



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CRIMINAL MISC. APPLICATION NO. 17 OF 2013**

**(From a Judgment of High Court at Mombasa in Criminal Appeal No. 125 of 2011 (Nzioka, J) dated 16th March, 2012 and (Original Criminal Case No. 205 of 2010 by Hon. Mutende – SPM Chief Magistrate's Court Mombasa).**

IN THE MATTER OF ARTICLE 23(1) 165 (3) (B) OF THE CONSTITUTION AND IN THE MATTER  
OF ARTICLE 50(1) OF THE CONSTITUTION

IN THE MATTER OF A FINE PURSUANT TO SECTION 3 OF THE NARCOTIC DRUGS ACT.

MWINYI MWINYI MZUNGU ..... PETITIONER

VERSUS

REPUBLIC .....RESPONDENT

**RULING**

The Applicant was charged Convicted and Sentenced to fifteen (15) years imprisonment for the offence of trafficking in Narcotic drugs contrary to section 4(a) of the Narcotics drugs and Psychotropic substances control Act No. 4 of 1994 by Hon. Mutende – Senior Principal Magistrate (as she then was).

Being dissatisfied of the Conviction and Sentence he lodged an appeal in the High Court vide Criminal Appeal No. 125 of 2011 Honourable Nzioka Judge heard the appeal and substituted the charge of trafficking with the lesser one of possession and proceeded to Sentence the appellant for five (5) years imprisonment without the option of a fine.

The present application seeks orders for a further interference of lady Justice Nzioka's Judgment and Sentencing in particular by giving the applicant the option of a fine in default of the Sentence of five (5) years.

Mr. Magolo Counsel for he applicant relies on article 159 (b) which provides,

***“Justice shall be administered without undue regard to technicalities”.***

With due respect to Counsel that article does not confer blanket jurisdiction to the High Court to determine matters that have already been determined by another Judge with concurrent jurisdiction. There is established a proper and methodical procedure of Appeal which lies to the Court of Appeal. Neither does Section 28 of the Penal Code confer jurisdiction as it merely provides the regime of Sentencing in regard to fines.

Counsel for the applicant submits that there was an oversight by reason of failure by the learned trial Judge by not calling for mitigation before Sentencing the Accused to five (5) years imprisonment.

Section 179 of the Criminal Procedure Code provides,

***“When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be Convicted of the minor offence although he was not charged with it”.***

The Judge in her evaluation considered this and decided to apply this section. I would not want to delve further as to do so would be sitting in an appeal of my colleague.

I am not persuaded that this Court has the jurisdiction to interfere with a Sentence entered by a fellow Judge.

I find this application to be without merit and it is disallowed.

Ruling delivered dated and signed this **2nd** day of **April, 2014**.

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**M. MUYA**

**JUDGE**

**2ND APRIL, 2014**

***In open Court in the presence of:-***

Learned State Counsel Miss Mwaura

Learned Counsel for the applicant Mr. Magolo

Court clerk Musundi