

**THE EFFECTIVENESS OF SENTENCING OF CRIMINAL OFFENDERS IN KENYA**

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By

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## **DECLARATION**

I, **ABIGAIL KAGAI INDIAZI**, 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.

Signed: .....

Date: .....

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

Signed:.....

**MUKAMI WANGAI**

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## Table of Contents

DECLARATION .....	II
ACKNOWLEDGEMENT .....	III
LIST OF CASES.....	VI
NATIONAL LEGISLATION.....	VII
ABSTRACT.....	VIII
1. INTRODUCTION .....	1
1.1 Background .....	1
1.2 Statement of the problem .....	2
1.3 Justification of study .....	2
1.4 Research objective.....	2
1.5 Research Questions .....	3
1.6 Methodology .....	3
1.7 Literature Review .....	4
1.8 Limitations .....	5
1.9 Chapter Summary.....	5
2. THEORETICAL FRAMEWORK .....	6
2.1 Theories of punishment.....	6
2.2 Positivism Theory .....	7
2.3 Deterrence Theory.....	7

3. THE SENTENCING REGIME IN KENYA .....	10
3.1 Introduction .....	10
3.2 The sentencing regime .....	10
3.2.1 The Constitution of Kenya .....	11
3.2.2 Statutory Guidelines .....	11
3.2.3 Case Law .....	12
3.3 Sentencing Policy Guidelines.....	13
3.3.1 Objectives of the sentencing guidelines .....	14
3.4 The role of Sentencing Policy Guidelines in addressing disparity in sentences .....	16
4. AN ANALYSIS OF THE FUTURE OF SENTENCING IN KENYA WITH THE SENTENCING GUIDELINES.....	21
4.1 Recommendations to the sentencing guidelines.....	21
4.1.1 Establishment of Sentencing Commission .....	21
4.1.2 Mandatory Minimum Sentences.....	22
4.1.3 Institutional Balance in Sentencing .....	23
4.1.4 Monitoring and Evaluation of the Sentencing Guidelines.....	25
4.2 Conclusion.....	25
5. SUMMARY AND CONCLUSION .....	27
Conclusion.....	28
BIBLIOGRAPHY .....	29

## LIST OF CASES

*Michael Stephen Okinda v Republic* [2015] eKLR.

*John Shikoli Atsunzi v Republic*[2016] eKLR.

*George Hezron Mwakio V Republic* [2010]eKLR

*Kennedy Munga v. Republic* [2011] eKLR

*Republic v Matano Katana* [2004]eKLR

*Fatuma Hassan Salo v. Republic*,[2006] eKLR.

*Peter M. Kariuki v Attorney General*, [2016] eKLR.

*Leonida Asiko v. Republic* [2006] eKLR.

*Fredrick Odhiambo Ogutu v Republic*, [2006] eKLR.

*Republic v. Fredrick Kazungu Diwani and Others* [2009] eKLR

*X and Y v Netherlands*, ECtHR judgement of 26 March 1985.

## **NATIONAL LEGISLATION**

Judiciary, *Report of the judicial taskforce on sentencing* (2016).

*Children Act*(Chapter 141 of 2012)

*Community Service Orders Act* (Act No.10 of 1998)

*Penal Code* (Cap 63 of 2009)

*Probation of Offenders Act* (Act No.28 of 1961)

*Sexual Offences Act* (Cap 62A of 2014)

Judiciary, *Sentencing Policy Guidelines* (2016).

## **ABSTRACT**

The main objective of this paper is to assess the effectiveness of sentencing in Kenya. Section 24 of the Penal Code highlights the punishments that can be accorded to an offender once they are convicted of a crime. The sentences range from custodial sentences to non-custodial sentences. This research intends to cover the various forms of punishment that can be issued to offenders mainly focusing on the judicial discretion that is applied with this. This area is of interest to this paper because collected data identifies that the sentencing system in Kenya is irregular and disproportionate. This is characterised by the disparities in the sentences that are given to offenders. Also, judges tend to rely on custodial sentences as a mode of sentencing even in instances where non-custodial sentences would still be effective. The research surrounds the fact that the unlimited discretion given to judges before the introduction of the Sentencing Policy Guidelines (2016) may have contributed to this irregularity and this disproportion. The Sentencing Policy Guidelines have put into place laws that act as a guide and that check the exercise of jurisdiction by the judicial officers. This paper looks into how this has been done and recommends the reforms and changes that could be done to the guidelines themselves in order to make the criminal justice system effective in the end. This study has also marked the progress of Kenyan law from a system of indeterminate sentencing to a determinate sentencing. The paper recommends the working together of the various players in the criminal justice system and evaluation of the sentencing guidelines as the way forward for the criminal justice system.

# 1. INTRODUCTION

## 1.1 Background

Sentencing of criminal offenders is an important part of the judicial system, as it indicates that the law is not dead and can be enforced upon those who contravene it. This is the stage of a criminal trial where those that are said to be guilty are given sanctions as a competent court finds suitable for the offender.<sup>1</sup> Sentences aim to punish offenders and make them pay for their offences or deter them and make them an example to the public. The concept of rehabilitation seeks to not only punish the offender but also aims to make them a better person through educating them, training them and offering other forms of help. The government also owes the society protection and this is made possible if criminal offenders are prevented from harming the community through reoffending.<sup>2</sup>

Since crime has been thought to be mostly influenced by the attitude and behaviour of a person, if an offender is helped to combat these, they are then inclined to abstain from crime or acquire skills that enable them overcome these influences. This is the main aim and goal for sentencing and punishing an offender.<sup>3</sup>

As much as the law has been successful in offering protection to prisoners and all detained persons<sup>4</sup>, it seems to have failed in ensuring the effectiveness of the penal system counting the fact that there exist cases of reoffending which shows that the reform of prisoners that is aimed to be achieved by a custodial sentence has failed. Also, the law seems to have overlooked the fact that in most instances these types of sentences are not permanent and in the end of it, the offender is released to the same society they had harmed and there are no systems put in place to

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<sup>1</sup>Lumumba PLO, 'Sentencing in Kenya: A search for the judiciary's prevailing policy and philosophy and the case for reform' *The Law Society of Kenya Journal* (2006), 117.

<sup>2</sup>Campbell-Holt C, *Lord Woolf: The Pursuit of Justice*, Oxford University Press, 2008, 283.

<sup>3</sup>Lumumba PLO, 'Sentencing in Kenya: A search for the judiciary's prevailing policy and philosophy and the case for reform', 120.

<sup>4</sup>Article 51, *Constitution of Kenya* (2010)

ensure the positivity of the sentence the offender served overflows even after the gates of the specific institutions they were in.

The Penal Code lists an array of punishments that could be issued to an offender but there still is an overutilization of custodial sentences.<sup>5</sup> There is also the issue of disparity of sentences, this is whereby offenders that are found to have committed similar crimes are given different sentences and this shows lack of consistency in the sentences given.

This paper seeks to look into the effectiveness of the sentencing system in Kenya while addressing the gaps that exist in between the goals of sentencing to the criminal justice system and the outcomes of sentencing itself.

