

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CRIMINAL REVISION NO. E552 OF 2024**

**JOHN KARIUKI NDEGWA.....APPLICANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**RULING**

1. By undated Notice of Motion filed on 27<sup>th</sup> January, 2025 and brought pursuant to Articles 22 (1), 23, 25(c), 27, 28, 50(2)(p), 159, 160 and 165 of the Constitution, section 4 of the Probation of Offenders Act, paragraph 2.5.1 of the revised sentencing policy guidelines, 2023, seeking for Orders;-
  - 1) *Spent.*
  - 2) *The court be pleased to order that the Applicant serve the remaining period of his sentence which is set to expire on 28.02.2027 (approximately a balance of 2 years 2 months) under probation.*
  - 3) *Any other Order which the court deems fit in the interest of justice.*
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of the Applicant sworn on 17<sup>th</sup> December, 2024. He states that Paragraph 2.5.1 of the revised sentencing policy guidelines (2023) advocates for the court's consideration of non-custodial sentences.
3. On that basis, he argues that he was convicted and sentenced to four years imprisonment for handling stolen goods under Section 322 (1) and (2) of the Penal Code in Criminal Case No. E799 of 2020 by the Chief Magistrate's Court in Nakuru. He confirms that he has never lodged an appeal against the trial court's decision and has no intention of doing so.
4. The Applicant asserts that Section 4 of the Probation of Offenders Act is relevant to his case and he is willing to comply with the provisions of any probation order imposed by the court. Further that he understands that a new offense during the probation term would result in his return to custody to complete the original sentence.

5. He states that he was a first-time offender with no prior criminal history or propensity for committing crimes. The Applicant maintains that the court has sufficient jurisdiction to handle this application pursuant to Article 165 of the Constitution.
6. In the supporting Affidavit, the Applicant reiterates his request to serve the balance of his custodial sentence, which is about 2 years and 2 months, under probation. His affidavit also cites Paragraph 4.8.14 of the revised sentencing policy guidelines (2023) as advocating for non-custodial sentences.
7. The Director of Public Prosecutions, through James Kihara, a Prosecution Counsel, has filed a Replying Affidavit sworn on 1<sup>st</sup> April, 2025 opposing the application. He confirms the Applicant's conviction and four-year sentence for handling stolen property in Criminal Case No. E799 of 2020.
8. He notes that the Applicant seeks to have the remainder of his four-year sentence commuted to a probation sentence, with approximately two years and two months remaining.
9. He however, disputes the reliance on paragraph 2.5.1 of the revised sentencing policy guidelines (2023) and argues that a probation report cannot assist the Applicant. He contends that the court cannot interfere with a sentence imposed by a judicial officer unless irregularity or illegality is shown, asserting that the matter is *res judicata*.
10. He further argues that the application for review is equivalent to seeking a pardon and is an abuse of the court process lacking merit, thus praying for its dismissal.

### **Analysis and determination**

11. Paragraph 2.3.15 of the Updated Sentencing Policy Guidelines, 2023, provides that in determining whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -

- a) **Gravity of the offence:** - sentence of imprisonment should be avoided for misdemeanour.
- b) **Criminal history of the offender.** Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.
- c) **Children in conflict with the law:** Non-custodial orders should be imposed as a matter of course in the case of children in conflict with the law except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied that a custodial order is the most appropriate and would be in the child's best interest. Custodial orders should only be meted out as a measure of last resort.
- d) **Character of the offender:** - non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
- e) **Protection of the community:** - where the offender is likely to pose a threat to the community.
- f) **Offender's responsibility to third parties:** - where there are people depending on the offender.

12. The Applicant herein is seeking for his custodial sentence to be converted to probation, basing his argument on paragraph 2.5.1 of the updated Sentencing Policy Guidelines. Paragraph 2.5.2, provides that ;-

*“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.”*

13. Paragraph 2.5.3, on the other hand provides that 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.
14. In this case, the senior Probation Officer at Nakuru, Kirugi Michael, prepared and filed a probation report dated 21<sup>st</sup> October, 2024 in respect to the Applicant herein. In his report, the Probation Officer stated that John Kariuki Ndegwa, a 27-year-old inmate is married with a four-year-old child. That he is a first-time offender who demonstrates profound remorse for his actions. That despite a challenging background, having scored a C- in KCSE and working as a boda boda rider to support his family, he has shown a willingness to reform.
15. The Probation Officer stated that the stolen phone was recovered and that the complainant has not only forgiven him but explicitly stated he believed that John Kariuki Ndegwa was suitable for a non-custodial sentence, acknowledging that he was merely implicated and found not guilty of the robbery with violence itself.
16. The Report further stated that his family and the community, through the local administration, attested to his industrious nature and good character in the past, urging the court to treat him as a first offender.
17. The Probation officer proposed a probation sentence for one year arguing that it would provide him with crucial counselling and supervision to address any trauma, offering him a vital second chance to build a productive life and continue supporting his young family, rather than disrupting it further through incarceration.
18. This Court has considered the above report , the circumstances of the offence, that he is a first offender, his young age and that the stolen phone was recovered. It is noted that while his two co accused were convicted and sentenced to life imprisonment for the offence of robbery with violence contrary to section 296 (2) of the Penal Code , the Applicant herein was

found guilty and convicted for the offence of handling stolen goods contrary to section 332 (2) of the Penal Code.

19. Also put into consideration is that the complainant has forgiven him. The community is ready to integrate him back to the society.

20. These circumstances are favourable for review of the sentence to the extent that the Applicant was sentenced on 28<sup>th</sup> October 2024. Accordingly, the Applicant is placed on a probation sentence of one (1) year under supervision of the Probation Officer.

**Dated, signed and delivered at Nakuru this 11<sup>th</sup> Day of November y , 2025.**

**PATRICIA GICHOHI**  
**JUDGE**

**In the presence of:**

**Mr. Kihara for Respondent.**

**John Kariuki - Applicant**

**Kamau - Court Assistant**