



**Rotich v Republic (Miscellaneous Criminal Application
E083 of 2024) [2025] KEHC 5117 (KLR) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5117 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION E083 OF 2024**

RN NYAKUNDI, J

APRIL 29, 2025

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS AS
UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF CORRECTIONAL SERVICE AND PROBATION OF
MALE AND FEMALE OFFENDERS ACT**

BETWEEN

ELIJAH KIPKORIR ROTICH APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. What is pending before me for determination is a Notice of Motion Application dated March 2024 in which the Applicant is seeking the following orders:
 - a. Spent
 - b. That the Applicant pray upon a grant of an order for non-custodial sentence in conformity with section 4 of the Probation Act
 - c. That section 4(1)(a)(b) of the *Probation of Offenders Act* Cap 64 Laws of Kenya be applied.
2. The Application is supported by the annexed Affidavit sworn by Elijah Kipkorir Rotich, the Applicant herein where he avers as follows:
 - a. That I was charged with robbery with violence c/sec 295 as read with 296(2) of the *Penal Code* at CM's at Eldoret by Hon. Odenyo convicted and sentenced (10) years' imprisonment



- b. That the subject is first offender, repentant, most remorseful and regrets for the previous characters.
- c. That the Applicant is seeking for sentence review and be admitted on probation basis non-custodial or community service order.
- d. That this Honourable Court has power to hear and determine infringement of fundamental rights and award remedies under the provisions of section 216 and 389 of the Criminal Procedure Code on mitigation and the values of sentence as provided for in the sentencing as provided in the sentencing policy guidelines 2016 paragraph 4.1.

Analysis and Determination

3. I have read the application and the affidavit in support of the Application and there is one issue for manifest i.e.

Whether the Application for an order of non-custodial sentence is merited.

4. First and foremost, I would like to highlight the history of this case before I delve into the merits of the case. The Applicant herein was charged with robbery with violence contrary to section 295 as read with 296(2) of the Penal Code in Eldoret CMCC 2718 of 2019 convicted and sentenced (10) years' imprisonment by Hon. Odenyo in a Judgement delivered on 12th October 2021. Being dissatisfied with the sentence, the Applicant herein appealed to the High Court at Eldoret in Criminal Appeal No E069 of 2021 in which the Appeal was dismissed for lack of merit. In particular, the session Judge held as follows: "11.I have evaluated the submissions of both parties, the petition of appeal and the mitigation of the appellant and I am persuaded that in arriving at the sentence passed, the trial court must consider the factors of the case and the mitigating plea of the appellant and accordingly use its discretion to make the decision herein. I therefore hold that the sentence was commensurate with the offence and find no reason to disturb the decision of the trial court. The upshot of the above finding is that the appeal before me is dismissed for lack of merit. It is so ordered."
5. The Applicant also filed a Criminal Petition No. E038 of 2022 in which this Honourable Court held as follows: On consideration of the matter pursuant to Article 50(6) a & b of the Constitution, section 333(2) of the CPC, the committal warrant to prison be amended in consonant with section 333(2) of the CPC. The imprisonment sentence to commence date be indicated as 5/09/2019.
6. A glimpse of the Applicant's application calls for review of Article 50(6) of the Constitution of Kenya 2010 which states as follows:
 - (6) A person who is convicted of a criminal offence may petition the High Court for a new trial if-
 - (a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and
 - (b) new and compelling evidence has become available.
7. Section 4 of the Probation of Offenders Act provides as follows:
 4. Power of court to permit conditional release of offenders
 - (1) Where a person is charged with an offence which is triable by a subordinate court and the court thinks that the charge is proved but is of the opinion that, having regard to youth, character, antecedents, home surroundings, health or mental condition of the



offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may—

- (a) convict the offender and make a probation order; or
- (b) without proceeding to conviction, make a probation order, and in either case may require the offender to enter into a recognisance, with or without sureties, in such sum as the court may deem fit.

- (2) Where any person is convicted of an offence by the High Court and the court is of the opinion that, having regard to the youth, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which, the offence was committed, it is expedient to release the offender on probation, the court may, in lieu of sentencing him to any punishment, make a probation order, and may require the offender to enter into a recognisance, with or without sureties, in such sum as the court may deem fit.

8. Moreover, section 5(1) of the Probation of the Offenders Act states that:

5. Probation order

- (1) A probation order shall have effect for such period, of not less than six months and of not more than three years, from the date of the order as may be specified therein, and shall require the probationer to submit during that period to the supervision of a probation officer appointed for or assigned to the district or area in which the probationer will reside after the making of the order, and shall contain such provisions as the court considers necessary for securing the supervision of the offender, and such additional conditions as to residence and other matters as the court, having regard to the circumstances of the case, considers necessary for securing the good conduct of the offender or for preventing a repetition of the same offence or the commission of other offences.

9. Testing the application against the background of all other evidence on record in order to ascertain existence of new compelling evidence to warrant a new trial on sentence that if not acted upon would adversely affect the rights and fundamental freedoms of the Applicant I find none at the moment. This is cognizant to the fact that matters of sentence had already been dealt as stated elsewhere in this ruling.

10. The offence of Robbery with Violence is provided for under the Section 296(2) of the [Penal Code](#) as follows:

“296. Punishment of robbery

- (1)
- (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

11. In the case of *Joseph Ochieng Osuga v Republic* [2021] eKLR this court stated that the power to interfere with a sentence imposed by the trial court is limited by precedent except where certain



conditions are met. This court cited the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR where it was stated that:

“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 stated is shown to exist.”

12. I take note that the Applicant herein was sentenced to serve 10 years’ imprisonment which sentence I hold the view that it was lenient and legal. In view of the foregoing, the Notice of Motion Application is dismissed for want of merit.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 29TH APRIL 2025

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R. NYAKUNDI

JUDGE