## **1.2 Statement of the problem**

The current problem is the ineffective role played by the existing sentencing system in addressing offences in Kenya. This ties in with the function of judicial officers in sentencing and analysing what measures ought to be taken to ensure the effectiveness.

## **1.3 Justification of study**

It is evident as there still exists repeat offenders who have already served the various sentences that had been accorded to them at first instance. Taking into account the role of punishing offenders, the criminal justice system can be said to be broken if the punishment of offenders does not give back any results in terms of effectiveness and the usefulness of it.

This proposal seeks to research whether our legal framework can be more efficient and effective in achieving the above.

## **1.4 Research objective**

The research aims to question the current laws on sentencing and whether their effectiveness in addressing punishment of offenders is their foreseen end.

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<sup>5</sup> Legal Resources Foundation, *Sentencing in Kenya: Practice, Trends, Perceptions and Judicial Discretion* (LRF 2011), 22

## **1.5 Research Questions**

The following questions will be posed:

1. What the legal framework in Kenya is in regards to sentencing
2. What objective is employed in punishment of offenders in Kenya and the effectiveness of it.
3. Whether the new sentencing guidelines seek to remedy the situation and the shortfalls of the criminal justice system.
4. The recommendations to the new sentencing guidelines.

## **1.6 Methodology**

This study will use a qualitative approach to its study of the current laws in Kenya and how they aim to help the judicial system in ensuring the effectiveness of sentences. Kenya also introduced the Sentencing Guidelines in 2016 which shall also be analysed in this paper. This study will also involve analysing a couple of decided cases to bring out a proper understanding of the steps involved when issuing sentences to offenders and to also point out the existence of repeat offenders.

There shall also be the use of books and articles that have been written that touch on the topic of sentencing and that analyze the legal framework that has been put in place. Further, on understanding the legal framework on sentencing, this paper shall also consider a brief comparative analysis with America.

The study will also make use of quantitative data to support the study and justifications of assertions. This study shall involve a visit to two prisons in Kenya, Langata Women's Prison and Kamiti Maximum Prison. The choice of these two prisons is characterized by their close proximity to Nairobi which serves as convenient. Besides that, access to them will be easier in terms of the partnership they have with Strathmore Law School. This part of the study shall involve collecting data through interviewing various prisoners. In interviewing these prisoners, the study is limited to offenders who have been sentenced with sexual offences because of the

convenient number available for the purposes of making comparisons in terms of the sentences. The data collected from this shall be presented in tables in Chapter Three of this paper.

## **1.7 Literature Review**

This research aims to find out whether the law governing custodial sentences has been effective in the rehabilitation of criminal offenders. Through answering this topic, there is the need to analyze what other scholars have written on the same topic.

Michael Tonry, does an analogy of the prison system and compares it to the health care systems. He describes hospitals as institutions that have two missions which include saving lives and maximizing on a patient's health. He attributes their success to the fact that they do not stand alone but are a part of a comprehensive health care system. He gives this as the comprehensive system that hospitals form part of:

*'Includes preventive public health programs, service delivery by outpatient facilities and gate-keeping by primary physicians. For those released from hospital, the system involves medication, nursing homes, home care and hospices. Substantial efforts are made to ensure the well-being of a patient within and outside the hospital.'*

To him prosecutors and judges perform the 'gatekeeping' function but they do this without guidance from an agreed 'diagnostic area'. This is the reason why the only successes that can be attributed to prisons is incapacitating offenders from committing crimes and other results such as rehabilitation of these offenders is not seen because that would involve a broader working system that does not exist.<sup>6</sup>

Lord Bingham states that for a punishment to be effective to the reform of a criminal, the punishment should not only fit the crime but also 'proportionate to the criminal'<sup>7</sup>. This basically supports the idea that for a custodial sentence to be effective, it should aim to do more than just apply what goes by the law as the appropriate sentence for an offender but look into other factors that could help reform the offender.

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<sup>6</sup> Tonry M, 'Has the prison a future?' in Michael Tonry (ed), *The Future of Imprisonment*, Oxford University Press, 2004, 7.

<sup>7</sup> Bingham T, 'Crime and Punishment' in *The Business of judging: Selected Essays and Speeches*. Oxford University Press, 2000.

Charles Barton describes that one of the main problems affecting the judicial system is the fact that the legislation on punishment is not only instrumental but the mentality that:

*'The wrongdoer should be given their just deserts'*

He views this to be a rigid approach that does not help in reforming criminal offenders.<sup>8</sup>

## **1.8 Limitations**

Challenge of conducting interviews-The participants may be hesitant to give away information that may make this study effective. Also, the number of prisoners required to ensure that making a comparison of the sentences may be limited which will force the interview to be limited to few offences and few interviewees.

## **1.9 Chapter Summary**

Chapter One is an introduction. This chapter introduces the topic of this dissertation as what the dissertation will be about.

Chapter Two of this paper is on the Theoretical Framework that surrounds the perspective which the paper borrows from and how the paper will be examined.

Chapter Three of this paper will look at the sentencing regime in Kenya, its development and the current structure of it. Chapter Four will be the recommendations for the purpose of the gaps that exist in it that could make the sentencing system better.

Chapter Five is the final chapter which shall include a summary of all the chapters and a conclusion.

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<sup>8</sup> Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice' *In Restorative justice: Philosophy to practice*, ed. Heather Strang and John Braithwaite, Ashgate Publishing Company, 2000, 5.

## 2. THEORETICAL FRAMEWORK

This part of the paper addresses the perspective from which any system of sentencing is structured towards. It is that there is need for social order and for the existence of a social contract between a sovereign and its subjects. This contract is what gives the sovereign the power to punish his subjects.

### 2.1 Theories of punishment

When it comes to sentencing and punishment, there are two philosophical theories that surround this: the utilitarian theory and the retributive theory.

#### The utilitarian theory

The utilitarian theory is based on the premise that punishment deters people from committing a crime.<sup>9</sup> It is based on what is best for the public as a whole; that a crime is punished and the whole community benefits as a whole. Also that the punishment should be greater than the benefit that is achieved from committing that crime, eventually because of this, people are deterred from committing crime.

Jeremy Bentham, in relation to achieving the common good viewed punishment in two ways. The first one being that it should be done when the costs of punishment are outweighed by the benefit that comes out of that punishment. The second view is that punishment should not be groundless, inefficacious, unprofitable and needless.<sup>10</sup>

Utilitarian theorists also believe that for a punishment to benefit the offender, the punishment should be customized to fit the offender.<sup>11</sup>

#### The Retributive Theory

Retribution theory is based on the theory that 'punishment must fit the crime'<sup>12</sup> and that a moral consideration that could substitute punishment of an offender cannot be included; that the guilty deserve to be punished.

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<sup>9</sup> Baumgardt D, *Bentham and the Ethics of Today*, Princeton University Press, 1952, 218.

<sup>10</sup> Draper T, 'An Introduction to Jeremy Bentham's Theory of Punishment', 5 *Journal of Bentham Studies* (2002), 7.

