

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT VIHIGA**

**CRIMINAL MISCELLANEOUS APPLICATION NO E014 OF 2025**

**HILLARY SINDIJI CHUKUNSI A.....  
APPLICANT**

**VERSUS**

**REPUBLIC.....  
RESPONDENT**

**SENTENCE**

**INTRODUCTION**

1. In its decision that was delivered on 18<sup>th</sup> December 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 this court directed the Applicant herein to file his mitigation documents for consideration by this court. The Applicant herein filed his documents in support of his mitigation on 12<sup>th</sup> September 2025 pursuant to the directions of this court on 18<sup>th</sup> June 2025 in respect of his Notice of Motion application dated 11<sup>th</sup> February 2025 and filed on 20<sup>th</sup> February 2025.
3. Parties submitted orally on the Applicant's mitigation. This Ruling is based on the said parties' oral submissions.

## **LEGAL ANALYSIS**

4. In his oral submissions, the Applicant stated that he had been in prison for fourteen (14) years. He stated that for the time that he had been in prison, he had regretted the offence and for having been in bad company when he was young. He pointed out that he did intensive training in Resources Oriented Development Initiative (RODI) for three (3) years. He said that he was now able to make included shampoo, hand sanitiser, liquid multi-purpose soap, domestic hygienic products and other products. He urged this court to give him an opportunity to go back to the society so that he could get a wife and build the economy. He indicated that he was arrested on 6<sup>th</sup> January 2012 and never went out on bond. He asked this court to consider the period he stayed in prison as his trial went on.
5. On its part, the Respondent pointed out that the Pre-Sentence Report was negative. It pointed out that the Applicant was not remorseful as he had continued to deny having committed the offence and that his family had distanced itself from him. The Local Administration still believed that he still had networks with the gang and that there was a possibility of him reverting to the gang.
6. It asked this court to consider the aggravating circumstances which were that the Applicant was in the company of others, they were armed with dangerous weapons, to wit, pangas and rungus and that during the commission of the offence, they raped the Complainant's

wife and daughter. It urged this court to mete out a sentence that was commensurate with the offence that the Applicant herein had committed and to be guided by the Sentencing Guidelines Policy and the objectives of sentencing. It sought that justice not only be done but the same be seem to be done.

7. According to the undated Pre-sentence Report of J. Sahani, Probation Officer, Vihiga filed on 14<sup>th</sup> November 2025, the Applicant was thirty-seven (37) years old and had stayed for twelve (12) years in prison. He stated that he attended Kegoye Primary School and dropped out in form one, however, his father challenged the said information saying that his education journey was bumpy. The father reported that he started his primary education in Vumale Primary School and upon reaching Class Eight (8), he was given money to register for his national exams but he ran away with the same. Through his father's efforts, he was taken back to school but the separation of his parents greatly affected his education as his mother kept pulling him out of school.
8. It was further reported that the Applicant's life after school was characterised by casual jobs and that he worked in a hotel until his arrest. He was married and had one (1) child. He consumed alcohol. He denied having committed the offence.
9. His family believed that he committed the offence when he was a teenager and he could have misjudged his actions. They pleaded with the court to re-sentence him stating that they were ready to

accommodate him and monitor his moves purposely to ensure that he lives a meaningful life.

10. The victim expressed deep emotional distress as she recounted the events surrounding the offence. She stated that the Applicant's actions had profound and lasting negative impact on her life and that of her daughter as they both subjected to rape during the incident and the Applicant further threatened them with a panga. She expressed fear and anxiety of possible retaliation or harm should he return to the community.

11. The Local Administration and the community explained that the Applicant was a member of a gang that had been robbing the community. They were concerned that the safety of the victim was not guaranteed if the Applicant returned home.

12. The prison authorities noted that the Applicant had maintained good behaviour throughout his sentence and had no record of criminal activities while in prison.

13. As the Local administration and the community had expressed deep apprehension of the Applicant's return, the Probation Office did not recommend for review of his sentence.

14. According to the recommendation letter dated 3<sup>rd</sup> February 2021, by Tindi M. Emmanuel (SP), the In-charge, Kisumu Maximum Prison, the Applicant had shown exemplary behaviour while serving his sentence and had acquired completion certificates in various rehabilitative programs. He added that he was In-charge of compound sanitation, obeyed the law and guided his fellow inmates

on matters of sanitation. He vouched for him being given a second chance by this court.

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 on the material night of 31<sup>st</sup> December 2011 and 1<sup>st</sup> January 2012 at Kegoye Sub-Location in Vihiga County within Western Province, the Applicant, jointly with others, while armed with pangas, rungas and sharp torches robbed of Mebo Gayansi Ambani cash Kshs 300/=, one

Sontec radio, one mobile phone make Nokia, nine (9) packets of Unga Ngano, ten sticks of lido soap, one dozen of golden battery, a dozen Royco, 5 packets of Unga ugali, one dozen of Chipsy, 4 kgs of simsim, 2 Kgs of tea leaves, 4 kgs of kunde, 20 pieces of fish, 2 kgs of omena, four sodas, 1.5 box of biscuits, 40kgs of beans, 40kgs of white maize, two (2) blankets, one axe and one satchet of Onga, 2 dozens of tea leaves sachet, one sachet of Oyo and one packet of roll ball all valued at Kshs 23,500/= the property of Mebo Gayansi Ambani and at or immediately before or immediately after the time of such robbery used actual violence to the said Mebo Gayansi Ambani.

19. During the incident, the Applicant jointly with the others raped the wife and daughter of the said Mebo Gayansi Ambani. The Applicant was convicted on Count II and III for the offences of rape contrary to Section 10 of the Sexual Offences Act No 3 of 2006 and the offence of defilement contrary to Section 7 of the Sexual Offences Act respectively. He was sentenced to serve ten (10) years on each Count. However, the sentences on Count II and Count III were held in abeyance as he had been sentenced to death for the offence of robbery with violence.

20. 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 Applicant had undertaken life skills that would enable him be re-integrated back to the society.

21. Having considered the facts of this case which had aggravating factors of rape and defilement, the Applicant's mitigation, the Prosecution's response thereto, the Pre-Sentence Report and the Recommendation Letter by Tindi M. Emmanuel (SP), the Officer in-charge Kisumu Maximum Prison, this court came to the firm conclusion that a reduction of his death sentence to a sentence of thirty-five (35) years imprisonment would be reasonable in the circumstances of this case.

22. As the Applicant'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).

23. 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).

24. 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...”**

25. 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.**

26. A perusal of the Charge Sheet showed that the Applicant was arrested on 10<sup>th</sup> January 2012. He did not seem to have been released on bond. He was sentenced on 4<sup>th</sup> October 2013.

### **DISPOSITION**

27. Accordingly, the upshot of this court’s decision was that although the Applicant’s conviction remained undisturbed as it was safe, his sentence of death be and is hereby set aside and substituted with a sentence of thirty-five (35) years imprisonment. The sentences of ten (10) years on Count II and Count III will run concurrently with the sentence of thirty five (35) years imprisonment.

28. For the avoidance of doubt, the period the Applicant spent in custody during trial between 10<sup>th</sup> January 2012 and 3<sup>rd</sup> October 2013 be and is hereby taken into account while computing his

sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

29. It is so ordered.

**DATED** and **DELIVERED** at **VIHIGA** this **18<sup>th</sup>** day of **December**  
2025

**J. KAMAU**  
**JUDGE**

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