NATIONAL COUNCIL ON THE ADMINISTRATION OF JUSTICE

SENTENCING POLICY GUIDELINES

2023

SENTENCING POLICY GUIDELINES, 2023

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VISION

A coordinated and cohesive justice sector serving the people in Kenya.

MISSION

To ensure a coordinated and consultative administration of justice by bringing together key actors to collectively develop and pursue reform priorities and strategies.

VALUES

- Accountability
- Consultation
- Public Service
- Constitutionalism
- Interdependence
- Innovation

FOREWORD

Sentencing is an integral component of the criminal justice process which is tasked to a trial Judge or Magistrate to impose. The Sentencing Policy Guidelines (SPGs) were gazetted on 29th April 2016 vide Gazette Notice No. 2970 as a collaborative effort of the justice sector institutions under the auspices of the National Council on the Administration of Justice (NCAJ). The Guidelines were developed pursuant to section 35(2) of the Judicial Service Act 2011, which mandates NCAJ to formulate policies and strategies for the efficient administration of justice.

Since the formulation of the SPGs of 2016, the criminal justice landscape around sentencing has evolved significantly, prompting NCAJ to review the Guidelines to align them with emerging jurisprudence, and make them more responsive to the justice needs of Kenyans. The review process was spearheaded by the NCAJ Committee on Criminal Justice Reforms.

The Revised SPGs (2023) provide guidance on emerging issues relevant to sentencing. In particular, the attention and care owed to victims of crime, as well as consideration of the unique vulnerabilities of some offenders in the criminal justice system, including but not limited to those with mental disabilities, pregnant and lactating mothers, children, and intersex persons, has been considered. The revised SPGs provide guidance in sentencing where the mandatory minimum and maximum sentences are concerned. They also guide the courts in conducting resentencing hearings.

Judges, Magistrates, and other criminal justice actors with a role in the sentencing process are implored to use these Guidelines as a crucial reference tool during sentencing. The Guidelines will provide them with the requisite knowledge and skills to deliver proportionate, impartial, fair, consistent, accountable and transparent sentences while respecting human rights.

The Revised Sentencing Policy Guidelines (2023) shall come into operation upon publication in the Kenya Gazette, whereupon the Gazette Notice No. 2970 of 2016 shall be deemed revoked with immediate effect.

Hon. Justice Martha K. Koome, EGH
Chief Justice and President of the Supreme Court of Kenya &
Chairperson, National Council on the Administration of Justice

ACKNOWLEDGEMENT

The Revised Sentencing Policy Guidelines (2023) aim to ensure consistency in the sentencing approach by Judges and Magistrates across Kenya, providing for consideration of stakeholders' concerns before sentencing. The review process commenced in February 2022 and was completed in February 2023.

I laud the Council for providing the overall leadership and guidance to developing the Guidelines. Special appreciation goes to NCAJ Committee on Criminal Justice Reforms, led by its Chairperson, Hon Lady Justice Grace Ngenye, for spearheading the revision process. I also acknowledge the invaluable input of a dedicated team of Judges, Magistrates, and representatives from State and non-State agencies of the criminal justice system, who shared their vast expert insights and experiences, thus greatly enriching the Guidelines.

I recognise the concerted efforts of the Consultants who undertook research, reviewed and consolidated the feedback from stakeholders toward developing the Revised Guidelines. These are Dr. Linda Musumba and Mr. Lenson Njogu. The support extended by Ms. Jane Muhia, Mr. Ian Chelal, Mr. Duncan Kavagi, Mr. Edgar Ayongah, Ms. Wangari Muriithi, and Mr. Eliud Githinji, who undertook graphic design, is highly appreciated.

I appreciate the technical and facilitative support from the NCAJ Secretariat, notably from Dr. Moses Marang'a, the Executive Director, and Ms. Susan Jean Ouko, the Head of the Criminal Justice Reforms Department at NCAJ. I appreciate Hon. Lady Justice Patricia Nyaundi SC, who, at the time of developing the Guidelines, served as a Rule of Law Advisor at NCAJ.

I sincerely thank Ms. Shamini Jayanathan, OBE barrister-at-law and Global Prosecution Advisor at UNODC, for her invaluable technical support in revising the Sentencing Policy Guidelines. Last, I acknowledge the United Nations Office on Drugs and Crime (UNODC) Wildlife Crimes Division for extensive financial support for the review process.

Finally, I wish to thank the editorial team that worked tirelessly to ensure that the SPGs are as nearly flawless as possible and ready for dissemination. The hard work characterised by extra hours of work cannot go unnoticed. The team included Hon. Lady Justice Grace Ngenye, Ms. Shamimi Jayanathan, Mr. Lenson Njogu and Ms. Susan Ouko.

Anne A. Amadi, CBS
Chief Registrar of the Judiciary & Secretary
National Council on the Administration of Justice

ABBREVIATIONS AND ACRONYMS

CSO	Community Service Order
GATS	Guided Approach to Sentencing
NCAJ	National Council on Administrative Justice
NCCJR	NCAJ Committee on Criminal Justice Reforms
NTSA	National Transport and Safety Authority
ODPP	Office of the Director of Public Prosecutions
SPGs	Sentencing Policy Guidelines
WPA	Witness Protection Agency

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EXECUTIVE SUMMARY

These Revised Guidelines (2023) aim to standardise the sentencing processes and procedures in all of Kenya's criminal courts and provide a framework within which Magistrates and Judges can exercise their discretion in a manner that is objective, accountable, transparent, proportionate, and respectful of the human rights of all concerned parties. Legislative change and emerging jurisprudence among other issues led to the review of the SPGs 2016 under the aegis of the NCAJ. The National Committee on Criminal Justice Reforms (NCCJR) spearheaded the review process.

To deepen the utility of the SPGs as a means for achieving predictability, certainty, and consistency in sentencing, the revised SPGs has a raft of new approaches. These include:

- The Guided Approach to Sentencing (GATS) as a means for reducing disparities in sentencing to achieve the objectives of proportionality, consistency and predictability.
- Guidance on emerging discourse with relevance to sentencing, in particular the attention and care owed to victims of crime, as well as consideration of the vulnerabilities of offenders including but not limited to those with mental disability, pregnant and lactating mothers, children and intersex persons.
- Guidance on the committal of children in conflict with the law to reflect the spirit of the Children Act, 2022.
- The use of post-penal orders for the protection and supervision of offenders where appropriate.
- Guidelines on resentencing hearings.

Part I of the Guidelines sets out the preliminaries, including the principles underpinning sentencing and its objectives which apply to sentencing in all cases. Judges and Magistrates are required to internalise the principles set out in Part I, which justify the specific policy directions provided in the subsequent Parts.

Part II provides information on each application's available penal sanctions and policy directions, including whether to impose a custodial or a non-custodial sentence.

Part III recognises that specific categories of offenders will require special consideration in the courts upon determination of sentence. The categories include, among others, children, offenders with disabilities, those suffering from terminal or mental illness, intersex persons, the elderly and pregnant offenders.

Part IV addresses the sentencing process, identifying the roles of particular stakeholders, e.g., the Office of the Director of Public Prosecutions (ODPP), and providing guidance on issues such as plea bargaining, discounts for an early guilty plea, and the components of a pronouncement of sentence.

Part V introduces a Guided Approach to Sentencing (GATS) to enhance sentencing consistency, proportionality, and predictability. Guidance on aggravating and mitigating

features is also provided. In addition, specific direction is given for murder and manslaughter to facilitate the sentencing or resentencing exercise for such crimes. In light of recent global discourse on the need for biodiversity and climate justice protection, Part V also includes factors relevant to crimes affecting wildlife.

The Guidelines are meant for use by the Judiciary and all the actors with roles and responsibilities in the criminal justice sentencing process, including but not limited to the ODPP, the National Police Service, Probation and Aftercare Services, the Directorate of Children's Services, Kenya Prisons Service and the Witness Protection Agency.

The successful implementation of the Revised Guidelines will require a strengthened partnership between the Judiciary and other NCAJ agencies concerned with the sentencing process. Enhancing the capacity of Court Users Committees to facilitate joint training, communication, and information sharing concerning the role of actors will be supportive and crucial.

Hon. Lady Justice Grace W. Ngenye
Judge of the Court of Appeal of Kenya &
Chairperson, NCAJ Committee on Criminal Justice Reforms

PART I: PRELIMINARIES

1.1 INTRODUCTION

1.1.1 Sentencing is the process by which a court imposes a penal sanction once an accused person has pleaded guilty or has been convicted of an offence following a trial.

1.1.2 The punishments that can be meted out for a specific offence are expressly set out in Section 24 of the Penal Code and other statutes in which offences are created. Most of these provisions are couched in terms that provide wide discretionary powers for Judges and Magistrates, enabling the court to determine the most suitable sentence for each individual offender. However, the disparities in the sentences imposed upon offenders who have committed similar offences under similar circumstances reveals a lack of uniformity that undermines public confidence in the Judiciary.

1.1.3 Courts are required to act objectively and impartially[1] and remain accountable to the public for their decisions and actions.[2] Article 73 (1) (a) (iii & iv) of the Constitution requires State officers to exercise their authority in a manner that "brings dignity to the office" and "promotes public confidence in the integrity of the office". Article 10 (2) of the Constitution sets out the following as the national values and principles of governance that bind all State Officers: rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, good governance, integrity, transparency, and accountability.

1.1.4 A lack of uniformity in both the approach to sentencing and sentencing outcomes, undermines the above Constitutional values and further undermines public confidence. Over-utilisation of custodial sentences without consideration of the overarching objectives of sentencing has been linked to high recidivism rates and overcrowding in prisons – with the obvious resource implications.

1.1.5 These Guidelines aim to standardise the sentencing processes and procedures in all of Kenya's criminal courts and provide a framework within which Magistrates and Judges can exercise their discretion in a manner which is objective, accountable, transparent, proportionate, consistent and respectful of the human rights of all concerned parties. They further aim to enhance coordination of all agencies involved in the sentencing process as well as supervision of the sentence passed.

1.1.6 In so doing, the Guidelines seek to enhance the delivery of justice and public confidence in the Judiciary.

1.1.7 The Guidelines are in no way intended to fetter judicial discretion. The Guided Approach to Sentencing (GATS) in Part V, aims to structure the approach to sentencing in a way that can achieve the above outcomes by anchoring the exercise of discretion in the principles articulated herein.

[1] Constitution of Kenya 2010, Article 73 (2) (b).

[2] Constitution of Kenya 2010, Article 10 (2) (c), Article 73 (2) (d). See also Fatuma Hassan Salo v. Republic Criminal Appeal No. 429 of 2006 [2006] eKLR in which the court emphasised that the discretion during sentencing "must however, be exercised judicially. The trial court must be guided by evidence and sound legal principle".

1.1.8 The Guidelines specifically seek to:

i. Align the sentencing process to the provisions of the Constitution of Kenya;

ii. Structure the process of exercising judicial discretion in sentencing.

iii. Link the sentencing process to the overarching objectives of sentencing;

iv. Encourage consideration of non-custodial measures and promote restorative justice values during sentencing;

v. Provide guidance on the sentencing approach for vulnerable offenders identified as requiring special consideration; and

vi. Facilitate the participation and involvement of victims in the sentencing process.

1.2 PRINCIPLES UNDERPINNING THE SENTENCING PROCESS

1.2.1 **Proportionality**: The sentence meted out must be proportionate to the offending behaviour meaning it must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behaviour is weighted in view of the actual, foreseeable, and intended impact of the offence as well as the responsibility of the offender.[3]

1.2.2 **Equality/Uniformity/Parity/Consistency/Impartiality:** The same sentences should be imposed for same offences committed by offenders in similar circumstances.[4]

1.2.3 **Accountability and Transparency:** The reasoning behind the determination of sentence should be clearly set out and in accordance with the law and the sentencing principles laid out in these guidelines.[5]

1.2.4 **Inclusiveness**: Both the offender and the victim should participate in and inform the sentencing process.[6]

1.2.5 **Totality of the Sentence:** The sentence passed for offenders convicted for multiple counts must be just and proportionate, taking into account the offending behaviour as a whole**.** More guidance is given on this in paragraphs 2.3.21 to 2.3.30.

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[3] The principle of proportionality is grounded within the concept of just deserts and is embraced by common law. In Hoare v The Queen (1989) 167 CLR 348), it was stated that "a basic principle in sentencing law is that a sentence of imprisonment imposed by the court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances." The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) recognise the principle of proportionality but emphasise that with respect to juveniles, the response should not only consider the gravity of the offence but also the personal circumstance of the juvenile. Article 50 (1) of the Constitution of Kenya 2010 upholds the right to have a fair determination of a matter. Fairness demands that the sentence imposed should neither be excessive nor less than is merited. See for instance Caroline Auma Majabu v. Republic Criminal Appeal No. 65 of 2014 [2014] eKLR where a sentence of life imprisonment and a fine of Kshs. 1,000,000 for having been found in possession of heroin worth Kshs. 700 was found to be excessive. See also Republic v Sigei (Criminal Case 18 of 2020) [2022] KEHC 14972 (KLR) (9 November 2022) (Judgment), where the High Court stated, "Sentences must be commensurate to the offence committed by an Accused. (pg11)". See also, Thomas Mwambu Wenyi v Republic [2017] eKLR

[4] Constitution of Kenya 2010, Article 27; Article 73 (1) (a) (iii); Article 73 (2) (b).

[5] Constitution of Kenya 2010, Article 50; Article 73 (2) (d)).

[6] Constitution of Kenya 2010, Article 50; Article 10 (2) (b) identifies inclusiveness as one of the national values and principles of governance.

12.6 **Respect for Human Rights and Fundamental Freedoms**: The sentences imposed must promote, and not undermine, human rights and fundamental freedoms. Whilst upholding the dignity of both the offender (and where relevant, the victim), the sentencing regime should contribute to the broader enjoyment of human rights and fundamental freedoms in Kenya. Sentencing impacts on crime control and has a direct correlation to fostering an environment in which human rights and fundamental freedoms are enjoyed.

1.2.7 Enhancing **Compliance with Domestic Laws and Recognised International and Regional Standards on Sentencing:** Domestic law sets out the sentences that can be imposed for each offence. In addition, those international legal instruments, which have the force of law under Article 2 (6) of the Constitution of Kenya, should be applied. There are also international and regional standards and principles on sentencing that, even though not binding, provide important guidance on sentencing. Relevant international and regional legal instruments and guidelines include but are not limited to:

S/No.	RELEVANT REGIONAL/INTERNATIONAL INSTRUMENTS
i	African Charter on the Rights and Welfare of the Child (adopted in 1990, entered into force on 29th November 1999) OAU Doc. CAB/LEG/24.9/49.
ii	African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (proclaimed by the African Commission on Human and Peoples' Rights) DOC/OS (XXX) 247.
iii	Convention on the Rights of the Child (adopted and opened for signature, ratification and accession by United Nations General Assembly (UNGA) Resolution 44/25 of 20th November 1989, entered into force on 2nd September 1990).
iv	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted and opened for signature, ratification and accession by United Nations General Assembly (UNGA) Resolution 39/46 of 10th December 1984, entered into force on 26th June 1987).
v	Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted by United Nations General Assembly (UNGA) Resolution 40/34 of 29th November 1985).
vi	Guidelines for Action on Children in the Criminal Justice System (recommended by United Nations Economic and Social Council (ECOSOC) Resolution 1997/30 of 21st July 1997).
vii	International Covenant on Civil and Political Rights (ICCPR) adopted by United Nations General Assembly (UNGA) Resolution 2200 A (XXI) of 16th December 1966, entered into force on 23rd March 1976 999 UNTS 171 (ICCPR).

S/No.	RELEVANT REGIONAL/INTERNATIONAL INSTRUMENTS
viii	Kampala Declaration on Prison Conditions in Africa and Plan of Action (adopted by a Conference of African Countries on 21st September 1996).
ix	Ouagadougou Plan of Action Adopted on Accelerating Prisons and Penal Reforms in Africa (adopted by the African Commission on Human and Peoples' Rights on 20th November 2003) ACHPR /Resolution 64 (XXXIV) 03).
x	Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) (adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders and approved by United Nations Economic and Social Council (ECOSOC) Resolution 663 C (XXIV) of 31st July 1957 and 2076 (LXII) of 13th May 1977).
xi	United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) (adopted and proclaimed by the United Nations General Assembly (UNGA) Resolution 45/113 of 14th December 1990).
xii	United Nations Rules for the Protection of Juveniles Deprived of their Liberty (adopted by United Nations General Assembly (UNGA) Resolution 45/113 of 14th December 1990).
xiii	United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (adopted by United Nations General Assembly (UNGA) Resolution 65/229 of 21st December 2010).
xiv	United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) (adopted by United Nations General Assembly (UNGA) Resolution 45/110 of 14th December 1990).
xv	United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) (adopted by United Nations General Assembly (UNGA) Resolution 40/33 of 29th November 1985).

1.3 OBJECTIVES OF SENTENCING

1.3.1 Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.

i. **Retribution:** To punish the offender for their criminal conduct in a just manner.

ii. **Deterrence:** To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.

iii. **Rehabilitation:** To enable the offender to reform from his/her criminal disposition and become a law-abiding person.

iv. **Restorative justice:** To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs.

v. **Community protection:** To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.

vi. **Denunciation:** To clearly communicate the community's condemnation of the criminal conduct.

vii. **Reconciliation:** To mend the relationship between the offender, the victim and the community.

viii. **Reintegration:** To facilitate the re-entry of the offender into the society.

PART II: PENAL AND CORRECTIVE SANCTIONS RECOGNISED UNDER KENYAN LAW

2.1 THE FOLLOWING PENAL SANCTIONS ARE RECOGNISED IN KENYA

1. Death penalty[7]
2. Imprisonment[8]
3. Community service orders[9]
4. Probation order[10]
5. Fines[11]
6. Payment of compensation[12]
7. Forfeiture[13]
8. Finding security to keep the peace and be of good behaviour[14]
9. Absolute and conditional discharge[15]
10. Suspended sentences[16]
11. Restitution[17]
12. Suspension of certificate of competency in traffic offences[18]
13. Police supervision[19]
14. Revocation/forfeiture of licences[20]
15. Committal to rehabilitation centres[21]
16. Recommendation for removal from Kenya[22]

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7 Penal Code, section 24 (a).

