

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION NO. E315 OF 2025

EMMANUEL KIPKURUI
APPLICANT

=VERSUS=

REPUBLIC
RESPONDENT

Coram: Hon. Justice R. Nyakundi

MS Sidi for State

RULING

1. The Applicant was charged with malicious damage to property contrary to Section 339(1) of the Penal Code. The brief facts of the particulars of the offence are that on the 3rd day of January 2025 at Sosiot area in Kapseret sub county within Uasin Gishu county you willfully and unlawfully destroyed one semi-permanent house valued at Ksh 35,000/=, cupboard, chairs and other assorted households all valued at Ksh 50,000/= the property of Simon Chepkok.
2. Count II: Threatening to kill contrary to Section 223(1) of the Penal Code. On the 3rd day of January 2025 at Sosiot area in Kapseret Sub-County within Uasin Gishu County without lawful excuse uttered the words 'Leo lazima mtu akufe' while armed with a panga to Simon Chepkok words that threatened the life of Simon Chepkok.
3. The Applicant was convicted and sentenced to serve 2 years imprisonment on 27th February 2025.
4. The Applicant has approached this Court vide an application for review of sentence under Section 362 as read with Section 364 of the CPC.

DECISION

5. The Superior Courts have delved into the issue of sentencing which is one of the core functions of trial Courts within our Criminal justice system. In the **Fatuma Hassan Salo v Republic [2006] eKLR** Makhandia J as he then was remarked; *Thus, the court should be guided by evidence and sound legal principles when it comes to the arrival of its decision. He also stated that the court should put into consideration all the relevant factors and exclude the irrelevant factors.* In addition, the Court in **Peter M. Kariuki v Attorney General, [2016] eKLR** also made the following observations; *That a Court has been granted discretion in a manner that is both judicial and reasonable – not upon caprice or personal opinion. This has been emphasized in the judgments of other cases to be useful to the appeal court when analyzing the judgment of a Lower Court.*
6. The Sentencing Guidelines of 2023 provide a foundation and a reference point for Judges and Magistrates in exercising discretion. The Policy Guidelines provides for a three-step approach that is to be applied by a trial Court in individualizing specific sentences befitting specific offences.
 - (a) **Sentencing options** – *The Court is meant to consider the sentencing options that are provided for by the statute where the crime falls under. This means a reference to the statute that provides for the crime in question.*
 - (b) **Custodial v non-custodial** – *For the statutes that provide for both custodial and non-custodial options, the guidelines give principles that are to be considered in analyzing which of these two orders would be the most appropriate.*
 - (c) *The third step is twofold, the choice that is to be considered depends on which option was made in step 3.*

- (i) For a **non-custodial sentence**, the guidelines have also provided a policy through which the Courts discretion is to be applied in choosing the most appropriate non-custodial sentence and eventually mitigation and aggravating circumstances are expected to be put into consideration
- (ii) For **imprisonment**, the same applies, that the guidelines have provided for a policy to be used in determining how long the term of imprisonment should be after the consideration of aggravating and mitigating circumstances.

7. A proper recrafted legal framework is needed to meet the challenging task of appropriate sentencing given the disparities on the various sanctions of what one considers to be the same offence with the prescribed sentence by the Legislature.

8. Having been in this space as a legal professional involved in adjudication of cases within the scope of criminal law, I am of the view that there is an urgent need to carefully study other theories or objectives of sentencing when it comes to punishment in order to determine which ones are acceptable as justifications for punishing the various wrongdoers in specific offences. It serves no purpose to put emphasis on deterrence and abandon the rehabilitative principle or objective if it is thoughtlessly just replaced without very clear guidelines or reasons. There are those who maintain that every different punitive measure taken by the various Courts can be satisfied by a single sentencing scheme, but practically it is difficult to accomplish transformative justice on sentencing by placing emphasis on just one objective. The Courts in Kenya tend to hinge more towards deterrence of an offender than rehabilitation. The common philosophical justifications for the institutional punishments include the following:

- (a) **Retribution** – punishment is justified merely because the offender has committed a wrong.

- (b) **Deterrence** – punishment is justified in order to clear the offender from committing further crimes in the future and to deter other members of society in general.
 - (c) **Rehabilitation** – the offender needs to be rehabilitated so that he will behave in a socially acceptable manner.
 - (d) **Incapacitation** – justifies the incarceration of the offender for the protection of society.
 - (e) **Condemnation** – the infliction of punishment upon the guilty person is the symbolic condemnation by society of the individual.
9. The Maximum Prisons facilities in Kenya were designed to hold fewer people than they do at the moment. Apparently, the correctional facilities do not have adequate infrastructure to hold the additional population of inmates hence there is an urgent need to revisit the issue of sentencing regime in Kenya to avoid a catastrophe so that petty offenders should be a subject of non-custodial sentences. It is trite that under the rehabilitative theory judicial discretion has been quite broad, based on the idea that the punishment should fit the criminal and not the crime. Sentencing should be “individualized” depending upon such factors as the particular circumstances of the crime, the prisoner’s previous criminal record, and the chances that another crime will be committed. Consequently, the Judge or Magistrate must have a great deal of discretion in order to treat offenders on a more individual basis.
10. From the comparative jurisdiction the court in **Mokela vs The State (135/11) [2011] ZASCA 166** the court held that:
- “it is well-established the sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how when the sentence is to be served.”*

11. The question I asked myself is whether the 4 years sentence passed against the convict is disproportionate to the offence. In answering this question trial or appellate courts are bound by law and sentencing policy guidelines to consider the following non-exhaustive list of factors under the totality of the circumstances as they relate to the specific defendant, keeping in mind the evolving standards of decency that mark the progress of a maturing society:

- *Whether the severity of the punishment is so great as to shock the conscience of the court and society as to what is right and proper.*
- *The gravity of the underlying offence, including the defendant's conduct and criminal history, the circumstances surrounding the crime, and the harm to the victim and society.*
- *The punishment for the same or a substantially similar crime in other jurisdictions.*
- *What crimes generate similar punishments within this State, and the extent to which crimes of an equal or more serious nature carry less serious punishments.*

12. It is within these parameters and the legislative scheme prescription on sentencing together with the sentencing policy guidelines of the judiciary 2023, the unfettered discretion of courts shall be exercised to arrive at a fair, just and proportionate sentence. If the courts conclude, under the totality of the circumstances and the factors enumerated above, that a fundamental miscarriage of justice would result from enforcing the sentence, the court shall vacate the sentence and remand the case to the trial court for resentencing that comports with the constitution and the penal statute.

13. The court in **S v Holder 1979 (2) SA 70(A)** made the following observations: *that an appropriate sentence, in accordance with the demands of the times, should be strived for, that is a sentence which is based on a balanced consideration of the triad of factors (crime, criminal and society). An appropriate sentence should reflect the severity of the*

crime, while at the same time giving full consideration to all the mitigating and aggravating factors surrounding the person of the offender; in other words, the sentence should reflect the blameworthiness of the offender, or be in proportion to what is deserved by the offender. These two factors, the crime and the offender, are the first two elements of the triad emphasized in R vs Zinn.

14. From the record there is no error of fact or law or discovery of new compelling evidence to review the sentence imposed by the trial court. As a consequence of it therefore the motion for review of sentence is denied.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 3RD DAY OF
DECEMBER, 2025**

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**R. NYAKUNDI
JUDGE**