

**ASSESSING THE EFFECTIVENESS OF CUSTODIAL SENTENCE IN
KENYA**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

By

Muiruri Sylvia Nyathira

082450

Prepared under the supervision of

Mr. Smith Otieno

January 2018

Word count: 10,990.

TABLE OF CONTENTS

DECLARATION.....	i
ACKNOWLEDGMENTS.....	ii
LIST OF ABBREVIATION.....	iii
ABSTRACT.....	iv
CHAPTER 1: INTRODUCTION.....	1
1.1 Background.....	1
1.2 Statement of Problem.....	3
1.3 Justification of Study.....	4
1.4 Statement of Objectives.....	4
1.5 Research Questions.....	5
1.6 Hypothesis.....	5
1.7 Assumptions.....	6
1.8 Research Design and methodology.....	6
1.9 Scope of study and Limitations.....	7
1.10 Definition of Terms.....	7
1.11 Literature Review.....	8
1.12 Theoretical Framework.....	11
CHAPTER 2: Custodial sentence and legal framework in Kenya.....	16
2.1 History of sentencing in Kenya.....	16

2.2 Custodial versus Non-Custodial Sentences.....	19
CHAPTER 3: An overview of the situation of prisons in Kenya	25
3.1 Causes of Overcrowding in Prisons in Kenya.....	26
3.2 Link between overcrowding in Prisons and recidivism.....	31
CHAPTER 4: Mitigation strategies for overcrowding in prisons.....	35
4.1 Measures to reduce Overcrowding.....	36
4.2 Possible alternatives.....	38
CHAPTER 5: Conclusion.....	43
BIBLIOGRAPHY.....	45

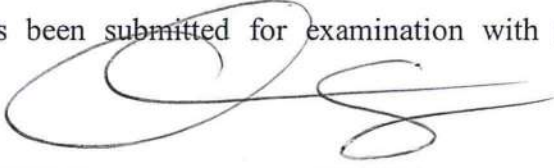
DECLARATION

I, MUIRURI SYLVIA NYATHIRA, 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: 29 / 05 / 2018

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

Signed: 

29TH MAY 2018

(Mr. Smith Otieno)

ACKNOWLEDGMENTS

I take this opportunity to express my sincere gratitude to the Almighty God for giving me the strength to complete this project.

LIST OF ABBREVIATIONS

CSO- Community Service orders

MCC-Model Criminal Code

UNAFEI- United Nations Asia and Far East Institute

UNODC- United Nations Office on Drugs and Crime

NCAJ- National Council on Administration of Justice

NGO-Non-Governmental Organisations

ABSTRACT

The issue of effectiveness of custodial sentence in Kenya is one that needs to be analysed especially since imprisonment is expected to be used as a means of rehabilitating offenders and in the end, reduce the crime problem in the society. The main reason for conducting this study is based on the claims that there is an increase in the likelihood of offenders released from prison reoffending. The media in the past has highlighted stories of the public sending released inmates trooping back to prison because they have reoffended within a short period after release.

To do this, the study sought to analyse the effectiveness of custodial sentence as a form of punishment in the criminal justice system in Kenya. The specific aim was to assess the legal framework for sentencing in Kenya and discuss the utilisation of the types of sentences in Kenya. This study is limited to prisons in Kenya, and the primary focus is the criminal justice system. The study makes the assumptions that; there are similar factors that may impact reoffending by both men and women and the prisons are not effective due to the overutilisation of custodial sentence in Kenya. A lot of focus in the past has been on the situation within the prisons in terms of living conditions, however this has failed to adequately address the cause of the ineffectiveness of prisons. This is because there is limited information on the factors affecting prison management and this may be attributed to the somewhat closed nature of the prisons.

It was therefore against this background that the main objective of the study was to assess the factors outside prisons that lead to the ineffectiveness of the custodial sentence. To achieve this, the study employed a research design that is qualitative mainly through the collection of data from published reports, journals, books and internet resources. The theory of utilitarianism particularly the objective proposed that is rehabilitation is the backdrop of this study.

A major finding of the study was that prisons are faced with the problem of overcrowding as the number of inmates in prison has by far surpassed the expected capacity. This in turn has led to a burden placed over prison staff and strains on the facilities and therefore the objective of rehabilitation is difficult to achieve. The study therefore recommends that some measures need to be employed to ensure that the courts increase the use of alternatives to imprisonment

and the legislature introduces early release measures such as parole.

CHAPTER ONE

1. INTRODUCTION

1.1 Background

In the criminal justice system in Kenya, there is a criminal procedure whereby the main participants are the police who carry out the role of investigations and arrest; the judiciary that carries out the role of determining cases; the probation service carries out the role of community treatment and the prison service is tasked with the role of rehabilitation, reformation and reintegration of offenders.¹ Sentencing is the result of imposition of a penal sanction by court action. Custodial sentence is among the penal sanctions set out in Section 24 of the Penal Code.² A custodial sentence is imposed after various factors have been put into consideration. These include; the gravity of the offence, the criminal history of the offender; where previous convictions are only taken into consideration when admitted or proven and the court considers whether the offender is likely to pose a threat to the community.³

The imposition of a custodial sentence should give effect to the objectives of sentencing as they are intended by the law to perform the function of retribution, rehabilitation and deterrence of offenders while enabling them to reform from their criminal disposition and become law abiding citizens.⁴ The function of the law is to regulate the undertaking of what is right or wrong, it then becomes an instrument of social control through the principles and procedures that are founded upon it and it in turn governs social relations. The purpose of sentencing as an action taken by the court is to ensure that there is peace in the society and that the rule of law; that is the accountability to the law is seen to be taking effect.⁵

¹ Olivia L.A, 'Overview of the Kenyan Criminal Justice System, *Resource Materials No. 90, UNAFEI*, 2014, 1.

² *Penal Code of Kenya* (Act No. 63 Revised edition 2014).

³ 'The Judiciary Sentencing Policy Guidelines,' 2016, Para. 7.19.

⁴ 'Judiciary Sentencing and Policy Guidelines,' Para. 4.1.

⁵ Mbote P and Akech M, 'Justice Sector and the Rule of Law,' *Open Society Initiative for Eastern Africa*, 2001.

The prison system in Kenya is one that has undergone reforms since the colonial era when it used to be more of retributive, through tough and harsh punishment of offenders within the prisons. In the current era, the shift of focus has been keener on the rehabilitation of offenders from their “Criminogenic” tendencies.⁶ It is expected that once released, former offenders will be able to reintegrate into the society.

However, the prisons have become overcrowded and this raises some questions concerning the utilization of custodial sentences and the effectiveness of the prisons in carrying out its role. There are more than 107 prisons in Kenya and the capacity is an average of 54,000 inmates however, this has risen to over 80,000 inmates.⁷

Moreover, there have been challenges in meeting the rehabilitation of prisoners as prisons are claimed to be in a bad state where congestion contributes to poor sanitation, inadequate facilities and supervisory staff.⁸ Therefore, the aspect of overcrowding of prisons can result in limited access by prisoners to prison rehabilitation services such as counselling and training. It has also been noted that a majority of petty offenders serve short custodial sentence whereby they would have been more suited for non-custodial measures which can equally combine punishment, rehabilitation and reintegration.⁹ The Community Service Order Act provides that the courts may make an order for any person who is convicted of an offence punishable by imprisonment for a term not exceeding three years, to carry out community service work instead of imprisonment.¹⁰

⁶ Muhoro P K, ‘Crime prevention: Current issues in correctional treatment and effective countermeasures,’ 115th *International Training Course Participants’ Papers, UNAFEI*, 2013.

⁷ Kenya Prisons Service, ‘*Kenya Prisons Service Strategic Plan*,’ Prison Headquarters, Government Press, Nairobi, 2015.

⁸ Omboto J O, ‘The Challenges Facing Rehabilitation of Prisoners in Kenya and the Mitigation Strategies’ *International Journal of Research in Social Sciences*, Volume 2, 2013.

⁹ ‘*Report of the Kenya Judicial Task Force on Sentencing*,’ 2016, 11.

¹⁰ *Community Service Orders Act*, (Act No. 10 of 2012).

In conclusion, the efficacy of the criminal justice system in Kenya should be determined with regard to the outcome of the process of sentencing. The custodial sentence outcome needs to actualise the objectives of criminal law as undermining them will only prove that the system is ineffective and impair the public confidence in the system.

1.2 STATEMENT OF THE PROBLEM

Over the past one year, there have been several instances of reoffending by people who have recently been released from prison. This was particularly shocking as some of the people who were released from prison through presidential pardon were back to committing crimes within a period of less than a month with others reoffending within days after their release.¹¹ There has also been a public outcry in various parts of the country over former prisoners committing the same crimes again or escalating to worse degrees of crime and it appears that the custodial sentences being imposed by the courts have failed to take into account the impact that they have on the achievement of the objectives of sentencing by the prisons. This is because there is overutilisation of this type of penal sanction and this has contributed to overcrowding in the prisons.¹² This can be linked to recidivism and the imposition of harsh penalties for misdemeanours. This results in management difficulty faced by the prisons in implementing effective treatment programs and thereby undermining the effectiveness of the criminal justice system.¹³

¹¹ <http://www.nation.co.ke/news/Public-sends-freed-inmates-trooping-back-to-prisons/1056-3450776-dqug2z/> on 20 November 2016.

¹² <http://www.prisonstudies.org/country/kenya> on 16 August 2017.

¹³ "Report of the Kenya Judicial Task Force on Sentencing," 13.

1.3 JUSTIFICATION OF THE STUDY

The criminal justice system should ensure that the guilty are punished and they are prevented from re-offending and causing further harm to the society. Prisons are expected to achieve this aim through incapacitation, rehabilitation and deterrence.¹⁴ Therefore, the main challenge in achieving the aim of custodial sentence is making the prisons processes and systems effective and efficient. The custodial sentence in Kenya has proven to be ineffective as there has been an increase in the rate of crime and recidivism rates.

Also, according to empirical data there is a problem of overcrowding in the prisons. This affects the capacity of the prisons to effectively carry out their mandate.¹⁵ It is necessary to assess the prisons systems in Kenya since there is an imminent lack of effectiveness of this legal form of punishment resulting from court action.

1.4 STATEMENT OF OBJECTIVES

The aim of this study is to analyse the criminal justice system with focus being on the courts and prisons in Kenya to find out the effectiveness of custodial sentences. The objectives of the study include;

1. To analyse the existing legal framework for sentencing in Kenya.
2. To assess the role that the prisons are expected to play in the reformation of offenders.
3. To make suggestions as to the strategies that can be employed in addressing the challenges encountered.

¹⁴ Ndung'u P.K, 'Administration of the Kenya Prisons Organization,' *Resource Material Series No. 98*, UNAFEI, 2014.

¹⁵ "Report of the Kenya Judicial Task Force on Sentencing," 2016.