8 Penal Code, section 24 (b).

9 Penal Code, section 24 (b); Community Service Orders Act, section3

10 Penal Code, section 24 (i); Probation of Offenders Act, section4

11 Penal Code, section 24 (e) & s 28.

12 Penal Code, section 24 (g); section 31.

13 Penal Code, section 24 (f); section 29.

14 Penal Code, section 24 (h); section 33; section 43 to 46.

15 Penal Code, section 35

16 Criminal Procedure Code, section 15

17 Criminal Procedure Code, section 178

18 Penal Code, section 39

19 E.g., Security Laws (Amendment Act), section 343

20 E.g., Alcoholic Drinks Control Act, section 42; Environmental Coordination and Management Act, section 146 (3).

21 Narcotic Drugs and Psychotropic Substances, section 58 (1).

22 Penal Code, section 26A

2.2 THE DEATH PENALTY

2.2.1 The death penalty is imposed upon offenders convicted of treason,[23] administration of unlawful oaths to commit capital offences[24] or robbery with violence[25] or attempted robbery with violence,[26] and in some instances of murder.[27] According to Section 69 of the Prisons Act, Cap 90, the mode of administering the death penalty recognised by Kenyan law is by hanging.

2.2.2 Children in conflict with the law cannot be subjected to the death penalty.[28] Further, the Criminal Procedure Code prohibits the imposition of the death penalty upon offenders convicted of an offence punishable by death, but that was committed when the offender was below the age of 18 years. Instead, in accordance with Section 25 (2) and (3) of the Penal Code, such an offender is to be detained at the President's pleasure, with the court required to forward to the President the notes of the evidence adduced during the trial, as well as a signed report expressing the court's observations or recommendations.[29] Notably, the provisions regarding children and sentencing 'at the President's pleasure' have since been declared unconstitutional in ***AOO & 6 others V Attorney General & Another***[30] and pending any appellate reversal of this decision, that is now the position. The anomaly that would arise from the incarceration of offenders at the pleasure of the President insofar as vulnerable categories of offenders such as those suffering from a mental disorder is concerned has been further elaborated in paragraphs 3.4.

2.2.3 Pregnant offenders are also exempted from the death penalty and where they are convicted of offences punishable by death, are to be sentenced to life imprisonment instead.[31]

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23 Penal Code, section 40 (3).

24 Penal Code, section 60.

25 Penal Code, section 296(2)

26 Penal Code, section 297 (2).

27 Following the decision in *Francis Karioko Muruatetu & Another vs Republic* (2017) eKLR (Muruatetu 1) where the court found that section 204 of the Penal Code is inconsistent with the constitution and therefore invalid to the extent that in provides for the mandatory death sentence for murder (paragraph 69)

28 Children's Act 2022, section 6 (2) & section 238; Convention on the Rights of the Child, Article 37 (a); International Covenant on Civil and Political Rights, Article 6 (5); African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, paragraph 9 (c)., African Charter on the Rights and Welfare of the Child Article 5 (1) & (3)

29 Penal Code, section 25 (3).

30 Petition No. 570 of 2015 [2017] eKLR.

31 Penal Code, section 211; International Covenant on Civil and Political Rights, Article 6 (5); African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, paragraph 9 (c).

Situational Analysis

2.2.4 Though a recognised form of punishment, the last execution took place in 1987. Following the Supreme Court's decisions in Muruatetu I[32] & II[33] the mandatory nature of the death sentence with respect to murder was declared unconstitutional. The Court specified that the decision does not outlaw the death penalty and that it is still applicable as a maximum punishment in instances where the circumstances so warrant.

2.2.5 In the period between Muruatetu I and Muruatetu II, the legality of all mandatory and even minimum sentences was called into question, leading to even greater disparity in sentencing and in some instances, minimum sentences were not applied at all despite being a statutory requirement. Whilst Muruatetu II has clarified the position relating to murder, it is likely that other offences that demand the mandatory death penalty will eventually be challenged and require resolution at the Supreme Court.

Policy Directions

2.2.6 Following Muruatetu II, the mandatory nature of the death penalty is still applicable to other capital offences, except murder.

2.2.7 Notwithstanding the nature of any offence punishable by death, no court shall impose the death penalty upon a child.[34] This applies even where a child has attained the age of majority by the time the court renders its decision. However, based on the decision in the ***AOO & 6 others V Attorney General & Another*** case reviewed above, children in conflict with the law cannot be given indeterminate sentences to be held at the pleasure of the President. Instead, children in conflict with the law should as far as possible be given non-custodial sentences in accordance with the Children Act 2022. See Part III of these Guidelines under 'Children.'

2.2.8 Pregnant women cannot be sentenced to death.

2.2.9 Where an accused person is convicted of several counts of capital offences each attracting the death sentence, the court shall pass the death sentence on each count but direct that the second or subsequent sentences be held in abeyance.[35]

2.3 IMPRISONMENT

2.3.1 Serving time in custody is the sentence provided for most offences created under various statutes.[36] It is also the sentence meted out in many cases.

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[32] *Francis Karioko Muruatetu & Another vs Republic* (2017) eKLR

[33] *Francis Karioko Muruatetu & Another V Republic; Katiba Institute & 5 others* (Amicus Curiae) (2021 eKLR)

[34] Section 238 Children Act 2022

[35] See *Okwaro Wanjala v Republic* [1978] KLR 114, Shah v Republic [1985] KLR 674, *Moses Atila Othira v Republic* [2009] eKLR

[36] For instance, under the Penal Code; Anti-Corruption and Economic Crimes Act, part V; Alcoholic Drinks Control Act, part V; Marriage Act, part XIII; Elections Act, part VI etc. Other sentences are provided in some cases either in substitution or in addition to imprisonment

2.3.2 The wording used by the Penal Code in most cases is "…liable to…imprisonment" or in some cases using the words "not exceeding…"[37] - thus setting out the maximum sentence in most cases. Section 26 (2) of the Penal Code gives the court discretion to impose a sentence shorter than prescribed by the relevant provision except where mandatory minimum sentences are prescribed.[38] Subsequent statutes such as the Sexual Offences Act provide minimum[39] and maximum sentences. The Security Laws (Amendment) Act provides minimum sentences in some instances.

2.3.3 The court can order that part of the custodial sentence be served in a rehabilitation centre where the court is satisfied that an offender is addicted to narcotic drugs or psychotropic substances, and where the offender is in possession of those substances only for their own consumption.[40]

2.3.4 The issue of consecutive or concurrent sentences is addressed in part under Section 14 of the Criminal Procedure Code and for offences committed during the currency of an existing sentence or before sentencing for a previous conviction, Section 37 of the Penal Code. However, this is a complex arena and so further guidance is given in paragraphs 2.3.21 to 2.2.30.

Situational Analysis

2.3.5 There exist notable disparities in the length of imprisonment of offenders committing same offences in more or less similar circumstances. There is a lack of uniformity and certainty in the sentences likely to be imposed. This has contributed to a negative perception against the Judiciary and lends support to claims of corruption and unprofessionalism. The uncertainty of the likely sentences also poses a challenge to prosecutors when negotiating plea agreements.

2.3.6 The prisons in Kenya are overcrowded with one of the major contributing factors being the over-utilisation of custodial sentences.[41] Offenders serving sentences of less than three years have in most cases been convicted of misdemeanours and so may have been more suitable candidates for non-custodial sentences.[42]

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[37] For example, Penal Code, section 89 (2)

[38] Penal Code, section 89, criminalises possession of firearms; Penal Code, section 308, criminalises possession of dangerous or offensive weapons in preparation for the commission of a felony

[39] Following the High Court decision in *Maingi & 5 others v Director of Public Prosecutions & Another* (Petition No. E017 OF 2021 [2022] KEHC 13118 (KLR) (17 May 2022) (Judgement) the legality of mandatory minimum sentences in sexual offences was voided with the Court also directing the re-sentencing of offenders in the same manner as in Muruatetu I. However, the matter is before the Court of Appeal.

[40] Narcotic Drugs and Psychotropic Substances (Control) Act, section 58 (1).

[41] See *Loramatu v. Republic* [1985] eKLR in which the court highlighted the failure to utilise non-custodial sentences in many cases; see also *Legal Resources Foundation, Sentencing in Kenya: Practice, Trends, Perceptions and Judicial Discretion* (LRF 2011) 34-36.

[42] Statistics from the Kenya Prisons Service Headquarters 412reveal that out of the total 31,725 convicted offenders, 12,643 have been sentenced to three years and less as of 18th March 2015. Moreover, 7,402 have been sentenced to one year and below.

2.3.7 The application of mandatory minimum sentences has been considered problematic due to its infringement on judicial discretion and its limiting effect on the right to fair trial in contravention of Article 25 (c) of the Constitution. The fettering of the judicial discretion owing to the prescription of mandatory minimum sentences imposed by statutes, is believed to have led to perceptions of undue harshness with respect to some of the sentences imposed - offender's mitigation cannot be taken into account to the extent that it can lower the sentence below the mandatory minimum.

2.3.8 Following the Supreme Court's decision in Muruatetu I and II,[43] there have been calls to extend the reasoning behind the judgement to all other circumstances where mandatory minimum or maximum sentences apply, including sexual offences.[44] Kenya is clearly in transition away from minimum sentences with the applicability of mandatory minimum sentences in offences other than murder currently being challenged before Courts.

2.3.9 In addition, time spent in custody, including police custody, is not always taken into account during the sentencing exercise.[45] There are some instances where offenders have been remanded in custody pending trial for periods longer than the statutory maximum or longer than they would have served had they pleaded guilty or had their trial heard at an earlier stage.

2.3.10 On sentencing an offender for multiple offences, Section 14 of the Criminal Procedure Code sets out the general rule that sentences run consecutively unless otherwise directed by the court. There is need for the courts to address this matter explicitly and in a uniform way, hence the further guidance on totality of sentence provided herein.

2.3.11 The option of committing offenders who suffer with substance abuse to appropriate rehabilitation centres is restricted to those convicted for offences under the Narcotics, Drugs and Psychotropic Substances (Control) Act 1994. For all other

[43] See *Francis Karioko Muruatetu & Another vs Republic* (2017) eKLR, see also *Francis Karioko Muruatetu & Another V Republic; Katiba Institute & 5 others* (Amicus Curiae) (2021 eKLR).

[44] This was well articulated by the Court in *Dismas Wafula Kilwake Vs. Republic* [2019] eKLR as follows; "Being so persuaded, we hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing." In the end, courts have a duty to dispense justice not only to the complainants but also to accused persons. See also *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) Notably, this issue is currently before the Court of Appeal.

[45] See for example *Republic v. Thomas Gilbert Cholmondeley* [2009] eKLR; *Charles Khisa Wanjala v Republic* [2010] eKLR

offenders, such committal would be under the court's general discretion. However, such options are not fully explored for several reasons including a lack of available facilities countrywide, a lack of awareness of the existence of such facilities, failure in early identification of substance abuse issues amongst offenders, and in matters relating to children, the absence of any such facilities altogether.

Policy Directions

Disparity in sentence

2.3.12 In order to achieve greater uniformity in sentencing across the country, Judges and Magistrates are referred to Part V of these Guidelines.

Custodial versus non-custodial sentences

2.3.13 Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for cases where the offence is so serious that neither a fine nor a community sentence can be justified. The length of that sentence will depend on the maximum penalty allowed by law and the seriousness of the offence and other factors set out in Part V. The court should bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence that is geared towards achieving the sentencing principles and objectives set out in Part I.

2.3.14 Imprisonment of petty offenders should be avoided, as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. Further, short terms of imprisonment are disruptive and contribute to re-offending.

2.3.15 In deciding whether to impose a custodial or a non-custodial sentence, the following factors should be considered:

i. **Gravity of the offence:** In the absence of aggravating circumstances, or any other circumstance that renders a non-custodial sentence unsuitable, a sentence of imprisonment should be avoided with respect to sentences that have been adjudged as deserving less than three (3) years.

ii. **Criminal history of the offender:** Taking into account the seriousness of the offence, first offenders should be considered for non-custodial sentences except where the seriousness of the offence crosses the custody threshold as set out in paragraph 2.3.13 above. When dealing with repeat offenders, consideration should be given to the nature of the previous behaviour and the time that has elapsed between the previous conviction and the current offence. For adult offenders with previous convictions that relate to offences committed when the offender was a child, these should be disregarded unless the circumstances of the case demand that they be taken into account owing to the similarity or frequency of the behaviour, or the seriousness of the previous offence(s). In any event, previous convictions should not be taken into consideration unless they are either admitted or proved.

iii. **Children in conflict with the law:** For particular guidance see Part III below. Generally speaking, non-custodial orders should be imposed as a matter of course in the case of children in conflict with the law. The exception to this is in circumstances where in light of the seriousness of the offence, coupled with other factors, the court is satisfied that a custodial order is the most appropriate and would be in the child's best interest.[46] Custodial orders should only be meted out as a measure of last resort and in accordance with the guidance provided under Section 239 of the Children's Act, 2022.[47] The Court shall also issue clear post-committal supervision orders upon completion of the committal orders or attainment of the age of majority where it is appropriate to so do in light of the nature of the offence and circumstances of the offender.

iv. **Conduct of the offender:** non-custodial sentences are best suited for offenders who are already remorseful and receptive to rehabilitative measures.

v. **Protection of the community:** Where there is evidence that the offender is likely to pose a threat to the community, a custodial sentence may be more appropriate. The probation officer`s report should inform the court of the risk posed by the offender to the community [48] in order to inform sentencing.

vi. **Offender's responsibility to third parties:** Where committing an offender to a custodial sentence is likely to unduly prejudice others, particularly vulnerable persons who depend on them, a court should consider if, in light of the nature and seriousness of the offence, the objectives of sentencing can be met with a non-custodial sentence or a suspended sentence (see paragraph 2.11 of these Guidelines). The court should enquire into the offender's personal circumstances and, where appropriate, seek the assistance of a pre-sentence report.

Mandatory minimum sentences

2.3.16 Where the law provides mandatory minimum sentences, the court is bound by those provisions and must not impose a sentence lower than what is prescribed.[49] A fine shall not substitute a term of imprisonment where a minimum term of imprisonment is the only option provided.[50] Courts must however remain cognisant of any changes made to the applicability of mandatory minimum sentences with respect to specific offences given the clear concerns that have been raised in a number of cases about the constitutionality of such sentences.

2.3.17 Until the Supreme Court decides on the matters, Judicial Officers and Judges must adhere to the prevailing legislative frameworks, jurisprudence from courts and the SPGs 2022 during sentencing on the issue of the applicability of mandatory minimum sentences.

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46 Constitution of Kenya 2010, Article 53 (2); Children's Act 2022, section 8.

47 Constitution of Kenya 2010, Article 53(1) (f); Convention on the Rights of the Child, Article 37 (b); African Charter on the Rights and Welfare of the Child, Article 4.

48 United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), rule 8.1.

49 This is despite the undue injustice caused in light of the individual circumstances. The only recourse is law reform. See *Kennedy Munga v. Republic* [2011] eKLR in which an order for probation in a defilement case was held to be illegal and was revised to fifteen years.

50 Penal Code, section 26 (3) (i).

Time served in custody prior to conviction

2.3.18 Section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with offences that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail or bond.

2.3.19 Upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody in identifying the actual period to be served (see GATS at Part V). This period must be carefully calculated – and courts should make an enquiry particularly with unrepresented offenders – for example, there may be periods served where bail was interrupted and a short remand in custody was followed by a reissuance of bail e.g., where a surety is withdrawn, and a new surety is later found. **This calculation must include time spent in police custody.**

2.3.20 An offender convicted of a misdemeanour and who had been in custody throughout the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be **deemed to have served their sentence and be released immediately.**

The principle of totality and concurrent and consecutive sentences

2.3.21 Notwithstanding the provisions under the Criminal Procedure Code and the Penal Code summarised in paragraph 2.3.4 above, the discretion to impose concurrent or consecutive sentences lies with the court. There are two elements to the concept of totality, and these apply as much to terms of imprisonment as they do to community service and fines.

2.3.22 Firstly, all courts when sentencing for more than one offence should pass a total sentence which reflects all the offending behaviour in a way that is just and proportionate. This is whether the sentences are consecutive or concurrent and will usually mean that concurrent sentences will result in a longer sentence overall than a single sentence for one offence. However, the court must avoid 'double counting' where the additional offences are ancillary to the main offence e.g., robbery with a weapon – the presence of a weapon – an intrinsic part of the main offence of robbery - will likely aggravate the sentence on robbery and so the weapon offence should run concurrently and will not necessarily exceed the sentence for the robbery itself.

2.3.23 Secondly, it is rarely possible to arrive at a just and proportionate sentence by simply adding together single sentences for each offence. The court must address the offending behaviour as a whole together with the personal circumstances of the offender. Accordingly, the court must bear in mind the purposes of sentencing set out in paragraph 1.3.

2.3.24 **A concurrent** sentence will normally be appropriate where the offences arise out of the same incident or facts. E.g., poaching of several animals that vary in the degree of protection they are afforded under the law; a burglary 'spree' of several properties committed in one night; fraud and associated forgeries, or a dangerous driving incident where multiple victims are injured as a result of one offence of dangerous driving e.g., driving into a bus stop.

2.3.25 A **consecutive sentence** will normally be appropriate where the offences arise out of unrelated facts or incidents e.g., attempting to obstruct the course of justice in relation to an unrelated offence; where the defendant is convicted of dealing in drugs and also possession of a firearm upon arrest – the firearm offence is not an intrinsic part of the drugs matter and requires separate recognition, or where the accused commits a theft on one occasion and an assault on a different victim on another occasion.

2.3.26 A consecutive sentence may also be appropriate where the offences are of the same or similar kind but where the court is of the view that a concurrent sentence will not sufficiently reflect the overall criminality e.g., assault of a police officer whilst trying to evade arrest for the original offence; assault of the same victim committed in the context of domestic violence or where there are sexual offences against the same victim.

2.3.27 Other considerations that apply include the following:

i. Where an accused person commits an additional offence during the operational period of a suspended sentence, and the court decides to activate the suspended sentence, the additional sentence should normally be consecutive as it will have arisen out of separate facts.

ii. Where consecutive sentences are to be passed, the court must add up the sentences together and then consider if the total is just and proportionate. A downward adjustment can then be made. See Part V and the GATS.

iii. Where sentencing multiple offenders who each have differing levels of culpability based on their role in the offence, any downward adjustment must be applied by the same proportion for each accused person so that the lead offender can be clearly identified.

iv. Where several offences are all imprisonable but none of the individual offences merit a custodial sentence, the custody threshold may be crossed by reason of multiple offending.

v. Indeterminate sentences should generally be ordered to run concurrently. In the absence of parole or similar mechanisms, it is not practicable at this stage to advise on the application of either determinate or indeterminate sentences imposed after the passage of a previous indeterminate sentence. The general principles of proportionality should be applied.

2.3.28 In the case of imprisonment in default of payment of a fine, the sentence cannot run concurrently with a previous sentence.[51]

2.3.29 A community service order imposed for multiple offences is a composite package rather than an accumulation of sentences for individual charges. Where the court believes it is necessary to impose more than one community order, it should order that they run concurrently and for ease of administration, each order should be identical and should not exceed the maximum period is three years in totality.

2.3.30 In relation to fines imposed for non-imprisonable offences, the court should start by determining the fine appropriate for each individual offence based on the seriousness of the offence and the financial circumstances of the offender insofar as they are known, or appear, to the court. The court should then add up the fines together and then consider if the total is just and proportionate.

