

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CRIMINAL MISCELLANEOUS APPLICATION NO E057 OF 2025

FRANCIS AGANI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

SENTENCE

INTRODUCTION

1. In its decision that was delivered on 24th February 2025, in 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)**, where the Applicant herein was one of the Petitioners, 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 on 28th January 2026 with regard to his undated Notice of Motion application filed on 23rd October 2025. He filed his documents in support of his mitigation on even date. This Ruling is based on the oral mitigation the parties presented in this court.

LEGAL ANALYSIS

3. In his mitigation, the Applicant prayed for forgiveness from the victim and from the court. He averred that this was his first offence. He pointed out that he had reformed and urged this court to help him see his children as a free man.
4. On its part, the Respondent submitted that the Applicant had committed a grievous offence, that of robbery with violence. It urged this court to look at both his reformation and the victim's side and mete out a sentence that would deter him and other would-be offenders.
5. According to the Pre-Sentence Report of Oliver Simiyu, Probation Officer, Vihiga dated and filed on 5th March 2026, the Applicant was forty-eight (48) years old and had spent thirteen (13) years in prison. He attended Madeya Primary School but dropped out in Class Five (5) due to lack of parental support. He later trained welding skills through apprenticeship but could not complete the training due to unavoidable uncertainties. With limited academic qualifications, he resorted to casual jobs in Kericho before shifting to small-scale farming and businesses until the time of his arrest.
6. He was married and had children, however, his wife died while he was in prison. He had never abused drugs and was a Christian, a member of Salvation Army Church, Itumbi. He was currently homeless after his thatched house became old and collapsed.
7. He admitted committing the offence blaming negative peer influence and a desire for quick financial gain for his involvement in

the crime. He expressed regret and acknowledged poor decision making, youth recklessness and misleading peers.

8. Although he held the view that the sentence that was meted on him was too severe and was not commensurate with the offence that he committed, he sought a second change in life. He stated that he would personally seek forgiveness from the victim if given a chance to do so. His family had remained in contact with him throughout his incarceration as they considered him an important person in the family and were ready to receive him and support him through reintegration.
9. Although the Applicant indicated that the victim was his immediate neighbour co-existed peacefully with his family, the victim was still afraid that he would retaliate and cause him more harm. The victim stated that the proposed re-sentencing of the Applicant had reminded of the traumatic incidence that he since had forgotten. He, thus, firmly opposed any application for leniency or review of the Applicant's sentence.
10. The Local Administration and the community believed that the prison rehabilitation might have given the Applicant the opportunity to reform and, therefore, urged the court to consider that and give him a second chance. An immediate neighbour opined that his family would provide him support so as not to go back to crime.
11. According to the remarks by the Prison Officers, the Applicant had maintained good conduct and had lived peacefully with his fellow inmates. They added that he had undertaken rehabilitation

programs training in Theology, sawing and carpentry and that that would support his livelihood if released. He had acquired several certificates which could support him if released from prison. The Probation Officer recommended that the Applicant be considered for resentencing as his conduct had been consistently positive and he had indeed reformed.

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. It was clear from the facts of the case that the on the material day of 3rd July 2012, at Madeya in Hamisi of Vihiga County, the Petitioner jointly with others, while armed with offensive weapons namely rungas and metal bar, robbed Thomas Aduma Memba of one Nokia and one Techno phone all valued at Kshs 4200/=, being the property of Dickson Kibisu and four (4) bed sheets, blankets, cups and bed covers, a dozen of plates, eight (8) sufurias, assorted clothes, three (3) bags, two (2) dozens of water glasses, set of table clothes and a kettle, all valued at Kshs 23,800/= and being the property of Mideko Memba.
15. At the material time, they were armed with offensive weapons being rungas and metal bar and at or immediately before or after the time of such robbery they wounded Thomas Aduma Memba.
16. 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.
17. Having considered the facts of this case, the Applicant's mitigation, the Prosecution's response thereto, the Pre-Sentence Report, the Recommendation Letter dated 24th June 2025 by Fredrick Ouko SSP on behalf of the Officer In-Charge Kibos Maximum Security Prison, the Petitioner's Certificates of completion on various rehabilitation program, 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 (30) years imprisonment would be reasonable in the circumstances of this case.

18. 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).

19. 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).

20. 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...”

21. 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.**
22. The Applicant was arrested on 3rd July 2012. Although granted bond he did not seem to have posted the same. He was sentenced on 26th May 2014. This was a period that therefore ought to be taken into consideration while computing his sentence.

DISPOSITION

23. 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 (30) years imprisonment which is to run from the date of the sentence of the lower court.
24. For the avoidance of doubt, the period between 3rd July 2012 and 25th May 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).
25. It is so ordered.

DATED and DELIVERED at VIHIGA this 10th day of March 2025

J. KAMAU

JUDGE

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