REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL REVISION DIVISION

ARISING FROM ORIGINAL CRIMINAL CASE NO. E070 OF 2025 AT WAMUNYU

REVISION APPLICATION NO. E059 OF 2025

BENJAMIN KASYIMA MUTUNGA ……

APPLICANT

VERSUS

REPUBLIC ……

RESPONDENT

(Being sentence review arising from original Criminal Case No. E070 of 2025 at Wamuyu)

RULING

1. The applicant has moved this Court by way of a Notice of Motion Application, under Article 50(2)(p)(q) of the Constitution, sections 333(2), 362 and 364 of the Criminal Procedure Code seeking revision of the sentence imposed upon him. He prays that the six-year imprisonment be reviewed and that this Court issue such further orders, directions and relief, it may deem fit and just in the circumstances. The application is supported by the grounds set out therein and the applicant's supporting affidavit.

2. The applicant was sentenced to six years imprisonment for the offence of being in possession of cannabis contrary to section 3(1) of the Narcotic Drugs and Psychotropic Substance Act; and three years' imprisonment for the offence of threatening to kill contrary to section 223(1) of the Penal Code. He pleads for leniency and urges the court to take into account the period he spent in custody during trial, specifically between 18th March 2025 and 16th June 2025 before being released on bond. He further states that he has no intention of appealing hence he seeks revision of the sentence downwards.
3. The respondent opposed the application, submitting that the applicant was found mentally unstable, which prompted the trial court to invoke section 166 of the Criminal Procedure Code and commit him to custody pending a presidential order. They argued that the court's hands are tied, as the matter before this Court concerns only the legality of the sentence, not its merits.
4. Upon perusal of the trial court record, it is evident that the applicant faced two counts. In count 1, he was charged with being in possession of cannabis contrary to section 3(1) as read with section 3(2) of the Narcotic Drugs and Psychotropic Substances Control Act. The particulars were that on 18th March 2025 at Kyambusya village, Nthaani Sub-location Muthetheni Location, Mwala sub-County within Machakos County, he was found in possession of 20 rolls of Cannabis (Bhang), one

broom of cannabis, and fifty grams of processed cannabis with a street value of kshs.10,000/- which was not in its medicinal preparation. In Count 2, he was charged with threatening to kill contrary to section 223(1) of the Penal Code. The particulars were that on 18th March 2025 at Kyambusya village, Nthaani Sub-location Muthetheni Location, Mwala sub county within Machakos County without lawful excuse, he uttered words *'kaa ready kuingia futi sita nikirudi',* threatening to kill Assistant Chief Nthaani sub location Mr. Thomas Kitonyi.

5. The applicant pleaded guilty to both counts and was convicted on his own plea of guilty. The trial court then to sentence him as follows;
    a. *For Count one, the offender is hereby sentenced to six years with no option of a fine.*
    b. *For Count two, he is sentenced to 3 years with no option of a fine.*
    c. *That by dint of section 166(3) of the Criminal Procedure Code the accused shall be held in custody awaiting the presidential order and he is to be taken to Mathari Hospital.*
    d. *The sentence shall run concurrently*
    e. *The right of appeal explained.*

6. The applicant's plea for revision is anchored on two main grounds: first that the court failed to comply with section 333(2) of the Criminal Procedure Code, which obliges courts to take into account the period an accused person has spent in custody prior to sentencing; and secondly, is

the exercises of revisionary jurisdiction under section 362 and 364 of the Criminal Procedure Code.

7. On the first ground, the applicant argues that the trial court failed to comply with section 333(2) of the Criminal Procedure Code which obliges courts to take into account the period an accused person has spent in custody prior to sentencing.
8. In the cases of **Ahamad Abolfathi Mohammed & Another Vs. Republic Criminal Appeal No 135 of 2016(unreported)** and **Bethwel Wilson Kibor vs. Republic (2009) eKLR** the courts emphasized that failure to specifically account for the time already spent in custody rendered the sentence irregular. This principle has also been reinforced by the Judiciary Sentencing Guidelines which noted that failure to factor in pre-sentence custody results in excessive punishment disproportionate to the offence.
9. The record shows that the applicant remained in custody from the period when he was arrested, that is 18th March 2025 to 16th June 2025. This period was not considered by the trial court during sentencing. Guided by the above authorities, this omission constitutes an error warranting revision.
10. The 2nd issue is the exercise of the Court's discretion under sections 362 and 364 of the CPC. Sections 362 and 364 of the Criminal Procedure Code empowers the High Court to examine the record of any criminal proceedings before a subordinate court to satisfy itself as to the