<sup>11</sup> Draper T, 'An Introduction to Jeremy Bentham's Theory of Punishment' 13.

Immanuel Kant supports that guilt should be enough justification for justice. That a human being is a free being and if his actions interfere with the rights of other human beings then he gives up his own right which justifies the interference of his right by other people.<sup>13</sup>

Custodial sentencing arises out of both theories: that the guilty deserve to be punished and that the punishment should fit the crime that has been committed.

## 2.2 Positivism Theory

Hans Kelsen describes a legal system as a system that has norms that prescribe sanctions. Sanctions are rewards or punishments that arise from a condition. The norms that make up a legal system are not valid, in fact they acquire their validity from a *Grundnorm*. This is either a constitution or any other source of law. To him, whatever norms there are, they are meant to further social order in a particular society.<sup>14</sup> Also his theory emphasizes that the law is meant to shape the behaviour of persons. This can either be negatively through a punishment or positively through a reward.<sup>15</sup>

The importance of social order in this paper comes out from the importance of issuing a custodial sentence. A custodial sentence intends to deter an offender so that they do not commit that crime again. Crimes are distinguished from civil wrongs because of the aspect that they tend to affect the whole community beyond the individual who was wronged. Therefore through this, the aspect of social order also relates to the punishment of crimes.

## 2.3 Deterrence Theory

To Jeremy Bentham, an offender usually weighs out the benefit that would arise from committing a crime against the weight of the punishment he is meant to suffer.<sup>16</sup> Nevertheless, he still identifies a flaw in their judgment that can at times lead individuals to choose something

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<sup>12</sup> Bindal A, "Rethinking Theoretical Foundation of Retributive Theory of Punishment", 51 *Journal of Indian Law Institute* (2009), 310.

<sup>13</sup> Kant I, *The Metaphysics of Morals*' Cambridge University Press

<sup>14</sup> Kelsen H, '*Pure Theory of Law*' 2 Berkley Carlifornia (1967) 32

<sup>15</sup> Patrono M, 'Hans Kelsen: A peacemaker through law' 45 *Victoria University of Wellington Law Review*,(2014), 653.

<sup>16</sup> Carlsmith K and Darley J 'Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment',83 *Robinson Journal of Personality and Social Psychology*' (2002), 284.

that may be aligned to their interest but not to the general interest of the public. To correct this, he suggests that the cost and benefit approach should be played out to achieve a situation where the criminal activity ends up looking unattractive to an individual.<sup>17</sup> Therefore, punishment should be proportional to the crime that has been committed. (Thomas Hobbes in support of this, relies on the view that people are generally driven by self-interest and seek material gain which could result in both conflict and crime.)

There should therefore be a social contract between the people and the government; the people entrusting the government to protect them from conflict and crime. The role of the state therefore is to enforce this social contract at times through the use of force. Therefore punishment comes into play and the government(the state) uses this to maintain the contract between itself and the people.<sup>18</sup> The view of the social contract and that severity of punishment should not outweigh the crime committed is also supported by Cesare Beccaria.<sup>19</sup>

The main aim of deterrence is seen to keep perpetrators away and to discourage the commission of crimes.<sup>20</sup> In the case *X and Y v Netherlands*<sup>21</sup>, the European Court of Human Rights seemed to reiterate the same sentiments on a case dealing with child abuse. In a recent Kenyan case *John Shikoli Atsunzi v Republic*<sup>22</sup>, Judge Mwita also reflected the same opinion stating that the object of sentencing should also be to deter repeat offenders.

In *John Shikoli Atsunzi v Republic*, the judge gives a very elaborate description of what a sentence should entail. Besides punishing an offender, the purpose of a sentence is also to reform the said offender. He also states that in order to reduce instances of repeat offences, sentences should be given while putting into consideration other similar offences and the situation of the offender.

This paper posits the deterrence theory but with the view that the legislation in Kenya does not deter offenders effectively. This can be backed up by case law as seen earlier in

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<sup>17</sup> Carlsmith K and Darley J 'Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment', 285.

<sup>18</sup> Hobbes T, 'Leviathan', *Renascence Editions*, 1999, 79.

<sup>19</sup> Beccaria C, '*An essay on crimes and punishment*', The federalist papers project, 13.

<sup>20</sup> Carlsmith K and Darley J 'Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment', 285.

<sup>21</sup> *X and Y v Netherlands*, ECtHR judgement of 26 March 1985

<sup>22</sup> *John Shikoli Atsunzi v Republic*[2016] eKLR

the case *George Hezron Mwakio v Republic*<sup>23</sup> where the accused was a repeat offender, in court because of defilement charge.

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<sup>23</sup> *George Hezron Mwakio V Republic* [2010]eKLR

### 3. THE SENTENCING REGIME IN KENYA

#### 3.1 Introduction

A criminal justice system's efficiency is judged on the basis of the outcome of the sentences issued to the criminals.<sup>24</sup> This therefore makes it important for sentencing to be guided through a criterion that eventually achieves the goals of the criminal justice system. This part of the paper shall address the sentencing regime that exists in Kenya and the gaps that exist in the process itself. The concluding part of this paper shall address the newly introduced Sentencing Policy Guidelines and the structure.

#### 3.2 The sentencing regime

Section 24 of the Penal Code provides for the sentences that can be granted by a court. They include both imprisonment, the death penalty and other non-custodial sentences.<sup>25</sup> The structure of the law in Kenya as seen in both the Penal Code<sup>26</sup> and the Sexual Offences Act<sup>27</sup> provide minimum custodial sentences or an alternative or additional minimum and maximum fines. For most statutes however, the maximum sentence is provided. Looking into the Penal Code, there exists exceptions that depart from the general structure-minimum custodial sentences. A mandatory death sentence is provided for the offence of treason and murder in Section 40 and Section 203 of the Penal Code respectively. Section 89 of the Penal Code also provides for both minimum and maximum sentence for the offence of possession of firearms.

With the kind of structure seen above, it is overt that judges and other judicial officers are clothed with so much discretionary power when it comes to sentencing offenders save for the offences that attract mandatory sentences.<sup>28</sup> In the exercise of this power, the judicial officers are guided by principles in statute, case law and the Sentencing Policy Guidelines of 2016 by the Chief Justice<sup>29</sup>. A breakdown of the principles as provided by law is as seen below.

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<sup>24</sup> Migai A and Kinyanjui S, 'Towards structured sentencing in Kenya: A case for reform', 9 *African Journal of Criminology and Justice Studies* (2016), 266.

<sup>25</sup> Section 24, *Penal Code* (Cap 63 of 2009)

<sup>26</sup> *Penal Code* (Cap 63 of 2009)

<sup>27</sup> *Sexual Offences Act* (Cap 62A of 2014)

<sup>28</sup> Kameri-Mbote P and Akech M, *Kenya: Justice Sector and the Rule of Law*, The Open Society Initiative for Eastern Africa, Nairobi, 2011.

<sup>29</sup> Judiciary, *Sentencing Policy Guidelines* (2016).

