PREROGATIVE OF MERCY DURING PENDING APPEAL: RECONSIDERING THE SUPREME COURT'S REASONING IN *MARYAM SANDA V. COP*

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Introduction

The Supreme Court's decision in Maryam Sanda v C.O.P[1] ("Sanda's case") has reignited debate over whether the prerogative of mercy ("mercy") may be exercised while a convict's appeal is still pending. Rooted in the ancient royal prerogative[2] and retained in sections 175 and 212 of the Constitution[3], this executive power functions as a humane corrective to the criminal justice system, especially in cases of wrongful conviction or exceptional circumstances.

Yet, when exercised during an active appeal, it raises constitutional concerns involving judicial finality and the separation of powers. In Sanda's case, the Court held that exercising such powers during a pending appeal is improper, reinforcing judicial authority over executive clemency during this period.

This article examines the constitutional and jurisprudential basis of that reasoning, questioning whether the Court's approach appropriately protects judicial powers or unnecessarily restricts an important executive safeguard within Nigeria's constitutional framework. It argues that while the Court sought institutional prudence, its reasoning introduces a restriction not expressly found in the Constitution.

Keywords: prerogative of mercy, constitution, clemency, convict, appeal.

Background

Maryam Sanda was convicted by the High Court of the Federal Capital Territory (F.C.T.) for the murder of her husband, Bilyaminu Bello, during a domestic dispute in 2017 and sentenced to death by hanging[4]. Dissatisfied with the decision of the trial Court, she appealed to the Court of Appeal. Her appeal was unanimously dismissed and her conviction upheld by the Court of Appeal[5]. Sanda was equally dissatisfied with the judgment of the Court of Appeal and further appealed to the Supreme Court.

The hearing of the appeal was on the 2nd of October 2025, and judgment was reserved to be delivered on the 12th of December 2025[6]. However, on the 23rd of October 2025, the Presidency published an Instrument commuting Sanda's death sentence to 12 years' imprisonment under section 175 of the

[1] 2025 LPELR-82714 (SC)
[2] Andrew Novak, 'The Origins of the Common Law Prerogative of Mercy' in Comparative Executive Clemency (Routledge 2015)
[3] Constitution of the Federal Republic of Nigeria 1999 (as amended), ss 175, 212
[4] (Coram Hon. Justice Y. Halilu)
[5] (Coram: Adah, JCA (now JSC); Williams-Dawodu, JCA and Idris, JCA (now JSC)
[6](Coram: Uwani Musa Abba Aji, JSC, Ibrahim Mohammed Musa Saulawa, JSC, Emmanuel Akomaye Agim, JSC, Chidi Nwaoma Uwa, JSC and Moore Aseimo Abraham Adumein, JSC)

Constitution, citing compassionate grounds[7].

When judgment was eventually delivered, the Supreme Court rejected the validity of this exercise of mercy during a pending appeal. It affirmed the death sentence and dismissed the appeal.

Analysis of the decision of the Supreme Court

Before addressing the merits of the appeal, the Supreme Court first considered the propriety of granting clemency while an appeal was pending. The apex Court was guided by the provisions of section 175 of the Constitution, which makes provisions for the President to exercise prerogative of mercy as follows:

"(1) The President may –
(a) grant any person concerned with or convicted of any offence created by an Act of the National Assembly pardon, either free or subject to lawful conditions;
(b) grant to any person respite, either for an indefinite or for a specified period, of the execution of any punishment imposed on that person for such an offence;
(c) substitute a less severe form of punishment for any punishment imposed on that person for such an offence; or
(d) remit the whole or any part of any punishment imposed on that person for such an offence or of any penalty or forfeiture otherwise due to the State on account of such an offence.
(2) The powers of the President under Subsection (1) of this section shall be exercised by him after consultation with the Council of State.
(3) The President, acting in accordance with the advice of the Council of State, may exercise his powers under Subsection (1) of this section in relation to persons concerned with offences against the army, naval or air-force law or convicted or sentence by a Court-martial."

The Court referred to prior authorities disapproving of clemency during pending appeals[8]. One of such decisions is *Francis Obidike v. State*[9], where the Court of Appeal deprecated the act of the executive in granting pardon to a convict of a capital offence pending his appeal against conviction. The Court equally called in aid its earlier decision in *Monsuru Solola & Anor v. The State*[10] that where an appeal subsists, the executive cannot intervene until the appeal is finally determined.

The Court then invoked section 233(2)(d), which grants it exclusive jurisdiction over appeals involving affirmed death sentences. The Court, per the lead judgment of Moore Aseimo Abraham Adumein, J.S.C., held as follows:
"I do not think that this jurisdiction can be affected by the grant of pardon, by the Executive, while an appeal against a sentence of death is pending in the Supreme Court of Nigeria. When the Supreme Court is seised of an appeal of this nature, four possibilities are the fate of the appeal. The appeal may be allowed and the convict acquitted and discharged. Secondly, the appeal may be allowed and the sentence imposed on the convict modified or varied. Thirdly, the appeal may be allowed and an order for retrial made. Finally, the appeal may be dismissed and the decision appealed against

[7] Official Gazette No.184 of the Federal Republic of Nigeria published as Government Notice No. 85. S. I. No. 79; thereto is a supplement to the Gazette Instrument of Presidential Prerogative of Mercy (Reduced Terms of Imprisonment and Sentence), 2025.

