

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKADARA
CRIMINAL DIVISION
MISC. CRIMINAL APPLICATION NO E176 OF 2025
SCOLA IMBITI NAMUNYU
APPLICANT

VERSUS

REPUBLIC **RESPONDENT**

RULING

1. By a notice of motion dated 2nd day of October 2025 , brought allegedly under the provisions of Articles 23(1) ,50(2)(p) , 165(3) , 159(2)(d) and 259(1) of the constitution and sections 333(2) , 362 and 364 of the Criminal Procedure Code and section 46 of the Prison Act , the applicant moved the court for an order that the court review , vary and or reduce the custodial sentence imposed upon the same to time already served or in the alternative, substitute the remainder with a non -custodial sentence.
2. That the court considers the applicant’s exceptional humanitarian circumstances and the urgent need for her to resume her parental and care giving responsibilities.
3. The application was grounded on the grounds that she was initially sentenced to 15 years plus one year in default of a fine of Kshs. 1,000,000 in MCCR no 85 of 2019 which sentence was reduced on appeal to seven (7) years plus one year in default of a fine of Kshs. 1,000,000/= and that the applicant had already served a significant portion of her sentence and was remaining

with three years eight months before her release on 18th April 2029.

4. It was contended that article 50(2)(p) of the constitution entitled the applicant to the benefit of the least severe sentence and that given the family dire circumstance and her own demonstrated rehabilitation, her case presented exceptional grounds for leniency.
5. The application was supported by her affidavit in which it was deposed that during her incarceration she had maintained good conduct and undertaken rehabilitative programs and being a single mother and sole bread winner of her family of which her first born daughter had dropped out of Strathmore university due to lack of fee while the second born despite securing university placement was unable to join.
6. It was deposed further that the last born in grade five had accumulated fee arrears and her 83-year-old mother had developed serious heart conditions requiring care which she had previously provided.
7. This application was filed under certificate of urgency.
8. The state did not file any response thereto though at the hearing Ms. Kariuki for the ODPP submitted that the court did not have jurisdiction as the applicant had filed an appeal to this court which reduced her sentence by half and that the matter does not fall under those for probation and community service order. She submitted that section 362 and 364 of the CPC is only applicable for revision of the orders of subordinate courts as

wastages in the case of **Daniel Otieno Oracha versus Republic** and that the applicants only recourse is to file an appeal to the court of appeal.

9. On behalf of the applicant Mr. Ayuo submitted that the doctrine of appellate finality does not extinguish the courts power to cure injustice rising from Article 27, 28, 50, 159 and 169 of the constitution and that under Article 165(3) (6) the court has original and unlimited jurisdiction to correct continued violation of human dignity post appeal and that the applicant's plea was deeply on humanitarian grounds. In support thereof reference was made to the case of **Patrick Wambua Musila v Republic [2023] eKLR** where the court held that the High Courts jurisdiction to correct a manifestly unjust or disproportionate sentence is not extinguished by the exhaustion of the appellate process since it is a jurisdiction grounded on the constitution.

10. It was submitted that under article 159(2)(d) and 259(1) of the constitution, justice must be administered without undue regard to technicalities and the constitution must be interpreted purposively to advance its values. It was contended that under Section 362 and 364 of the CPC the High Court is authorized to examine any criminal record to satisfy itself as to the correctness, legality or propriety of the sentence or order and the court has powers to reduce reverse or alter the sentence as was stated in the case of **Sammy Wahini Ngugi versus Republic [2018] eKLR** to the

effect that the powers are a constitutional safeguard against injustice and remain exercisable even after an appeal where the circumstances reveal illegality or manifest disproportion.

11. It was further submitted that the right under section 333(2) of the CPC to consider the time spent in custody is a mandatory requirement which continues to be enforced through post-conviction review as was stated in the case of **Ahamad abolfathi Mohamedd & another versus Republic** [2018] e KLR and further that section 354(3) of the CPC give the court power to reduce or vary the sentence on appeal.

DETERMINATION

12. In this cause the only issue for determination is whether this court has jurisdiction to exercise the power of revision where the applicant as in this case had filed an appeal to this court?
13. It is not disputed that the applicant herein filed an appeal to this court at Kibera being Criminal Appeal No E002 of 2024 wherein the Court at paragraph 26 of the judgement had this to say “after my own independent appraisal of the evidence on record, I find that PW2, Pw7 and PW8 were consistent in their evidence regarding how the narcotic were recovered. In addition , the evidence of PW1 corroborated by the forensic analysis PW4 confirmed narcotics were delivered by the appellant. In my view the appellants defence was properly dismissed.

14. On sentence, the court has this to say: “. 28 on sentence the appellant was convicted to serve 10 years imprisonment. In addition to paying a fine of kshs 1,000,000 in default to serve 12 months imprisonment. In sentencing proceedings, the trial court considered that the appellant was a first offender, the presentencing report before imposing the sentence. 29. Section 329 of the criminal procedure code gives judges and magistrates in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard , I find that the sentence meted out was lawful and in accordance with the trial courts discretion . 30. In the case of **Wagude versus Republic (1983) KLR 569 Kneller Hancox JJA and Chesoni Ag. JA** held that

“ the Court may interfere with the sentence only if it is shown that it was manifestly excessive” . 31. Guided by the above decision it is my view that although the sentence imposed was legal , it was excessive. Consequently, the appeal on the sentence succeeds. The sentence of 15 years imposed is hereby substituted with a sentence of 7 years imprisonment “

15. The applicant is silent as to whether the same filed an appeal to the Court of Appeal against the judgement of this court herein. As rightly submitted by the respondent the courts power of revision can only be

exercised under its supervisory jurisdiction against the subordinate courts and tribunals and not against the decisions of the Superior Courts as the applicant is inviting this court to do as to do so will be akin to supervising itself.

16. The unlimited original jurisdiction of this court is limited to matters that are the domain of appellate process. The applicant herein has benefitted for the reduction on sentence by this court on appeal which sentence is neither illegal or irregular therefore this court has no residual jurisdiction to review vary or reduce the sentence further on account of what the applicant considers humanitarian grounds.

17. Any further reduction on sentence can only be done by the court of appeal should an appeal be filed thereat and the applicant succeeds otherwise all the issues raised by the applicant herein belongs to the jurisdiction of the power of mercy committee as to interfere with the sentence herein will be akin to sitting on appeal against the courts own decision.

18. I therefore find no merit on the application herein which I hereby dismiss save to state that the sentence imposed by this court on appeal shall be less the period the applicant spent in pre- conviction custody under the provisions of section 333(2) of the CPC as I note that the judgement of the court dated 30th September 2024 is silent thereon.

19. And it is ordered.

**DATED SIGNED AND DELIVERED THIS 17TH DAY OF
MARCH 2026**

**J. WAKIAGA
JUDGE**

In the presence of: -

Irene - Court Assistant

Mr Ayuo for the applicant

Ms. Kariuki for the state

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