

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
CRIMINAL REVISION NO E001 OF 2026

JACKSON MMATA..

.....**APPLICANT**

VERSUS

**REPUBLIC.....RESPONDEN
T**

RULING

INTRODUCTION

1. The Applicant herein was charged with the offence of being in possession of chang'aa contrary to 31(2)(b) as read with Section 31(3) of the Alcoholics Drinks Control Act Cap 121 (Laws of Kenya). The Learned Trial Magistrate Hon N. Mosei (PM) convicted and fined him Kshs 55,000/= or in default to serve six (6) months' imprisonment.
2. On 9th December 2025, through the Court Administrator, the said Learned Trial Magistrate forwarded the trial file to wit **Hamisi PMCRC No E0554 of 2025 Republic vs Jackson Mmata** for review of his orders on the ground that a report from the Government Analyst was sneaked into the file with the findings that the alleged chang'aa that the Applicant herein had allegedly been found in possession of, was actually water.

LEGAL ANALYSIS

3. The court looked at the Exhibit Memo dated 24th November 2025 which had forwarded twenty two (22) litres of chang'aa to the

Government Chemist Department for analysis. In its Government Analyst Report dated 26th November 2025, the Government Analyst, D.K. Kibet explained that the said liquid put through physical, chemical and instrumental (alcoholmeter and gas chromatography) tests and found to have been water. It was, therefore, clear to this court that the Applicant herein was wrongly convicted and ought to be acquitted forthwith.

4. Notably, Section 364 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides 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 (emphasis court);

(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 Panel Code (Cap. 63), the Prevention of Terrorism Act (Cap. 59B), the Narcotic Drugs and Psychotropic Substances (Control) Act (Cap. 245), the Prevention of Organized Crimes Act (Cap. 59), the Proceeds of Crime and Anti-Money Laundering Act (Cap. 59A), the Sexual

Offences Act (Cap. 63A) and the Counter-Trafficking in Persons Act (Cap. 61), 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. Further, Section 354 of the Criminal Procedure Code states that:-

1. At the hearing of the appeal the appellant or his advocate may address the court in support of the particulars set out in the petition of appeal and the respondent or his advocate may then address the court.

2. The court may invite the appellant or his advocate to reply upon any matters of law or fact raised by the respondent or his advocate in his address.

3. The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may-

a. in an appeal from a conviction—

i. reverse the finding and sentence, and acquit or discharge the accused (emphasis court), or order him to be tried by a court of competent jurisdiction; or

ii. alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

iii. with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

- b. in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;**
- bb. in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High court thereon to the subordinate court for determination, whether by way of rehearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as High Court may think fit;**
- c. in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of re-hearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation**

to the matter, including an order as to costs, as the High Court may think fit;

d. in an appeal from any other order, alter or reverse the order, and in any case may make any amendment or any consequential or incidental order that may appear just and proper.

4. Subject to subsection (5), an appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it, at the hearing of the appeal:

Provided that where the appeal is on some ground involving a question of law alone, he shall not be entitled to be present except with the leave of the High Court.

5. The right of an appellant who is in custody to be present at the hearing of the appeal shall be subject to his paying all expenses incidental to his transfer to and from the place where the court sits for the determination of the appeal:

Provided that the court may direct that the appellant be brought before the court in a case where in the opinion of the court his presence is advisable for the due determination of the appeal, in which case the expenses shall be defrayed out of moneys provided by Parliament.

6. Nothing in subsection (1) shall empower the High Court to impose a greater sentence than might have been imposed by the court which tried the case.

6. In view of the injustice that had been meted upon the Applicant herein and bearing in mind that the High Court was currently away for the Christmas Recess, it became necessary for this court to make its decision without first hearing the Applicant or the Respondent. Indeed, the power to determine a revision in the absence of the parties was well captured in Section 365 of the Criminal Procedure Code Cap 75 (Laws of Kenya) which states as follows:-

“No party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision:

Provided that the court may, when exercising those powers, hear any party either personally or by an advocate, and nothing in this section shall affect section 364(2).

7. The circumstances of this case were a clear demonstration of the greatest height of impunity being meted out on innocent Kenyans. Where an innocent person could be arrested and arraigned in court on trumped up charges could only point out to malice and injustice that the Kenyans were suffering. Indeed, arbitrary detention of a person without any lawful cause was a gross violation, contravention and breach of that person’s right as contemplated in Article 29(a) of the Constitution of Kenya, 2010 that provides as follows:-

“Every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.”

8. This court hopes that the Applicant could get justice if the event he elected to pursue a claim for violation of his constitutional and fundamental rights. However, it will say no more on this issue so as not to embarrass any other court that would be dealing with its matter.

DISPOSITION

9. For the foregoing reasons, the upshot of this decision was that the application by the Trial Court dated 9th December 2025 was merited and the same be and is hereby allowed.
10. The effect of this Ruling is that the conviction and sentence of a fine of Kshs 55,000/= and in default to serve six (6) months imprisonment that was meted out to the Applicant herein by the Trial Court on 8th December 2025 be and is hereby set aside and/or vacated as it was unsafe, illegal, unlawful and had no legal basis.
11. It is, therefore, hereby directed that the Applicant be and is hereby released from custody forthwith unless he held for other lawful cause.
12. It is so ordered.

DATED and DELIVERED at VIHIGA this 2nd day of January 2026

J. KAMAU

JUDGE

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