



**Osman & 2 others v Republic (Criminal Revision E007 of 2026)  
[2026] KEHC 2242 (KLR) (17 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 2242 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL REVISION E007 OF 2026  
DO CHEPKWONY, J  
FEBRUARY 17, 2026**

**BETWEEN**

**MAHAMAD MOHAMED OSMAN ..... 1<sup>ST</sup> APPLICANT**

**HUSSEIN SANDERE JUMA ..... 2<sup>ND</sup> APPLICANT**

**IAM (A MINOR) ..... 3<sup>RD</sup> APPLICANT**

**AND**

**REPUBLIC ..... STATE**

**RULING**

1. Vide a Notice of Motion dated 3<sup>rd</sup> February, 2026, the Applicants, Mahamad Mohamed Osman, Hussein Sandere Juma and IAM (A minor) aggrieved and dissatisfied with the sentence order issued vide Kahawa CMCCR. Case No.E007 of 2026 are seeking the following orders:-
  - a. Spent.
  - b. This Honourable Court be pleased to call for and examine the record of Kahawa Law Courts in Criminal Case No.E007 of 2026 for purposes of satisfying itself as to the correctness and propriety of the sentence imposed.
  - c. This Honourable Court be pleased to review, revise and/or set aside the sentences imposed on 2<sup>nd</sup> February, 2026 against the Applicants for the offence of being unlawfully present in Kenya.
  - d. This Honourable Court be pleased to set aside the fines of Kshs.300,000/= imposed upon the 1<sup>st</sup> and 3<sup>rd</sup> Applicants, and the fine of Kshs.400,000/= imposed upon the 2<sup>nd</sup> Applicant, together with the respective default custodial sentences.



- e. In the alternative, this Honourable Court be pleased to substitute the sentences with non-custodial sentences, probation, repatriation or such other lawful and lenient orders as the court may deem fit.
  - f. This Honourable Court be pleased to take into account the period already spent in custody by the Applicants pursuant to Section 333(2) of the Criminal Procedure Code.
  - g. This Honourable Court be pleased to issue special protective orders in respect of the 3<sup>rd</sup> Applicant, being a Minor, in line with Articles 53(2) of *the Constitution* and the Children's Act.
  - h. Pending the hearing and determination of this application, this Honourable Court be pleased to order the release of the Applicants on reasonable terms or issue such interim orders as may meet the ends of justice.
  - i. Without prejudice to the forgoing, this Honourable Court be pleased to substitute the custodial sentence imposed upon the Applicants with an order for repatriation to the Applicants' country of origin under the supervision of the relevant immigration authorities, in lieu of imprisonment.
  - j. Costs be in the cause.
2. The application is premised on the grounds set out in the Supporting Affidavits of the Applicants in which the background of their cases has been analysed. The Applicants were arraigned before the Kahawa Law Courts in Criminal Case NO.E007 of 2026 on having been charged with the offence of Being Unlawfully Present in Kenya contrary to Section 53(1)(j) as read with Section 53(2) of the *Kenya Citizenship and Immigration Act* No.12 of 2011. The Applicants pleaded 'Guilty' to the said offence and were convicted on their own plea of guilt. The trial Court then proceeded to order:-
    - a. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants were sentenced to pay a fine of Kshs.300,000/= or in default to serve twelve (12) months imprisonment.
    - b. The 2<sup>nd</sup> Applicant was sentenced to pay a fine of Kshs.400,000/= or in default, to serve fifteen (15) months imprisonment.
    - c. The 3<sup>rd</sup> accused (minor) was sentenced to pay a fine of Kshs.300,000/= or in default, to serve twelve (12) months imprisonment.
  3. It is these sentences that have triggered the application in which the Applicants are basically seeking for revision of the said sentences.
  4. When the matter came up for interparties hearing, counsel for the Applicants, Mr. Ayiro submitted that the Applicants were Somali Nationals who were seeking a review of the sentences which they considered too harsh and were unable to raise the fines due to their unlimited means. He also submitted that the 3<sup>rd</sup> Applicant was a minor as evidenced by his passport attached to the Affidavits and his continued incarceration offends the Constitutional principle that a child's best interests are of paramount importance. He further stated that the 2<sup>nd</sup> Applicant, who he also said was the 3<sup>rd</sup> Applicant's sibling, had been taken ill and was undergoing treatment at Kiambu Level 5 Hospital. He again pointed out that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants were aged 23 and 21 years respectively. He urged that the court considers the time the Applicants had spent in custody since 21<sup>st</sup> January, 2026 and the fact that their relatives, being people of low means could only raise a modest sum of Kshs.20,000/=. According to counsel, the Applicants other complaints was that their incarceration had occasioned them hardship and affronted their dignity.