1.5 RESEARCH QUESTIONS

The research intends to answer the following questions:

1. Why is there a shortcoming of custodial sentences?
2. What is the impact of the prisons in the effectiveness of the sentence?
3. What needs to be done to ensure that the key players in criminal justice system meet their mandate?

1.6 HYPOTHESIS

The effectiveness of a custodial sentence is determined by the impact it has on a prisoner after serving the sentence. Therefore, the challenges that face the criminal justice system will impede the effectiveness of custodial sentencing as a form of punishment. The challenges that are faced in the dispensation of expected services within the criminal justice system have been highlighted in previous research as inhibiting the success of prisons in terms of rehabilitation. One of the challenges is overutilisation of the custodial sentence as this has led to overcrowding in prisons and therefore the prison service may not be able to properly allocate services such as rehabilitation to offenders. This is because the offenders end up not receiving personalised attention that should serve to reform them from their criminal disposition and upon their return to society, they are rejected as they may no longer conform to its norms. This in itself leads to reoffending.

The variables of the research that led to the formation of this hypothesis are as follows; the independent variable is that custodial sentence in Kenya is ineffective due to its overutilisation. The dependent variable is that the effects of the overutilisation are; overcrowding in prisons, ineffective rehabilitation and recidivism. It is therefore hypothesized that; the ineffectiveness of custodial sentence in Kenya is due to its overutilisation and this results in it being unable to effect the objective of imprisonment, which is the rehabilitation of offenders. This will be tested through the collection of relevant information and at the end, will be affirmed or rejected.

1.7 ASSUMPTIONS

The assumptions in the research are that:

1. The factors that impact recidivism are not the same for both men and women however there may be slight similarities in those factors.
2. The mechanisms being adopted in the prisons are not effective in achieving the aim of sentencing.
3. The resources used in this research will give a reflective view of the effectiveness of custodial sentencing in Kenya.

1.8 RESEARCH DESIGN AND METHODOLOGY

The study employs a qualitative research design to provide a comprehensive and detailed examination of the topic. This is a sociological approach which seeks to assess empirical knowledge and to assess the impact the law has on the parties involved in the criminal justice system. This design was chosen based on the difficulty that may be faced due to the bureaucratic nature of prisons and the duration that may be taken to process the essential approval and authorization in order to conduct interviews with prisoners.

The research methodology is based on historical research which is one of the common approaches under this design.¹⁶ This will involve the study and analysis of data relating to past events and will require involvement and acquaintance with data analysis.¹⁷ This is necessary to make observations and interpretations clearly.

Therefore, the data collected is widely through desktop research whereby there is an in-depth analysis of previous research that has been conducted within the prisons in Kenya.

¹⁶ Law M, Stewart D, Letts L, Pollock N, Bosch J, & Westmorland M, 'Guidelines for Critical Review of Qualitative Studies Based on Guidelines for Critical Review,' *Form-Qualitative Studies*, 1998.

¹⁷ 'Guidelines for Critical Review of Qualitative Studies Based on Guidelines for Critical Review,' 5.

The methods employed include in the research are; an analysis of; published reports, statistics that have been availed in the recent period, books and the employment of library research about the theoretical aspects concerning the area of law in this research. Internet searches are also relied on for sources of information especially any relevant reports concerning prisons in Kenya.

In addition to this there are ethical considerations that have been keenly regarded throughout the employment of the qualitative research. Therefore, the research is transparent, and opinions formed will not conflict with the respect for the prisoners who have been a part of the previous research that has been relied on in the present paper or other researchers' opinions.

1.9 SCOPE AND LIMITATIONS OF THE STUDY

The main scope of this study is to analyse the factors that contribute to the effectiveness of custodial sentences or lack thereof and it is limited to studies that are related to the prisons in Kenya.

1.10 DEFINITION OF TERMS

Criminogenic- a situation or place likely to cause criminal behaviour.

Offender- This term has been used to refer those who have broken the law and are either liable for criminal sanctions or have been sentenced.

Prison-This term has been used to refer to the authorized centres of detention within a criminal justice system that hold offenders who are held during investigations and those who have been convicted.

Pre-trial detention-This term is used to refer to the duration during which an individual is denied liberty before their case is heard and determined. It underlines a specific period of imprisonment.

Recidivism- This term refers to the tendency of an offender to reoffend.

Imprisonment rate- This term is used to refer to the number of prisoners per 100,000 of the

general population.

1.11 LITERATURE REVIEW

Recidivism refers to the turning back to crime or relapse into former criminal habits after punishment.¹⁸ The criminal tendencies of an individual are hard to control legally but the society does have expectations that the courts will handle the offenders in a manner that will ensure that they do not offend again.

Therefore, the main function of the court as far as this matter is concerned is to impose a criminal sentence of imprisonment.¹⁹ The courts claim to have no responsibility over what happens thereafter as they are in the custody of the prison service. However, the effectiveness of the legal objective of imprisonment impacts the expectations of the constructive social benefit to grow out of the court action.²⁰

The common view is that prisons should work, so it is important to consider why currently it appears to have minimal impact on offending. Therefore, there may be a possibility that this is not entirely correct.²¹ Prisons are viewed as an unpleasant consequence that will deter a potential offender and motivate a former offender to not want to go back to offending. It is assumed that the offender is rational and will analyse the potential costs and benefits of changing their ways. Behaviourists argue that punishment is effective only under specific conditions; if it is probable, prompt and to some extent aversive.²² Therefore, if the crimes are not solved, punishment may not be probable, if an offender is caught and it takes long to have them face the consequences then the punishment is not prompt.²³

¹⁸ Harold M, 'Recidivism and the Courts' *Journal of Criminal Law and Criminology & Criminology*, 1995, 365.

¹⁹ Harold M, 'Recidivism and the Courts' 367-369.

²⁰ Harold M, 'Recidivism and the Courts,' 370.

²¹ Killias M, Villetaz P and Gilleieron G, '*The effects on re-offending of custodial versus non-custodial sanctions*,' Swedish National Council for Crime Prevention Report, 2014, 12.

²² Killias M *et al* '*The effects on re-offending of custodial versus non-custodial sanctions*,' 2014, 12.

²³ Aidan S, 'Punishments and Treatments for offending,' *Journal of Criminal Psychology, Psychlorton Organisation, United Kingdom*, 2013.

On the averseness, according to Hollin, when separated from family, friends and work, deprived of liberty and confined in unsanitary conditions, prison may be perceived differently by some offenders.²⁴ Beyond rehabilitation, prisons are seen as a useful means of incapacitating offenders for a given period of time that might otherwise do harm to other people.²⁵ According to studies it has been shown that most offenders reduce reoffending rates after some intervention has been made.²⁶ Furthermore, the mode of intervention should be one that employs relevant sanctions that will consider rehabilitation in that individuals desist from repeating offences in the future.²⁷

There have been many attempts by the Kenyan government to reform the prisons penal institutions by attempting to employ international standards of rehabilitation. However, this has been hindered by the state of congestion in the prisons as the facilities are not adequate.²⁸ According to a study was conducted at Naivasha Maximum security prison, the largest modern penal institution in East and Central Africa in 2013, it was concluded that the increased number of prisoners resulted in a deficiency in prison space which negatively impacted the maintenance costs hence overburdening the prisons' systems.²⁹ There have also been frequent malfunctions which have in the past resulted in tension in the institutions and unrest among prisoners causing riots and strikes. The increase in numbers has also had implications on rehabilitation programs.³⁰

²⁴ Hollin R, *Criminal behaviour: A psychological approach to explanation and prevention*, The Falmer Press, London, 1992.

²⁵ Nagin P, Blokland A, 'Assessing the impact of first time imprisonment on offenders' *Journal of Quantitative Criminology*, 227.

²⁶ Killias M *et al*, 'The effects on re-offending of custodial versus non-custodial sanctions,' 15-16.

²⁷ Webster M, 'Limits of Justice: The Role of the Criminal Justice System in Reducing Crime,' *Toronto Centre of Criminology, University of Toronto*, 2004, 95.

²⁸ Kenya Prisons Service, 'Kenya Prisons Service Strategic Plan,' 2015.

²⁹ Musyoka A, "Impact of prison reforms on rehabilitation of offenders in Kenya: The case of Naivasha Maximum Security Prison," *published research paper, University of Nairobi*, 2013.

³⁰ Musyoka A, "Impact of prison reforms on rehabilitation of offenders in Kenya: The case of Naivasha

This is due to the fact that as population in prison rises, programs frequently are not expanded to accommodate the increased population. Idleness also increases as prisoners' lack jobs to keep them occupied. As a result, prisoners became prone to delinquent behaviours, violence and even escapes.³¹In addition to this, causes of overcrowding, according to studies, include rise in crime rate, rise in rates of convictions and increase in length of sentences. This pushes up the cost of prisoners' maintenance beyond what the economy of Kenya can support. This inability to meet the aim of the criminal justice system will only lead to the increase in the rate of crime in the society.

This is because there will be failure to address the problem of the offenders and their criminal tendencies and the high rate of crime will also threaten the social development of the society.³²It has been suggested that adopting non-custodial sentences will assist in the decongestion of prisons and this should be set up along with the probation department who will ensure that the giving of community service as a form of punishment will serve as a means of rehabilitation.³³ However this should be limited to first time offenders.

There is also a societal expectation that even upon returning to the society the impact the prison has on the offenders from prison should be seen to have taken effect positively. Therefore, there is a need to investigate the systems in place to ensure that the prisons are seen to be executing their mandate effectively.

Maximum Security Prison," 36.

³¹ Mutemi P, 'An Analysis of the challenges facing Kenyan prisoners during their rehabilitation,' *published research paper, Strathmore Law School*, 2017, 9.

³² Rob. A, '*Global Prison Trends*,' Penal Reform International, London, 2015.

³³ Simon R, '*Report on improving African Prisons*,' 9 September 2009.

1.12 THEORETICAL FRAMEWORK

I. The justification for Punishment

Punishment is essentially a consequence that arises from an offense against a rule that has been set by a legal authority to the offender. The idea as to why prisons exist, may seem obvious, however there has been an evolution historically regarding the philosophy behind the system of imprisonment. This chapter will delve into the various philosophies of imprisonment and investigate the main theories of imprisonment as well as relatively new theories that have been advanced over the years.

II. Rationale for Punishment

Punishment involves infliction of pain or other unpleasant consequence because of an offense against a rule.³⁴ This is administered by a legal authority which the offender is under. There are theories of punishment that seek to offer a justification, and these may be divided into two rationales. These are the retributive rationale and the utilitarian rationale.

a. Retributive Rationale

This rationale poses a justification for punishment as; the society has the right to punish as long as it is done in accordance with the law and proportionally inflicting pain or punishment for an offence.³⁵ This was also supported by the social contract theory which posits that; man is born free and is constantly in search of that freedom.³⁶ However, by virtue of being a part of the society, the society has the right to punish which is derived from the social contract associated with Thomas Hobbes's *Leviathan*, John Locke's *Two Treatise on Government* and Jean-Jacques Rousseau *Du Contrat Social*.³⁷

The theory of the social contract basically proposed that once people become a part of the

³⁴Newman G, *The punishment Response*, 3ed, Jones and Barlett, New York, 1978.

