

KILLER OR VICTIM: AN EVALUATION OF THE LAW ON INFANTICIDE IN KENYA

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By

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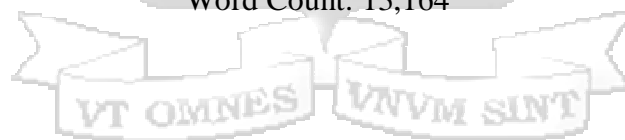
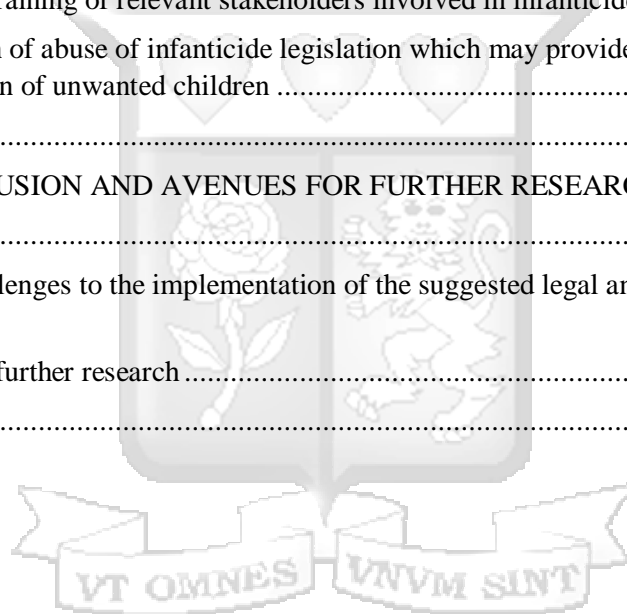


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Declaration

I, OUMA BRENDA ACHIENG, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

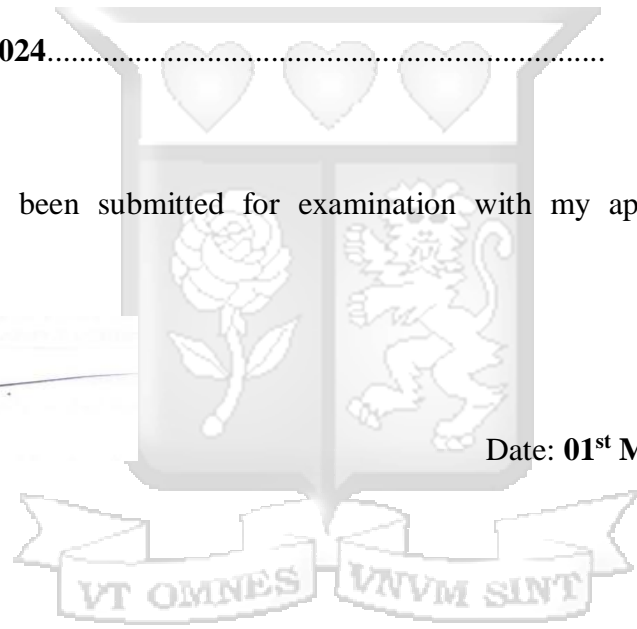
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This dissertation has been submitted for examination with my approval as University Supervisor.

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ABSTRACT

Motherhood is considered to be one of the greatest joys in a woman's life. Despite the challenges that are coupled with it, most women would consider being a mother as a very fulfilling journey. Thus, women who kill their children present a profound challenge to the accepted notions of motherhood which emphasize on the security that a mother is expected to accord to their child. The offence of infanticide in modern times has been construed to mean the action of a woman causing the death of her infant due to the challenges that come with childbirth and the effects of lactation. This shows that the law appreciates the reality that the woman's mind was incapacitated at the time of occurrence of the offence, however, the offence is still criminalized due to the life that has been lost.

The study employs the use of qualitative research through the use primary sources such as statutes as well as secondary sources. This study evaluates whether the law in Kenya should continue criminalizing the offence of infanticide. The study considers the current approach taken by different courts in Kenya in deciding such cases. This study also employs the use of a comparative analysis in analysing the development of the law on infanticide using the UK as a comparative jurisdiction. Through the comparative analysis, the study recommends adapting some of the practices that courts in the UK have taken up over the years in deciding cases of infanticide. Lastly, this study examines the opportunity for reform on the law on infanticide in Kenya. It does so by analysing what the UK courts have been doing and whether the same can be adapted by the Kenyan courts.



LIST OF ABBREVIATIONS

PPD Post Partum Depression

UK United Kingdom



LIST OF CASES

Anita Chepkemoi Langat v Republic (2021) eKLR.

Grace Njeri v Republic (2011) eKLR.

Leonard mwangemi munyasia v Republic (2015) eKLR.

Linet Mwanjuma Mwambezi v Republic (2015) eKLR.

Miriam Muthoni Kariuki v Republic (2008) eKLR.

NC v Republic (2021) eKLR.

NWP v Republic (2015) eKLR.

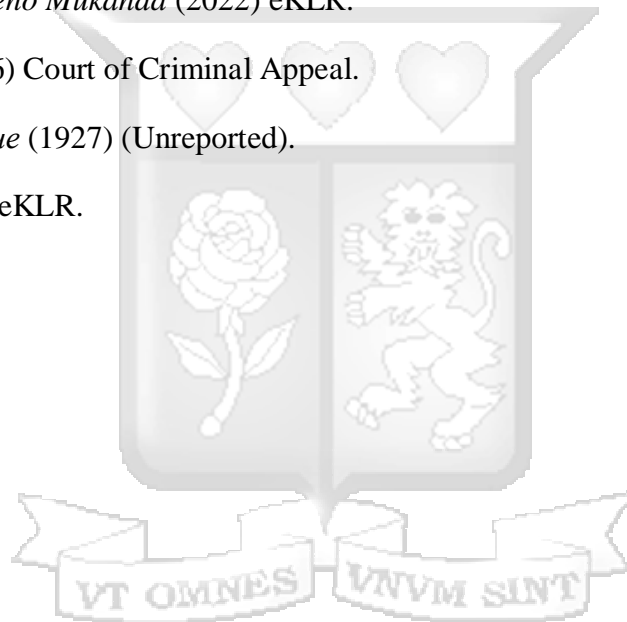
PAO V republic (2016) eKLR.

Republic v Claudia Neno Mukanda (2022) eKLR.

Republic v Hale (1936) Court of Criminal Appeal.

Republic v O'donoghue (1927) (Unreported).

Republic v SC (2021) eKLR.



LIST OF LEGAL INSTRUMENTS

Kenyan Statute

Criminal Procedure Code (2012).

Kenya Mental Health Action Plan (2021-2025).

Penal Code of Kenya (2012).

UK Statute

Infanticide Act (1938).



CHAPTER 1 : INTRODUCTION TO THE STUDY

1.1 BACKGROUND

The act of infanticide encompasses three core elements: first, the wilful act or omission of a mother occasioning the death of her child, which child is less than one year old; second, proof of mental incapacity during the time at which the fatal act or omission occurred; and third, proof that the mental incapacity was precipitated by the difficulties associated with childbirth, or the challenges besetting new lactating mothers.¹ The Penal Code prescribes that women found guilty of killing their children under these circumstances be prosecuted on the lesser charge of manslaughter, instead of murder.²

The term used to refer to the type of mental incapacity faced by women who commit the aforementioned offence is PPD. PPD refers to non- psychotic depressive episodes that begin in or extend up to the postpartum period which is the period after birth.³ Further, although this disease or mental incapacity is commonly known to occur during the first year after birth, it can also continue affecting the mother for several years.⁴ Studies conducted have shown that postpartum depression is most likely caused by hormonal changes experienced by the mothers.⁵ PPD is often confused with ‘baby blues’ and post- partum psychosis , the former usually occurring within two to three days after giving birth and is characterized by feelings of depression and anxiety.⁶ The latter, post- partum psychosis, is a more severe form of postpartum depression which may lead to detrimental mental health effects and its symptoms consist of bipolar or manic attacks, auditory hallucinations and even suicidal thoughts.⁷ Postpartum depression falls in between the two as mentioned above, and is often identified through symptoms such as anxiety, feelings of worthlessness or inadequacy, feelings of guilt, suicidal thoughts and fear of harming the baby.⁸

¹ Section 210, *Penal Code of Kenya* (2010).

² Section 205, *Penal Code of Kenya* (2010).

³ O’Hara M, ‘Postpartum depression: what we know’, Wiley Library, 2009,2.

⁴ Wang Z, Liu J, Shuai H, Cai Z, Fu X, Liu Y, Xiao X, Zhang W, Krabbendam E, Liu S, Liu Z, Li Z, Yang B, ‘Mapping global prevalence of depression among postpartum women’11 *Translational Psychiatry*, 2021, 1.

⁵ Hopkins J, Marcus M, Campbell S, ‘Postpartum depression: A critical review’ 95 *Psychological Bulletin* 3, 1984.

⁶ <https://www.healthline.com/health/parenting/postpartum-psychosis> on 20 October 2016.

⁷ <https://www.psychiatry.org/patients-families/peripartum-depression/what-is-peripartum-depression> October 2020.

⁸ <https://www.unicef.org/parenting/mental-health/what-postpartum-depression> .

Generally, PPD affects about thirteen percent of women globally with its prevalence varying between ten and fifteen percent of women globally.⁹ Within the Kenyan context, one in every ten women develop depression after childbirth as reported by the Ministry of health.¹⁰ There has been a consensus amongst doctors that there is indeed a link between PPD and infanticide.¹¹ This link can then lead to a reasonable conclusion that the cause or the reason for committing the act of infanticide is the altered mental state of the mother.¹² However, PPD is not taken as seriously as it should be in the eyes of the law thus leading to it being overlooked in numerous occasions. This is further fuelled by reason of patients being reluctant to disclose their symptoms.¹³ Moreover, many women who suffer from PPD have no psychiatric history which contributes to them being reluctant to seek the necessary help.¹⁴

The issue that then arises is the controversy generated by the act of infanticide due to the difficulty in proving the offence.¹⁵ This controversy under the Kenyan law manifests itself where according to section 9(1) of the penal code, an individual is not to be held criminally responsible for an act that occurs independently of their own will.¹⁶ The act of infanticide, as discussed earlier, is in fact committed while the mother's mental state is altered. Therefore, following the provision, the woman should not be held criminally responsible. However, the same act under section 210 criminalizes the act of infanticide and provides that those who commit the act shall be treated as though they have committed manslaughter. This then begs the question, has the law been unnecessarily punishing the sick?¹⁷

Courts have been notably divided on the issue of infanticide, and magistrates have in many instances found themselves in difficult situations especially where the perpetrators are found

⁹ Adhinkari A, Karki P, Thapa S, Shrestha P, 'Prevalence of postpartum depression among postnatal mothers in Kadaghari, Nepal' 4 *Journal of Biomedical Science* 2, 2022, 1.

¹⁰ Ondieki E, Merab E, 'My struggle with depression after childbirth,' Daily Nation, 11 June 2016 < <https://nation.africa/kenya/life-and-style/lifestyle/my-struggle-with-depression-after-childbirth-1207168> > on 11 June 2016.

¹¹ Cheron S, 'Women who kill their children: murder or a case of punishing the sick,' Daily Nation 10 September 2018 < <https://nation.africa/kenya/news/women-who-kill-their-children-murder-or-a-case-of-punishing-the-sick-86022>> on 10 September 2018.

¹² Cheron S, 'Women who kill their children: murder or a case of punishing the sick,' Daily Nation 10 September 2018 < <https://nation.africa/kenya/news/women-who-kill-their-children-murder-or-a-case-of-punishing-the-sick-86022>> on 10 September 2018.

¹³ Niel M, Payne J, 'Perinatal depression; a review', 87 *Cleveland Clinic Journal of Medicine* 5, 2020, 1.

¹⁴ Niel M, Payne J, 'Perinatal depression; a review', 1.

¹⁵ Dumbava D, Chiroban O, 'Forensic Expertise elements in infanticide, with value to justice,' *Review of juridical studies*, 1, 2013.

¹⁶ Section 9, *Penal code of Kenya*, (2010).