## Determination

5. Having carefully read through the application, the affidavits filed in support and in opposition of the same, and listened to the oral submissions advanced by counsel for the parties herein and find the issue for determination being:-
  - a. Whether this Court should exercise its revisionary jurisdiction to interfere with (and revise) the sentence imposed upon the Applicants.
  - b. What are the appropriate orders to issue?
6. This Court's revisionary power is anchored in Section 362 to 366, all of the Criminal Procedure Code. Section 362 empowers the court to call for and examine the record of criminal proceedings before a sub-ordinate court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order and as to the regularity of the proceedings. Section 364 then sets out the powers of the High Court on revision, including the power to alter a sentence or order.
7. While revision is not an appeal in disguise, it is not a sterile ritual confined only to obvious typographical errors. The statutory language is intentionally wide to allow the High Court to intervene where a sentence is illegal, incorrect, or improper.
8. In the present case, the court is called upon to consider the sentence and fines that were imposed against the Applicant by the trial Court. While it is true that sentencing is ordinarily a matter of discretion for the trial Court, that discretion is not unbounded. It is now settled law that sentence is a matter of discretion of a trial Court but a superior court may interfere where the sentencing court may have acted on a wrong principle or taken into account some wrong material or overlooked some material factors, or where the resulting sentence is manifestly excessive in the circumstances of the case. The Court of Appeal in its decision in the case of *Bernard Kimani Gacheru –vs- Republic* [2002]eKLR, emphasized that “sentences rest in the trial Courts discretion and will not interfere unless the trial Court acted on wrong principle, overlooked a material factor, or the sentence was manifestly excessive. This principle was affirmed in the case of *Ogola Owuors –vs- Regium* [1954] 21 270 as follows:-

“The principles upon which an Appellant Court will act in exercising its jurisdiction to review sentences are firmly established”.
9. The court is further mindful that since this is not an appeal, and being an application for revision, the question is not whether this Court would have imposed a different sentence in the first instance but whether, in light of the record and the circumstances that were placed before that court, the sentence imposed against the Applicants met the legal tests of correctness, legality and propriety.
10. The Applicants were found to be unlawfully present in Kenya contrary to Section 53(1(j)) as read with Section 53(2) of the *Kenya Citizenship and Immigration Act* on their own plea of Guilty. The penalty provision provides that upon conviction, an offender is liable to a fine not exceeding Kshs.500,000/= or imprisonment for a term not exceeding three years, or both.
11. The words ‘not exceeding’ denotes the maximum limit which can be imposed but not as a compulsory. It does not compel a court to gravitate toward the ceiling in every case. Instead, Parliament provided a range of penalty options precisely to allow courts to tailor sentences to the nature of the offence, the offender's circumstances, and the public interest. Thus, sentencing remains a discretion that must be exercised judiciously, proportionately and for the legitimate aims of criminal justice. As this Court and others within and outside our jurisdiction have reiterated, sentencing serves multiple objectives which include retribution, deterrence (both specific and general), rehabilitation, restorative justice,



denunciation and community protection. However, in immigration related offences such as unlawful presence, the dominant objectives often manifest as deterrence.

