



REPUBLIC OF KENYA



**Ogunnaike & 2 others v Republic (Criminal Revision E005 of 2026)  
[2026] KEHC 4557 (KLR) (30 March 2026) (Revision)**

Neutral citation: [2026] KEHC 4557 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL REVISION E005 OF 2026  
DO CHEPKWONY, J  
MARCH 30, 2026**

**BETWEEN**

**MEMUNAT FUNMILAYO OGUNNAIKE ..... 1<sup>ST</sup> APPLICANT**

**IDRIS BISOYE OGUNNAIKE ..... 2<sup>ND</sup> APPLICANT**

**WARIS BABATUNDE OYEYEMI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**REVISION**

**Introduction**

1. Before this Court for determination is the Notice of Motion application dated 19th January, 2026 by which the Applicants seek, principally, that this Court calls for and examines the record in Kahawa Criminal Case No. E077 of 2025, Republic –vs- Memunat Funmilayo Ogunnaike & Others and thereafter, review, vary, set aside and/or substitute the sentence imposed upon them on 6th January, 2026 being a fine of Kshs.5,000,000/= each and, in default, to serve five (5) years’ imprisonment in respect of Count II in which the accused was charged with the offence of Being in Possession of Psychotropic Substances contrary to Section 3(1) as read with Section 3(2) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, No.4 of 1994).
2. For avoidance of doubt, the application specifically seeks the following orders: -
  - a. Spent.
  - b. That this Honourable Court be pleased to call for and examine the record for proceedings and sentence in Criminal Case No. E077 of 2025 by the Senior Principal Magistrate court at Kahawa Hon Gideon Kiage.



- c. That this Honourable Court be pleased to review, vary, set aside and/or substitute the sentence imposed on the Applicants on 6<sup>th</sup> January, 2026 in Count II being fine of Kshs 5,000,000/= each or five years imprisonment in default.
  - d. That this Honourable court be pleased to substitute the said sentence with a lawful, fair and proportionate sentence including but not limited to; a reduced fine, a non-custodial sentence and/or any other sentence the court deems fit.
  - e. That this Honourable court be pleased to take into account the Applicant's foreign nationality and willingness to be repatriated to their country of origin on reasonable terms.
  - f. That this Honourable court be pleased to issue such further and consequential directions as may be necessary in the interest of justice.
  - g. That the costs of this application be in the cause.
3. The application is supported by the grounds set out on its face and Supporting Affidavit of Memunat Funmilayo Ogunnaike. The board foundation of the application is that the Applicants were charged with, among other offences, the offence of Being in Possession of Psychotropic Substances contrary to Section 3(1) as read with Section 3(2) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No.4 of 1994 at Senior Principal Magistrate's Court at Kahawa via Criminal Case No.E077 of 2025. The particulars of the offence are that:-
- “On the 9<sup>th</sup> day of July, 2025 at Tsavo Walle Apartments House NO.418 riruta Area within Nairobi County, the accused persons jointly with others not before court were in possession of 28 tablets of flunitrazepam with a market value of Kshs.1,400/=.
4. The accused persons pleaded guilty of the charge and were accordingly convicted on their own 'Plea of Guilt' whereby the learned trial Magistrate sentenced each to pay a fine of Kshs. Shillings Five Million (Kshs.5 Million) and in default, to serve five (5) years imprisonment pursuant to the provisions of Section 3(1) as read with Section 3(2)(b) of the Narcotic Drugs and Psychotropic Substances Act No.4 of 1994.
  5. According to the deponent, the 1<sup>st</sup> Applicant on behalf of all the Applicants, the offence in Count II related to possession of 28 tablets of Flunitrazepam with a market value of only Kshs.1,400/= which in their opinion is extremely minimal as against the imposed sentence which they believe to be manifestly excessive, lost, disproportionate and founded on misapprehension of the law governing the sentence provided for under Section 3 of the Narcotic Drugs and Psychotropic Substances (Control)Act.
  6. The Applicants contend that although the trial court acknowledge some of the mitigating factors, it proceeded to mechanically apply the mandatory minimum sentence without properly exercising judicial discretion by inquiring into the Applicants' personal circumstances and financial means, the mitigating factors, their election to plead guilty at the earliest opportunity, alongside a consideration that prolonged incarceration for a lengthy custodial term would not serve the rehabilitative, deterrent or corrective purpose of sentencing. The Applicants have further urged that they are foreign nationals who have already been convicted under the *Kenya Citizenship and Immigration Act* for unlawful presence in Kenya and have expressed their willingness to be repatriated to their country of origin and as such, repatriation would adequately meet the end of justice and public