### 3.2.1 The Constitution of Kenya

Judicial officers through the provisions directed at public officers are expected to adhere to the principles of good governance, integrity, transparency and accountability.<sup>30</sup> They are also expected to act fairly and with impartiality and to carry out their functions *'in a manner that promotes public confidence in the integrity of the office.'*<sup>31</sup> Public confidence is viewed to be very important in the administration of justice. This is because it puts trust of the public to believing in the legitimacy of the institutions that are in place to ensure criminal justice in a society. Therefore if the public trusts these institutions, they will show the willingness to cooperate and work with them. For example, individuals become motivated to report crimes that are committed and others show the willingness to participate as witnesses in courts.<sup>32</sup>

Their discretion is also expected to involve the laws of alternative dispute resolution.<sup>33</sup> Specifically when it comes to children, the Constitution provides that they should not be detained unless it is done as a measure of last resort, and even then, the detention should be for the shortest time possible.<sup>34</sup> In *Republic v Matano Katana*, the judge explained that this law is intended to extend parental responsibility, which is a right of a child, even when the child has acted in conflict with the law.<sup>35</sup> Parental responsibility is important for the welfare of a child as it makes it a duty for a parent to protect the child from abuse and offer any other form of protection that they child may need according to their evolving capacities.<sup>36</sup> Reducing and limiting the absence of parental responsibility from a child, even when in violation with the law, is the intention of this law.

### 3.2.2 Statutory Guidelines

There are guidelines in various statutes that direct judicial officers towards the exercise of their discretion in their role of sentencing offenders.

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<sup>30</sup> Article 10(1) and 10(2), *Constitution of Kenya* (2010)

<sup>31</sup> Article 73(2), *Constitution of Kenya* (2010)

<sup>32</sup> Hough M and Roberts J, 'Public confidence in justice: An international review', <http://www.icpr.org.uk/media/32918/public%20confidence%20in%20justice%20international%20review.pdf>

<sup>33</sup> Article 159(7), *Constitution of Kenya* (2010)

<sup>34</sup> Article 53(1)(f), *Constitution of Kenya* (2010)

<sup>35</sup> *Republic v Matano Katana* [2004]eKLR

<sup>36</sup> Section 23, *Children Act*(Chapter 141 of 2012)

The Penal Code requires the judicial officer to put into consideration the circumstances of the offence and the character of the offender.<sup>37</sup> They are empowered for this cause by Section 329 of the Criminal Procedure Code that allows them to retrieve any evidence that would enable them to arrive at an appropriate sentence. Similar powers are granted by the Community Service Orders Act where the judge can be granted with information of the offender and the offence from the community service officers.<sup>38</sup>

Section 4 of the Probation of Offenders Act highlights the factors that a judge is to consider when giving a probation order. They include: *youth, character, antecedents, home surroundings, health or mental condition of the offender, the nature of the offence and any extenuating circumstances in which the offence was committed.*<sup>39</sup>

### 3.2.3 Case Law

Through the decisions arrived at by judges and magistrates in cases, the jurisprudence that is relied on when it comes to sentencing of offenders can also be derived.

In *Fatuma Hassan Salo v. Republic*, Justice Makhandia stated that the court should be guided by evidence and sound legal principle when it comes to the arrival of its decision. He also stated that the court should put into consideration all the relevant factors and exclude the irrelevant factors.<sup>40</sup>

Further in *Peter M. Kariuki v Attorney General*, the Court of Appeal stated that a court has been granted discretion when it comes to issuing a sentence. However, this discretion is not planted on any definite rules. Nevertheless, it was stated to be the duty of the judge to exercise this discretion in a manner that is both judicial and reasonable- not upon caprice or personal opinion.<sup>41</sup> This has been emphasized in the judgments of other cases to be useful to the appeal court when analyzing the judgment of a lower court.<sup>42</sup>

Case law has also placed an emphasis on the application of mitigating factors in the issuance of sentences. Before its hearing at the High Court, the magistrate at the trial court did not consider

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<sup>37</sup> Section 35, *Penal Code* (Cap 63 of 2009)

<sup>38</sup> Section 3(3), *Community Service Orders Act* (Act No.10 of 1998)

<sup>39</sup> Section 4, *Probation of Offenders Act* (Act No.28 of 1961)

<sup>40</sup> *Fatuma Hassan Salo v. Republic*, [2006] eKLR.

<sup>41</sup> *Peter M. Kariuki v Attorney General* [2016] eKLR.

<sup>42</sup> *Leonida Asiko v. Republic* [2006] eKLR.

the mitigating factors of the accused in the case *Fredrick Odhiambo Ogutu v Republic*.<sup>43</sup> The judge at the High Court held that in relation to paragraph 23 of the Judiciary Sentencing Guidelines, the court is required to consider both mitigating and aggravating circumstances. The trial court was therefore held to be at fault for not putting this into consideration.

### 3.3 Sentencing Policy Guidelines

Uniformity and certainty is fundamental in a justice system. This is not attainable if the role of sentencing is solely placed upon the discretion of judicial officers. Sentencing in Kenya has been marked by disparities, lack of uniformity and transparency in the decisions arrived at by the judges. This can be emphasized through a research study conducted to find out the disparities in the sentences that are given by judicial officers to offenders of similar offences.<sup>44</sup>

#### **KAMITI MAXIMUM PRISON**<sup>45</sup>

<b>Offence</b>	<b>Prisoner</b>	<b>Length of sentence</b> <sup>46</sup>
Rape	Prisoner 1	15 years
	Prisoner 2	25 years
	Prisoner 3	Life Imprisonment
	Prisoner 4	Life Imprisonment
Defilement	Prisoner 1	15 years
	Prisoner 2	20 years
Attempted Rape	Prisoner 1	5 years
	Prisoner 2	10 years

<sup>43</sup> *Fredrick Odhiambo Ogutu v Republic*, [2006] eKLR.

<sup>44</sup> This research was carried out between September 2016 and November 2016. Data was collected from Langata Women's Prison and Kamiti Maximum Prison.

<sup>45</sup> The research in this prison was conducted through an interview of eight prisoners, convicted of the crimes of rape, attempted rape and defilement

<sup>46</sup> For the length of the sentence indicated in years indicates the period which the offender has been sentenced to serve in prison. For example where the table indicates fifteen years, the offender would be expected to be held in prison and released after fifteen years. Life imprisonment on the other hand means that the offender will be held in prison for the rest of their life.