Alternative places of custody – rehabilitation/treatment for substance addiction or abuse

2.3.31 Where a court is satisfied, based on the report of an appropriate agency, that an offender convicted of an offence under the Narcotic and Psychotropic Substances (Control) Act is a drug addict in accordance with Section 58 (1) thereof, it should make an order requiring the offender to serve a term in a rehabilitation centre, hospital or any other institution where his condition can be attended to. It is worth noting that the court has the power to order similar rehabilitation pending completion of the trial if it is practicable.

2.3.32 Where the court is satisfied, based on the report of an appropriate agency, that an offender convicted for an offence other than under the Narcotic and Psychotropic Substances (Control) Act is addicted to narcotic drugs or psychotropic substances, the court shall ensure that the person is referred to a drug rehabilitation centre for treatment before they can be transferred to prison to serve the remainder of their sentence if any.

2.3.33 In both instances, the court must enquire about the location and availability of such institutions.

2.3.34 In the case of a non-custodial sentence, with a requirement to attend treatment under this section, the court shall give clear directions on the supervision requirements.

2.4 COMMUNITY SERVICE ORDERS

2.4.1 Community Service Orders (CSO) is a non-custodial sentence that entails doing unpaid public work for the benefit of the community and for a period that does not exceed the term of imprisonment that the offender could have been sentenced to, up to a maximum of three years.[52]

2.4.2 CSOs, in suitable cases, are effective as they promote a sense of responsibility to the offender. They may also contribute to the community wronged by the offender. In some cases, this form of sentence is retributive, particularly for offenders who find it

[51] Penal Code, section 37.

[52] Community Service Orders Act, section 3 (2) (a) as read with section 3(1)(b)

demeaning to serve a sentence publicly and it can be very demanding for offenders with other responsibilities. If supervised properly, it achieves the objectives of sentencing and courts should impose it where it is the most appropriate sentence under the circumstances.

2.4.3 According to the Second Schedule of the Community Service Orders Act, it is the duty of the community service officers, in this case probation officers,[53] to identify suitable work placements and to oversee the work and progress of offenders.[54]

Situational Analysis

2.4.4 CSOs need to be more underutilised[55] with supervision of such orders cited as the major challenge. In the absence of a guarantee of proper supervision, the courts are sometimes reluctant to impose such orders. There is also need for the identification of a larger pool of work placements for the execution of such orders.

Policy Direction

2.4.5 Where the court intends to commit a person to serve community service for one month and above, it should request for a community service officer's[56] report before pronouncing the order.[57]

2.4.6 Prior to imposing a CSO, the court must engage with the community service officer to satisfy itself as to the suitability of the work placement and the adequacy of the supervision arrangements.

2.4.7 To strengthen and streamline the framework for CSOs, the court should routinely engage with the Community Service Orders Committee and contribute towards addressing issues undermining the effectiveness of the orders.[58]

2.4.8 The Chairperson of the Community Service Orders Committees bears the responsibility of ensuring that the system of community service orders is functioning effectively.

2.4.9 Community Service Orders Committees should consistently engage with the National Community Service Orders Committee to raise issues affecting the realisation of the objectives of Community Service Orders such as funding.[59]

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53 Community Service Orders Act, section 12

54 Community Service Orders Act, Second Schedule, Part (a) and (b).

55 See *Jonathan Mutinda v. Republic* [2004] eKLR in which a petty traffic offender was sentenced to imprisonment. The High Court on appeal stated, "the magistrate is also reminded to take advantage of the other remedies like community service order, instead of resorting to the custodial sentence. The courts are sensitised in helping to decongest the prisons. He is doing just the opposite". See also *Republic v Paul Murima Mbatia* [2021] eKLR where the High Court quoted CJ Emeritus Willy Mutunga in The Sentencing Policy Guidelines as follows "The sentencing process…It should also infuse restorative justice values and champion the national value of inclusivity by promoting community involvement through use of non-custodial sentences in suitable cases."

56 Section 12 of the Community Service Orders Act provides that probation officers serve as community service officers.

57 Community Service Orders Act, section 3 (3), section 3(5) (b).

58 Community Service Orders (Case Committees) Regulations, 1999, section 4 (a).

59 Community Service Orders (Case Committees) Regulations, 1999, section 4 (g).

2.5 PROBATION ORDERS

2.5.1 The Probation of Offenders Act, Cap 64, gives courts the option of placing offenders on probation.[60] A probation order is one which places an offender under the supervision of a probation officer for not less than six months and not exceeding three years.[61] An offender may be required to enter into a recognisance, with or without sureties, where a probation order is imposed.[62] An offender is required to comply strictly with the terms of the probation order the breach of which will attract a range of sanctions outlined in the Probation of Offenders Act.[63] If an offender commits an offence during the probation term, the offender becomes liable to be sentenced for the original offence. The court is under an obligation to explain these terms to the offender when the order is imposed.[64]

2.5.2 When deciding on whether to place an offender on probation, Section 4 (i) of the Probation of Offenders Act calls upon the court to have regard to the following information, typically contained in a pre-sentence report:

i. Age
ii. Character
iii. Antecedents
iv. Home surroundings
v. Health or mental condition of the offender
vi. The nature of the offence
vii. The victim impact statement
viii. Any extenuating circumstances in which the offence was committed

2.5.3 The court must be satisfied of the offender's willingness to comply with the provisions of the probation order for it to impose the order.[65]

Situational Analysis

2.5.4 There is a gradual increase in the number of probation orders imposed as courts increasingly recognise the merits of probation as opposed to custody.

2.5.5 Whilst pre-sentence reports are required in cases where courts are considering imposing probation orders, there are concerns over the insufficient numbers of available and qualified probation officers, and the limited resources available to discharge this function. This also means that the eventual supervision of a probation order is also hampered.

60 Section 4.
61 Probation of Offenders Act, section 5
62 Probation of Offenders Act, section 4 (2).
63 Probation of Offenders Act, section 8.
64 Probation of Offenders Act, section 4 (3).
65 Probation of Offenders Act, section 4 (3).

Policy Directions

2.5.6 The policy guidelines on custodial versus non-custodial sentences in paragraphs 2.3.13 to 2.3.15 of these guidelines apply.

2.5.7 Before issuing a probation order, the court must receive and consider a probation officer's report alongside any victim impact statement if available.

2.5.8 The main aim of a probation order is to facilitate the reformation and rehabilitation of the offender. Therefore, an offender's remorsefulness and attitude should be considered when determining the suitability of the sentence.[66]

2.5.9 The court should engage with the probation officer to establish conditions that are necessary to enhance the supervision of the probation order. Section 5 of the Probation of Offenders Act obligates the court to set out the conditions necessary to secure the supervision of the offender. Section 4 (3) requires the court to clearly explain to the offender the terms of the Probation Order and the consequences of any breach.

2.5.10 The Judicial Officer representing the court station in the Probation Orders Case Committee should continuously engage with the chair of the committee to ensure that the committee meets consistently and addresses issues that may undermine the effective operation of probation orders.

2.5.11 The Probation Orders Case Committee should consistently engage with the Central Probation Committee to raise issues such as funding affecting the realisation of the objectives of probation orders.[67]

2.6 COMPENSATION

2.6.1 Compensation orders are particularly desirable as they fuse restorative and retributive justice. Payment of compensation is a punishment to the offender, but it also gives the offender an opportunity to take responsibility for their conduct and remedy the harm caused.

2.6.2 The court is mandated to make a compensation order in addition or in substitution for any punishment.[68] However, the court cannot make a compensation order in substitution of an offence that attracts a mandatory minimum custodial sentence. An order of compensation takes effect on the expiry of the time limited for an appeal, and where an appeal is lodged, on confirmation of the conviction and order.[69]

2.6.3 Where a person is convicted of corruption or an economic crime that occasioned loss to anyone, it is mandatory for the court to impose compensation orders, upon conviction or on subsequent application.[70]

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66 *Elijah Munene Ndundu & Another v R* [1978] KLR 163. See also *Juma Makokha Mohammed v Republic* [2021] eKLR where the High Court where the High Court reviewed a sentence from 4 years to 3 years on account of the offender's remorsefulness that was evident in his plea of guilt.

67 Probation of Offenders Act, Probation of Offenders (Central Probation Committee) Rules, Rule 4 (b); Probation of Offenders Act, Probation of Offenders (Case Committees) Rules, Rule 4 (d).

68 Penal Code, section 31; see also the Probation of Offenders Act, section 6.; Forest Conservation and Management Act s68 Act, section 55; Victim Protection Act section 24; Counter Trafficking in Persons Act section 13

69 Criminal Procedure Code, section 175 (4).

70 Anti-Corruption and Economic Crimes Act, section 51 read together with section 54 (1) (a).

2.6.4 The sum to be paid by the offender to the injured party is such sum as the court considers could justly be recovered as damages were civil proceedings to be brought by the injured party against the offender in respect of the civil liability concerned.[71]

2.6.5 The court is mandated to make compensation orders with respect to costs incurred by the victim during treatment as a result of the harm caused by the offender.[72] It can also require the convicted person to compensate the victim for costs incurred n relation to the proceedings including repairs of any damage.[73] To ascertain the proper compensation, the court shall request for evidence of the said costs.

Situational Analysis

2.6.6 In practice, courts have been reluctant to impose compensation orders mainly due to the following reasons:

i. Firstly, the determination of the quantum of the compensation raises issues of civil law that a criminal court is reluctant to engage in. Section 175 (3) (i and ii) of the Criminal Procedure Code appreciates instances where the complexity of the evidentiary matters may require a civil suit. However, there are instances where there are no complexities, and the court can determine the amount of compensation that a victim deserves.

ii. Secondly, enforcement of compensation orders is in certain instances challenging and the courts are keen to impose orders that will be met, thus maintaining the authority of the court.

iii. Thirdly, there has been an emphasis on retributive justice with focus being on punishing the offender with little or no attention to the victim.

Policy Directions

2.6.7 In deciding whether to make an order of compensation, the court must consider:

i. Jurisdiction: Where the appropriate compensation order exceeds the pecuniary jurisdiction of that court, then it must not pronounce the order.[74] The judicial officer should advise the injured party to seek compensation in a civil suit.

ii. The complexity of evidentiary matters touching on the quantum of damages: Where, in the opinion of the court, evidentiary matters are complex and require a civil suit, or where the evidence available is not adequate to determine the damages, the court shall refrain from making a compensation order[75] and should advise the injured party to seek compensation in a civil suit.

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71 Criminal Procedure Code, section 175 (2) (b

72 Victim Protection Act, section 26 (1) (b).

73 Victim Protection Act, section 26 (1) (c).

74 Criminal Procedure Code, section 175 (3) (a).

75 Criminal Procedure Code, section 175 (3) (b) (i & ii); see *Mukindia v. Republic* [1966] EA 426. See also *Elikah Nasimiyu Bunyasi v Republic* [2021] eKLR

iii. Validity of action: Where the claim is barred by the Limitations of Action Act, the court shall not make a compensation order.[76]

iv. Undue prejudice to the rights of the convicted person: Where there are circumstances which, in the opinion of the court, would render compensation order unduly prejudicial to the rights of a convicted person in respect to the civil liability, then the court shall not make a compensation order.[77]

2.6.8 Compensation should benefit and not inflict further harm on the victim. Any financial recompense from the accused person may cause distress and the victim may not want compensation from that offender in the first place – assumptions should not be made either way. The victim's views should be properly obtained through sensitive discussions by the police or probation services, but it should be explained that the offender's ability to pay will ultimately determine whether and how compensation might be ordered.

2.6.9 The court should consider two types of loss – financial loss such as the cost of repairing damage or, in the case of injury, loss of earnings or medical expenses; and pain and suffering caused by injury.

2.6.10 The court should engage with the offender to determine a practical and achievable schedule of payment. Where the court is satisfied that the offender is not in a position to make a single payment but can do so in instalments, then it should give directions on the payment of such instalments and set mention dates to correspond with the dates that payments are due.

2.6.11 The compensation order shall specify the amount of money or form of compensation payable, manner of payment, date of payment and provide the applicable interest rates. The Judge or Judicial Officer should explain the consequences of any breach of payment.

2.6.12 Upon convicting an offender of a corruption or economic crime, the court is obligated to order the offender to return to the rightful owner the property acquired through or as a result of the offence. The court is also obligated to impose compensation orders where loss has been occasioned by any person because of the conduct.[78]

2.6.13 The fact that a custodial sentence is imposed does not, in itself, make it inappropriate to order compensation but the court should enquire whether the offender will have the means to satisfy the order if imprisoned.[79] It may be more appropriate to advise the injured party to seek a civil suit. Where a compensation order is imposed alongside a custodial sentence, imprisonment in default of non-payment should not be imposed.

76 Criminal Procedure Code, section 175 (3) (b) (iii).

77 Criminal Procedure Code, section 175 (4).

78 Anti-Corruption and Economic Crimes Act, section 54.

79 Section 366 of the Criminal Procedure Code

2.7 FINES

2.7.1 The law permits the imposition of fines[80] and as specified in the relevant provisions, they may be imposed in addition to or in substitution of another punishment.[81] However, where only a minimum sentence of imprisonment is provided, a fine must not be imposed in substitution.[82]

2.7.2 In some cases, minimum fines are prescribed but, in most cases, the relevant provisions provide the maximum amount payable in fines, leaving the court to determine the level of fine that is appropriate.

Situation Analysis

2.7.3 There are many instances where the fines are in effect excessive, and offenders end up serving imprisonment terms in default of payment. Further, many terms of imprisonment in default set by the courts fall foul of the provisions under the Penal Code and other statutes where the term of imprisonment in default is explicitly set out. A major challenge is in regard to minimum fines fixed by statute which, in view of the circumstances of a given case, are excessive.[83] Moreover, even where the amount is minimal, many offenders are unable to pay and are imprisoned resulting in further overloading of Kenya's prison system and placing offenders in prison for offences that in and of themselves are not serious enough to merit a custodial term.

2.7.4 Whereas the law allows for the payment of fines in instalments,[84] this option is rarely utilised. The reluctance to allow fines to be paid in instalments is attributed to the challenges in enforcement.

Policy Directions

Preference for a fine

2.7.5 Where the option of a fine is provided in the law, the court must first consider it before proceeding to impose a custodial sentence.[85] If in the circumstances a fine is not a suitable sentence, then the court should expressly indicate the reasons why it is not appropriate to impose a fine.[86]

Determination of a fine

2.7.6 Enquiry should be made of the offender regarding his/her means. Except in petty cases and in cases where the necessary information is within the court's knowledge, this should ordinarily be addressed in the pre-sentence report but there is nothing to prevent the court from asking the accused person to take the oath and give evidence about his

80 Penal Code, section 28 (1).

81 Penal Code, section 26 (3).

82 Penal Code, section 26 (3) (i).

83 For instance, there is a 1 million KES fine imposed for possession of a wildlife trophy under section 95 of the Wildlife Conservation and Management Act 2013 as amended in 2019. .

84 Criminal Procedure Code, section 336 (3).

85 *Anis Mihidin v Republic HCCRA No. 98 of 2001* (Unreported). See also *Mohamed Ahmed v Republic* [2018] eKLR

86 See *Fatuma Hassan Salo v Republic* [2006] eKLR where it was stated that, "where an option of a fine is given, the court has to give reasons as to why a fine is inappropriate".

or her means, making clear the dangers of committing perjury. Courts shall also factor stare decisis in calculating the fine.

2.7.7 The aim of the fine is to have equal impact on offenders of different financial circumstances. It should be a hardship but should not force the offender below a reasonable 'subsistence' level. Accordingly, multiple offenders sentenced for the same offence may receive differing levels of fines according to their means even though they are being sentenced for an identical offence.

2.7.8 The fines should not be so excessive as to render the offender incapable of paying and thus liable to imprisonment.[87] The consequences of non-payment should be clearly explained to the offender.

Payment in instalments

2.7.9 Where an offender is incapable of paying a fine in one lump sum, but undertakes to pay within a given period, the court should make an order for payment in instalments.[88] The order should specify the schedule of payments and the amount payable at each instance.

2.7.10 For an order for the payment of a fine in instalments to be imposed, the offender should be required to execute a bond with or without sureties unless, in view of the individual circumstances, it appears to the court that the offender is unlikely to default and/or abscond.

2.7.11 Where payment of a fine in instalments has been ordered by the court, the case shall be listed for mention 14 days after each date on which an instalment is due.

2.7.12 Default of a single instalment shall result in the whole outstanding amount being payable immediately, potentially leading to imprisonment in default of payment.[89] Courts should list the matter for mention with the offender in attendance and enquire as to the reasons for the default and hear submissions from the prosecution and defence (and if appropriate, any victim), before making any final pronouncement.

Imprisonment in default of payment of a fine

2.7.13 Courts should be cognizant of the limits of the term of imprisonment that can be applied in the event of default of payment of a fine – normally six months unless a period of imprisonment in default of payment of a fine is explicitly stipulated under the relevant law.

2.7.14 Under the Penal Code, the fall-back position rests in Section 28 of the Penal Code where a scale is set out, the maximum being just 12 months' imprisonment in default of non-payment for any fine that exceeds Kshs. 50,000.[90]

2.7.15 Where a court imposes separate fines for individual offences, it must indicate a separate sentence in default of payment of each fine.[91] For further guidance on totality in relation to fines, see paragraph 2.3.30 above.

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87 Penal Code, section 28. See *R v Mureto Munyoki* 20 [KLR] 64 in which it was stated, "it is a first principle in inflicting fines that the capacity of the accused to pay should be considered"

88 Criminal Procedure Code, section 336 (3).

89 Criminal Procedure Code, section 336 (3).

90 Criminal Procedure Code, section 342.

91 See *Wakitata v Republic* Vol. 1 (E & L) 52.

2.8 FORFEITURE

2.8.1 Criminal forfeiture refers to the court's power to confiscate the accused property as part of a sentence. According to Black's Law Dictionary, 7th Edition, confiscation is defined as appropriating property as forfeited to the government, to seize property by authority of the law.

2.8.2 An order of forfeiture complements the other forms of punishment. The offender is unable to benefit from their criminality. Forfeiture, for example, under the Anti-Corruption and Economic Crimes Act, can serve as a strong general deterrent. Orders of forfeiture can also raise revenue that should be used to enhance the response to crime such as equipping and upskilling investigations of serious crimes such as terrorism.

2.8.3 There is no general power for a court to order forfeiture unless it is expressly provided for. Courts must be mindful that laws are amended and that new provisions may come into place that might expand or restrict the power of forfeiture for certain offences. Some examples of forfeiture powers can be found in Section 29 of the Penal Code, Section 40 of the Prevention of Terrorism Act, 2012, Section 68 (c) of the Forest and Conservation Management Act, 2016, Section 105 of the Wildlife Conservation and Management Act 2013 (as amended). The Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 provides for the forfeiture of narcotic drugs, psychotropic substances, and all conveyance and implements used in the carrying out of the offence, and the property of persons convicted under the Act.