7. In their oral response, M/S Muriu, learned counsel for the State highlighted the nature of application before the court and analysed the provision on the penalty provided for the offence the Applicants were charged, convicted and sentenced for. Learned counsel conceded on the position that the provision on the penalty for the offence under Section 3 of the Narcotic Drugs and Psychotropic Substances Act was not corched on mandatory terms by virtue of the case of the terms “shall be liable to. She urged the court to invoke its powers as provided for under Section 362 and 364 of the Criminal Procedure Code and examine the record of the trial court and revise the sentence that was imposed against the Applicants in consideration of the nature of the offence, the circumstances of the offence as well as aggravating circumstances.

### **Issues for Determination**

8. Having considered the application, the supporting affidavit, and the authorities cited, the issues that arise for determination are:
  - a. Whether this Court has jurisdiction to entertain the present application in revision;
  - b. Whether the sentence imposed by the trial court was based on a proper interpretation of section 3(2)(b) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*;
  - c. Whether the sentence imposed was lawful, proper, and proportionate in the circumstances of the case.
  - d. What appropriate orders should issue.
9. The High Court’s power of revision is set out under Article 165(6) and (7) of *the Constitution*.

### **Jurisdiction of the Court**

10. The High Court’s power of revision is set out under Articles 165(6) and (7) of *the Constitution*. The jurisdiction of this Court in criminal revision is anchored in Sections 362 and 364 both of the Criminal Procedure Code. Section 362 provides that:-

“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.
11. This provision is with regard to situations where the trial Magistrate has made a mistake or irregularity or illegality in a finding, sentence or order recorded or passed. The High Court has power to correct such mistake, irregularity or illegality.
12. Section 364 in turn empowers the Court, in an appropriate case, to alter or reverse the order of the subordinate court and, in the case of conviction, to exercise powers akin to those of an appellate court.
13. It is true that Subsection (5) of Section 364 provides that where an appeal lies and none is brought, revision should not ordinarily be entertained at the insistence of a party who could have appealed. However, the settled position is that revision remains available where the complaint transcends mere dissatisfaction with severity and raises questions as to the correctness, legality, or propriety of the



sentence imposed, especially where the subordinate court is shown to have acted on a wrong principle of law or a material misapprehension of the sentencing provision.

14. In the present case, the gravamen of the complaint is not merely that the sentence was severe, but that the trial court misapprehended the law by treating the sentence prescribed under section 3(2)(b) as mandatory and inexorable, and thereby failed to exercise judicial discretion. That complaint squarely invokes the revisionary jurisdiction of this Court. I am therefore satisfied that this Court is properly seized of the matter.
15. Justice Odunga (as he then was) had this to say of the revisionary jurisdiction of the High Court in the case of Joseph Nduvi Mbuvi –vs- Republic [2019]eKLR:

“In my considered view, the object of the revisional

jurisdiction of the High Court is to enable the High Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Courts revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same on track so that the trial proceeds towards its intended destination without hitches. Notable is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.”