¹⁷ Cheron S, 'Women who kill their children: murder or a case of punishing the sick,' Daily Nation 10 September 2018 < <https://nation.africa/kenya/news/women-who-kill-their-children-murder-or-a-case-of-punishing-the-sick-86022> > on 10 September 2018.

to be mentally ill.¹⁸ The case of PAO v Republic (2016) offers one viewpoint in the manner in which judges have dealt with infanticide cases. In this case, the accused had been convicted of the crime of infanticide and had served a custodial sentence of about one year.¹⁹ The accused had pleaded guilty to the charge; however, it is stated that the prosecution failed to mention that at the time the offence was committed, the accused's mental state was disturbed. The judge thus followed the trend applied in the UK where a non-custodial sentence is given to such offenders so that they can receive treatment. The accused was thus released following this basis. However, other judges have taken a vastly different approach in determining such cases. This is demonstrated in the case of Grace Njeri v Republic (2011), an appeal case where the appellant had been earlier charged and convicted of the crime of infanticide.²⁰ The brief details of the case were that the appellant had wilfully caused the death of her son by throwing him into a pit latrine leading to the sentencing of serving twenty years imprisonment. No inquiry as to her mental state during the commission of the crime was done. This clearly indicates how the magistrate did not take into consideration the unique nature of the crime of infanticide as is supported by the judge in the appeal case.²¹ The judge attempted to remedy the harshness of the previous sentencing and lowered it from twenty years to five years.

Further, the law provides for a verdict of guilty but insane²² however no provision is provided for hospitalization, more so sending the insane persons to mental hospitals or institutions as explained by Justice Lesitt.²³ Therefore, it is evident there is a clear gap in the law on how cases of infanticide should be handled. The case of Leornard Mwangemi Munyasia v Republic is instructive on the fact that a man ought not to be condemned if it is proved that at the time of the offence, he was not a master of his mind.²⁴ In the premises, the law on infanticide should be reformed to reflect this fundamental criminal law principle.

1.2 STATEMENT OF THE PROBLEM

The penal code under section 210 provides for the offence of infanticide which is attributed to PPD as one of its causes. Those who commit this offence are liable for up to life imprisonment

¹⁸ Kibet P, 'Why infanticide perpetrators receive lesser penalties' The Standard, 2014, <https://www.standardmedia.co.ke/counties/article/2000108710/why-infanticide-perpetrators-receive-lesser-penalties> 2014.

¹⁹ PAO v republic (2016) eKLR.

²⁰ Grace njeri v republic (2011) eKLR.

²¹ Grace njeri v republic (2011) eKLR.

²² Section 166(2), *Criminal procedure code*, (2010).

²³ Kakah M, 'Judge Lesiit wants postpartum victims protected' Nation, 19 April 2019 <https://nation.africa/kenya/news/judge-lesiit-wants-post-partum-victims-protected-160272> on 19 April 2019.

²⁴ Leornard Mwangemi Munyasia v Republic (2015) eKLR.

as the offence is treated as though it is manslaughter. However, PPD is usually not accorded the attention it deserves thus always going unnoticed and untreated. PPD is a condition which is well beyond the control of the affected individual thus acts committed under such a condition are equally beyond the control of the individual. The current law does not consider that such individuals are also victims of mental incapacitation and only bear focus on the lost life which in most cases, is not disputed. Incarceration of such individuals fails to provide them with the necessary help and treatment that they require thus posing the risk of worsening the condition. Therefore, this study will aim to assess whether the law in Kenya should continue criminalizing infanticide as entrenched in section 210 of the penal code.

1.3 RESEARCH OBJECTIVES

1. To examine the current approach towards women who commit the offence of infanticide in Kenya.
2. To assess the development on the law relating to infanticide within the UK as a comparative jurisdiction.
3. To assess the opportunity for law reform on Kenya's infanticide provisions.

1.4 RESEARCH QUESTIONS

1. What is the current approach towards women who commit the offence of infanticide in Kenya?
2. What is the development on the law relating to infanticide within the UK as a comparative jurisdiction?
3. What is the opportunity for law reform on Kenya's infanticide provisions?

1.5 HYPOTHESIS

Kenyan legislation like many others across the globe, takes the approach of criminalising the act of infanticide. This offence provides a unique set of circumstances as the law recognises the direct influence that PPD has on the commission of the offence however the law still goes ahead to punish these individuals by subjecting them to treatment as though they have committed manslaughter. The law can be said to be justified in criminalising the said act so as to ensure that such women do not go scott free after ending the life of an innocent child. However, such reasoning fails to highlight the underlying yet grave issue that affects a staggering number of women today which is PPD Thus, subjecting such individuals to

incarceration that varies from as low as two years to a maximum of life imprisonment not only is unfair to the individuals as the act was commissioned under a lucid moment, but also goes against the same law that provides that persons cannot be held criminally liable for acts done independently of their will. Therefore, through the non-criminalization of the offence of infanticide, the individuals who commit this act will be able to receive the much-needed treatment they require. Further, through this approach, it is efficiently guaranteed that the condition of these women does not worsen to become postpartum psychosis which would be severely detrimental to the wellbeing of the affected women,

1.6 JUSTIFICATION

There has been an increase in the number of women committing infanticide with a report in 2015 stating that there had been a fifty five percent increase.²⁵ PPD has also been prevalent over the recent years as discussed earlier on. Further, as also discussed above, there is an evident link between the offence of infanticide and PPD therefore the plausible route to take would be to treat the women who suffer from this condition consequentially leading them to commit this offence, as mentally ill persons. Thus, this study will be useful in so far as it will try to address the problems that follow the criminalization of infanticide and therefore shed light as to why the criminalization of the said offence should be done away with. Further, this study will be most beneficial to adjudicators who judge these types of cases as in most instances, they have found themselves in difficult situations where the perpetrators have been found to be mentally unsound.²⁶ This study will also be beneficial to policy makers as it will provide guidance as to how to amend the law in manner that would be accommodative to individuals suffering from PPD.

1.7 THEORETICAL FRAMEWORK: THE THEORY OF INTERSECTIONAL FEMINISM

Coined by Kimberle Crenshaw in 1989, the theory of intersectional feminism presents a prism through which various forms of inequality can be seen to operate together and further

²⁵ Cherono S, 'Incest, infanticide on the rise: report' on 21 March 2016
<https://nation.africa/kenya/news/incest-infanticide-on-the-rise-report--1182124> on 21 March 2016.

²⁶Kibet P, 'Why infanticide perpetrators receive lesser penalties' 2014.
<https://www.standardmedia.co.ke/counties/article/2000108710/why-infanticide-perpetrators-receive-lesser-penalties> 2014.

exacerbate each other.²⁷ Through intersectional feminism, there is a better understanding of how concurrent forms of oppression overlap, thus through this understanding, the depths of the inequalities faced by women is better understood.²⁸ Further, intersectional feminism takes into account the various ways in which women experience discrimination and how different factors regarding discrimination can intersect and affect someone's life.²⁹ Thus, the purpose of the theory is to recognize how different aspects of an individual's life may interact leading to a change in the way they experience life.³⁰ This theory further examines the influence of different variables on one's behaviours and experiences instead of solely focusing on a single factor.³¹ This means that change in the manner in which life is experienced may lead to a further change in an individual's mannerism and overall wellbeing. Therefore, this theory is particularly important as it provides a broader lense through which issues such as infanticide can be analysed through discussions encompassing gender inequality, societal norms among others.

This theory will be useful in the study in so far as it will expound on how women who commit infanticide face many other challenges aside from PPD which contribute to the commission of the offence. The challenges, as discussed above, are never taken into consideration as to how they massively contribute to the mental wellbeing of women who commit infanticide. Therefore, through this theory, the importance of assessment of other external factors that would contribute to the incapacitation of the woman's mental state is highlighted.

1.8 LITERATURE REVIEW

There has been very little academic work written with regards to the criminalization of infanticide in Kenya. Oundo in her work, provides emphasis on the judicial response to the crime of infanticide.³² Her study focuses on the manner in which the judicial system is not aware of the effects of PPD and that in most cases, the attention is drawn towards the age of the

²⁷ <https://www.unwomen.org/en/news/stories/2020/6/explainer-intersectional-feminism-what-it-means-and-why-it-matters> on 1 July 2020.

²⁸ <https://www.unwomen.org/en/news/stories/2020/6/explainer-intersectional-feminism-what-it-means-and-why-it-matters> on 1 July 2020.

²⁹ Sharkey G, 'What is 'Intersectional Feminism''?' Denison Education, July 26 2016 <https://denison.edu/academics/womens-gender-studies/feature/> July 26 2016.

³⁰ <https://iwda.org.au/what-does-intersectional-feminism-actually-mean/> on 11 May 2018.

³¹ DeFelice K and Diller D, 'Intersectional Feminism and Behaviours Analysis' *National Library of Medicine* 1 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6834793/> on 4 February 2019.

³² Oundo M, 'A critical analysis of the judicial response to the crime of infanticide. A study carried out in Nairobi, Kenya,' Unpublished LLM Thesis, Nairobi, 2013.

deceased child.³³ She further discusses that the courts in Kenya rely on P3 forms in a bid to reach a verdict rather than seeking the opinion of psychiatrists since the issue at hand is of a mental nature.³⁴ As a consequence of the lack of psychiatrists' report or psychiatric treatment, she states that some women who were meant to receive the requisite treatment were instead incarcerated all due to the lack of psychiatric reports.

Gachuki in his work discusses on victims of postpartum psychosis undergoing criminal trial in Kenya where he discusses on the manner in which infanticide cases are handled in court.³⁵ He expounds on the meanings of 'baby blues', PPD and postpartum psychosis. Furthermore, he discusses on the gender specificity of the offence of infanticide and the difficulty that courts undergo in the determination of such cases and does through a number of case studies which depict the different stances that the courts take while providing verdicts on such cases. His main argument, therefore, is that victims of postpartum psychosis should not be subjected to imprisonment and that the law should generate mechanisms that would be able to cater for such individuals.

1.8.1 On criminalization of infanticide

The legal community has been quite inconsistent with its treatment towards infanticidal mothers. Infanticide as an offence is unique in the sense that it stands as a partial defence to both murder and manslaughter while still being a distinct homicide offence.³⁶ Loughnan discusses that feminist theorists have analysed infanticide to be one of two options, first being an instance of the legal construction of women's offending while the second option being an instance of the construction of the gendered legal subject.³⁷ The former opinion gives emphasis on the medicalization of women committing crime and thus views infanticide defendants as being 'mad' and not 'bad' which further means that such individuals should be subjects of medical attention rather than legal attention as what they require is treatment not punishment.³⁸ Oberman states that in cases where the woman is seen as 'bad' there is a higher chance of her getting convicted and further receiving a much harsher sentence.³⁹ However, since there is a

³³ N Gachuki, 'Victims of postpartum psychosis undergoing criminal trial in Kenya' Academia.edu, 2019, 19.

³⁴ N Gachuki, 'Victims of postpartum psychosis undergoing criminal trial in Kenya' Academia.edu, 2019, 20.

³⁵ N Gachuki, 'Victims of postpartum psychosis undergoing criminal trial in Kenya' Academia.edu, 2019, 11.

³⁶ Loughnan A, 'The strange case of infanticide doctrine' 32, *Oxford Journal of Legal Studies* 4, 2012, 687.

³⁷ Loughnan A, 'The strange case of infanticide doctrine' 687.

³⁸ Loughnan A, 'The strange case of infanticide doctrine' 687.

³⁹ Oberman M, 'Understanding infanticide in context: who kill' 92 *The journal of criminal law and criminology*, 3/4, 2002, 714.

lack of consistency with regards to the research conducted on the relationship between infanticide and PPD, then the latter opinion cannot be achieved.

Further, prosecuting authorities are not uniformly sympathetic when confronted with cases of infanticide.⁴⁰ Brookbanks notes that despite the many factual resemblances between cases of infanticide, these cases produce great inconsistencies in the manner of sentencing which could range from two years to life imprisonment.⁴¹ This is because the offence of infanticide does not conform factually to the offences of murder and manslaughter which therefore contributes to the irregularities brought about by the sentencing of such cases.⁴² This issue further contributes to the unfair punishment of the women who suffer from PPD as there is a general lack of consensus in the manner in which infanticide cases should be dealt with.

Moreover, the use of the principle of guilty but mentally ill seems to create more harm than good with regards to how the law deals with mentally ill persons. Kelly in her discussion states that the guilty but mentally ill verdict is one of the worst possible outcomes since such a verdict pays recognition to the role played by the mental disability in the commission of the offence, yet it holds the individual or the sufferer responsible and further accords her the same punishment as a cold-blooded murder.⁴³

The life of the mother who commits infanticide matters too thus if she was mentally disturbed at the time that the act was committed then she should be treated accordingly.⁴⁴

1.8.2 On the relationship between infanticide and PPD

The current treatment of postpartum disorders in the legal and medical worlds raises a number of issues with regard to women and criminal law. The courts inconsistent responses to evidence brought forward of postpartum disorders in infanticide cases is unfortunate proof of a society which ignores and misunderstands the female perspective.⁴⁵ Reece states that most infanticide

⁴⁰ Brookbanks W, 'Case note; unpacking the elements- a Canadian approach r v Boroweic', *New Zealand Criminal Review*, 2016, 10.

