



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISCELLANEOUS APPLICATION NO. E354 OF 2025

JOHNSTONE

MELEK.....APPLICANT

- VERSUS -

REPUBLIC.....RESPONDENT

RULING ON CRIMINAL REVISION

1. This is an application dated 15th December 2025 by Notice of Motion Pursuant to **Articles 10, 21(1), 22(2), 23, 28, 29, 47(2), 49(1), 159(2), 244(c)** and **333(2)** of the Constitution and **Section 123** of the Criminal Procedure Code Cap 75 of the Laws of Kenya, seeking the following three (3) reliefs;

a) THAT this Honourable Court be pleased to substitute and admit the applicant to probation

sentence for his remaining sentence of imprisonment.

b) THAT this honorable Court be pleased to issue appropriate orders adjusting the applicant's sentence to reflect non-custodial sentence or/with favourable fine.

c) Any other or further orders that the Honourable Court may deem fit to grant in the interest of justice.

2. The Applicant sought to ground his application on the following five (5) grounds;

- i. That the applicant and the complainant is husband and wife and they have legally married with five children and the fact that the applicant was a source of livelihood to the family who are now left in the hands of the complainant who is now struggling to make life meet.*
- ii. That the entire family has since sat down and resolve the differences between the two couples and that they are ready to live in harmony and take care of their children together.*
- iii. That it is just and fair for the Honourable Court to grant the orders as prayed.*

iv. That unless the orders sought are granted, the entire family and children will be subjected to total suffering.

3. The Applicant is currently serving a five (5) year Imprisonment having been convicted and sentenced on 3rd April 2025, on his own plea of guilty for the offence of Assault causing grievous harm; the complainant was his wife with whom they have five children;
4. The Court allowed the filing of supplementary affidavit to better appreciate the case at hand.
5. This Application was placed before the Court on the 29th January 2026 in the absence of the Applicant the Court by way of directions, called for the trial Court file in the Chief Magistrate's Court at Molo, Criminal Case Number E554 of 2025 Republic Vs Johnstone Melek; that the state be served, a hearing date was scheduled for the 16th March 2026.
6. This Court has jurisdiction to hear and determine the orders sought in this revision in accordance with **Section 363** as read with **Section 364** of the criminal procedure code and **Article 165 (3), (9)** of the constitution of Kenya together with all the enabling provisions of the law;
7. In undertaking the Review, the Court finds the Application as presented together with supporting evidence as lacking in basis and merit, however this is a constitutional Court ready to

appreciate concerns raised and utilize the tools at its disposal to render substantive justice.

8. That in adopting the reasonable and harmonious rule of construction when considering section **348** of the criminal procedure code provides that;

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate Court, except as to the extent or legality of the sentence”.

9. The Power of High Court to call for records is provided for under **Section 362** of the criminal procedure code.

“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. **Section 364** of the criminal procedure code provide for the Powers of High Court on revision as follows;

(1) In the case of a proceeding in a subordinate Court the record of which has been called for or which has

been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a Court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(c) in proceedings under section 203 or 296(2) of the Panel Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate Court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the Court, the order of the subordinate Court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an

opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate Court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the Court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

11. The Trial records reveal that the Applicant pleaded guilty, he stated that ***“it is true”***. The prosecution provided details of the domestic violence giving rise to the offence and the Applicant responded facts were true.

12. The Court entered to “plea of guilty” and reserved sentence subject to the preparation of the Pre-Sentence Probation inquiry report after which preparation and filing the Court proceeded to sentence the Applicant.
13. It’s noteworthy that the Applicant was at no point forewarned by the Court of the consequences and import of plea of guilt.
14. The importance of warning the accused person as to the consequences of pleading guilty was considered in the case of **Elijah Njihia Wakianda -vs- Republic [2016] eKLR** where the Court of Appeal held that; -

“.....We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the Constitution guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial Court to be particularly solicitous of his welfare. The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring

that an unrepresented accused person is not lost at sea in the maze of the often- intimidating judicial process.....”