#### **Whether the Trial Court Properly Interpreted the provisions under Section 3(2)(b)**

16. The starting point is the charge and the penalty provision under which the Applicants were sentenced. As already observed, the Applicants were charged under Section 3(1) as read with Section 3(2)(b) of the Act. The relevant part of section 3, as extracted in the decision before this Court, provides that a person guilty of possession of a narcotic drug or psychotropic substance under subsection (1) shall be liable, in respect of a narcotic drug or psychotropic substance other than cannabis, where the person is in possession of less than one gram, to a fine of not less than five million shillings, or to imprisonment for a term of not less than five years, or to both such fine and imprisonment.
17. The trial court’s decision concluded that a reading of the Act provides for a mandatory minimum sentence and thus, for that reason, it could not exercise discretion to issue a different sentence.
18. This Court’s interpretation of the said Section 3(2)(b) aligns with the interpretation in the case of Daniel Kyalo Muema v Republic [2009] eKLR, wherein the Court of Appeal addressed the meaning of the phrase “shall be liable” in Section 3(2)(a) of the same Act. In that case, the trial court had imposed a sentence on the footing that the provision prescribed a mandatory or minimum sentence. However, the Court of Appeal rejected that interpretation and held that the phrase “shall be liable” does not, in its ordinary meaning, require the imposition of the stated penalty, but merely expresses the penalty which may be imposed at the discretion of the court. In approving the reasoning in *Opoya v Uganda* [1967] EA 752, the Court stated that the phrase is not mandatory, but ordinarily provides the maximum sentence to which the offender is exposed.
19. The Court of Appeal further anchored that construction in Section 66(1) of the *Interpretation and General Provisions Act* and Section 26 of the Penal Code. It held that unless a contrary intention is clearly expressed, where a written law prescribes a penalty, that penalty denotes a punishment not exceeding the stated punishment. The Court also underscored that Section 26 of the Penal Code



- authorizes a court to impose a shorter term than the maximum prescribed and, where appropriate, a fine in addition to or in substitution for imprisonment, save where a statute expressly provides for a minimum sentence of imprisonment.
20. Although the Daniel Kyalo Muema case(supra) concerned Section 3(2)(a) which is about dealing with cannabis, the reasoning of the Court on the phrase “shall be liable” is of wider significance. As such, in this Court’s my view, unless Parliament has used language that unmistakably displaces discretion and prescribes a rigid minimum, the court must be slow to construe a penalty clause in a manner that extinguishes the judicial function in sentencing.
  21. Likewise, the High Court in the case of Mwangi –vs- Republic [2025] KEHC 4480 (KLR) applied that same approach in revisiting a sentence imposed under Section 3 of the same Act. The Court considered a case in which the appellant had pleaded guilty pursuant to a plea agreement and had been sentenced to serve a term of four (4)years’ imprisonment for possession of cannabis. The Court held that the sentence was unwarranted and excessive in the circumstances, stressed the centrality of mitigation, first-offender status, remorse, and proportionality, and set aside the sentence, while substituting it with the period already served. This Court expressly relied on the Daniel Kyalo Muema case (supra)in reaffirming that the sentencing court retains discretion and that the provision does not demand an unnecessarily crushing sentence.
  22. Guided by those authorities, I am unable to uphold the proposition that the trial court was stripped of all discretion merely because the Applicants were charged under Section 3(2)(b). A sentencing court must always begin by correctly construing the statute. If it proceeds on the mistaken footing that the law leaves it no room to weigh mitigation, personal circumstances, proportionality, and the overall justice of the case, then the sentence becomes susceptible to interference not merely for being severe, but for being founded on an error of principle.
  23. Sentencing is not an arithmetical reflex but rather a judicial exercise hence, even where Parliament prescribes stern punishment, the court must still individualize the sentence. It must interrogate the circumstances of the offence, the nature and quantity of the substance, the offender’s antecedents, the plea, the mitigation, and the broader objectives of punishment. A sentence imposed without that evaluative discipline becomes less of an exercise of judgment and more of a mechanical reaction.

