



REPUBLIC OF KENYA



**Njagi v Republic (Criminal Revision E410 of 2025)
[2026] KEHC 333 (KLR) (21 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 333 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL REVISION E410 OF 2025
RM MWONGO, J
JANUARY 21, 2026**

BETWEEN

BRIAN MURIMI NJAGI APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

The Application

1. Through a notice of motion dated 19th September 2025, 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. In it, he states that he has a constitutional right which can be exercised under section 4 of the *Probation of Offenders Act*. That



he was charged and convicted with defilement contrary to section 8(1) as read with 8(2) of the [Sexual Offences Act](#), and that he was sentenced to 7 years imprisonment. His appeal in the High Court in HCCRA No. E063/2022 was dismissed in its entirety.

3. Prior to this application and pursuant to the application in Misc CR Application No.E057 of 2025, this court considered section 333(2) of the Criminal Procedure Code and reduced the applicant's sentence by 14 days after taking into account the time he had spent in custody pending trial. He urged the court to allow the present application because, he said, he has since reformed and has enhanced his skills while in prison through trainings. He produced some of the certificates from the trainings he has attended. He pointed out that the remaining unserved sentence amounted to only one (1) year and five (5) months. As such, he seeks that the Court do grant him a non-custodial sentence pursuant to Section 4 of the [Probation of Offenders Act](#).
4. The state opposes the application on the ground that only, the court that tried and sentenced the applicant could lawfully invoke Section 4 (1) and (2) of the [Probation of Offenders Act](#).

Parties' Submissions

5. The application was canvassed by way of written submissions.
6. In his submissions, the applicant relied on section 4(1) and (2) of the [Probation of Offenders Act](#) which provides for conditional release of offenders under the circumstances defined therein. He urged the court to consider the circumstances of the case like, age of the offender and his character. He submitted that after he was incarcerated; his wife left him, leaving their child without a parent and in the care of his brother, who also died through a road accident. That the child's grandparents are not well to do and they are struggling to put the child through school. He is now seeking the reliefs prayed so that he can be released take care of his child.
7. The respondent submitted that for Section 4 of the [Probation of Offenders Act](#) to apply, certain factors must be considered. These include: 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 an order under this provision after conviction. Based on this, the respondent argued that this provision can only be invoked before the High Court if it was the court that tried the matter. That the prayers should have been sought before the court that tried the matter. It argued that this court lacks jurisdiction to entertain the application.

Issue for Determination

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

Analysis and Determination

9. Section 4 (1) and 4(2) of the [Probation of Offenders Act](#), invoked by the applicant, provides for the power of a court to permit conditional release of offenders as follows:

- “ 4
- (1) Where a person is charged with an offence which is triable by a subordinate court and the court thinks that the charge is proved but is of the opinion that, having regard to youth, 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-
 - (a) convict the offender and make a probation order; or



(b) without proceeding to conviction, make a probation order, and in either case may require the offender to enter into a recognisance, with or without sureties, in such sum as the court may deem fit.

4 (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 youth, 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 recognisance, with or without sureties, in such sum as the court may deem fit.”

10. It is clear from these provisions that a probation order may be made before or after conviction, but before sentencing in or by the court that is trying the case. Section 4(1) applies to the subordinate court where it is the trial Court; and Section 4(2) applies to the High Court where it is the trial court.
11. In the present case, it is not in issue that the Court that tried and sentenced the applicant is the subordinate court. Section 4(1) would have been applicable in the Subordinate Court if that Court was satisfied that the charge was proved but was of the opinion that, given the parameters therein, and with or without meting sentence, it was expedient to release the offender on probation.
12. In the present circumstances, the subordinate court did in fact convict and sentence the applicant to 7 years imprisonment. That Court did not apply section 4 (1) of the *Probation of Offenders Act*. The High Court cannot now invoke Section 4(1) to interfere with the trial Court’s decision. Neither can the High Court invoke Section 4 (2) as it is not itself the trial Court.

Conclusion and Disposition

13. In light of the foregoing, the High Court hereby determines conclusively that it has no power to invoke either Section 4(1) or 4(2) of the *Probation of Offenders Act* where, as in this case, the trial court tried, convicted, and sentenced the applicant.
14. The application herein is therefore disallowed in its entirety and is dismissed.
15. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 21ST DAY OF JANUARY, 2026.

R. MWONGO

JUDGE

Delivered in the presence of:

Applicant present in Open Court

No Representation for ODPP

Francis Munyao - Court Assistant

