Cherotich v Republic (Criminal Application E398 of 2025)
[2025] KEHC 19116 (KLR) (22 December 2025) (Ruling)

Neutral citation: [2025] KEHC 19116 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPLICATION E398 OF 2025

RN NYAKUNDI, J

DECEMBER 22, 2025

BETWEEN

SARAH CHEROTICH ..... APPLICANT

AND

THE REPUBLIC ..... RESPONDENT

RULING

1. Before this Court is an Application dated 19th December 2025. The Applicant has moved this Court seeking the following Orders;

    a. This application be certified urgent.

    b. This Honourable Court be pleased to review, vary, or substitute the custodial sentence imposed upon the Applicant in SPM's Court Iten CR No. E1072/25.

    c. The sentence be converted to a non-custodial or community-based alternative, or any other compassionate arrangement deemed just and appropriate by the Court.

    d. The Court grants any further or other orders as may be just and equitable under the circumstances.

2. The Application is made on the following Grounds;

    i. The Applicant is a 70-year-old first-time offender, with no prior criminal record.

    ii. She is unmarried and bears responsibility for six children, aged 18–40 years.

    iii. The Applicant owns a small plot of land which she intends to cultivate for vegetable farming, evidencing a lawful and sustainable livelihood plan.

iv. She has reflected on her actions, expressed sincere remorse, and demonstrated willingness to reintegrate and support her family.

v. She hails from Sirgoit, Iten, demonstrating stable residence and strong community ties.

vi. The Applicant was sentenced to three (3) months' imprisonment and has served one (1) month.

vii. This Honourable Court has jurisdiction to entertain this Application pursuant to Section 354 of the Criminal Procedure Code, and Articles 22(1), 23(1), 159(2), 165(3)(a), (b) & (d), and 258(1) of *the Constitution* of Kenya.

3. The application is supported by the annexed Affidavit of Anne Murugi Munyua who deponed as follows:

a. I am the legal representative of the Applicant herein and competent to swear this Affidavit.

b. I have personal knowledge of the circumstances of the Applicant as reflected in the attached Annexure "A" – Summary of Mitigating Factors and Recommendations for Sentence Review.

c. The Applicant is a 70-year-old first-time offender, unmarried, and a mother of six children, aged 18–40 years.

d. She owns a small plot of land which she intends to use for vegetable farming, demonstrating a lawful means of livelihood.

e. She expresses deep remorse, has reflected on her conduct, and seeks to return to her children to provide care, guidance, and support.

f. She hails from Sirgoit, Iten, reflecting stable residence and strong community ties.

g. She was sentenced to three (3) months' imprisonment and has served one (1) month.

h. Continued incarceration at this stage imposes disproportionate hardship on her family, particularly her dependants.

i. I respectfully pray that this Honourable Court reviews her sentence, granting either immediate release or a compassionate, non-custodial alternative.

j. I make this Affidavit in good faith in the interests of justice, fairness, and humanitarian consideration.

k. The contents herein are true to the best of my knowledge, information, and belief.

Decision

4. This Court has been approached to review the custodial sentence imposed against the Applicant which sentence he is serving against a innocent child who is not even aware that she is in prison and have the sentence reviewed, varied and substituted with that of non-custodial C.S.O for a period of three (3) weeks.

5. The issued of sentencing and resentencing can be viewed from the lens of the law under Chapter 4 on the Bill of Rights, Article 27, Article 50 (2) (p) & (q), Article 165 (6) & (7) as read with Article 2 (5) & (6) of *the Constitution*. These provisions are to be read and interpreted purposefully with Section 362 and 364 of *the Constitution*. The law on review of sentence by Superior Courts from a decision

of a Subordinate Court is now well settled as reflected in the decision by Bernard Gacheru v Republic [2002] eKLR where 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. Similarly, the court in S vs Malgas 2001 (1) SACR 469 (SCA) made the following observation:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection 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 of 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. In the same strength, the Supreme Court of South Africa in Mokela vs The state (135)/11) ZASCA 166 the held as follows:

> " It is well-established that 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 or when the sentence is to be served."

8. The fundamental purpose of sentencing can be pursued by applying one or more of the following objectives as stated in the Judiciary Sentencing Policy Guidelines:DenunciationDeterrenceSeparationRehabilitationReparationOffender-victim-community restoration

9. The additional sentencing principles to be considered by Court whether the trial, appeal or review include:The principle that sentences should be increased or reduced in accordance with the existence of aggravating and mitigating circumstances.The principle of parityThe principle of totalityThe principle of imposing the least restrictive appropriate sanctionThe principle of restraint in the use of imprisonment, with particular attention to the circumstances of Aboriginal offenders.