Situational Analysis

2.8.4 The process for effecting forfeiture orders is not straightforward. Many of the aforementioned laws do not provide for a procedure for the courts to follow. Section 389 A of the Criminal Procedure Act makes some provision for protecting third party interests but procedures for disposal of forfeited goods is not clearly articulated anywhere. In the case of abandoned property, disposal becomes even more complicated e.g., tools, vehicles, weapons left in protected area pose a challenge to Kenya Wildlife Service. Police stations and courts also face the same issue in relation exhibits. Livestock present a liability issue to anyone who steps in to care for them pending any orders of the court and subsequent disposal.

2.8.5 Forfeiture of vehicles, tools or implements used in the commission of an offence, under powers such as Section 68 (c) of the Forests Conservation and Management Act, may cause injustices to third parties where the offenders are not the owners of the vehicles, tools or implements.

Policy Directions

2.8.6 Where the court is satisfied of the link between property and the offence committed as set out in the different provisions, and where the court is mandated by the law, it should, in addition to the general punishment meted out to the offender, make an order for forfeiture of the property to the State.

2.8.7 In all cases in which an order of forfeiture is applicable, the prosecutor should, at the earliest opportunity before sentencing, bring to the attention of the court any such property that is linked to the commission of the offence.

2.8.8 Where the court has the discretion to order forfeiture, it should be careful not to cause an injustice to a third party who is the owner of the property in question, where the offence is not one in which they took part in, and it is clear that they could not have reasonably been aware that the property would be so used.[92] The Court should also be careful to consider the beneficial ownership of properties by third parties to ensure that third parties are not used to conceal the proceeds of crime.

2.9 FINDING SECURITY TO KEEP THE PEACE AND BE OF GOOD BEHAVIOUR

2.9.1 A court can, in offences other than capital offences or those offences that require a mandatory minimum term of imprisonment, require a convicted offender to enter into a recognisance, with or without sureties to keep the peace and be of good behaviour. This order can be imposed instead of or in addition to the sentence that the offender is liable to.[93] The court is mandated to order that the offender is held in custody until they enter into such recognisance. The period the person is held in custody must not exceed one year. Where the order is in addition to a term of imprisonment, the period in custody awaiting the recognisance, when added to the term of imprisonment, must not exceed the maximum sentence for that offence.[94]

Situational Analysis

2.9.2 There are instances where this order is suitable but has not been imposed.

2.9.3 A distinction is drawn between an order to keep the peace and be of good behaviour as a sentence when an offender has been convicted of an offence,[95] and a similar order prior to conviction as envisaged by Sections 43 to 61 A of the Criminal Procedure Code. The latter was declared unconstitutional.[96]

Policy Directions

2.9.4 The order to keep the peace and be of good behaviour is a useful tool for dealing with petty offenders. It is particularly suitable and should be imposed, where, in the opinion of the court, the offender takes his recognisance seriously or where the sureties are able to influence the offender to adhere to the order.[97]

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92 Constitution of Kenya, 2020 Article 159 (2) (a), the court is under an obligation to ensure that justice is done to all.

93 Penal Code, Section 33.

94 Penal Code, Section 33.

95 Referring to Section 24 of the Penal Code which provides this order as one of the punishments, Justice Mumbi Ngugi stated, "that provision of the Penal Code was not deleted or repealed, and it may be argued that as a punishment imposed after one has been tried and convicted of an offence it is constitutional." *Anthony Njenga Mbuti & others v. the Attorney General & others* [2015] eKLR.

96 *Anthony Njenga Mbuti & others v. the Attorney General & others* [2015] eKLR, paragraph 170.

97 Section 191 (1) of the Children's Act 2022, for example, allows the court to deal with a child "in any other lawful manner". This order can, therefore, be used when dealing with a child in conflict with the law who understands the nature of a recognisance.

2.10 ABSOLUTE AND CONDITIONAL DISCHARGE

2.10.1 Section 35 of the Penal Code provides three options:

- Firstly, where an offender is discharged absolutely.
- Secondly, where an offender is discharged but with the condition that any offences committed within a fixed period will make them liable to a sentence for the original offence (a conditional discharge).
- Thirdly, where an offender is discharged, absolutely or conditionally, and is ordered to pay compensation. This is in accordance with Section 12 of the Criminal Procedure Code which allows the court to combine sentences. The payment of the compensation is distinct and separate from the discharge.[98]

2.10.2 The operational period of a conditional discharge cannot exceed twelve months. If an offender, who has been discharged conditionally, commits an offence during the term fixed by the court, they become liable for the punishment of the original offence as well as the punishment for the new offence – see the section on Totality of Sentence. The court is under an obligation to inform the offender of the consequences of a breach of a conditional discharge.[99]

Situational Analysis

2.10.3 Where a discharge is imposed, courts are keen to state the reasons so as not to appear to be absolving the offender.

2.10.4 Orders discharging offenders are used sparingly, which is in tandem with the wording used in Section 35 of the Penal Code.

Policy Directions

2.10.5 An offender should only be discharged if, in light of the nature of the offence and their character, the offender is a suitable candidate for a non-custodial sentence and a probation order is not appropriate.[100]

2.10.6 The decision of the court must be guided by the principles and objectives of sentencing set out in paragraphs 1.2 and 1.3 of these SPGs.

2.10.7 The upshot, therefore, is that a discharge, especially an absolute one, should be sparingly imposed. However, where the court is satisfied, in light of the circumstances that justice demands a discharge, then it should exercise its powers under Section 35 of the Penal Code.

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98 See *Mutuku Mwanza v. Republic* [2004] eKLR where it was held that discharging an offender subject to payment of compensation was not illegal.

99 Penal Code, section 35 (2)

100 Penal Code, Section 35 (1).

2.11 SUSPENDED SENTENCES

2.11.1 Section 15 of the Criminal Procedure Code allows the court, when it passes a sentence of not more than two years imprisonment, to suspend a sentence of imprisonment for a fixed period of time. If the offender does not commit an offence during the fixed period, then the sentence does not take effect. In the event that the offender commits an offence during the fixed period, then the sentence takes effect and the sentence for the second offence runs consecutively with the original sentence.[101]

Situational Analysis

2.11.2 There is no guidance on the criteria that would justify the imposition of a suspended sentence of imprisonment. As a result, the use of this option is limited and open to abuse.

2.11.3 The lack of digital records at police stations and courts may enable offenders on suspended sentences who offend during the operational period of that suspended sentence, to get away without serving their original sentence.[102]

Policy Directions

2.11.4 Before imposing a suspended sentence, the court must be satisfied that the case meets the criteria for an immediate term of imprisonment. i.e. the offence is so serious that neither a fine nor a community sentence can be justified.

2.11.5 Suspending that period of imprisonment may then be considered where there are exceptional circumstances that would justify that suspension. Examples may include undue prejudice or injustice to the offender or his dependants or other compelling factors that would make the punishment unduly harsh when measured against the objectives of sentencing set out in these Guidelines.[103] Examples may include where the offender is the sole provider or has a disability that would make a custodial term extremely difficult. See Part III of these Guidelines for particular guidance on certain categories of offenders.

2.12 SUSPENSION OF DRIVING LICENCES FOR TRAFFIC OFFENCES

2.12.1 Pursuant to Section 39 of the Penal Code, where a person is convicted of an offence connected to driving a motor vehicle, a court can:

i. suspend a driving license for a fixed period.

ii. cancel the license and disqualify the person from obtaining another driving licence permanently or for a fixed period.

2.12.2 When a court makes such an order, it is required to endorse the certificate with particulars of the conviction and of the order, and to forward the same to the Inspector General of the National Police Service and the Director General of National Transport Services Authority (NTSA).

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101 Criminal Procedure Code, Section 15 (3).

102 See policy directions in the inter-agency coordination section, paragraph 5.1.

103 See paragraph 1.2 of these guidelines on proportionality.

2.12.3 Such an order is both retributive as well as rehabilitative - and can impact the offender positively. It may also contribute towards decreasing road carnage.

Situational Analysis

2.12.4 This order needs to be more utilized. The implementation is challenging – there is no mechanism for the court to ensure that NTSA has implemented the suspension. It is unclear whether NTSA has the means to ensure that a reissue of a driving license does not occur within the operational period of a cancellation or suspension. Fines are the predominant sentence imposed in traffic offences.

Policy Direction

2.12.5 Certain offences require a mandatory cancellation of a driving licence for a set period.[104] For offences where a suspension is discretionary, the courts should consider the detrimental effect upon an offender e.g., his or her ability to work, and any dependants. A permanent suspension should be reserved for the most extreme cases. Where the offence is serious enough to justify a lengthy period of suspension, then the courts should consider whether the length imposed is just and proportionate, taking into account the seriousness of the offence and any other relevant factors as outlined in the SPGs.

2.12.6 The principles underpinning sentencing in paragraph 1.2 of these Guidelines must guide the court when considering whether to order a suspension of a certificate of competency.

2.13 RESTITUTION

2.13.1 According to Black Law's Dictionary, restitution is defined as the return or restoration of some specific thing to its rightful owner or status, compensation for benefits derived from a wrong done to another, and also compensation or reparation for the loss caused to another.

2.13.2 Section 178 of the Criminal Procedure Code mandates the court to make orders for restitution in respect of stolen property.

Situational Analysis

2.13.3 Restitution orders are not generally imposed though there are some cases where courts have utilised this power.[105] This perhaps reflects the emphasis on retribution in the sentencing process, and that victims have often played a peripheral role. With the advent of the Victim Protection Act and the increasing use of victim impact statements, courts are more alive to the issues of compensation, restitution and reparation.

2.13.4 However, due to lack of adequate storage facilities in police stations and courts, property seized is not maintained in good condition and in many cases is not in a state to be returned to the victim.

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104 For example, see section 46 of the Traffic Act, Cap 403

105 See, for example, *Republic v Fredrick Kazungu Diwani and Others* Criminal Revision No. 42 of 2009 [2009] eKLR in which the High Court ordered that in addition to the sentence imposed by the trial magistrate, the offender had to return the sum of Kshs. 13,104,000/=, obtained by fraud to the complainant.

Policy Direction

2.13.5 Exhibits belonging to a victim or witness that are in good condition/value and/or were in use by the victim or witness before the offence, should, as far as practicable, be produced formally for the purposes of trial as early as possible – this issue should be tackled at the pre-trial stage – and once produced, the item returned to the owner, unless ownership is an issue in dispute in the trial. This recognises the realities regarding poor storage facilities and lack of adequate security surrounding such storage. It also improves public confidence and cooperation in the criminal justice process – the loss of a vehicle or a mobile phone by a victim or a witness to a criminal trial process that may be measured over a prolonged period of time, can have a very harsh impact and deter them from future engagement with the criminal justice system.

2.13.6 In any event, exhibits used in a trial, generally, should be returned to the owner once the trial is concluded, unless, for example, where the stolen property cannot be recovered.

2.13.7 A proper chain of command and inventory should be established and maintained for the proper documentation of the detained property. The officer in-charge of the police station shall maintain the inventory. Once produced in court, the court must take responsibility for maintaining the chain of custody and shall create its own inventory of exhibits produced during court proceedings.

2.14 POLICE SUPERVISION

2.14.1 Section 18 of the Security Laws (Amendment) Act amends the Criminal Procedure Code[106] and gives the court powers to order police supervision of an offender for a period not exceeding five years upon release from custody in certain circumstances.

2.14.2 The court may impose such an order for up to five years:

i. When an offender, having been convicted of an offence punishable with imprisonment for a term of three years or more, is again convicted of an offence punishable with imprisonment for a similar term.

ii. When an offender is convicted of an offence that relates to violation of conditions imposed upon offenders placed on police supervision.

2.14.3 The court must impose such an order under Section 344A of the Criminal Procedure Code in respect to offenders convicted of offences under Sections 296 (l), 297 (l), 308 and 322 of the Penal Code, the Prevention of Terrorism Act or the Sexual Offences Act. In this case, the supervision is for a fixed term of five years.[107]

Situational Analysis

2.14.4 Police supervision was previously provided for in section 344A of the Criminal Procedure Code but was abolished by the Criminal Law (Amendment) Act of 2003.[108] Its operation since its re-introduction is yet to be fully implemented.

106 Criminal Procedure Code, Section 343

107 Criminal Procedure Code, Section 344A

108 Act No. 5 of 2003

Policy Directions

2.14.5 To facilitate the supervision, the court should impose necessary conditions upon the offender as provided for in section 344 (1) and section 344 A (2) of the Criminal Procedure Code.

2.14.6 In respect to offenders convicted of an offence under section 296 (l), 297 (l), 308 and 322 of the Penal Code, the Prevention of Terrorism Act or the Sexual Offences Act, the court must state that the offender shall be under police supervision for five years on release from prison. The court must also reiterate the mandatory conditions for the offender to comply with during the period of supervision as set out in section 344A of the Criminal Procedure Code.

2.14.7 First offenders are not liable to police supervision except where they are convicted of offences under section 296 (l), 297 (l), 308 and 322 of the Penal Code, the Prevention of Terrorism Act or the Sexual Offences Act.[109]

2.15 REVOCATION OF LICENCES

2.15.1 Various statutes provide for the revocation/forfeiture of licences upon conviction for an offence. For instance:

i. Section 42 of the Alcoholic Drinks Control Act, 2010 provides for the revocation of a licence in addition to any other penalty if the conditions set out in that section exist.

ii. Under Section 146 (3) of the Environmental Management and Coordination Act, Cap 387, the court is mandated to order the cancellation of any licence, permit or authorisation given under the Act and that relates to the offence.

iii. Section 34 of the Food, Drugs and Chemical Substances Act, Cap 254, gives the court the discretion to cancel a licence issued under the Act if a person is convicted of any offence under the Act.

Situational Analysis

2.15.2 Orders of the court cancelling/revoking licences are not frequent.

2.15.3 Owing to its impact, cancelling/revoking of a licence serves as both a specific and general deterrent.

Policy Directions

2.15.4 The power to cancel or revoke a licence is in most cases discretionary. In deciding as to whether to exercise this power, a court should be guided by the principles set out in paragraph 1.2 of these Guidelines. In particular, the court should consider whether the revocation/cancellation of a licence would amount to an excessive punishment in view of the nature and circumstances of the offence.

[109] Prior to outlawing in 2003, first offenders were not liable to police supervision orders. See *Rotich v Republic* [1983] eKLR. Conversely, section 344A of the Criminal Procedure Code now provides for police supervision for the offenders convicted of the listed offences.

2.16 RECOMMENDATION FOR REMOVAL OF FOREIGN NATIONALS (REPATRIATION)

2.16.1 Section 26A of the Penal Code allows the court to make recommendations for the removal of foreign nationals who are convicted and sentenced to custodial sentences in Kenya. There are two scenarios envisaged:

i. Where a court convicts and sentences a person who is not a citizen of Kenya to a term of imprisonment not exceeding twelve (12) months, it may recommend the removal of such person immediately or on completion of the sentence.

ii. Where a court convicts and sentences such a person to a term of imprisonment exceeding twelve (12) months it shall, where the Court is satisfied that the person may be removed, recommend to the relevant minister, now relevant Cabinet Secretary, the removal of such person upon completion of the sentence.

iii. Where a recommendation for removal from Kenya is issued by the Court, the Cabinet Secretary responsible for matters relating to citizenship and the management of foreign nationals, the Inspector General of the Police, and Commissioner of Prisons shall assess the merits and practicability of the order. The assessment of the order will inform whether to implement the repatriation or direct that the person be kept and remain in police custody, prison or immigration holding facility or until his/her departure from Kenya in line with Section 43 (2) of the Kenya Citizenship and Immigration Act.

Situational Analysis

2.16.2 Repatriation orders are rarely imposed for offenders who are legally in the country. For offenders who are illegally in the country, such orders are automatic, though the Ministry may intervene where that offender has status as an asylum seeker or refugee.

2.16.3 Removal from the country may have a diplomatic and consular effect between States. These are matters that the relevant Ministry will have to consider upon receipt of the recommendation of the court. For non-citizens who are legally in the country (e.g., under a work permit), the removal in such circumstances will be made by the relevant Cabinet Secretary upon concluding that the person's presence in Kenya is 'undesirable' or whose presence is contrary to national interests.

2.16.4 Failure to make such recommendations for offenders who are illegally in the country, could mean that such persons are liable to be arrested upon release from custody for offences related to being in Kenya, unlawfully.

Policy Directions

2.16.5 Where a person is illegally in the country and has no application for legal status either pending or anticipated, a recommendation should be made.

2.16.6 For offenders who are legally within the country, the making of such a recommendation should only be done after careful consideration of factors that include, but are not limited to:

i. the nature and seriousness of the offence;

ii. the immigration status of the offender;

iii. the extent to which the nationality and status of the accused as a foreign national played a part in the commission of the offence;

iv. the personal circumstances of the offender and the impact of such an order upon the offender, any dependents and any other ties to the country e.g., a genuine and subsisting relationship with a partner who is Kenyan, or who is legally resident in the country, whether he or she is a home or business owner in Kenya, or where the offender provides employment or other benefits to the country;

v. where an offender has lived at least half of his/her life in Kenya and has no social, cultural or family ties with the country of return; and

vi. other relevant factors as identified in Part V.

2.16.7 Factors that might tend in favour of a recommendation might include where the offending has caused serious harm or where they are a persistent offender who shows a particular disregard for the law.

2.16.8 A recommendation should be a just and proportionate response to the nature and seriousness of the offence and the circumstances of the offender.

PART III CATEGORIES OF OFFENDERS REQUIRING FURTHER CONSIDERATION

3.1 CHILDREN

3.1.1 Children deserve special consideration when it comes to committal or the giving of judicial/court orders. The enactment of the Children Act, 2022, reflects the Constitutional and international obligations placed upon Kenya in handling children in conflict with the law.

3.1.2 The death penalty cannot be imposed on children in conflict with the law,[110] nor can they be imprisoned. However, a child can be committed to a rehabilitation school or a borstal institution. Rehabilitation schools cater for children aged from twelve[111] to sixteen years.[112] Borstal institutions cater for children aged fifteen years to seventeen years.[113] Other orders such as fines, probation, committing the child to a fit person for care, placement in an educational institution or vocational training programme and more, are all possible options under section 239 of the Children Act, 2022.

3.1.3 Where the court is not satisfied with the findings with respect to the age of the offender, it should request for a further determination before proceeding to sentence. This may take the form of submissions from the child offender, his/her family or caregiver, medical reports, the directorate of children's services among others as need be.

3.1.4 In determining the most appropriate sentence, the court should be guided by the principles set out in this section alongside the general principles and objectives of sentencing as set out in Part I.

