REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL REVISION NO. E154 OF 2025

SAMUEL NDUNG'U NDIRANGU ……

APPLICANT

VERSUS

REPUBLIC ……

RESPONDENT

RULING

1. This is a Ruling over an application seeking to revise the sentence meted out against him in Nyeri CMCC No. E1023 of 2025 by Hon. Ismael S.I. (RM) after plea of guilty on 17.09.2025.

2. The applicant was charged with an offence of stealing contrary to section 268(1) as read with section 275 of the penal code. The particulars are that on 12.09.2025 at 1730 hours at Kagwathi village within Tetu Sub-County of Nyeri County, the applicant stole 18 kgs of coffee berries valued at KSh. 2,340/=.

3. The applicant was caught in the act, and the coffee berries were recovered. He was arrested and arraigned in court and pleaded guilty. He mitigated that he will never repeat the offence. The court called for a presentence report, which it

found not to be favourable. The applicant was sentenced to 3 years' imprisonment. I have perused the file, and I cannot see how the same is not favourable. The local administration described him as a habitual thief. However, there was no evidence of any theft he ever committed or any fight he had ever been involved in.

4. Section 362 of the Criminal Procedure Code, which enables this court to resentence, reads as follows;

> **The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.**

5. The orders which this court can give under Section 362 of the Criminal Procedure Code are spelt out under Section 364 of the Criminal Procedure Code in the following manner;

> *"(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may-*
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> *(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by*

sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(c) in proceedings under Section 203 or 296 (2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High

Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."

6. It thus behoves this court to examine the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the subordinate court in line with Section 362 of the Criminal Procedure Code and if necessary, issue orders under Section 364.

7. The proceedings concerning the establishment of a previous record are clearly circumscribed in law. The process is neither a matter of conjecture nor an exercise in speculation; it is a structured procedure that requires the participation of both the court and the parties. Section 142 of the Criminal Procedure Code provides for this process as follows:

> (1) In any trial or other proceeding under this Code, a previous conviction may be proved, in addition to

any other mode provided by any law for the time being in force-

(a) by an extract certified, under the hand of the officer having the custody of the records of the court in which the conviction was had, to be a copy of the sentence or order; or

(b) by a certificate signed by the officer in charge of the prison in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the

punishment was suffered, together with, in either case, evidence as to the identity of the accused person with the person so convicted.

(2) A certificate in the form prescribed by the Cabinet Secretary given under the hand of an officer appointed by the Cabinet Secretary in that behalf, who has compared the finger prints of an accused person with the finger prints of a person previously convicted, shall be prima facie evidence of all facts therein set out if it is produced by the person who took the finger prints of the accused.

(3) A previous conviction in a place outside Kenya may be proved by the production of a certificate purporting to be given under the hand of a police officer in the country where the conviction was had, containing a copy of the sentence or order, and the finger prints, or photographs of the finger prints, of the person so convicted, together with evidence that the finger prints of the person so convicted are those of the accused person.

(4) A certificate under this section shall be *prima facie* evidence of all facts stated therein without proof that the officer purporting to sign it did in fact sign it and was empowered so to do.

8. A previous record cannot, therefore, be founded merely on the contents of a probation officer's report. It is worse if the previous record is not a conviction, but allegations of habitual theft. In the case of **Stephen Mangera Marwa v Republic** [2014] KEHC 1675 (KLR), D.S. Majanja J, discussed the question of previous record as follows:

> The learned magistrate fell into error by accepting the prosecutor's submissions which were not supported by any record of previous convictions. The statements of the prosecutor were prejudicial to the appellant. Previous convictions must be proved by production of a court record and in that respect I adopt the sentiments of Lesiit J., in Abdi Ahmed v Republic Meru HCCA No. 87 of 2010 (Unreported) where she stated;
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> > With due respect to the learned magistrate the way to receive a previous record of an accused person was not followed. In such a case the prosecution is required to adduce proof of previous conviction by producing a certificate from the Central Bureau of Criminal Records as proof of the conviction. In the bare minimum the prosecution could provide the case umber and the court in which the accused person was convicted and if possible cause it to be availed to the court. In either case the court is expected to put the record to the accused person and require him to admit or deny the same. In the instant case neither a certificate of previous records nor a conviction nor the court and criminal case number in which the

> Appellant was convicted were given. The prosecution did not therefore establish that the Appellant was ever convicted of any offence prior to the one on record."

9. The right to be heard generally and in particular on the question of a previous conduct can't be used to deny non-custodial sentences.

10. The sentence provided is set out under section 275 of the Penal Code as follows:

> *General punishment for theft* - Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.

11. The offence with which the applicant was charged, therefore attracts a maximum of three years. The court did not have regard to the plea of guilty, mitigation, culpability and harm of the applicant's action. The coffee was fully recovered. The applicant pleaded guilty at the first appearance. The culpability was minimal, and the harm was equally low. The court is not entitled to rely on rumors to convict.

12. The applicant did not meet the criteria for the minimum sentence. At the very least, he was entitled to no more than one year in prison. Further, without a prior record, the court could not, on the basis of the administrator's allegations, sentence the applicant to a custodial sentence. He had merited

a non-custodial sentence. His mitigation was not considered and the coffee was recovered.

13. There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed. In line with this, there must exist a reasonable proportionality between the sentence passed and the circumstances of the crime committed. This principle was emphasized in the case of *R v. Scott [2005] NSWCCA 152*, where Justices Howie, Grove and Barr underscored that sentencing must balance the gravity of the offence with the culpability of the offender. The court noted that disproportionate sentencing undermines public confidence in the criminal justice system and may result in an injustice to the offender. It stated:

> **"There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed…One of the purposes of punishment is to ensure that an offender is adequately punished…a further purpose of punishment is to denounce the conduct of the offender."**

14. On the other hand, in the New Zealand decision of *R v. AEM* [2000] NZCA, the court emphasized that sentencing must not only reflect the seriousness of the offence, but also

ensure fairness to the offender in light of all relevant factors considered.

15. The probation report does not have any negative connotations except for rumours and hyperbole. The Applicant has no prior record.

Determination

16. Based on the above findings, I make the following orders:-

a) I reduce the sentence of 3 years imposed on the applicant and substitute it with the applicant serving the remaining sentence through a 4-month community service at Kagwathi Primary School.

b) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **12th** day of **February, 2026**. Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Applicant present

Ms. Kaniu for the State

Court Assistant – Michael