

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**MISCELLANEOUS CRIMINAL APPLICATION NO. E141 OF 2024**

**KASSIM HAMISI *alias* KAY KAY .....**  
**APPLICANT\_**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Applicant herein was charged in Mariakani Criminal Case No. E170 of 2023 with 4 counts of the offence of trafficking in narcotics contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act. He was also charged with being in possession of narcotic drugs and psychotropic substance contrary to Section 2(a) of the Act. Upon conviction, he was sentenced to pay a fine of Kshs. 100,000/= and in default to served 1-year imprisonment on each count. The sentences are to run consecutively
2. By his undated application, the Applicant seeks that the Court reviews his sentence and grant him an alternative sentence like a suspended sentence, community service or promotion. He also seeks a reduction of the fine or for the sentences to run concurrently and from the date of his arrest.
3. The Respondent opted not to file a response to the Application.
4. The Constitution has conferred upon this Court supervisory jurisdiction over subordinate courts. Article 165(6) and (7) of the Constitution provides as follows:
  - (6) *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.*
  - (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*
5. In exercise of its supervisory jurisdiction, this Court is empowered to call for the record of proceedings in such subordinate courts, and make and give appropriate orders and directions as it deems necessary to ensure the fair administration of justice.

6. To give effect to this provision with regard to criminal matters, the Criminal Procedure Code provides for revision powers of the Court. It also elaborates the purpose of calling for the record of proceedings in subordinate courts by this Court, which is to satisfy itself as to the correctness, legality or propriety of any finding or order. Section 362 of the Criminal Procedure Code provides:

*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.*

7. Where the Court finds after examining the record of proceedings before a subordinate court that the same are wanting in correctness or that there is illegality or impropriety of a finding, order or sentence, the Court may by dint of the revision powers conferred upon it by Section 364, enhance the sentence or alter or reverse the order except that of an acquittal.

8. Section 364(5) of the CPC provides as follows:

*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.*

9. The law is explicit, that proceedings by way of revision shall not be entertained where an appeal lies from a finding, sentence or order, but no appeal is brought. Put simply, a party cannot fail to file an appeal against a finding, sentence or order, where one lies, and choose instead to move this Court by way of revision.

10. Section 347 of the Criminal Procedure Code provides that a person convicted on a trial held by a subordinate court may appeal to the High Court. Our courts have repeatedly stated in many cases, that where a clear procedure for redress is prescribed by the Constitution or a statute, that procedure should be strictly followed. One such case is **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** where the Court of Appeal stated:

*In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.*

11. The Applicant has not demonstrated that the proceedings before the trial court are wanting in correctness or that there is illegality or impropriety of the sentence imposed upon him. In the premises the orders for reduction of fine or alternative sentence cannot be granted by this

Court in the present application. Flowing from the above stated provisions of the law and the authority cited, the Applicant's redress lies with the appellate court. It is in the exercise of its appellate jurisdiction that this Court can examine the record and look at the sentence complained about and make a decision thereon.

12. Section 333(2) of the Criminal Procedure Code provides as follows:

***Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include 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.***

13. From the record, there is no mention by the trial court that the period that the applicant had spent in custody pending trial, was taken into account when sentencing him, as required in law. This is a serious omission on the part of the trial court, as it amounts to non-compliance with an express statutory provision.

14. In the end, the application partially succeeds. The sentence imposed upon the Applicant shall be reduced by the period from 28.2.24, the date of his arrest to 23.4.24 when he was released on bond. All other prayers in the application are declined.

**DATED SIGNED and DELIVERED in MALINDI this 28<sup>th</sup> day of November 2025**

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**M. THANDE**  
**JUDGE**