⁴¹ Ryznar M, 'A crime of its own a proposal for achieving greater sentencing consistency in neonaticide and infanticide cases' 47 *University of San Francisco Law Review*, 2013, 3.

⁴² Ryznar M, 'A crime of its own a proposal for achieving greater sentencing consistency in neonaticide and infanticide cases' 4.

⁴³ Kelly C, 'The legacy of too little too late; the inconsistent treatment of postpartum psychosis as a defence to infanticide' 19 *Journal of contemporary health law and policy* 1, 2002, 264.

⁴⁴ <https://medium.com/degrees-of-monstrosity-female-serial-killers/fatal-maternity-part-7-the-infanticide-law-controversy> on 5 June 2022.

⁴⁵ Reece E, 'Mothers who kill; postpartum disorders and criminal infanticide' 38 *UCLA Law Review* 3, 1991, 703.

cases seem to share similar facts, where a woman with no criminal record and who initially exhibits signs of yearning for her child suddenly finds that she cannot deal with the child and thus kills it.⁴⁶

The recognition that the perpetrators of the offence of infanticide are victims of involuntary mental incapacities creates a rather paradoxical response towards this act.⁴⁷ This is due to the reasoning that on one hand an innocent life has been lost by the person that he or she was to depend on, while on the other hand is the mother who is insane or mentally challenged and is incarcerated for a crime that is unthinkable to many.⁴⁸ As discussed earlier on, there is indeed a link between PPD and infanticide, however it has been argued that there is no need for an offence dealing with one kind of mental disturbance.⁴⁹

1.8.3 Contribution

Although scholars such as Gachuki have written on this topic, their study does not help in so far as remedying the situation at hand which is the actual legislative provisions that cause the problems as discussed. This study will be important as it shall add on to what has been said with regards to the judicial response to the crime of infanticide. This shall be done through advocating for the amendment of the section 210 of the penal code so as to offer leniency towards women who commit infanticide. The leniency in question would be in form of serving of a custodial sentence instead of a prison sentence so as to offer the women suffering from PPD the help they require.

1.9 METHODOLOGY

This study will be taking a qualitative approach. This approach will be best suited to this study as the study cuts across two disciplines namely law and psychology. The main sources of data that shall be used include primary sources such as statute and relevant case law which will be of aid in demonstrating the current legislative situation and the gap that exists in the application of the legislation. This study will also rely on secondary sources such as books and journal

⁴⁶ Reece E, 'Mothers who kill; postpartum disorders and criminal infanticide' 705.

⁴⁷ Spinelli M, 'Maternal infanticide associated with mental illness; prevention and the promise of saved lives' 161 *American journal of psychiatry*, 9, 2004, 1548.

⁴⁸ Spinelli M, 'Maternal infanticide associated with mental illness; prevention and the promise of saved lives' 1548.

⁴⁹ Lambie I, 'Mothers who kill the crime of infanticide' 24 *International journal of law and psychiatry*, 2001, 71.

articles which shall be useful in offering a deeper understanding of the concepts of infanticide and PPD.

I intend to use the case study method to demonstrate the approach that the law has taken towards women who commit the act of infanticide. Through this method, I shall examine about six cases and expound on the general understanding of the courts on the issue of PPD and its effects on the individuals who suffer from it. Further, through this method, I shall be able to explain the different decisions that the various courts have had in relation to cases of infanticide.

As for the assessment on the development on the law using the UK as a comparative jurisdiction, I intend to use a comparative analysis. Through this method, I will aim at comparing the Kenyan law on infanticide with that of England which provides lenient treatment towards individuals who commit infanticide. The leniency is in form of provision of a custodial sentence instead of serving of a jail term. Thus, through this analysis, I will be able to expound on how and why the Kenyan legislation on infanticide should be amended to emulate English law on the same.

Finally, as to the opportunity for reforming the Kenyan law on infanticide, I shall use a critical analysis whereby I shall demonstrate whether there is an actual opportunity for reform and whether doing so would be of benefit.

1.10 CHAPTER BREAKDOWN

The first chapter serves as the introduction of the study and entails the theoretical framework that shall be used in the study, the research objectives, the research questions, and the literature review.

Chapter two examines the current approach that the Kenyan law has taken towards women who commit the act of infanticide through a case law analysis.

Chapter three assesses the development on the law relating to infanticide within the UK as a comparative jurisdiction.

Chapter four assesses the opportunity for law reform on Kenya's infanticide provisions.

Finally, chapter five entails the conclusion and recommendations.

CHAPTER 2 : CURRENT APPROACH TOWARDS WOMEN WHO COMMIT THE OFFENCE OF INFANTICIDE

2.1 Introduction

This chapter examines the approach courts have taken in penalization of infanticide cases. As has been discussed previously, different judges have taken vastly different approaches towards determining cases on infanticide. These different approaches follow the provision on infanticide as provided for under the Penal Code (2010), which has been borrowed word for word from the UK statute. England's Infanticide Act has served as an example to many jurisdictions which prompted them to adapt the legislation⁵⁰, Kenya being among these countries.

Thus, the purpose of this chapter is to assess the different approaches taken by the different judges in different cases and how these differences have affected the women either positively or negatively.

The cases selected for this chapter are *Miriam Muthoni Kariuki v Republic (2008)*, *NWP v Republic (2015)*, *Linet Mwanjuma Mwambezi v Republic (2015)*, *Republic v SC (2021)*, *Anita Chepkemoi Langat v Republic (2021)*, *Republic v Claudia Neno Mukanda (2022)*

2.1.1 Miriam Muthoni Kariuki v republic (2008) eKLR

In the matter, Miriam Muthoni Kariuki, the appellant was arraigned in the superior court for murdering her son, Michael Muchiri Muthoni, on September 17, 2005.⁵¹ The deceased was her son and they lived with her father, Kariuki Muchiri Kagucia, PW1. PW1 heard the appellant go out of the house but never saw her.⁵² On the morning of September 17, Judy Wangare Mwangi and two other students saw a child's head in the river and reported it to the principal. The deceased was retrieved and taken to Murang'a District hospital mortuary.⁵³ The assistant chief of Githunguri sublocation, Florence Wangui Muchiri, arrested the appellant and took her to Kangema police station. The appellant argued that she left the child asleep in her father's house and informed her sister-in-law about it.⁵⁴ However, when she returned home, she found

⁵⁰ Ryznar M, 'A crime of its own a proposal for achieving greater sentencing consistency in neonaticide and infanticide cases' 21.

⁵¹ (2008) eKLR.

⁵² (2008) eKLR.

⁵³ (2008) eKLR.

⁵⁴ (2008) eKLR.

neither the deceased nor her sister-in-law. The appellant was arrested and later charged with the crime.⁵⁵

In her defence, the appellant claimed she left her child asleep in her father's house and informed her sister-in-law about it.⁵⁶ But when she got home, she didn't discover the deceased or her sister-in-law. PW3, the appellant's sister-in-law, vehemently rejected PW3's claim that she had taken the deceased.⁵⁷ PW3 was asked by the appellant to locate the child after hearing some screams coming from the river side, but PW3 never showed. The appellant was later arrested by a headman and was later taken to the station where murder was the charge that was brought against her.⁵⁸

The trial judge rejected the accused person's defence and found that she did throw the child in the river when she left the house early in the morning. The appellant was then found guilty of the offence of murder and consequently, was sentenced to death.⁵⁹ The appellant was dissatisfied with the conviction and sentence and thus lodged an appeal with the current court. There were however a number of inconsistencies within the accused's defence such as whereas she had mentioned in her testimony that she had left the deceased under the care of PW3, her cross-examination did not reflect in her defence.⁶⁰ The court then reached the conclusion that her conduct was not one of a mother who had lost a child she loved.⁶¹

The court further asserted that the circumstances of the case warranted for a charge of infanticide rather than murder owing to the inconsistencies on the age of the deceased.⁶² Additionally, the court stated that the mere fact that the appellant strangles and throws the body of her own son depicts quite unusual behaviour which gave rise to the view that the appellant had a disturbed mind at the time the act was committed.⁶³ Therefore, the court set aside the conviction for murder and substituted it for one of infanticide. The appellant was then sentenced to eight years imprisonment starting from the date of conviction.⁶⁴

⁵⁵ (2008) eKLR.

⁵⁶ (2008) eKLR.

⁵⁷ (2008) eKLR.

⁵⁸ (2008) eKLR.

⁵⁹ (2008) eKLR.

⁶⁰ (2008) eKLR.

⁶¹ (2008) eKLR.

⁶² (2008) eKLR.

⁶³ (2008) eKLR.

⁶⁴ (2008) eKLR.

This case offers a perspective whereby the mental stability of the accused person is mentioned but not paid much attention to. The court clearly notes that such unusual behaviour must have been caused by the presence of a disturbed mind. However, instead of recommendation of treatment or provision of a non- custodial sentence, the court subjects the appellant to imprisonment. This then leaves the issue of a disturbed mind, as highlighted by the court, unattended to.

2.1.2 NWP v republic (2015) eKLR

This was an appeal case where the appellant had been charged with the offence of infanticide. The brief facts were that on 20th April 2011, at around 7:00 am, PW1 Paul Mutiso found an infant had been thrown inside a water tank.⁶⁵ The police were then alerted of the incident. PW3, AI, who cohabited with the appellant as her husband, went in such of her at around 1:00 am and found her at a nearby local bar indulging in alcohol.⁶⁶ Upon inquiry of where the child was, she was unable to answer. She then suddenly too off, running away and disappearing into the darkness. The following day, she was re- arrested, together with her husband.⁶⁷ The body of the child was retrieved where it had a piece of cloth around its neck. A postmortem was conducted on the body which revealed that the child was roughly 7 months old, and the likely cause of death was hypoxia due to strangulation further leading to cardiopulmonary arrest.⁶⁸

The appellant in her defence had stated that she believed that someone else, namely Sarah Mueni, with whom she had disagreed with. However, evidence adduced disputed her claims which prompted the trial magistrate to provide the eight-year sentence. The appellant appealed on grounds that no malice aforethought was proven and the judgement was contrary to the law among others.⁶⁹ State counsel opposed the appeal by arguing that the last person to be seen with the child was the appellant, thus that fact indicated that she had knowledge of the death of the child. He further stated that the evidence brough forward claiming that the child was killed by another person was not supported. Thus, he asserted that the sentence was lenient and should not be interfered with.⁷⁰

The court therefore had to determine, among other issues, if it was a wilful act and whether at the time the act was committed, the appellant had a troubled mind following the effect of the

⁶⁵ (2015) eKLR.

⁶⁶ (2015) eKLR.

⁶⁷ (2015) eKLR.

⁶⁸ (2015) eKLR.

⁶⁹ (2015) eKLR.

⁷⁰ (2015) eKLR.

birth of the child.⁷¹ Upon much deliberation, the court stated that the prevailing circumstances pointed the appellant as culprit behind the child's death and that the facts of the case suggested that the appellant was not innocent.⁷² Malice aforethought was proven through the presence of the cloth on the child's neck which the court inferred the action to mean it was a wilful act. On the issue of presence of a disturbed mind, the court stated that it was apparent the mind of the appellant was in fact disturbed at the time.⁷³ This is because the appellant alluded to issues such as creditors whom she owed money and she also struggled with the infidelity of her husband.⁷⁴ The court asserted that such situations prove to be sources of disturbance towards the appellant's mind. The court thus decided to reduce the eight- year sentence to that of five years.

This case offers a different approach taken by the court where the court takes note of the mental disturbance faced by the appellant and decided to reduce the sentence given by the lower court. This further depicts the manner in which the said mental disturbance is gravely overlooked as instead of releasing the appellant in order to attend to the disturbance, the court subjects her to further imprisonment.

2.1.3 Linet Mwanjuma Mwambezi v republic (2015) eKLR

This was an appeal case where the appellant was found guilty and was subjected to three years imprisonment as she had committed the offence of infanticide contrary to section 210 of the penal code.⁷⁵ The particulars of the case were that on 14th December 2013 in Kilifi County, the appellant was accused of wilfully causing the demise of the infant, who was less than twelve months old, by dumping him at the shamba.⁷⁶

The court stated that the act of abandoning the child at a shamba and leaving him unattended amounted to an omission of culpable negligence.⁷⁷ The court further stated that punishment for infanticide is similar to that of manslaughter which is a maximum sentence of life imprisonment. Thus, the court asserted that the sentence given to the appellant of three years was not excessive meaning there was no reason for the court to interfere with it. Therefore, the appeal was dismissed.⁷⁸

⁷¹ (2015) eKLR.