Situational Analysis

3.1.5 There are children in conflict with the law held in borstal institutions or rehabilitation schools who are best suited for non-custodial measures outlined in Section 239 of the Children Act, 2022.

3.1.6 Orders placing children in rehabilitation schools or borstal institutions, when not executed on time, lead to children spending considerable time in police cells and sometimes prison facilities. This may be due to logistical/transport issues, or the lack of availability of an accompanying officer amongst other reasons.

3.1.7 Most children are not represented by advocates, and their parents or caregivers are rarely involved in the committal process, which is in contravention to Section 2 Practice Directions relating to Pauper Briefs Scheme and Pro Bono Services.[114]

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110 Children's Act 2022, section 6 and section 238; Convention on the Rights of the Child, Article 37 (a); International Covenant on Civil and Political Rights, Article 6 (5); African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, paragraph 9 (c); United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), paragraph 17.2

111 Children's Act 2022, section 2.

112 Children's Act 2022, section 239(1) (e).

113 Children's Act 2022, section 239 (1) (g); Borstal Institutions Act, section 2.

114 Gazette Notice No. 370.

3.1.8 Owing to the inaccurate determination of age, some "youthful offenders" committed to rehabilitation schools or borstal institutions may actually be adults. This is an issue of concern since the law demands that children in conflict with the law must be separated from adult offenders.[115]

3.1.9 In cases where custodial orders are handed to children, there exist very few facilities for their committal with Shimo la Tewa Borstal and Shikusa Borstal, being the only available facilities catering for boys, and Kamae Girls' Borstal for girls.

3.1.10 Children committed to rehabilitations schools are sometimes sent far away from their homes as the Directorate of Children Services has only nine rehabilitation schools classified as per the risk level.

Policy Directions

3.1.11 Section 8 (2) of the Children Act, 2022 requires that all judicial institutions shall treat the best interests of the child as the first and primary consideration to the extent that this is consistent with adopting a course of action to safeguard, secure, and promote the rights and welfare of the child, and secure such guidance and correction as necessary for the welfare of the child and in the public interest. This is consistent with the Constitution considers the child's best interest as the paramount consideration. [116]

3.1.12 Domestic and international laws dictate that custodial orders should only be imposed as a matter of last resort when dealing with children in conflict with the law.[117]

3.1.13 Whilst the seriousness of the offence will be the starting point, the approach to sentence should be child-focussed rather than offence -focussed, if the spirit of the Children Act, 2022 is to be applied. For a child in conflict with the law, rehabilitation should be the main objective, wherever possible.

3.1.14 It is important to bear in mind factors that might diminish the culpability of a child or young person. Children are not fully developed and have not attained full maturity. As such, this can impact upon their decision making and risk-taking behaviour – it is important for the courts to consider the extent to which the child had been acting impulsively and whether their conduct has been affected by inexperience, emotional volatility, or negative influences. Children may not fully appreciate the effect of their actions on other people and may be more susceptible to peer pressure and external influences and also changes taking place during adolescence that can lead to experimentation and risk-taking. A child's emotional and developmental age may not be the same as their chronological age and so care must be taken.

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115 Constitution of Kenya, Article 53 (f) (2); Convention on the Rights of the Child, Article 37 (c); African Charter on the Rights and Welfare of the Child, Article 2 (b); United Nations Rules for the Protection of Juveniles Deprived of their Liberty, paragraph 1.

116 Article 53 (2) of the Constitution of Kenya.

117 Constitution of Kenya, Article 53 (1) (f); Convention on the Rights of the Child, Article 37 (b); African Charter on the Rights and Welfare of the Child, Article 4; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), paragraph 17.1 (b) & (c) and paragraph 19.1.

3.1.15 The statutory obligation under the Children Act, 2022 to treat the child's best interests as the primary consideration requires the court to properly examine all relevant circumstances before passing a sentence. Factors regularly present in the background of children and young people that come before criminal courts include deprived homes, poor parental employment records, low education attainment, early experience of offending by other family members, experience of abuse or neglect and the misuse of drugs or alcohol. Special educational needs or emotional problems may have never been identified. The court must seek to ensure that it has access to information to identify these factors and where necessary ensure that a proper assessment is conducted before a sentence is passed.

3.1.16 The court should, whenever possible, ensure the attendance and participation of the parent(s) or caregivers during committal.[118] This assists the court in identifying the most suitable orders. However, the parent(s) or caregivers may be excluded from the process if it is in the child's best interest.

3.1.17 The court should also consider reasons why a child or young person may conduct themselves inappropriately in court (e.g., due to nervousness, a lack of understanding of the process, a belief that they will be discriminated against, peer pressure to act in a certain way etc.) and take this into account.

3.1.18 In deciding to place a child within an institution e.g., a borstal institution, the court must be satisfied that the offence crosses the custody threshold and must consider the impact of such a sentence on their leaving their existing care arrangements as well as whether the disposal could exacerbate any underlying issues – this is particularly important where there are concerns about the effect on vulnerable children with risks of self-harm including suicide. Any restriction on liberty must be commensurate with the seriousness of the offence.

3.1.19 In terms of practical and logistical considerations, before placing a child in a particular borstal institution, the court shall be guided by a probation officer's report on the availability of space in that institution.[119] A child should only be placed in an institution if there is available accommodation and as much as practicable, in the institution closest to their home.

3.1.20 The order placing a child in a rehabilitation school or borstal institution must expressly indicate that the child is to be transferred to the committed institution as soon as possible but in any event not later than 24 hours from the date of the order.

3.1.21 Where a child is not represented by an advocate of choice, they are eligible for free legal representation provided by the state in accordance with the Legal Aid Act of 2016, and Practice Directions relating to Pauper Briefs Scheme and Pro Bono Services.[120]

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118 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), paragraph 15.2.

119 Borstal Institutions Act, section 8.

120 Kenya Gazette Notice No. 370.

3.2 OFFENDERS WITH DISABILITY

3.2.1 Article 54 of the Constitution recognises the right of persons with disability to be treated with dignity[121] and to have reasonable physical access to all places.[122] Further, Article 29 (f) recognises the freedom from cruel, inhuman or degrading treatment.[123] Article 14 of the UN Convention on the Rights of Persons with Disabilities requires States to ensure that persons who are detained are accorded reasonable accommodation. These provisions have a bearing on the sentences imposed upon offenders with disability. The sentence imposed must not amount to cruel, inhumane or degrading treatment in view of the disability and the facilities available with respect to custodial sentences.

Situational Analysis

3.2.2 The prisons infrastructure does not sufficiently accommodate persons with disability. In effect, where the extent of disability is high, the offenders suffer undue hardship, which sometimes amounts to inhuman and degrading treatment. There is a need to enhance accessibility and accommodation for persons with disability in prisons.

Policy Directions

3.2.3 When imposing sentencing orders against offenders with disability, the court should ensure that the sentence imposed does not amount to an excessive punishment in light of the extent of disability, and considering the offence committed. In particular, the court should ensure that the sentence imposed does not amount to cruel, inhuman or degrading treatment in view of the extent of disability of the offender.[124] Consideration should be given to suspended sentences and other non-custodial sentences that can adequately reflect the seriousness of the offence whilst also serving the other aims of sentencing. Depending on the extent of disability, a doctor's report may be required to have regard to the type of care, nutrition and treatment that may be required.

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121 Article 54 (1) (a); see also Constitution, Article 28 which protects dignity for all persons.

122 Article 54 (1) (c); Persons with Disability Act, Section 21.

123 See also the International Convention on Civil and Political Rights (ICCPR), Article 7. Both the Constitution and ICCPR do not define "inhuman and degrading treatment". However, paragraph. 5 of the Human Rights Committee, General Comment 20, indicates that excessive chastisement ordered as punishment for a crime amounts to inhuman and degrading treatment. The African Commission on Human and Peoples Rights has held that "acts of inhuman and degrading treatment "not only cause serious physical or psychological suffering but also humiliate the individual…' and 'can be interpreted to extend to the widest possible protection against abuses, whether physical or mental (*Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*.

124 Constitution of Kenya, 2010, Article 28; Article 29 (f).

3.3 TERMINALLY ILL AND ELDERLY OFFENDERS AND OFFENDERS WITH CHRONIC ILLNESS

3.3.1 As with the case of offenders with disability the consideration should be whether in view of the illness or age, the sentence rendered is excessive.[125] There are two dimensions worth considering. Firstly, whether the illness or old age would cause the offender to experience undue and unjustifiable hardship in custody and whether the conditions in custody would be termed inhuman bearing in mind the offenders' state.[126] Secondly, whether the offender's condition is one that would cause undue burden on other offenders and/or prison officers taking care of them.

3.3.2 Article 57 of the Constitution affirms the right of older members of society to live in dignity. The sentence imposed on them must therefore not undermine this right.

Situational Analysis

3.3.3 The Kenya Prisons Service has made a good attempt at addressing the needs of HIV/AIDS positive offenders. However, other offenders with terminal illnesses such as those in need of chemotherapy for cancer treatment; hypertension; diabetes or other chronic illnesses, are not adequately catered for and face undue hardship while in custody.

Policy Directions

3.3.4 When imposing sentencing orders against terminally ill and elderly offenders, a court should ensure that the sentence imposed does not amount to an excessive punishment in view of the extent of illness and age, as well as in light of the offence committed. In particular, the court should ensure that the sentence imposed does not amount to cruel, inhuman or degrading treatment in view of the extent of illness or age of the offender.

3.3.5 Non-custodial sentences – or suspended sentences - should be considered unless, in light of the nature and seriousness of the offence committed and other factors, justice would demand the imposition of a custodial sentence.

3.4 OFFENDERS WITH MENTAL ILLNESS

3.4.1 Some accused persons may come before the courts suffering from mental illness that varies in the degree to which it afflicts the accused. For the purposes of the Guidelines, there are three general categories:

i. Mental illness that may amount to a legal defence under Section 166 of the Criminal Procedure Code, and with application of the M'Naughten Rules.

ii. Mental illness that does not amount to a legal defence may nevertheless require consideration in determining the ability of an accused person to understand the proceedings against him.

125 See paragraph 1.4 of these guidelines on proportionality.

126 African Charter on the Rights and Welfare of the Child, Article 17 (3).

iii. Finally, mental illness that doesn't fall into the above two categories may nevertheless impact the kind of sentence that the court should impose in determining a just and proportionate response to the crime committed.

3.4.2 It is important that these distinctions are made.

3.4.3 For offenders suffering from a mental illness that amounts to defence, Section 166 of the Criminal Procedure Code makes provision for where the court makes a finding of 'guilty but insane'. Here, the law provides that the court must order the offender into custody whilst awaiting the President's order.[127] The court has the discretion as to the place and manner of custody during this period. Under Section 166 (3) of the Criminal Procedure Code, the President may then order that the person be detained in a mental hospital, prison or other suitable place of safe custody. In such circumstances, the order committing an offender with mental illness to safe custody is accompanied by a regular review mechanism. The review is undertaken through the aegis of the officer in charge of the institution keeping the offender in safe custody, with the first review coming three (3) years after the initial committal and subsequently after every two years.[128]

3.4.4 Where improvement is noted in the follow-up evaluation of the offender, the same should be brought to the attention of the President for further appropriate orders including discharge where applicable.[129]

3.4.5 For accused persons who cannot understand the proceedings against them as a result of a mental illness, Section 167 of the Criminal Procedure Code makes provision for cases where the accused person cannot understand the proceedings against him. The provisions are largely the same although notably, the review mechanism is not provided for.

3.4.6 No statutory guidance, however, exists relating to situations where the accused person suffers from mental illness that does not amount to a legal defence or affect his/her understanding of proceedings but nevertheless presents a relevant issue at the time of sentencing.

Situational Analysis

Mental disorder amounting to a defence or where the accused cannot understand the proceedings against him by virtue of a mental illness

3.4.7 A finding of 'guilty but insane' has divided the Judiciary on the legal soundness of such a finding. Emerging jurisprudence has called for urgent reform on this issue.[130]

127 Criminal Procedure Code, Section 166 (2).

128 Criminal Procedure Code, Section 166 (4).

129 Criminal Procedure Code, Section 166 (5).

130 See *Wakesho v Republic (Criminal Appeal 8 of 2016) [2021] KECA (KLR)* where the Court of Appeal observed that a finding of guilty but insane is a legal paradox considering the need to prove *mens rea* in the commission of the crime. The Court opined that *it must be established beyond reasonable doubt that an offender who committed the offence or omitted acted voluntarily and with a blameworthy mind.* Similarly, the Court noted the conflicting decisions emerging from various courts on the legality of some of the provisions of section 166 of the CPC, for instance, the SOM Case and Republic v ENW [2019] eKLR and directed the Attorney General to take immediate steps to initiate reforms to clarify the position.

3.4.8 Further, jurisprudence has further raised doubt over the constitutionality of the procedure that follows a finding of 'guilty but insane', or where the accused cannot understand the proceedings. Concerns have been raised over the issue of holding such a person under 'Presidential Order' under these sections.

3.4.9 In particular, the courts have found that the vesting of discretion on the President on how the accused is to be treated after a conviction is inimical to the fundamental duty of the Judiciary to determine guilt and determine the terms of how the accused person serves a sentence.[131] In the case cited, the court ordered the accused to be sent to a mental hospital and left it to the psychiatrist in charge of the hospital to certify, at such time as was appropriate, when and if the accused was no longer a danger to society. In Republic v ENW [2019] eKLR, a distinction was drawn under Section 166, between the judicial function to pass sentence, a reserve of the judicial process, and the executive responsibility of the President regarding the power of mercy. In conclusion, the court found that it was expedient and judicious to give a determinant sentence in cases concluded under Section 166 (1) of the CPC. After so doing, the court becomes functus officio, and should let the Executive carry out its responsibility under Section 166 (2) to (7) of the CPC.

3.4.10 The Court of Appeal in Wakesho v Republic (Criminal Appeal 8 of 2016) [2021] KECA (KLR)[132] essentially followed this approach by ordering the offender who had been in custody to be sent to a mental hospital until such time a psychiatrist, responsible for his/her care, certified the offender as no longer a danger to society.

3.4.11 However, what happens thereafter is unclear. Does the psychiatrist order the offenders' release? Does it require a referral back to court? Is there any question of the accused then being sent into custody to serve a sentence?

3.4.12 Further concerns have arisen on the implementation of the review mechanism under Section 166 in that it falls short of the standards expected of the treatment of persons with mental illness. A first review coming three (3) years after committal to safe custody is an inordinately long period for an enquiry into the safety and wellbeing of an offender with mental illness.

3.4.13 For persons committed to safe custody under Section 167 of the Criminal Procedure Code, the lack of provision for any review mechanism clearly falls markedly short of the fair and just treatment expected of persons who lack the capacity to understand legal proceedings or the consequences of their actions.

3.4.14 The lack of a cogent treatment and care regime and adequate confinement facilities for the categories of offenders highlighted above exposes them to the possibility of worsened mental illness and physical deterioration.

Where a 'mental disorder' becomes a relevant issue upon sentencing

3.4.15 A 'mental disorder' is a catch-all for mental illness and developmental disorders. Examples might include schizophrenia, bipolar disorder, Post-Traumatic Stress Disorder (PTSD), or depression. Developmental disorders are conditions that may

131 Ibid 133 Wakesho where the court ordered that the accused be taken to a mental hospital where he would remain until such time as a psychiatrist in charge of the hospital certifies him no longer a danger to society or to himself.

132 Ibid 133

be apparent at birth or might manifest in a way that means the individual never quite fitted in with the average behavioural range. Autism is one example as might be a personality disorder such as being exceptionally anxious, obsessive or paranoid, or where the person has a severe generalised intellectual disability (low IQ) and cannot live independently. Other disorders may also be relevant such as dementia, Alzheimer's or an acquired brain injury. The symptoms may not be full blown at the time of sentence, but some disorders are progressive and may be exacerbated by a period of imprisonment.

3.4.16 Situations will arise where the courts are sentencing offenders who, at the time of passing a sentence, have a mental disorder, neurological impairment or development disorder that does not amount to a defence and equally does not impact their ability to understand the proceedings. No guidance currently exists on how the courts should approach this issue.

3.4.17 There are no mental health institutions/facilities for children with mental illness in Kenya.

Policy Directions

For offenders who are found 'guilty but insane'

3.4.18 The cases cited in the footnotes above make clear that the basis for any finding of 'guilty but insane' must be clearly expressed by the courts, pending further clarification and/or amendment in the law.

3.4.19 On the question of sentence following findings under Sections 166 or 167, the court must be guided by relevant expert opinion based on the thorough examination of the offender. Among other things, courts should specifically request for advice on the treatment and care regime suitable for the offender.

3.4.20 The court should then determine where the offender should be placed and give a direction that he or she be detained until a psychiatrist responsible for that facility, at such time certifies the offender as no longer a danger to society. The court should expressly state that upon making such a finding, the psychiatrist responsible for the facility must refer the matter back to the court before any release is made for further directions/order. This would also apply where treatment is failing, whereupon the court may make further orders on treatment.[133]

For offenders with mental illness who do not understand the proceedings against them

3.4.21 For accused persons that fall under section 167 of the Criminal Procedure Code (namely those that do not understand proceedings by virtue of mental illness), Section 167 (4) of the Criminal Procedure Code gives an opportunity for the court to make recommendations on a suitable intervention. This provision should be utilised to address the lack of any review mechanism expressed under Section 167. The court should in such a case recommend a more responsive review timeline and care regime for implementation by the relevant care agency based on a comprehensive expert report in the terms outlined in paragraph 3.4.19 above. Similar directions as outlined in paragraph 3.4.20 above should also be given.

133 *Cr Appeal 26 of 2019 John Kariuki Wangui vs The Republic.*

Sentencing offenders with a mental disorder

3.4.22 For all other cases that do not fall within Sections 166 or 167, where it appears that the offender is or appears to be suffering from a mental disorder at the time of sentencing, the court must obtain a medical report before passing a sentence unless the court considers it unnecessary to do so e.g., if existing, reliable and up to date information is available. Where conditions are progressive, the impact of the sentence may also require expert opinion particularly where custody is being considered.

3.4.23 In determining the sentence, courts will naturally assess culpability – see the section on GATS in Part V. Culpability may be reduced if at the time of the offence the offender was suffering from a mental disorder and provided that there is a sufficient connection between the offender's disorder, and the actual offending behaviour. Whilst expert testimony can be very helpful on this issue, the court is not bound to follow that opinion if there are compelling reasons to set it aside in which case the court must state those reasons. If the court considers that culpability should be reduced, it must provide the reasons and the extent of that reduction. Relevant factors in this context may include but are not limited to:

i. Whether at the time of the offence, the offender's disorder causes them to behave in a disinhibited way.

ii. Where an offender was failing to take medication prescribed for the disorder at the time of the offence, the court must consider the extent to which that failure was wilful or arose as a result of the offender's own lack of insight into their mental disorder.

iii. Was the offender 'self-medicating' with alcohol or non-prescribed or illegal drugs at the time and did that make it worse? If so, the court should consider the extent to which the offender was aware that would be the effect.

