

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL MISC. APPLICATION NO. E138 OF 2023

JOSEPH WANYONYI NYONGESA.....1ST APPLICANT

EMMANUEL NYONGESA SIMIYU.....2ND APPLICANT

JOSEPH JUMA SIMIYU.....3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicants moved this Court by an undated Notice of Motion, filed on 12th October, 2023, seeking the following Orders;-

1) The Honourable Court be pleased to substitute their current sentence of imprisonment that they are now serving with a probation sentence.

2) The Honourable Court be pleased to invoke the provisions of section 362, 363 and 364(b) of the Criminal Procedure Code and Provisions under the Probation of Offenders Act and review the balance on the sentence to a non-custodial sentence.

3) The Honourable Court has jurisdiction to determine this Petition under the provisions of Article 165 (3) and (9) of the new constitution of Kenya 2010 and the relevant provisions under the Probation of Offenders Act, respectively.

4) That they are utterly remorseful and repentant of what really happened and if given another chance, they will not repeat such an act again.

2. The Application is supported by three affidavits, each sworn by the respective Applicants. The deponents state that they were jointly charged with the offence of Murder, contrary to Section 203 as read with Section 204 of the Penal Code, in High Court Criminal Case No. 62 of 2016.

Following a full trial, the Applicants were found guilty and each sentenced to a custodial term of fifteen (15) years.

3. The Applicants now move this Court to substitute the remainder of their custodial sentences with a non-custodial sentence, specifically, a term of probation. The Applicants contend that this Court is properly seized of the matter and possesses the requisite jurisdiction to hear and determine the Application pursuant to Articles 23 and 165 (3) & (6) of the Constitution of Kenya.
4. In support of their plea for leniency, the Applicants aver that they have undergone significant reformation during their incarceration. They emphasise that they are deeply remorseful for their actions and fully prepared to comply with the laws of the land.
5. The Respondent opposed the Application by the Replying Affidavit sworn on 29th October, 2025, by James Kihara, the Prosecution Counsel. He stated that the trial Court found the three Applicants acted with a common intention in the murder of Francis Njuguna and sentenced each to serve 15 years in prison.
6. He stated that the Applicants have now petitioned the court to substitute their custodial sentences with non-custodial probation, claiming complete reformation and remorse. However, the Prosecution argues that such a move would contradict the Judiciary of Kenya Sentencing Policy Guidelines (2023), which dictate that sentencing must balance retribution, deterrence, and community protection. Specifically, that, the Guidelines suggest that custodial sentences should remain reserved for cases where these objectives cannot be met through non-custodial means.
7. The Respondent further anchored its opposition on several key legal precedents. The case of *Marus v Republic [2024] KEHC 3432 (KLR)*, was cited, where R. Nyakundi J, articulated that the gravity of the offence and the protection of the community are paramount factors in sentencing.

8. Regarding the severity of the crime, the Respondent referenced the case of ***Republic v Ruth Wanjiku Kamande [2018] eKLR***, noting that murder is a grave offence requiring a severe custodial sentence to reflect society's condemnation.
9. In addition, the Supreme Court case of ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR*** was invoked to argue that while rehabilitation is a factor, punishment must always remain commensurate with the crime's gravity.
10. He further addressed the court's powers under **Section 362 of the Criminal Procedure Code**, which allows the High Court to examine criminal records to ensure the legality and propriety of a sentence. On that basis, the Prosecution invites the court to use this power to review victim sentiment and probation reports, arguing that the irrevocable loss of life over a mere television outweighs the Applicants' claims of reform.
11. Ultimately, the Respondent maintained that a non-custodial sentence would undermine the sanctity of human life and erode public confidence, and therefore requests the court to uphold the original 15-year term.

Analysis and Determination

12. The Applicants have moved this Court seeking a review and substitution of their 15-year custodial sentence with a non-custodial probation order. They invoke the Court's jurisdiction under Articles 23 and 165(3) & (6) of the Constitution of Kenya, alongside Sections 362, 363, and 364 of the Criminal Procedure Code.
13. The High Court's power of revision is set out in Article 165(6) and (7) of the Constitution, which provides:-

“(6)The High Court has supervisory jurisdiction over the subordinate courts and any person, body, or authority exercising a judicial or quasi-judicial function but over a superior court. (7)For the purposes of clause (6), the High Court may call for the record of

any proceedings before any subordinate court or person, body, or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

14. Further, Section 362 of the Criminal Procedure Code provides for powers of the High Court to call for subordinate Court records, thus; -

“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.”

15. On the other hand, Section 364 of the Criminal Procedure Code provides for powers of the 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. (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.”

16. Supervisory and revisionary powers of the High Court empower it to effectively supervise subordinate courts to correct their errors or wrongs and or ascertain itself on the correctness, legality and propriety of the lower court record as emphasised under Section 362 of the Criminal Procedure Code.
17. The Applicants herein were all convicted of the murder of Francis Njuguna, a 74-year-old man, in a tragic incident of vigilante justice. This Court, presided over by Hon. Joel Ngugi J (As he then was), delivered its sentence on 2nd June, 2020.
18. In his ruling, the learned Judge noted that the Applicants set in motion a macabre sequence of events by whipping up a mob to attack the Deceased’s son over a suspected theft of a television. When the 74-year-old father intervened to plead for his son, he was beaten to death by the crowd. Consequently, the Court sentenced each Applicant to fifteen (15) years’ imprisonment, backdated to the date of their arrest on 15th October, 2016, in line with section 333 of the Criminal Procedure Code.
19. This court notes the Applicants’ contention that they have undergone significant reformation during the ten years they have been in custody. They express utter remorse and argue that their continued rehabilitation would be better served through a non-custodial sentence, allowing them to reintegrate into society as law-abiding citizens.

20. In opposition, the Respondent argues that the Judiciary Sentencing Policy Guidelines (2023) prioritise retribution, deterrence, and denunciation for grave offences such as murder. Citing *Republic v. Ruth Wanjiku Kamande* (Supra) and *Muruatetu* (supra), the Respondent maintains that punishment must remain commensurate with the crime's gravity. He states that they emphasise that the victims continue to grieve and their lives have been irrevocably altered over a stolen loss of life over a stolen mere television. Upon reconsidering the principles of proportionality and gravity, it is evident that the trial court properly balanced the Applicants' youth and remorse against the heinous nature of the offence and therefore sentenced each of them to serve 15 years' imprisonment.
21. While the Applicants emphasise their rehabilitation, this court finds that the sentence delivered on 2nd June, 2020, accurately reflected the objective seriousness of taking a life. Though the reform is commendable, it does not automatically entitle the Applicants to a non-custodial sentence. This court finds no reason to interfere with the sentence meted out against the Applicants herein.
22. Consequently, the Applicants' undated Notice of Motion, seeking the substitution of their custodial sentence with a probation Order or any other non- custodial sentence, is hereby dismissed.

Dated, signed and delivered at Nakuru this 14th Day of May, 2026.

PATRICIA GICHOHI
JUDGE

In the presence of:

Applicants

Ms Anyumba for Respondent

Erickson- Court Assistant

ORIGINAL