³⁵ Marteni M, 'Criminal Punishment and the Pursuit of Justice,' *Harvard Law School Journal*, 2011,271.

³⁶ http://www.sophia-project.org/uploads/1/3/9/5/13955288/elahi_socialcontract.pdf 20 August 2017.

³⁷ Joycelyn M, *Prisons today and tomorrow*, 3ed, Jones and Barlett, New York, 2014, 4.

society, they give up their individual freedom for protection and if one breaks the social contract by transgressing the rights of others, the society has the right to punish and inflicting such punishment in proportion to their crime.³⁸ According to theorists, human beings possess free will and are able to make rational decisions therefore an offender who is found to be insane should not be punished. Under this theory, punishment is seen as a form of vengeance whereby offenders should suffer because they have caused others to suffer.³⁹

This rationale however is not encouraged because applying it alone, does not lead to any positive change as far as the offender is concerned as they, even after serving their sentence in prison, return to the society but may not be able to reintegrate into the society whereas some may have developed a desire to take revenge on the society thus the punishment will have failed.⁴⁰

b. Utilitarian rationale

This rationale on the other hand provides a justification for punishment by proposing that the society only has the right to punish if it is in accordance with the greater good of the majority of the people.⁴¹ It is also an ancient rationale whereby according to Plato punishment though evil, is justified by the greater benefits as the person being punished improves their soul or character.⁴² Therefore, this rationale recognises some of the justifications for punishment which are more acknowledged in the modern era. The first one being deterrence, which is the capacity to prevent an individual from committing an act (a crime) and this is influenced by what is done to another person through punishment due to commission of a crime.

³⁸ Joycelyn M, *Prisons today and tomorrow*, 5.

³⁹ Mickunas A, 'Philosophical issues related to prison reform,' in Joycelyn M (3ed), *Prisons today and Tomorrow*, Jones and Barlett, New York, 2014.

⁴⁰ Marteni M, 'Criminal Punishment and the Pursuit of Justice,' 277.

⁴¹ Joycelyn M, *Prisons today and tomorrow*, 6.

⁴² Murphy J, 'Punishment and rehabilitation,' 17.

Deterrence takes effect also on the individual in that punishment enables them not to commit that act again.⁴³ This rationale is based on the idea of hedonistic calculus as advanced by Jeremy Bentham who advanced the idea that punishment should be calibrated on deterrence and that man is seen as a rational and hedonistic (pleasure seeking) being and will choose to avoid the pain resulting from punishment and therefore not commit acts that would lead to punishment.⁴⁴

The second justification under the utilitarian rationale is rehabilitation, which is the process of impacting change in a person's behaviour such as tendencies to commit crime through external agents.⁴⁵ Such external agents include interventions such as education and training that are aimed at changing one by behaviour modification over a given period of time.

III. Imprisonment as a form of Punishment

This is one of the methods of punishment that appears to be complex. This is because, it affects one's freedom as they are put under the control of others and they have very limited freedom. Imprisonment may also have psychological effects, and this may occur due to the somewhat negativity associated with prison environment.⁴⁶

As earlier stated, the utilitarian justifications given for this form of punishment are rehabilitation and deterrence of offenders in the modern era.⁴⁷ Rehabilitation is incorporated as the aim of imprisonment whereby prisoners undergo a process of change and at the end of the imprisonment they can join the society as changed persons. This process however is one that involves a voluntary undertaking and therefore is dependent on two factors; first, the prisoner must want to become rehabilitated and the second one is that the work of

⁴³ Joycelyn M, *Prisons today and tomorrow*, 6.

⁴⁴ <http://www.utilitarianism.com/bentham> 23 August 2017.

⁴⁵ Joycelyn M, *Prisons today and tomorrow*, 8.

⁴⁶ Mickunas A, 'Philosophical issues related to prison reform,' 78.

⁴⁷ Joycelyn M, *Prisons today and tomorrow*, 12.

rehabilitation will be taken seriously by the prisons.⁴⁸

Therefore, the utilitarian approach of imprisonment as a form of punishment is seen as serving a greater good in that it deters the individual and others from committing crime, or it rehabilitates an offender in that they will not reoffend when released. However, a retributive rationale would necessitate that imprisonment as punishment is imposed in proportion to the severity of the crime committed by an individual.⁴⁹ One of the key principles that guide rehabilitation is the principle of reformation.⁵⁰ It justifies imprisonment to rehabilitate or to reform an offender's behaviour. The main argument that supports this principle is that; offenders often lack the ability to live within a society and have cognitive deficiencies and therefore this behaviour results in criminal inclination.⁵¹

Ideally, the theory of rehabilitation is based on the preparation of people to return to the society and providing them with the support to re-integrate into the society by providing them with opportunities that will enable them to avoid further reoffending upon their release.

Therefore, recidivism as a theoretical construct is premised on some general reasons as to why people reoffend, and these include; failure of sanctions, failure of support in re-joining the society, failure of rehabilitation programmes, economic stress, mental health and incorrigibility.⁵² The success of the prisons in achieving their mandate is therefore a matter to be discussed at length within this paper due to the existing conflicting views in the media with reports of recidivism. The assessment of the effectiveness of custodial sentence in this paper will be based on the utilitarian theory of punishment focusing on the two justifications for imprisonment as a form of punishment under the theory that will result in deterrence and rehabilitation.

⁴⁸ Mickunas A, 'Philosophical issues related to prison reform,' 80.

⁴⁹ Joycelyn M, *Prisons today and tomorrow*, 13.

⁵⁰ Falshaw L, Travis R and Nugent. F, "Searching for What Works, HM Prison Service," *The British Journal of Forensic Practice*, 2004, 6.

⁵¹ Falshaw L, Travis R and Nugent F, "Searching for "What Works": HM Prison Service," 6.

⁵² Mutemi P, "An Analysis of the challenges facing Kenyan prisoners during their rehabilitation," 16.

Chapter breakdown.

Chapter one outlines the background of the study by stating the problem and laying down the justification as well as the objectives and scope of the study. An analysis of literature as well as the theoretical framework with relation to the study is succinctly discussed.

Chapter two highlights the legal and historical context of custodial sentences in Kenya and the changes that have taken place over the years. It also deals with the various types of sentences in Kenya and a contrast of custodial versus non-custodial sentences is made.

Chapter three addresses the problem statement referred to in chapter one and delves into the claims of overutilisation of custodial sentences in Kenya and offers an explanation on the effectiveness of such sentences.

In chapter four, mitigating strategies on the issue of overcrowding are discussed as well as a comparative analysis of their effectiveness is highlighted.

Chapter five includes the conclusions and recommendations on how to improve the prisons and ensure the effectiveness of custodial sentences.

CHAPTER TWO

CUSTODIAL SENTENCE AND LEGAL FRAMEWORK IN KENYA

2.1 Introduction.

Sentencing guidance in the criminal justice system in Kenya largely emanated from the repealed Constitution. Part of the provisions provided that; section 74, ‘no person shall be subject to torture or inhuman and degrading punishment or other treatment’ while section 77 provided that ‘no punishment should be meted out that is severer in degree than the maximum may be imposed.’

In Kenya, there are two types of trial courts that are empowered to pass criminal sentences these are; The High Court and the Magistrates Court, in accordance with the Criminal Procedure Code. The High Court has original jurisdiction to hear all criminal matters.⁵³ On the other hand, Magistrates Courts can preside over all criminal cases except those involving murder, treason, and complex or white-collar crimes which fall under the jurisdiction of the High Court.⁵⁴ In addition to this, the High Court also hears appeals from the Magistrates Courts. These courts then have the mandate to pass sentences in accordance with the Criminal Procedure Code after all witnesses have been heard and the accused has been convicted (found guilty).⁵⁵ The prescribed punishments are set out under each crime which are, provided for in the Kenyan Penal Code.⁵⁶

⁵³ Article 165 (3) (a), *Constitution of Kenya* (2010).

⁵⁴ Muthoga R & Bowman R, ‘A Brief Survey of Sentencing Law and Its Practice in Kenya,’ *Federal Sentencing Reporter*, 2010, 250.

⁵⁵ Section 215, *Criminal Procedure Code* (Act No. 75 of 2012).

⁵⁶ *Penal Code* (Act No. 63 Revised Edition 2014).

The Kenyan Penal Code has been in existence since the year 1963 and has been amended various times. There have been problems associated with the Code and among them is a general lack of organization.⁵⁷ This is because when there is an advancement in the legal area and new developments in criminal law, the legislators opt to enact separate legislation as opposed to updating the Penal code. For example, the Sexual Offences Act was enacted in 2016 and some sections of the Penal Code dealing with sexual offences were repealed.⁵⁸

The sentences prescribed in the Penal Code include; imprisonment, death, community service, detention, fine, forfeiture and payment of compensation. Until 2003, corporal punishment was legal whereby several strokes would be imposed as punishment. Death sentences on the other hand are usually pronounced but there has not been any execution for the past thirty years due to Kenya's moratorium on the same.⁵⁹

The Sexual Offences Act which was enacted in 2006 provides for minimum custodial sentences with an option of minimum and maximum fines as an alternative of to run along with custodial sentences.⁶⁰ Maximum sentences are prescribed in different statutes and the Penal Code provides for death sentence murder and treason.⁶¹

For some time, it was taken that only maximum sentences would be prescribed and therefore decisions as to the length of sentence were left to judicial discretion. This mandate of judicial discretion was guided by the Penal Code whereby the judges were expected to consider the offender's character and the circumstances of their offence.⁶² The Criminal Procedure Code provides that judges can obtain victim impact statements along with any evidence that will enable them to give a sentence.

⁵⁷ Muthoga R & Bowman R, 'A Brief Survey of Sentencing Law and Its Practice in Kenya,' 250.

⁵⁸ Muthoga R & Bowman R, 'A Brief Survey of Sentencing Law and Its Practice in Kenya,' 250.

⁵⁹ Omboto J, 'The Capital offenders' Punishment and Death Sentence Dilemma in Kenya,' 9.

⁶⁰ Migai A and Kinyanjui S, 'Towards structured sentencing in Kenya: A case for reform,' 267.

⁶¹ Section 40 and 203, *Penal Code* (Act No. 63, revised edition 2014).

⁶² Section 38, *Penal Code* (Act No. 63, Revised Edition 2014).

Over a period of years, sentencing was guided by principles set out in case law until 2004 when the judiciary first developed general sentencing guidelines which were set out in the Bench book for Magistrates in Criminal Proceedings. However, these guidelines were found to be too general as there were a lot of discrepancies in the sentences given in similar cases.