12. In this case, the Applicants' grievance, is not that the trial Court lacked jurisdiction to impose a fine but that the fine imposed, in their circumstances, operates as a proxy custodial sentence, not because custody is the most suitable sanction, but because poverty makes payment of the fine impossible.
13. The Judiciary's Sentencing Policy Guidelines caution that a fine fixed by the court should not be so excessive as to render an offender incapable of paying, and or expose them to imprisonment; and that the offender's means, together with the nature of the offence, should be taken into account. The Revised Sentencing Guidelines equally emphasize that the capacity of the offender to pay is a factor to be considered in imposing fines.
14. These Guidelines speak to a practical truth, that is, deterrence is not achieved by setting a fine at a theoretically high level that the offender cannot meet. A fine is meant to operate as a financial consequence of offending. It is not intended to be an indirect route to incarceration hence where a court imposes a fine that is plainly beyond the offender's means, the 'fine' ceases to be a fine in reality and becomes a trigger for default imprisonment. In that event, the punishment that the law contemplated as an option (a fine) is effectively replaced by imprisonment, not because the sentencing court expressly found custody necessary for public safety or gravity of the conduct, but because the offender is indigent. That outcome may be lawful in form, but it can be improper in effect.
15. Thus, sentencing, especially where a fine is provided for as an alternative, must be anchored on among other principles, chief among them proportionality and individualization of each case to the facts surrounding the accused person. The court must therefore consider the nature of the offence and the offender's circumstances.
16. In the present case, the Applicants have stated that their relatives can only raise about Kshs.20,000.00. This submission, viewed together with the affidavits on record, is not a mere plea for sympathy. It is a relevant sentencing consideration because it directly speaks to whether the fines imposed are capable of being complied with, and therefore whether the sentence, in practical terms, achieves the statutory purpose or defeats it.
17. It is now a renowned principle in law, that a superior court may interfere with sentence where the trial court acted on a wrong principle, overlooked material factors, or the sentence is manifestly harsh. In the present case, the Applicants were convicted on a plea of guilt to the offence of Being Unlawfully Present in Kenya contrary to Section 53(1)(j) as read with Section 53(2) of the [Kenya Citizenship and Immigration Act](#). The Prosecution argued that the trial court had acted within the maximum penalty and urged that the sentence imposed against the 1<sup>st</sup> and 2<sup>nd</sup> Applicants, be upheld. While this Court accepts that the fines imposed by the trial court were well within the statutory ceiling, the statutory maximum is not the legal test in the circumstances. The test in revision is the correctness, legality, and propriety of the Sentence imposed. A sentence may be legal in the sense that it lies within the permitted range, and yet be improper if it is demonstrably disproportionate or if it undermines the objectives that the law seeks to achieve.
18. Section 53 of the [Kenya Citizenship and Immigration Act](#) provides for a penalty range of upto Kshs.500,000/=, and/or imprisonment upto three(3) years. Parliament ought to have fixed a mandatory fine, but it did not. It provided a ceiling and left room for courts to fashion a sanction that best meets the justice of each case. That statutory design recognises that offenders are not uniform in means and circumstances, and that deterrence is not achieved by imposing the highest possible number, but by imposing a penalty that is real, enforceable, and proportionate.



