

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CRIMINAL MISCELLANEOUS APPLICATION NO E050 OF 2024

**HUMPHREY MADEBE MUZAMBU.....1ST
APPLICANT**

**STEPHEN AYODI MADUVI.....2ND
APPLICANT**

VERSUS

**REPUBLIC.....
RESPONDENT**

SENTENCE

INTRODUCTION

1. In its decision that was delivered on 30th April 2025, this court relied on the case of **Mbugua & 6 Others vs Attorney General & 3 Others (Constitutional Petition E002 & E003 of 2024 (Consolidated)) [2025] KEHC 1248 (KLR) (24 February 2025) (Judgment)** wherein this very court held that it was discriminatory to deny offenders who had been convicted of the offence of robbery with violence and attempted robbery with violence the right to have their mitigation during trial considered, while the non-capital offenders enjoyed that right.
2. It was in that regard that in its Ruling delivered on 30th April 2025, this court directed the 1st and 2nd Applicants herein to file their mitigation documents for consideration by this court. The Applicants herein filed their documents in support of their mitigation on 16th May 2025.

3. This Ruling is based on the said filed mitigating documents and parties' oral submissions which both parties relied on in their entirety.

LEGAL ANALYSIS

4. In his mitigation, the 1st Applicant admitted that he had committed a mistake and averred that committing a mistake was not the same as repeating it again. He stated that if he went back to the society, he would live in peace with people. He said that he had a heavy sentence and had learnt that stealing someone's property was not good.
5. He point out that he had Certificates in Emmaus, Lamp and Light and Prisoner's Journey and a Recommendation Letter from the In-charge of Kisumu Prison. He added that he was now a good Christian and was currently the secretary of the Divine Church in Prison. He promised that once he was out of prison, he would counsel other people to avoid offences that could make them waste their time in prison. He was emphatic that he would never repeat the mistake again. He added that he stayed in remand throughout the trial.
6. On his part, the 2nd Applicant contended that he had been taught and had learnt a lot since he was arrested. He stated that he had realised that he had taken a wrong route and his life was now in the court's hands. He added that he was now a Church goer and had Certificates in Emmaus and Prisoner's Journey and a Recommendation Letter from the Officer In charge Kisumu.

7. He pointed out that the sentence that was meted on him was heavy. He prayed that he be given a sentence that he could complete and go back to his family. He and invited the court to note that he stayed in remand during his full trial.
8. On its part, the Respondent submitted that the Re-sentencing Report for the 1st Applicant was negative as he was still denying the offence. It pointed out that the Local Administration and the Community insisted that he should continue to serve the initial sentence as he was a member of a gang and hence, they were opposed to him being re-sentenced. It, however, noted that the Re-sentencing Report for the 2nd Applicant was positive as it recommended for his re-sentencing.
9. It urged the court to consider the circumstances of the case herein as both the Applicants were armed with torches and were in the company of others who were not brought before the court and that they gang-raped the complainant in turns. It added that the complainant was a close relative to both Applicants. It urged the court to consider that as an aggravating factor and dispense justice for the victim by imposing a sentence that was commensurate with the offence.
10. According to the Pre-sentence Report of Mariam Korir, Probation Officer, Vihiga dated and filed on 5th June 2025, the 1st Applicant was twenty-nine (29) years old and had spent nine (9) years in prison. He attended Erusui Primary School but dropped out of school in Class Seven (7) due to impact of the separation

between his parents. He stayed at home until the age of fifteen (15) years when he moved to Mombasa between 2012 and 2015 where he stayed with his aunt selling mandazi. He returned back home in 2015 and started a tree nursery where he was selling tree seedlings for his economic activity.

11. He was of good health but had a history of drug abuse as he was termed as an alcoholic. It was believed that he operated in a gang of criminals who were robbing people in the community and neighbouring villages. He did not seem to have been remorseful as he still denied the offence and blamed the offence on his friends.
12. His family wished that he returned home to take the place of his father who had since died. Her grandmother believed that he was young at the time of the offence and had now changed his ways. She urged the court to consider resentencing him so that he could return home.
13. The victim of the offence herein expressed a lot of resentment laced with emotions while explaining the incident. She said that the incident still remained a fresh and a traumatic memory in her mind. She narrated the torture she went through especially being raped in front of her grandchildren. She pointed out that she continued to experience intense fear particularly during night as she was stigmatised and also faced health implications as a result of the sexual assault.
14. She added that she continued to experience intense fear particularly during night which affected her sleep as she was

stigmatised and also faced health implications as a result of the sexual assault. She and her children did not wish to see the Applicants return to the community as the incident was still painful to them. She opined that the life imprisonment for the Applicants was her only solace and the same should be upheld to serve justice on her part and her family.

15. The Local Administration and the community were all in agreement about the antecedent of the 1st Applicant. They explained that he was a member of a bad gang that was stealing and robbing community members. They believed that the life imprisonment was the best punishment for him. The Probation Office opined that the 1st Applicant continues with his initial sentence.

16. In his Pre-sentence Report dated and filed on 5th June 2025, J. Sahani Probation Officer stated that the 2nd Applicant was thirty-three (33) years old and had spent seven (7) years and eight (8) months in prison. He was married and was blessed with one (1) child. He was of good health but consumed alcohol, bhang and tobacco.