The discrepancies arose from the length of sentences and decisions on issuing orders for non-custodial sentences.⁶³ This was proven through an empirical study conducted in fifteen court stations in Kenya where interviews were conducted with the key parties including the probation officers, magistrates, prison officers and convicted offenders.⁶⁴ According to the findings of the study, the judicial officers were of the view that though they considered the general guidelines in the Bench book, they had wide discretionary powers as they had to make a decision on the exact sentence where a maximum was provided. There was also an argument that the increased utilisation of non-custodial sentences would serve as a measure of decongesting prisons.⁶⁵

In 2014, a judicial task force on sentencing was set up by the Chief Justice with the mandate of assessing sentencing patterns, compile a report on how to reduce the existing discrepancies and suggest solutions and means of intervention. This led to the formation of Sentencing and Policy Guidelines in 2016. These were set out as guidelines upon which the objectives of sentencing would be met.⁶⁶

⁶³ Migai A and Kinyanjui S, 'Towards structured sentencing in Kenya: A case for reform,' *African Journal of Criminology and Justice Studies*, 271.

⁶⁴ Legal Resources Foundation, 'Sentencing Trends in Kenya,' 2010-2011.

⁶⁵ Lumumba P, *A handbook on criminal procedure in Kenya*, Law Africa, Nairobi, 2005.

⁶⁶ 'Report on the judicial task force on Sentencing,' 11.

The guidelines sought to extensively deal with three issues; sentencing options which are provided by the statutes that create the offence, suitability of custodial versus non-custodial orders and the appropriate term of imprisonment and considerations.⁶⁷ However, the guidelines have not impacted the sentencing regime yet, as it was envisaged that offence specific guidelines would be gradually developed in order to create a harmonised approach to sentencing and steps towards achieving this have not yet been taken.⁶⁸

2.2 Custodial versus Non-Custodial Sentences

Custodial sentence involves the imprisonment of offenders and is imposed whereby the objectives of sentencing cannot be met by issuing another form of punishment.⁶⁹ It involves putting an offender in custody where the sentence provided for most offences created under existing statutes.⁷⁰ Pursuant to section 26 (2) of the Penal Code, the court has the discretion to impose a shorter sentence than prescribed by the relevant provision. An exception to this is where mandatory minimum sentences are prescribed.⁷¹ The implication of this is that the Penal Code provides the maximum sentences in most cases and uses the words ‘not exceeding.’⁷²

There are some instances in the Penal Code where minimum and maximum sentences are provided for.⁷³ Subsequently statutes such as the Sexual Offences Act provide for minimum and maximum sentences. When an offender is convicted of more than one offence, the sentences imposed for each of the offences should run consecutively except where the court directs that they run concurrently.⁷⁴

⁶⁷ *Judiciary Sentencing Policy Guidelines*, 2016.

⁶⁸ Migai A and Kinyanjui S, ‘Towards structured sentencing in Kenya: A case for reform,’ 2013, 276.

⁶⁹ *Kampala Declaration on Prison Conditions in Africa and Plan of Action*, para 1.

⁷⁰ *Judiciary Sentencing Policy Guidelines*, Para. 7.1.

⁷¹ *Judiciary Sentencing Policy Guidelines*, Para. 7.2.

⁷² Section 89, *Penal Code* (Act No. 63, revised edition 2014).

⁷³ Section 89 (2), *Penal Code* (Act No. 63, Revised edition 2014).

⁷⁴ Section 14, *Criminal Procedure Code* (Act no. 75 of 2012).

Non-custodial sentences on the other hand, are imposed as an alternative to imprisonment. The aim of such sentences is to reduce the use of imprisonment, and to rationalize criminal justice policies, while considering the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.⁷⁵

In order to make decisions on the type of sentence to order, judges should take into account whether there are aggravating circumstances that would make a non-custodial sentence unsuitable, the seriousness of the offence and should not put weight to previous convictions especially where they have not been admitted or proved.⁷⁶

The court should also consider the community's interests especially where an offender has a chance of being a threat to them therefore a non-custodial sentence may not be appropriate.⁷⁷ In addition to this, the economic situation facing the offender should inform the court in deciding a sentence especially when the custodial sentence will affect people who are directly dependent on him/her.⁷⁸

Non-custodial sentences are what are termed as 'alternatives to sentencing'. Ideally, young offenders that is children who are on the wrong side of the law should have non-custodial sentences imposed as opposed to custodial sentences.⁷⁹ The overriding factor that determines the suitability of non-custodial sentences as opposed to custodial sentence is whether an offender is a first-time offender and their remorsefulness and willingness to accept rehabilitation.⁸⁰

⁷⁵ Rule 1.5, United Nations Standard Minimum Rules for Non-Custodial Measures, (Tokyo Rules).

⁷⁶ *Judiciary Sentencing Policy Guidelines*, Para. 7.18.

⁷⁷ Rule 8.1, Tokyo Rules.

⁷⁸ *Judiciary Sentencing Policy Guidelines*, Para. 7.19.

⁷⁹ Section 4, *Children Act* (Act No. 141 of 2001).

⁸⁰ *Judiciary Sentencing Policy Guidelines*, Para. 7.20.

In Kenya, there are various non-custodial sentences, and these include imposition of fines, community service orders, probation orders, conditional discharge, absolute conditional discharge and suspended sentences.⁸¹ These sentences and their applicability are further expounded on below;

a) Fines

This is applicable when it is an option instead of imposition of a custodial sentence by the court as is permitted by the law.⁸² Further, the amount payable should not be excessive in that the offender will be liable to imprisonment for inability to pay. If one defaults on payment, then they will be liable to imprisonment for a period not exceeding six months unless otherwise allowed by law. The court stands guided by the Penal Code and the scales prescribed under section 28(1).⁸³

b) Community Service Orders

This involves undertaking public work that is for the benefit of the community where there is no form of payment for a period that is not longer than the term of imprisonment that an offender would have been sentenced to.⁸⁴ This type of order is limited to a case whereby the offence is not punishable with imprisonment exceeding three years and if it exceeds the three years the court determines that a lesser sentence would be appropriate.⁸⁵ Once such orders are issued by the court it is the duty of community service officers to identify relevant work and oversee the outcome and the progress made by the offenders.⁸⁶ The effect that such orders have on offenders is that they are supposed to instil a sense of responsibility to them and they make contribution to the community they have wronged. Hence this form of sentence is retributive and serves the objective of deterrence.⁸⁷

⁸¹ *Judiciary Sentencing Policy Guidelines*, 16.

⁸² Section 28 (1), *Penal Code* (Act No. 63, Revised edition 2014)

⁸³ Section 342, *Criminal Procedure Code* (Act No. 75 of 2012).

⁸⁴ Section 3 (2) (a), *Community Service Orders Act* (Revised Edition 2016).

⁸⁵ Section 3 (1) (a), (b), *Community Service Orders Act* (Revised Edition 2016).

⁸⁶ Second Schedule, *Community Service Orders Act* (Revised Edition 2016).

⁸⁷ *Judiciary Sentencing Policy Guidelines*, Para. 8.5.

c) Probation Order

This is an option that can be regarded by the court whereby the offenders are placed under the supervision of a probation officer for a period specified by the court.⁸⁸ The offender may be required to enter into a bond agreement with the court with or without sureties in a sum that the court deems fit.⁸⁹ In the event that an offender commits an offence during the period of probation, they shall be liable to be sentenced for the original offence. However before such an order is made by the court there are factors that the court must regard these include; youth, character, antecedents, home surroundings, health and mental status of the offender in addition to the nature of the offence and any mitigating circumstances in which the offence was committed.⁹⁰ The court must also be of the opinion that the offender is willing to comply with the order.⁹¹ Such an order subsists for a period of not less than six months and not exceeding three years.⁹² Such a sentence will enable the reformation and rehabilitation of an offender as they are closely supervised and expected to avoid reoffending.⁹³

d) Absolute Discharge

This is an order that is made by the court if regarding the nature of the offence and the character of the offender; if it finds that it would be unsuitable to inflict punishment and probation orders are not suitable.⁹⁴ Then the court may discharge an offender absolutely. Where an absolute discharge is imposed, the courts should keen to state the reasons so as not to appear to be absolving the offender orders discharging offenders are used sparingly.

⁸⁸ Section 4, *Probation of Offenders Act* (Chapter 64).

⁸⁹ Section 4(2), *Probation of Offenders Act* (Chapter 64).

⁹⁰ Section 4(1), *Probation of Offenders Act* (Chapter 64).

⁹¹ Section 5, *Probation of Offenders Act* (Chapter 64).

⁹² Section 5, *Probation of Offenders Act* (Chapter 64).

⁹³ *Judiciary Sentencing Policy Guidelines*, Para. 9.10.

⁹⁴ Section 35 (1), *Penal Code* (Act No. 63, Revised edition 2014).

The application of this sentence should be guided by the objectives of punishment and are only deemed as effective where it does not amount to an injustice or seen to be sparing an offender from taking responsibility for their actions.⁹⁵

e) Conditional Discharge

This is an order made by the court where it is considered not appropriate to discharge an offender absolutely. Therefore, the court makes an order to discharge the offender on condition that they do not commit an offence for a period of twelve months from the date of the order.⁹⁶ While making the order the terms are clearly explained to the offender in a language that they understand that failure to comply with the conditions will render them liable to the sentence of the original offence. In addition to this an offender may be discharged either absolutely or conditionally and be ordered to pay compensation but this is not an addition to the discharge however, the court can combine sentences.⁹⁷ The application of both absolute and conditional discharge should consider the nature of the offence and only after an offender is suitable for a non-custodial sentence.

f) Suspended Sentence

This type of sentence can only be imposed by the court if the sentence that has been passed is one of not more than two years.⁹⁸ The sentence of imprisonment is suspended for a specified period so long as the offender does not commit an offence during that period. If the offender commits an offence during the fixed period, the sentence will take effect and the sentence for the second offence will run consecutively with the original one.⁹⁹ The effect of such a sentence is that it would deter an offender from committing another offence in order to avoid punishment.

⁹⁵ *Judiciary Sentencing Policy Guidelines*, Para. 14.6.

⁹⁶ Section 35 (1), Penal Code (Act No. 63, Revised edition 2014).

⁹⁷ Section 12, Criminal Procedure Code (Act No. 75 Of 2012).

⁹⁸ Section 15, Criminal Procedure Code (Act No. 75 Of 2012).

⁹⁹ Section 15 (3), Criminal Procedure Code (Act No. 75 Of 2012).

In summary, according to a situational analysis by the Judiciary it was found that prisons in Kenya are overcrowded and one of the major contributing factors is the overutilisation of custodial sentences.¹⁰⁰ There are many cases in which non-custodial sentences would be suitable, but the courts have instead opted for custodial sentences.¹⁰¹ Therefore, non-custodial sentences as alternatives to imprisonment should be applied in the most suitable cases. This will be advantageous to the country in that it seeks to enhance the participation of the victim in some instances and infuse restorative justice values in the process of sentencing. In addition to this, the application of such sentences will promote community involvement while ensuring the objectives of sentencing are met. However, the laws that govern alternative sentences have some restrictions with regard to their use. The restriction applies as a matter of law and policy to the offences of murder, rape, defilement, robbery with violence, possession of a firearm, motor vehicle theft, corruption by public officers and fraud which are classified as unsuitable for non-custodial orders.¹⁰²

The first research question has been answered by conducting a succinct analysis of the legal framework for sentencing in Kenya and particularly breaking down the key elements to consider in the utilisation of alternatives to sentencing.

