



**Simiyu v Republic (Miscellaneous Criminal Application E072 of 2025)
[2025] KEHC 15918 (KLR) (24 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS CRIMINAL APPLICATION E072 OF 2025
MS SHARIFF, J
OCTOBER 24, 2025**

BETWEEN

ALBERT KAKAI SIMIYU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant herein, Albert Kakai Simiyu, was charged, tried, convicted and sentenced in the Subordinate Court at Kimilili in Criminal case No.E331 of 2022 for two counts: grievous harm contrary to Section 234 of The Penal Code and malicious damage to property contrary to Section 330(1) of The Penal Code.
2. The particulars of the offences were that on 22nd May 2022 at Lukhuna Market in Bungoma North Sub-County within Bungoma County, jointly with two others in court and another not before the court, the applicant unlawfully did grievous harm to Elias Barasa and maliciously damaged property worth Kshs. belonging to Gladys Baraza.
3. Following a full trial before the Senior Principal Magistrate Hon. G. Adhiambo, the applicant was convicted and sentenced to 18 months imprisonment for the offense of grievous harm, while his co-accused persons were acquitted of all charges. On the second count of malicious damage to property, both the applicant and his co-accused were acquitted after the prosecution failed to prove beyond reasonable doubt that they had maliciously damaged the complainant's property.
4. Being dissatisfied with both the conviction and sentence, the applicant lodged an appeal in Bungoma High Court Criminal Appeal No. E024 of 2023. The said appeal was heard and dismissed by the learned Judge D.Kemei on 22nd February 2024, who upheld the conviction but enhanced the sentence from 18 months to five (5) years imprisonment, to commence from the date of conviction; 9th March 2023.



Application

5. The applicant has now moved this court seeking consideration for noncustodial sentence under the provisions of Article 50(2)(q) of *akn ke act 2010 constitution The Constitution* of Kenya 2010 and Sections 4 & 5 of the *akn ke act 1943 29 Probation of Offenders Act* Cap 64 Laws of Kenya on the grounds that:
 - I. He is reformed and rehabilitated person who has learnt hard lessons while in custody;
 - II. He has participated in several rehabilitation programs during his time in prison;
 - III. He seeks to be granted a fair opportunity to serve the remaining term of sentence under non-custodial supervision;
 - IV. He is remorseful, repentant, and reformed.
6. This application is supported by an affidavit sworn by the applicant wherein he restates the grounds cited hereinabove and prays for appropriate relief.
7. This application is brought under Article 50(2)(q) of *akn ke act 2010 constitution The Constitution* of Kenya 2010 which provides that every accused person has the right to 't a sentence that is fair and not excessive, and to conditions of detention that are humane and take into account the special needs of persons." The application also relies on Sections 4 and 5 of the *akn ke act 1943 29 Probation of Offenders Act* Cap 64 Laws of Kenya.

Section 4 of the *akn ke act 1943 29 Probation of Offenders Act* provides:

" (1) Where a person is charged with an offence which is triable by a subordinate court and the court thinks that the charge is proved but is of the opinion that, having regard to youth, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, expedient to release the offender on probation, the court may—

- (a) convict the offender and make a probation order; or
- (b) without proceeding to conviction, make a probation order, and in either case may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.

- (2) Where any person is convicted of an offence by the High Court and the court is of the opinion that, having regard to the youth, character, antecedents, home surroundings. health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which, the offence was committed, it is expedient to release the offender on probation, the court may, in lieu of sentencing him to any punishment, make a probation order, and may require the offender to enter into a recognisance, with or without sureties, in such sum as the court may deem fit. "

Section 5 further empowers the court to make probation orders even after conviction in appropriate circumstances.



Analysis

8. This is an application for non-custodial sentence under the *akn ke act 1943 29 Probation of Offenders Act* rather than a revision of conviction or sentence. The applicant seeks to serve the remaining portion of his sentence under probation supervision.
9. For a court to grant probation, it must be satisfied that the applicant has demonstrated genuine rehabilitation, remorse, and that probation would serve the interests of justice. The court must also consider the nature of the offence, the character of the offender, and public interest.
10. The applicant was convicted of grievous harm, a serious offence that resulted in significant injury to the victim. Such offences strike at the very fabric of society and warrant substantial custodial sentences to serve both punitive and deterrent purposes.
11. While the applicant claims to have participated in rehabilitation programs, mere participation does not automatically demonstrate genuine reform. The court requires compelling evidence of character transformation that goes beyond self-serving declarations of remorse.
12. The court must also consider the broader public interest in maintaining confidence in the criminal justice system. Premature release through probation for serious violent offences may undermine the deterrent effect of custodial sentences and send the wrong message to potential offenders.
13. Having served approximately two years of a five-year sentence, the applicant has not yet served a substantial portion that would justify early release. The enhanced sentence imposed after careful consideration by the appellate court, after reflecting on the gravity of the offence and the need for adequate punishment.

Conclusion

14. Premised upon the reasons disclosed hereinabove, I find that this application devoid of merit. The applicant has failed to establish compelling grounds that would justify the grant of probation at this stage of his sentence.
15. Accordingly, I hereby dismiss this application in its entirety.
16. This file is hereby marked as closed.

DATED and DELIVERED AT BUNGOMA THIS 24TH DAY OF OCTOBER, 2025.

M.S. SHARIFF

JUDGE

