

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL REVISION NO. E146 OF 2025**

**ABRAHAM KIPKETER KIBIWOTT .....**  
**APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**Coram: Before Justice R. Nyakundi**  
**M/s Sidi for the State**

**RULING**

1. The Applicant was charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code. The brief particulars are that on the 8<sup>th</sup> day of April 2025 at Legebet location in Soy Sub County within Uasin Gishu County assaulted Paulina Jemaiyo Biwott thereby occasioning her actual bodily harm.
2. The Applicant pleaded guilty, was convicted and sentenced to serve 3 years' imprisonment on 5<sup>th</sup> May 2025.
3. As a consequence of that the Probation Officer filed a presentence review report which had the following components:

***Introduction and sources of information***

*This is a sentence review report is in respect of Abraham Kipketer Biwott who is serving three-year imprisonment for the offence of Assault causing actual bodily harm. In coming up with the report, we perused relevant court file, Police file, interviewed the inmate, prison authority, his family members (Brother Simeon and sister Naomi), his church pastor Romana Yego, area administrators (Assistant chief and village elder).*

***Current family and personal history***

***Family Background.***

*The inmate was born to Christopher Chemai Biwott and Pauline Chemaiyo who are both alive but separated in his early years of life. His father started another family in Aldai, Nandi County*

*while his mother acquired a parcel of land and established a homestead at Tartar area of Soy subcounty where the offender resided from.*

*He is the sixth born in a family of seven children brought forth by his mother. The criminal history is only linked to the accused person who is said to be the black sheep of the family. His mother reported that he has settled him on 0.4 acre which is part of her acquired 1.2-acre homestaed.*

*His two siblings Simeon and Naomi when contacted held that the inmate had a history of violence directed at his own family. He assaulted a neighbor and his brother before, eventually assaulting his 84-year-old mother leading to this matter. They still believe that his release will put their mother who has threatened to quit her home at risk. That the inmate confiscated their mother's land title deed which has become the greatest impediment to possible reconciliation. It is our finding that the family maintains their earlier stand. They are vehemently opposed to his early release.*

### **Personal history**

*Abraham was born at Aldai in Nandi County. His parents separated during his early childhood years. He left with his mother who raised him as a single parent at Tartar Village Soy Subcounty. He has primary level of education but never joined high school. He acquired shoe-making and carpentry skills through apprenticeship and practiced the trade as a local cobbler and carpenter. He reported a history of a series of marriage union coupled with numerous separations and at the time of his arraignment, he was single with no children. His family members attributed his current marital status to aggression leading to domestic violence. His family submitted that he has previous conviction having served jail term for assaulting a neighbor. Although he denies drinking alcohol or ever abusing any form of intoxicating substances, the area*

*assistant chief linked him to history of drug addiction. During our interview, he complained of stomach discomfort.*

### **Prison assessment rehabilitation and re-integration**

*Prison authorities submitted that the inmate has not had cases of indiscipline although he exhibits restlessness and lack of composure. He was yet to undergo any skills training. At the prison facility, he subscribed to Seventh Day Adventist Church for spiritual wellness.*

*It is our finding that his family members are still opposed to his early release hence no arrangements are in place to ensure smooth re-entry, resettlement and reintegration in the family.*

### **Offenders' attitude towards non-custodial sentence**

*The inmate is receptive to community-based court sanction and he is willing to submit to community service orders. He has promised to co-exist peacefully with his family.*

### **Conclusion**

*Your Lordship, the inmate before court was subjected to earlier sentence review which was declined by the court. Our inquiry established that he has a reported history of violence directed towards his own family and others, with the latest victim being his 84-year-old mother. He is perceived to harbor a sense of entitlement to his mother's property, often at the expense of his siblings which has significantly strained familial relations. He is described as antagonistic and occasionally chaotic.*

*Our latest home inquiry indicates that the family is still opposed to reunion. His mother (the victim in the matter) is still bitter threatening to quit her home in the event he is immediately released. It is our finding that his poor relationship with the mother was further aggravated by his resolve to confiscate her land title deed which he doesn't deny. The family is thus infuriated by his high-handedness and maintain that as long as he still holds on to the said title deed, he is not welcome*

*back home. This in our view is a clear demonstration unresolved differences and prevailing hostility with his family. Local administrators have also voiced concerns citing the absence of adequate safeguards to ensure the victim's safety should the inmate be released. They believe that in the current circumstances, his continued incarceration will guarantee parties their safety. They propose comprehensive home environmental adjustment before the inmate may be considered for reunion with his family.*

### **Recommendation**

*My Lord, the aforementioned indicates that although the inmate has promised to co-exist peacefully with his family and ready to submit to community interventions, his home environment remains unreceptive. His family members including the victim who is his biological mother, are still opposed to his early release. Therefore, we find the inmate in the matter not suitable for early release and respectfully recommend his continued period of institutional rehabilitation.*

### **Decision**

4. This application has been considered under Art 50(2)(p)(q), 6(a)(b) as read with Section 362 & 364 of the Criminal Procedure Code.
5. The guiding principles on review of sentence post-conviction is well articulated by the Court of Appeal in **Bernard Gacheru Vs Republic [2002] eKLR** the Court held that:

*“It is now settled law, following several authorities by this Court and by the high Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate Court will not easily interfere with sentence unless, the sentence is manifestly excessive in the circumstances of the case, or that the trial Court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court might itself not have passed that sentence, these alone are not sufficient*

*grounds for interfering with the discretion of the trial Court on sentence unless, anyone of the matters already states is shown to exist."*

6. This was also the position taken by the Court in **S vs. Malgas 2001 (1) SACR 469 (SCA)** held that:

*"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial Court, approach the question of sentence as if it were the trial Court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial Court...However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial Court. It may do so when the disparity between the sentence of the trial Court and the sentence which the appellate Court would have imposed had it been the trial Court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"*

