



**Wanjiru v Republic (Miscellaneous Criminal Application  
E052 of 2024) [2025] KEHC 5708 (KLR) (7 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5708 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
MISCELLANEOUS CRIMINAL APPLICATION E052 OF 2024**

**DKN MAGARE, J**

**MAY 7, 2025**

**BETWEEN**

**BENSON MWANGI WANJIRU ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in Othaya PMCC No.  
E052 of 2023 given on 06.06.2024 by Honorable M.N. Munyendo)*

**RULING**

1. This is a ruling over an application filed on 4.7.2024 seeking the revision of the sentence to consider that the co-accused was sentenced to 5 years while the applicant was sentenced to 7 years imprisonment. He also stated that the quantity he was found with was minuscule. He pleaded for a lenient sentence. He stated that he was a first offender and remorseful.
2. He filed submissions stating that he was dissatisfied with the sentence. He stated that it was harsh for being found with 400 grams and that it must be commensurate with the circumstances. He relied on the cases of Republic v Thomas Patrick Gilbert Cholmondeley [2009] KEHC 3853 (KLR), Republic v James Kiarie Mutungei [2017] KEHC 7170 (KLR).
3. The state opposed the appeal.

**Analysis**

4. The power to revise a sentence arises from the court's powers under Article 165(6) of *the Constitution* of Kenya, which states that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body, or authority exercising a judicial or quasi-judicial function, but not over a superior court.



5. The revisionary powers of this court are for the purpose of satisfying itself as to the correctness, legality, or propriety of any finding by the subordinate court as set out under Section 362 and 367 of the Criminal Procedure Code, that:
  362. 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.
  367. When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.
6. The Applicant was charged and convicted of an offence under Section 4 of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994. The said section provides as follows:

Penalty for trafficking in narcotic drugs, etc. Any person who traffics in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable

  - a. In respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life; or
  - b. In respect of any substance, other than a narcotic drug or psychotropic substance, which he represents or holds out to be a narcotic drug or psychotropic substance to a fine of five hundred thousand shillings, and, in addition, to imprisonment for a term not exceeding twenty years.
7. Sentencing is a matter of discretion of the trial court and may be interfered with only in exceptional circumstances. In the case of *MM1 v Republic* [2022] eKLR, the Court referred to the case of *Mokela v. The State* (135/11) [2011] ZASCA 166 where the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”
8. This court will not alter a sentence unless the trial court has acted upon wrong principles or overlooked some material factors. The Court of Appeal in *Ogolla s/o Owuor v. Republic* [1954] EACA 270, held that the Court does not interfere with a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.
9. This court may also interfere if the sentence is excessive and therefore an error of principle has occurred. In the case of *Shadrack Kipkoech Kogo v R Eldoret Criminal Appeal No. 253 of 2003* the Court of Appeal held that:

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence



itself is so excessive and therefore an error of principle must be interfered (see also Sayeka v R. (1989 KLR 306))

10. The sentence given in law was 7 years. The co-accused was given 5 years. The applicant states in his submissions, and not in the application, that the sentencing was discriminatory. However, I do not see the discrimination. The sentencing was simply on a basis of differentiation and not discrimination. In the case of Claire Njoki Kirera v Council for Legal Education & 2 others [2021] eKLR A C Mrima addressed the issue of differential treatment not being necessarily discriminatory as follows:
  81. The position in law that differential treatment is not necessarily discriminatory was discussed at length in a Multi-Judge bench in Petition 56, 58 & 59 of 2019 (Consolidated), Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR.
  82. In the case, the Court considered whether differential treatment amounts to violation of the right to equality and non-discrimination as guaranteed under Article 27 of *the Constitution*. The Learned Judges made reference to various decisions and finally observed as follows: -
  983. The precise meaning and implication of the right to equality and non-discrimination has been the subject of numerous judicial decisions in this and other jurisdictions. In its decision in Jacqueline Okeyo Manani & 5 Others v Attorney General & Another (supra) the High Court stated as follows with respect to what amounts to discrimination:
    26. Black's Law Dictionary, 9th Edition defines "discrimination" as (1) "the effect of a law or established practice that confers privileges on a certain class because of race, age, sex, nationality, religion or hardship" (2) "Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured".
    27. In the case of Peter K Waweru v Republic [2006] eKLR, the court stated of discrimination thus: -

Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."(emphasis)
    28. From the above definition, discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups. Article 27 of *the Constitution* prohibits any form of discrimination stating that. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law, and that (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
    29. *The Constitution* advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in



law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.

30. In this regard, the Court stated in the case of Nyarangi & 3 Others V Attorney General [2008] KLR 688 referring to the repealed constitution; “discrimination that is forbidden by *the constitution* involves an element of unfavourable bias. Thus, firstly unfavourable bias must be shown by the complainant; and secondly, the bias must be based on the grounds set in the constitutional definition of the word “discriminatory” in section 82 of *the Constitution*.
984. It is thus recognised that it is lawful to accord different treatment to different categories of persons if the circumstances so dictate. Such differentiation, however, does not amount to the discrimination that is prohibited by *the Constitution*. In John Harun Mwaui v. Independent Electoral and Boundaries Commission & Another (supra), the court observed that:
- [i]t must be clear that a person alleging a violation of Article 27 of *the Constitution* must establish that because of the distinction made between the claimant and others, the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of *the constitution*.
985. When faced with a contention that there is a differentiation in legislation and that such differentiation is discriminatory, what the court has to consider is whether the law does indeed differentiate between different persons; if it does, whether such differentiation amounts to discrimination, and whether such discrimination is unfair. In EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & Another: Petition 150 & 234 of 2016 (Consolidated) the court held that:
288. From the above definition, it is safe to state that *the Constitution* only prohibits unfair discrimination. In our view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization.”
986. In Harksen v Lane NO and Others (supra) the Court observed that the test for determining whether a claim based on unfair discrimination should succeed was as follows:
- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not, then there is a violation of *the constitution*. Even if it does bear a rational connection, it might nevertheless amount to discrimination.
11. The Applicant had previous records. The applicant had been convicted of possession of cannabis in E178 of 2019. There was also a sentence for being drunk and disorderly. However, the same does not count for the record. The Applicant was thus not a first offender. On the other hand, the co-accused was a first offender. If the court treated the two offenders the same way, that would be unfair. In this case, the previous record has to count.



12. The court finds no justifiable basis to interfere with the sentence imposed in this matter. As a matter of law, interference with a sentence passed by a subordinate court is permissible only in exceptional cases through appeal or review. Consequently, the application stands dismissed.

**Determination**

13. I therefore make the following orders: -
- a. The undated application filed on 04.06.2024 is dismissed.
  - b. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 7<sup>TH</sup> DAY OF MAY, 2025.**

Ruling delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Mr. Kimani for the State

Pro se Applicant – present

Court Assistant – Michael