A major question that is often posed regarding these measures is on their effectiveness on diverting people from prisons and this will be discussed at length in the unfolding discussion on the claims of over utilisation of custodial sentences.

¹⁰⁰ *Judiciary Sentencing Policy Guidelines*, Para. 7.6.

¹⁰¹ Migai A, 'Sentencing in Kenya: Practice, Trends, Perceptions and Judicial Discretion,' 34.

¹⁰² 'Alternatives to imprisonment in East Africa Trends and challenges,' Penal Reform International, 2012, 9.

CHAPTER THREE

MITIGATION STRATEGIES FOR OVERCROWDING IN PRISONS.

INTRODUCTION.

The size of the prison population in Kenya is growing and this places an enormous financial burden on the government as they must cater for the increase and it is also a great cost to the social cohesion of the society.¹⁰³ There are two categories of incarcerated persons these include; those who are on remand pending hearing of their cases (pre-trial detention) and those whose cases have been concluded and are convicted.¹⁰⁴ In 2009, according to the Kenya National Commission on Human Rights (KNCHR) prison assessment it was concluded that extreme overcrowding was among the endemics faced in Kenyan prisons.¹⁰⁵ Subsequently as per the Kenya Prison Brief, the total Prison population (which includes pre-trial detainees or remand prisoners) is 53,841 as at August 2016.¹⁰⁶ Out of this population, pre-trial detainees or remand prisoners this makes up 43.1% of the total.¹⁰⁷

This is despite the fact that the official capacity of prison system in Kenya is 26,757; the current pre-trial population alone is approximately 26,687.¹⁰⁸ This current pre-trial population translates to 85% of the official capacity, therefore, this empirical evidence therefore points directly to the situation of overcrowding in the prisons in Kenya.¹⁰⁹

¹⁰³ NCAJ, “*Understanding pre-trial detention in respect to case flow management and conditions of detention, ‘Criminal Justice System in Kenya Audit, 2017, 347.*”

¹⁰⁴ “NCAJ, ‘Criminal Justice System in Kenya Audit,’ 75.

¹⁰⁵ Kenya Human Rights Commission, ‘Draft report of the Study of Prison Conditions in Kenya,’ 2009.

¹⁰⁶ <http://www.prisonstudies.org/country/kenya> on 21 September 2017.

¹⁰⁷ <http://www.prisonstudies.org/country/kenya> on 21 September 2017.

¹⁰⁸ NCAJ, ‘Criminal Justice System in Kenya Audit,’ 346.

¹⁰⁹ <http://www.prisonstudies.org/country/kenya> on 13 December 2017.

According to a recent audit of the Criminal justice system in Kenya, pre-trial detention has become a serious problem and contributed to overcrowding in prisons.¹¹⁰ Some offenders served more than the statutory term for their alleged offense in pre-trial detention.¹¹¹ This is despite there being functioning bail system, and all suspects, including those accused of capital offenses, are eligible for bail.¹¹²

3.1 Causes of Overcrowding in Prisons in Kenya

As earlier stated, Kenya has a prison population of 53,841 inmates and an imprisonment rate of 121 people out of a population of a hundred thousand this has put the country as the 17th out of the countries with the highest imprisonment rate in Africa.¹¹³ On an annual basis, a large number of people go through the Criminal Justice System, thus placing a significant burden on criminal justice resources.¹¹⁴ In the midst of the process, there may be people in detention for shorter or longer periods and some may be acquitted or convicted.¹¹⁵

Imprisonment rates and overcrowding may be assumed to be a consequence of increase in crime rates within a country.¹¹⁶ However this may not be the case as studies have indicated that rates of imprisonment and crime may advance, independent of each other. This is due to the fact that a rise crime may impact on rates of imprisonment but not constitute the main factor that leads to increasing rates of incarceration.¹¹⁷ Therefore, there may be other underlying factors within the criminal justice system that contribute to overcrowding. Some of these factors that have led to the current situation of overcrowding in Kenya are addressed

¹¹⁰ NCAJ 'Criminal Justice System in Kenya Audit,' 62.

¹¹¹ NCAJ, 'Criminal Justice System in Kenya Audit,' 62.

¹¹² *Judiciary Bail and Bond Policy Guidelines*, 2015.

¹¹³ <http://www.prisonstudies.org/world-prison-brief-data> 21 September 2017.

¹¹⁴ NCAJ, 'Criminal Justice System in Kenya Audit,' 348.

¹¹⁵ NCAJ, 'Criminal Justice System in Kenya Audit,' 348.

¹¹⁶ https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf on 21 September 2017.

¹¹⁷ https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf on 21 September 2017.

in detail below;

I. Delays in the criminal justice system

According to a prison study conducted by the Judiciary in 2013 it was revealed that a majority of prisoners complained of experiencing delays in their cases and most did not have appeal numbers.¹¹⁸ Delays have been found to be caused by a number of reasons, these include; delays in investigation by police or prosecutors, due to the high number of arrests, lack of cooperation between criminal justice agencies, such as the police, prosecutors and courts and the loss of the files of detainees in the system.¹¹⁹

The frequent postponement of trials for various reasons such as; case overload at the courts, absence of witnesses, lack of transport to take accused persons to court and lack of proper filing and tracking systems in prisons to ensure that pre-trial detainees are taken to court on dates fixed by the court system are also contributing factors to delays experienced in the process.¹²⁰

During year 2012 / 2013, there were visits by a team led by the Deputy Registrar from the criminal division to ten prisons in Kenya these included; Kamiti, Langata Women Prison, Naivasha Maximum, Kisumu Main, Kibos, Shimo-la-Tewa, Manyani, Nyeri (King'ong'o), Main Meru and Embu prisons.¹²¹ The visits sought to find out how many prisoners had been in the justice system for more than five years. A report prepared after the visit established that a total of 3,008 prisoners complained of delays in the hearing of their cases for a variety of reasons.¹²² Most complaints arose from administrative failures such as lack of case file numbers for appeals filed in the High Court.

¹¹⁸ NCAJ, 'Criminal Justice System in Kenya Audit,' 69.

¹¹⁹ NCAJ, 'Criminal Justice System in Kenya Audit,' 69.

¹²⁰ NCAJ, 'Criminal Justice System in Kenya Audit,' 69.

¹²¹ NCAJ, 'Criminal Justice System in Kenya Audit,' 69.

¹²² "Judiciary Case Audit and Institutional Capacity Survey," *Volume 1*, 2014.

In addition to this, arbitrary arrests, prolonged pre-trial detention and unfair trials have resulted in the imprisonment of innocent people while others serve excessively harsh sentences due to failure of the criminal justice system by key players such as the police and the prosecution.¹²³

II. Prolonged Pre-trial detention

The delays within the criminal justice system as highlighted above have adversely affected the processing of cases before a final sentence is passed and it can be concluded to having had a significant impact on the population of prisons.¹²⁴ Pre-trial detention can provide a window into the effectiveness and efficiency of a country's criminal justice system, as well as its commitment to the rule of law. Ideally to have a lower percentage of all prisoners who are not yet convicted, there should be a shorter average duration of pre-trial detention which leads to a relatively efficient criminal justice system whereby cases move through the justice system within a shorter time and offenders are generally released faster.¹²⁵

In Kenya, however, most of all detainees, 43.1% of the entire prison population to be precise are pre-trial detainees.¹²⁶ This portrays, at best, an inefficient and overwhelmed criminal justice system, and at worst a lack of commitment to the rule of law. The inability to pay fines because of poverty in cases where offenders have the option to do so and underutilization of alternative methods such as Community Service Order (CSO) by courts also contributes to overcrowding in prison institutions.¹²⁷

¹²³ Omboto J, 'The challenges facing rehabilitation of prisoners in Kenya and the Mitigation strategies,' 41.

¹²⁴ UNODC, 'Handbook on Strategies to reduce Overcrowding in Prisons,' 22.

¹²⁵ UNODC, 'Handbook on Strategies to reduce Overcrowding in Prisons,' 23.

¹²⁶ <http://www.prisonstudies.org/country/kenya> on 15 January 2018.

¹²⁷ Article 51, 'Initiative (Freedom from Torture) 'Draft – Kenya Baseline Study Report, 18 May 2012.'

III. Insufficient utilisation of alternatives to sentencing

The over utilisation of custodial sentences by the judiciary has contributed to overcrowding in prisons.¹²⁸ There are many cases in which non-custodial sentences would be suitable for example community service orders for minor offences, but the courts opt for custodial sentences.¹²⁹

According to statistics from the Kenya Prisons Service Headquarters, it has been established that out of the total 31,725 convicted offenders, 12,643 have been sentenced to three years and less as at 18th March 2015.¹³⁰ In addition to this, 7,402 have been sentenced to one year and below.¹³¹ The table below further illustrates the breakdown of the categories of crimes for which they have been sentenced by gender;

Offenses	Male	Female	Total
Order & Admin of lawful	10235	457	10692
Injurious to Public	3231	169	3400
Against Person	5771	394	6165
Related to Property	9382	333	9715
Attempts & Conspiracies	1312	75	1387
Employment Act	5851	253	6104
Liquor Act	18292	8564	26856
Drugs Related	5174	249	5423
Various Cases	16111	1814	17925
Registration of Persons	408	40	448

Source: Republic of Kenya Economic Survey 2016

¹²⁸ "Report of the Judicial Task Force on Sentencing," Online Version Amended 28 January 2016.

¹²⁹ Migai A, 'Sentencing in Kenya: Practice, Trends, Perceptions and Judicial Discretion,' 35.

¹³⁰ Kenya Prisons Service Headquarters, June 2015.

¹³¹ *Judiciary Sentencing and Policy Guidelines*, 19.

These numbers suggest that some of the candidates who would be more suitable for non-custodial sentences end up in prison. According to studies, it has been established that short term sentences are bound to be disruptive to offenders and at most times rarely achieve the objective of rehabilitation.¹³² Therefore it would be better to have non-custodial sentences imposed on petty offenders and custodial sentences reserved for grave offenders.

The Community Service Orders have proved a useful tool in rehabilitating those charged with minor offences, thus can reduce the number of people being jailed.¹³³ Community-based penalties have given some relief to prisons by providing alternatives to imprisonment especially to minor offenders. However, the Courts still make considerably low use of the available supervised non-custodial sentences and it is important to take note that, there are 628 Probation and Aftercare Services Officers who also operate as Community Service Orders officer and they have managed to recommend a total of 50,722 non-custodial orders that were adopted by the Court.¹³⁴

According to the audit on the criminal justice system in 2016, though the figures under Community Service Orders appear to be impressive, the courts sentenced most of the offenders to serve only few hours or days of community service. This indicates that the cases exited the system quickly and would not accumulate till the end of the year, with only a few carried forward the following year.¹³⁵ Probation officers are required to inquire into pre-trial cases, but it was found that few of the courts the Courts make use of this facility for lack of clear policy or legislation.¹³⁶

¹³² NCAJ, 'Criminal Justice System in Kenya Audit,' 75

¹³³ NCAJ, 'Criminal Justice System in Kenya Audit,' 75.