3.4.24 If the court considers a custodial sentence is merited, the court must consider the impact of the mental disorder when assessing the length of sentence. This is because the sentence may exacerbate the effects of the disorder. When a custodial sentence is passed, the report and any other relevant information concerning the offenders physical and mental health should be forwarded to the prison to ensure they have the appropriate information and can ensure the welfare of the offender.

3.4.25 Courts must take particular care to ensure that the offender understands the sentence and what will happen if they reoffend or breach the terms of community service, probation, or suspended sentence order.

3.5 PREGNANT AND LACTATING FEMALE OFFENDERS

3.5.1 The law protects pregnant offenders from receiving the death penalty.[134] The decision on the appropriate sentence for a pregnant offender usually raises issues related to the welfare of the unborn child. Thus, the best interest of the child becomes an important consideration.[135]

134 *Penal Code, section 211*; African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, paragraph 9 (c)

135 *Children Act, 2022* Section 8; Convention on the Rights of the Child, Article 3. Rule 61 of the United

Situational Analysis

3.5.2 There are pregnant and lactating offenders who are imprisoned yet are suitable candidates for non-custodial sentences. The majority of pregnant and lactating offenders are imprisoned for terms of three years and below.

3.5.3 The Kenya Prisons Service seeks to offer reasonable services to pregnant offenders and the children born in custody. However, there are financial challenges and significant concerns concerning the upbringing of children born and raised in the prison environment.

Policy Directions

3.5.4 Where the court is satisfied that an offender is pregnant or lactating, and in the absence of any aggravating features, it should consider imposing a non-custodial sentence unless the seriousness of the offence and other factors demand a custodial sentence for justice to be served.[136] This is in keeping with international conventions and best practice on the topic.

3.5.5 The court should direct that a file is opened for a child of a lactating offender to go hand in hand with the criminal file for purposes of keeping track of the child.

3.6 INTERSEX PERSONS

3.6.1 For long, the plight of intersex persons had been ignored, exposing this group of vulnerable persons to numerous human rights violations.

3.6.2 However, Kenya is making significant strides in addressing the needs of intersex persons. For instance, Section 21 of the Children Act, 2022 makes particular reference to intersex children and their right to be treated with dignity. Further, Section 144 (z) of the same Act now provides that intersex children who may be at risk of their rights been violated be categorized as children in need of care and protection. The National Police Service Standing Orders Chapter 5 Rule 15 (4), makes provision for detention of intersex persons in police custody. The Persons Deprived of Liberty Act 2014 contains specific provisions on the protection of the human rights of intersex offenders and the need to ensure separate confinement.

3.6.3 In addition, intersex persons are officially recognised as a third gender in Kenya, as evidenced in the Census of 2019 in which Kenya became the first country in Africa to recognise and collect data on intersex persons.

Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders calls upon courts to consider the care-giving responsibilities of women when sentencing them.

136 United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders, rule 64. See also Constitution of Kenya 2010, Article 53 (2); United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), r. 8.1; African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, paragraph. 9 (e) (i) which highlight the best interest of the child as a critical consideration.

Situational Analysis

3.6.4 In 2017, a Taskforce on the Policy, Legal, Institutional and Administrative Reforms regarding Intersex Persons was established partly informed by the outcome of R.M. vs AG case and 4 Others (2010) eKLR and Baby A's case.[137] The handling of intersex persons still remains a very practical challenge for Kenya's criminal justice system.

Policy Directions

3.6.5 The court should give appropriate directions, taking into account all the relevant circumstances, in the sentencing or committal orders relating to intersex persons to ensure the protection of their dignity and their physical person particularly when they are committed to custodial sentences.

137 *(Baby A Suing through the Mother EA) & another v Attorney General & 6 Others* (2014) eKLR See also

PART IV: THE SENTENCING PROCESS

4.1 THE ROLE OF CRIMINAL JUSTICE ACTORS IN SENTENCING

The sentencing process commences once a person has been convicted and the court begins to consider the sentence to be imposed. The following parties have a role to play in the sentencing process:

4.1.1 THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION

4.1.1.1 The Office of the Director of Public Prosecution (ODPP) bears the duty:

i. To draw to the attention of the court all issues that would impact upon the sentence including aggravating or mitigating circumstances, the previous record of the offender & victim impact statements.

ii. To submit to the court on relevant provisions of the law and judicial precedents that should be considered when sentencing.

iii. To draw to the attention of the court any other issue that would impact upon the sentence, such as the presence of witnesses under the protection of the Witness Protection Agency.

Situational Analysis

4.1.1.2 Typically, prosecutors inform the court whether the accused person is a repeat offender and sometimes implore the court to impose a harsh sentence.

4.1.1.3 It emerges that, in many cases, the prosecutors do not have information on the offenders' past convictions, and hence ask the court to treat offenders as first-time offenders. Unfortunately, some of those offenders are recidivists. This is attributed to the lack of digital police records.

Policy Directions

4.1.1.4 The Prosecutor should ensure that the offender's accurate criminal record is obtained before the trial is concluded.

4.1.1.5 Prosecutors should adequately and objectively guide the court by effectively dispensing with the duties listed above.

4.1.2 CHILDREN OFFICERS

4.1.2.1 When sentencing children in conflict with the law (the 'child'), the court will usually rely on the probation officer to produce a pre-sentence report. However, occasionally the courts may ask for a social enquiry report from the Directorate of Children's Service to provide more information. This will be conducted by a children's officer who bears the duty to provide accurate, objective and reliable information about the child offender that would assist the court in reaching the most appropriate sentence. The officer should gather information from all the parties involved to avoid biased information and/or conclusions. Information to be obtained as part of such a report

might include, but is not limited to:

i. the circumstances under which the offence was committed.

ii. the child's background.

iii. the child's family ties.

iv. the child's past criminal history.

v. the child's health status.

vi. the child's social status.

vii. the child's attitude towards the offence/remorsefulness.

viii. the likelihood of the child reforming.

ix. any other relevant information such as availability of space in borstal or rehabilitation school concerning children.

Situational Analysis

4.1.2.2 The role of children's officers in the sentencing process is not clearly understood. Probation officers are routinely used for the preparation of pre-sentence reports in relation to children in conflict with the law. The added value of a social enquiry report prepared by a children's officer has not been fully recognised. Having said that, resource challenges have been cited in the delivery of such reports and the availability of enough qualified children's officers to assist the courts in this way.

Policy Directions

4.1.2.3 To pass a just sentence, it is vital that the court receives and considers relevant information.[138] This is particularly important when sentencing children in accordance with the principles and policy directions set out in these Guidelines. Accordingly, the court should always give consideration to the need for a social enquiry report before proceeding to sentencing.[139] While appreciating that such reports are not binding, the court should give reasons for departing from any recommendations therein.

4.1.2.4 Children officers must provide accurate information and should endeavour to uphold the principles of accountability and transparency.[140] Offering inaccurate information shall attract administrative sanctions and potentially criminal prosecution. The court may seek clarity on information provided either orally or through the reports.

138 Criminal Procedure Code, section 329.

139 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), paragraph 16.1, Children's Act 2022 section 71 (5), 97, 136, 150, 169 (iii), & 228.

140 United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), paragraph 7.1.

4.1.3 PROBATION AND AFTERCARE SERVICE (PACS)

4.1.3.1 PACS implements two primary laws namely the Probation of Offenders Act CAP 64 and the Community Services Orders Cap 93. Probation officers bear the duty to provide factual, unbiased, objective and reliable information about the offender, victim and the community which would assist the court to determine the most appropriate sentence.

4.1.3.2 The sentencing options recommended by probation officers include Probation Orders, Community Service Orders and committal to statutory penal institutions for children and youth.

4.1.3.3 The recommendations guide the court on the statutory institutions to commit an offender based on law, the age of the child and the programmes available as follows:

Agency	Institution	Age	Primary Legislation
Department of Children Services	Rehabilitation school	12 - to below 16 years	Children's Act 2022
Probation and Aftercare Service	Hostel	12 and above	Probation of Offenders Act Cap 64
Kenya Prisons Service	Borstal Institution	15- 17 years	Borstal Institutions Act Cap 92
	Youth Corrective Training Centre	17- 21 years	Prisons Act Cap 90

Situational Analysis

4.1.3.4 As identified in Part II above ('Probation Orders'), PACS is not well resourced through the budget making process to allow them to conduct their duties effectively. Challenges to the recommendations and findings are sometimes made by offenders on the basis that they are inaccurate or have been made without proper interview of the parties involved.

Policy Directions

4.1.3.5 It is vital that the court receives and considers relevant information.[141] The court should, as a matter of course, request a pre-sentence report in appropriate cases. The court should be guided by the pre-sentence reports presented and should be satisfied that the enquiry has been adequately conducted for the purposes of sentencing. While appreciating that pre-sentence reports are not binding, the court should give reasons for departing from the recommendations therein.

4.1.3.6 The offender, whether an adult or a child, should be interviewed by the probation officer. In addition, where victims are available and willing, they should also be interviewed. This avoids allegations of bias on one side.

141 Criminal Procedure Code, Section 329.

4.1.3.7 Probation officers must provide accurate information and should endeavour to uphold the principles of accountability and transparency. Offering inaccurate information shall attract administrative sanctions and potentially criminal prosecution. The court may seek clarity on information provided either orally or through the reports.

4.1.4 THE DEFENCE

4.1.4.1 The offender may be represented or unrepresented.

4.1.4.2 The defence should bring to the attention of the court:

i. any mitigating and other circumstances which should be taken into account including evidence of the remorsefulness of the offender as well as the positive attitude of the offender towards rehabilitative efforts where applicable.

ii. circumstances which would make a particular form of sentence inappropriate.

iii. any information that may have a bearing on the sentence including a commitment to restorative justice measures such as compensation, restitution of and reconciliation with the victim.

iv. the reception towards rehabilitative efforts.

v. relevant provisions of the law and judicial precedents that should be taken into account when sentencing.

vi. Any other relevant issue that has a bearing on sentencing.

Situational Analysis

4.1.4.3 Where offenders are not represented by advocates, many of them fail to understand what is required in terms of mitigation. In many cases, they fail to provide information that may impact on the sentence, opting to remain silent or giving irrelevant information.

Policy Directions

4.1.4.4 Upon conviction, the court shall invite the offender to make submissions before proceeding to consider the sentence. This is especially so for the unrepresented. Whereupon the court should guide the offender on what is required of them at this stage. This may take the form of a question-and-answer approach as the court sensitively extracts relevant information from the offender.

4.1.4.5 The offender's replies, including opting to remain silent should be recorded.

4.1.4.6 The offender should be given an opportunity to challenge or respond to any issue raised by the other parties that impacts on the punishment including reports submitted towards sentencing.

4.1.5 THE VICTIM

4.1.5.1 The victim is entitled to submit their views on the appropriate sentence. This includes the impact of the crime, needs arising from the crime or other sentiments such as a desire to reconcile with the offender. Where a victim wishes to submit views, the court is obligated to hear them[142].

[142] Victim Protection Act Section 9 (2) (a); United Nations Standard Minimum Rules for the Non- Custodial Measures (Tokyo Rules), Rule 8.1.; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, paragraph 6 (b).

4.1.5.2 The victim`s views can be submitted by a legal representative[143] or an intermediary as envisioned in the Constitution[144] if they so wish.

4.1.5.3 Victim impact statements can be filed by or on behalf of the victim, including by the prosecutor.[145] These statements provide particulars of the personal harm suffered by the primary victim or, where the primary victim is deceased, particulars of the impact of the primary victim's death on their dependants, family or community.[146]

Situational Analysis

4.1.5.4 Typically, victims have been placed in the periphery of the sentencing process with participation largely limited to their role in the trial process as witnesses. They are, on many occasions, not informed of the progress in the case.

Policy Directions

4.1.5.5 The court should provide hearing notices to the victims to attend the sentencing hearing, but their reluctance to participate should be respected.[147]

4.1.5.6 Before sentencing, a court should enquire whether victim impact statements will be submitted. Victim impact statements are not mandatory.[148] Where submitted, they, together with views submitted by the victim, should be considered in determining the sentence to be imposed.[149]

4.1.5.7 At the beginning of the sentencing hearing, the court should inform the victims of their right to express their views and that the court would give them an opportunity to do so after hearing submissions from the prosecution and defence.

4.1.5.8 Participation of the victim at this stage is voluntary and the court should keep the victims informed of this position. In achieving the objectives outlined in Part I, the impact upon the victim may be a particular consideration on the issue of reconciliation and reintegration.

4.1.6 THE WITNESS PROTECTION AGENCY

4.1.6.1 Where there is a protected witness under the witness protection programme, issues relating to the place of imprisonment, or where a non-custodial sentence is passed the WPA must be notified. This is also the case where the offender is transferred from one place of custody to another or is afforded early release. This is to ensure that witnesses remain protected.

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143 Victim Protection Act, section 9 (2); United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules), Rule 8.1; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Paragraph 6 (b).

144 Article 50 (7)

145 Criminal Procedure Code Section 329 C (3) (a)

146 Criminal Procedure Code Section 329 A.

147 Victim Protection Act Section 9 (2). Section 12; Tokyo Rule 8.1

148 Criminal Procedure Code, section 329 D; Sexual Offences Act, Section 12.

149 Criminal Procedure Code section 329 B; Victim Protection Act, 12

4.2 CONDUCTING THE SENTENCING HEARING

4.2.1 Prior to scheduling a sentencing hearing, the court should confirm whether the accused person has received the requisite reports within a reasonable time to be able to prepare for the sentencing hearing. The court should schedule a hearing in which it receives submissions that would impact on the sentence from all relevant persons and agencies. Whilst the pertinent information is typically contained in the pre-sentence reports, and particularly probation reports in accordance with the Probation of Offenders Act, Cap 64, the hearing provides the court with an opportunity to examine the information and seek clarity on all issues.

4.2.2 The sentencing hearing also provides the offender with an opportunity to submit on any adverse information that would be prejudicial to him/her. This is in keeping with the spirit of the Constitution that guarantees the offender the right to a fair hearing.[150]

4.2.3 Section 39 (13) of the Sexual Offences Act No.3 of 2006 requires that Registrar of the High Court shall maintain register with respect to sexual offenders. Prosecutors, police and the courts should peruse that register for convicted sexual offenders in exercise of the supervision of dangerous sexual offenders and to be aware of past perpetration of such an offence by an accused person that may be material to the determination of sentence. Indeed, under that provision, any person who has reasonable cause to so do, may access that register.

4.3 ACCUSED PERSONS PLEADING GUILTY

4.3.1 Although a guilty person is entitled not to admit the offence and to put the prosecution to proof of its case, an acceptance of guilt, reflected in a guilty plea:

i. Normally reduces the impact of the crime upon the victims;

ii. Saves victims and witnesses from having to testify; and

iii. Is in the public interest in that it saves public time and money on investigations and trial.

4.3.2 In order to maximise these benefits, and to provide an incentive to those who are guilty to indicate a guilty plea as early as possible, this guideline suggests that a reduction in sentence should always follow upon a guilty plea.

4.3.3 However, an accused person should never be pressured to plead guilty.

Situational Analysis

4.3.4 An offender's guilty plea rarely impacted on the decision of the courts in the past. This is because of underlying perceptions that such consideration would be tantamount to 'rewarding' an offender. However, today, the discounting of sentences on this basis is considered acceptable; this is because aside from the aforementioned benefits to the victims and the criminal justice system, it is a clear expression of the willingness on the part of the offender to take responsibility for their actions. In addition, an early plea of guilty increases the chances of positive outcomes of reconciliation and re-integration of the offender.

150 Constitution of Kenya, Article 50.

Policy Directions

4.3.5 The court must remain guided by the overall objective, which is the conviction of the guilty. It, therefore, shall satisfy itself that the accused person fully understands what pleading guilty means and the effect of pleading guilty.

4.3.6 Where courts are satisfied that it is safe to accept a plea of guilty, they should grant a discount after considering the appropriate sentence based on culpability and harm specific to the offence alongside other aggravating and mitigating features. Once the court has arrived at that sentence, a discount of up to one third of the sentence should be applied where the offender has pleaded guilty at the earliest opportunity. Thereafter, e.g., where an offender has pleaded guilty just before, or during trial, a lesser reduction may be afforded.

4.3.7 The reduction in sentence for a guilty plea can be taken into account by imposing one type of sentence rather than another – for example, by reducing a custodial sentence to one of community service or reducing community service to a fine.

4.3.8 Where an offender has indicated a plea to a lesser or different offence which is not accepted by the prosecution or the court, but is then later convicted of that lesser offence, the court should give a level of reduction that is appropriate to the stage at which that indication of plea was given.

4.3.9 In the case of a mandatory minimum sentence, the discount cannot go below that minimum term set by statute.

4.4 PLEA BARGAINING

4.4.1 Plea bargaining is an alternative to trial with the purpose being to expedite the administration of justice in accordance with Article 159 (1) (d) of the Constitution.

4.4.2 A prosecutor and an accused person or his representative may negotiate and enter into an agreement for the reduction of a charge to a lesser included offence; the agreement of a basis of facts in relation to the current charge, or the withdrawal of the charge or a stay of other charges or the promise not to proceed with other possible charges.

Situational Analysis

4.4.3 Plea bargaining is yet to be effectively embraced in the justice system. The unpredictability of sentencing outcomes is seen as one of the reasons for the reluctance of accused persons and prosecutors to enter into such agreements. There is need for robust sensitization on justice sector actors and active support by judicial officers and judges where necessary.

Policy Directions

4.4.4 Where satisfied about the lawfulness of a plea-bargaining agreement, courts should be guided by the recommendations therein.

4.4.5 Where a court determines that there are compelling reasons to deviate from the terms proposed in the agreement it shall state so and qualify its reasons.

4.4.6 Where a plea-bargaining agreement is accepted, the court is still left with a discretion on the issue on sentencing. The court should then still follow the guided approach to sentencing and a discount for guilty plea – because of the benefits highlighted above – should be afforded.

4.5 DETERMINATION OF THE SENTENCE

4.5.1 In determining the appropriate sentence, courts must assess a number of issues starting with the degree of both culpability and harm.

4.5.2 The assessment of culpability will be based on evidence of the crime provided through testimony where a trial has been conducted, or, where a plea is entered, through the prosecution summary of facts. Aggravating and mitigating features surrounding the offence may be advanced by the prosecution and the accused person (or his/her representative).

4.5.3 Where an offence is committed by more than one offender a court shall ascertain the culpability of each of the offenders involved and render individual sentences commensurate to their involvement in the offence.

4.5.4 The assessment of harm may be based on testimony, or the summary of facts presented and also by a victim impact statement where that has been obtained.