### **Whether the sentence imposed the Sentence Was Proper and Proportionate**

24. Sentencing must always be guided by established objectives and principles. As was noted in Mwangi v Republic case (Supra) the purposes of sentencing include retribution, deterrence, rehabilitation, restorative justice, community protection, denunciation, reconciliation, and reintegration. A lawful sentence is therefore one that balances these aims and responds to the facts of the individual case in a manner that is just, measured, and proportionate.
25. In the present matter, several factors clearly emerge from the record. First, the Applicants were convicted on their own plea of guilty which served as a court’s precious judicial time. Secondly, the particulars before the Court indicate that the psychotropic substance involved consisted of 28 tablets of flunitrazepam, with a market value of Kshs.1,400/=. While the seriousness of narcotic and psychotropic substance offences is not to be minimized, the gravity of sentence must nonetheless bear a rational relationship to the factual circumstances of the offence. Thirdly, the Applicants raised specific mitigating matters, including their personal circumstances, their foreign nationality, and their willingness to be repatriated. Fourthly, there is nothing on the face of the material before this Court to demonstrate that the trial court undertook a careful individualized sentencing exercise. Rather, the tenor of the impugned reasoning suggests that the sentence was approached from the premise that the



law prescribed a fixed and unavoidable punishment. That approach, in light of the authorities already cited, cannot stand.

26. It is this Court's strong view that a court passing sentence must be careful not to treat all offences under the same law as if they are equally serious and deserving of the same punishment. As was stated in the case of *Mwangi v Republic* (Supra), in rejecting a disproportionately harsh sentence, the High Court observed that "one does not require a hammer to kill a mosquito." What the Court meant was that punishment should not be harsher than necessary. Hence, where a lighter sentence is enough to meet the ends of justice, the court should not impose an unnecessarily severe one.
27. The sentence of payment of a fine of Kshs. 5,000,000/= each, and in default five years' imprisonment that was imposed upon the Applicants in the present matter, without any evident individualized consideration of their plea, the market value of the drug/substance as recorded, their personal and financial circumstances, together with the justice of the case, was in this Court's considered view, excessive and disproportionate.
28. Therefore, this Court finds that the sentence imposed on Count II, though imposed under the authority of Section 3(2)(b), was founded on a misdirection on the principle as to the scope of judicial discretion and does not reflect a proper consideration and balancing of the relevant guidelines on sentencing as provided by statutes and policy. It thus calls for intervention by this court in exercise of the revisionary powers accorded to it by Article 167(6) and (7) of *the Constitution* and Sections 362 and 364 of the Criminal Procedure Code.

#### **Appropriate Relief to issue**

29. Having so found, the next question is what sentence ought to properly substitute the impugned sentence? In doing so, this Court must remain alive to the seriousness of offences involving narcotic and psychotropic substances. The Court must communicate society's condemnation of unlawful possession and discourage others from engaging in similar conduct. Yet, even in that context, the punishment imposed must remain lawful, proportionate, and individualized.
30. I have carefully considered that the Applicants pleaded guilty at the earliest opportunity, thereby saving valuable judicial time and demonstrating acceptance of responsibility; that the record before this Court indicates that the psychotropic substance in question was 28 tablets, had a market value of Kshs. 1,400/=; that the Applicants placed before the Court mitigating circumstances including their foreign nationality and their stated willingness to be repatriated to their country of origin; and finding that there is nothing on the material before court to disclose aggravating factors such as violence, recidivism, organized trafficking, or any refusal to take responsibility for the offence.
31. In those circumstances, I am satisfied that the sentence imposed by the trial court for a fine of Kshs.5,000,000/= each and in default five (5) years' imprisonment, was manifestly excessive and disproportionate. Accordingly, I set aside the said sentence and substitute it with a fine of Kenya Shillings Fifty Thousand (Kshs.50,000/=) each, and in default one (1) year imprisonment for each Applicant, such imprisonment to be calculated from the date of the Applicants were first arrested in accordance with the provisions of Section 333(2) of the Criminal Procedure Code.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 30<sup>TH</sup> DAY OF MARCH , 2026.**

**D. O. CHEPKWONY**

**JUDGE**



In the presence of:

Mr. Magero counsel for the State/Respondent

Mr. Mwaru for Mr. Abdulahi counsel for the Applicants

Applicants – All present online

Court Assistant – Martin/Sakina