¹³⁴ *State of the Judiciary Report*, 2013, 85.

¹³⁵ NCAJ, 'Criminal Justice System in Kenya Audit,' 76.

¹³⁶ NCAJ, 'Criminal Justice System in Kenya Audit,' 76.

Therefore, the courts still make a considerably low use of the available supervised non-custodial sentence and have been shown to prefer imprisonment and fines instead. It has been cited that a major concern amongst the judicial officers is that there are no adequate structures for the supervision of the non-custodial sentences.¹³⁷ This is because probation work is impeded by limited and reduced funding. In addition to this, the department is also slowed down by weak and outdated laws, for example the Probation of Offenders Act and CSO Act, that fail to govern new areas of work such as bail information services and aftercare.¹³⁸ There is no approved policy on aftercare and bail information.

3.2 Link between overcrowding in Prisons and recidivism

Overcrowded prisons will inevitably lead to negative impact on the conditions of imprisonment and the intended outcomes of imprisonment. There are several effects of overcrowding. Among them is that overcrowding may result in a decline of general services that are expected to be provided within the prisons in order to comply with standards set with regard to access to medical, sanitary and educational, training or rehabilitation facilities.¹³⁹ Rehabilitation within prisons may be affected also through assigning low risk prisoners to maximum security units because other prison space is not available.¹⁴⁰ It is also a popular assumption that serving a prison sentence under conditions of overcrowding may increase the risk of reoffending upon release.¹⁴¹

¹³⁷ Legal Resource Foundation, 'Sentencing in Kenya: Practice, Trends, Perceptions', 22.

¹³⁸ NCAJ, 'Criminal Justice System in Kenya Audit,' 76.

¹³⁹ Hans Jörg. A, 'Prison Overcrowding: Finding Effective Solutions, Strategies and Best Practices against Overcrowding in Correctional Facilities,' *Max Planck Institute for foreign and International Criminal Law*, 87.

¹⁴⁰ Hans Jörg. A, 'Prison Overcrowding: Finding Effective Solutions, Strategies and Best Practices against Overcrowding in Correctional Facilities,' 87.

¹⁴¹ Steinberg J, "Prison overcrowding and the constitutional right to adequate accommodation in South Africa," *Centre for the Study of Violence and Reconciliation*, 2005, 7.

This can be attributed to the fact that overcrowding affects prison staff in terms of the working conditions and this may create stress and inability to fully comply with national and international standards of accommodating prisoners.¹⁴² In addition to this, due to overcrowding, the Kenyan Prisons Service is faced with several challenges in discharging its mandate of rehabilitation. These challenges include shortage of food, clean water, and spread of diseases and likelihood of employment of unskilled prison personnel.¹⁴³

Ideally rehabilitation should focus on changing the varying circumstances that may have left individuals susceptible to law breaking and it is a process that can provide convicted offenders with the opportunities to avoid further offending upon release.¹⁴⁴ Rehabilitation involves various methods to reduce harm in relation to the offender, the community and the victim and assist in breaking down barriers to reintegration, to reduce the prospect of reoffending or recidivism.¹⁴⁵

Therefore, situation of overcrowding in Kenyan prisons especially male prisons not only implies the lack of prison space and proper supervision of the incarcerated, it also suggests the failure of criminal justice system in dispensing the primary duty to control crime in the society.¹⁴⁶ This shows that prisons end up not adequately deterring offenders and the public from committing crimes. Short prison sentences are aimed towards a particular group of offenders, persistent or chronic offenders, who pose unique problems and result in a heavy burden for prison based correctional systems.

¹⁴² Steinberg, J, 'Prison overcrowding and the constitutional right to adequate accommodation in South Africa,' 8.

¹⁴³ Mutemi P, 'An Analysis of the challenges facing Kenyan prisoners during their rehabilitation,' 15.

¹⁴⁴ http://www.uclshrp.com/exchange/criminal_justice_reform_and_rehabilitation/ on 18th December 2017.

¹⁴⁵ Owino B, Egesah Akong'a J, 'Looking in the mirror; reflection on implementation of the principles of penal systems in Kenya's prisons,' *Volume 3, Journal of International Academic Research for Multidisciplinary*, 2015, 206.

¹⁴⁶ Owino B *et al*, 'Looking in the mirror; reflection on implementation of the principles of penal systems in Kenya's prisons,' 207.

This is because their frequency of re-offending and reconvictions imposes significant costs and in the long run places pressure on the capacity of prisons; furthermore, persistent offenders display the limits of prison-based rehabilitation.¹⁴⁷

A prison system is often considered successful when it does not result in high rate of recidivism. However, this is not the case as a recent research conducted on prisons revealed that a considerable number of inmates comprises of re-offenders.¹⁴⁸ According to a Human Rights Watch World Report, Kenyan prisons are faced with shortages of food, clean water and adequate clothing; limited access to medical services; corruption as well as prisoner on prisoner human rights violations due to the situation of overcrowding.¹⁴⁹ Therefore, rehabilitation will be inevitably difficult to achieve given these challenges, this is because the Kenya Prison Service cannot be able to adequately meet the task of carrying out effective rehabilitation programmes due to strain on the existing funding.¹⁵⁰

Overcrowding further affects the prison staff whose working conditions may be not be favourable and thus create stress and may lead to situations of non-compliance with international and national standards of accommodating prisoners.¹⁵¹ This is mainly because overcrowding is commonly connected to violations of normative standards and statutory law. These standards require there is adherence to principles such as the separation principle. This principle is based on the separation of sentenced and remand prisoners, children and adult prisoners; therefore, this should be adhered to in situations of imprisonment and utilisation of prison facilities.¹⁵²

¹⁴⁷ Hans Jörg A, 'Prison Overcrowding: Finding Effective Solutions, Strategies and Best Practices against Overcrowding in Correctional Facilities,' 85.

¹⁴⁸ Makori E, 'Socio-Economic Factors That Influence Recidivism in Kakamega County Kenya', *Volume 47, Journal of Law, Policy and Globalization*, 2016, 117.

¹⁴⁹ Kenya Human Rights Commission, 'Draft report of the Study of Prison Conditions in Kenya,' 2009.

¹⁵⁰ Mutemi P, 'An Analysis of the challenges facing Kenyan prisoners during their rehabilitation,' 16.

¹⁵¹ Hans Jörg A, 'Prison Overcrowding: Finding Effective Solutions, Strategies and Best Practices against Overcrowding in Correctional Facilities,' 88.

¹⁵² Hans Jörg A, 'Prison Overcrowding: Finding Effective Solutions, Strategies and Best Practices against

Therefore, overcrowding of prisons may lead to lack of compliance with these principles, by failing to separate the sentenced from remand prisoners and juveniles from adult prisoners.¹⁵³ While it has been noted that over the years the prisons have partnered with donor institutions and NGOs to provide rehabilitative programmes, the situation is yet to change.¹⁵⁴ The problem of overcrowding is coupled up with insufficient aftercare services upon the release of offenders.¹⁵⁵ Therefore upon release, most former offenders are unable to secure employment and lack assistance in setting up enterprises using the skills obtained in prison.

At this point, it is evident that prison overcrowding and prison population growth poses a major challenge to prison administrations and the criminal justice system, in relation to both human rights and the efficient management of penal institutions. At this point attention is then drawn to factors driving prison growth which include the crime rates, the system of criminal sanctions and sentencing practices as favouring imprisonment and prolonged pre-trial detention practices.

This conclusion fulfils the second research objective and with the above discussion of the situation of prisons in Kenya and the causes of overcrowding, the first research question is also answered by finding that there is a shortcoming of custodial sentence in Kenya due to the overcrowding of prisons. The second research question has also been answered by finding that the situation of overcrowding has attributed to the shortcoming of the Prisons Service in terms of offering rehabilitation programmes therefore increasing the chances of recidivism.

Overcrowding in Correctional Facilities,' 88.

¹⁵³Hans Jörg A, 'Prison Overcrowding: Finding Effective Solutions, Strategies and Best Practices against Overcrowding in Correctional Facilities,' 89.

¹⁵⁴ *Report of the Judicial Task Force on Sentencing*, 14.

¹⁵⁵ *Report of the Judicial Task Force on Sentencing*, 14.

CHAPTER FOUR

MITIGATION STRATEGIES FOR OVERCROWDING IN PRISONS.

INTRODUCTION.

The issue of overcrowding has been a concern both internationally and nationally and it has formed part of policy agendas for decades.¹⁵⁶ So far, it is not a surprise that strategies to reduce overcrowding have been analysed and widely circulated.¹⁵⁷ Generally, approaches that deal with prison overcrowding introduce methods of reducing rates of pre-trial detention, imprisonment and reduction in the length of imprisonment.¹⁵⁸

The specific strategies include; the use of alternative sentencing, the application of restorative justice approaches, decriminalization, reduction of the numbers of pre-trial detainees through the cooperation of the police, the prison service and the courts in a bid to ensure speedy trials and effective case management, recognition of the last resort principle, having in place targets for reducing the population in prisons, putting into consideration the prisons capacity before making a sentence, implementation of early and conditional release schemes, promoting regional and international Charters on Prisoners' Rights and pushing the political will to change and reform.¹⁵⁹ Subsequently, the strategies that are employed to reduce the extent of overcrowding should contemplate a careful statistical analysis with respect to the

¹⁵⁶Hans Jörg. A, 'Prison Overcrowding: Finding Effective Solutions, Strategies and Best Practices against Overcrowding in Correctional Facilities,' 65.

¹⁵⁷Hans Jörg. A, 'Prison Overcrowding: Finding Effective Solutions, Strategies and Best Practices against Overcrowding in Correctional Facilities,' 89.

¹⁵⁸Hans Jörg. A, 'Prison Overcrowding: Finding Effective Solutions, Strategies and Best Practices against Overcrowding in Correctional Facilities,' 88-90.

¹⁵⁹Report of the Workshop, '*Strategies and best practices against overcrowding in correctional facilities,*' Twelfth United Nations Congress on Crime Prevention and Criminal Justice Salvador, Brazil, 12-19 April, 2010.

exact reasons behind overcrowding in the country.¹⁶⁰

The following discussion highlights some of the possible options that have been applied in other jurisdictions, most of which will require careful examination by the legislators and not just the mere introduction of policy directions.