19. The Court agrees with the line of thought that criminal law is not solely about reprimanding or the crushing of the offender. It is about lawful and proportionate consequences that serve legitimate objectives, including deterrence. In immigration-related offences, deterrence can be achieved by a fine that is meaningful but payable, coupled with prompt and orderly repatriation. Conversely, where a fine is so high that it inevitably results in imprisonment by default, the sentence risks becoming counterproductive: the offender does not learn the lesson through payment of the fine, the State bears the cost of incarceration, and the end result is still repatriation. In such circumstances, the fine, instead of advancing deterrence, may hinder the statutory objective by converting the process into prolonged custodial warehousing.
20. This Court must also take judicial notice of the broader criminal justice context. Unnecessary imprisonment contributes to prison congestion, burdens the public purse, and may erode respect for the justice system where incarceration appears to flow primarily from poverty. Courts are encouraged, where the law provides alternatives, to avoid custodial outcomes that do not add commensurate value to public safety or justice. Hence, default imprisonment should not become the automatic destination where a realistic and proportionate fine would sufficiently meet the ends of justice.
21. Turning to the 3<sup>rd</sup> Applicant, the Applicant's counsel correctly pointed out, and the prosecution conceded that he is a minor as evidenced by his passport. According to the prosecution's counsel, the trial Court ought to have been guided by the Children's Act more specifically, Section 239 which provides for the different methods of dealing with a child in conflict with the law. *The Constitution* is equally emphatic under Article 3 that the best interests of the child is of paramount importance in every matter concerning a child. As such, justice for a child demands that detention be a measure of last resort and for the shortest appropriate period. A fine so high that it is plainly incapable of being paid, with the predictable result that a minor remains in custody by default, is difficult to reconcile with those constitutional and statutory guidelines.
22. In the circumstances of this case, the Court is persuaded that the continued incarceration of the Applicants has been driven substantially by their inability to raise the fines imposed. That inability is a material factor since it affects whether the fines operate as fines or whether they operate as an indirect custodial sentence.
23. Thus, the Court is satisfied that the sentence imposed against the Applicants, though within the statutory ceiling, the same were improper in the circumstances of this case, hence, and that this is an appropriate case for revision so that the sentence meets the objectives of Section 53 without unnecessarily converting indigence into imprisonment.
24. What then is the proper sentence? The Courts are required to impose fines that are sufficiently serious to mark the wrong and deter repetition, yet not so unrealistic as to guarantee default imprisonment and thereby defeat the purpose of imposing a fine. In the Circumstances, for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants, a fine of Kshs.100,000/= each is substantial and punitive, while being more realistically within reach than the amounts imposed by the trial court. For the 3<sup>rd</sup> Applicant, a minor, the Court finds that a much lesser fine would be appropriate, proportionate, and consistent with the provisions of the Children's Act.
25. Finally, since the matter concerns unlawful presence and the Applicants are to be repatriated, this Court finds that it is in the interests of justice and sound administration thereof that, upon payment of the revised fines, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants be promptly released from custody and processed for repatriation in accordance with the law. Likewise, the 3<sup>rd</sup> Applicant.
26. In the resultant, and in exercise of this Court's powers under Sections 362 and 364 of the Criminal Procedure Code, the Court makes the following orders:-



- a. The sentence imposed upon the 1st Applicant, Mahad Mohamed Osman, is hereby revised by setting aside the fine of Kshs.300,000/= and substituting therefor a fine of Kshs.100,000/=. In default of payment, the 1<sup>st</sup> Applicant shall serve six (6) months' imprisonment.
- b. The sentence imposed upon the 2nd Applicant, Hussein Sandare Jama, is equally revised by setting aside the fine of Kshs.400,000/= and substituting therefor a fine of Kshs.100,000/=. In default of payment, the 2<sup>nd</sup> Applicant shall serve six (6) month's imprisonment.
- c. The sentence imposed upon the 3rd Applicant, Iman Mohamed Abshir (a minor), is also revised by setting aside the fine of Kshs.300,000/= and substituting it with an order that the 3<sup>rd</sup> Applicant be discharged under Section 35 of the Penal code (Cap 63).
- d. Upon payment of the revised fines and or serving the revised sentence, or pursuant to the discharge order, each Applicant shall be released from custody and handed over to the immigration authorities for purposes of repatriation within forty-eight (48) hours, subject to lawful immigration and processing.
- e. The period spent in remand custody during trial, if any, to be taken into account when computing sentence in respect of the 1<sup>st</sup> and 2<sup>nd</sup> accused person.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 17<sup>TH</sup> DAY OF FEBRUARY , 2026.**

**D. O. CHEPKWONY**

**JUDGE**

