

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION NO E055 OF 2025

SETH JUMBA
MADIABA.....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 stated that he had four (4) children two (2) of whom had died. He sought forgiveness from the victim, the court and God. He pointed out that this was his first offence and prayed for a second chance.
4. On its part, the Respondent submitted that the Applicant had been charged with a grievous offence, that of robbery with violence. It pointed out that the victim was still fearful of him but noted that the Chief Magistrate had asked that he be given a second chance as he only used to take illicit alcohol and drugs. It asked that this court balances the fact that the Applicant had reformed and the victim's views.
5. According to the Pre-Sentence Report of J. Sahani, Probation Officer, Vihiga dated 2nd March 2026 and filed on 5th March 2026, the Applicant was fifty-seven (57) years old and had spent thirteen (13) years in custody. He attended Mutiva Primary School, Kinu Primary School and Marakusi Primary School but dropped out at Class Five (5) following the death of his grandfather. He was married and had children. He operated a canteen together with his wife until his arrest. His wife passed away in 2015.
6. He moved to Nairobi where he worked as an unskilled construction labourer. He later relocated to Mombasa where he trained informally as a welder while earning a daily wage. However, exposure to welding light reportedly affected his eyesight, forcing him to discontinue the trade. He subsequently worked briefly for a shipping company before returning to casual construction work in Nairobi. He then returned to his rural home due to unstable employment.

7. He admitted having committed the offence, expressed remorse for his actions and acknowledged the harm he caused during the robbery. He stated that his time in custody had led to significant personal transformation. He reported that he had improved in discipline, peaceful coexistence with others and made a firm commitment to living a crime-free life. He expressed willingness to seek forgiveness from the victim and had indicated that he harboured no ill feelings.
8. His family maintained that he had no known criminal record prior to the incident. His neighbours also gave positive accounts of his prior conduct. One of the Village Elders, in fact, vouched for his character and asserted that he did not have previous complaints or convictions against him.
9. On the other hand, the Local Administration noted that prior to his incarceration, the Applicant had been involved in a series of social vices and criminal activities such as stealing, smoking bhang, drinking and gambling. It, however, agreed that given the period he had been in custody and with the prison rehabilitation undertaken, he had reformed and could be given a chance to be reintegrated back into the society. The Assistant Chief and the Community Policing undertook to closely monitor his activities.
10. The victim expressed fear of a retaliatory attack from the Applicant and thus, strongly objected to his re-sentencing, because if the same was granted, he would be released at some point.

11. According to the remarks by the Prison Officers, the Applicant had maintained good discipline and had no record of misconduct during his incarceration. They pointed that he suffered from a terminal illness which overwhelmed him limiting his participation in physical skill-oriented prison programs. He had, however, completed several rehabilitation courses. They had no objection to his re-sentencing application. The Probation Office recommended the review of the Applicant's sentence due to his health and health condition. It added that he had maintained discipline, pursued spiritual and behavioural rehabilitation and had secured a structured support system for reintegration.
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 rungus 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, the Applicant and his Co-Accused persons were armed with offensive weapons being rungus 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. According to the Pre-Sentence Report, he had been receiving support from his family and the Local Administration had indicated

the willingness to monitor his conduct to ensure smooth reintegration.

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 for the Officer In-charge Kibos Maximum Security 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 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** 2026

J. KAMAU
JUDGE