

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT ELDORET**  
**CRIMINAL APPLICATION NO. E386 OF 2025**

**ROSE CHEROP ..... APPLICANT**

**=VERSUS=**

**THE REPUBLIC ..... RESPONDENT**

**Coram: Before Hon. R. Nyakundi**  
**M/s Sidi for the State**  
**Oduor Munyua Advocate for the Applicant**

**RULING**

1. Before this Court is an Application dated 19<sup>th</sup> December 2025 brought under Articles 22(1), 23(1), 159(2), 165(3)(a), (b) & (d), and 258(1) of the Constitution of Kenya; Sections 354, 362 and 364 of the Criminal Procedure Code; and all other enabling provisions of the law the Applicant seeks the following Orders;
  - a. *THAT this Application be certified as urgent and heard on a priority basis.*
  - b. *THAT this Honourable Court be pleased to review, vary, and/or substitute the custodial sentence imposed upon the Applicant in CM's Court Eldoret CR No. E1723 of 2025.*
  - c. *THAT the remainder of the sentence be converted to a non-custodial or community-based sentence, or such other compassionate alternative as the Court may deem just.*
  - d. *THAT the Court grants such further or other orders as may meet the ends of justice.*
2. The Application is made on the following Grounds;
  - i. *The Applicant is a 56-year-old unmarried woman and the sole caregiver to a 13 year-old minor child.*
  - ii. *The Applicant is a second-time offender who has demonstrated genuine remorse, reflection, and willingness to reform.*

- iii. *The Applicant has served half of the custodial sentence imposed, adequately meeting the punitive objectives of sentencing.*
  - iv. *Continued incarceration would occasion disproportionate hardship to an innocent child who depends entirely on the Applicant.*
  - v. *The principles of sentencing—particularly rehabilitation, proportionality, and restorative justice—would be better served through a non-custodial sentence.*
  - vi. *This Honourable Court is vested with revisionary and supervisory jurisdiction under the Constitution and the Criminal Procedure Code to prevent injustice.*
3. The Application is supported by the annexed affidavit of Anne Murugi Munyua who deponed as follows;
- a. *THAT I am the Advocate on record for the Applicant herein and competent to swear this Affidavit.*
  - b. *THAT I am conversant with the facts of this matter, having obtained the same through professional engagement and interviews conducted within the correctional facility.*
  - c. *THAT the Applicant, Rose Cherop, is a 56-year-old unmarried woman and the sole caregiver to her 13-year-old child, Maxwell Mungoo, who is wholly dependent on her.*
  - d. *THAT the Applicant is a second-time offender, but has demonstrated sincere remorse, reflection, and insight into her past conduct.*
  - e. *THAT the Applicant has expressed a clear commitment to pursue lawful and dignified means of providing for her family upon release.*
  - f. *THAT the Applicant was sentenced to six (6) months' imprisonment and has already served three (3) months thereof.*
  - g. *THAT continued incarceration will occasion undue hardship to the minor child, who has no alternative caregiver.*

- h. *THAT I verily believe that the remaining portion of the sentence can be safely and justly served through a non-custodial or community-based arrangement.*
- i. *THAT I therefore humbly pray that this Honourable Court reviews the sentence and grants a resentencing determination culminating in the Applicant's immediate release, or in the alternative, a compassionate and proportionate sentence.*
- j. *THAT this Affidavit is sworn in good faith in the interests of justice, fairness, dignity, and humanitarian consideration.*

### **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) months.
- 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:

- Denunciation
- Deterrence
- Separation
- Rehabilitation
- Reparation

- Offender-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 parity
  - The principle of totality
  - The principle of imposing the least restrictive appropriate sanction
  - The 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 Rose Cherop she is hereby committed to C.S.O at Kilimani Chief's Office for three (3) months which sentence shall be supervised by the Probation Officer based at Uasin Gishu Office. This is therefore to command the Commanding Officer Women Wing at Eldoret Prisons to remove the convict Rose Cherop 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 prophecy as the promised Messiah; Immanuel (God with us). Orders accordingly.

**GIVEN UNDER MY HAND AND SEAL OF THIS HONORABLE COURT  
THIS 22<sup>ND</sup> DAY OF DECEMBER 2025.**

.....  
**R. NYAKUNDI**  
**JUDGE**