10. In this application for review of sentence there is no actual manifest error on the face of the record but compassion and the place of mercy cannot be ignored alongside the other factors as stipulated in the Sentencing Policy Guidelines and overall circumstances like the age of the convict, the seriousness of the offence, the spirit of transformation of the convict within the community based rehabilitation environment. It is accepted that all sentences except mandatory ones can be mitigated. This means that the punishment which would normally be regarded as commensurate to the gravity of the crime can be alleviated by reference to factors personal to the offender or convict and his or her circumstances.

The actual sentence would ordinarily be less than the sentence deserved on the basis of the objective facts of the crime.

11. To this extent, in determining this issue on review of sentence one must look at the historical facts of the primary litigation in which an innocent child was also committed along his or her mother to serve with equal measure with the convict in an offence he or she knows nothing about. The constitutional imperative on the decision making on matters affecting children is no longer in doubt as crafted and fashioned in Article 53(1) of *the Constitution*. It asserts that the child's best interests are paramount in all matters concerning each one of them. *The Constitution* does not stop there is a yardstick on the decision making process by a Judge or Magistrate to construe and interpret the law within the parameters of Article 10 on principles of governance and national values. In addition, the Children's Act is very comprehensive and holistic in terms of Section 4 & 8 which echoes the doctrine of welfare on best interest of the child to be the primary consideration in any decision by a Judicial Officer, a Tribunal or Court. The codification of children Rights in *the Constitution* informs the legislation of the Children's Act and the ratification of international and regional instruments on the rights and welfare of the child. This involves the United Nations Convention on Children's rights and the African Charter on the rights and welfare of the child.

12. It is the law in Kenya within the Bill of Rights and Article 27 on equality before the law and freedom from non-discrimination that no children should serve custodial sentences for their mothers' crimes. The trial Courts in imposing sentences against breastfeeding, pregnant and mothers accompanied with children to their courtrooms should have prioritized the child best interests, family life and human rights to avoid incarcerating children for offences committed not known in law and in which they cannot be held culpable. There is no lacuna in law on the alternative non-custodial sanctions to be imposed in favor of the convicted mothers underpinned on the welfare and best interest of the child. The age range for children incarcerated with their mothers in approximation was below two years and some of them were born in that very prison. there was therefore a violation by the trial court not taking to account the best interests of the child as by law established. I am of the considered view and in support of the law and our Constitution that even when a single caregiver or biological mother is subject of a criminal process which leads her to be found guilty and convicted trial courts are commanded by *the Constitution* that they must consider the best interest of the child. What that means even imprisonment of the caregiver, guardian, foster parent, adoptive parent would be detrimental to the child, the sentencing court must consider a non-custodial sentence unless the offence in question is so serious that it will be entirely inappropriate and unjust to prefer a non-custodial sentence. The Prison facilities in Kenya have limited provisions of a daycare center, nursery or some kind of facility appropriate for children of very tender years like the ones presented to this court during the routine prison visit at Eldoret Correction facilities.

13. For those reasons, the sentences of the class or category of conflict under Articles 165 (6) & (7), 2(5) & (6), 10, 27 (4), 53 of *the Constitution*, Sections 4 & 8 of the Children's Act as read with Sections 362 & 364 of the Criminal Procedure Code stands reviewed from that of custodial to non-custodial sentences as recommended by the Probation Officer for this case at bar of Beatrice Rotich she is hereby committed to C.S.O at Kimamet Chief's Office for three (3) weeks which sentence shall be supervised by the Probation Officer based at Elgeyo Marakwet Office. This is therefore to command the Commanding Officer Women Wing at Eldoret Prisons to remove the convict Beatrice Rotich together with her child forthwith to commence the non-custodial sentence for the remainder of the period of incarceration. For those who believe in the mythology of creation and its Holy Book the Bible in the book of Proverbs Chapter 22:6, Psalms Chapter 127:3-5 and Ephesians Chapter 6:4; God tells us that children are a blessing and a gift, their spirits are filled with innocence, joy and laughter and a heritage

from the Lord. They should not be put to shame for reasons that their mothers are in conflict with the law. (Emphasis mine)

14. It is for this command I release ye forth the innocent children of our land from the gates of prisons and experience freedom indeed as we celebrate the birth of Jesus Christ God's son fulfilling prophesy as the promised Messiah; Immanuel (God with us). Orders accordingly.

GIVEN UNDER MY HAND AND SEAL OF THIS HONORABLE COURT THIS 22ND DAY OF DECEMBER 2025.

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R. NYAKUNDI

JUDGE