4.5.5 Mitigating factors refers to any fact or circumstance that lessens the severity or culpability of a criminal act and can also include the personal circumstances of the offender.

4.5.6 Convicted offenders should be expressly provided with the opportunity to present submissions in mitigation.

4.5.7 A list of aggravating and mitigating circumstances – which is not exhaustive – is contained within the GATS along with those specific to murder, manslaughter, and wildlife cases, in Part V.

4.5.8 Having heard all relevant submissions and considered any reports advanced by either prosecution or defence, or the probation or children's officer (where applicable), and any victim impact statement, the court should:

i. Decide as to whether a custodial or a non-custodial sentence should be imposed in line with these guidelines.

ii. In the case of sexual offences, before the terms of a custodial sentence are determined, the court must have recourse to relevant probation reports as required in sections 39 (2) and (4) of the Sexual Offences Act No.3 of 2006 that contain provisions about post-penal supervision of dangerous sexual offenders.

4.6 PRONOUNCEMENT AND FORM OF JUDGMENT

4.6.1 The sentencing process forms part of the trial and is therefore subject to the fair hearing constitutional guarantees. The sentence must be pronounced without unreasonable delay.[151] The judgment must clearly set out the reasons that informed

[151] Constitution of Kenya 2010, Article 50 (2) (e).

the sentence.[152] This includes the factual grounds and legal provisions that led to the sentence and these should be pronounced in open court. Care must be taken to explain the sentence to the offender in line with these Guidelines.

4.6.2 Where a court departs from these Guidelines, it must give reasons.

4.6.3 Copies of the judgment should be availed to the accused person, victim and witnesses, and the Witness Protection Agency where necessary.

4.7 PROTECTION AND POST-PENAL SUPERVISION ORDERS

Protection Orders

4.7.1 Protection and supervision orders are an important part of sentencing because of the respective ends they are purposed to achieve. They are expressly provided in certain statutes such as the Domestic Violence Act No. 2 of 2015, the Witness Protection Act No. 10 of 2006, and the Victim Protection Act No.17 of 2014.

4.7.2 Protection orders are targeted towards safeguarding vulnerabilities whether in relation to the accused person or to relevant third parties e.g., the requirement for regular treatment for accused persons suffering from chronic diseases that require regular medication and doctor's supervision the absence of which would be life-threatening.

4.7.3 Children who may be affected by the incarceration of their parent who may be their sole carer are also vulnerable because the incarceration of their parent may lead to inhuman suffering caused by the lack of parental care.

4.7.4 Refugees, asylum seekers, and undocumented immigrants who come into contact with the criminal justice system are also vulnerable to harassment. This stems from their inability to navigate through the criminal justice system unaided for lack of familiarity and grounding, and often time may lack the resources required to defend themselves adequately. In the case of undocumented immigrants, they may be re-arrested for the same offence of being in the country illegally immediately upon release, thus the need for protection orders to ensure that after serving their sentence they are handed over to the appropriate and authorised agencies for the safe processing of their documents, status and the administration of any other lawful action or procedure. The implementation of protection orders commences immediately upon the need arising after the pronouncement of sentence.

Post-Penal Supervision Orders

4.7.5 Post-penal supervision orders are targeted towards the released offender with the benefits intended for both the released offender and the public. Continued supervision of the released offender is aimed at boosting the success of their rehabilitation and integration processes. It is also aimed towards the protection of the public from the dangers posed by yet to be fully rehabilitated or incorrigible released offenders such as dangerous sexual offenders and murderers among others.

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[152] Constitution of Kenya 2010, Article 73 (2) (d); Criminal Procedure Code, section 169 (1). See *Fatuma Hassan v. Republic [2006]* in which the court highlighted that the "trial court seized of the matter is obliged to make detailed notes on the matters it has taken into account in arriving at the one of the options of punishment available".

4.7.6 Post-penal supervision orders are carried out upon the release of the offender from custody e.g., the supervision of dangerous sexual offenders as outlined in paragraph 4.2.3

Situational Analysis

4.7.7 Courts routinely request for pre-sentence reports as a guide for the award of both custodial and non-custodial sentences. In this regard, they may request the inclusion of specific information concerning the accused person that should indicate any relevant and present vulnerability of note that is applicable to them directly or connected third parties. In addition, courts may in some cases request for recommendations on sentencing.

4.7.8 Often, the accused person or connected third party dependents suffer for lack of an appropriate mechanism to ensure that the vulnerabilities arising from the accused person's incarceration are addressed promptly. This is important in minimizing suffering in the case of accused persons in need of specific and ongoing treatment such as dialysis as well as a long-term healthcare plan. The same applies in the case of children, senior citizens and other family members of ill-health who are solely dependent on the accused person. For these reasons there is need for protection orders that prevent deterioration in specific vulnerabilities caused by the sentencing decision to incarcerate an accused person.

4.7.9 Similarly, communities have paid the price for being oblivious to the dangers posed by released offenders in their midst having continued or unresolved offending behaviour such as dangerous sex offenders and murderers. Post-penal supervision orders are necessary in such cases to protect the public from the harmful consequences thereof through the release of the offender into a supervision programme by relevant agencies. Such post-penal supervision is aimed at protecting the released offender from deterioration in their offending behaviour as well as from the vengeful acts of a furious public.

Policy Directions

4.7.10 Courts should be guided by pre-sentence reports as to the appropriateness of issuing a protection or post-penal supervision order. As much as possible, courts should make requests for specific information to be included in the reports based on the presentation of respective cases before them.

4.7.11 The court may also seek clarity on information provided either orally or through the reports to determine the need for issuance of appropriate protection or post-penal supervision reports.

4.7.12 In issuing protection or post-penal supervision orders, courts should refer to applicable laws and specify the agency required to implement the orders.

4.8 GUIDELINES FOR RE-SENTENCING HEARINGS, AND THE IMPERATIVES FOR RESENTENCING

4.8.1 The phenomenon of re-sentencing hearings and the procedure of resentencing originate from the Supreme Court decision in Muruatetu I and II Cases.[153] The import of the decisions is that all offenders convicted of murder who have been subject to the mandatory death penalty and desire to be heard on sentence are entitled to re-sentencing hearing for consideration of mitigation.

4.8.2 In this circumstance, the re-sentencing court is clothed with the power to review a sentence by factoring in the weight of an offender's mitigation in calculating a definitive term of imprisonment. As already noted, there is a resolute move towards reviewing all mandatory minimum and maximum sentences to promote judicial discretion and strengthen the right to a fair trial. The following guidelines are aimed at providing guidance to judicial officers and judges when faced with a re-sentencing application.

Situational Analysis

4.8.3 The legislative framework on the death penalty and more so the mandatory nature of the penalty has been defined and applied differently by various courts pursuant to Muruatetu I, contributing to disparities in the resentencing processes and decisions.

4.8.4 In conducting resentencing, it has been observed that some courts have not been requesting a resentencing report that would be important in reaching an informed determination of the suitable sentence.

4.8.5 There is no clarity with respect to which category of offenders can apply for resentencing hearing.

4.8.6 The timelines and process for a resentencing application are unclear to all relevant stakeholders including offenders.

4.8.7 There is a lack of clear guidance on the jurisdiction of the resentencing court.

4.8.8 There is a need for new guidelines to indicate aggravating and mitigating factors that a sentencing court may take into account in determining whether to impose a sentence of death, or where to 'pitch' the length of any term of imprisonment that may be imposed upon conviction for murder.

4.8.9 There is a lack of clarity on the right of appeal – or its process - upon a resentencing decision.

4.8.10 There is a lack of guidance on the right to revision as guaranteed in the criminal procedure code.

4.8.11 The courts continue to experience the challenge of missing and incomplete files. There needs to be guidance regarding how the court should approach the issue of resentencing in such cases.

153 See Francis Kirioko Muruatetu & Other vs Republic (2017) eKLR, see also Francis Kirioko Muruatetu & Another V Republic; Katiba Institute & 5 Others (Amicus Curiae) (2021 eKLR)

4.8.12 Offenders appearing for resentencing hearing continue to do so mostly without legal representation amid the complexities of the resentencing process.

4.8.13 The parameters of what constitutes life imprisonment are unclear i.e., whether life means life in prison, or whether 'life' might be a determinate period, set by the court, after which the offender becomes eligible for release.

Policy Directions

A. Who can Apply for Resentencing?

4.8.14 All convicts as specified in the relevant instructing instrument.

In the case of murder convicts:

a) All offenders convicted of murder who have been subject to the mandatory death penalty and desire to be heard on sentence as at the time of the Supreme Court's decision (14 December 2017).

b) All offenders sentenced to death for murder after the decision in Muruatetu but without regard to or compliance with the court's declaration (i.e., not taken into account mitigating factors).

4.8.15 Capital offenders in murder cases whose sentence has been commuted to life imprisonment cannot apply for resentencing where mitigation had been considered. However, Article 50 (6) of the Constitution can be invoked by convicts who have gone through the entire appellate process to petition for a retrial.

B. Timelines for a Resentencing Application

4.8.16 A resentencing application can be made:

i. After the completion of the trial process and where a sentence has been issued.

ii. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for resentencing upon being satisfied that the appeal has been withdrawn.

iii. Alternatively, a resentencing application can be made once an applicant has received judgment on appeal, and where it is submitted that neither the High Court nor the Court of Appeal considered the mitigating and circumstances of the case.

iv. On development of new jurisprudence after conviction, it is expected that trial courts shall have considered the said jurisprudence during sentencing under the principle of *stare decisis*.

4.8.17 The trial court should always ensure that any mitigation presented is recorded in writing.

C. Jurisdiction

4.8.18 Resentencing cases shall be handled by the 'Sentencing Court' – e.g., if the last court that sentenced the convict was the Court of Appeal, then the resentencing hearing shall also be handled at the Court of Appeal and not a lower court. This applies *mutatis mutandis* to cases in either superior or inferior courts.

4.8.19 Petitioners in prison shall present their petitions for rehearing to the Officer in Charge (OIC) of the prison, who shall thereupon forward the petition and copies to the Registrar of the Sentencing Court.

D. Presentation of Mitigating and Aggravating Factors in Resentencing Hearings

4.8.20 The Sentencing Court shall be guided by the sentencing principles and objectives set out in Part I of these the Guidelines in all resentencing hearings. The following mitigating factors were set out by the Supreme Court as particularly relevant in a resentencing hearing:[154]

i. Age of the offender.
ii. Being a first offender.
iii. Whether the offender pleaded guilty.
iv. Character and record of the offender.
v. Commission of the offence in response to gender-based violence.
vi. Remorsefulness of the offender.
vii. The possibility of reform and social re-adaptation of the offender.
viii. Any other factor that the court considers relevant.
ix. Time already spent in prison by the convict.[155]
x. Duress, provocation, less participation in the offence (including progressive provocation).
xi. Any attempt to make reparation for the offence.

4.8.21 As in any sentencing hearing, proper investigations must address the above factors. This may be done by way of, for example, a pre-sentence report, completed by PACS, any victim impact statement, a witness protection report (where relevant), and a report from the prison where the convict was in custody.

4.8.22 Finally, the Sentencing Court has a duty to ensure applications made are robust and present sufficient information in mitigation for there to be a true consideration of all the circumstances. The information to be presented includes but is not limited to:

i. The circumstances under which the offence was committed.
ii. If charged and convicted with others, the precise role the offender played in the commission of the offence and the overall impact of their role in the harm suffered by the victim.
iii. The offender's background.
iv. The offender's family.

154 Ibid 156

155 Criminal Procedure Code, section 333(2); the court in making a resentencing decision shall take account of the period spent in custody

v. The offender's past criminal history.
vi. The responsibilities the offender has in society and whether the offender is a primary care giver.
vii. The offender's health status, including both physical and mental health at the time of the offence.
viii. The offender's health status, including both physical and mental health at the time of resentencing.
ix. The offender's means of livelihood.
x. The offender's attitude towards the offence/remorsefulness.
xi. The offender's behaviour whilst in prison and likelihood of reform.
xii. Impact of potential release on the victim; and
xiii. Any other relevant information.

C. Access to Legal Representation

4.8.23 Every offender/convict eligible for resentencing must have effective legal representation. This is in line with Kenya's national and international obligations. Whilst there is a history of inmates representing themselves in resentencing cases, the serious nature of the proceedings and the complex legal context requires that all eligible persons have legal representation.

Policy Direction

4.8.24 Every re-sentencing hearing shall be conducted with the participation of legal representation on behalf of every offender/convict. The State shall provide free legal representation for indigent offenders/convicts through the National Legal Aid Service or the Pauper Briefs Scheme.

D. Missing or Partial Court Records

4.8.25 Where a trial record is missing or incomplete, the court shall maintain a record of efforts made to trace the file, and as a last resort, approach the matter as follows:

i. Reconstruction of the court file by calling for police/prosecution file.

ii. Use judgments made by judicial officers and/or judges to reconstruct the content of the trial record.

iii. Where file reconstruction cannot be achieved, the court has jurisdiction to still proceed with the sentence re-hearings. The absence of a trial record shall not deprive a convict of an opportunity for a sentence re-hearing.

iv. The maximum punishment must be reserved for the worst of offenders in the worst of cases.[156] However, the death sentence should not be preferred

[156] *R v. Anderson Mabvuto,* Criminal Case No. 66 of 2009. "It is trite that murder is a very serious offence: see section 210 of the Penal Code which provides for death as a maximum sentence upon conviction of the offence. However, it has been repeatedly held that the maximum punishment must be reserved for the worst of offenders in the worst of cases: See Rep. v. Anderson Mabvuto, Criminal Case No. 66 of 2009 (unreported) and Rep. v. Jamuson White, Criminal Case No. 74 of 2008 (unreported). Both the State and the Defence are agreed that the death sentence imposed on the convict was not merited. I fully concur with Counsel that it cannot be properly contended that the offence herein was committed in circumstances that can be described as worst instance of murder. In any case, the Convict's participation in the commission of the offence appears to have been very minimal'. An extract from Malawi Capital Resentencing Project Selected Jurisprudence, March 27th, 2017.

where the trial record is wholly or partially missing to warrant uncertainty on the circumstances of the commission of the offence. On the other hand, such reasoning would apply with equal measure to where the murder re-sentencing is based on evidence received.[157] New pieces of evidence adduced by the State and the convict should be carefully assessed on a case-by-case basis.

v. Any omissions in the record must resolved in favour of the accused.

D. Right to Appeal a Resentencing Decision

4.8.26 Every offender shall have the right to appeal a re-sentencing ruling to a higher court. There shall only be one right of appeal to a resentencing ruling. This is in view of the fact that in offences other than murder, appeals to the Court of Appeal are only on matters law. Where there has been a revision of a sentence, one cannot apply for re-sentencing.

E. Revision

4.8.27 In the exercise of their desire to be heard in a re-sentencing hearing, convicted persons should limit their right to revision as guaranteed by the Criminal Procedure Code.[158]

[157] (1) The Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. (2) Evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include the evidence by or on behalf of the victim of the offence and any relevant reports to enable the court to assess the gravity of the offence. (Reprieve unpublished memorandum on re-sentencing, 2009. An extract from Malawi Capital Resentencing Project Selected Jurisprudence, March 27th, 2017.

[158] Criminal Procedure Code Sec 361 (7) as read with sections 362, 363, 364, 365 and 366.

PART V: THE GUIDED APPROACH TO SENTENCING

5.1 THE GUIDED APPROACH TO SENTENCING

STEP 1: Determine the sentencing range

5.1.1 For each offence, start by determining whether there is a statutory maximum, minimum, or both.

5.1.2 Next, look at the case law. Have the High Court, Court of Appeal or Supreme Court issued any judgments that would be relevant to sentencing? Make sure to provide the prosecution and defence with an opportunity to address case law:

i. Before hearing submissions from the prosecution and defence counsel, ask them if there are any judicial precedents the Court should consider. Judicial precedent may be relevant to the appropriate sentence, the principles to be applied when determining the sentence, or both.

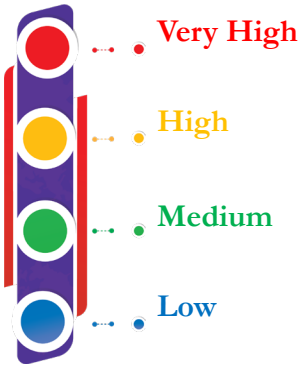
ii. Copies of any judgments or the citations should be given to all parties by the party relying on them.

iii. If the Court is aware of a judicial precedent that neither the prosecution nor the defence has identified, the Court should ask both to consider that precedent before making their submissions. The Court should give them sufficient time to do so.

5.1.3 Once submissions on the issue of sentencing range and any relevant case law are made from the prosecution and the defence, and the statutory sentencing range identified, move on to Step 2.

STEP 2: Determining the level of seriousness

5.1.4 There are generally four levels of seriousness although as offence specific guidance is developed in time, this may vary. For the purposes of the GATS, the following 'traffic lights' are proposed.



5.1.5 Determining the seriousness level requires the Court to assess both **culpability** of the offender and the **harm** caused by the offending behaviour. This information will come from the evidence that was adduced during the trial or, where there has been a plea, from the prosecution summary of facts and victim impact statements, and defence submissions.

5.1.6 At this stage, a guilty plea should NOT be considered.

STEP 2A: Determining culpability

5.1.7 The circumstances of the offence may justify either reducing or increasing the sentence. Here are some factors to consider:

- Was the offence motivated by or did it demonstrate hostility based on race, gender, sex, pregnancy, marital status, health status, ethnicity, age, disability, religion, conscience, belief, culture, dress, language, or birth.
- Was the offence planned or premeditated?
- The length of time over which the offending behaviour took place.
- Did the offence require a high level of planning, organisation, sophistication, or professionalism?
- Did the crime involve sustained or prolonged offending behaviour such as repeated attacks upon the same victim or a spate of robberies?
- Did the accused intend to cause a more severe consequence than what actually occurred?
- Was the offence committed whilst under the influence of alcohol or drugs which were consumed voluntarily and deliberately so as to effect the commission of the offence (i.e., to give the accused 'Dutch courage')?
- Was the offence intended to interfere with or obstruct the course of justice?
- Was the offence committed by a group rather than an individual?
- Did the accused use or threaten to use a weapon? The more dangerous the weapon, the higher the culpability.
- Did the offence involve a flagrant and excessive use of violence or damage to a person or property in the execution of the offence?
- Was the offence committed for financial gain? Examples might include a person killed in order to make an insurance claim.
- Was there a high level of profit - realised or anticipated – from the commission of the offence?
- Did the offence involve an abuse of trust or position of authority?
- Did the offence involve restraint, detention, inhuman treatment, or other degradation of the victim?
- Was the victim vulnerable, e.g., very young, elderly, or disabled?
- Was the victim providing a public service or performing a public duty at the time of the offence?
- Did the offence cross international borders?
- Was a witness placed in the witness protection programme because of dangers posed to them by the accused person or their agents?

