

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
MISC. CRIMINAL APPLICATION NO. E007 OF 2025

JAMILA MAALIM HUSSEIN EYMOI.....
.....APPLICANT

VS

REPUBLIC.....
RESPONDENT

RULING

1. The applicant herein was charged in Criminal Case No. E163 of 2021 in the SPM's Court at Mandera Law Courts with the following counts:

Count I: Being in possession of a specified firearm without a firearm certificate c/sec 4A (1) (a) as read with section 4A(2)(a) of the Firearms Act Cap 114 Laws of Kenya. Particulars were that on 20.04.2021 at around 1800hrs at Busley in Mandera East Sub County within Mandera County of the Republic of Kenya, she was found in possession of a firearm make AK47 Rifle Serial No. 1974EP3373 fitted with one magazine which was loaded with 13 rounds of ammunition of caliber 7.62mm special without a firearm certificate as required by law.

Count II: Being in possession of ammunition without holding a firearm certificate c/sec 4(2) (a) as read with section 4(3) (a) of Firearms Act Cap 114 Laws of Kenya. The particulars were that on 20.04.2021 at around 1800hrs at Busley in Mandera East Sub County within Mandera County of the Republic of Kenya, she was found in possession of 13 rounds of ammunition of calibre

7.62mm special without holding a firearm certificate as required by law.

Count III: Entering Kenya through a place not designated as a place of entry c/regulations 15(2) (a) as read with Regulation 57 of The Kenya Citizenship and Immigration Regulations, 2012. Particulars were that on 20.04.2021 at around 1800hrs at Border Point III along Kenya Somalia Border, she was found having crossed from Bulla Hawa Somalia to Mandera Kenya through a place not designated as a point of entry.

2. She was tried and convicted of Count I and II and sentenced to 20 years and 10 years' imprisonment respectively. She was however acquitted on Count III.
3. Being dissatisfied with the determination of the trial court, she appealed against both her conviction and sentence before the High Court vide Criminal Appeal Case No. E050 of 2022. Upon evaluating the evidence on record, the court substituted the 20-year sentence with 7 years in Count I and maintained the 10 years' imprisonment in respect to Count II. The same was to start running from the date of conviction being 01.08.2022. That the sentences were to run concurrently.
4. She has since filed the current application dated 11.02.2025 and annexed thereon a supporting affidavit of even date deposing that, she has been faithfully serving her term in prison and that the remainder of the sentence being 2 years, be waived to grant her a chance to reintegrate back to the society. The applicant

urged that she is remorseful for her actions and further, that being a first offender, she deserves another chance. She stated that she is a mother of 5 children (9,7,6,4 and 2 years) and that the minors are in dire need of parental care. That if it is agreeable to the court, she be granted an opportunity to serve the remainder of the term under probation.

5. During the hearing of the application, the applicant via submissions dated 11.03.2025 urged that having partially served her sentence, this court be gracious to confer upon her a non-custodial sentence on the remainder of the term. That this court via article 165 of the constitution is empowered to allow the application as prayed. Additionally, she relied on section 4(b) of the Probation of Offenders Act which provides for non - custodial measures to apply to all persons' subject to prosecution, trial or the execution of a sentence at all stages of administration of justice.
6. She also argued that the time that she spent in custody was also not taken into account during sentencing in recognition of section 333(2) of the CPC. She therefore urged this court to allow the application noting that she had undergone rehabilitation hence ready to join the society again.
7. The learned prosecutor on the other hand was opposed to the said application urging orally that the applicant having previously appealed against her conviction and sentence before this court and partially having succeeded, this court is *functus officio*. He

urged this court to dismiss the application for the same was devoid of merit.

8. I have considered the application and both the oral and written submissions by the parties herein. The main issues for determination are; whether the applicant should serve the remainder of her sentence on probation and whether the court had considered the period spent in remand custody before sentence.
9. It is not in dispute that having been charged with three Counts herein, the applicant appealed against both the conviction and sentence before this Court. Consequently, the 20-year sentence was substituted with 7 years in respect of Count I and 10 years' imprisonment in respect Count II to start running from the date of conviction being 01.08.2022. That the sentences to run concurrently from the date of conviction.
10. It is trite that once a judge or a judicial officer has pronounced a sentence, he/she becomes *functus officio*. It then follows that if the sentence is illegal or inappropriate the only court which can address the same is an appellate court. In my humble opinion, if at all the applicant was not satisfied, the proper thing would have been to appeal the same to the Court of Appeal. It therefore follows that the applicant's reprieve lies elsewhere and not before this court.
11. In recognition of the time spent as articulated under section 333(2) of the Criminal Procedure Code, it is noted that the applicant was arrested on 20.04.2021 and arraigned in court on

22.04.2021. She spent in custody until 06.07.2021 when she was released on bond and after absconding court, her bond terms were cancelled upon being re-arrested on 31.03.2022. She was consequently sentenced on 01.08.2022 thus she spent a total of 6months and 17 days in custody which ought to have been considered.

12. In my view, this court at this stage is *functus officio* and as a consequence, the application herein is dismissed for being in want of merit save for the already mentioned 6 months and 17 days spent in custody, which shall be taken into account when computing sentence imposed by this court. To that extent, the application partially succeeds and partially fails.

Dated, signed and delivered virtually this 8th day of April 2025

J. N. ONYIEGO
JUDGE