15. This duty exists not only to capital offences but other serious offences whose sentences may be indefinite or long. The Court must ensure that not only does the accused understand the ingredients of the offence with which he is charged at all the stages of the plea taking, but that he also understand the sentence he faces where he opts to plead guilty as failure to do so is a violation of his right to a fair trial and that the plea of guilty was in those circumstances not unequivocal.
16. The Court finds that the plea was equivocal contrary to **Section 207(2)** of the Criminal Procedure Code Cap 75, Laws of Kenya which provide thus:-

“207. Accused to be called upon to plead

(1) The substance of the charge shall be stated to the accused person by the Court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the Court shall convict him and pass sentence upon or make an

order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the Court may permit or require the complainant to outline to the Court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the Court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the Court shall order a plea of “not guilty” to be entered for him.

(5) If the accused pleads—

***(a) that he has been previously convicted or acquitted on the same facts of the same offence;
or***

(b) that he has obtained the President’s pardon for his offence, the Court shall first try whether the plea is true or not, and if the Court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.

17. The proper procedure to be followed was fortified in the East African Court of Appeal case of **Adan v Republic [1973] EA 45**, that held as follows and acts as a guide Trial Courts:

“(1) The person pleading guilty fully understands the offence with which he is charged. The Court taking plea of guilty must in its record show the substance of the charge and every element or ingredient constituting the offence has been explained to him in a language that he understands and that, with that understanding and out of his own free will, the pleader admits the charge. That if an accused dispute the facts of the charge a plea of not guilty must be entered where there is more than one accused jointly charged, the plea of each should be recorded separately and if a charge or indictment contains several counts, the accused must be asked to plead to them separately. If an accused does not change his/her plea of guilty should be entered and a conviction recorded and after mitigation and facts relevant to sentence can be meted out.”

18. The powers of the High Court on Revision are provided under **Section 364** of the Criminal Procedure Code. It is worth noting that where an appeal lies from the finding, sentence or order, and no appeal has been brought, no proceeding shall be

entertained by way of revision. The Court exercises its supervisory jurisdiction over Subordinate Court to correct apparent mistakes and to prevent a miscarriage of justice.

19. In **R -v- John Wambua Munyao & Others Cr. Rev. 215/18** Justice Ondunga stated that: -

“Article 165(6) and (7) of the Constitution confers upon this Court supervisory jurisdiction upon this Court to make any order or to give any direction it considers appropriate to ensure fair administration of justice.”

20. As such the Court only exercises its jurisdiction of revision where there are glaring acts of omission by the Trial Magistrate. It is noteworthy to mention that a revision is not an appeal and such parties are discouraged from arguing an appeal which is disguised as revision.

21. In this instance it is apparent the Applicant was note forewarned by the Court as to the serious consequences of the plea he faced.

22. The Trial Court imposed a deterrent sentence without any rationale and in the face of a favorable probation report recommending a non-custodial sentence. The Learned Magistrate observed that the Applicant, **“deserved a custodial sentence to deter him for committing a crime**

in the future” to this Court this finding was injudicious s the same was not anchored on any material before the Court, the Applicant deserved the leniency of the Court.

23. What is the course available to the Court in such circumstances? In other words, should the Court order a retrial? The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

“...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;.....”

24. The Court of Appeal in the case of **Samuel Wahini Ngugi vs. R [2012] eKLR** held: -

“The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of **Ahmed Sumar vs. R (1964) EALR 483**, the Court found as follows:

‘It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered...In this judgment the Court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person’

25. That decision was echoed in the case of **Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported)** when this Court stated as follows:

‘...the principle that has been accepted to Courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.’

26. In **Muiruri -vs- Republic (2003), KLR, 552** and **Mwangi - Vs- Republic (1983) KLR 522** and **Fatehali Maji -vs- Republic (1966) EA, 343** the view expressed was that: -

“Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it.”

27. It is evident that the plea taking process was not done in full compliance of the law, the imprisonment sentence was equally injudicious the same was prejudicial to the applicant. It is for that reason, the conviction and sentence was illegal.

28. Having pleaded guilty, the applicant was not forewarned of the consequences of his guilty plea and the sentencing deprived him of the benefits that accrue all accused persons by the Court *suo motu* imposing an imprisonment sentence and for that reason, I will revise the order of the lower Court, quash

the conviction and set aside the sentence imposed in Chief Magistrate's Court at Molo, Criminal Case Number E554 of 2025 Republic Vs Johnstone Melek.

29. The Period of Imprisonment of the Applicant from the 15th April 2025 to date shall suffice as sufficient penalty.

30. The Applicant may forthwith be released from custody unless otherwise lawfully held.

**Signed, Dated and Delivered virtually in open Court at
Nakuru
on this 20th April 2026**

**Mohochi S.M
JUDGE**