Section 4 of the Sexual Offences Act provides for a sentence of imprisonment for a term not less than 5 years and can be extended to life imprisonment. Section 3(3) of the same Act awards the crime of rape the sentence of imprisonment for a term of not less than ten years and can be extended to life imprisonment. Section 8 of the Sexual Offences Act also provides for the offence of defilement with a child of the age between sixteen years and eighteen years as was in this case. This offence attracts the sentence of imprisonment for a term that is not less than fifteen years.<sup>47</sup>

### **LANGATA WOMEN'S PRISON<sup>48</sup>**

<b>Offence</b>	<b>Prisoner</b>	<b>Length of sentence</b>
<b>Rape</b>	Prisoner 1	Life imprisonment
	Prisoner 2	Life imprisonment
<b>Defilement</b>	Prisoner 3	Life imprisonment
	Prisoner 4	Life imprisonment

The justice system in Kenya has also focused so much on custodial sentences hence playing the role of excluding non-custodial sentences.<sup>49</sup> With the aim of remedying this, the Chief Justice appointed a Taskforce on Sentencing on 16th June 2014. This Taskforce came up with the Sentencing Guidelines of 2016. These guidelines are aimed to provide a structure for the exercise of the discretion of judicial officers as opposed to completely doing away with the role of discretion for a judge.<sup>50</sup>

#### **3.3.1 Objectives of the sentencing guidelines**

The objective of the guidelines is to guide the court in the exercise of its jurisdiction through a standard framework. With this sentencing is aimed to be done in a transparent and objective manner which makes it easy for the purposes of accountability. As discussed above, this way, the discretion of the court is not done away with, it is still exercised but in a limited and structured

<sup>47</sup> *Sexual Offences Act*, Cap 62A of 2014

<sup>48</sup> This research was conducted through an interview with four prisoners, convicted of the crimes of rape and defilement.

<sup>49</sup> Judiciary, *Sentencing Policy Guidelines* (2016), 3.

<sup>50</sup> Judiciary, *Report of the judicial taskforce on sentencing* (2016), 16.

way. The objectivity of the sentences themselves is achieved through the principles that are provided by the guidelines and not based on the subjective opinion of the judge.<sup>51</sup>

The guidelines in guiding the process of the sentencing, they also align the process of sentencing to the requirements and the provisions of the Constitution.

The sentencing guidelines are also framed to address the problems that existed before they were introduced by the Chief Justice in 2016.<sup>52</sup> Some of these problems as identified by the Taskforce on Sentencing that was put in charge (of conducting a study of how sentencing in Kenya is done and how to improve it) by the Chief Justice include the overutilisation of custodial sentence and the disparities in sentences. The guidelines seek to address this by promoting the use of non-custodial sentences and guide the sentencing of specific groups of offenders according to their differing and unique needs.

The Sentencing Guidelines provide a foundation for sentencing in Kenya. They offer specific guidelines on some issues that are fundamental in the role of sentencing. The guidelines provide for a three-step approach that is to be used by a court when referring to the Sentencing Guidelines;

1. **Sentencing Options-** The court is meant to consider the sentencing options that are provided for by the statute where the crime falls under. This means a reference to the statute that provides for the crime in question.
2. **Custodial v Non-Custodial-** For the statutes that provide for both custodial and non-custodial options, the guidelines give principles that are to be considered in analysing which of these two orders would be the most appropriate.
3. The third step is twofold, the choice that is to be considered depends on which option was made in step 2.
  - a. For a **non-custodial sentence**, the guidelines have also provided a policy through which the court's discretion is to be applied in choosing the most appropriate non-custodial sentence and eventually mitigation and aggravating circumstances are expected to be put into consideration.

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<sup>51</sup> Judiciary, *Sentencing Policy Guidelines* (2016), 11.

<sup>52</sup> Judiciary, *Sentencing Policy Guidelines* (2016), 12.

- b. For **imprisonment**, the same applies: that the guidelines have provided for a policy to be used in determining how long the term of imprisonment should be after the consideration of aggravating and mitigating circumstances.<sup>53</sup>

In addition to this there is also a provision that guides with sentencing special categories of people such as children, the elderly, female offenders, those with disabilities, terminal illnesses and those with mental illnesses.<sup>54</sup>

### **3.4 The role of Sentencing Policy Guidelines in addressing disparity in sentences**

As discussed above, it is evident that a judge's discretion in issuing a sentence is still deemed to be within his powers and legal as long as the sentence falls within the required range by law.<sup>55</sup> This way disparities in sentences come to surface. Therefore any mechanism that could be set in place to address these disparities targets the discretion of the judicial officer, mostly to limit it.

There are different approaches used in different jurisdictions to address disparity in sentences. The guidelines that are used to address this issue seek to act as guidance to the judicial officer that help formulate an appropriate sentence depending on the case that has been presented to him.<sup>56</sup> This is because cases are affected by different circumstances and factors.

Two systems of sentencing namely determinate and indeterminate sentencing, both discussed below, mark the different approaches that have been put in place to guide the judicial officer's discretion in sentencing.

Indeterminate sentencing is characterized by statutes providing a wide range of punishments for the judicial officer to choose from. The legislators only set out the maximum sentence an offender can be given and it is upon the judge to exercise his discretion on this. The judge's authority is supplemented by other bodies: correctional officials and the parole bodies.<sup>57</sup> After a sentence is given by a judge, these bodies' role is to grant release dates depending on their view of whether the prisoner has been reformed. Further, once released the parolee (the prisoner

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<sup>53</sup> Judiciary, *Sentencing Policy Guidelines* (2016), 5.

<sup>54</sup> Judiciary, *Sentencing Policy Guidelines* (2016), Part 3.

<sup>55</sup> Migai A and Kinyanjui S, 'Towards structured sentencing in Kenya: A case for reform', 272.

<sup>56</sup> Migai A and Kinyanjui S, 'Towards structured sentencing in Kenya: A case for reform', 272.

<sup>57</sup> Mackenzie D, 'Sentencing and Corrections in the 21st Century: Setting the Stage for the Future' *Department of Criminology and Criminal Justice* (2001), 6.

released on parole) is not free from a second imprisonment. He can be returned to prison under the original sentence if they violate the conditions given for their original release.<sup>58</sup>

This system creates so much disparity in the kind of sentences that given to offenders and the uncertainty of the length of imprisonment that an offender is meant to get.<sup>59</sup> The power given to the judicial officer is broad and also unstructured. The uncertainty of the sentence arises because it also relies on the discretion of either the parole board or the correctional officers.<sup>60</sup>

The aim of indeterminate sentencing is to individualize the sentence. That once the judge had issued the maximum sentence, it is left upon the other bodies to analyze the rehabilitation of the offenders and therefore decide how long the offender's sentence can be.<sup>61</sup> This depends on their observations on how the prisoner has been reformed.

Evidently, the judge's discretion is exercised fully in this system but the effectiveness of it is questionable. As stated above, public confidence in the criminal justice system contributes to its effectiveness.<sup>62</sup> The ineffectiveness is attributed to the lack of confidence by the public in the system because of the irregularities that exist and eventually make unreliable.<sup>63</sup>

The determinate sentencing system, contrary to the former system, limits the discretion of the judicial officers to specific guidelines which become the framework that makes sentencing more objective and manageable.<sup>64</sup> The American system further allows the judge to give a sentence that departs from the guidelines that are given. The judge then has to write the reasoning that led him to arrive to that sentence.<sup>65</sup>

Seemingly both systems are structured in the belief that judicial discretion should not be entirely eliminated, but that it should operate within much narrower bounds, should be informed by other standards. The Taskforce on Sentencing that was appointed by the Chief Justice categorized the Kenyan sentencing system as an indeterminate system evidenced by the injustices that have been

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<sup>58</sup> Schulhofer S, 'Due process of sentencing' 4 *University of Pennsylvania Law Review*, 734.

