

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

(CORAM: R. MWONGO, J.)

CRIMINAL REVISION APPLICATION NO. E258 OF 2025

BERNARD NJUKI CUVI.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

Background

1. The applicant was charged in the lower court with the offence of attempted murder contrary to section 220(a) of the Penal Code. He was tried and eventually convicted and sentenced to 40 years imprisonment by the trial court. He appealed against the decision of the trial court and, on the first appeal, the sentence was reduced to 25 years imprisonment. Through a ruling, this court considered section 333(2) of the Criminal Procedure Code and ordered that the sentence ought to have started on 17th July 2022.

The Application

2. Through a notice of motion dated 13th March 2025, the applicant seeks the following orders:
 - 1) Spent;
 - 2) That this Court grant an Order to the Officer in Charge Kenya Prisons Services-Embu to issue a Report touching on the Applicant herein;
 - 3) That this Court grant an Order to the Probation Officer-Embu office to issue a Report touching on the Applicant herein;
 - 4) That this Court grant an Order to Embu County Referral Hospital to carry out a check-up and issue a medical report touching on the Applicant herein;
 - 5) That this Honourable Court be pleased to grant a Review of the Applicant's Sentence served and consider a non-custodial sentence for the remainder of the term; and
 - 6) That the applicant has a proven record during his pendency in custody.
3. The application is premised on grounds that the applicant has been in prison for 4 years so far and his age is advanced. He also cited medical problems for

which he requires medical attention. He says the prison conditions are too harsh owing to the crowded nature of the facilities. He stated that he is the caregiver of minors who depend on him for provision but since he is incarcerated, they are lacking in basic needs.

4. He stated that he deeply regrets the criminal acts he was engaged in and prays that the court grants him a non-custodial term for the remainder of the imprisonment term. That he is also dwelling peacefully in prison and making the best out of the time he spends there. That he is very disciplined now and the prison authorities can attest to this.
5. He produced medical records in support of his case, showing that he is a known asthmatic and he also suffers from pulmonary tuberculosis and he frequents the medical facility at the prison. There is also a letter by the same medical facility confirming the applicant's medical condition. He also produced copies of birth certificates of minors who depend on him for school fees which remains unpaid.

Reponse

6. The respondent did file any response to the application but it filed its written submissions.

Parties' Submissions

7. The application was canvassed by way of written submissions.
8. The applicant relied on the case of **Muthoni v Republic [2025] KEHC 3257 (KLR)** and the 2016 Judiciary Sentencing Policy Guidelines and stated that the court has jurisdiction to entertain the application. He submitted that he is 63 years old and he suffers from pulmonary tuberculosis which requires a lot of money to manage. On the basis of this medical history, he seeks a sentence review while reminding the court that a sentence should not be cruel and inhumane.
9. He further relied on the cases of **IMA v Republic [2019] eKLR** and **Njagi Ndwiga John alias Ngai Magati v Republic [2019] eKLR**. He argued that he has transformed positively during his incarceration and he lives peacefully with fellow inmates and prison authorities.
10. The respondent relied on section 362 and 364 of the Criminal Procedure Code. It stated that the court lacks jurisdiction to determine the application because the impugned sentence was passed by a court of concurrent jurisdiction, which court has since become *functus officio*. It also relied on the cases of **Joseph**

Maburu alias Ayub v Republic [2019] KEHC 1172 (KLR) and Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] KESC 2 (KLR) Muruatetu 1. It stated that the time spent in custody had already been considered at the time of sentencing in accordance with section 333(2) of the Criminal Procedure Code.

Issues for determination

11. The issues for determination are:

- 1) Whether the court has jurisdiction to entertain the application; and
- 2) Whether the court should grant the orders prayed.

Analysis and Determination

12. The revisionary power of the High Court is drawn from its supervisory power pursuant to Article 167(6) & (7) of the Constitution which provide:

“(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]

13. Section 362 of the Criminal Procedure Code provides as follows on the High Court’s criminal revision powers in exercise of its supervisory 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]

14. In this case, the matter was first tried before the magistrate’s court where the applicant was sentenced to 40 years imprisonment. This sentence was reviewed to 25 years imprisonment by the High Court upon appeal. The applicant herein was charged with the offence of attempted murder. Guideline 4.8 of the Judiciary Sentencing Policy Guidelines 2023 in its entirety provides for resentencing for convicts of murder only.

15. Guidelines 4.8.14 and 4.8.15 provide thus:

“A. Who can Apply for Resentencing?”

4.8.14 All convicts as specified in the relevant instructing instrument.

In the case of murder convicts:

a) All offenders convicted of murder who have been subject to the mandatory death penalty and desire to be heard on sentence as at the time of the Supreme Court’s decision (14 December 2017).

b) All offenders sentenced to death for murder after the decision in Muruatetu but without regard to or compliance with the court’s declaration (i.e., not taken into account mitigating factors).

4.8.15 Capital offenders in murder cases whose sentence has been commuted to life imprisonment cannot apply for resentencing where mitigation had been considered. However, Article 50 (6) of the Constitution can be invoked by convicts who have gone through the entire appellate process to petition for a retrial.”

[Emphasis added]

16. In the present case, it is therefore clear that the applicant herein is not eligible for resentencing hearing considering he was charged and convicted with attempted murder. Thus, there is no basis for granting the prayers sought since, evidently, the court has no jurisdiction to consider the arguments made herein.

Disposition

17. In light of the foregoing, court has no jurisdiction herein and the application is hereby dismissed.

18. Orders accordingly.

Delivered electronically, dated and signed at Embu High Court this 4TH DAY OF FEBRUARY, 2026, pursuant to notice issued on 27th January, 2026 as to electronic delivery.

**R. MWONGO
JUDGE**

