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- |   |                          |
|---|--------------------------|
| Strengthening Environmental Rule of Law for Sustainability  | Dr. Kariuki Muigua       |
| The Role and Effectiveness of the Kenyan Institutional Framework in Protection Against Forced Evictions                                   | Stephen Chege Njoroge    |
| Transitional Justice and Racial Injustice: Complicity, Challenges, and Ways Forward   | Dr. Kenneth Wyne Mutuma  |
| Revisiting the legal debate on Genetically Modified Organisms (GMOs) in Africa: Which way for Kenya?                                      | Michael Sang             |
| Greenwashing: A hindrance to Achieving Sustainability?  | Dr. Kariuki Muigua       |
| Promoting Urban Resilience and Sustainability in Kenya's Cities and Towns   | Caroline Jepchumba Kibii |
| Construction Adjudication in Kenya: The Need to Develop Legal Framework for Effective Construction Adjudication                           | Lucky Philomena Mbaye    |
| Revisiting the Legal Debate on the Constitutionality of the Life Sentence in Kenya: The Case for Its Continued Relevance                  | Michael Sang             |
| Renewable Energy, The Promised Land: Obligations Under the UNFCCC (1992) & Steps Towards Fulfilling Kenya Vision 2030 On Renewable Energy | Andrew Derrick           |
| Separation of Powers and Judicial Overreach in Kenya: Legal Safeguards against Usurpation of Parliamentary Powers by Courts               | Michael Sang             |
| Book Review: Achieving Climate Justice for Development  | James Njuguna            |
| Review: Journal of Appropriate Dispute Resolution (ADR) and Sustainability, Vol 1, Issue 1 (2023)   | Mwati Muriithi           |

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## **Revisiting the Legal Debate on the Constitutionality of the Life Sentence in Kenya: The Case for Its Continued Relevance**

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### **Abstract**

*This paper delves into the legal debate on the constitutionality of life sentences in Kenya's criminal justice system. It provides an overview of the national and international legal context surrounding life imprisonment, exploring domestic provisions and the evolution of views on criminal justice sanctions from the abolition of the death penalty to the rejection of life sentences as human rights violations. The paper discusses inconsistent judicial decisions and their adverse impact on criminal justice in Kenya, leading to confusion and uncertainty. Proposing reform measures, including statutory amendments, seeking advisory opinions, and comprehensive reviews by the Kenya Law Reform Commission, the paper aims to present a balanced approach to address the challenges surrounding life sentences. It highlights the importance of striking a balance between justice for serious crimes and the protection of human rights, emphasizing the need for a transparent, fair, and equitable criminal justice system in Kenya's pursuit of a just and humane society.*

**Key Words:** *Life-Sentence, Constitutionality, Kenya, Criminal-Justice, Death-Sentence, Human-Rights, Legal-Reform*

### **1. Introduction**

Kenya's criminal justice system has long grappled with the question of life sentences and their constitutionality.<sup>1</sup> The debate surrounding

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<sup>1</sup> *Godfrey Ngotho Mutiso v Republic* [2010] eKLR; *Joseph Njuguna Mwaura and 2 Others v Republic* [2013] eKLR

the appropriateness and effectiveness of this severe form of punishment has evolved over the years, drawing on domestic legal provisions, international human rights standards, and the ever-changing landscape of societal values.<sup>2</sup> This discourse has led to conflicting judicial decisions, resulting in confusion and a lack of clarity on the constitutionality of life sentences.<sup>3</sup> This comprehensive exploration delves into the legal context and the evolving views on criminal justice sanctions in Kenya, with a particular focus on the life sentence. Beginning with an examination of domestic law, the paper sheds light on the various domestic provisions that pertain to life imprisonment, exploring the offenses that attract such severe sentences. Moreover, the paper analyzes the impact of these provisions on sentencing practices and the potential for judicial discretion in imposing life sentences.

