



**Otiato v Republic (Criminal Petition E008 of 2024)
[2025] KEHC 8608 (KLR) (19 June 2025) (Sentence)**

Neutral citation: [2025] KEHC 8608 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL PETITION E008 OF 2024**

**JN KAMAU, J
JUNE 19, 2025**

BETWEEN

DAVID OTIATO PETITIONER

AND

REPUBLIC RESPONDENT

SENTENCE

1. The Petitioner herein filed his documents in support of his mitigation on 9th May 2025 pursuant to the directions of this court in its Judgment that was delivered on 29th April 2025 in respect of his Petition dated 26th February 2024 and filed on 4th March 2024 herein wherein he had sought a review of sentence.
2. His undated Written Submissions were filed on 9th May 2025. The Respondent did not file any Written Submissions on the said limb. This Ruling is therefore based on the said Petitioner’s Written submissions on mitigation and the Respondent’s mitigation that was orally given in court.

Legal Analysis

3. The Petitioner cited Article 6(4) of the International Covenant on Civil and Political Rights, Article 2(5)(6) and Article 50(2)(q) of *the Constitution* of Kenya 2010 and placed reliance in the case of Consolidated Constitutional Petition No E002 and E003 of 2024. He urged this court to review his sentence in consideration of his mitigating factors.
4. He pleaded with this court to consider that during the commission of the offence and arrest, he was about eighteen (18) years of age hence ignorance and peer pressure could have been what led him to indulge in crime. He pointed out that through the experience and the suffering that he had undergone in prison, he was now conversant with all the consequences of crime.



5. He asserted that the certificates of completion in various rehabilitation programs and the recommendation letter he had annexed herein were a clear indication that since he was sentenced, he had been living peacefully with fellow inmates and prison administration while engaging himself in different rehabilitation programs from which he had acquired life skills to enable him re-integrate back into the society when given a second chance in life. He promised to lead a self-supportive life as a law-abiding citizen.
6. He sought the court's, the Complainant's and society's forgiveness and indicating that a man was to err and that it did not mean that if someone had committed such an offence, he was unable to be reformed or rehabilitated. He expressed remorse and urged this court to substitute his death penalty with a jail term.
7. In this regard, he relied on the case of Elijah Mugo Murimi v Republic Criminal Revision No E099 without highlighting the holding he relied on therein. He invited the court to consider the primary purpose of a sentence as stipulated in the United Nation Standard Minimum Rules (Mandela Rule No 4) and our prisons motto of "Kurekebisha na haki". He pointed out that the longer the sentence, the more difficult it was for a reformed person to be re-integrated back into society.
8. He further submitted that he was from a poor background and that continued incarceration would ruin the rest of his life. He sought the leniency of court and urged it to consider the period he served in custody before and after his sentence pursuant to Section 333(2) of the [Criminal Procedure Code](#).
9. The Respondent submitted orally in court on 19th June 2025. It urged this court to note that the Petitioner was in the company of others and was armed with knives and they threatened to use actual violence on the Complainant, one Grace Sayo. It urged this court to consider the impact of the incident on the Complainant, her family and the community. It urged this court to be guided by the Judiciary Sentencing Guidelines and give a sentence that was commensurate with the offence and ensure that justice was dispensed to all.
10. According to the Pre-sentence Report of J. Sahani, Probation Officer, Vihiga dated 3rd June 2025 and filed on 4th June 2025, the Petitioner was thirty- three (33) years old. He started school at Esiembero Primary School. After his parents separated, he was transferred to Muhanda Primary School where he was stayed with his grandmother. However, she lacked the capacity to provide the necessary guidance and supervision and he dropped out of school and started smoking bhang at the age of twelve (12) years.
11. At the time he committed the offence, he was nineteen (19) years old. He blamed an older peer and strong influence for the secondary role that he played in committing the offence. The Probation Office was unable to trace the Complainant due to the lapse of time. His family was ready to support him re-integrate well back to society.
12. The Local Administration and the community pointed out that his upbringing might have played a key role in his criminal behaviour. They pledged to guide him through and encourage him to exploit his potentials for his reformed life.
13. According to the remarks by the Prison Officer in-charge at Kibos G.K Prison, the inmate had shown a greater improvement in his behavioural pathways. He pointed out that he had undergone spiritual nourishment by learning theology to which he had a diploma certificate. He added that he had not been subjected to any other form of punishment due to misconduct or breach of prison rules.
14. The Probation Office urged this court to consider re-sentencing the Petitioner as that would not only serve the interest of justice but also align with the principles of rehabilitation and second chances for young offenders who showed the potential reform.



15. Notably, the principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.
16. It was also important that the sentence communicate to the community, condemnation of his criminal act. The sentence would indirectly send a strong signal to deter would be offenders from committing such an offence. The sentence also had to be one that was hinged on retributive justice for the secondary victims.
17. If the court did not take into account the three (3) objectives of deterrence, retribution and denunciation of his offence at the time of sentencing him, chances of the Petitioner being reintegrated in the society would be next to impossible as there were possibilities of being harmed. Justice not only needed to be done but it had to be seen to be done.
18. It was clear from the facts of the case that the on the material day of 4th October 2012, at around 9.00am, the Petitioner with another not before the court robbed the Complainant who was on her way to work. The robbery took place during the day and the Complainant vividly saw the Petitioner who slapped and robbed her of two (2) mobile phones and Kshs 50,000/= . At the material time, he was armed with a knife which was produced in court as evidence. He had threatened to stab her as she pursued him after the incident.
19. As can be seen hereinabove, one of the objectives of sentencing and/or incarceration was majorly to rehabilitate offenders. This court was persuaded to find and hold that the same had been achieved herein as the Petitioner had undertaken life skills that would enable him be re-integrated back to the society. According to the Pre-Sentence Report, the community had forgiven him and attributed the commission of the offence to his young age. The Local Administration undertook to guide him to realise his full potential.
20. Having considered the facts of this case, the Petitioner’s mitigation, the Prosecution’s response thereto, the Pre-Sentence Report, the Recommendation Letter by Fredrick Ouko, the Officer in-charge Kibos Maximum Security Prison, the Petitioner’s Certificates of completion on various rehabilitation programs, the fact that the Petitioner was nineteen (19) years at the time he committed the offence and the fact that he did not injure the Complainant with the knife he was armed with, this court came to the firm conclusion that a reduction of his death sentence that was commuted to life imprisonment to a sentence of twenty five (25) years imprisonment would be reasonable in the circumstances of this case.
21. As the Petitioner’s sentence was now determinate, this court was mandated to consider the period that he spent in remand while his trial was on going in line with Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya).
22. The said Section 333(2) of the [Criminal Procedure Code](#) provides that:-

“Subject to the provisions of section 38 of the [Penal Code](#) (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).



23. Further, the Judiciary Sentencing Policy Guidelines provide that:-

“The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

24. The requirement under Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR.

25. The Petitioner was arrested on 4th October 2012. Although granted bond he did not seem to have posted the same. He was sentenced on 21st January 2013. This was a period that therefore ought to be taken into consideration while computing his sentence.

Disposition

26. Accordingly, the upshot of this court’s decision was that although the Petitioner’s conviction remained undisturbed as it safe, his sentence of death which was later commuted to life in an executive order of the President of the Republic of Kenya be and is hereby set aside and substituted with a sentence of twenty five (25) years imprisonment which is to run from the date of the sentence of the lower court.

27. For the avoidance of doubt, the period between 4th October 2012 and 20th January 2013 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

28. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 19TH DAY OF JUNE 2025.

J. KAMAU

JUDGE

