

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION NO E019 OF 2024

**HENRY
OTANA.....APPLICANT**

VERSUS

**REPUBLIC.....
RESPONDENT**

SENTENCE

INTRODUCTION

1. In its decision that was delivered on 23rd June 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 11th February 2026. This Ruling is based on the oral mitigation the parties presented in this court.

LEGAL ANALYSIS

3. In his mitigation, the Applicant pointed out that he had been in prison for so many years that many of the plans that he had,

including his family, had been disrupted. He averred that his children never reached the level of education that he had hoped they would have reached and hence, he prayed for a second chance in life to rectify the wrong that he had done.

4. He said that Kenyans would see him as a reformed person from whom they could see a good example. He expressed remorse and vowed never to repeat the offence again. He asked the victims to forgive him and stated that he would also seek their forgiveness if he went home.
5. On its part, the Respondent submitted that the Applicant had committed very serious crimes, those of gang rape and robbery with violence. It pointed out that the victims were still traumatised and he had never sought their forgiveness. It urged this court to mete out a sentence that was commensurate with the offence that he had committed.
6. 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-four (54) years old. He attended Ebunagwe Secondary School. He was an artist who painted and drew images in schools, churches, homes and shops in the community. He was married and blessed with six (6) children. He was a Christian but an alcoholic.
7. His family longed for the time he would return home and promised that they would support him to be re-integrated into the society with ease. They pleaded with the court to consider re-sentencing him.

8. The victims, who were mother and son, were the Applicant's neighbours. During the robbery, the mother was gang raped while her son was assaulted. They both expressed a lot of resentment which was laced with emotions while narrating the incident during the Social Inquiry. They explained that they had never healed from the traumatic experience and, therefore, they did not want to hear anything about the Applicant apart from him serving his life sentence. They averred that his life sentence was their solace and were adamant that he should continue to serve the said sentence as justice on their part.
9. The local administration and the community contended that the Applicant was drunk on the day of the incident. They believed that he was in a group of people who were walking free yet they committed the offence together. They also implored this court to re-sentence him as he was first offender.
10. On the other hand, the Probation Office recommended that the Applicant continues to serve the initial sentence because he was not remorseful as he still denied having committed the offence and instead blamed his friends for it.
11. According to the remarks by the Prison Officers, the Applicant had no criminal history in the prison. He had a Certificate in Theology and was currently engaged in a tailoring class. In the recommendation letter dated 16th September 2025 by Rev Patrick O. Olela (SP), Chaplain In-Charge signed on behalf of the Officer In-charge Kisumu Maximum Prison, the Applicant's conduct was

reported to be above reproach and that he had never been accused of breaking any prison rule. It was also indicated that he had taken cognisance of the offence and that he had a positive demeanour to rehabilitation as he was dutifully serving his sentence.

12. Notably, the principle of sentencing was fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing were retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya had added community protection and denunciation as sentencing objectives. It was important that the sentence communicate to the community, condemnation of the criminal act. The sentence would indirectly send a strong signal to deter would be offenders from committing such an offence.

13. The objectives were not mutually exclusive and could overlap. However, if the court did not take into account the three (3) objectives of deterrence, retribution and denunciation of the offence at the time of sentencing an accused person, chances of that person being reintegrated in the society would be next to impossible as there were possibilities of being harmed. The sentence had to be hinged on retributive justice for the secondary victims. Justice not only needed to be done but it had to be seen to be done.

14. The facts of the case were that on the material day of 28th March 2013 at Emativini Sub-location in Vihiga County within

Western Province, jointly with others and while armed with dangerous weapons namely pangas, the Applicant herein robbed EA ten (10) iron sheets all valued at Kshs 8,000/= and immediately before such robbery used actual violence on the said EA.

15. On the same day, at Emativini Sub-location in Vihiga County within Western Province, jointly with others, the Applicant intentionally and unlawfully caused their organs to penetrate the vagina of the said EA, who was aged, fifty four (54) years, without her consent.

16. At the material time of the incident, the Applicant was aged forty one (41) years while the said EA was aged fifty four (54) years. The Applicant and his accomplices, who had apparently gone scot free, raped her in the presence of her son. This was an abomination and to say the least, very evil. EA and her son had remained traumatised almost twelve (12) years after the incident.

17. The Applicant still denied having committed the offence and blamed his accomplices. This did not help him in convincing this court that he was remorseful particularly because during his mitigation, it appeared to have been more about his family and the plans that he had before he was incarcerated. It may very well have been that he was not a good communicator because the Officer In-Charge of Kisumu Maximum Prison had indicated that he (the Applicant) was remorseful. All in all, the Applicant did not come out as having been truly remorseful.

18. Be that as it may, as can be seen hereinabove, one of the objectives of sentencing and/or incarceration was majorly to rehabilitate offenders. The Pre-Sentence Report had indicated that the Applicant herein had undertaken life skills that would enable him be re-integrated into the society. The observation by the Prison authorities was also positive. Despite the enormity of the offence, this court was persuaded to find and hold that part of the objectives of sentencing in this case had been achieved herein. This court hoped that the rest of the objectives would be achieved as the Applicant continued to serve the remainder of his sentence in prison.
19. Accordingly, having considered the facts of this case, the Applicant's mitigation, the Prosecution's response thereto, the Pre-Sentence Report, and the Recommendation Letter from the Officer In-Charge Kisumu Maximum Prison, this court came to the firm conclusion that a reduction of his death sentence that was later commuted to life imprisonment to a sentence of thirty five (35) years imprisonment would be reasonable in the circumstances of this case.
20. 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).
21. 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).

22. 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:...

Time already spent in prison by the convict...”

23. 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.**

24. The Applicant was arrested on 5th April 2013. Although he was granted bond, he did not appear to have posted the same. He was sentenced on 3rd February 2014. This was a period that ought to be taken into consideration while computing his sentence.

DISPOSITION

25. For the foregoing reasons, 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.
26. For the avoidance of doubt, the period between 5th April 2013 and 2nd February 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).
27. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **18th** day of **February**
2026

J. KAMAU
JUDGE