⁷² (2015) eKLR.

⁷³ (2015) eKLR.

⁷⁴ (2015) eKLR.

⁷⁵ (2015) eKLR.

⁷⁶ (2015) eKLR.

⁷⁷ (2015) eKLR.

⁷⁸ (2015) eKLR.

In this case, no reference to the mental status of the accused was made, neither was she subjected to any form of testing to ascertain her mental status. This case thus offers a different approach taken by the court as the court did not seek to find out whether or not the accused was in appropriate state of mind during the commission of the crime.

2.1.4 Republic v SC (2021) eKLR

In the matter, the accused person had pleaded guilty to the offence of infanticide.⁷⁹ At first, the accused had been charged with the offence of murder, but the charge was reduced to infanticide after a successful plea bargain agreement signed in 2020.⁸⁰ The particulars of the offence were that on the 8th of March 2019, the accused had unlawfully killed her baby named MK.

The brief facts of the case are that the accused met SS in the year 2016 after which they cohabited and lived together as husband and wife. She had a child from her previous relationship whom she moved and lived with together with SS in Nakuru county.⁸¹ The couple was then blessed with a child and named him MK, on 23rd January 2019. However, the child was born two months premature. S's mother later visited them at their home in Keringet and went with the accused together with the two children back to their home in Bomet in order to tend to them.⁸² Later, after about a week, S also travelled to Bomet and joined them.

During the couple's stay in Bomet, they developed domestic issues.⁸³ On the 6th of February 2019, the couple had a heated quarrel which eventually led to their separation.⁸⁴ The accused then left her matrimonial home and went to live with her sister, WC, in Kericho county.

On 8th March 2019, the accused person's infant (MK), became ill, after which her sisters and neighbours contributed money towards the child's treatment in hospital.⁸⁵ At around 11:00am on the same day, the accused, who was still at oddswith S, left with the infant to take her to the hospital.⁸⁶ However, while on the way, she ensured she was alone and then strangled the infant

⁷⁹ (2021) eKLR.

⁸⁰ (2021) eKLR.

⁸¹ (2021) eKLR.

⁸² (2021) eKLR.

⁸³ (2021) eKLR.

⁸⁴ (2021) eKLR.

⁸⁵ (2021) eKLR.

⁸⁶ (2021) eKLR.

using a cloth until the infant died.⁸⁷ The accused person then went and dumped the body of the infant in a pit latrine belonging to her aunt, SC.⁸⁸

The accused then called her sister, W, and told her the infant had died on her way to the hospital and that she had arrived at the hospital. She further called S and informed him of the same.⁸⁹ When asked about the whereabouts of the body of the deceased infant by S, she mentioned that it had been burned at Kericho county and referral hospital and further declined to provide any more information. About three days later, a neighbour named Nancy Mutai informed SC that her daughter had seen a body of a baby in the pit latrine.⁹⁰ Both ladies went and confirmed that they were indeed a body of a baby inside the pit latrine. They later went and reported the matter at Litein police station. The body was later retrieved and taken to Kapkatet district hospital.⁹¹ A postmortem was conducted by Doctor Peter Koech who confirmed that the child was about two months old and asserted that the death was caused asphyxiation secondary to strangulation with cloth.⁹²

Investigations were carried out and after receiving information from the accused's husband and sisters, it was evident that the accused person had committed the act.⁹³ The accused was arrested on the 10th of March 2019 and taken to Bureti police station. The charge of murder was brought against her, which was then reduced to the offence of infanticide contrary to section 210 of the penal code.⁹⁴

The defence counsel stated that the accused had not recovered from the effects of childbirth and that she was suffering from PPD, among other things.⁹⁵ The court took into consideration the mitigating circumstances surrounding the case and placed her on probation three years on condition that she would comply with the requirements given by the probation officer.⁹⁶

This case thus demonstrates an instance in which the court took into account the fact that the accused person was suffering from PPD. Therefore, her mental state was disturbed at the time

⁸⁷ (2021) eKLR.

⁸⁸ (2021) eKLR.

⁸⁹ (2021) eKLR.

⁹⁰ (2021) eKLR.

⁹¹ (2021) eKLR.

⁹² (2021) eKLR.

⁹³ (2021) eKLR.

⁹⁴ (2021) eKLR.

⁹⁵ (2021) eKLR.

⁹⁶ (2021) eKLR.

of the commission of the offence which would warrant a non- custodial sentence as opposed to a custodial one.

2.1.5 Anita Chepkemoi Langat v republic (2021) eKLR

This was an appeal case where the appellant had been charged with the offence of infanticide contrary to section 210 of the penal code.⁹⁷ The particulars of the case are that on 25th January 2020 at Kurumana village in Chepalungu sub- county within Bomet county, she killed her child namely DC, a child under the age of 12 months by jumping with her in an open water pan.⁹⁸ The appellant pleaded guilty to the charge. She was then sentenced to serve seven years in prison.⁹⁹

The facts presented were that on 26th January 2020 at 8:37 a.m., the chief of Siongiroi reported that the body of a small child had been seen floating in a dam that was within Siongiroi.¹⁰⁰ Police officers discovered that the body of the child belonging to the accused and one Wilson Langat. Upon further inquiry, it was suspected that the accused might have committed suicide with the deceased.¹⁰¹ However, a search was conducted after which the accused was found in a nearby village. She admitted to jumping into the dam with the child and was then arrested.¹⁰²

The appellant was aggrieved by the decision of the lower court and thus filed her appeal dated 17th December 2020.¹⁰³ In her submissions, the appellant stated that her husband had started quarrelling with her once he realised that she was pregnant, and he further denied responsibility for the pregnancy.¹⁰⁴ A probation report further revealed that their marriage became rocky, and the appellant alleged that her husband became hostile towards her at their matrimonial home.¹⁰⁵

The appellant stated that the devil used her when she threw herself and her child into the water well.¹⁰⁶ She further stated that she was confused and could not properly comprehend what had happened to her. The prosecution insisted that the 7-year sentence was in accordance with the law and should not be interfered with. The court cited the case of *Nancy Cherono v republic*

⁹⁷ (2021) eKLR.

⁹⁸ (2021) eKLR.

⁹⁹ (2021) eKLR.

¹⁰⁰ (2021) eKLR.

¹⁰¹ (2021) eKLR.

¹⁰² (2021) eKLR.

¹⁰³ (2021) eKLR.

¹⁰⁴ (2021) eKLR.

¹⁰⁵ (2021) eKLR.

¹⁰⁶ (2021) eKLR.

(2021) where the issue of PPD was discussed.¹⁰⁷ The case listed symptoms in relation to PPD as discussed in a research study which included recurrent thoughts of death and suicide and thoughts of harming oneself and the baby.¹⁰⁸

Following the above discussion, the court acknowledged that the accused person may have suffered some form of PPD caused by the circumstances she had faced. The court then offered leniency towards the accused with regard to the sentence only. The 7- year sentence was set aside and substituted for a 3- year probation sentence.¹⁰⁹

Similar to the previous case, the court took into consideration not only the mental disturbance that the accused may have been facing at the time of the commission of the offence, but also the circumstances that would have contributed to the said disturbance.

2.1.6 Republic v Claudia Neno Mukanda (2021) eKLR

The accused person had initially been charged with the offence of murder contrary to section 203 of the penal code. The brief facts of the case were that on 1st May 2019, the accused person's mother, PW2 Caroline Mukanda left the child with the accused at her home and went to work.¹¹⁰ When she came back to the house, she did not find the accused nor the child and was later informed that the accused had left earlier with the child.¹¹¹ On 4th May 2019, the accused came back home without the child. When asked about the whereabouts of the child, the accused responded that the child had died but refused to give the location where the body was.¹¹² The police were informed of the situation and upon further interrogation, the accused led them to where the body was buried, which was near the kitchen.¹¹³ The body was then exhumed. A postmortem conducted on the body of the child revealed that the child had died due to obstruction of their airwaves caused by either strangulation or drowning.¹¹⁴

In her defence, the accused stated that she was the mother of the deceased who was two months old at the time of his death. She further stated that the biological father of the deceased had

¹⁰⁷ (2021) eKLR.

¹⁰⁸ (2021) eKLR.

¹⁰⁹ (2021) eKLR.

¹¹⁰ (2022) eKLR.

¹¹¹ (2022) eKLR.

¹¹² (2022) eKLR.

¹¹³ (2022) eKLR.

¹¹⁴ (2022) eKLR.

chased her away during her pregnancy.¹¹⁵ On 1st May 2019, she stated that she left the child on the bed and went to wash clothes and later came back and found that the child had covered himself with a blanket causing his death.¹¹⁶ Additionally, she states that she went to her aunt and informed her that she had a mental problem. Later, she was taken to the police station where she informed the police that she had to intention to kill the child.¹¹⁷

Counsel for the accused submitted that the deceased died by a blanket covering of a blanket which was not a deliberate act and further that the accused had problems breast feeding the child and that her mind was affected.¹¹⁸ Counsel also stated that the accused should have been charged with the offence of infanticide as opposed to that of murder.¹¹⁹

The court asserted that the doctor's finding prove that the accused's claims were wrong, and that the accused should have indeed been charged with the offence of infanticide.¹²⁰ The court thus found the accused person guilty of the offence of infanticide and convicted her accordingly.¹²¹

This case provides an immensely different position that has been taken by the court. This is because the court fails to take note of the mental disturbance that the accused person was facing as mentioned by her and her counsel. Instead, the court convicts her.

2.2 Conclusion

This chapter has analysed cases where judges have taken different approaches in sentencing cases of infanticide. It is apparent that there is no uniformity in the manner in which such cases are decided. This has led to situations where women who are faced with the mental challenges manifested in the form of PPD, are left vulnerable as most of these women are sentenced to serve time in prison. These prison sentences do more harm than good as these women do not receive the care and treatment that they deserve in order to deal with the cause of what led them to commit such an offence. This chapter has thus established that there is need for assessment and development of the law on infanticide in Kenya. The next chapter will highlight the developments on the law of infanticide within the UK as a comparative jurisdiction.

¹¹⁵ (2022) eKLR.

¹¹⁶ (2022) eKLR.

¹¹⁷ (2022) eKLR.

¹¹⁸ (2022) eKLR.

¹¹⁹ (2022) eKLR.

¹²⁰ (2022) eKLR.

¹²¹ (2022) eKLR.

CHAPTER 3 : ASSESSMENT ON THE DEVELOPMENT ON THE LAW RELATING TO INFANTICIDE WITHIN THE UK AS A COMPARATIVE JURISDICTION

3.1 Introduction

This chapter seeks to give a comparative study of the Kenya's penal provision on infanticide vis a vis the UK's framework on infanticide. Reference will be made to the UK Infanticide Act (1938) and its provisions. The use of the English legislation as a comparator is because the Kenyan legislation on infanticide has been borrowed from that of the UK. This is because the English Infanticide Act has served as a model to other countries, including Kenya, as it offers the consistency needed in sentencing of infanticide cases.¹²² Furthermore, there have been developments on the provision and its use by the courts over the years which will be especially beneficial in the Kenyan context seeing as the laws are similar. An example of these developments includes the straying away from custodial sentencing which will be discussed in detail later. Thus, the purpose of this chapter is to use the UK's legal development on infanticide to inform the case for Kenya's legal reform.

3.2 The UK law on infanticide

Around 30 countries in the world have provisions addressing the offence of infanticide that provide a diminished capacity defence towards accused mothers.¹²³ About twenty of these countries are European.¹²⁴ Most of these countries follow the English Infanticide Act of 1938 which allows for women who commit the offence of infanticide to face charges of manslaughter rather than murder.¹²⁵ Women in these countries convicted of this crime in most instances receive probation and referral to mental health institutions as opposed to imprisonment.¹²⁶ However, countries such as Luxemburg have harsher penalties for mothers who kill their children as compared to those who commit other forms of homicide.¹²⁷

¹²² Ryznar M, 'A crime of its own a proposal for achieving greater sentencing consistency in neonaticide and infanticide cases' 478.

¹²³ Bamat J, 'How do courts judge mothers who kill their babies' France24, 31 July 2010 <https://www.france24.com/en/20100730-maternal-neonaticide-infanticide-justice-france-usa-canada-cottrez> .

¹²⁴ Spinelli M, 'Infanticide and American criminal justice (1980-2018)' *National library of medicine* 2018, 1 <https://pubmed.ncbi.nlm.nih.gov/29938373/> on 25 June 2018.

