

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VIHIGA**  
**CRIMINAL MISCELLANEOUS APPLICATION NO E045 OF 2025**  
**KENNEDY OUMA OCHIENG.....APPLICANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant herein was charged with another with the offence of being in possession of alcoholic drinks without a licence contrary to Section 27(1)(b) as read with Section 27(4) of the Alcoholic Drinks Control Act No 4 of 2010 on Count I and the offence of transporting alcoholic drinks without a licence contrary to Section 7(1)(b) as read with Section 62 of the Alcoholic Control Act No 4 of 2010 on Count II.
2. He was convicted on his own plea of guilty and sentenced to a fine of Kshs 550,000/= in default to serve two (2) years imprisonment for Count I and a fine of Kshs 20,000/= in default to serve two (2) months imprisonment for Count II. The Trial Court ordered that the sentences run concurrently.
3. On 25<sup>th</sup> July 2025, he filed a Notice of Motion application dated 23<sup>rd</sup> July 2025 seeking for review of his sentence under the Probation of Offenders Act. He averred that considering the nature of the offence that he committed and the fact that he admitted liability by pleading guilty, the same permitted a non-custodial sentence. He stated that he could expiate his guilt by restitution through Community Service Order (CSO) which was a legitimate form of

sentencing and encouraged under the Sentencing Policy Guidelines, 2023.

4. He submitted that this court had original jurisdiction power in criminal and civil matters under Article 23(1) and Article 165(3) of the Constitution of Kenya, 2010 to give redress on sentences. He urged the court to work with the Probation Department and review his sentence as he was remorseful for his actions and promised never to get involved in crime again.
5. He was emphatic that the short stay in prison had become a sufficient lesson and had influenced his desire to change. He said that he was in a better position of helping the local administration in campaigning against drug and alcohol abuse and educating citizens on the need to embrace positive means of generating income. He added that the non-custodial sentence would ease congestion in the prison as he would have an opportunity to fend for himself and his family while the community benefitted from his free services.
6. The Respondent was not opposed to his application and did not, therefore, file any Written Submissions. The Applicant's undated Written Submissions were filed on 2<sup>nd</sup> February 2026. This Ruling is, therefore, based on the Applicant's affidavit evidence and his said Written Submissions.

### **LEGAL ANALYSIS**

7. The Applicant submitted that he was a first-offender. He contended that he was married and had children and he was the sole

breadwinner of his family. He asserted that one of his daughters had dropped out of school as her mother could not be able to raise school fees.

8. He prayed for a non-custodial sentence on the ground that prison life had tortured him physically, emotionally and economically. He invoked Section 4 of the Probation of Offenders Act and asserted that the statute provided for offenders of petty cases with less than three (3) years to be considered for Probation. He pointed out that he had remained with eight (8) months to complete his sentence and thus qualified to be considered for Probation. He urged the court to allow him to enjoy the benefit of the law without any discrimination as others had enjoyed the same.
9. According to the Sentence Review Report by Oliver Simiyu, Probation Officer, Vihiga County, dated 7<sup>th</sup> January 2026 and filed on 9<sup>th</sup> January 2026, the Applicant was fifty-six (56) years old. He was married and had five (5) children. He had no history of criminal activity and/or conviction and did not consume drugs or any substance.
10. He attended Ruraka Primary School and Rang'ala Boys High School but dropped out of Form Three (3) due to lack of school fees. He started engaging in small business and farming before moving to Nairobi where he trained as a driver. He, therefore, spent most of his life as a driver.

11. He had served ten (10) months in prison and while there, he had engaged in general farm and spiritual practices which had shaped his conduct and exposed him to moral skills.
12. He averred that he had learnt his lesson and regretted having committed the offence. He was willing to serve CSO given a second chance by this court. He stated that the prison environment was not hospitable as there were communicable diseases which had affected him.
13. His wife was concerned about him and lamented that she was overwhelmed with the family's responsibility, with some of the children dropping out of school due to lack of a fatherly support system. The Applicant's family was willing to receive him and offer support during reintegration and resettlement process.
14. The Probation Office found him suitable for a non-custodial sentence and recommended that his sentence be reviewed for him to serve a CSO at Rang'ala Location Chief's Office for the remainder period of six (6) months.
15. Section 4(1) and 4(2) of the Probation of Offenders Act that the Applicant relied upon provides for the power of a court to permit conditional release of offenders. It states as follows:-

**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.**

**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 recognizance, with or without sureties, in such sum as the court may deem fit.”**

16. It was clear from these provisions that a probation order could be made before or after conviction, but before sentencing or by the

trial court. Section 4(1) of the Probation Act applied to the subordinate court where it was the trial Court while Section 4(2) of the Probation Act applied to the High Court where it was the trial court.

17. Further, Section 5(1) of the Probation of Offenders Act states that:-

**“A probation order shall have effect for such period, of not less than six months and of not more than three years** (emphasis court), **from the date of the order as may be specified therein, and shall require the probationer to submit during that period to the supervision of a probation officer appointed for or assigned to the district or area in which the probationer will reside after the making of the order, and shall contain such provisions as the court considers necessary for securing the supervision of the offender, and such additional conditions as to residence and other matters as the court, having regard to the circumstances of the case, considers necessary for securing the good conduct of the offender or for preventing a repetition of the same offence or the commission of other offences.**

18. The Applicant was remaining with less than six (6) months to complete his sentence. That could be reason why the Probation Office recommended that he serve CSO at the Chief’s Office at

Rang'ala Location. Notably, Section 3 of the Community Service Orders Act provides as follows:-

**1. Where any person is convicted of an offence punishable with—**

**a. Imprisonment for a term not exceeding three years, with or without the option of a fine; or**

**b. Imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate, the court may, subject to this Act, make a community service order requiring the offender to perform community service.**

19. This court had due regard to the case of **Gilbert Mwangi Kiai vs Republic [2017] eKLR** where it was held that the CSO was the sentence that ensured that an offender served his sentence within his or her community, while going on with his or her normal life. The court added that it was a path to complete reintegration of an offender, who may even have committed a serious offence but was in the process of being reformed.

20. From the above legal provision and case-law, CSO was one form of punishment provided in Section 24 of the Penal Code Cap 63 (Laws of Kenya) and thus entrenched in the criminal justice system as was provided therein.

21. It was a program that mainly focused on and implemented in the case of petty offenders sentenced to between six (6) months and one (1) year imprisonment, first offenders and those sentenced to offences providing for up to three (3) years imprisonment and had demonstrated remorse, rehabilitation and restoration to warrant a second chance to reintegrate into society after reparation through public work under CSO and also to decongest prisons.
22. In the instant case, the social inquiry had established that the Applicant had a fixed residence/abode, had obligations of taking care of his children and that he was a first-offender. He was remorseful and sought leniency of this court so as to be given a chance to reunite with his family. This court also noted that he had been through various rehabilitation programs. He had stable social support mechanisms and the outside environment was conducive for reintegration and resettlement. He was therefore suitable for sentence review.

### **DISPOSITION**

23. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 23<sup>rd</sup> July 2025 and filed on 25<sup>th</sup> July 2025 was merited and the same be and is hereby allowed.

24. The effect of this Ruling is that the Applicant's sentence of two (2) years' imprisonment be and is hereby reviewed to a non-custodial sentence. It is hereby directed that the Applicant be and is hereby released to the Probation Office to serve Community Service Order at Rang'ala Location Chief's Office for the remaining period of his sentence.

25. It is so ordered.

**DATED** and **DELIVERED** at **VIHIGA** this **24<sup>th</sup>** day of **February**  
2026

**J. KAMAU**  
**JUDGE**