

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
(CORAM: R. MWONGO, J.)
HC CRIMINAL REVISION NO. E415 OF 2025

JOHN MUGENDI NYAGA.....APPLICANT
-VERSUS-
REPUBLIC.....RESPONDENT

JUDGMENT

The Application

1. Through an undated notice of motion, the applicant seeks the following orders:
 - 1) That this court has jurisdiction to hear and determine this application;
 - 2) That this court has jurisdiction to order for non-custodial sentence in its powers of review of a sentence considering that the applicant has, all along, been remorseful and his defense can attest to this fact;
 - 3) That this Honourable court be pleased to grant the prayers sought which invoke the provisions of section 4 of the Probation of Offenders Act;
 - 4) That the applicant has used his period of incarceration well by engaging in productive rehabilitative courses which have equipped him with skills that would benefit his family and the society;
 - 5) That the applicant is a first offender, a family man, remorseful, truthful and a rehabilitated person who is ready to rejoin the community as a productive member and an inspiration to the young people in the society.
2. The application is supported by an affidavit sworn by the applicant, wherein he states that he has a constitutional right which can be exercised under section 4 of the Probation of Offenders Act. He states that he was charged in the High Court and convicted for murder contrary to section 203 as read with section 204 of the Penal Code. He was sentenced to 7 years imprisonment which sentence he is still serving.
3. Subsequently, the applicant moved this court under section 333(2) of the Criminal Procedure Code seeking that the time he had spent in pre-trial custody be taken

into account. This was done and 99 days which he had spent in pre-conviction custody were included in his sentence which was computed to start on 09th February 2022.

4. The applicant now urges this court to allow his application under section 4 of the Probation of Offenders Act because he has since reformed, and has enhanced his skills while in prison through trainings. He argued that he is working towards becoming a more productive member of the society once he is released on probation if the court is pleased to make the probation order.
5. The state opposes the application on the grounds that Section 4 (2) of the Probation of Offenders Act does not donate power to the High Court to hear and determine an application for exercise of the Court's revisionary jurisdiction.

Parties' Submissions

6. The application was canvassed by way of written submissions.
7. The applicant submitted that he is a divorced father of 3 children who are facing hardships as he remains incarcerated. That he has undertaken diverse courses in prison, which have develop his skillset and he had certificates to prove this. That he is remaining with 12 months of the sentence, which he prayed be converted into a non-custodial sentence under section 4 of the Probation of Offenders Act.
8. the respondent submitted that for section 4 of the Probation of Offenders Act to apply, certain factors must be considered. These factors are: offender's age or background, home environment, health or mental condition, seriousness of the offence, mitigation or other special circumstances. The High Court may make such an order under this provision after conviction but before sentencing.
9. It further submits that the case was tried before the High Court but a probation order could only be made in lieu of sentencing and after consideration of the factors named in that provision. The state relied on the case of **Joseph Maburu alias Ayub v Republic [2019] KEHC 1172 (KLR)** and argued that once a court pronounces itself on a sentence, it becomes functus officio, and no further orders can be made. It argued that this court lacks jurisdiction to entertain the application.

Issue for Determination

10. The issue for determination is whether the application has merit.

Analysis and Determination

11. Generally, where a matter is tried before a trial court, a probation order may be made by that court under section 4 of the Probation of Offenders Act before or after conviction but before sentencing. Where the trial was conducted by the High Court, as it was in the applicant's case, the probation order may be made after conviction and in lieu of sentence.

12. Section 4(2) of the Probation of Offenders Act which has been invoked by the applicant provides as follows:

“ (2) Where any person is convicted of an offence by the High Court and the court is of the opinion that, having regard to the age, character, antecedents, home surroundings health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may, in lieu of sentencing him to any punishment, make a probation order, and may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.” [Emphasis added]

13. According to this provision, the factors for consideration are to be taken into account by the High Court before an offender is sentenced. In this case, the applicant was already sentenced and he is in fact presently serving the imprisonment term. Therefore, a probation order cannot be made at this stage. Thus, the provision of section 4 (2) POOA does not apply.

14. It is clear from this provision that at the time of trial, the High Court can, upon conviction of an offender, but before meting sentence, release the offender on Probation upon taking into account certain circumstances or factors, The factors are: the offenders age, character, antecedents, home surroundings, health or mental condition, the nature of the offence or any extenuating circumstances in which the offence was committed. Upon taking these into account, the Court may then release the offender in lieu of sentencing him.

15. It is also clear that any such release must be considered by the High Court, as the trial Court, before and in lieu of meting sentence. Accordingly, once sentence has been pronounced, the Court necessarily becomes functus officio and Section 4 (2)

Probation of offenders Act ceases to be applicable. There is no provision for review of the Court's decision under Section 4 (2) of the Probation of Offenders Act.

16. The High Court's revisionary power cannot be invoked under Section 362 – 367 CPC, because such revisionary power is exercisable only in respect of revision of the decisions and orders of Subordinate Court. The decision sought to be reviewed herein is a High Court decision. In any event, the applicant had previously applied that his sentence be computed by taking into account Section 333 (2) of the CPC in HCCR Rev No. E206/2025 which the High Court allowed. He was granted 14 weeks and 1 day and his sentence was thus reviewed to commence on 9/02/2022.

Conclusion and Disposition

17. In the circumstances herein, as already stated, the High Court cannot, once it has sentenced an offender at trial, then invoke section 4 (2) of the Probation of Offenders Act to grant conditional release.

18. Accordingly, the application herein fails and is hereby dismissed.

19. Orders accordingly.

Delivered, dated and signed at Embu High Court this 21st day of January, 2026.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. Applicant present in Court
2. No Representation for ODPP
3. Francis Munyao - Court Assistant