¹²⁵ Bacewicz A, Friedman H, 'Infanticide and the law' in Shackelford T (ed) *The sage handbook of domestic violence* 2ed, Sage, London, 2020, 407.

¹²⁶ Bacewicz A, Friedman H, 'Infanticide and the law' 407.

¹²⁷ Bacewicz A, Friedman H, 'Infanticide and the law' 407.

The current law in England allows for prosecutors to show compassion to mothers who kill their infant children by reason of the imbalance of their mind.¹²⁸ The specific law that speaks to the offence is the Infanticide Act of 1938. Section 1(1) of the Act briefly provides the ingredients of the offence starting with the intentional causation of death to a child below the age of twelve months. Further, when the act was committed, the state of her mind was troubled. Also, due to the effects of giving birth or lactation following the child's birth, she will be found guilty of infanticide. Lastly, since the offence of infanticide is a felony, she will be prosecuted and punished as though she had committed the crime of manslaughter of the child. This is true even though the circumstances surrounding the offence would have amounted to murder if not for this act.¹²⁹ Furthermore, the Criminal Code speaks to the offence of infanticide under sections 222(4) and 233. The former provides for the three forms of culpable homicide as recognized under the law which include murder, manslaughter and infanticide.¹³⁰ The latter speaks to the specific offence of infanticide where it briefly states that a female person commits the crime if first, by a wilful act or omission, she causes the death of her newly- born child. Second, if at the time the act is committed, she is not completely recovered from the effects of giving birth to the child. Third, due to the effect of lactation as a result of birthing the child, her mental state is troubled.¹³¹

Following the provisions of the UK law as mentioned above, there is no specific requirement of a causal connection between the wilful act resulting in death and the disturbance of the mother's mind.¹³² It is reasonable to draw the conclusion that there is an implicit assumption that if a woman with a disturbed mind kills her children, then the killing occurred as a result of the disturbance¹³³

¹²⁸ Griffith R, 'Dealing with incidents of feticide and infanticide in England and Wales' 23 *British journal of midwifery* 5, 2015, 2.

¹²⁹ Section 1, *Infanticide act*, 1938.

¹³⁰ Anand S, 'Rationalizing infanticide: A medico- legal assessment of the criminal code's child homicide offence' 47 *Alberta Law Review* 3, 2010, 707.

¹³¹ Anand S, 'Rationalizing infanticide: A medico- legal assessment of the criminal code's child homicide offence' 707.

¹³² Anand S, 'Rationalizing infanticide: A medico- legal assessment of the criminal code's child homicide offence,' 710.

¹³³ Anand S, 'Rationalizing infanticide: A medico- legal assessment of the criminal code's child homicide offence,' 710.

3.3 Historical context to the UK law on infanticide

Infanticide was not an offence in the UK until the year 1922.¹³⁴ However, the issue of infanticide dates as far back as the 1860s and 1870s where concerns rose over the murder of children.¹³⁵ With the passage of time, the term infanticide included the killing, neglect or abuse of newborn babies and further, older children in various domestic, institutional and geographical locations.¹³⁶ Thus, throughout the years leading up to 1922, the law maintained quite a conservative approach, that women who committed infanticide should be charged with murder thus deserving of the death sentence.¹³⁷ This therefore meant that the same laws that were applied to other forms of homicide also applied to cases of infanticide, thus justifying the death penalty.¹³⁸ Despite the death sentence being the usual course of action, the last execution of a woman for the murder of her own baby occurred in the year 1849.¹³⁹ Thus, the purpose of the law when it was introduced into the English jurisdiction was to provide for lenient treatment of women who killed their babies, specifically at or soon after a concealed birth.¹⁴⁰ This was mainly because of the social reasons rather than the psychiatric circumstances of the crime.¹⁴¹ This further goes to show that psychiatric defences were quite uncommon prior to the 1938 act.¹⁴²

The precursor to the current infanticide act, the Infanticide Act 1922, was introduced at the time owing to the fact that the general opinion was against treating infants killed by their

¹³⁴ Enright M, 'The very antithesis of womanhood: Edith Roberts and the infanticide acts'' Birmingham blogs, 20 March 2018 <https://blog.bham.ac.uk/legalherstory/2018/03/20/the-very-antithesis-of-womanhood-edith-roberts-and-the-infanticide-acts/> .

¹³⁵ Jackson M, 'Infanticide' 367 *The Lancet* 9513, 2006, 1.

¹³⁶ Jackson M, 'Infanticide' 1.

¹³⁷ Enright M, 'The very antithesis of womanhood: Edith Roberts and the infanticide acts'' Birmingham blogs, 20 March 2018 <https://blog.bham.ac.uk/legalherstory/2018/03/20/the-very-antithesis-of-womanhood-edith-roberts-and-the-infanticide-acts/> .

¹³⁸ Grey D, 'Parenting, infanticide and the state in England and Wales, 1870-1950,' in Barron H, Siebrecht C *Parenting and the state in Britain and Europe* (1 ed), Palgrave Macmillan, 2017, 76.

¹³⁹ Grey D, 'Parenting, infanticide and the state in England and Wales, 1870-1950,'76.

¹⁴⁰ Brennan K, Milne E 'Infanticide: guarding against harshness' *News law journal*, 2019, 2 https://www.newlawjournal.co.uk/docs/default-source/article_files/013_nlj_7824_specialist_crime-brennan-milne.pdf?sfvrsn=21a00d0e_3 on 18 January 2019.

¹⁴¹ Brennan K, Milne E 'Infanticide: guarding against harshness' *News law journal*, 2019, 2 [https://www.newLawjournal.co.uk/docs/default-source/article_files/013_nlj_7824_specialist_crime-brennan-milne.pdf?sfvrsn=21a00d0e_3](https://www.newlawjournal.co.uk/docs/default-source/article_files/013_nlj_7824_specialist_crime-brennan-milne.pdf?sfvrsn=21a00d0e_3) on 18 January 2019.

¹⁴² Kamaruddin S, Hamin Z, Babat C, Ahmad N, 'In defence of baby killers: Lesson from English Law' 7 *BiLD Law Journal* 4s, 2022, 211

mothers as victims of an ‘ordinary’ murder.¹⁴³ Furthermore, English literature depicts that when the infanticide act 1922 was introduced, the offence related to the death of a ‘new born baby’ as opposed to a child below the age of twelve months and no reference to lactation was made.¹⁴⁴ During this period, two cases were of great importance towards the development of the legislation on infanticide. These are the cases of *R v O’Donoghue*¹⁴⁵ and *R v Hale*¹⁴⁶. The former involved the court of appeal affirming a rule by a trial judge that the offence could not be left to the jury with regard to a child aged thirty-five days old at its death.¹⁴⁷ The latter case applied the ruling of the O’Donoghue case however in this case, the child was three weeks old.¹⁴⁸ As a result of the two cases, the 1938 Infanticide Act.¹⁴⁹ This extension was justified by a reference to the supposed disturbing effects of lactation.¹⁵⁰

Before the enactment of the 1938 Infanticide Act, all women convicted of murder were consequently sentenced to death by the judge only to end up having their sentence reprieved by the home secretary.¹⁵¹ Such outcomes were very common and were dubbed by the judiciary as the ‘black- cap force’.¹⁵² Therefore, the enactment of the Infanticide act formalised a well-established practice where women who killed their infant children would not be executed.¹⁵³ The Infanticide Act of 1938 was thus enacted in order to deal with the ‘black- cap force’ which had arisen as a result of women being sentenced to mandatory death for murder only to have their sentences reduced to a lesser sentence later.¹⁵⁴ Thus, parliament replaced the previous 1922 act and introduced the terms ‘balance of her mind was disturbed’ so as to realise the

¹⁴³ Howard H, ‘The offence/defence of infanticide: a view from two perspectives’ 82 *Journal of criminal law* 6, 2018, 6.

¹⁴⁴ Lansdowne R, ‘Infanticide: psychiatrists in the plea bargaining process’ 16 *Monash University Law Review*, 1990, 3.

¹⁴⁵ *R v O’Donoghue* (1927), The court of criminal appeal.

¹⁴⁶ *R v Hale* *Times* (1936).

¹⁴⁷ Lansdowne R, ‘Infanticide: psychiatrists in the plea bargaining process’ 3.

¹⁴⁸ Lansdowne R, ‘Infanticide: psychiatrists in the plea bargaining process’ 3.

¹⁴⁹ Lansdowne R, ‘Infanticide: psychiatrists in the plea bargaining process’ 7.

¹⁵⁰ Lansdowne R, ‘Infanticide: psychiatrists in the plea bargaining process’ 7.

¹⁵¹ Milne E, ‘100 years of the infanticide act’ *Counsel magazine*, 5 December 2022 <https://www.counselmagazine.co.uk/articles/100-years-of-the-infanticide-act> on 5 December 2022.

¹⁵² Milne E, ‘100 years of the infanticide act’ *Counsel magazine*, 5 December 2022 <https://www.counselmagazine.co.uk/articles/100-years-of-the-infanticide-act> on 5 December 2022.

¹⁵³ Milne E, ‘100 years of the infanticide act’ *Counsel magazine*, 5 December 2022 <https://www.counselmagazine.co.uk/articles/100-years-of-the-infanticide-act> on 5 December 2022.

¹⁵⁴ Lykourougur K, ‘Mothers who kill: a look at infanticide,’ *Doughty street chambers* <https://insights.doughtystreet.co.uk/post/102ipk5/mothers-who-kill-a-look-at-infanticide> on 9 October 2023.

intention of the framers of the bill that the physical as well as the mental stresses of childbirth should be recognised in law.¹⁵⁵

3.4 Current approach to infanticide in the UK

As has been mentioned earlier, the law on infanticide was introduced in the year 1922, repealed and re-enacted with significant modifications by the Infanticide Act of 1938.¹⁵⁶ The offence of infanticide is quite unique as it is the only offence within the English law for which a precondition is the possession of an abnormal mental state.¹⁵⁷ The case of *R v Gore (2007)* established that there is no need for all ingredients of murder to be proven before a defendant could be convicted of the crime of infanticide.¹⁵⁸ This case confirmed the intention of parliament which was to create a somewhat new offence of infanticide which would cover circumstances much wider than those that would otherwise constitute murder.¹⁵⁹ This further goes to show that the mens rea for infanticide does not require the intention to kill or cause serious bodily harm.¹⁶⁰

However, as imprisonment may be the expectation as provided for by the law, it is not the case in normal practice. This is because, almost from the outset of the infanticide act, most women who have been convicted of infanticide have received non-custodial sentences.¹⁶¹ This means that these women often receive probation and referral to mental health treatment in lieu of imprisonment.¹⁶² Thus, the UK much like many European countries, maintains a strong psychiatric presence within the antenatal clinics so as to address the needs of mothers and their families.

¹⁵⁵ Lykourougur K 'Mothers who kill: a look at infanticide,' Doughty street chambers <https://insights.doughtystreet.co.uk/post/102ipk5/mothers-who-kill-a-look-at-infanticide> on 9 October 2023.

¹⁵⁶ Weare S, 'Bad, mad or sad? Legal language, narratives, and identity constructions of women who kill their children in England and Wales' *International journal for the semiotics of law*, 212 <https://doi.org/10.1007/s11196-016-9480-y> on 21 April 2016.

¹⁵⁷ Weare S, 'Bad, mad or sad? Legal language, narratives, and identity constructions of women who kill their children in England and Wales' *International journal for the semiotics of law*, 212 <https://doi.org/10.1007/s11196-016-9480-y> on 21 April 2016.

¹⁵⁸ Laver N, 'Infanticide and the criminal law,' Claims.co.uk <https://www.claims.co.uk/knowledge-base/court-proceedings/infanticide-and-criminal-law>

¹⁵⁹ Laver N, 'Infanticide and the criminal law,' Claims.co.uk <https://www.claims.co.uk/knowledge-base/court-proceedings/infanticide-and-criminal-law>

¹⁶⁰ Laver N, 'Infanticide and the criminal law,' Claims.co.uk <https://www.claims.co.uk/knowledge-base/court-proceedings/infanticide-and-criminal-law>

¹⁶¹ Ward T, 'The sad subject of infanticide: law, medicine, and child murder,' Researchgate, 1999, 163.

¹⁶² Bacewicz A, Friedman H, 'Infanticide and the law' 407.

