

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKADARA
CRIMINAL DIVISION
CRIMINAL REVISION CASE NO E038 OF 2025
HASSAN MOHAMED KIBURUMA
APPLICANT

VERSUS

REPUBLIC
RESPONDENT
(Being an application for revision from the original conviction and sentence in criminal case no 49 of 2019 of the Chief Magistrates Court at JKIA)

RULING

1. The applicant was charges tried and convicted of the offence of trafficking in Narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (control) Act the particulars of which were that on the 28th day of march 2019 with another at INKS hotel within Nairobi County jointly with others not before the court trafficked in a narcotic drug namely heroin to wit 2610 grams with a market value of kshs 7,830,000 by storing in as suit case in contravention of the Act.
2. Being dissatisfied by the said conviction and sentence, he filed an Appeal to this court at Kibera being Criminal Appeal No 19 of 2024 and by a judgement thereon dated 19th November 2014, the court Kavedza J dismissed the appeal on conviction on the ground that the case was proved beyond reasonable doubt but allowed the appeal on sentence and had this to say thereon “26. *While the offence of trafficking in narcotic is grave and warrants a stringent and deterrent*

sentence to safeguard public health and rule of law, the court must also consider the appellants advance age of 57 years. A custodial sentence of 20 years' risk being tantamount to a life sentence hence foreclosing opportunities for rehabilitation and reintegration into society.

27. It is therefore imperative to strike a balance between deterrence and appellants potential for reform and rehabilitation. A tailored sentence reflecting both the seriousness of the offence and the appellant's prospects for rehabilitation may serve justice, enabling his eventual reintegration into the community as a reformed individual while preserving the integrity of the law.

28. The upshot of the above analysis is that the appeal partially succeeds. The sentence of twenty (20) years is hereby substituted with a sentence to twelve (12) years imprisonment. The additional sentence of payment of a fine of kshs 23,490,000 in default to serve 12 months' imprisonment is upheld. The sentence imposed shall run from the date of the appellants arrest 28th March 2019 pursuant to section 333(2) of the Criminal Procedure Code'

3. Having benefitted from the courts favourable decision on appeal, one would have expected the applicant to celebrate but lo and behold, by an application filed under certificate of urgency dated 11th December 2024 less than one month from the date of the judgement,

the applicant moved the court in Criminal Revision No E 092 of 2024 at Kibera , for an order to review the sentence pardon and discharge the applicant on the ground of a alleged new jurisprudence in sentencing of offenders based on culpability and harm.

4. The application was supported by the affidavit by the applicant in which it was contended that the he was a male Tanzanian from a poor and needy background and that he had been advised by his advocate on record that the court has discretion to allow the application in the interest of justice and that the court should consider the provision of Article 57 of the Constitution while reviewing the sentence.
5. By an order dated 28th January 2025, the said application was transferred to this criminal registry for determination.

SUBMISSIONS

6. At the hearing hereof, Mr Hamisi for the applicant submitted that the applicant had spent time in prison and that he was an old man who should be considered to had served time so as to go back to his country. The court was urged to temper justice with mercy under Article 159 of the Constitution . In support of the preposition herein reliance was placed in the case of James v Republic [2025] KEHC 3384 (KLR) where the applicant who was convicted of a similar offence and had a balance of two years eleven month on his prison

sentence was found eligible for early release in the spirit of prison decongestion .

7. Ms Kariuki for the State submitted that revision powers are only exercised over the orders of the lower courts and not orders from a court of similar jurisdiction and that decongestion is initiated by the prisons. She submitted that trafficking as an offence does not fall within the offences subject to release under the prison decongestion.

DETERMINATION

8. The issue of early release of prisoner on the basis of prison decongestion is one that has created problems in the criminal justice system in this country. It is a jurisdiction which is subject to abuse.
9. In this cause the applicant filed an appeal to this court which appeal as stated herein partially succeeded and therefore the valid judgement on record as regards the applicant herein is the judgement of this court (Kavedza J) dated 19th November 2024 in which the applicant's sentence was reduced from twenty years' to twelve years, which judgement the appellant has not appealed against.
10. This court therefore lacks jurisdiction to review its own decision as to do so will be akin to sitting on appeal from as court of similar jurisdiction. The court had in exercising the powers provided under section 354(3) of the Criminal Procedure Code reduced the sentence

mated upon the applicant by the lower court and if the same was aggrieved by the said decision the only recourse available to the same was to file an appeal to the Court of Appeal and not to come back to the same court for review of a sentence of the lower court which had already been set aside and substituted .

11. Further sections 362 and 364 upon which the application herein is founded does not give this court the powers to review the record of the court of concurrent jurisdiction and I find and hold that the applicant has not satisfy the grounds upon which a court can review its own judgement even if the court were to read into the review provisions in civil cases which is limited to the discovery of new evidence , mistake apparent on the face of record and sufficient other reasons .

12. The case of ***James v Republic (supra)*** is not relevant to the applicant case as the same was under the provision of prison decongestion and further the applicant herein has not served substantial part of the sentence even if the court was to be merciful as submitted by the applicant his age notwithstanding.

13. I therefore find no merit on the application herein which I hereby dismiss.

14. In the interest of justice I grant the applicant leave to file notice of appeal to the court of appeal out of time as I take the view that litigation must come to an end at every stage of our court hierarchy and therefore those

who have had their bite at the cherry by way of appeal should create room for those whose cases are still pending otherwise the issue of case backlog will never be a thing of the past.

15. The applicant still has recourse to the power of mercy committee or wait for his time when prison decongestion exercise is on going to try his luck as James (supra) did and succeeded.

**DATED SIGNED AND DELIVERED AT MAKADARA
THIS 17TH DAY OF MARCH 2026**

**J WAKIAGA
JUDGE**

In the presence of: -

Court Assistant -

Counsel for the state-

Applicant -