7. The doctrine of proportionality in sentencing is one of the fundamental aspect which actually must define the trial Courts discretion in imposing a fair and appropriate sentence. The Court in **Tarry Vs Pryce (1987) 24 A Crim R 394, 402** had this to say:

*Although the discretionary aspect of sentencing is of great importance, there is to my mind no doubt that there is scope for a more scientific approach. A lack of consistency between sentencers dealing with run-of-the-mill cases cannot be supported by reliance on the discretionary power to sentence. The need for consistency in the punishment in like cases of like persons overrides the right of the sentencers to impose his idiosyncratic view.*

8. The role of non-custodial sentence should underpin our penal system in which custodial sentence remains a recourse of last resort in punishing offenders. The sentence policy guidelines of the judiciary 2023 provides a framework in which Judicial discretion should be exercised

to arrive at a fair and proportionate sentence on individualized circumstances. The objectives and principles of sentencing are well articulated and defined as follows:

- (a) **Retribution:** *to punish the offender for his/her criminal conduct in a just manner.*
- (b) **Deterrence:** *to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.*
- (c) **Rehabilitation:** *to enable the offender reform from his/her criminal disposition and become a law-abiding person.*
- (d) **Restorative justice:** *to address the needs arising from the criminal conduct such as loss and damages.*
- (e) **Community protection:** *to protect the community by incapacitating the offender.*
- (f) **Denunciation:** *to communicate the community's condemnation of the criminal conduct.*
- (g) **Reconciliation:** *To mend the relationship between the offender, the victim and the community.*
- (h) **Reintegration:** *To facilitate the re-entry of the offender into the society.*

9. Sentencing is a discretionary process mainly exercised by trial courts who have the advantage to appreciate the circumstances of the offence and how it applies to the sentencing objectives and principles within the regulatory framework of our sentencing policy guideline 2023. This court is being asked to review the custodial sentence and have it substituted with non-custodial sentence. As I appreciate the record and the impugned decision on sentence I bear in mind that this is one area of law which involves the weighing of many complex factors, it will always be possible to point to some factors which should arguably have been taken into account or left out of account; even if they should have been, the court should not intervene unless it is

convinced that this would have resulted in the decision going the other way.

10. One of the most fundamentals of sentencing is proportionality meaning that elements on the gravity of the offence and moral blameworthiness of the offender carries more weight in a trial court figuring out the final verdict to be imposed. The more serious the crime and its consequences the heavier the sentence would be meted out. The doctrine of proportionality in sentencing demands that punishment or sanctions so passed speaks out loudly against the offence and the conduct of the accused person. The court in **R v Morrisette, 1970 CanLII 642, 1 CCC (2d) 307 at Para 10 (Sask CA); R v BO2, 2010 NLCA 19 at para 51** held as follows:

*In my view, the public can be best be protected by the imposition of sentences that punish the offender for the offence committed, that may deter him and others from committing such an offence and that may assist in his reformation and rehabilitation. If the offender is one for whom reformation is beyond question, then the public can be protected only by depriving him if his freedom. In the case of other offenders, and particularly young offenders, the principal element or consideration, consonant with the maintenance of public confidence in the effective enforcement of the criminal law, should be the offenders' reformation and rehabilitation.*

11. The applicant in this case through this application on review of sentence is inviting the court to depart from the objective of general deterrence to rehabilitation while serving on non-custodial sentence as recommended by the probation officer. I consider one of the key objectives to be met for a court to review the custodial sentence and have it substituted with a community service order or probation order is to achieve restorative justice approaches to sentencing. In my considered view it does remedy adverse effects of crime in a manner that addresses the needs of all parties involved in the criminal dispute. Hence restorative justice accomplishes rehabilitation of the offender, reparation to the victim and the community which in turn promotes a

sense of responsibility to the offender to acknowledge the harm done to the victims of the offence. My reading of the probation officer report the applicant has not demonstrated regret or remorse for the offence. The victims described in the charge sheet and who gave evidence on oath have not filed a victim impact statement pursuant to Art 50(9) of the constitution as read with section 3, 4 (2) & 9 of the victim Protection Act No. 17 of 2014. The court in **R Vs Mahoney, 2018 NLCA 16** on this very same subject under consideration held that:

*Retribution is not the same as vengeance. Vengeance “has no role to play in a civilized system of sentencing.” It represents an uncelebrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender’s conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.*

12. In the context of this file and the recommendations by the probation officer one wonders how the inmate is very remorseful and pleads for forgiveness when no effort has been undertaken to seek restoration or victim offender mediation with the victims of the offence and the community who may be offended by his wrong doing. What would be the implication of a model such as this which has not incorporated the contribution of the victims of the offence in the early release of the offender. It seems to me that as a justice system would have created a chaotic crucible that will turn the experience of imprisonment into what might be described as a penal control frolic. I say this because the decongestion exercise is more of reducing prison population than about priorities and context of rehabilitation and reintegration of the

offenders to the communities. The purpose of conditional release of probation or community service order is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law abiding citizens.

13. The inference one draws from the facts of this case and the information provided by the probation officer weighed together with other components of the criminal justice systems on sentencing there exist no compelling or substantial circumstances in favor of the applicant to justify a lesser sentence. As a final note the probation officer report failed to pay attention to a broader conception of the victim rights and protection of the community who happen to be the main actors in the rehabilitation and community supervision of the applicant while on release to non-custodial sentence. The application for an early release of the applicant is therefore declined for want of merit. It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 26<sup>TH</sup> DAY  
OF NOVEMBER, 2025**

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**R. NYAKUNDI  
JUDGE**