4.1 Measures to reduce Overcrowding

Reducing Pre-trial detention

The regulation of inflow and length of pre-trial detention is necessary in order to address the problem of prolonged pre-trial detention which leads to overcrowding of prisons in the long run.¹⁶¹ There are various measures to regulate inflow that have been proposed and subsequently adopted in various countries.¹⁶² These include; expanding legal assistance and increasing this by having paralegals to provide advice to offenders, imposition of time limits in criminal proceedings, offering less restrictive bail amounts, facilitating ‘camp courts’ inside prisons and reforming criminal procedure so that cases are reviewed regularly and brought to a conclusion expeditiously.¹⁶³

Camp courts is a measure that has been adopted in Malawi and India whereby the concept behind these courts is that they are established inside the prison with the assistance of paralegals and magistrates.¹⁶⁴ These prison courts can only handle matters that involve minor offenders and act as a useful way to reduce overcrowding in prisons and speed up justice delivery.¹⁶⁵ The operation of these courts require paralegals to prepare a list of pre-trial

¹⁶⁰Hans Jörg. A, ‘Prison Overcrowding: Finding Effective Solutions, Strategies and Best Practices against Overcrowding in Correctional Facilities,’ 86.

¹⁶¹ Morgan N, “Overcrowding: Causes, Consequences and Reduction Strategies,” 52.

¹⁶² Penal Reform International, “Ten-Point Plan to Reduce Prison Overcrowding,” 2013, 2.

¹⁶³ Penal Reform International, “Ten-Point Plan to Reduce Prison Overcrowding,” 2013, 2.

¹⁶⁴ <https://worldjusticeproject.org/our-work/programs/implementing-legal-aid-act-malawi> on 18 January 2018.

¹⁶⁵ <http://irishruleoflaw.ie/camp-courts-malawi/> on 19 January 2018.

detainees who have overstayed in prison of those who have not been able to afford bail after being granted.¹⁶⁶

The prosecutors discuss the list beforehand and attend the camp court on the material day together with the magistrate and court clerk to work through the list.¹⁶⁷ The expected outcome is that some of the pre-trial detainees are granted bail, the amount is reduced for those who cannot afford set bail terms or those who have overstayed may be released.¹⁶⁸

Another key measure to address the issue of length of in stay in detention is through ensuring that the court processes are efficient.¹⁶⁹ There is also the option of having a limit on the time that a person can be held pending the sentencing. For example, in India, the Supreme Court ruled that people should not be held for longer than the maximum period of the sentence.¹⁷⁰ In addition to this, Scotland has a stricter standard whereby there is a statutory limit of 140 days on the time a person can be held before a trial process begins.¹⁷¹

Utilisation of alternatives to Imprisonment

Courts can be encouraged to use alternatives to imprisonment instead of imposing short-term prison sentences.¹⁷² This is enabled through sentencing guidelines that prescribe the use of non-custodial sanctions in particular cases.¹⁷³ In addition to this; the judges may be required to explain the decision of the court to impose a prison sentence where an alternative is available in law. For example, in Kazakhstan judges were required by the Criminal Collegium of the Supreme Court, to explain the reasons for imposing prison sentences rather

¹⁶⁶ <http://irishruleoflaw.ie/camp-courts-malawi/> on 19 January 2018.

¹⁶⁷ <http://irishruleoflaw.ie/camp-courts-malawi/> on 19 January 2018.

¹⁶⁸ <http://irishruleoflaw.ie/camp-courts-malawi/> on 19 January 2018.

¹⁶⁹ UNODC, 'Handbook on Strategies to reduce Overcrowding in Prisons,' 112.

¹⁷⁰ N. Morgan, "Overcrowding: Causes, Consequences and Reduction Strategies," *International Training Course Visiting Experts' Papers*, 59.

¹⁷¹ http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_13-55.pdf on 16 January 2018.

¹⁷² UNODC, 'Handbook on Strategies to reduce Overcrowding in Prisons,' 113.

¹⁷³ *Judiciary Sentencing Policy Guidelines*, 2016.

than an alternative where the law provided for both options for the offence committed.¹⁷⁴

¹⁷⁴ UNODC, 'Handbook on Strategies to reduce Overcrowding in Prisons,' 114.

This requirement had a great impact on the reduction of prison sentences between 2001 and 2002.¹⁷⁵ Prison sentences reduced from 51.3 percent of all sentences in 2000 to 41.8 percent in 2002.¹⁷⁶

4.2 Possible alternatives

There is a wide range of alternative sentences available in the legislation of various countries. However, some of them may prove to be complicated as they may be rarely employed due to the cost implications and organizational difficulties they may have.¹⁷⁷ Others require a specialized service such as probation services in order to have their implementation supervised. As has been proven through research and various case studies, alternatives to sentencing such as fines and conditional and suspended sentences, have contributed to the reduction of the population in prisons.¹⁷⁸ These alternatives have also not had major implications on cost and in addition to this, community service orders are preferred due to their aim of compensating the community that has been harmed by an offender's actions.¹⁷⁹

i). Fines

Fines have been proven as an effective alternative that reduces overcrowding.¹⁸⁰ The imposition of fines however should be done in a manner that is equitable so that it does not disproportionately disadvantage the poor.¹⁸¹ Judges may have guidelines and rules in law which obliges them to consider fines as a first option for offences with a fixed maximum length of prison sentences. For low-income countries, offenders may be faced with the

¹⁷⁵ https://www.penalreform.org/wp-content/uploads/2013/06/brf-02-2007-health-in-prisons-en_01.pdf2 on 8th January 2018.

¹⁷⁶ <http://www.penalreform.org/human-rights-and-health-inprisons-> on 16 January 2018.

¹⁷⁷ UNODC, 'Handbook on Strategies to reduce Overcrowding in Prisons,' 114.

¹⁷⁸ UNODC, 'Handbook on Strategies to reduce Overcrowding in Prisons,' 114.

¹⁷⁹ MCC, Article 56: Community Service as an Alternative Penalty, Commentary,' 142-143.

¹⁸⁰ UNODC, "Handbook of basic principles and promising practices on Alternative to Imprisonment," *Criminal Justice Handbook Series*, 2007, 29.

¹⁸¹ UNODC, 'Handbook on Strategies to reduce Overcrowding in Prisons,' 115.

problem of not being able to pay fines due to low income. A system day-fine which considers the income of an offender may be effective in such circumstances. Therefore, where fines are provided for in the penal statutes as an alternative to prison, introducing a day-fine system may make the fine system more effective.¹⁸²

An example of how day fine system works is given in the UNODC Handbook on Strategies to Reduce Overcrowding in prisons as follows:

‘Calculation of fines is done by multiplying two factors: i). the seriousness of the offence and ii). The offender’s daily net income. So, if a crime is valued at 30 “days”, and each day valued at \$1 for a person with low-income and \$20 for a wealthier person, then the indigent offender would need to pay a fine of \$30, while the wealthier person would need to pay a fine of \$600. Therefore, in principle, the impact of the fine is the same on both the wealthier and the poorer person, which eliminates discrimination in sentencing.’¹⁸³

ii). Suspended Sentence

Suspended sentence is a simple yet effective measure which is suitable for use against offenders who have committed nonviolent, petty offences, are first time offenders, or in situations where there are mitigating circumstances and is applicable for categories, such as children, women with small children or pregnant women.¹⁸⁴ The advantage of this type of sentence is that does not require the input of significant additional resources for their application.¹⁸⁵ Several studies have concluded that offenders who receive suspended sentences have lower rates of reoffending compared to some other to imprisonment.¹⁸⁶

¹⁸² UNODC, ‘Handbook on Strategies to Reduce Overcrowding in Prisons,’ 115.

¹⁸³ UNODC, ‘Handbook on Strategies to reduce Overcrowding in Prisons,’ 115.

¹⁸⁴ UNODC, ‘Handbook on Strategies to reduce Overcrowding in Prisons,’ 115.

¹⁸⁵ UNODC, ‘Handbook on Strategies to reduce Overcrowding in Prisons,’ 114.

¹⁸⁶ S Cocker, ‘*Using reconviction data to explore the effectiveness of community penalties in West Yorkshire*,’ Report no. 6-5, 2006.

The explanation given for this finding is that the experience of prison exerts a “Criminogenic” effect. This is consistent with theories that contend that the experience of prison increases deviance as it may advance the acquisition of new criminal skills and in turn reduces the offender’s ability after release to obtain income through legitimate means.¹⁸⁷

iii). Early Release Measures

According to the Tokyo Rules, the use of early release measures is encouraged.¹⁸⁸ There are also post-sentencing alternatives that are provided to avoid institutionalization and to assist offenders during their early integration into society.¹⁸⁹ Some of the popular alternatives listed, include; parole.¹⁹⁰ Parole, also referred to as early conditional release as it is the early release of sentenced prisoners under specific condition that after release the offender will refrain from engaging in criminal activities.¹⁹¹ It may be applied as a mandatory measure that takes place after a certain proportion of the sentence has been served.

According to reoffending statistics from several countries, there is an indication of low reoffending by those on parole as compared to reoffending after release after serving one’s entire sentence.¹⁹² In England and Wales for example, 67 percent of offenders would reoffend within two years upon release. But this changed to only 6 percent offending during the parole period which is normally around one year.

¹⁸⁷ Lulham R, Weatherburn D, Bartels L, ‘The recidivism of offenders given suspended sentences: A comparison with full-time imprisonment,’ *New South Wales Bureau of Statistics and Research, Number 136*, 2009.

¹⁸⁸ United Nations Standard Minimum Rules for Non-Custodial Measures, A/RES/45/110, 2 April 1991.

¹⁸⁹ UNODC, ‘Handbook on Strategies to reduce Overcrowding in Prisons,’ 120.

¹⁹⁰ Rule 9.2, United Nations Standard Minimum Rules for Non-Custodial Measures.

¹⁹¹ Hans Jörg A, ‘Prison Overcrowding: Finding Effective Solutions, Strategies and Best Practices against Overcrowding in Correctional Facilities,’ 19.

¹⁹² UNODC, ‘Handbook on Strategies to reduce Overcrowding in Prisons,’ 120.

4.3 Decriminalization and Depenalization

Decriminalization is the removal of a conduct or activity from the ambit of criminal law. It may include imposition of administrative sanctions in that other laws that are not based on criminal matters may then regulate the conduct or activity that has been decriminalized or the abolition of all sanctions for a petty crime.¹⁹³ Depenalization, is the relaxation of the penal sanction imposed by law for a specific offence or offences. This since not just any socially undesirable actions should be subject to the criminal law.¹⁹⁴ For example, Finland decriminalized (removed from the criminal law) public drunkenness in 1969, and the use of default imprisonment was also reduced.¹⁹⁵ These reforms were successful as they led to the reduction of the prison population by almost a third.

4.4 Political Will

However, most of these strategies cannot be employed without one key factor, and this is the political will. From an extensive historical and comparative perspective punishment generally conditioned by economic and social factors, this includes; public and political sentiments.¹⁹⁶ Therefore, the involvement of local governments and politicians is important because they decide, how to change the penal legislation in the country. This is because it is dependent on political will that policies will be sustained for a sufficient period to have a long-lasting effect in reducing overcrowding in prisons.¹⁹⁷

¹⁹³ UNODC, 'Handbook on Strategies to reduce Overcrowding in Prisons,' 45.