<sup>59</sup> Travis S, 'Guiding the Sentencing Court's Discretion: A Proposed Definition of the Phrase Non-Violent Offense under United States Sentencing Guideline 5K2.13' 86 *Journal of Criminal Law and Criminology* (1996), 532-537.

<sup>60</sup> Mackenzie D, 'Sentencing and Corrections in the 21st Century: Setting the Stage for the Future' 6.

<sup>61</sup> Mackenzie D, 'Sentencing and Corrections in the 21st Century: Setting the Stage for the Future' 6.

<sup>62</sup> Hough M and Roberts J, 'Public confidence in justice: An international review'

<sup>63</sup> Schulhofer S, 'Due process of sentencing' 4 *University of Pennsylvania Law Review*, 734.

<sup>64</sup> Migai A and Kinyanjui S, 'Towards structured sentencing in Kenya: A case for reform', 273.

<sup>65</sup> Travis S, 'Guiding the Sentencing Court's Discretion: A Proposed Definition of the Phrase Non-Violent Offense under United States Sentencing Guideline 5K2.13', 536.

brought about in the exercise of discretion by the judicial officers.<sup>66</sup> For example, under the Sexual Offences Act, instances that show that the unique circumstances that exist between the offender and the offence committed had not been put into consideration. Boys convicted into borstal institutions for having defiled girls who are their peers yet they had engaged in consensual sexual conduct.<sup>67</sup> Another unjust measure imposed by the sentencing system is the punitive mandatory fines that are imposed by the Forests Act which have led to the imprisonment of offenders because of their inability to pay the fines.<sup>68</sup> For instance the Kshs. 50,000 fine imposed for prohibited acts in forests under section 52 (2) of the Forests Act.

In light of this, Kenya has adopted the determinate system of sentencing where judges and magistrates in Kenya are guided by principles of law in making decisions in order to ensure consistency and transparency. They serve as reference for both judicial officers and other practitioners that engage with courts especially in matters of sentencing.<sup>69</sup>

There are many competing theories that encompass Criminology and sentencing to be specific as viewed in Chapter 2. When it comes to setting up a sentencing guideline, what guides the policies that are formed are the theories that are in line with the issues the sentencing guideline seeks to address.<sup>70</sup> The former Chief Justice, Hon. Willy Mutunga states that the purpose of the Sentencing Guidelines of 2016 is to curb the disproportionate and the inconsistency of the sentences that have been issued in criminal cases. He breaks down the inconsistency to include: the undue preference for custodial sentences despite the numerous options for custodial sentences. Also the unjustified disparity in the sentences issued to offenders who have committed similar offences. He explains that addressing these challenges would help in the administration of justice.<sup>71</sup>

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<sup>66</sup> Judiciary, *Report of the judicial taskforce on sentencing* (2016), 11.

<sup>67</sup> Judiciary, *Report of the judicial taskforce on sentencing* (2016), 12.

<sup>68</sup> Judiciary, *Report of the judicial taskforce on sentencing* (2016), 11.

<sup>69</sup> Judiciary, *Sentencing Policy Guidelines* (2016), 2.

<sup>70</sup> Wicharaya T, *Simple Theory, Hard Reality: The Impact of Sentencing Reforms on Courts*, State University of New York Press, 1995, 3.

<sup>71</sup> Judiciary, *Sentencing Policy Guidelines* (2016), 2. A message from the Chief Justice.

Tamasak Wicharaya states that a sentencing guideline model should have two components; the control over judicial decisions as well as the deterrence and incapacitative effects of the sentence to the offender.<sup>72</sup>

The mandatory minimum sentences ensure that the principles of deterrence and incapacitation are adhered to by mandating that those who commit specific kind of offences get to serve a sentence of imprisonment. The sentencing guidelines go a step further in enforcing this by enforcing that a fine should not serve as a substitute to a term of imprisonment where a minimum sentence has been provided for. And also that the offender should not be given a sentence of period shorter than that which has been prescribed by law.<sup>73</sup> In the case *Kennedy Munga v Republic*, the accused was found guilty of defilement and while the Sexual Offences Act<sup>74</sup> provides a sentence of imprisonment for those found guilty of the offence, the offender was fined and an addition of a probation order was also issued.<sup>75</sup>

The effectiveness of a sentence has been emphasized as an important factor that governs the principles of sentencing. The effectiveness has sometimes been viewed in terms of ensuring that the punishment should benefit the offender in that it is customized to fit the offender. With this, the guidelines have also directed that the sentence can also be served anywhere else other than in prison. For example where an offender has been convicted of an offence under the Narcotic and Psychotropic Substances (Control) Act, the court should make an order requiring the offender to serve a term in a rehabilitation centre.<sup>76</sup> This aims to ensure that this kind of offender especially if found to be a drug addict, not only gets punished for the offence committed but also get the help they may need.

Backing up the theory of ensuring the effectiveness of a sentence through ensuring that the sentence is customized to fit the offender, the sentencing guidelines have guided the courts on when a custodial sentence should be chosen over a non-custodial sentence. The sentencing guidelines direct that where there is an option of a non-custodial sentence, it should be preferred to a custodial sentence unless the objectives of sentencing in that instance cannot be met through

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<sup>72</sup> Wicharaya T, *Simple Theory, Hard Reality: The Impact of Sentencing Reforms on Courts*. 8.

<sup>73</sup> Judiciary, *Sentencing Policy Guidelines* (2016), 20.

<sup>74</sup> Section 8

<sup>75</sup> *Kennedy Munga v. Republic* [2011] eKLR

<sup>76</sup> Section 58(1), *Narcotic Drugs and Psychotropic Substances (Control) Act*.

a non-custodial sentence.<sup>77</sup> The guidelines further direct the court to the fact that the sentence should be intended to steer the offender from crime. As stated above, the guidelines provide for the factors that are to be taken into account when deciding between a custodial and a non-custodial sentence.<sup>78</sup>

Evidently, these sentencing guidelines have been introduced and have the potential of conducting reform in the sentencing system in Kenya if adhered to. These guidelines are however not exhaustive. The taskforce on Sentencing that was appointed by the Chief Justice recommends a gradual review of the sentences in order to address specific offences and their developments. The establishment of a Sentencing Committee was also suggested. Whose purpose would be to developing sentencing guidelines that are offence-specific in consultation with the relevant players involved in the judiciary.<sup>79</sup> There is also a part to be played by other players in the criminal justice system other than judges and magistrates in order to streamline the sentencing regime in Kenya.<sup>80</sup>

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<sup>77</sup> Judiciary, *Sentencing Policy Guidelines* (2016), 21.

<sup>78</sup> Judiciary, *Sentencing Policy Guidelines* (2016), 21.

<sup>79</sup> Judiciary, *Report of the judicial taskforce on sentencing* (2016), 16-17.

<sup>80</sup> Migai A and Kinyanjui S, 'Towards structured sentencing in Kenya: A case for reform' 275.