As has been mentioned, most women convicted of infanticide usually receive probation orders with psychiatric treatment attached.¹⁶³ Examples of such cases include that of Lauren Saint George who suffered from post- partum depression and consequently killed her daughter just six days after being discharged into her care.¹⁶⁴ After much deliberation by the jury, she was found neither guilty of murder nor manslaughter.¹⁶⁵ Furthermore, one of the Justices mentioned that any prison sentence would be suspended as she had already suffered and still continued to suffer.¹⁶⁶ Another example is that of Gintare Suminaite who killed her daughter just moments after giving birth to her in the bathroom of her home as the baby was a result of a secret affair and she had further hidden the pregnancy.¹⁶⁷ The accused denied charges of murder but admitted to committing infanticide, to which the court responded by asserting that her circumstances were tragic and sentenced her to a twenty four month community order.¹⁶⁸

On the other hand, judges have raised concerns over the infanticide legislation being outdated and unsatisfactory.¹⁶⁹ The deputy chief justice, Lord justice judge, while providing a ruling in the case of Ms Kai- Whitewind, stated that an area of concern with regard to the infanticide defence is that the law is restricted to a mother being affected by the actual birth and not further subsequent events such a lack of bonding.¹⁷⁰ She further states that another area of concern is when the mother who has in fact killed her child is unable to admit it.¹⁷¹ She explains that this

¹⁶³ Ryznar M, 'A crime of its own a proposal for achieving greater sentencing consistency in neonaticide and infanticide cases' 23.

¹⁶⁴ 'Lauren Saint George guilty of killing baby girl Lily- Mai' BBC, 25 July 2022, <https://www.bbc.com/news/uk-england-london-62296439> on 25 July 2022.

¹⁶⁵ 'Lauren Saint George guilty of killing baby girl Lily- Mai' BBC, 25 July 2022, <https://www.bbc.com/news/uk-england-london-62296439> on 25 July 2022.

¹⁶⁶ Milne E, 'Murder or infanticide? The causes behind the most shocking of crimes,' Independent, 10 July 2017 <https://www.independent.co.uk/life-style/health-and-families/murder-or-infanticide-understanding-the-causes-behind-the-most-shocking-of-crimes-a7820806.html> on 10 July 2017.

¹⁶⁷ Milne E, 'Murder or infanticide? The causes behind the most shocking of crimes crime,' Independent, 10 July 2017 <https://www.independent.co.uk/life-style/health-and-families/murder-or-infanticide-understanding-the-causes-behind-the-most-shocking-of-crimes-a7820806.html> on 10 July 2017.

¹⁶⁸ Milne E, 'Murder or infanticide? The causes behind the most shocking of crimes,' Independent, 10 July 2017 <https://www.independent.co.uk/life-style/health-and-families/murder-or-infanticide-understanding-the-causes-behind-the-most-shocking-of-crimes-a7820806.html> on 10 July 2017.

¹⁶⁹ Frith M, 'Scrap outdated infanticide law, say judges,' Independent, 4 May 2005 <https://www.independent.co.uk/news/uk/crime/scrap-outdated-infanticide-law-say-judges-5345949.html> on 4 May 2005.

¹⁷⁰ Frith M, 'Scrap outdated infanticide law, say judges,' Independent, 4 May 2005 <https://www.independent.co.uk/news/uk/crime/scrap-outdated-infanticide-law-say-judges-5345949.html> on 4 May 2005.

¹⁷¹ Frith M, 'Scrap outdated infanticide law, say judges,' Independent, 4 May 2005 <https://www.independent.co.uk/news/uk/crime/scrap-outdated-infanticide-law-say-judges-5345949.html> on 4 May 2005.

issue may occur as a result of the mother being too unwell or too emotionally disturbed by her actions. These issues, as she goes on to explain, make it difficult to produce psychiatric evidence with regard to the balance of the mother's mind.

The discussion above has given insights as to how the courts in the UK address cases of infanticide. It is evident that the courts have abandoned subjecting women who commit infanticide to serving prison sentences and instead provide them with the necessary mental health treatment. It is also evident that the courts have raised concerns over the legislation itself being outdated thus failing to meet the needs of the current world.

3.5 Conclusion

This chapter has analysed the development on the law relating to infanticide within the UK as a comparative jurisdiction. It is evident that infanticide has been an issue in the UK since time immemorial, one which the British courts and legislators have worked hard in order to curb it. It is also apparent that the British courts have taken the initiative to help women who have committed infanticide and are ailing from PPD through provision of non- custodial sentences. Further, through the discussions on the outdated nature of the Infanticide Act of 1938, the issue of intersectional feminism as discussed earlier on is brought to light. Through these discussions and concerns raised, it is made clear that a number of factors come into play that consequently affects a woman's way of life, leading her to act one way or another. Through the British cases highlighted above, the courts appear to take note of the different circumstances that may lead to a woman killing her child and thus providing the necessary tools to aid her. The British law and practices with regard to infanticide may not be seamless nor perfect, however, Kenya does have a lot to learn from the British regulatory framework. The next chapter will discuss the opportunity for law reform on Kenya's infanticide provisions.

CHAPTER 4 : ASSESMENT ON THE OPPORTUNITY FOR LAW REFORM ON KENYA'S INFANTICIDE PROVISION

4.1 Introduction

Thus far, this study has examined the different approaches taken by Kenyan courts in adjudicating cases on infanticide as well as a comprehensive comparison between the UK regulatory framework and that of Kenya. Following the aforementioned discussions, this chapter will endeavour to make recommendations towards legal reform on the law relating to infanticide in Kenya.

4.2 Application of the UK's regulatory framework to that of Kenya's

Kenya could obtain a few takeaways from the UK practice on how cases on infanticide are decided upon. The 1938 British Infanticide Act has served as a model for infanticide law in many other countries, Kenya being among these countries. Therefore, by virtue of taking up the British legislation, Kenya could also take note of the practices undertaken by the British courts with regard to such cases. One of the most key takeaways is the significant abandonment of the imprisonment of mothers who commit this crime and instead substituting the same with noncustodial sentences involving mental health treatment. As discussed in the cases in the previous chapter, the UK courts and legislation take into consideration the imbalances that occur within women's minds as a result of giving birth. Thus, the courts are aware that subjecting these women to serve prison sentences would do more harm than good. Furthermore, medical and legal authorities are seen to recognize PPD as a serious health issue affecting women and acceptable as a viable insanity defence.¹⁷² Additionally, the Criminal Law Revision Committee in England has shown support towards expanding the scope of England's Infanticide Act to include killings that result from circumstances beyond the birth.¹⁷³ These include the woman's immediate environment and many other stresses.¹⁷⁴

Thus, just as the UK courts have had notable discussions on the law on infanticide being outdated, Kenyan courts and legislators should seek to do the same. Having such discussions will eventually result in better treatment being accorded to infanticidal women suffering from PPD.

¹⁷² *NC v Republic* (2021) eKLR.

¹⁷³ Ryznar M, 'A crime of its own a proposal for achieving greater sentencing consistency in neonaticide and infanticide cases' 21.

¹⁷⁴ Ryznar M, 'A crime of its own a proposal for achieving greater sentencing consistency in neonaticide and infanticide cases' 21.

4.3 Legal reform

This study so far, has highlighted the ways in which cases of infanticide are decided upon which has further led identification of the shortcomings within the Kenyan legal system with regard to such cases. This means that it is of importance to assess whether there is any opportunity for legal reform within the current system which would be beneficial in the sense that human rights shall be upheld and promoted through such reform. Therefore, in light of international best practice and the UK's development on infanticide law, this chapter will seek to highlight different recommendations towards legal reform in Kenya.

4.3.1 Continued criminalization of infanticide?

The first of these recommendations is with regard to whether the offence of infanticide should continue being criminalized. As has already been established, the unique nature of the offence of infanticide sets it apart from other forms of homicide considering the mental state of the accused at the time of the commission of the offence is a key factor in such cases. Suggestions have been made regarding women who kill their children as a result of the effects of childbirth.¹⁷⁵ The deductions made from these suggestions are that women who commit this offence, depending on the severity of their mental disorder, are either fully competent and thus criminally responsible, or fully incompetent thus incurring no criminal responsibility.¹⁷⁶ This means that a balance has to be drawn between the harm caused to the victim and the culpability of the defendant.¹⁷⁷

However, despite the peculiar nature of the offence, where it is a partial defence to a charge of murder or manslaughter as well as a distinct homicide offence¹⁷⁸, the offence still ought to be criminalized. This is because through the denial of female aggression, the criminal justice system turns a blind eye on women who deserve punishment and further, their victims who deserve protection.¹⁷⁹ Furthermore, the offence ought to continue being criminalized so as to uphold moral and ethical values as upheld by the society. For some people, the death of a

¹⁷⁵ Howard H, 'The offence/defence of infanticide: a view from two perspectives', 46.

¹⁷⁶ Howard H, 'The offence/defence of infanticide: a view from two perspectives', 46.

¹⁷⁷ Howard H, 'The offence/defence of infanticide: a view from two perspectives', 47.

¹⁷⁸ Loughnan A, *Manifest madness: mental incapacity in the criminal law*, 1ed, Oxford Academic, Great Britain 2012, 202.

¹⁷⁹ Mason J, 'The myth of madness: murderous mothers and maternal infanticide' 85 *The journal of criminal law* 6, 2021, 13.

helpless baby under violent circumstances is considered an unforgivable and heinous crime.¹⁸⁰ Thus, through the law punishing this crime, there is a sense of societal values being upheld following the severity of the offence.

Additionally, through comparing the offence of infanticide with that of manslaughter, it is evident that it is of importance that the offence continues being criminalized. Infanticide is similar to manslaughter through the manner both offences operate.¹⁸¹ Cases of manslaughter involve situations where a person kills without the intention of doing so.¹⁸² Such cases may also involve instances where a person is provoked to an extent that they got enraged leading them to temporarily self-control.¹⁸³ Similarly, cases of infanticide involve women temporarily losing their self-control due to their incapacitated state of mind, leading them to taking the life of their infants. Therefore, just as the crime of manslaughter is punishable by law since it is a crime that requires less culpability as compared to murder¹⁸⁴, so does the offence of infanticide also require to be punished as it also involves a lower level of culpability.

The English courts have followed this position whereby the courts remain guided by the Infanticide Act of 1938. This means that the offence in itself is still recognized through the Infanticide Act. Thus, this practice demonstrates the position that the English courts take in relation to such cases where first, the legal system criminalizes the offence since a life has been lost due to the actions of the woman. However, there is still an appreciation of the lack of the necessary mens rea during the commission of the offence due to the woman's incapacitated state of mind which attracts the leniency given by the courts. Similarly, this study advocates for Kenya to take a similar approach whereby the offence should still be retained in our penal code, however where the change should occur is in the sentencing. This is because the fact that an infant's life has been lost cannot be denied and repercussions for such an act are warranted. However, the fact that the woman, at the time the offence was committed, was suffering from

¹⁸⁰ Montgomery H, 'Infanticide: vulnerable mothers who kill their babies can be granted leniency – so why is this historic law being rejected in favour of harsher punishment' The conversation, 8 August 2023 <https://theconversation.com/infanticide-vulnerable-mothers-who-kill-their-babies-can-be-granted-leniency-so-why-is-this-historic-law-being-rejected-in-favour-of-harsher-punishment-210735> on 8 August 2023.

¹⁸¹ Gregoire P, Nedim U, 'What is infanticide in the criminal law' NSW Courts, 3 December 2019 <https://nswcourts.com.au/articles/what-is-infanticide-in-the-criminal-law/> on 3 December 2019.

¹⁸² Gregoire P, Nedim U, 'What is infanticide in the criminal law' NSW Courts, 3 December 2019 <https://nswcourts.com.au/articles/what-is-infanticide-in-the-criminal-law/> on 3 December 2019.

¹⁸³ Gregoire P, Nedim U, 'What is infanticide in the criminal law' NSW Courts, 3 December 2019 <https://nswcourts.com.au/articles/what-is-infanticide-in-the-criminal-law/> on 3 December 2019.

¹⁸⁴ <https://www.law.cornell.edu/wex/manslaughter>.

PPD can also not be ignored. Some Kenyan courts have followed this position where it has been asserted that following the general state of mind of a women who kill their children during or shortly after birth, it may be such that it negates the degree of intention and wilfulness which are requirements for other forms of destruction of life.¹⁸⁵ This position is properly recognized through the offence of infanticide¹⁸⁶ which highlights that a life has been lost, but under peculiar circumstances compared to other forms of homicide. Thus, it is of importance that this position is retained within the Kenyan legal system which would ensure a unified manner in which cases of infanticide are decided which take into consideration the severity of the offence while also highlighting the state of mind of the accused woman.

