REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION NO. E307 OF 2025

STEPHEN NYONGESA KINUSI ……. APPLICANT

=VERSUS=

REPUBLIC ……. RESPONDENT

Coram: Hon. Justice R. Nyakundi

MS Sidi for State

RULING

1. The Applicant was charged with threatening to kill contrary to Section 223(1) of the Penal Code. The brief facts of the particulars are that on the 22nd day of May 2025 at around 1300hrs at Vumilia a village, soy sub county within Uasin Gishu County without lawful excuse uttered words "Nitawauwa" words threatening to kill Rosa Ivayo (mother) and Josam Munyasi (brother).
2. The Applicant was convicted on his own plea of guilty and was sentenced to serve 3 years imprisonment on 4th September 2025.
3. The Applicant has approached this Court vide an application for review of sentence under Section 362 as read with Section 364 of the CPC.

DECISION

4. The Superior Courts have delved into the issue of sentencing which is one of the core functions of trial Courts within our Criminal justice system. In the **Fatuma Hassan Salo v Republic [2006] eKLR** Makhandia J as he then was remarked; *Thus, the court should be guided by evidence and sound legal principles when it comes to the arrival of its decision. He also stated that the court should put into consideration all the relevant factors and exclude the irrelevant factors.* In addition, the Court in **Peter M. Kariuki v Attorney**

General, [2016] eKLR also made the following observations; *That a Court has been granted discretion in a manner that is both judicial and reasonable – not upon caprice or personal opinion. This has been emphasized in the judgments of other cases to be useful to the appeal court when analyzing the judgment of a Lower Court.*

5. The Sentencing Guidelines of 2023 provide a foundation and a reference point for Judges and Magistrates in exercising discretion. The Policy Guidelines provides for a three-step approach that is to be applied by a trial Court in individualizing specific sentences befitting specific offences.

(a) ***Sentencing options*** *– The Court is meant to consider the sentencing options that are provided for by the statute where the crime falls under. This means a reference to the statute that provides for the crime in question.*

(b) ***Custodial v non-custodial*** *– For the statutes that provide for both custodial and non-custodial options, the guidelines give principles that are to be considered in analyzing which of these two orders would be the most appropriate.*

(c) The third step is twofold, the choice that is to be considered depends on which option was made in step 3.

(i) For a ***non-custodial sentence****, the guidelines have also provided a policy through which the Courts discretion is to be applied in choosing the most appropriate non-custodial sentence and eventually mitigation and aggravating circumstances are expected to be put into consideration*

(ii) For ***imprisonment,*** *the same applies, that the guidelines have provided for a policy to be used in determining how long the term of imprisonment should be after the consideration of aggravating and mitigating circumstances.*

6. A proper recrafted legal framework is needed to meet the challenging task of appropriate sentencing given the disparities on the various

sanctions of what one considers to be the same offence with the prescribed sentence by the Legislature.

7. Having been in this space as a legal professional involved in adjudication of cases within the scope of criminal law, I am of the view that there is an urgent need to carefully study other theories or objectives of sentencing when it comes to punishment in order to determine which ones are acceptable as justifications for punishing the various wrongdoers in specific offences. It serves no purpose to put emphasis on deterrence and abandon the rehabilitative principle or objective if it is thoughtlessly just replaced without very clear guidelines or reasons. There are those who maintain that every different punitive measure taken by the various Courts can be satisfied by a single sentencing scheme, but practically it is difficult to accomplish transformative justice on sentencing by placing emphasis on just one objective. The Courts in Kenya tend to hinge more towards deterrence of an offender than rehabilitation. The common philosophical justifications for the institutional punishments include the following:

   (a) **Retribution** – punishment is justified merely because the offender has committed a wrong.
   (b) **Deterrence** – punishment is justified in order to clear the offender from committing further crimes in the future and to deter other members of society in general.
   (c) **Rehabilitation** – the offender needs to be rehabilitated so that he will behave in a socially acceptable manner.
   (d) **Incapacitation** – justifies the incarceration of the offender for the protection of society.
   (e) **Condemnation** – the infliction of punishment upon the guilty person is the symbolic condemnation by society of the individual.

8. The Maximum Prisons facilities in Kenya were designed to hold fewer people than they do at the moment. Apparently, the correctional facilities do not have adequate infrastructure to hold the additional

population of inmates hence there is an urgent need to revisit the issue of sentencing regime in Kenya to avoid a catastrophe so that petty offenders should be a subject of non-custodial sentences. It is trite that under the rehabilitative theory judicial discretion has been quite abroad, based on the idea that the punishment should fit the criminal and not the crime. Sentencing should be "individualized" depending upon such factors as the particular circumstances of the crime, the prisoner's previous criminal record, and the chances that another crime will be committed. Consequently, the Judge or Magistrate must have a great deal of discretion in order to treat offenders on a more individual basis.

9. I have also concerns about the Presentence Reports particularly during the decongestion programs authorized across the country at any one given time. First, what is known as a presentence report contains criteria which often facilitate disparity in sentencing. A presentence report, written after a background investigation of the offender has been made, is supposed to aid the sentencing Judge or Magistrate in making a proper decision. Unfortunately, such a report is difficult to compile and time-consuming. Consequently, the Judge or Magistrate does not necessarily get a truly accurate picture of the convict's background and personality. But, even assuming a perfectly accurate report, the criteria upon which the Judge evaluates the offender unintentionally, but inevitably, provide for discriminatory treatment against certain social classes. (See ***Golden Gate University Law Review Vol. 11, Iss. 2 [1981], Art. 3***).

10. This is an application based on revision of sentence which a preserve of the law under Section 362 of the Criminal Procedure Code. The operative words are that for revision to be entertained by this Court the characteristic of the sentence must depict illegality, unjustness, irregularity and impropriety. In articulating these provisions, am also persuaded to borrow a leaf from the legal text in civil law on exercise of review jurisdiction by a Court based on error apparent on the face of

the record, or patent mistake or on sufficient cause and finally discovery of new evidence which was not available to the Court or the Applicant when the impugned decision was made. This very same Court whether on revision or appeal is to be guided by the principles laid down by the Court of Appeal in the dicta of ***Benard Kimani Gacheru vs. Republic [2002] eKLR:***

> *"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, sentence must depend on the facts of each case. on appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."*

11. I have considered the application by the Applicant who pleaded guilty to the offence of threatening to kill contrary to Section 223(1) of the Penal Code. The trial Magistrates Court considered the facts of the case, convicted him of the offence and subsequently imposed a sentence of three (3) years. It is this sentence which he is aggrieved about and applies to this Court to review it to a lower digit. In my considered view the Applicant has not met the threshold in the criteria set under Section 362 of the CPC and in pari materia the legal principles under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules on review of an impugned judgment or ruling on any of the grounds expressly provided for in that Statute. The application therefore lacks merit and the same is dismissed forthwith.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 28TH DAY OF APRIL, 2026

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R. NYAKUNDI

JUDGE