## **4. AN ANALYSIS OF THE FUTURE OF SENTENCING IN KENYA WITH THE SENTENCING GUIDELINES**

As discussed earlier, the process of sentencing is very intricate for the purposes of trial justice. This ties in with the fact that the effects of a sentence do not affect an individual alone but also the whole community.<sup>81</sup> The disparity and the fact that sentencing system has proved to be very disproportional, the sentencing guidelines were created to serve as a solution to this problem. Kenya adopted the determinate system of sentencing once the discretion of the judge when arriving at a decision for the purposes of issuing a sentence to an offender was limited through the introduction of sentencing guidelines.

### **4.1 Recommendations to the sentencing guidelines**

The role of the sentencing guidelines has been discussed and the effect to the criminal justice system. This part shall seek to address the recommendations for the sentencing guidelines that Kenya has adopted in order to achieve effectiveness in sentencing for the purposes of administration of justice.

#### **4.1.1 Establishment of Sentencing Commission**

The establishment of a sentencing commission has been deemed to have a positive impact because of the need for consistency in the application of law and policy in order to address the unique nature of individual offences.<sup>82</sup> The role of the commission in order to achieve this would be to constantly revise the guidelines where necessary through examining the trends and practices.<sup>83</sup> A successful sentencing commission has to operate as an objective body focused on developing sentencing policies aimed at reducing disparity, increasing certainty, and promoting proportionality in sentencing.

The effectiveness of the sentencing commission relies on the membership as well. Since the sentencing guidelines seek to serve the criminal justice system as a whole, it would be key to have representatives from all other sectors of the criminal justice system.<sup>84</sup> This ensures

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<sup>81</sup> Judiciary, *Sentencing Policy Guidelines* (2016), 2.

<sup>82</sup> Constitutional Project Staff, *Principles for the design and reform of sentencing systems: A Background Report*, University of California Press, 2006, 24.

<sup>83</sup> Judiciary, *Report of the judicial taskforce on sentencing* (2016), 17.

<sup>84</sup> Constitutional Project Staff, *Principles for the design and reform of sentencing systems: A Background Report*, 24.

credibility because it becomes a reflection of the entire criminal justice system. For example besides the judiciary, a representative from the office of the Director of Public Prosecutions, and senior academics in the area of law.<sup>85</sup>

The commission would also have the role of training and educating the judicial officers on the new sentencing guidelines according to the changes that may have taken place.<sup>86</sup>

#### **4.1.2 Mandatory Minimum Sentences**

A mandatory minimum sentence is a minimum sentence that is usually in terms of years that is in legislation as the sentence to be imposed upon a person that has been convicted of a certain offence.<sup>87</sup> The mandatory and rigid nature of such provisions reduce the discretion of the judge in putting into consideration circumstances that are often specific and unique to the case and to the offender.

In order to correct the mandatory nature of the sentence, Gary Lowenthal suggests that judges are allowed in specific circumstances as deemed fit to depart from the strict requirements of the legislation and choose a penalty for the offender according to the relevant factors.<sup>88</sup> In order to avoid the manipulation of these provisions, he further states that the court should only be allowed to depart from the legislation if the reasons are 'substantial and compelling'. The court should also state its reasons for departure from the main provisions of the legislation and also give the prosecution the right to appeal.<sup>89</sup> The 'substantial and compelling' approach is appropriate as it tends to focus on the circumstances of the individual case and reduces the rigidity and severity of mandatory minimum sentences.<sup>90</sup>

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<sup>85</sup> Jacobson J and Hough M, *Creating a Sentencing Commission for England and Wales: an opportunity to address the prisons crisis*, Studio Project Limited, 2008, 36.

<sup>86</sup> Judiciary, *Report of the judicial taskforce on sentencing* (2016), 17.

<sup>87</sup> Constitutional Project Staff, *Principles for the design and reform of sentencing systems: A Background Report*, 26.

<sup>88</sup> Lowenthal G, 'Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform', *81 California Law Review* (1993), 122.

<sup>89</sup> Lowenthal G, 'Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform', 122.

<sup>90</sup> Lowenthal G, 'Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform', 122.

Giving weight to the circumstances of individual cases reduces the severity and rigidity of mandatory punishment provisions and this would help achieve proportionality in sentencing.<sup>91</sup>

#### **4.1.3 Institutional Balance in Sentencing**

Institutional balance requires that institutions that relate with sentencing have to act within the scope of their competencies.<sup>92</sup> Sentencing guidelines intend to remedy the fact that sentencing overly relies on the discretion of a judge so that other institutions are put to play in the role of sentencing. The players of these institutions include prosecutors, probation officers, officers in charge of prisons and even the defense bar.<sup>93</sup> The Sentencing Guidelines of 2016 require a participation by the players that inform the sentencing process.<sup>94</sup> This role will be played effectively if the various institutions act in their capacities appropriately in the role of sentencing. Some of the institutions that are involved are mentioned below and their role in ensuring criminal justice has been explained as well.

When an offender is sentenced to a non-custodial probation order, the Department of Probation and Aftercare Services plays an important role to ensure that the offender is rehabilitated by the system. Therefore for the court to impose non-custodial sentences, their effectiveness relies on this institution.<sup>95</sup>

Those serving custodial sentences in prison also rely on the programmes that are offered to them in prison in order to be rehabilitated.<sup>96</sup> The Kenya Prisons Service plays an important role in ensuring that its facilities and prisons create the necessary conditions that would foster the rehabilitation of offenders.

The court also has the power to issue a community service order<sup>97</sup> which usually comprises unpaid public work within a community for the benefit of that community.<sup>98</sup> A supervising officer is put in charge of the person that has been sentenced and the offender is required to

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<sup>91</sup> Lowenthal G, 'Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform', 123.

<sup>92</sup> Jacques J, 'The Principle of Institutional Balance' *41 Common Market Law Review* (2004), 383.

<sup>93</sup> Constitutional Project Staff, *Principles for the design and reform of sentencing systems: A Background Report*, 35.

<sup>94</sup> Judiciary, *Sentencing Policy Guidelines* (2016), 52.

<sup>95</sup> Judiciary, *Sentencing Policy Guidelines* (2016), 52.

<sup>96</sup> Judiciary, *Sentencing Policy Guidelines* (2016), 52.

<sup>97</sup> Section 24(b), *Penal Code* (Cap 63 of 2009)

<sup>98</sup> Section 3, *Community Service Orders Act* (Cap 93 of 2012)

report to him as specified in the assignment of work.<sup>99</sup> For this order to be effective, the National Community Service Orders Case Committee should be able to co-ordinate, direct and supervise the work of community service officers.<sup>100</sup>

The National Council on the Administration of Justice is established under the Judicial Service Act.<sup>101</sup> It is composed of both state and non-state actors from the justice sector whose role is to ensure the coordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system. In order to foster effectiveness in the sentencing system, this institution should consistently engage with the inter-agency local coordination forums and influence policy changes in different institutions within the criminal justice system.<sup>102</sup>

The Kenya Police Service is created by the Constitution<sup>103</sup>, the National Police Service Act 2011 and the National Police Service Commission Act 2011. Its role in the sentencing system is in keeping records of the offenders so that in sentencing recidivists and offenders are separated which helps in determining how they will be sentenced by the court since this could serve as either mitigating or aggravating circumstances to an accused.<sup>104</sup>

Section 157 of the Constitution establishes the Office of the Director of Public Prosecutions. The prosecutors during trial contribute to the role of sentencing as they are required to have the necessary knowledge and also inform the court of the necessary legal provisions that would impact the decision of the court during sentencing.<sup>105</sup> They should also acquire an accurate criminal record of the accused as this serves the role of understanding the criminal's circumstances which is important for the purposes of sentencing.

