

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CRIMINAL MISCELLANEOUS APPLICATION NO E016 OF 2025

**SIMON KADIVANI ALIAS SOLOMON KADAGAYA.....
APPLICANT**

VERSUS

**REPUBLIC.....
RESPONDENT**

SENTENCE

INTRODUCTION

1. In its decision that was delivered on 14th January 2026, 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 23rd December 2025.
3. The parties did not file any Written Submissions on the said limb. This Ruling is, therefore, based on their submissions on mitigation that was orally given in court.

LEGAL ANALYSIS

4. The Applicant told this court that he was aged forty five (45) years and that he was incarcerated in 2012 when he was thirty six (36) years of age. He admitted that he had done a mistake when he committed the offence. He expressed remorse and sought for forgiveness from the Complainant. He said that he had learnt a lesson during the time he had been in prison for seventeen (17) years and promised never to repeat such an offence again. He added that he had studied masonry, tailoring and carpentry.
5. He pleaded with the court to review his sentence to enable him go home to take care of his aged mother who was ailing and taking care of his two (2) children who his wife left behind after she left. He said that his father died while he was in prison. He stated that the Probation Office had already spoken to his neighbours who were willing to accept him back. He urged this court to consider the time that he had spent in custody while his trial was on going.
6. On its part, the Respondent submitted that the Applicant had committed robbery with violence which was a very serious offence. It submitted that despite the emerging jurisprudence on resentencing, the sentence meted out ought to be commensurate with the offence and its gravity. It pointed out that the Probation Office had indicated that the whereabouts of the Accused person's children and wife were unknown and that it was not correct that this two (2) children were living with his mother.

7. It averred that the sentence that was meted out to the Accused person was proper. In this regard, it urged this court to not to interfere with the sentence that was given by the Court of Appeal and hence disallow his application for sentence review.
8. According to the Pre-sentence Report of Mariam Korir, Probation Officer, Vihiga dated 28th July 2025 and filed on 31st July 2025, the Applicant was fifty-five (55) years old. He attended Chavakali Primary School but dropped out in Standard Six (6) due to financial constraints. He resorted to doing casual jobs and farming for pay for four (4) years. At the time of his arrest, he was selling mandazis.
9. He was married but separated when he was arrested. He was blessed with two (2) children. He was of good health and had no relationship with the victim who was not traced. He was remorseful and regretted having committed the offence.
10. His family vouched for his resentencing promising to support him in case he completed his sentence. On their part, the Local Administration and the community were in agreement of his antecedent of previously stealing and robbing the community. They, however, opined that due to his age now, he may have changed his ways and thus urged the court to consider resentencing him.
11. The Pre-Sentence Report also noted that the Prison pointed out that he had no record of criminal history while in the prison. It added that he had a Certificate in tailoring and carpentry and had been assisting in the prison.

12. According to the remarks by the Prison Officer in-charge at Kamiti Maximum 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 and certificates.
13. 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.
14. 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.
15. 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.
16. It was clear from the facts of the case that on the material day of 28th July 2013 at Logere Village, Jepkoyai Location, Vihiga

County, jointly with others and while armed with dangerous weapons, namely, pangas, rungas and torches, the Applicant robbed one Everlyne Vugutsa Onacha of assorted items all valued at Kshs 115,200/= and immediately before such robbery, threatened to use violence to the said Everlyne Vugutsa Onacha.

17. He faced an alternative charge of handling stolen goods contrary to Section 322(2) of the Penal Code Cap 63 (Laws of Kenya). The particulars of the offence were that on the 17th day of August 2013 at Bukhayo Road, Chavakali Market in Vihiga County, otherwise than in the course of stealing, he dishonestly retained one (1) M-Kopa Solar, one (1) mobile phone make NOKIA Serial No xxx and one (1) Converter S/No. 06/265755 knowing or having reason to believe them to be stolen.

18. The particulars of Count II were that on 28th July 2013 at Logere Village, Jepkoyai Location, Vihiga County, jointly with others and while armed with dangerous weapons, namely, pangas, rungas and torches, the Applicant robbed one Joyce Ajema Onacha of her assorted household items all valued at Kshs 16,000/= and immediately before such robbery, threatened to use violence to the said Joyce Ajema Onacha.

19. In Count III, the particulars were that on 28th July 2013 at Logere Village, Jepkoyai Location, Vihiga County, jointly with others and while armed with dangerous weapons, namely, pangas, rungas and torches, the Applicant robbed one Victor Anyasi Onacha of Mobile phone make Techno No. 250 S/No. not known and a pair of

shoes all valued at Kshs 3,500/= and immediately before such robbery, threatened to use violence to the said Everlyne Vugutsa Onacha.

20. The particulars of Count IV, the particulars were that on 28th July 2013 at Logere Village, Jepkoyai Location, Vihiga County, jointly with others and while armed with dangerous weapons, namely, pangas, rungas and torches, the Applicant robbed one Rachel Onacha of assorted goods all valued at Kshs 26,800/= and immediately before such robbery, threatened to use violence to the said Rachel Onacha.

21. 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. According to the Pre-Sentence Report, although the community and the Local Administration opined that he was a prison monger, they were hopeful that he had reformed due to the time that he had remained in prison. They were, therefore, willing to accept him back into the society.

22. Having considered the facts of this case, the Applicant's mitigation, the Prosecution's response thereto, the Pre-Sentence Report, the Recommendation Letter by Henry K. Limanye ndc "k" (ACGP) the Officer in-charge Kamiti Maximum Security Prison dated 19th December 2025, 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 that was commuted to life imprisonment to a sentence of thirty five (35) years imprisonment would be reasonable in the circumstances of this case as he was convicted on three (3) Counts, which were aggravating factors herein.

23. 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).

24. 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).

25. 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...”

26. 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.**

27. Notably, there were no lower court file records in the file herein. This court relied on the Court of Appeal decision **Cr Appeal No 70 of 2016 Simon Kadivani alias Solomon Kadagaya**, the Pre-Sentence Report and particulars from the Charge Sheet the Applicant read out to the court to fill in the missing details regarding his arrest and sentence.

28. The Applicant was arrested on 7th February 2014. Although granted bond he did not seem to have posted the same. He was sentenced on 19th September 2014. This was a period that therefore ought to be taken into consideration while computing his sentence.

DISPOSITION

29. 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 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 five (35)

years imprisonment which is to run from the date of the sentence of the lower court.

30. For the avoidance of doubt, the period between 7th February 2014 and 18th September 2014 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).

31. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **14th** day of **January** 2026

J. KAMAU
JUDGE