[8] Anthony Isibor v. The State (2002) FWLR (Pt. 98) 843 at 861, (2002) 4 NWLR (Pt. 758) 741 at 767; Monsuru Solola & Anor. v. The State (2005) 11 NWLR (Pt. 937) 460 at 488-489

[9] (2001) 17 NWLR (Pt. 743) 601 at 642

[10] (2005) 2 NWLR (pt. 937) 460

affirmed and upheld. Therefore, there is obviously good reason for the admonition that when an appeal against a death sentence is pending, it is better and safer to delay granting amnesty or pardon to the convicted prisoner."[11]

The Court employed vivid metaphor to underscore its institutional concern and further held that:
"In this case, the final journey had taken off, with two earlier stopovers, and the judicial plane of the apex Court was in its final descent, preparatory to landing, it was obviously premature for a Presidential pardon to have been granted in favour of the Appellant. The judicial airspace cannot be shut down against the plane of the Justices of the apex Court from landing."[12]

The apex Court's reasoning reveals a willingness to subject the exercise of mercy to constitutional principles, particularly where its deployment undermines judicial powers, the doctrine of separation of powers, and the integrity of the justice system. At the forefront of the Court's position is the concept of judicial finality. An appeal, once properly entered, suspends the finality of a conviction and places the matter under the jurisdiction of an appellate Court[13]. Until the appeal is determined, the conviction and sentence remain provisional and subject to affirmation, variation, or reversal. To then grant mercy during this period is to pre-empt the judicial process and undermine the judiciary's Constitutional role as the final arbiter of guilt and punishment as provided under section 6(6)(a) & (b) of the Constitution.

Closely linked to this is the doctrine of separation of powers. While mercy is an executive power, the determination of criminal liability and the rightness or wrongness of convictions falls exclusively within the judicial domain. The Supreme Court explained the reasoning behind its holding by delineating the nature of the executive power exercised by the President. The commutation of sentence exercised in the Appellant's favour, the Court reasoned, is a mitigatory intervention that substitutes a lesser punishment for one imposed by the Court. Its operational sphere is confined to the penalty. It leaves entirely intact the foundational judicial act, the conviction, and the legal reasoning upon which that conviction rests. The executive, in exercising this power, does not sit as an appellate Court; it does not pronounce on error or affirm correctness. It acts on considerations external to the judicial record[14].

By appealing against her conviction to the Supreme Court, Sanda had invoked the judicial power of the Court and is contending that the entire judicial process that led to her condemnation was vitiated by error. She challenged the legal soundness of the conviction itself. This therefore constitutes a live, justiciable controversy that was properly initiated and was pending before this Court prior to the commutation of the sentence by the President. The Supreme Court capped its reasoning by concluding that to hold that the President's commutation of sentence extinguishes this Court's jurisdiction would be to concede that an executive act can effectively nullify a constitutional right of appeal. It would imply that the executive branch, through an exercise of mercy, can foreclose the judicial branch from performing its core function of determining the legality of the lower Court's proceedings and decisions[15].

[11] LPELR-82714 (SC) Page 19/56
[12] LPELR-82714 (SC) Page 20/56
[13] Ezeokafor v. Ezeilo (1999) 9 NWLR (Pt. 619) 513
[14] LPELR-82714 (SC) per Chidi Nwaoma Uwa, J.S.C., page 48/56
[15] LPELR-82714 (SC) per Chidi Nwaoma Uwa, J.S.C., page

Comments

The Court's jurisdictional concern is understandable. It seeks to preserve judicial finality and avoid executive interference. Yet clemency does not strip the Supreme Court of its power to review the conviction; it only alters the sentence. The tension, therefore, is not about jurisdictional loss but about the timing of executive and judicial powers. The Supreme Court, in its judgment, may have solved an institutional anxiety problem rather than a strict constitutional interpretation problem.

As it is now, mercy is among the most far-reaching discretionary powers conferred on the executive under the Constitution. Its language is deliberately unqualified, subject only to consultation with the Council of State. Yet the Court's reasoning appears to narrow a power that the Constitution clearly frames in broad terms.

First, reliance is placed on the literal wordings of the Constitution itself. The sections do not expressly time-limit the power or say it is suspended by pending appeals. This deliberate constitutional silence is significant and must be accorded due interpretive weight. In *A.-G., Federation v. Abubakar*[16], the Supreme Court held that Courts must give effect to the plain language used in a Constitutional provision.

The point is that, where the Constitution intends to impose preconditions, it does so expressly. The Court cannot add to nor subtract from the Constitution under the guise of judicial interpretation. After all, Courts are not at liberty to read into the Constitution qualifications that its framers deliberately omitted[17]. The phrase "concerned with or convicted of" used in section 175 also suggests the power applies both before and after conviction, without inserting a "post-appeal only" requirement. If mercy may validly be exercised while a criminal matter is still pending before a trial Court, it becomes difficult to justify a categorical prohibition against its exercise merely because a matter has progressed to an appellate Court. An appeal does not erase the subsisting conviction or sentence of the lower Court; rather, it suspends its finality while subjecting it to review[18]. Until set aside, the judgment of the trial Court remains subsisting, and the constitutional power of the executive to grant mercy is capable of attaching to it.

