

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION NO. E458 OF 2024

DEBORAH ACHIENG
PETITIONER

=VERSUS=

REPUBLIC
RESPONDENT

*IN THE MATTER OF SENTENCE REVIEW UNDER SECTION 362 AS READ
WITH SECTION 364 OF THE CRIMINAL PROCEDURE CODE IN RELIANCE TO
ARTICLE 50(2) (P) OF THE C.O.K.*

Coram: Justice R. Nyakundi
Ms Sidi for State

RULING

1. Before Court is a notice of motion expressed to have been brought under Section 357, 362, 364 & 382 of the Criminal Procedure Code. The application is seeking for the following orders:
 - (a) *That this Court be pleased to determine my application for sentence review.*
 - (b) *That may this honorable Court be pleased to review, vary, revise and set aside orders issued by Hon. Peter Areri on conviction and sentence on 16/10/2023.*
 - (c) *That the honorable Court be pleased to find that the plea taking process was flawed and thus there was unequivocal plea.*
 - (d) *That the honorable Court grant any other order it finds fit to grant based on the aforementioned prayers stated and sworn in the affidavit.*
2. That the application is supported by affidavit sworn by the applicant as follows:
 - (a) *That I am a Kenyan citizen adult female of sound mind hence competent to swear this affidavit.*

- (b) That I was charged with the offence of infanticide contrary to Section 210 of the Penal Code Cap 63 of the laws of Kenya and sentenced to 7 years imprisonment.*
- (c) That the sentence meted upon me is harsh and excessive against my mitigation.*
- (d) That I am now approaching this honorable Court to kindly review my sentence to a lesser or non-custodial sentence.*
- (e) That I have no other application in the Court of appeal, hence this application.*
- (f) That this honorable Court has competent, unlimited jurisdiction to hear and determine this application under the provisions of Article 165(3)(b) of the Constitution of Kenya 2010.*
- (g) That I am remorseful, repentant, reformed and rehabilitated as I have learned hard lessons while in custody and now beg for leniency.*
- (h) That I do beg that I be accorded to benefit with the provision of Article 50(2)(q) of the Constitution of Kenya 2010.*
- (i) That it's my humble prayer that I be granted a fair opportunity to argue my petition.*
- (j) That all I have deponed herein is true to the best of my knowledge information and belief.*

DECISION

3. The litigation of this matter arises out of an offence of infanticide contrary to Section 210 of the Penal Code of the laws of Kenya. The Applicant to this matter entered into a plea agreement pursuant to Section 137 (A-O) of the Criminal Procedure Code. From the terms of the agreement, the Applicant pleaded guilty to the offence and the Court in its discretion sentenced her to 7 years imprisonment.
4. She has now moved this Court that that sentence be reviewed in terms of Section 357, 362, 364(1) and 165 of the CPC Cap 75 Laws of Kenya in reliance with Article 27(1) (2) (4) 28, 22(1) 25c, 50(1)(2) of the Constitution of Kenya among other enabling laws.

5. From the perspective of this Court sitting either as an appellate or invoking review jurisdiction under Section 362 and 364 of the Criminal Procedure Code, conventionally it must be borne in mind that the powers on imposition of sentence remains a reserve of the trial Court unless and until any challenge to that decision meets the threshold of the following principles:

Benard Kimani Gacheru vs. Republic [2002] eKLR:

“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, that 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 feels that the sentence is heavy and that 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. This is what the Court had in mind in the case of **Rhodes (R on the application of) v Police & Crime Commissioner for Lincolnshire [2013]:**

“The Court must not interfere simply because it thinks it would have made a different decision if it had been the primary decision-maker. Nothing less than Wednesbury unreasonableness will do. In other words, the Court must not interfere unless it is satisfied that the PCC’s decision is ‘irrational’ and ‘perverse’. The assessment of the PCC’s decision must be made by reference tot eh material he had available to him. This could include not only the materials he considered but also the materials he could and should have considered.”

7. It is now settled law in line with the Court of appeal decision in the **Benard Gacheru Case (Supra)** as also stated in **S vs Malgas 2001 (1) SACR 469 (SCA)** that the principles guiding interference with sentencing by a superior Court from a decision of an inferior or subordinate Court must be in consonant with the following:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by 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 imposed by 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”.

8. My function today is to decide whether the sentence imposed by the trial Court was appropriate to the perpetrator in the circumstances of this case? The law on interference or review of sentence as can be seen on the above case law is now well settled. It can be argued that the circumstances of the perpetration of the same offence by different offenders on different occasions can be varied that previous decided cases are of literal assistance. It can also be asserted that cases can notwithstanding variation have similarities which become apparent once particular factors are identified as being of importance in sentencing. These factors and the range of variability should not be seen as discrimination under Article 27(4) of the Constitution.
9. This was a heinous crime of a mother against her own child whom she looked up to for the sustenance and protection of her right to life guaranteed under Article 26 of the Constitution. In my view the Applicant has not shown the compelling and substantial

circumstances of an exceptional nature to have the sentence reviewed downwards for her benefit. The Applicant in this case though she admitted the offence within the province of plea bargaining agreement under Section 137 (A) - (O) of the CPC the following aggravating factors render her plea for review of sentence downwards or substitution of it to a non-custodial sentence untannable:

- (a) The offence targeted her own toddler who has just been born looking forward to a legitimate expectation of survival
- (b) This was an innocent and defenseless victim who would not imagine or contemplate or encompass that her own mother was going to premeditate, plan and maliciously execute such an heinous crime against her.
- (c) From the post mortem report and photographic impressions this was excessive cruelty and brutality against her own child.
- (d) There was abuse of trust on the part of the Applicant

10. These aggravating factors surrounding the criminal offence increase severity, culpability of the harm caused which could have necessitated higher more sentence than the 7 years imposed.
11. Having regard to the broad range of conduct that can arise in cases of this nature from intentional killing down to criminal negligence or assault without intent to kill or to cause serious injury the basis of two brands are applicable to the facts of this case. First and foremost, the factor of worst culpability and second high culpability. In construing the provisions cited by the applicant to review the sentence to lesser years, unfortunately that threshold has not been met and the application is dismissed.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY
FEBRUARY, 2026**

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R. NYAKUNDI
JUDGE