



**Otanga v Republic (Criminal Miscellaneous Application E044 of 2024)
[2025] KEHC 18777 (KLR) (17 December 2025) (Sentence)**

Neutral citation: [2025] KEHC 18777 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION E044 OF 2024
JN KAMAU, J
DECEMBER 17, 2025**

BETWEEN

ANDREW PEKU OTANGA APPLICANT

AND

REPUBLIC RESPONDENT

SENTENCE

Introduction

1. In its decision that was delivered on 29th October 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. The Applicant had filed his documents in support of his mitigation on 19th February 2025 together with Written Submissions in support of his Notice of Motion application dated 4th April 2023 and filed on 13th March 2024 herein wherein he had sought a review of sentence. He subsequently filed a letter of recommendation by CIP Shadrack Opanga that was signed for the Office-In-charge of Kisumu Maximum Prison.
3. In his oral mitigation to this court, he indicated that he was young when he committed the offence having been arrested at the age of twenty one (21) years. He said that he had been in prison for twenty five (25) years. He stated that he had done many certificates that would help in his life outside prison. He urged this court to give him a second chance so that he could take care of his mother aged ninety (90) years as all his brothers were deceased.



4. On its part, the Respondent urged this court to be guided by the Sentencing Policy Guidelines and give a sentence that was commensurate with the offence that the Applicant herein had committed. It asked this court to consider that the Applicant was with others and they were armed and injured the Complainant.
5. According to the Pre-sentence Report of Debora Okode, Probation Officer, Vihiga dated 27th November 2025 and filed on 28th November 2025, the Applicant was forty-five (45) years old and had spent twenty-four (24) years in prison. He attended Eubayai Primary School and dropped out of school in Class six (6) due to financial constraints. He remained at home assisting his parents with farm work and later relocated to Kiambu to work as a coffee harvester in Sasini Coffee Factory. Thereafter, he returned to his village where he engaged in farming until his arrest. He had been married and had one (1) child. However, his wife later remarried but died. He was a Christian and did not consume drugs.
6. He expressed remorse and stated that if he was given a chance, he would render his apology to the victims. He said that he was first offender.
7. His family vouched for him and stated that he was a young man at the time of the commission of the offence and that the Prison had now rehabilitated him. They prayed for his return.
8. The victim could not be traced as it was reported that he relocated to Lugari where he died and was buried. The Local Administration and the community noted that the Applicant herein was a good and hardworking person and had never been found in any criminal activities in the area. They pleaded with court to grant him a lenient sentence so that he would go back home and care for his mother. The Probation Office recommended that he be re-sentenced.
9. According to the remarks by the Prison Officer in-charge at Kisumu Maximum Prison, the inmate had taken his sentence positively and had enrolled in various rehabilitation and reformation programmes. He pointed out that he had been a team leader and all his engagements had real commitment and devotion.
10. 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.
11. 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.
12. 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 Appellant 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.
13. The facts of the case showed that on the material day of 2nd November 2001, the Complainant, Salome Muku Ambuke, found the Applicant herein waiting at her gate and he robbed her of a sum of Kshs 4,000/=, a bag containing one (1) lessa, one (1) calculator, two (2) exercise books, one (1) handbook and one (1) pen while armed with offensive weapon namely axe and at or immediately before or after the time of the robbery wounded the said Salome Muku Ambuke.



14. As can be seen hereinabove, one of the objectives of sentencing and/or incarceration was majorly to rehabilitate offenders. Having perused the Pre-Sentence Report, this court was persuaded to find and hold that the same had been achieved herein as the Appellant herein had undertaken life skills that would enable him be re-integrated back to the society. This court also noted that the value of the goods that were stolen was also low. Even so, the victim had remained traumatised almost thirteen (13) years after the incident and was in fact scared that the Appellant would harm him if he was released from jail.
15. Having considered the facts of this case, the Applicant's mitigation, the Prosecution's response thereto, the Pre-Sentence Report, the Recommendation Letter by Shadrack Oponga (CIP), the Officer in-charge Kisumu Maximum Prison, and the Applicant's Certificates of completion on various rehabilitation programs, 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.
16. As the Appellant'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).
17. 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).
18. 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...”
19. 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.
20. The Appellant was arrested in November 2001. Although he was granted bond, he did not seem to have posted the same. He was committed in jail in 2001. He had been in prison for twenty four (24) years.
21. Taking into account the one third (1/3) remission of his reviewed sentence of thirty (30) years, he ought to have served twenty (20) years imprisonment. Going further, bearing in mind the period he spent in remand while his trial as ongoing from November 2001, it was evident that he has since completed his sentence.

Disposition

22. Accordingly, the upshot of this court's decision was that although the Appellant's conviction remained undisturbed as it was 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 thirty (30) years imprisonment which is to run from the date of the sentence of the lower court.



23. As the court did not have the lower court file, it could not consider the period the Applicant spent in remand during trial in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya). Be that as it may, it was evident that the Applicant has since completed his sentence even without taking into account the period he remained in remand. It is hereby directed that the Applicant be and is hereby released from custody forthwith unless he be held for any other lawful cause.
24. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 17TH DAY OF DECEMBER 2025

J. KAMAU

JUDGE