Subsequently, the paper delves into international treaty law, tracing the evolution of perspectives on criminal justice sanctions from the abolition of the death penalty to the rejection of the life sentence as a serious violation of human rights. By drawing upon landmark cases, both domestic and international, the paper elucidates the growing recognition of fair trial rights, individualized sentencing, and the protection of human dignity within the context of life imprisonment. As the discussion unfolds, we encounter inconsistent judicial decisions that have fueled the legal debate on the constitutionality of life sentences in Kenya. Analyzing various case law, the paper highlights the contrasting approaches adopted by the courts, resulting in confusion within the legal landscape. Furthermore, the

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<sup>2</sup> *Republic v Regina Wambui Njoroge* [2020] eKLR

<sup>3</sup> Muthoga, R., & Bowman, R. (2010). A Brief Survey of Sentencing Law and Its Practice in Kenya. *Federal Sentencing Reporter*, 22(4), 249–253. Available at <https://doi.org/10.1525/fsr.2010.22.4.249> accessed 1 August 2023

paper explores the adverse impact of this uncertainty on the criminal justice system, from delayed justice and inequality in sentencing to potential infringements on human rights.

To navigate this challenging terrain, the paper presents a series of proposed reform measures that could offer a way forward. These include statutory amendments by Parliament to clarify and standardize sentencing practices, seeking a comprehensive advisory opinion from the Supreme Court to definitively address the issue, and commissioning a thorough review of sanctions for serious crimes by the Kenya Law Reform Commission.

Amidst these reform proposals, the paper acknowledges the multifaceted nature of the debate. The case for the continued relevance of life sentences finds its basis in the pursuit of justice for serious crimes, public safety, and deterrence, while acknowledging the severity of certain offenses. Conversely, the paper recognizes the counterarguments advocating for individualized sentencing, the preservation of human rights, and the pursuit of more effective alternatives to lengthy incarceration.

As the discourse on life sentences in Kenya's criminal justice system continues to evolve, this exploration aims to shed light on the complexities and implications of the prevailing legal framework. By evaluating potential reforms and embracing a human rights-based approach, we aspire to foster a more equitable, transparent, and balanced system of criminal justice – one that upholds the rule of law while safeguarding the dignity and rights of all individuals involved.

## 2. The National and International Legal Context of the Life Sentence

### 2.1 Domestic Law on the Life Sentence in Kenya

The penal code stipulates that 'save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term.<sup>4</sup> This means that the court has the discretion to impose a sentence shorter than life imprisonment, even if the offense carries the possibility of life imprisonment as the maximum penalty. The penal code also provides for offences that attract life imprisonment including concealment of treason,<sup>5</sup> manslaughter,<sup>6</sup> attempted murder<sup>7</sup> and arson<sup>8</sup>.

In addition, the Sexual Offences Act prescribes a sentence of life imprisonment for an offender who defiles a minor aged 11 years and below.<sup>9</sup> The Prevention of Terrorism Act also prescribes life imprisonment for 'where a person carries out a terrorist act which results in the death of another person.<sup>10</sup> Under the Prevention of Organised Crimes Act, 'If as a result of the act referred to in section 3(n) a person dies<sup>11</sup>, the member of the organized criminal group shall on conviction be liable to imprisonment for life.<sup>12</sup> A person who 'by use of physical force, or by threat or intimidation of any kind compels

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<sup>4</sup> Penal Code, Section 26 (2)

<sup>5</sup> Ibid, section 42

<sup>6</sup> Ibid, section 205

<sup>7</sup> Ibid, section 220

<sup>8</sup> Ibid, section 332

<sup>9</sup> Sexual Offences Act, Section 8 (2)

<sup>10</sup> Prevention of Terrorism Act, 2012, section 4 (2)

<sup>11</sup> Section 3 (n) lists 'being a member of an organized criminal group endangers the life of any person or causes serious damage to the property of any person' as an organized criminal activity.

<sup>12</sup> Prevention of Organised Crimes Act, 2010 sec 4 (2)

another person to take such oath or engagement in the nature of an oath, commits an offence and shall on conviction be liable to imprisonment for life'.<sup>13</sup> Furthermore, 'any person who – (a) is found in possession of any of the specified firearms without a license or permit or other lawful justification; or (b) being licensed to possess, hold, trade in or otherwise have custody of any of the specified firearms, ammunition or parts of such firearm or ammunition hires or otherwise unlawfully permits another person to take possession of or use that firearm or ammunition to advance the course of organized criminal activity, commits an offence and is liable to imprisonment for life'.<sup>14</sup>