17. He attended Virembe Primary School but did not go beyond class six (6) in 2009 after the demise of his parents and due to desperate economic conditions at home. When he was sixteen (16) years, he started to engage in casual jobs to fend for himself and support his grandmother who was elderly.

18. He was later hired to bake and supply mandazis in the local market which he did until 2012. He moved to Nairobi in 2013 and embarked on unskilled masonry and casual jobs. In 2016, he returned home and engaged in motorcycling. It was at that work that he was recruited into a five (5) member gang that terrorised the locals in the area. He confessed that they committed a lot of felonies in the community. However, the gang had since disintegrated with his incarceration and that of his co-accused. The remaining two (2) members were killed in a robbery incidence in Nairobi while one ran away and his whereabouts was unknown. He expressed remorse and blamed himself for what they did to the victim who was his aunt.
19. His family was aware that he got himself into bad peer groups which disturbed the community but wished he would return home and take care of his homestead.
20. The Local Administration and the Community reported that he was a member of a gang that terrorised the members of the community by stealing and robbing them. They believed that life imprisonment was the best punishment for the 2nd Applicant. They were emphatic that they were not ready to receive the Applicants back into the society. They opined that they should continue with the sentence they are serving to serve as justice to the victim and deterrence to the community at large. On its part, the Probation Office recommended resentencing of the 2nd Applicant attributing his crime to psychological vulnerability and poor life circumstances.

21. The Prison Officers gave a good report about the 1st Applicant. They pointed out that he had no record of criminal history in the prison. They stated that he was currently in carpentry class after the sentence was changed from death to life and was also participating in church activities in the prison. In respect of the 2nd Applicant, the Prison Officers stated that he had shown a greater improvement in his behavioural pathways.
22. 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.
23. It was also important that the sentence communicate to the community, condemnation of their 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.
24. 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 them, chances of the Applicants 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.

25. From the facts of the case, on the material night of 12th January 2017 at Lusiola Village, Serem Sub-Location, Shamakhokho Location in Hamisi Sub-County within Vihiga County, jointly with others, while armed with dangerous weapons namely pangas, the Applicants robbed Margaret Mboga Isindu of two (2) d-lights lamp, one hurricane lamp, hot pot, padlock, knife, sufuria, 50kgs of **(sic)** and a slasher all valued at Kshs 10,000/= and at the time of the robbery threatened to use actual violence to the said Margaret Mboga Isindu. They were also convicted of the offence of rape.

26. 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 Applicants had undertaken life skills that would enable them be re-integrated back to the society. According to the Pre-Sentence Report, the community and the Local Administration had not recommended for their re-sentencing. The Probation Office on the other hand, only recommended the re-sentencing of the 2nd Applicant.

27. Having considered the facts of this case, the Applicants' mitigation, the Prosecution's response thereto, the Pre-Sentence Report, the Recommendation Letter by Rev Patrick O. Olela Chaplain In Charge on behalf of the Officer In Charge Kisumu Maximum Prison, and the Applicants' Certificates of completion on various rehabilitation programs, this court came to the firm conclusion that a reduction of their death sentence which was

commuted to life imprisonment to a sentence of thirty five (35) years imprisonment would be reasonable in the circumstances of this case as they were convicted on both Counts.

28. This court rejected the assertion by Mariam Korir that the 1st Applicant was not suitable for resentencing as the said J. Sahani had recommended resentencing for the 2nd Applicant. Indeed, both Applicants participated in the robbery with violence and the offence of gang rape.

29. As the Applicants' 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).

30. 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).

31. Further, Clause 4.6.20 (ix) of the Judiciary Sentencing Policy Guidelines provides that:-

“The Sentencing Court shall be guided by the sentencing principles and objectives set out in Part I of these the Guidelines in all resentencing hearings. The following mitigating factors were set out by the Supreme Court as particularly relevant in a resentencing hearing:...

(ix) Time already spent in prison by the convict...”

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

33. The Charge sheet indicated that the Applicants were arrested on 12th January 2017. Although granted bond, they did not seem to have posted the same. They were both convicted and sentenced on 20th September 2017. This was a time that ought to be taken into account while computing their sentence.

DISPOSITION

34. Accordingly, the upshot of this court’s decision was that although the 1st and 2nd Applicants’ conviction on both Count I and Count II relating to the offence of robbery with violence and gang rape remained undisturbed as they were both safe, their respective death sentences in respect of Count I which were commuted to life imprisonment by a Presidential Executive Order be and are hereby set aside and substituted with sentences of thirty five (35) years imprisonment for each of them. As the sentences for Count I were now determinate, the sentences of fifteen (15) years for Count II

that were meted upon each of the Applicants herein be and are hereby reinstated forthwith. The sentences in respect of both Count I and Count II will run concurrently from the date of the sentences of the lower court.

35. For the avoidance of doubt, the period between 12th January 2017 and 19th September 2017 that each Applicant spent in remand during trial be and is hereby taken into account pursuant to Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

36. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **20th** day of **November**
2025

J. KAMAU
JUDGE