REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CRIMINAL REVISION NO. E064 OF 2025

JOYCE IGOKI NABEA.....

APPLICANT

VERSUS

REPUBLIC.....

.....RESPONDENT

RULING

1. By Notice of Motion application dated 1st November 2025 brought under the provisions of section 362, 363, 364 and 365 of the Criminal Procedure Code, the applicant is seeking for the following orders

a) *That this Honourable court be pleased to call for and examine the record of proceedings, conviction, and sentence in Naivasha CMCR No MCCR/E1965/2025 –Republic v Sofia & Joyce Igoki Nabea to satisfy itself as to the correctness, legality, or propriety of the sentence imposed upon the applicant.*

b) *That this Honourable court be pleased to find and hold that the sentence of 3 years' imprisonment imposed upon the applicant was excessive, harsh, and irregular, given the mitigating circumstances and the recommendation of a non-custodial sentence.*

c) *That this Honourable court be pleased to revise, vary, or set aside the custodial sentence and substitute the same with a non-custodial sentence, or a fine, in accordance with section*

29 of the Prohibition of Female Genital Mutilation Act.

d) *That this Honourable court be pleased to make such further or other orders as it may deem just and expedite in the circumstances of this case.*

2. The application is based on the grounds that: -

a) *That the learned trial Magistrate erred both in law and in fact by failing to give due effect to the probation officer's report dated 14th October 2025 which recommended a non-custodial sentence.*

b) *That the trial court failed to consider the applicant's advanced age, frail health, remorsefulness, and the coercive role played by the co-offender.*

c) *That the trial court ignored the applicant's chronic hypertension, post-operative orthopaedic condition, mobility limitations, and pending*

surgery at Kijabe Mission Hospital and Stirling Health Consultants on 1st December 2025.

d) *That the trial court further failed to consider the alternative of imposing a fine as permitted by section 29 of the Prohibition of Female Genital Mutilation Act.*

e) *That the trial court thereby imposed a sentence that was excessive, harsh and disproportionate to the circumstances of the offence and the offender.*

f) *That the trial court's failure to weigh mitigating factors contravened Article 50(2)(p) of the Constitution, section 216 of the Criminal Procedure Code, and the Sentencing Policy Guidelines.*

g) *That this Honourable court has jurisdiction under section 362 of the Criminal Procedure Code to*

examine, vary, and correct any illegality, impropriety, or irregularity found in the record of the subordinate court.

3. The application is further supported by an affidavit sworn by the applicant wherein she deposes that she was charged vide *MCCR NO E1965 of 2025, Republic vs Sofia & Joyce Igoki Nabea* in the Chief Magistrate Court at Naivasha with the offence of performing female genital mutilation contrary to section 19(1) as read with section 29 of the Prohibition of Female Genital Mutilation Act No. 3 of 2011.
4. That after a full trial she was convicted and sentenced to serve three (3) years imprisonment. That the trial court failed to consider all the grounds tabulated herein. Further, she has undergone surgery where a metal plate has been inserted on her left knee and is scheduled for another surgery on her right knee to be

performed at Kijabe Mission Hospital and Stirling Health Consultants for observation. Further she walks with aid of crutches and requires regular hospital attendance which is disrupted by incarceration.

5. However, the respondent responded to the application vide replying affidavit dated; 14th November 2025 sworn by Shirley Chepkonga, a Principal Prosecution Counsel. She deposes that before the sentence was meted out, the applicant was allowed an opportunity to offer mitigation that was considered. That, the three (3) years imprisonment imposed is to act as deterrence sentence.

6. Further sentencing is a matter of discretion of the court and that, an appellate court will not interfere with a sentence of the trial court unless it is excessive or the trial court overlooked material facts, or

considered wrong material or acted on a wrong principle.

7. That the provision of section 362 requires that for the sentence to be revised, it should be incorrect, improper, illegal or irregular. The case of *Jackson Konde Kyalo vs Republic (2018) eKLR* was cited to argue that an accused has a right to be given a fine where there is provision for the same.
8. That failure to consider a fine and mete out a custodial sentence herein amounts to an error of principle and improper sentence. Furthermore, considering the mitigation offered the court ought to have considered the option of a fine. Consequently, the sentence be revised and the applicant be granted an option of a fine.

9. After considering the application, it suffices to note that, it is brought under the provisions of section 362 of Criminal Procedure Code that state: -

> *“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.”*

10. Pursuant thereto, the law is settled that to allow an application for revision the order of sentence under review must met three tests, correctness, legality or propriety and regularity of proceedings.

11. The applicant was charged with the offence of procuring to perform female genital mutilation contrary to section 20 (b) as read with section 29 of

the Prohibition of Female Genital Mutilation Act No. 3 of 2011. The sentence provided for the offence under section 29 states that anyone who commits an offence under the Act, is liable to a mandatory minimum penalty of at least three (3) years imprisonment, a fine of at least Kshs. 200,000 or both.

12. Pursuant to the aforesaid, the sentence imposed by the trial court is lawful, correct and proper. Notably section 29 does not compel the court to mete out the fine sentence in priority to a custodial sentence. As such the provision of section 362 as read with section 364 of the Criminal Procedure Code is not available to the aid of the applicant.

13. It also suffices to note that the court's discretion in sentencing is a crucial constitutionally protected judicial function under Article 50(2) emphasizing individual justice over mandatory, rigid penalties

(Muruatetu's case). However, where minimum and mandatory sentences are provided for under the law, the discretion is taken away.

14. Be that, as it were, as already said herein, an appellate court will not interfere with a trial court's sentence unless it is manifestly excessive, illegal or based on wrong principles, as stated in the case *of Benard Kimani Gacheru vs Republic (2002) eKLR.*

15. As regards mitigation the personalized mitigation is essential necessitating re-sentencing if improperly considered by the trial court as stated in the case of; *Ouma & another vs Republic (2025) eKLR.*

16. Finally, as stated in *Esikati vs Republic (2025) eKLR* if a statute, as herein, sets a valid minimum sentence, the appellate court cannot interfere with it even if it holds the view the sentence is high, harsh or excessive in the circumstances of the case.

17. Pursuant to the aforesaid, the application herein cannot be allowed under section 362 of Criminal Procedure Code. It is dismissed.
18. However, in view of the grounds in the application inter alia, the applicant's advanced age and health, the applicant may consider moving the court for sentence review based on any other provisions of the law.
19. It is so ordered.

Dated, delivered and signed this 10th day of March 2026.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Kai for the applicant

Ms. Chepkonga for the respondent

Ms Hannah: court assistant