## **2.2 International Treaty Law on the Life Sentence - The Evolution of Views on Criminal Justice Sanctions from:**

### **2.2.1 Abolition of the Death Sentence**

Over the years, there has been a global trend towards the abolition of the death penalty. Many countries and international organizations have recognized the inherent flaws and irreversible nature of capital punishment, leading to an increased focus on alternative forms of punishment, including life imprisonment.<sup>15</sup> Several international human rights treaties have addressed the issue of the death penalty and life imprisonment. For instance, The Universal Declaration of Human Rights (UDHR) establishes the right to life as a fundamental human right.<sup>16</sup> The International Covenant on Civil and Political

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<sup>13</sup> Ibid, section 5 (1) (d)

<sup>14</sup> Ibid, section 26

<sup>15</sup> Mugambi, J. N. (2020). The Death Penalty in Kenya: The Need for a Review. *Nairobi Law Monthly*, Issue 94, 30-32.

<sup>16</sup> Universal Declaration of Human rights (UDHR), art 3 available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 1 August 2023

Rights (ICCPR) reaffirms the right to life and imposes restrictions on the application of the death penalty.<sup>17</sup>

In addition, The Second Optional Protocol to the ICCPR calls for the abolition of the death penalty and aims to end capital punishment worldwide.<sup>18</sup> The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) explicitly prohibits torture, which includes prolonged or indefinite detention.<sup>19</sup> As understanding of human rights has evolved, there has been a growing recognition that certain punishment practices, such as the death penalty and cruel or inhuman treatment, are incompatible with fundamental human rights.<sup>20</sup> The concept of restorative justice has gained traction, emphasizing rehabilitation, reconciliation, and reintegration of offenders into society over punitive measures.<sup>21</sup> In addition, international law has increasingly emphasized the principles of proportionality and non-discrimination in the application of criminal sanctions, seeking to avoid disproportionate or discriminatory punishments.<sup>22</sup> The principle of human dignity also underpins much of the evolving international views on criminal

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<sup>17</sup> The International Covenant on Civil and Political Rights (ICCPR) art 6 available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> accessed 1 August 2023

<sup>18</sup> The Second Optional Protocol to the ICCPR available at [https://treaties.un.org/doc/Treaties/1991/07/19910711%2007-32%20AM/Ch\\_IV\\_12p.pdf](https://treaties.un.org/doc/Treaties/1991/07/19910711%2007-32%20AM/Ch_IV_12p.pdf) accessed 1 August 2023

<sup>19</sup> The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading> accessed 1 August 2023

<sup>20</sup> Mugambi, J. N. (2020). The Death Penalty in Kenya: The Need for a Review. *Nairobi Law Monthly*, Issue 94, 30-32.

<sup>21</sup> Ibid

<sup>22</sup> Ibid

justice sanctions, guiding a shift towards more humane treatment of offenders.<sup>23</sup>

While there is a growing global trend towards the abolition of the death penalty, the issue of life imprisonment remains complex. Some argue that life imprisonment, especially when imposed without the possibility of parole or mitigation, can also be considered a form of cruel and inhumane punishment, as it denies individuals any hope of release or redemption. Others argue that life imprisonment offers deterrence and justice for victims of serious offences and should be upheld.

### **2.2.2 Commutation of the Death Sentence to Life Sentence**

The evolution of views on criminal justice sanctions, particularly the commutation of the death sentence to life imprisonment, has been influenced by various factors, including changing societal attitudes, human rights considerations, and international legal developments. One of the primary drivers for the evolution of views on criminal justice sanctions is the increasing recognition of human rights and the rejection of cruel and inhumane punishments.<sup>24</sup> The death penalty has been historically associated with significant cruelty and irreversibility. As international human rights norms developed, there was a growing realization that the death penalty violated the right to life and constituted a form of cruel and degrading punishment.<sup>25</sup>

Over time, there has been a shift in emphasis from solely punitive measures to a more rehabilitative approach to criminal justice. The

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<sup>23</sup> Ibid

<sup>24</sup> Owino, G. O. (2019). The Elusive Abolition: The Constitutional Future of the Death Penalty in Kenya. *Journal of East African and International Law*, 8(2), 206-228.