4.3.2 Promotion of non- custodial sentences for the offence of infanticide

The next recommendation that this chapter makes is the promotion of non- custodial sentences for women found guilty of infanticide. Promotion of non- custodial sentences is essential in the sense that all the complex factors and unique challenges faced by women after childbirth are recognized. As has been discussed previously, the UK courts have in practice opted for non- custodial sentences over the years.¹⁸⁷ English courts have notably followed this position whereby in the last 50 years no woman has been imprisoned following a conviction of infanticide.¹⁸⁸

The expected penalty for a woman who has committed infanticide in England is life imprisonment, however in practice, non- custodial sentences are usually awarded.¹⁸⁹ Furthermore, the Law Commission in England considers the unique nature of the offence and asserts that the more lenient sentences that are customary are warranted.¹⁹⁰ Studies conducted in England and Wales depict that infanticide convictions usually attract lenient punishments.¹⁹¹ A further study conducted between the years 1990 and 2003 depicts that most infanticide

¹⁸⁵ *PAO v Republic* (2016) eKLR.

¹⁸⁶ *PAO v Republic* (2016) eKLR.

¹⁸⁷ Ryznar M, 'A crime of its own a proposal for achieving greater sentencing consistency in neonaticide and infanticide cases' 481.

¹⁸⁸ Wheelright J, 'Women who kill their newborns are deeply unwell, so why are they being tried for murder', 30 June 2023 <https://www.theguardian.com/commentisfree/2023/jun/30/women-kill-newborns-murder-infanticide-paris-mayo-courts> on 30 June 2023.

¹⁸⁹ Laver N, 'Infanticide and the criminal law,' Claims.co.uk <https://www.claims.co.uk/knowledge-base/court-proceedings/infanticide-and-criminal-law>

¹⁹⁰ *Murder, manslaughter and infanticide*, The Law Commission, 2006.

¹⁹¹ Loughnan A, *Manifest madness: mental incapacity in the criminal law* Oxford University Press, 2012.

convictions have resulted in non- custodial sentences that are usually in form of hospital orders¹⁹² that require admittance to a psychiatric hospital for treatment.¹⁹³ Other forms of such sentences that the UK courts have opted for include probation. Probation is also another mechanism that is frequently used by English courts while sentencing women found guilty of infanticide.¹⁹⁴ Supervision done under probation orders usually last between six months and three years and in some instances, such as those of infanticide cases, the court usually adds additional requirements such as receiving medical treatment or counselling.¹⁹⁵ After following this approach for about 80 years, the British legal system has demonstrated that it is as effective as incarceration as it prevents and deters infanticide from occurring.¹⁹⁶ Furthermore, using probation as a sentencing mechanism has also proven to be more efficient and cost effective for the English legal system.¹⁹⁷

In the Kenyan context, some courts have adopted this same mechanism as discussed in the case study in chapter 2. Some courts have opted to give non- custodial sentences which include probation orders in place of custodial sentences. This shows that Kenyan courts have implemented these practices to some extent. Thus, this study advocates for the full implementation of non- custodial sentences to be granted to women who are convicted of the offence of infanticide, following the UK courts practice on the same. This is because it is evident that custodial sentences do not serve any useful purpose especially towards the traumatized women who commit infanticide.¹⁹⁸

4.4 Institutional reform

Aside from advocating for legal reform, institutional reform is equally as important. This type of reform involves reviewing and restructuring state institutions so as to respect human rights

¹⁹² Lykourgou K, 'Mothers who kill: a look at infanticide' Doughty Street Chambers 9 October 2023 <https://insights.doughtystreet.co.uk/post/102ipk5/mothers-who-kill-a-look-at-infanticide#:~:text=The%20Infanticide%20Act%201938%20is,the%20balance%20of%20her%20mind> on 9 October 2023.

¹⁹³ Wilezynski A, 'Mad or bad? Child killers , gender and the courts' 37 *The British Journal of Criminology* 3, 1997, 422.

¹⁹⁴ Marks M, Kumar R, 'Infanticide in England and Wales' 33 *Medicine, science and the law* 4, 1993, 336

¹⁹⁵ <https://www.nidirect.gov.uk/articles/non-custodial-sentences#toc-3>

¹⁹⁶ Spinelli M, 'Maternal infanticide associated with mental illness; prevention and the promise of saved lives' 161 *American journal of psychiatry*, 9, 2004,1548.

¹⁹⁷ Spinelli M, 'Maternal infanticide associated with mental illness; prevention and the promise of saved lives' 1548.

¹⁹⁸ N Gachuki, 'Victims of postpartum psychosis undergoing criminal trial in Kenya' Academia.edu, 2019, 21.oun

and ensure accountability towards the people.¹⁹⁹ Thus, this type of reform is important to the study as reviewing state institutions, the judiciary in this case, shall enable improvements to be made in their operations. This in turn would ensure continuous improvement in the services offered to the people.

4.4.1 Mandatory screening for PPD

The first recommendation that this chapter makes is that PPD screening should be mandatory. As has been mentioned before, PPD is estimated to affect ten to fifteen percent of women globally, and it is an issue that if left untreated, leads to negative and long-lasting effects on the woman's wellbeing.²⁰⁰ The absence of screening may impede the recognition of the women at risk of PPD which further leads to a negative impact in terms of delivery of timely mental healthcare.²⁰¹ Consequentially, women who are not screened are at risk of developing PPD which may lead to them fatally harming their children. PPD screening is more widely documented and practiced in western countries where most of them opt to use the Edinburgh Postpartum Depression Scale (EPDS).²⁰² The EPDS is a screening tool in form of a questionnaire that can increase the chances of detection of women at risk of PPD.²⁰³

In the UK, there has been progress at the national level with regard to improving access to perinatal mental health services, the perinatal period being between pregnancy and the first twelve months after childbirth.²⁰⁴ However, most localities do not have specialist services available at the full level recommended with some not providing these services at all.²⁰⁵ This

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<https://www.ictj.org/institutional-reform#:~:text=Institutional%20reform%20is%20the%20process,are%20accountable%20to%20their%20constituents>.

²⁰⁰ Marti- Castner M, Hvidtfeldt C, Villadsen S, Laursen B, Pedersen T, Norredam M, 'Disparities in postpartum depression screening participation between immigrant and Danish- born women' *32 European journal of public health* 1, 2021, 41.

²⁰¹ Marti- Castner M, Hvidtfeldt C, Villadsen S, Laursen B, Pedersen T, Norredam M, 'Disparities in postpartum depression screening participation between immigrant and Danish- born women', 41.

²⁰² Marti- Castner M, Hvidtfeldt C, Villadsen S, Laursen B, Pedersen T, Norredam M, 'Disparities in postpartum depression screening participation between immigrant and Danish- born women', 41.

²⁰³ Marti- Castner M, Hvidtfeldt C, Villadsen S, Laursen B, Pedersen T, Norredam M, 'Disparities in postpartum depression screening participation between immigrant and Danish- born women'

²⁰⁴ NHS England, NHS Improvement, National Collaborating Centre for Mental Health, 'Perinatal mental healthcare pathway', May 2018 <https://www.england.nhs.uk/wp-content/uploads/2018/05/perinatal-mental-health-care-pathway.pdf> on May 2018.

²⁰⁵ NHS England, NHS Improvement, National Collaborating Centre for Mental Health, 'Perinatal mental healthcare pathway', May 2018 <https://www.england.nhs.uk/wp-content/uploads/2018/05/perinatal-mental-health-care-pathway.pdf> on May 2018.

issue necessitated the need for recommendations in form of guidelines by the UK National Screening Committee (NSC) that the National Health System (NHS) could follow. However, the NSC did recommend that the EPDS should be used alongside clinical judgement.²⁰⁶ Furthermore, even though the use of EPDS may not be equally valid across different contexts, there is little to no evidence suggesting that there are better performing instruments over the EPDS.²⁰⁷ In Kenya, there is no routine screening of PPD at postnatal clinics.²⁰⁸ The resulting effect includes increased perinatal morbidity as a result of direct or indirect causes of PPD.²⁰⁹ Furthermore, where screening is conducted, no formal psychiatric evaluation is done in order to confirm PPD.²¹⁰ Such situations depict that the country should strive to achieve consistency in the provision of PPD screening. Thus, this study advocates for full implementation of mandatory PPD screening and the use of EPDS as a screening mechanism in order to detect PPD. This is because the prevalence of PPD is high thus necessitating routine screening of mothers at postnatal clinics would be effective towards early detection of PPD.

4.4.2 Further preventative measures

A further recommendation that this chapter makes is with respect to additional preventative measures that can be taken in order to prevent the occurrence of the offence of infanticide. Such measures include prenatal education and counselling, continuity of care throughout the postpartum period and linking of maternity with specialist mental health datasets. Through identifying women at risk of postpartum illnesses, preconception counselling and proper management during pregnancy can significantly reduce the risk of such illnesses.²¹¹

The UK has taken notable strides towards the practice of these measures whereby projects have been taken up with the aim of linking maternity with specialist mental health datasets through which women with a susceptibility to PPD can be easily identified and linked to proper mental

²⁰⁶ Howard L, Bick D, 'When should women be screened for postnatal depression' 10 *Expert review on neurotherapeutics* 2, 2010, 152.

²⁰⁷ Howard L, Bick D, 'When should women be screened for postnatal depression' 152.

²⁰⁸ Musau V, 'Prevalence of postpartum depression among women delivering at Kenyatta National Hospital' Unpublished Masters in Obstetrics and gynecology, University of Nairobi, Nairobi, 2013, 25.

²⁰⁹ Musau V, 'Prevalence of postpartum depression among women delivering at Kenyatta National Hospital' Unpublished Masters in Obstetrics and gynecology, University of Nairobi, Nairobi, 2013, 10.

²¹⁰ Musau V, 'Prevalence of postpartum depression among women delivering at Kenyatta National Hospital' Unpublished Masters in Obstetrics and gynecology, University of Nairobi, Nairobi, 2013, 25.

²¹¹ Jairaj C, Seneviratne G, Bergnik V, Sommer I, Dazzan P, 'Postpartum psychosis: A proposed treatment algorithm' 37 *J Psychopharmacol* 10, 2023,

services.²¹² This is done both on national and local level.²¹³ Additionally, it is a requirement in the UK for healthcare professionals referring a woman to a maternity service to ensure that any information regarding past or present mental health problems is shared.²¹⁴ Through such provisions, detecting women at risk of PPD is made even easier. In Kenya, a few of these preventative measures are presently being practised such as educating families on the issue of PPD.²¹⁵ Thus, this study advocates for Kenya to take up similar measures and fully implement these measures in order to prevent the occurrence of PPD which may lead to the commission of infanticide.

4.4.3 Formation of social help groups for women suffering from PPD

Another recommendation that this chapter makes is with regard to formation of social help groups for women suffering from PPD and those convicted of infanticide resulting from PPD. One of the leading causes of infanticide is women having no support around them from both family and friends while also having difficult relationships with their partners.²¹⁶ Transitioning into motherhood is marked by emotional turmoil for some women, and lack of support towards these women can lead to PPD and eventually lead to the lives of the mother and the child being compromised.²¹⁷ Thus, it is evident that support in the postpartum period is instrumental in the emotional and most importantly, the physical wellbeing of the mother and the newborn.²¹⁸ Furthermore, numerous studies conducted in the past have depicted that the presence of strong social support networks enhance resilience to stress leading to protection of the woman from developing depression.²¹⁹

In the UK, services are rendered to provide such support to women suffering from PPD by the NHS. These include national support groups in form of a pre and postnatal advice and support

²¹² <https://www.gov.uk/government/publications/better-mental-health-jsna-toolkit/4-perinatal-mental-health>

²¹³ <https://www.gov.uk/government/publications/better-mental-health-jsna-toolkit/4-perinatal-mental-health>

²¹⁴ <https://www.gov.uk/government/publications/better-mental-health-jsna-toolkit/4-perinatal-mental-health>

²¹⁵ <https://www.cbtkenya.org/what-is-postpartum-depression-cbt-kenya/> on 5 April 2021.

²¹⁶ <https://www.nhs.uk/mental-health/conditions/post-natal-depression/overview/> on 4 August 2022.

²¹⁷ Corrigan C, Kwasky A, Groh C, 'Social support, postpartum depression, and professional assistance: a survey of mothers in the midwestern United States' 24 *The journal of perinatal education* 1, 2015, 48.

²¹⁸ Corrigan C, Kwasky A, Groh C, 'Social support, postpartum depression, and professional assistance: a survey of mothers in the midwestern United States' 49.

