



**Madegwa v Republic (Miscellaneous Criminal Application  
E077 of 2024) [2025] KEHC 11990 (KLR) (11 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 11990 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CRIMINAL APPLICATION E077 OF 2024  
RN NYAKUNDI, J  
AUGUST 11, 2025**

**BETWEEN**

**STARICO MADEGWA ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. What is pending before me for determination is a Notice of Motion Application dated 1<sup>st</sup> July 2024 brought under section 333(2), 362, 364 of the Criminal Procedure Code and Article 50(2)(p) of *the Constitution* in which the Applicant is seeking the following orders:
  - a. That the Petitioner is seeking for a review order for his sentence of 30 years under section 362 as read with 364 of the CPC and in reliance to Article 50 (2)(q) of *the Constitution* of Kenya 2010.
  - b. That the Petitioner is seeking for a sentence reduction in conformity with emerging jurisprudence and the progressive objectives of sentencing.
  - c. That the Petitioner is seeking for orders of a reduction of his sentence on the basis of new existing circumstances of his case together with mitigation which was not considered on his sentencing.
  - d. That the Petitioner is seeking for an order to reduce his sentence proportionately to the time he spent in pre-trial custody under section 333(2) of the CPC.
2. The Application is supported by the annexed affidavit dated 5<sup>th</sup> July 2024 sworn by STARICO MADEGWA who avers as follows;
  - a. That I was charged with the offence of Defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No.3 of 2006, was sentenced to serve a Life sentence by CM's at Eldoret.



- b. That the Petitioner appealed this decision but was unsuccessful as it was dismissed in its entirety.
- c. That the Petitioner under appeal no. E080 of 2021 appealed the above decision at Court of Appeal at Eldoret which was partially successful as the life sentence was substituted with 30 years.
- d. That the Petitioner is approaching this Court to seek for s review of his sentence under section 362 as read with 364 of the CPC and in reliance to Article 50(2)(q) of COK on the grounds:
  - a. That the Court should take a judicial notice that life expectancy in Kenya is 70 years and further consider the petitioner is now aged 52 and combining it with his new sentence of 30 years it makes it 82 years. I urge the Court to kindly reduce this sentence due this sentence due to this reality, to him hope of making it out of prison alive.
  - b. That the Petitioner is praying that since the law is no longer rigid with regard to minimum mandatory sentences, the court should consider his case in circumstances by further reducing his sentence as the reduction he received on his appeal is still held in some court of authority to be equivalent to a life sentence. It was not proper to substitute a life sentence with another amounting to a life sentence.
  - c. That the Petitioner is pursuing parity on his sentence through a sentence review on the reason that the court disregarded his mitigation on record and personal circumstances before sentencing him which is a procedural irregularity that could be corrected through a sentence review for an individualized sentence after considering the above issues. In this case the court in consideration of the mitigation factor according to the judiciary sentencing policy to reduce his 30 years' imprisonment by 50 percent to make it to 15 years or lesser.
  - d. That the failure to consider his mitigation denied him the benefit under article 50 (2) (p) and now that he was granted a determinate period he wishes to claim the benefit under this provision for a lesser sentence as this was a procedural irregularity which limited his right to a fair trial under article 25 (c) of the COK.
  - e. That the petitioner has demonstrated that he is a reformed and a changed person who is remorseful for his action.
  - f. That the Petitioner has equally new circumstances for his case in this instance his family that he left out there is undergoing a lot of economic hardship since he was their sole bread winner.
  - g. That the court should adopt new jurisprudence and precedence in line with sentencing objectives for reformation and rehabilitation by moving away from the old objective such as deterrence with the purpose of to torment the petitioner.
  - h. That the trial court made a procedural irregularity by not complying with section 333(2) of the CPC where the period he spent in remand custody was never considered during imposition of the 30 years sentence that was ordered to commence from conviction date
  - i. That the Petitioner is quite remorseful for his wrong doing and prays that the Court should exercise its leniency on him by reducing or issuing a discharge order of him



from prison probably by making a finding that the sentence he has already served to be sufficient punishment.

- j. That the Petitioner believes the punishment the punishment imposed on him is cruel and unusual as it is incompatible with human dignity, disregarded his rehabilitation opportunity and would pray that the court following the harsher experience on him that has made him become sick to reduce his sentence in order to reflect a consideration for correcting of the above mentioned painful effect.

### **Analysis and Determination**

3. I have read and considered the Notice of Motion Application and the affidavit in support of the same. There is one issue manifest for determination:

### **Whether the Application for sentence review is merited?**

4. The gist of the Applicant's application is based on the revisionary jurisdiction of the High Court. The High Courts' revisionary jurisdiction is governed by section 364 of the Criminal Procedure Code which states 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 Penal 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.
5. It bears repeating that, the High Court has the mandate under Article 165 (3) of *the Constitution* to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in *the constitution*, a further leapfrog development; under article 50(2)(p) of *the Constitution*. A glimpse of the Appellant's Appeal clearly calls for a re-hearing of the sentence imposed. Article 50 (2) (p) of *the constitution* provides as follows: Every accused person has the right to a fair trial, which includes the right—
- p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
6. Article 50(6) further provides for conditions under which one can petition for a new trial, which in this case is a new trial only on sentence. The provision speaks in the following terms.
- (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. The court has the authority to alter or decline to change the sentence imposed in certain situations. The court has complete discretion over that. I have reviewed the court's criminal trial record, including the verdict and sentencing. I've taken note of the conditions surrounding the offence. I have also read the court's sentencing record. Before giving the Applicant the only punishment permitted by law at the time, the court took into account the appellant's mitigation.
8. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in it's entirely so as to arrive at appropriate sentence. The Court of Appeal in *Thomas Mwambu Wenyi Vs Republic* [2017] eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira v State of Maharashtra* at paragraph 70-71 where the court held the following on sentencing:
- “Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”
9. Also in the case of *Francis Karioko Muruatetu & Another v Republic* (Supra) where the Supreme Court stated the guidelines and mitigating factors in a re-hearing on sentence were discussed. The



judiciary has also developed Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 which should be considered.

10. In the decision of *In R Vs Bieber* [2009] 1 WLR 223 the Court of Appeal of the United Kingdom had held as follows:

“The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. Where a mandatory life sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. He may have served a sufficient term to meet the requirements of punishment and deterrence and rehabilitation may have transformed him into a person who no longer poses any threat to a public. If, despite this, he will remain imprisoned for the rest of his life it is at least arguable that this is inhuman treatment...”

11. I take note that section 333(2) of the Criminal Procedure Code is applicable to this application before me. Section 333(2) of the Criminal Procedure Code provides that in sentencing, where an accused person was in remand custody the period spent in custody should be taken into account. It reads:

“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to conclude the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

12. The Court in the case of *Bethwel Wilson Kibor vs Republic* [2009] eKLR expressed itself as follows:

“By provision to section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years’ period that the appellant had been in custody. The appellant told us that as at 22<sup>nd</sup> September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

13. According to The Judiciary Sentencing Policy Guidelines: “The provision to section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

14. The applicant was arrested on 3<sup>rd</sup> April 2015 and convicted on 27<sup>th</sup> December 2018. Notably, the Applicant seeks to have the duration he spent in custody be taken into account which is his legal entitlement in my considered view. In view of the foregoing and in considering the provisions of section 333(2) of the Criminal Procedure Code, the sentence shall run from the date of arrest being 3<sup>rd</sup> April 2015.

**DATED, DELIVERED AND SIGNED AT ELDORET THIS 11<sup>TH</sup> AUGUST, 2025**



.....

**R. NYAKUNDI**

**JUDGE**