<sup>25</sup> Ibid

idea that offenders might be capable of reform and reintegration into society gained prominence. This shift in focus led to a questioning of the utility and ethics of the death penalty, prompting many countries to consider alternatives such as life imprisonment with a possibility of parole.<sup>26</sup>

The adoption of regional and international legal instruments further reinforced the trend towards considering life imprisonment as an alternative to the death penalty. For instance, the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), aiming at the abolition of the death penalty, encouraged states to limit the use of capital punishment and consider alternatives.<sup>27</sup> In some cases, countries instituted moratoriums on executions, signaling a willingness to review their capital punishment policies. These moratoriums often opened the door for discussions on potential alternatives, including the commutation of death sentences to life imprisonment.<sup>28</sup>

Furthermore, high-profile cases of wrongful convictions and exonerations highlighted the risk of irreversible error in capital punishment cases. These instances added to the growing skepticism towards the death penalty and contributed to the consideration of life imprisonment as a more just alternative.<sup>29</sup>

While the commutation of death sentences to life imprisonment represents progress in the context of criminal justice sanctions, it is essential to recognize that life imprisonment itself remains a subject of debate and human rights concerns. The issue of lengthy or

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<sup>26</sup> Ibid

<sup>27</sup> Ibid

<sup>28</sup> Ibid

<sup>29</sup> Ibid

indefinite detention without a realistic chance of release has been criticized as potentially violating the principle of human dignity and the right to hope for redemption and rehabilitation. Therefore, even as the views on the death penalty evolve, discussions on the appropriate scope and duration of life sentences continue in international legal and human rights forums.<sup>30</sup>

### **2.2.3 Rejection of the Life Sentence as a Serious Violation of Human Rights**

The evolution of views on criminal justice sanctions, particularly the life sentence, has seen shifts from outright rejection to nuanced considerations regarding its application.

Historically, there have been strong voices in the human rights community advocating for the abolition of life imprisonment due to concerns about its inherent cruelty and violation of human rights. Critics argue that life imprisonment, especially without the possibility of parole, amounts to "civil death" and denies individuals the chance of redemption and rehabilitation.<sup>31</sup> As the focus on rehabilitation and restorative justice has gained traction, some human rights advocates have questioned the effectiveness of indefinite or lengthy sentences, including life imprisonment. The emphasis has been on finding more humane ways to address criminal behavior and reintegrate offenders into society rather than resorting to extreme punitive measures.<sup>32</sup>

Over time, attention has been drawn to the conditions of imprisonment and the potential for inhumane treatment within the

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<sup>30</sup> Ibid

<sup>31</sup> Matofari, J. W. (2017). The Future of the Death Penalty in Kenya: A Critical Analysis of the Abolitionist Discourse. *Nairobi Law Monthly*, Issue 66, 24-26

<sup>32</sup> Ibid

prison system, including cases of overcrowding, inadequate healthcare, and violence. Such concerns have raised questions about the ethics of life imprisonment as a form of punishment.<sup>33</sup> The international community has increasingly recognized the need for special protections for juvenile offenders, acknowledging their potential for rehabilitation and reform. This recognition has led to the rejection of life sentences without the possibility of parole for juveniles in some jurisdictions.<sup>34</sup>

Furthermore, international human rights bodies and treaties have played a significant role in shaping the discourse on life sentences. For instance, the United Nations Standard Minimum Rules for the Treatment of Prisoners (known as the Nelson Mandela Rules) provide guidance on the treatment of prisoners, emphasizing the need for respect for human rights and dignity.<sup>35</sup>

Some advocates have called for a review of life sentences to ensure that they are reserved for the most severe and heinous crimes and are not applied indiscriminately. This approach seeks to strike a balance between accountability for crimes and the principles of human rights and human dignity.<sup>36</sup>

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<sup>33</sup> Ibid

<sup>34</sup> Ibid

<sup>35</sup>United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) available at <https://www.un.org/en/un-chronicle/nelson-mandela-rules-protecting-rights-persons-deprived-liberty#:~:text=to%20sentenced%20prisoners.,The%20Rules%20are%20based%20on%20an%20obligation%20to%20treat%20all,disciplinary%20measures%20to%20medical%20services>. Accessed 1 August 2023

<sup>36</sup> Matofari, J. W. (2017). The Future of the Death Penalty in Kenya: A Critical Analysis of the Abolitionist Discourse. *Nairobi Law Monthly*, Issue 66, 24-26