²¹⁹ Onger L, Wanga V, Otieno P, Mbui J, Juma E, Stoep A, Mathai M, 'Demographic psychosocial and clinical factors associated with postpartum depression in Kenyan women' 18 *BMC Psychiatry* 318, 2018, 6.

hotline.²²⁰ Local support groups are also available to provide help.²²¹ In Kenya, there are support groups available in form of peer support groups, many of them organized by non-governmental organizations.²²² There are also a few government owned institutions that offer such support services such as Chiromo Mental Health Hospital.²²³ This study therefore recommends that Kenya should take a similar approach to that of the UK where the ministry of health should be at the forefront of providing these services. This should be done in a manner that ensures that hospitals in the country are in the position to provide proper support services to women suffering from PPD. Moreover, the formation of local support groups in the country would be of essence as such groups provide women with comfortable environments which allow them to relate with other women who have suffered from the same condition.

4.4.4 Capacity training of relevant stakeholders involved in infanticide cases

A further recommendation that this chapter makes is with regard to capacity training of the relevant stakeholders involved in infanticide cases. These include judges, magistrates, police officers, among others. It has been suggested that the cognitive changes that are associated with postpartum mental illnesses have not been fully realized by the courts.²²⁴ This implies the insufficiency in terms of knowledge by the actors involved on issues involving PPD. The UK has taken note of this issue with regard to lack of awareness and understanding of mental health conditions.²²⁵ Suggestions have been made regarding training of legal actors involved in cases associated with mental health conditions. These recommendations include that training should be offered to the police in order to recognize the signs of mental health conditions.²²⁶

Additionally, recommendations have been made towards offering training to the judiciary which includes judges and magistrates so as to increase awareness of the presence of court

²²⁰ <https://www.nhs.uk/mental-health/conditions/post-natal-depression/overview/> on 4 August 2022.

²²¹ <https://www.nhs.uk/mental-health/conditions/post-natal-depression/overview/> on 4 August 2022.

²²² <https://stillamum.com/postpartum-depression-support/>

²²³ <https://stillamum.com/postpartum-depression-support/>

²²⁴ Friedman S, Sorrentino R, 'Commentary: postpartum psychosis, infanticide, and insanity – implications for forensic psychiatry', 40 *Journal of the American academy of psychiatry and the law* 3, 2012, 5.

²²⁵ McLeod R, Philipin C, Sweeting A, Joyce L, Evans R, 'Court experience of adults with mental health conditions, learning disabilities and limited mental capacity' BMRB and Liverpool John Moores University, Ministry of Justice research series 8/10, 2010, 16 <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/court-experience-adults-1.pdf> on July 2010.

²²⁶ McLeod R, Philipin C, Sweeting A, Joyce L, Evans R, 'Court experience of adults with mental health conditions, learning disabilities and limited mental capacity' 27.

users suffering from mental health conditions.²²⁷ Solicitors too have been recommended to receive training to increase their awareness since very few had in- depth knowledge of mental health conditions.²²⁸ These recommendations have been given with respect to all mental health conditions, thus seeing as infanticide is caused by PPD which is a mental health condition, these recommendations would be incredibly informative towards legal actors involved in infanticide cases.

In Kenya, significant steps have been taken towards increasing the knowledge and awareness on mental health conditions. These steps include training healthcare workers such as nurses and clinical officers by offering training courses in mental health.²²⁹ However, the same has not been done towards legal actors even though they are involved with people suffering from mental health conditions such as women facing PPD. Thus, this study recommends a similar approach like that of the UK to be adapted in the sense that proper recommendations should be made towards the judiciary and other legal actors. This would be of use to them as such recommendations may be used as guidelines towards achieving the greater goal which is proper understanding and awareness on mental health condition, specifically PPD.

4.4.5 Prevention of abuse of infanticide legislation which may provide a pass for abortion/elimination of unwanted children

Lastly, this chapter also makes the recommendation with regard to preventing abuse of the infanticide legislation which may provide a pass for abortion or elimination of unwanted children. In order to curb such a situation from occurring, records of clinical evidence of the antenatal period and postnatal medical assessments by experts should be availed.²³⁰ Expert evidence in relation to a defendant's disturbed mental state is a necessity in cases of infanticide.²³¹ Through production of such evidence, the courts are able to ascertain for sure that the defendant's mental was indeed incapacitated at the time the crime was committed.

²²⁷ McLeod R, Philipin C, Sweeting A, Joyce L, Evans R, 'Court experience of adults with mental health conditions, learning disabilities and limited mental capacity' 27.

²²⁸ McLeod R, Philipin C, Sweeting A, Joyce L, Evans R, 'Court experience of adults with mental health conditions, learning disabilities and limited mental capacity' 16.

²²⁹ *Kenya Mental Health Action Plan (2021-2025)*.

²³⁰ Arneet A, Jayanthi Y, Kumar Y, Raj S, 'Infanticide a concept' 3 *Journal of forensic science and medicine* 1, 2017, 45.

²³¹ Loughnan A, 'The strange case of infanticide doctrine' 32, *Oxford University Press*, 4, 2012, 705.

In the UK, the courts usually request for psychiatric reports when there is a concern regarding a person's mental well-being.²³² Such reports help the courts to make informed decisions which consider the individual's mental health condition.²³³ Furthermore, these reports evaluate whether the individual understands the nature of their actions.²³⁴ This practice is applied in all cases that involve the defendant's mental state being impaired at the time the offence was committed which includes infanticide cases. The situation is almost similar in Kenya where some courts, while deliberating infanticide cases, have been insistent on the issue of subjecting the defendant to a psychiatric assessment so as to establish her state of mind at the time.²³⁵ Furthermore, some courts have been careful not to allow for an easy way out for murdering mothers since in some cases, women plead PPD as a defence.²³⁶ Thus, in such type of cases, where no form of post-partum mental illness is found, then more severe charges are pressed.²³⁷ This practice then depicts the importance of producing psychiatric reports in cases of infanticide so as to properly affirm the defendant's state of mind. However, this practice is not actualized in all courts in the country. This study therefore advocates for mandatory production of psychiatric reports in all cases of infanticide so as to ascertain the mental state of the defendant. This will be especially useful in curbing murderous women from using the infanticide defence as a means of avoiding severe punishment.

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<https://concisemedico.co.uk/blogs/psychiatric-report-for-court-in-uk/#:~:text=The%20court%20typically%20requests%20psychiatric,the%20individual's%20mental%20health%20condition> on 2024.

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<https://concisemedico.co.uk/blogs/psychiatric-report-for-court-in-uk/#:~:text=The%20court%20typically%20requests%20psychiatric,the%20individual's%20mental%20health%20condition> on 2024.

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<https://concisemedico.co.uk/blogs/psychiatric-report-for-court-in-uk/#:~:text=The%20court%20typically%20requests%20psychiatric,the%20individual's%20mental%20health%20condition> on 2024.

²³⁵ Cherono S, 'Women who kill their children: murder or a case of punishing the sick,' Daily Nation 10 September 2018 < <https://nation.africa/kenya/news/women-who-kill-their-children-murder-or-a-case-of-punishing-the-sick-86022> > on 10 September 2018.

Cherono S, 'Women who kill their children: murder or a case of punishing the sick,' Daily Nation 10 September 2018 < <https://nation.africa/kenya/news/women-who-kill-their-children-murder-or-a-case-of-punishing-the-sick-86022> > on 10 September 2018.

²³⁶ Cherono S, 'Women who kill their children: murder or a case of punishing the sick,' Daily Nation 10 September 2018 < <https://nation.africa/kenya/news/women-who-kill-their-children-murder-or-a-case-of-punishing-the-sick-86022> > on 10 September 2018.

²³⁷ Cherono S, 'Women who kill their children: murder or a case of punishing the sick,' Daily Nation 10 September 2018 < <https://nation.africa/kenya/news/women-who-kill-their-children-murder-or-a-case-of-punishing-the-sick-86022> > on 10 September 2018.

4.5 Conclusion

This chapter has analysed the opportunity for law reform on Kenya's infanticide provision. Kenya's practices with regard to infanticide have not been uniform or standard. This chapter has therefore analysed what the UK courts have been doing in relation to cases of infanticide and whether adapting the same practices would be of benefit to the Kenyan legal system. Thus, following the discussion, it is evident that through reforming of the law, the legal system will be not only be unified, but also it shall conform to international best practice in so far as infanticide cases are concerned.

CHAPTER 5 : CONCLUSION AND AVENUES FOR FURTHER RESEARCH

5.1 Introduction

This study sought to establish whether the law in Kenya should continue criminalizing infanticide. This is pursuant to section 210 of the Penal Code of Kenya which criminalizes the offence. In doing so, the study has exhibited the need for the law in Kenya to take a different approach than it has been over the years and instead de-criminalize the offence of infanticide.

The study began by providing an overview of what the offence of infanticide constitutes, as well as some of the controversies generated by it. This chapter also introduced the research problem and highlighted the research questions that the study would be based on. The second chapter analysed the current approach that is taken towards women who commit infanticide in Kenya. This was done so through examining different cases of infanticide that have been decided upon in Kenyan courts, and the different approaches taken by the courts in their decisions. In the third chapter, the study assessed the development of the law relating to infanticide within the UK as a comparative jurisdiction. The Kenyan infanticide legislation was borrowed from that of the UK, thus assessing the developments in relation to the English law would be of use towards reforming the law on infanticide in Kenya. The fourth chapter analysed the opportunity for law reform on Kenya's infanticide provision. This was done so by examining both legal and institutional reform that the country can undertake, based off of the UK's practice on the same. Lastly, the ensuing segments of this chapter shall evaluate the practical challenges in the recommendations that have been put forward in the study and further avenues for research.

5.2 Possible challenges to the implementation of the suggested legal and institutional reforms

As has been discussed, the ways in which infanticide cases have been adjudicated in the country calls for reform within the legal system so as to accommodate the offence's unique nature. Implementation of these reforms faces several challenges as will be discussed.

The first of these challenges is the current economic strain faced by the country. The country continues to grapple with financial challenges which are caused by cash flow hinderances at the national treasury. This also causes problems within the county governments with regard to development projects at county level as the necessary funds are not disbursed. Furthermore, lack of funds within the government necessitates budget cuts at both levels of government. This means that changes to be affected regarding cases on infanticide may also be affected especially changes that are to be undertaken at an institutional level. Changes such as capacity training relevant stakeholders require funds to be allocated to so that they can be actualized. It has already been demonstrated that the government needs to be at the forefront in ensuring all necessary measures are taken to combat the prevalence of PPD in the country. Thus, the government should endeavour to achieve proper public finance management in order to ensure that funds are allocated to hospitals all around the country so as to provide adequate mental healthcare to women facing PPD.

Secondly, lack of political will also prove to be a hinderance towards achieving the suggested reforms. All the aforementioned reforms cannot be achieved without a level of political will being present. Political will shows the commitment of the relevant actors to achieve the recommendations put forward. Efforts should be made to persuade politicians that the reform being sought aligns with their objectives as politicians. Without the commitment of political leaders to address issues such as the one at hand then there may be resistance towards the change that is being sought. Therefore, the government should ensure that politicians and other legal actors are well informed and involved as without any political will or determination while trying to reform the law otherwise all efforts towards the same shall be futile.

Negative connotations to mental health matters within the society may also prove to be a challenge while striving to reform the law on infanticide. People suffering from mental health issues are usually subject to negative judgement and stigmatization from all around them, beginning from their family and friends. Furthermore, public stigma is often based on fear, misconception, and prejudice and women suffering from PPD suffer from the same. The resultant effect of the stigma may be worsening of the person's condition. As has been

discussed, PPD is an issue that has a unique and complex nature. This complexity is often not understood by most people, even legal actors such as judges. Thus, the government should endeavour to provide civic education to the people so that awareness may be raised on matters to do with mental health, more so PPD.

5.3 Avenues for further research

This study limited itself to assessing whether the offence of infanticide should still be criminalized in Kenya. Heavy emphasis has been given to the legal aspects that surround the offence through examinations of the manner in which such cases are decided upon and using the UK as a comparative jurisdiction. Through these examinations, it has been evident that there are many more factors that come into play when a woman commits infanticide. These include factors such as poverty, the stress that accompanies childbirth and providing for the child, lack of social support and domestic violence and abuse. In light of these factors, further research on sociological and psychological factors that contribute to infanticide would be of importance. Additionally, further research on the contributory role that gender roles and gender inequality plays in the occurrence of infanticide would be of use. This is because the uniqueness of the offence of infanticide also stems from the emphasis on the gender of the accused where the offence is restricted to women. Following up on the aforementioned area of further research, another area of research that would be of importance is the offence of infanticide committed as committed by men. This study restricted itself to the offence of infanticide as committed by women since the offence as it is known and understood today is specific to women only. However, men are also capable of committing the same offence and are also capable of suffering from PPD. Thus, it would be useful to study the effects of PPD in men and how the same can lead them to committing infanticide.

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