It is key that these institutions work together as criminal justice is not solely achieved by only the judiciary but also through other players. Also so that each institution does not extend their role unilaterally to the detriment of another institution.<sup>106</sup>

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<sup>99</sup> Section 4, *Community Service Orders Act* (Cap 93 of 2012)

<sup>100</sup> Section 8, *Community Service Orders Act* (Cap 93 of 2012)

<sup>101</sup> Section 34, *Judicial Service Act* (No.1 of 2011)

<sup>102</sup> Judiciary, *Report of the judicial taskforce on sentencing* (2016), 19.

<sup>103</sup> Article 243, *Constitution of Kenya* (2010)

<sup>104</sup> Judiciary, *Report of the judicial taskforce on sentencing* (2016), 19.

<sup>105</sup> Judiciary, *Report of the judicial taskforce on sentencing* (2016), 19.

<sup>106</sup> Jacque J, 'The Principle of Institutional Balance' 391.

#### **4.1.4 Monitoring and Evaluation of the Sentencing Guidelines**

The role of monitoring and evaluating the sentencing guidelines is slightly different from the role of the Sentencing Commission because this involves looking into the impact of the sentencing guidelines in reforming the criminal justice system. Through monitoring sentencing and the correctional practices, the policy makers can gauge where the gap exists and implement new policies.

The monitoring and evaluation relies on extensive data. An array of information is collected for analysis. Information on the sentences imposed on an offender, whether or not they are in line with the sentencing guidelines, the effect the sentence has on the offender in terms of recidivism and the role played by other institutions in ensuring the successes and failures of the sentence imposed.

The reliance of the data for the monitoring and evaluation, the judiciary should conduct this role itself.<sup>107</sup> This is in order to avoid the complexities that would arise when an external body has been chosen to identify problem areas in the system even before the availability of extensive data on this.<sup>108</sup>

## **4.2 Conclusion**

Sentencing guidelines are a promising part of sentencing reforms as the hands of the judges are not tied and they can still exercise their discretion while guided by the guidelines.<sup>109</sup> Mandatory minimum sentences have been used as a guideline to guide the judicial officers before sentencing but their rigidity and severity has proven not to be effective as they do not put into consideration individual circumstances of the accused persons.

Kenya has just introduced the new guidelines in 2016. The development of sentencing guidelines often takes time and hence the need to have a Sentencing Commission to be in charge of this and to address the developments and improvements gradually.<sup>110</sup> All in all sentencing guidelines

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<sup>107</sup> The Sentencing Policy Guidelines outline the objectives to be met by the guidelines themselves. Judiciary, *Sentencing Policy Guidelines* (2016), 11-12.

<sup>108</sup> Knapp K, 'Evaluating Systemic Sentencing Guidelines' *U.S Sentencing Commission*, 78.

<sup>109</sup> Barrett B, 'Sentencing Guidelines: Recommendations for Sentencing Reform' *57 Missouri Law Review* (1992), 1114.

<sup>110</sup> Barrett B, 'Sentencing Guidelines: Recommendations for Sentencing Reform', 1115.

provide the best hope of sentencing reform by increasing uniformity and proportionality in the exercise of a judge's discretion.

## **5. SUMMARY AND CONCLUSION**

This paper has brought to light the issue of sentencing and addressed the importance of it in the criminal justice system. It has brought out the fact that the criminal justice system relies heavily on sentencing for the purposes of both the offender and the community. Once an offence has been committed, it benefits the community if the offenders are punished. This creates trust and public confidence in the criminal justice system and it is important because it also encourages the public to participate in the system itself. This way they can be confident when reporting criminal matters and at times even willing to actively help the system by acting as the witnesses. Further, through deterrence, other members of the community end up refraining from participating in criminal activities.

Besides the outlook of the law, the paper has also taken a practical approach to results that confirm the existence of gaps in the sentencing system. The gaps in the sentencing system in Kenya have been characterised by; the overutilisation of custodial sentences to punish offenders, the disparity in the sentences that have been given to offenders and repeat offences. The disproportionate and irregular sentences have come about as a result of the exercise of the unbound discretion of the judicial officers. In some cases that have been considered the court confirms the challenge posed on it because of the lack of sentencing guidelines. This system opened the door for judges to arbitrarily give sentences without putting into consideration the uniqueness of the offences and the offenders that commit those crimes.

Through the adoption of sentencing guidelines, Kenya has followed the determinate system of sentencing whereby the discretion exercised by judicial officers is guided by sentencing guidelines and there is an objective way of issuing sentences eventually. The guidelines do not divert from the provisions of statute and the Constitution instead, they act as a practical guide to specific cases varying on the offence committed, circumstances surrounding the offence and the offender himself. In order to stay in line with the provisions of statute, they offer a three-step approach; the judicial officer still has to refer to the provisions of statute as the first step before choosing between a custodial and a non-custodial sentence in the second and third step.

The policy in the guidelines has also put into consideration non-custodial sentences and guided when they can be issued over custodial sentences. This opens room to correcting the problem

that had been identified that in issuing sentences the judicial officers have shown a tendency of preferring custodial sentences to non-custodial sentences even in circumstances where the latter would be more effective.

Also, the guidelines have put into consideration the unique circumstances of various offenders and used this to structure an approach of guiding how they sentencing them should be done. This special category of people includes children, the elderly, female offenders, those with disabilities, terminal illnesses and those with mental illnesses.

The Sentencing Policy Guidelines are a new policy in the legal framework of criminal justice as they were introduced by the former Chief Justice in 2016. Their effectiveness will be judged with time but they have undoubtedly addressed so many gaps that existed in the law for the benefit of both the offenders and the community as a whole.

This paper recommends the establishment of a Sentencing Commission that should be in charge of undertaking necessary reforms according to the societal changes or any changes that may affect the policies in the Sentencing Guidelines. Also, the need to work hand in hand with other institutions that play a role in criminal justice and the various players of those institutions. The judiciary itself should also participate in constant monitoring of how the Sentencing Guidelines as it is the institution that is expected to be on the look for any irregularity or need for reform.

The application of these new policies cannot occur in a vacuum, good governance has to play an important role in implementing their role and ensuring that political changes do not affect how they are implemented.

## **Conclusion**

In conclusion, the criminal justice system in Kenya has made a huge step through the introduction of the Sentencing Guidelines. This paper proves that this system is better than the indeterminate sentencing system that was in place before. If the proper steps are taken in ensuring that judicial officers adhere to these guidelines then the gaps that existed before can be remedied and this will help strengthen the criminal justice system as a whole.

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