



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL REVISION E209 OF 2024**

**EMMANUEL SIMIYU WASIKE .....**  
**APPLICANT**

**-VERSUS-**

**REPUBLIC .....**  
**RESPONDENT**

**RULING**

1. The Applicant brings this undated Notice of Motion Application purportedly pursuant to the provisions of **Sections 379(4), 333(2), 356 and 357 of the Criminal Procedure Code** seeking revision of sentence imposed against him in the lower court by substituting it with a non-custodial Probation Order for the remaining period of a prison term imposed against him .

2. The Applicant was charged alongside others in the Chief Magistrate's Court at **Nakuru (Criminal Case No. E1183 of 2024)** with the offence of **Entering a protected area without a permit or any other lawful exemption contrary to Section 102(1) (a) as read with Section 102(1) (h) of the Wildlife Conservation and Management Cap 376 Laws of Kenya (Count 1) and undertaking extractive activity in a wildlife protected area without a permit contrary to the same law (Count 2)**. He pleaded guilty, got convicted and sentenced to a fine of Kshs. 200,000/= (two hundred thousand) on each count or serve 2 years imprisonment on each. The Applicant pleads that he has reformed while in prison and benefited from vocational training.
3. The Prosecution Counsel opposes the Application *vide* written submissions dated 27<sup>th</sup> October 2025 which I have perused.
4. I have considered the Application and perused the trial court's record. Indeed, the Applicant was so charged, convicted and sentenced before the lower court.

5. **Sections 362, 364 and 365 of the Criminal Procedure Code** empower this court to call for a subordinate court's record with a view to satisfying itself as to the legality, correctness or propriety of an order or decision made by the court, and issue appropriate orders or directions.
6. The Applicant does not in substance appear to be contending that the sentence meted out against them is illegal. Rather, he wants variation thereof to a probationary period considering the mitigation statements put forth.
7. The Supreme Court in the case of **Francis Muruatetu & Others vs Republic** has outlawed the mandatory nature of the death sentence in cases of murder brought under **section 203 as read section 204 of the Penal Code**. The apex court introduced the exercise of discretion in sentencing offenders in such cases guided by peculiar facts and circumstances attending each case. The Court proceeded to allow for re-sentencing of convicts on death row for murder in line with the principles set out in the landmark case.

8. Other superior courts subsequently applied the same principle in other cases including **Kathewa Laichena vs Republic (2018) eKLR** and **William Okungu Kittiny vs Republic (2018) eKLR** to outlaw mandatory or minimum sentences provided for by some laws including the **Penal Code** and the **Sexual Offences Act**.
9. The Supreme Court has, however, clarified in its latest decision on this controversy *to wit*; **Joshua Gichuki Mwangi & Others** in **Petition No. E018 of 2023** that any challenge to the constitutional validity of mandatory sentences for other capital offences other than murder, or other minimum sentences that take away the court's discretionary power to decide an appropriate sentence for an offence, is welcome for determination by the High Court, and also the Court of Appeal where the High Court agrees with the Petitioner(s). This challenge is, however, to be mounted in a proper substantive Constitutional Petition and not *vide* a Miscellaneous Criminal Application such as brought by the Applicants herein. Because of the importance of such a Petition, proper Respondents would include the Director of Public

Prosecutions, the Attorney General and other appropriate Interested Parties as may be identified.

10. This court will not therefore treat this Application as the Petition contemplated by the Supreme Court in **Joshua Gichuki Mwangi** *supra*. Moreover, if the Applicant thinks that the sentence imposed by the trial court is excessive or severe in the obtaining circumstances, the proper remedy would be an Appeal and not revision of the lower court's order as craved in this Application. The Applicant could also wait for the regular Judiciary's Prison Decongestion Programme and try his luck . As it is, the sentence complained of is not illegal or otherwise improper. The sentence is within the legal limit prescribed by law.

11. In the premises, this Application is dismissed. However, the custodial sentences if served shall commence from the date of arrest of the Applicants on 21<sup>st</sup> May 2024 as per the charge sheet presented before the trial court.

**J. M. NANG'EA, JUDGE.**

**Ruling dated, signed and delivered at Nakuru this 12<sup>th</sup> day of March, 2026.**

**In the presence of:**

**Mr Wakasyaka for the DPP.**

**Applicant.**

**The Court Assistant (Jeniffer).**

**J. M. NANG'EA, JUDGE.**

Original