

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION NO E026 OF 2025
CYRUS KAVAYI ONZERE.....APPLICANT
VERSUS
REPUBLIC.....RESPONDENT
SENTENCE

INTRODUCTION

1. In its decision that was delivered on 18th 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. He filed his documents in support of his mitigation on 17th June 2025 pursuant to the directions of this court on 12th June 2025 in respect of his Notice of Motion application dated 17th April 2025 and filed on 25th April 2024.
3. He filed undated Written Submissions on 17th June 2025. He also mitigated orally as did the Respondent herein. This Ruling is based on the said parties' submissions.

LEGAL ANALYSIS

4. In his Written Submissions on mitigation, the Applicant submitted that he was about eighteen (18) years old when he committed the offence hence, that he was ignorant of the law and had been influenced by peer pressure. He stated that due to the experience and suffering he had undergone in prison, he was currently conversant with all the consequences of crime. He added that he had lived peacefully with fellow inmates and prison administration while engaging himself in different rehabilitation programs from which he had acquired life skills for easier reintegration back into the society when given a second chance.
5. He sought the court's forgiveness on behalf of the victim and the society at large asserting that man was to err and that it did not mean that if someone committed such an offence, he would be unable to reform. He expressed remorse and promised not to repeat the offence again. He urged the court to reduce his death sentence to a proportionate one as was held in the case of **Elijah Mugo Murimi vs Republic Criminal Revision No E009 of 2022** (eKLR citation not given).
6. He urged the court to consider the primary purpose of a sentence of imprisonment as stipulated in the United Nation Standard Minimum Rules (Mandela Rules No 4) and the Prisons' motto which was "Kurekebisha na Haki" and note that the longer the sentence, the

more difficult it was for a reformed person to be re-integrated in the society. He pleaded with the court to consider that he was from a poor background and that the long incarceration would continue to ruin his life. He urged the court to consider the period he spent in custody during trial in compliance with Section 333(2) of the Criminal Procedure Code.

7. In his oral submissions, he explained that he was five (5) days shy to attain the age of eighteen (18) years when he committed the offence having been born on 24th April 1991. He said that he informed the Trial Court of the same. He was emphatic that he was reformed and rehabilitated and reiterated that he had learnt many skills that would help him work when he was released. He averred that he would also be able to get married and have children. He pointed out that he was arrested on 9th June 2008 and asked the court to consider that period as he was never released on bond.
8. On its part, the Respondent noted that the Pre-Sentence Report was positive. It asked this court to mete out upon the Applicant a sentence that was commensurate with the offence that he had committed. It urged the court to consider the aggravating circumstances which were that the Applicant was with others at the material time, they were armed with pangas and they injured the Complainant. It prayed that the court be guided by the Sentencing Guideline Policy and the objectives of sentencing and ensure that justice was not only done to the Complainant but that justice must be seen to be done.

9. According to the Pre-sentence Report of Mariam Korir, Probation Officer, Vihiga dated and filed on 14th November 2025, the Applicant was thirty-seven (37) years old and had spent twelve (12) years in prison. He attended Vovole Primary School and Racecourse Primary School and was arrested during the April holidays while at home and subsequently charged in the present case. He had never married and had no children as he was imprisoned at a young age. He was a Christian and never abused drugs.
10. His family was emotionally affected by his life imprisonment sentence. They described him as having been well-behaved during his childhood and pleaded for leniency citing his young age at the time of the offence. They stated that they were willing to assist with his reintegration should the court consider resentencing him. They believed he had reformed and deserved a second chance to rebuild his life.
11. The victim expressed strong resentment towards him stating that he continued to experience emotional distress resulting from the incident. He reported that he had sustained physical injuries during the violent encounter although he had since healed. He expressed fear and anxiety that the Applicant might seek retaliation upon being released.
12. The Local Administration and the community were apprehensive that the Applicant might retaliate if he was released, recalling his previous involvement in theft and robbery. Although

they acknowledged that he may have changed with age, they remained cautious about his potential return.

13. According to the remarks by the Prison Officer in-charge, Ephantus Kariuki (SSP), Kibos Maximum Security Prison, the inmate had exhibited exemplary character while serving his sentence. The Prison authorities reported positively of his conduct noting no disciplinary issues or repeat offences. The Probation Office recommended his re-sentencing to give him an opportunity to rebuild his life and contribute positively to society.

14. 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.

15. 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.

16. 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.

17. It was clear from the facts of the case that on the material day of 14th May 2008 at about 2.00 am, at Mudete Village, Mudete Sublocation, North Maragoli in what was then known as Vihiga District within the then Western Province, the Applicant, jointly with another, while being armed with offensive weapons, namely pangas, robbed Gerald Musalia Akuyava, of two (2) Nokia mobile phones make 3110 and 1110, a CD player make Royal, one Radio Cassette make Atacha, one brief case, 10 CD compact, five (5) long trousers, four (4) shirts, three (3) caps, one speaker, an amplifier, a driving license and a waist belt made of leather, all valued at Kshs 46,000/= and at immediately after the time of such robbery, wounded the said Gerald Musalia Akuyava.

18. 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.

19. It was evident from the information that was obtained during the Social Inquiry by the Probation Office that the Applicant was about twenty (20) years when he committed the offence and not eighteen (18) years as he had alleged. He was then lawfully incarcerated.

20. Having considered the facts of this case, the Applicant's mitigation, the Prosecution's response thereto, the Pre-Sentence Report and the Recommendation Letter by Ephantus Kariuki, the Officer In-Charge Kibos Maximum Security Prison, this court came to the firm conclusion that a reduction of his death sentence to a sentence of thirty (30) years imprisonment would be reasonable in the circumstances of this case.

21. 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).

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, 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...”

24. 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.**

25. As the Charge Sheet and the lower court record was missing in this file, this court could not determine the Applicant’s prayer under Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

DISPOSITION

26. 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 (30) years imprisonment that it to run from the date that he was sentenced by the Trial Court.

27. The Applicant was at liberty to file an application seeking to be granted the period that he had spent in remand while his trial was ongoing in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) once the record of the Trial Court was availed.

28. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **18th** day of **December**
2025

J. KAMAU
JUDGE

ORIGINAL FILE COPY