- Was there an attempt to dispose of or conceal evidence following the commission of the crime or did the accused attempt to blame others?
- Was the offence committed whilst the accused was on bail?
- Was the offence committed in the presence of others (especially children)?
- Was the offence committed while the accused was subject to court orders or whilst the accused was in custody?
- Does the accused have relevant previous convictions e.g., of a similar nature to the offence committed?
- Did the accused intend to harm more than one victim?

5.1.8 The absence or presence of any of these factors will either increase or reduce the level of culpability. This list does not include every potential factor; every case is different. A complete analysis of culpability will require the Court to look closely at all factors.

STEP 2B: Determining harm

5.1.9 A victim impact statement is an obvious source of information for determining the level of harm, but it may not always be availed to the court – not all victims may wish to make such a statement and they should not be forced to do so. The following factors may be considered in determining the harm caused by the offence:

- Were multiple victims involved?
- Were other people placed at risk by the accused's conduct?
- Where injury was inflicted, how serious were the injuries – both physical and psychological –to the victim?
- How did the offence affect the victim? Consider the impact upon the victim's employment prospects, mobility, or ability to continue their lifestyle as a result of the offence, and any medical or psychological prognoses.
- Where damage occurred, how serious was the damage?
- Did the victim suffer losses as a direct result of the offence? Consider both financial and less tangible losses, such as the loss of items of sentimental value.
- Is the kind of offence prevalent in the victim's community?
- Did the offence have a harmful impact on the broader community, or is the type of offence prevalent in the community?

5.1.10 The absence or presence of these factors will either increase or reduce the level of harm as assessed by the court. The above list is not exhaustive, and different offences will have different types of harm that must be considered. The court must judge each case separately on its own facts.

STEP 3: Determine the bandwidth for sentence (but don't announce)

5.1.11 This is simply the 'ENTRY POINT' on sentence. No announcement is made at this point. By determining culpability and harm relating to the offence itself, the court

can determine the sentencing range applicable, with red being the most serious and blue the least.

5.1.12 The four bandwidths should be considered as providing a sentencing 'range' with red being the most serious and blue the least. The illustrations below will guide the court.

HARM	CULPABILITY				
		VERY HIGH	HIGH	MEDIUM	LOW
	VERY HIGH				
	HIGH				
	MEDIUM				
	LOW				

Table 1: Sentencing Bandwidth

ILLUSTRATIONS

- **If the court determines the sentence falls into the 'very high' or 'red' range, this could mean a sentence that lies within the top quarter of a maximum custodial sentence. E.g., where maximum sentence is 12 years under statute, the sentencing range will fall somewhere between 9 and 12 years.**
    - **Where the statute calls for a minimum sentence, a 'very high', 'high' or 'red' range of sentence might impose a sentence starting at 1.5 times the minimum sentence up to twice the minimum sentence. This would apply to fines as well as custodial terms where both are provided for as minimum terms.**

- **Where a sentencing range falls within the 'amber' range the sentence might fall from the mid-way point of the statutory maximum up to three-quarters of the statutory maximum. E.g., where a maximum sentence is 12 years under statute, the sentencing range would fall somewhere between 6 and 9 years.**
    - **Where the statute calls for a minimum sentence, an amber range of sentence might impose a sentence starting at the minimum sentence up to 1.5 times the minimum sentence. This would apply to fines as well as custodial terms where both are provided for as minimum terms.**

- **Within the green range, this would mean a custodial sentence might be regarded as falling from one quarter of the maximum sentence up to the half-way point but can also mean a high-level community service up to the statutory maximum of community service. E.g., for an offence where the maximum is 12 years, the sentencing range would fall between 3 to 6 years but could also mean a high level of community service (close to 3 years).**
    - **Where the statute calls for a minimum sentence, a 'green range' of sentence might impose a sentence starting at the minimum sentence up to over the minimum sentence to a maximum of 50% of the minimum term again. This would apply to fines as well as custodial terms where both are provided for as minimum terms.**

- **Within the blue range, this would mean a sentence that could range from a fine up to probation, community service, or up one quarter of the statutory custodial maximum. E.g., where the statutory maximum is 12 years, the custodial sentencing range would not go above 3 years, but the court could also impose probation, community service or even a fine.**
    - **Where the statute calls for a minimum sentence, a 'green range' of sentence might impose the minimum sentence and where a fine is one of the options, the starting point might be that minimum financial term as opposed to custody.**

- **Where fines are the only option, the same approach can be applied with the statutory maximum divided into four and the bandwidths applied accordingly.**

Case example:

- *The offender has been involved in an argument in a nightclub with a victim. He lashes out and pushes the victim once. The victim falls down, hits his head on the edge of a table and sustains an injury that renders him facially paralysed on one side of his face. Here, the harm might be judged to be 'very high', but the culpability is low. The sentencing range would therefore fall into the amber or even green range.*
- *Contrast this with an offender who, in the same scenario, pushes the victim down to the ground, loses his temper and viciously kicks the victim repeatedly to the head. The victim surprisingly sustains very limited injuries – just superficial bruising. The harm may be medium to low but the culpability – kicking someone to the head repeatedly is extremely serious – is deemed high or very high. The sentencing range would then fall within medium or amber range of sentence.*

STEP 4: Consider additional information such as personal mitigation

5.1.13 Apart from factors that relate to the culpability of the offender in the execution of the offence or offences, the court will also be told of other factors that relate to the offenders' personal circumstances, conduct after the offence, the role the offender played in the offence as a whole, and other matters raised by the defence (if represented), or elicited by the court directly from the offender through careful questioning. The prosecution may also have raised certain issues that are not directly relevant to the offence (such as assistance given to the investigation) or previous relevant convictions. This may raise or reduce the 'moral culpability' of the accused.

5.1.14 In taking these factors into account, the court may be persuaded to move up or down WITHIN the range of sentence applicable (e.g., to the bottom end of the 'red' range), or even to move to a different bandwidth on sentencing altogether. It is for the court to determine how much weight should be assigned to the aggravating or mitigating features presented. Not all factors that apply will necessarily influence the sentence.

5.1.15 The common mitigating factors include:

- Absence of any prior convictions or absence of any relevant/recent convictions.
- Is there evidence of the accused's good character or exemplary conduct?
- Has the accused demonstrated or expressed remorse evidenced by, for example, cooperation with the authorities, an apology, or an offer for reconciliation?

- Did the accused self-report?
- Was there minimal or no planning involved in the commission of the offence?
- If acting with others, was the accused in a lesser or subordinate role or did the accused perform a limited role under the direction of others?
- Did the offender become involved through coercion, intimidation, or exploitation that did not rise to an affirmative defence?
- Did the accused have a limited awareness or understanding of the offence?
- Has there been a delay between arrest and conviction, that delay not being attributable to the conduct of the offender?
- Was the activity initially legitimate but subsequently evolved into illegal conduct?
- Did the accused age or maturity factor into the offence?
- Is the accused the sole or primary caretaker for dependent relatives? The consequences of the incarceration of the accused on other vulnerable persons dependent on them such as children, elderly persons, bedridden persons, etc. should be considered.
- Evidence of disability or serious medical condition requiring urgent, intensive or long-term treatment – see 3.3 of these Guidelines.
- Mental disability or disorder – see 3.4 of these Guidelines.
- Cultural or other factors that may have a bearing on how the offender reacted or behaved in the commission of the offence.

5.1.16 Common aggravating features, separate to the circumstances directly relating to the commission of the offence or offences, might include:

- Previous convictions – the nature of these convictions and the time between the last conviction and the present offence should be carefully considered.
- Was the offence committed whilst the accused was on bail?
- Did the accused fail to respond to warnings or concerns expressed by others about the accused's behaviour?
- At the time the offence was committed, was the accused subject to court orders e.g., a restraining order?
- Was the offence committed whilst the accused was in custody?
- Was the offence committed against the same victim or same class of victim as revealed by previous convictions?
- Is this particular crime prevalent in the community?

STEP 5: Determine the sentence

Taking into account all of the above factors, the court will then determine the applicable sentence.

STEP 6: Apply any Reduction for a Guilty Plea

5.1.17 Although the Court has the discretion to consider the extent to which a guilty plea should impact the sentence, it should consider the following standards:

Example: The statutory maximum on actual bodily harm is 5 years.

***'Red'** would mean a sentence in the top 25% of the table which translates into a sentencing range of anywhere from 3.75 years to 5 years. After hearing mitigation, the court may decide to impose a sentence at the lower end of this range at 3 years and 8 months.*

***'Amber'** would mean a sentence between the midway point of 5 years (2.5 years) up to 3.75 years. After hearing additional factors in particular previous convictions for violence, the court may decide to impose a sentence of 3 years.*

***'Green'** would mean anywhere from high level of community service up to 50% of the statutory maximum which is 2.5 years. After hearing mitigation, the court might decide to impose a sentence of community service.*

***'Blue'** from a fine, to probation, community service or up to 25% of the statutory maximum which is 1.25 years. After hearing additional information, the court might decide to impose probation.*

- If the accused person pleaded guilty at the earliest opportunity, the sentence arrived at in Step 5 should now be reduced by one-third. So, a sentence of 3 years would then be reduced by 1 year.
- If the accused pleads guilty after pleading not guilty at plea taking but at any time before or during trial, the sentence should be reduced anywhere up to a third.

STEP 7: Consider Totality of Sentence

5.1.18 Always bearing in mind the aims of sentencing outlined in Part II and the principles governing totality of sentence as outlined in 2.3.21 to 2.3.30, the courts may make a further upward or downward adjustment in order to arrive at a sentence that is just and proportionate.

STEP 8: Consider compensation and ancillary orders

5.1.19 The Court should consider whether to make a compensation order or other ancillary orders such as forfeiture or disqualification as allowed by the law applicable to the offence. The Court should prioritise compensation over fines when imposing financial orders. Prioritising the compensation may mean that any fine is reduced or dispensed with altogether to enable the compensation to be paid.

STEP 9: Announce the sentence and give reasons

5.1.20 The Court should give reasons for its decision, identifying the particular aggravating and mitigating features that it has taken into account, and explain the effects of the sentence e.g., where a suspended sentence is given, an explanation of what that means in terms of the operational period and the consequences of further offending on any future sentence. Where sentences fall outside the guidelines discussed here, the Court must give reasons for departing from these guidelines.

STEP 10: Give consideration for time spent in custody

5.1.21 The court must give credit for time spent in custody pending the determination of the sentence and deduct that period from the sentence to be served. See paragraphs 2.3.18 to 2.3.20 for specific guidance on how to calculate this.

Additional matters

5.1.22 The process for seeking a confiscation order of any proceeds of crime is NOT a part of the sentencing process. However, the court should be aware that the prosecution may, in some instances, want to apply to the court for orders against tainted property or for pecuniary penalty orders for any benefit derived from the commission of the offence. It is good practice for the Court to ask the prosecution if such an application is being considered.

5.2. MURDER, MANSLAUGHTER AND WILDLIFE CRIMES - OFFENCE-SPECIFIC GUIDANCE

5.2.1 Different offences will have specific aggravating features. Developing offence specific guidance can be helpful to the courts in determining the range of sentence applicable and thus delivering greater consistency and uniformity in approach. Below are some examples that would distinguish between features applicable to murder, manslaughter, and wildlife crimes

MURDER

5.2.2 The harm caused by such an offence is immeasurable. The sentence is not a measure of the value placed on the life of the victim. Therefore, the assessment of aggravating and mitigating features relating to the offence focusses on culpability. However, the victims' family may wish to make a statement to the court about the impact of the offence.

5.2.3 In addition to the generic features contained in the GATS, features particularly relevant to murder may include but are not limited to:

5.2.4 Aggravating Factors in Murder Cases:

i. A significant degree of planning or premeditation.

ii. The mental or physical suffering inflicted upon the victim before death. Factors such as the type of weapon used, torture or inhuman or degrading treatment prior to death will be relevant.

iii. The use of duress or threats to enable the offence to take place.

iv. The vulnerability of the victim e.g., due to age or disability.

v. The fact that the victim was providing a public service or performing a public duty.

vi. Multiple victims or multiple perpetrators.

vii. Where the offence involved an abuse of trust. The relationship between the victim and the accused should be carefully considered.

viii. Offence was motivated by, or there was demonstrated hostility to the victim based on his or her race, gender, sex, sexual orientation (or presumed sexual orientation), pregnancy, marital status (so called 'honour killings' for example), health status (e.g., murder occurred because of the HIV status of the victim, or albinism), ethnicity, culture, dress, language, birth, or religious orientation (or presumed religious orientation).

ix. A history of assaults, threats, or coercion upon the same victim.

x. Absence of self-defence or provocation.

xi. The offence involved deliberate drugging or stupefying of the victim.

xii. Proven abduction or kidnapping of the victim before the murder was committed.

xiii. Where a demand for ransom was made, signifying a financial motive.

xiv. Concealing, destroying, or dismembering the body.

xv. Where the murder was conducted in furtherance of a ritualistic practice such as witchcraft.

5.2.5 Mitigating features relating to murder might include:

i. Lack of premeditation.

ii. The offender suffered from a mental disorder or mental disability which lowered his degree of blame.

iii. In a case of joint enterprise, the role the offender played may be lower than his co-accused. For example, in the resentencing of the Applicants in ***Francis Karioko Muruatetu & 6 others v Director of Public Prosecution [2019] eKLR*** the Judge categorised the offenders into four categories based on their culpability. The first category involved the architects of an offence e.g., those who financed the killing, the second category involves offenders who ensnared the deceased into his death, the third category is the henchmen, those who carried out the brutal killing and the fourth category involves offenders involved in the cover up of the offence by attempting to silence witnesses. The Judge sentenced the third category with the highest term of imprisonment and graduated the term down for the other categories.

iv. That the offender was provoked.

v. That the offender acted to any extent in self-defence or in fear of violence.

vi. The age of the offender.

MANSLAUGHTER

5.2.6 Where an unlawful killing is done without an intention to kill (or cause grievous bodily harm?), the offence of manslaughter may be made out. In sentencing such cases, as with murder, the focus must lie primarily upon culpability. With manslaughter cases, the degree of culpability may vary widely, from the 'one punch' manslaughter to the case involving a prolonged campaign of domestic violence which ultimately results in the victim's death. The focus must be on the offender's actions and intentions at the time of the crime in assessing the degree of culpability. Sometimes a nuanced approach is called for.

5.2.7 In addition to the generic features contained in the GATS, some features that are relevant to assessing culpability in manslaughter cases include, but are not limited to the following:

i. Where death was caused in the course of an unlawful act which involved an intention by the offender to cause harm falling short of grievous bodily harm e.g., one punch that caused the victim to fall and suffer a catastrophic and fatal brain injury.

ii. Where death was caused in the course of an unlawful act that carried a high risk of death or grievous bodily harm which was or ought to have been obvious to the offender e.g., driving a motor vehicle dangerously through a crowded street.

iii. Where death was caused in the course of committing or escaping from a serious offence.

iv. Where the offender tried to conceal the offence by concealing, dismembering, or destroying the body.

v. Where death was caused in the course of self-defence or defence of another (though not amounting to a defence).

vi. Where there was no intention by the offender to cause ANY harm AND no obvious risk of anything more than minor harm e.g., the offender pushed the victim out of the way and the victim fell and suffered a fatal injury.

vii. Where the offender's responsibility was substantially reduced by mental disorder, learning disability or lack of maturity. Examples might include the woman who suffers severe post-natal depression, or the war veteran who suffers post-traumatic stress disorder to the extent that he behaves in a way that is erratic and violent in the face of ordinary day-to-day stressors.

viii. Where there has been a history of violence towards the victim by the offender, this might be relevant to sentencing.

ix. Significant mental or physical suffering caused to the deceased.

x. Where the offence involved use of a weapon.

xi. Offence committed in the presence of children (particularly relevant to domestic violence deaths).

OFFENCES CONCERNING WILDLIFE

5.2.8 The destruction of Kenya's wildlife negatively impacts a significant contributor to Kenya's Gross Domestic Product, namely tourism. At present, global discussions of climate change and biodiversity protection demand greater attention to how Kenya must address the need to protect the environment. The contribution of wildlife to Kenya's ecosystems is key to this objective. Whilst great strides have been made in recent years regarding legislative reform and addressing stronger prosecutions and investigations in this field, sentences must properly reflect the harm caused and further deter such offending.

5.2.9 Typically sentencing in this arena does not fully take into account the impact upon the environment or the impact upon human populations are affected by such crimes. Some of the relevant laws have not been updated to take into account the current climate.

5.2.10 Many offences concerning protected species (both wildlife and forestry) call for minimum sentences to be applied. These Guidelines state the current position on such mandatory minimum terms. Below are some factors to take into consideration that may justify an elevation from the mandatory minimum term in certain circumstances. Were such minimum terms to be removed from the statute books, these factors may guide the sentencing court in determining the level of seriousness and appropriate 'bandwidth' on sentence, more generally. This is not an exhaustive list and courts must take care to consider all relevant factors:

- The species is a particular driver of tourism or other economic benefit to Kenya.
- The species is a protected species under Kenyan law or international agreement to which Kenya is party, such as the Convention on International Trade in Endangered Species (CITES).
- The offence against the protected species also took place within a protected area.
- The accused is a public official charged with the duty of protecting Kenya's natural resources and heritage or involved law enforcement or military officials in the commission of the offence.
- The commission of the offence involved international elements.
- The offence involved a group of persons acting in the execution or furtherance of a common purpose, in which the accused played a leadership role.
- The offence was planned or meticulously premeditated and executed.
- The offence was committed for commercial purposes with a high value, whether realised or not.
- The offence involved a high degree of sophistication in execution such as the use of poisoning, illegal weaponry or explosives, concealment of trophies, or corruption of others.
- A protected species was actually killed.

- A law enforcement officer was killed or injured during the execution of the offence.
- Death or injury to any human.
- The offence involved a large number of protected species.
- The offence caused significant damage to the environment or a community (e.g., pollution or loss of a keystone species).
- Where damage has been caused, the cost of clean-up/restoration/rebuilding is significant.
- The offence caused significant financial loss to a community.
- The offence brought disrepute to a government agency or the national government.
- The offence posed a high risk to public health such as bushmeat consumption.
- The offence has inflamed community tension and conflict.
- Where a protected species has been killed as a result of cultural practices e.g., giraffes are killed for their tails, or as a result of a belief in the medicinal value (e.g., pangolin scales being a cure for hysteria).
- Where the impact upon the population of that species is particularly high e.g., certain species of sea turtle can take 35 years before it is ready to reproduce. Elephants take 2 years to gestate. Rhinos only reproduce every four or five years producing one calf at a time.
- Where the impact upon the ecosystem is high as a result of sustained or prolonged poaching either of that particular species (such as elephants) or in that particular area.
- Suffering to the animal e.g., the use of snares is a cruel and indiscriminate practice resulting in a slow and painful death to animals that are caught.

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