

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MAKADARA**  
**CRIMINAL DIVISION**  
**MISC. CRIMINAL APPLICATION NO E108 OF 2025**  
**DENNIS OMONDI MAKOKHA .....**  
**APPLICANT**  
**VERSUS**  
**REPUBLIC .....**

**RESPONDENT**

*(Being a revision from the original conviction and sentence in criminal case no E002 of 2023 of the Chief Magistrates Court at JKIA)*

**RULING**

1. The applicant was convicted of the charge of trafficking in narcotic drugs contrary to section 4(a) (11) of the Narcotic drugs and psychotropics substances Act NO 4 of 1994 and sentence as follows: -
  - a) Count 1 to pay a fine of Kshs 37,510,000/= in default one-year imprisonment and in addition to serve ten (10) years imprisonment
  - b) Count 2 a fine of kshs 24, 755,040 in default to serve one-year imprisonment and in addition to serve ten (10) years imprisonment
  - c) Count 3 to pay a fine of kshs 1,000,000 in default to serve one-year imprisonment and in addition to serve five years' imprisonment.
2. This sentence was to run concurrently from the date of arraignment in court that is on 16<sup>th</sup> march 2023. In case

the accused failed to pay the fine he was to serve the extra default sentences of one-year imprisonment for each of the counts

3. The applicant opted not to file an appeal but approached this court for review of the sentences to run concurrently from the date of arrest.
4. In support of the applicant it was deposed that the sentence were to run concurrently and consecutively on the additional sentences making a total of thirteen (13) years which was excessive in light of the mitigation to the effect that he unknowingly participated in the commission of the offence as he was misled by someone he considered a friend as to the nature of the transaction involved and that the court should have ordered for a pre-sentencing report to inform itself sufficiently.
5. It was further deposed that he was a first offender with a young family which depended on him and was very remorseful and that the court should consider the time in prison which had reshaped his disposition and will in future carefully choose his friends and associates.

### **SUBMISSIONS**

6. The applicant filed written submissions in which it was stated that the same opted not to file an appeal but to approach the court court for a review or resentence as the sentence imposed was excessive in the circumstances of the case as there were alternative to the lengthy imprisonment which were unable to meet the objects of sentencing within the meaning of Article 24 (1) (e) of the

Constitution and as per the Judiciary sentencing Policy Guidelines at Paragraphs 4.5.5 where mitigation is considered to lessen the severity or culpability of a Criminal Act.

7. It was submitted that the applicant was seeking to adduce further evidence in mitigation for the courts consideration to the effect that he was 33 years old , first offender , a husband and a father of five children who had been rehabilitated while in prison and ready to re-join the community and in support thereof reference was made to the case of Joseph Kaberia Kahinga & 11 others v Republic [2016] e KLR and Charo Ngumao Gududu V republic [2008] e KLR where the court of Appeal held that the principle of sentencing demanded that first offenders with minimal aggravating circumstances be sentenced leniently .
8. The applicant supported his submissions with the following cases where the court reduced the sentences : Review No E008 of 2024 (sic) Njuguna Njoroge v Republic :where the sentence of life imprisonment was reduced to 20 years , rev no 66 of 2024 (sic) Geoffrey Murunga v Rep where the sentence of 25 years was reviewed to 15 years and Cr Appeal no E007 of substituted to time served .
9. The respondent did not file any submissions and at the hearing herein Ms Kariuki for the State did not make any submissions and left it to the court to make determination thereon.

## **DETERMINATION**

10. This matter belongs to an emerging practice in the criminal justice systems wherein the convicts are now opting to file applications for review of sentence allegedly founded under Articles 20,22, 23(1)(3)(a) and (f) and 24 (1) (e ) of the constitution and section 329 of the CPC in place of appeal.
11. The first issue therefore for the court's determination is whether the court where the applicant is satisfied with the conviction and in the absence e of an appeal on sentence has jurisdiction to review the sentence of the trial court ?
12. Article 20 of the constitution is the application of the bill of rights while 22 thereof is the enforcement of the said rights and 23 thereof is the authority of the court to uphold and enforce the said rights .In this application there is no allegation of violation of the applicants constitutional rights , thus the citation of the said Constitutional Provisions are misplaced and cannot come to the aid of the applicant in the absence of any allegation of violation of his rights.
13. Section 329 of the criminal procedure code provides that the court may before passing sentence receive such evidence as it thinks fit in order to inform itself as to the proper sentence to pass. This section to my understanding is applicable to the sentencing court and this court can only look at it if it is the applicant's case that in passing the sentence herein the court did not receive the evidence

necessary to enable it pass a fit sentence thereby rendering the sentence passed herein erroneous.

14. In this matter the court while sentencing the applicant had this to say “ in this case I have taken into account the circumstances under which the offence was committed, the accused mitigation and the period spent in custody as provided for under section 333(2) of the Criminal Procedure Code. I have also considered the quantity and the value of the drugs the accused was found trafficking. I have also considered the pre-sentencing report prepared by Mrs. Winfred Siganga. Taking into account the nature of the offence, the gravity , the mitigation by the accused , the jurisprudence on sentencing , the sentencing policy guidelines and also while appreciating the devastating effect of drug menace has had on our society particularly the youth and most importantly I note from this case that the accused role was largely to convey. He was being paid small amount of money.....”

15. It is clear that the court took into account the applicant’s mitigation and the pre-sentencing report which ruled out the applicant’s suitability to none custodial sentence.

16. The grounds upon which this court can interfere with the discretion of the trial court are now well settle to wit unless that sentence is manifestly excessive in the circumstances of the case or that the court overlooked some material factors or took into account some wrong

material or acted on a wrong principle. That even if the appellate court feels that the sentence is heavy and that it might itself not have passed that sentence , those alone are not sufficient grounds for interfering with the same.

17. I am afraid that the applicant has not satisfied the grounds for review and or revision of the sentence of the lower court having noted that the same benefited from a lesser sentence the fact that he was only used to convey the drugs notwithstanding.

18. The issue of the same having reformed while in prison is not for this court to decide at this stage as that is within the jurisdiction of the Power of Mercy Committee and the courts should be slow at eroding the powers of the same by constantly reviewing sentence without jurisdiction.

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

**DATED SIGNED AND DELIVERED THIS 17<sup>TH</sup> DAY OF MARCH 2026**

**J WAKIAGA  
JUDGE**

**In the presence of: -**

Court assistant -

Counsel for the State

Applicant

MAKADARA MISC. APPLICATION NO E108 OF 2025