



REPUBLIC OF KENYA



**Nyaga v Republic (Criminal Revision 273 of 2025)
[2026] KEHC 1265 (KLR) (11 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1265 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL REVISION 273 OF 2025
RM MWONGO, J
FEBRUARY 11, 2026**

BETWEEN

PETER GITONGA NYAGA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Background

1. The applicant, alongside another, were charged in the lower court with being in possession of cannabis sativa (bhang) contrary to section 3(1) as read with 3(2)(a) of the Narcotic and Psychotropic Substances Control Act.
2. After a full hearing, the applicant was convicted and sentenced on 05/03/2025 to 3 years imprisonment

The Application

3. Through an undated application, the applicant seeks the following orders:
 1. That this court be pleased to review is sentence and grant a non-custodial one; and
 2. That the court be pleased to make any other orders as it shall deem fit.
4. The application is supported on the grounds that the applicant is the sole breadwinner of his family and that he is a first offender. That he is remorseful and has exhibited high standards of discipline during his incarceration. He stated that he had also learned new skills while in prison. He urged the court to apply section 4 of the *Probation of Offenders Act*. (P.O.O.A).

Written Submissions

5. The application was canvassed by way of written submissions.



6. In his submissions, the applicant urged the court to apply its discretion in the matter according to Article 165 of *the Constitution*, stating that the trial court failed to consider his mitigation. That if it had done so, he would have benefited from the least severe sentence in law. He argued that he has a family who needs him and on that basis, he prayed for leniency and a non-custodial sentence.
7. The respondent, in its submissions, admitted that the court had jurisdiction to determine the application through the revisionary powers bestowed upon it under sections 362-366 of the Criminal Procedure Code. It however argued that the trial court did not impose the maximum sentences provided under the penal sections. It relied on the cases of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) and Shadrack Kipkoech Kogo v Republic, Eldoret Crim. Appeal No.253 of 2003, and argued that the trial court had already exercised leniency in sentencing hence the sentences cannot be held as harsh and excessive.

Issue for Determination

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

Analysis and Determination

9. The Supervisory jurisdiction of the High Court is vested by Article 167(6)&(7) of *the Constitution* which provides:
 - “(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.” [Emphasis added]
10. Further, Section 362 of the Criminal Procedure Code provides as follows on the High Court’s revisionary jurisdiction:

“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.” [Emphasis added]
11. In this case, the applicant has asked the court to substitute his 3-year imprisonment sentence with a non-custodial sentence on the strength of section 4 of the *Probation of Offenders Act*.
12. On perusal of the sentencing ruling, it is noted that the trial Magistrate sentenced the applicant to 3 years imprisonment. This was after considering that he was a first offender, and also after the same court pronounced a sentence of 5 years imprisonment to his co-accused person.
13. As to whether this court should apply the provisions of the *Probation of Offenders Act*, the answer is no, because that provision can only be applied by the court in which the matter was tried. In this case,



the offence for which the applicant was tried and convicted is the subordinate court. Section 4(1) of the [Probation of Offenders Act](#) provides:

“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 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-

- (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 recognizance, with or without sureties, in such sum as the court may deem fit.” [Emphasis added]

14. According to the above provision, a probation order can only be made prior to a conviction.

Conclusion and Disposition

15. The factors for consideration under [Probation of Offenders Act](#) are to be taken into account after conviction but before an offender is sentenced by the trial court. In this case, the applicant has already sentenced and is presently in the process of serving the imprisonment term. Therefore, a probation order cannot be made at this stage, under the provisions of Section 4 (1) POOA. Thus, that provision does not apply.
16. In essence, therefore, the custodial sentence already meted on the applicant cannot be changed to a non-custodial one at this stage long after sentencing under the [Probation of Offenders Act](#).
17. In light of the foregoing, the application herein fails and is hereby dismissed.
18. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 11TH DAY OF FEBRUARY, 2026.

R. MWONGO

JUDGE

Delivered in the presence of:

Applicant Present in Court

Ms. Mwaniki for the Respondent

Francis Munyao - Court Assistant