¹⁹⁴ UNODC, 'Handbook on Strategies to reduce Overcrowding in Prisons,' 45.

¹⁹⁵ Seppala T, 'Causes of Prison Overcrowding: Workshop on Strategies to Reduce Overcrowding in Correctional Facilities,' *Twelfth United Nations Congress on Crime Prevention and Criminal Justice*, 2010.

¹⁹⁶ Hans Jörg A, 'Prison Overcrowding: Finding Effective Solutions, Strategies and Best Practices against Overcrowding in Correctional Facilities,' 61.

¹⁹⁷ UNODC, 'Handbook on Strategies to reduce Overcrowding in Prisons,' 40.

In conclusion, the above highlighted measures may be applicable to the Kenyan situation and will serve the purpose of reducing overcrowding in prisons and in identifying this the third research question on what needs to be done to remedy the situation of overcrowding in prisons. Therefore, Kenyan criminal justice stakeholders should work together to introduce these measures. From the statistics provided it has been identified that the overcrowding in prisons stems from inefficiency related to the courts. Therefore, the courts may apply the measures of reducing pre-trial detention in cases of petty offenders and introduce the camp courts in highly populated remand prisons. In addition to this, the judiciary should streamline its operations and departments for purposes of reducing delays in cases and increasing efficiency.

The overutilisation of custodial sentence can be reduced by the increased utilization of alternatives to sentencing. It is worthy to note that the Kenyan courts have been applying the alternatives to sentencing.¹⁹⁸ However, this needs to be improved and the study has highlighted some alternatives that have been applied in other jurisdictions and have proven to be effective in reducing overcrowding. Therefore, Kenyan courts can apply the day-fine system as it considers the offenders level of income. The utilisation of suspended sentences may also be increased in the case of petty offenders who constitute a huge portion of the prison population.¹⁹⁹

The study also takes note of the need to introduce the early conditional release measure of parole. This has been applied in various jurisdictions and statistics from those countries indicate that the rate of reoffending is lower than that of those who have been released after serving their entire sentence.

¹⁹⁸ NCAJ, 'Criminal Justice System in Kenya Audit,' 2017.

¹⁹⁹ <https://www.standardmedia.co.ke/article/2000231096/prisons-are-full-of-young-and-poor-petty-offenders-report-indicates> on 5 February 2018.

However, in order to apply all these measures there is a need for political will. In essence, this means that the Kenyan legislators need to be involved in the process of improving penal laws in the country. This is because political support is important in reducing overcrowding and limiting the use of imprisonment through political consensus on the need to have penal reforms and reduction of prisoner rates. Therefore, any legislative actions need to be carried out on all levels of the criminal justice system and the changes can only be achieved with the cooperation of the key players in the criminal justice system.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS FINDINGS.

INTRODUCTION.

This chapter presents a summary of the key findings and discussions. The study had three objectives namely; (a). To analyse the existing legal framework for sentencing in Kenya, (b). To assess the role that the prisons are expected to play in the reformation of offenders and (c). To make suggestions as to the strategies that can be employed in addressing the challenges encountered. Therefore, following the research findings and discussions in the preceding chapters; this study concludes that; the issue of overcrowding in Kenyan prisons undermines the effectiveness of the custodial sentence and its objectives particularly that of rehabilitation and is a contributing factor to the increase in recidivism rates.

The study concludes that the situation of overcrowding poses a challenge to the prison management in ensuring that prisoners are reformed. This is due to the fact that a prison systems' success is measured by the rate of recidivism and therefore the current rate of recidivism in Kenya which is around 50% and this indicates that they have indeed failed to effectively rehabilitate inmates.

Furthermore, from the analysis of the various causes of overcrowding of the prisons in Kenya, the courts are contributing to this situation as there are several instances of prolonged pre-trial detention and delays being occasioned by the courts which led to an ineffective criminal justice system. In terms of the legal framework the Sentencing Guidelines of 2016 are yet to be fully implemented as the utilisation of non-custodial sentences is still relatively low and there are inconsistencies in the sentences for similar offences.

The study delved into various mitigation strategies that have been employed in various jurisdictions and the finding is that these strategies have worked to reduce overcrowding in prisons within those jurisdictions. However, these strategies should be employed whereby there is political will to address the issue of overcrowding and put in place policies to achieve this end. The mitigation strategies highlighted in this study are highly recommended to effectively address the situation of overcrowding in prisons in Kenya. This study recommends the following mechanisms to be put in place; application of reasonable fines, increased utilisation of suspended sentence, the introduction of early release measures such as parole and decriminalisation and Depenalization of some minor offences to reduce the population of petty offenders in prison.

In conclusion, the study has effectively answered the research questions in the following manner; first research question was answered by conducting a succinct analysis of the legal framework for sentencing in Kenya and particularly breaking down the key elements to consider in the utilisation of alternatives to sentencing. The second research question is also answered by finding that there is a shortcoming of custodial sentence in Kenya due to the overcrowding of prisons and negatively impacts the Prisons Service in terms of offering rehabilitation programmes therefore increasing the chances of recidivism and finally the third question by identifying the mechanisms that can be employed in a bid to address the issue of overcrowding in prisons in Kenya. The study also made the hypothesis that, the ineffectiveness of custodial sentence in Kenya is due to its overutilisation and this results in it being unable to effect the objective of imprisonment, which is the rehabilitation of offenders. The study therefore confirms this hypothesis in the affirmative.

BIBLIOGRAPHY

1. Aidan Sammons, "Punishments and treatments for offending," *Journal of Criminal Psychology, Psychlorton Organisation, United Kingdom*, 2013.
2. Falshaw Louise, Travis and Nugent, "Searching for "What Works": HM Prison Service Accredited Cognitive Skills Programme," *The British Journal of Forensic Practice*, 2004.
3. Hans Jörg. A, 'Prison Overcrowding: Finding Effective Solutions, Strategies and Best Practices against Overcrowding in Correctional Facilities,' *Max Planck Institute for foreign and International Criminal Law*.
4. Harold Metcalf, 'Recidivism and the Courts' Volume 26 *Journal of Criminal Law and Criminology. & Criminology*, 1995
5. Hollin Clive R, *Criminal behaviour: A psychological approach to explanation and prevention*, Falmer Press London, 1992.
6. Joel Meyer, 'Reflections on Some Theories of Punishment,' *Volume 59 Journal of Criminal Law and Criminology & Police Science*, 1968.
7. Jocelyn Pollock, '*Prisons Today and Tomorrow*' Jones & Bartlett Publishers, 2009.
8. *Judiciary Sentencing policy guidelines*, Nairobi, 2016.
9. *Judiciary Bail and Bond Policy Guidelines*, 2015.
10. Judiciary Case Audit and Institutional Capacity Survey," *Volume 1*, 2014
11. Kenya Human Rights Commission, 'Draft report of the Study of Prison Conditions in Kenya,' 2009.
12. Killias M, Villetaz P and Gilleieron G, '*The effects on re-offending of custodial versus non-custodial sanctions*,' Swedish National Council for Crime Prevention Report, 2014.

13. Law M, Stewart D, Letts L, Pollock N, Bosch J, & Westmorland M, 'Guidelines for Critical Review of Qualitative Studies Based on Guidelines for Critical Review,' *Form-Qualitative Studies*, 1998.
14. Lumumba Patrick, *A handbook on criminal procedure in Kenya*, Law Africa, Nairobi, 2005.
15. Makori E, 'Socio-Economic Factors That Influence Recidivism in Kakamega County; Kenya', *Volume 47, Journal of Law, Policy and Globalization*, 2016.
16. Marteni Mike, 'Criminal Punishment and the Pursuit of Justice,' *Harvard Law School Journal*, 2011.
17. Mickunas A, '*Philosophical issues related to prison reform*,' in Joycelyn M (3ed), *Prisons today and Tomorrow*, Jones and Barlett, New York, 2014.
18. Migai Akech and Kinyanjui Sarah, 'Towards structured sentencing in Kenya: A case for reform,' 2013.
19. Muhoro Peter Kimani, 'Crime prevention: Current issues in correctional treatment and effective countermeasures,' *115th International Training Course Participants' Papers, UNAFEI*, 2013.
20. Muthoga Rachael, & Bowman R, 'A Brief Survey of Sentencing Law and Its Practice in Kenya,' *Federal Sentencing Reporter*, 2010.
21. Musyoka Anastacia, "Impact of prison reforms on rehabilitation of offenders in Kenya: The case of Naivasha Maximum Security Prison," *published research paper, University of Nairobi*, 2013.
22. Mutemi Peter, 'An Analysis of the challenges facing Kenyan prisoners during their rehabilitation,' *published research paper, Strathmore Law School*, 2017.
23. National Council on Administration of Justice, "*Understanding pre-trial detention in respect to Case flow management and conditions of detention*," *Criminal Justice System in Kenya Audit*, 2017.

24. Morgan Neil, "Overcrowding: Causes, Consequences and Reduction Strategies," 142nd international training course visiting experts' papers, UNAFEI.
25. Olivia L.A Onyango, 'Overview of the Kenyan Criminal Justice System, *Resource Materials No. 90, UNAFEI, 2014.*
26. Omboto John, 'The Challenges Facing Rehabilitation of Prisoners in Kenya and the Mitigation Strategies' *International Journal of Research in Social Sciences, Volume 2, 2013.*
27. Owino B, Egesah Akong'a, 'Looking in the mirror; reflection on implementation of the principles of penal systems in Kenya's prisons,' *Volume 3, Journal of International Academic Research for Multidisciplinary, 2015.*
28. Penal Reform International, "Ten-Point Plan to Reduce Prison Overcrowding," 2013.
29. Peter Kimani Ndung'u, "Administration of the Kenya Prisons Organization," *Resource Material Series No. 98, UNAFEI, 2014.*
30. *Report of the Kenya Judicial Task Force on Sentencing,* Online Version Amended 28 January 2016.
31. Report of the Workshop, '*Strategies and best practices against overcrowding in correctional facilities,*' Twelfth United Nations Congress on Crime Prevention and Criminal Justice Salvador, Brazil, 12-19 April 2010.
32. Simon Robert, 'Improving Africa Prisons,' Institute for Security Studies, Pretoria South Africa (2009).
33. Steinberg J, "Prison overcrowding and the constitutional right to adequate accommodation in South Africa,' *Centre for the Study of Violence and Reconciliation, 2005*
34. "The Youth Justice System: Effective, Transparent Justice for All," *Rethinking Alternatives to Prison Speech by ICPS Director Rob Allen to the Inside Government*

Conference, 9 March 2010.

35. United Nations Office on Drugs and Crime, 'Handbook on Strategies to reduce Overcrowding in Prisons,' 2011.

36. Webster M, 'Limits of Justice: The Role of the Criminal Justice System in Reducing Crime,' *Toronto Centre of Criminology, University of Toronto*, 2004.