9 of 2019) [2021] KEHC 445 (KLR) (10 December 2021) (Ruling), et alia.

Part IV: Determination of the Appropriate Sentence to Mete Out to the Accused, Upon the Plea Agreement

34. In determining the appropriate sentence to mete out to the Accused, this Court has addressed its mind to the *Constitution*; the CPC and in particular section 137I read with section 216 of the CPC; ACECA; the *Penal Code*; the broad principles applicable to sentencing generally (afore-discussed); the principles which govern sentencing upon a plea agreement (also afore-discussed); the Sentencing Policy Guidelines, 2023 (which policy is intended to promote transparency, consistency and fairness in sentencing as enunciated in Michael Kathewa Laichena & another vs. Republic (2018) eKLR); the submissions of the appropriate sentence as advanced by learned Counsel Ms. Akinyi representing the Accused and learned Prosecution Counsel Mr. Ogallo representing the state; the appropriate sentence proposed by the DPP in the said plea agreement namely a non-custodial sentence; and the sentence desired by the Accused in the said plea agreement namely a non-custodial sentence.

35. In particular, this Court has considered the mitigating factors prevailing in favour of the Accused which include: (i) under section 137I of the CPC, the remorse expressed by the Accused; (ii) the fact that the Accused is deemed a first-time offender; and (iii) the fact that the Accused admitted all the seven offences (although three were withdrawn) and entered in the said plea agreement which paints a picture of a deeply remorseful offender.

36. This Court has also considered the aggravating factors prevailing against the Accused under section 137I of the CPC, seriousness of the offences and their negative implication on public good.

37. Besides, this Court has addressed its mind to other factors as follows: (i) the maximum sentence for the offences; (ii) the recommendations recorded in paragraph *18* for a non-custodial sentence; and (iii) the fact that no public property was obtained by the Accused fraudulently in form of salaries and allowances on basis of the offences.

38. Now therefore, having carefully considered the purpose of sentencing in the context of the mitigating factors which now outweigh the aggravating factors; and there having been no previous criminal records against the Accused considered in the context that first offenders are the most favourite children of the law; and having addressed my judicial mind to the deep remorse signified through the decision to enter into a plea agreement; and having further paid due regard to the *Constitution*; the CPC and in particular, section 137I read with section 216 of the CPC; ACECA; the *Penal Code*; the broad principles applicable to sentencing generally (afore-discussed); the principles which govern sentencing upon a plea agreement (also afore-discussed); the Sentencing Policy Guidelines, 2023; the submissions of the appropriate sentence as advanced by the Accused and the state; the appropriate sentence proposed by the DPP in the said plea agreement namely a non-custodial sentence; and the sentence desired by the Accused in the said plea agreement namely a non-custodial sentence, all considered in the context of the principle that imprisonment should be meted out only in cases where it is absolutely necessary to do so on basis of legitimate penological grounds which include punishment, deterrence, public protection and rehabilitation, this Court concurs with the recommendation recorded in paragraph 18 of the Plea Agreement for a non-custodial sentence.

39. Having considered the sentence recommended under paragraph 18 of the Plea Agreement, this Court finds it proportional, appropriate, adequate, deterrent and stiff enough to best serve the overall purpose of sentencing namely retribution, deterrence, rehabilitation, restorative justice, community protection, denunciation and promotion of a sense of responsibility. Consequently, this Court finds no reason to depart from the recommended sentence.

40. Reasons wherefore, the Accused is sentenced as follows:

    a. Under Count I, the Accused is sentenced to pay a fine of Kshs. 70,000, the default of which the Accused shall serve a term of imprisonment of twelve (12) months.

    b. Under Count III, the Accused is sentenced to pay a fine of Kshs. 50,000, the default of which the Accused shall serve a term of imprisonment of twelve (12) months.

    c. Under Count V, the Accused is sentenced to pay a fine of Kshs. 50,000, the default of which the Accused shall serve a term of imprisonment of twelve (12) months.

    d. Under Count VII, the Accused is sentenced to pay a fine of Kshs. 50,000, the default of which the Accused shall serve a term of imprisonment of twelve (12) months.

41. The cash bail deposited in Court may be utilized to pay the fine.

42. This Court informs the Accused that both the Judgment entered upon a Plea Agreement and the attendant Sentence upon Plea Agreement are final and not amenable to appeal, except on basis of the extent or legality of the sentence, for which limited grounds the Accused has fourteen (14) days within which to exercise his right to appeal. See section 137L (1) of the CPC, read with section 349 of the CPC.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MILIMANI ANTI-CORRUPTION COURT THIS 26TH DAY OF MAY, 2025

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C.N. ONDIEKI

PRINCIPAL MAGISTRATE

In the presence of:

The Accused (appearing pro se)

Prosecution Counsel: Mr. Ogallo

Ms. Makori watching brief for EACC

Court Assistant: Ms. Mutave