In addition, the grant of mercy during the pendency of appeals is a sovereign, plenary executive power intended to temper justice with mercy[19], and the Constitution's only clear fetter is consultation with the Council of State[20], not the status of criminal matter or and ongoing appeal. A learned author has argued that "the prerogative of mercy is not limited by the judicial calendar. It is not suspended by the pendency of an appeal. It is not held in abeyance until the Courts have finished their work. The President's power exists independently, co-equally, and at all times, subject only to the Constitution."[21]

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[16] (2007) 10 NWLR (Pt. 1041) 1 Per ONNOGHEN, J.S.C. at page 124, paras. F-G

[17] Olafisoye v. F.R.N. (2004) 4 NWLR (Pt. 864) 580

[18] Nyame v. F.R.N (2021) 6 NWLR (Pt. 1772) 289 (paras D-G, page 364)

[19] Ahmod Ariyibi, 'The Prerogative of Mercy in Nigeria: Legal Framework and Application Process' (Synergy Attorneys, 12 November 2025), explaining the prerogative as a compassionate discretionary power.

[20] See section 175(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), which provides that the President exercises the prerogative of mercy after consultation with the Council of State.

[21] Sylvester Udemezue Maryam Sanda: The Supreme Court Did Not, and Cannot, "Override" President Tinubu: A

Further, the conceptual distinction between mercy and justice must be emphasized.[22] The prerogative of mercy, as rightly explained by the Court in Sanda's case, does not determine guilt or innocence but merely mitigates the punishment of a conviction[23]. From this perspective, the existence of a pending appeal does not negate the fact that there is a subsisting conviction and sentence, however provisional. The executive, in exercising prerogative of mercy, is therefore not sitting on appeal over the Courts but merely exercising a constitutional power to mitigate the conviction and sentence.

Finally, the doctrine of separation of powers supports, rather than restricts, the executive's independent exercise of mercy. Historically, the prerogative of mercy exists alongside judicial power, not beneath it[24]. Just as Courts cannot compel the executive to grant clemency[25], the executive should not be required to await judicial finality before exercising a constitutionally conferred discretion. Any attempt to judicially police the timing of this power risks subordinating executive power to judicial control in a manner not contemplated by the Constitution.

Recommendations

The tensions exposed in Sanda's case indicate the need for some reforms.

1. **Constitutional Clarification Rather than Judicial Limitation**
   If the intention is that prerogative of mercy should only follow the exhaustion of appeals, sections 175 and 212 should be amended to specify this in clear terms. Until then, Courts should refrain from reading into the Constitution restrictions that does not contain.

2. **Procedural Guidelines Without Constitutional Curtailment**
   Short of constitutional amendment, the executive branch may adopt self-regulating guidelines providing that prerogative of mercy will ordinarily be considered after a pending appeal is determined, except in exceptional circumstances. This preserves flexibility while promoting institutional harmony. This harmony is very important since the judiciary is not challenging the constitutional powers of the executive to grant mercy but rather, the timing of the exercise of such powers.

3. **Strengthening Advisory Councils on Prerogative of Mercy**
   The Council of State should be strengthened both institutionally and procedurally. Their composition should reflect legal expertise, independence, and diversity. This would enrich the information and advice the President would be offered before exercising this power.

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constitutional clarification on the prerogative of mercy | Law and Society Magazine accessed 28th February, 2026.

[22] Ahmod Ariyibi, 'The Prerogative of Mercy in Nigeria: Legal Framework and Application Process' (Synergy Attorneys, 12 November 2025), explaining that mercy mitigates punishment without determining guilt.

[23] LPELR-82714 (SC) per Ibrahim Mohammed Musa Saulawa, J.S.C., page 45/56

[24] See Evans Ufeli, 'Prerogative of Mercy Under the Nigerian Law' (Sahara Reporters, 12 October 2025), noting that the prerogative of mercy is a distinctly executive, non-judicial mechanism

[25] See Okeke v. State (2003) 15 NWLR (Pt. 842) 25, where the Appellant urged the Supreme Court to make a recommendation of mercy on his behalf should his appeal be dismissed, the Supreme Court responded that issues concerning recommendation of mercy for convicted persons are matters within the province of the Committee on Prerogative of Mercy.

Conclusion

The Constitution grants the prerogative of mercy in broad, unqualified terms, without specifying any temporal limits on when it may be exercised. While concerns about judicial finality and the separation of powers are understandable, they cannot justify imposing limitations that the Constitution itself does not articulate.

The prerogative of mercy is conceived as an autonomous executive power that operates alongside the judicial process, not as one dependent on or subjected to it. Any restriction on when it may be exercised must therefore come from a Constitutional amendment, rather than from judicial inference and interpretation.

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