correctness, legality, or propriety of any finding, sentence, or order. The jurisdiction is not to be exercised routinely or as a matter of course, but only where there is a patent defect, gross error, or illegality. This was emphasized in **Kibet & 2 others v Republic 3) [2023] KEHC 24772 (KLR),** where the court stated that revisionary powers are meant to correct glaring errors of law or jurisdiction, not to substitute the court's discretion merely because an accused is dissatisfied with the outcome.

11. In the present matter, the trial court upon considering the pre-sentence report which indicated that the applicant had two previous convictions and suffered schizophrenia and psychosis, sentenced him to six years for possession of cannabis and three years for threatening to kill, the sentences were to run concurrently. In addition, to the sentences, the trial court invoked section 166(3) of the CPC and committed the accused to custody pending presidential order. It is unclear which offence this latter order was pegged on thus creating ambiguity and irregularity in sentencing.

12. The respondent argues that the applicant's mental instability justified invocation of section 166 of CPC. However, this does not oust the jurisdiction of this Court to review the legality and propriety of the sentence. The applicant is not appealing against conviction but merely seeks that the sentence be aligned with constitutional and

statutory safeguards, particularly proportionality and fairness under Article 50(2)(p)(q).

13. In **Isaac Ndegwa Kimaru & 17 others vs. Attorney General & another; Kenya National Human Rights and Equality Commission (interested party) [2022] eKLR**, this High Court (differently constituted) declared that detaining persons with mental challenges "at the President's Pleasure" constitutes cruel, inhuman, or degrading treatment, violating Articles 28 and 29. The "guilty but insane" verdict itself has been described as a logical fallacy, as a person lacking *mens rea* due to insanity cannot be legally "guilty" of murder.

14. It was therefore erroneous for the trial court to sentence the accused under a section of the law already declared unconstitutional. This amounted to an error of law on the face of the record which warrants setting aside

15. It is therefore this Court's finding that the trial court erred when it failed to consider time spent in custody, contrary to section 333(2) CPC and when it imposed an additional sentence under section 166 CPC, which is unconstitutional and irregular.

16. Regarding the six years imprisonment itself, the applicant pleaded guilty to being in possession of 20 rolls of Cannabis (Bhang), one broom of cannabis, and fifty grams of processed cannabis with a street value of kshs 10,000/- which was not in its medicinal preparation. Evidently, this was an amount outside the provision of

section 3(2)(a) of the Act, where the drug is meant for personal consumption. Its sentence fell under section 4 which provides:

> "Any person who traffics in, or has in his or her possession any narcotic drug or psychotropic substance or any substance represented or held out by him or her 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—
>
> (i)where the person is in possession of between 1—100 grams, to a fine of not less than thirty million shillings or to imprisonment for a term of thirty years, or to both such fine and imprisonment;

17. The processed bhang in court was 50 grams. This was in addition to the 20 rolls and one broom, not weighed. It follows that the applicant faced a maximum term of imprisonment of upto 30 years imprisonment. He was sentenced to 6 years imprisonment in court one. I find that this was a sentence in exercise of discretion that was very lenient given the available sentence of upto 30 years imprisonment. This Court find no sufficient reasons provided for it to interfere with that exercise of discretion.

18. Consequently, this application succeeds only to the extend that the time spent in custody is to be considered in the six years imprisonment and the order of being held at presidential pleasure is set aside. I thus make the following orders;

    a. The time period spent in custody that is from 18th March 2025 to 16th June 2025 be considered as part of the sentence.

    b. The sentence under section 166(3) of the Criminal Procedure Code requiring the accused to be held in custody awaiting the presidential order and he is to be taken to Mathari Hospital is set aside.

Orders accordingly.

Dated, signed and delivered at Machakos this 9th day of April, 2026

RHODA RUTTO

JUDGE

In the presence of;

…….Applicant

…….Respondent

Selina Court Assistant