While there has been an evolution in the views on the life sentence, opinions still differ among different countries and individuals. Some argue that life imprisonment can serve as an appropriate punishment for certain grave crimes, while others continue to advocate for its abolition or substantial reform to ensure fair and humane treatment of offenders.<sup>37</sup>

### **3. Inconsistent Judicial Decisions and the Legal Debate on the Constitutionality of Life Sentence in Kenya**

#### **3.1 Challenges to the Constitutionality of the Death Sentence**

##### ***Francis Karioko Muruatetu v Republic (2019) Eklr***

The Court in its Judgement declared the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code unconstitutional and issued orders for the establishment of a framework to deal with the sentence re-hearing of the applicable cases. The court also directed the legislative making bodies to enact legislation to the effect of repealing sections that made provision for the death penalty.<sup>38</sup>

#### **The court averred as follows:**

To our minds, what Section 204 of the Penal Code is essentially saying to a convict is that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless... Try as we might, we cannot decipher the possible rationale for this provision. We think

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<sup>37</sup> Ibid

<sup>38</sup> Para 112; *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (*Muruatetu*)

that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.<sup>39</sup>

We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to Article 50(2) of the Constitution are not exhaustive.<sup>40</sup> Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.<sup>41</sup>

Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.<sup>42</sup> Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime,

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<sup>39</sup> Para 45 Ibid

<sup>40</sup> Para 46; Ibid

<sup>41</sup> Para 47, Ibid

<sup>42</sup> Para 48, Ibid

but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.<sup>43</sup>

If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualize the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict.<sup>44</sup>

This judgment marked a significant development in the legal debate on the constitutionality of the death sentence in Kenya. The court emphasized the significance of mitigation in the fair trial process. Mitigation allows the accused to present arguments and evidence to persuade the court to consider factors that could reduce the severity of the sentence.

The court underscored that judicial discretion in sentencing is vital in upholding justice. The imposition of a mandatory death sentence deprived judges of the ability to take into account individual circumstances and variations in criminal culpability, leading to potential injustices and disproportionate punishments.

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<sup>43</sup> Paragraph 50, Ibid

<sup>44</sup> Para 53, Ibid

The paper avers that this judgment represents a crucial step in the legal debate on the constitutionality of the death sentence in Kenya, reflecting a growing recognition of the importance of fair trial principles and individualized sentencing in the criminal justice system.

### **3.2 Declaration of the Life Sentence as Unconstitutional- *Julius Kitsao Manyeso v Republic* (2023)**

This judgment declaring the life sentence as unconstitutional is a significant development in the legal debate on criminal justice sanctions in Kenya. It builds upon the principles established in *Muruatetu* which declared the mandatory death sentence as unconstitutional.

The court held as follows:

This fact notwithstanding, we are of the view that the reasoning in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the Constitution. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28 and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others vs The United Kingdom* (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all

prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.<sup>45</sup>

We are equally guided by this holding by the Supreme Court of Kenya, (*Muruatetu*) and in the instant appeal, we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence.<sup>46</sup> ...We accordingly set aside the sentence of life imprisonment imposed on the Appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction.<sup>47</sup> The paper argues that the court noted that individuals sentenced to life imprisonment are not allowed to present arguments and evidence to persuade the court to consider factors that could lead to a reduction in the severity of the sentence. This denial of mitigation is considered unjustifiable discrimination and unfair, violating the principle of equality before the law under Article 27 of the Kenyan Constitution. The change in sentencing highlights the court's recognition of the need to address the unconstitutionality of the life sentence and to impose a sentence that allows for the possibility of rehabilitation and eventual release, taking into account the principles of human rights and proportionality.

The paper posits that the judgments in both *Muruatetu* and *Manyeso* cases demonstrate the evolving understanding of criminal justice sanctions in Kenya and the increasing scrutiny of severe sentences, such as the death penalty and life imprisonment. These judgments reflect a growing recognition of the importance of fair trial rights, individualized sentencing, and the preservation of human dignity in

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<sup>45</sup>*Julius Kitsao Manyeso v Republic* (2023) eKLR (Manyeso) Para 21

<sup>46</sup> *Id*, para 26

<sup>47</sup> *Id*, para 27

the criminal justice system. As Kenya continues to grapple with these complex legal issues, the judiciary's consideration of international human rights principles contributes to the broader global discourse on the appropriate treatment of offenders and the protection of human rights within the criminal justice context.

### 3.3 Affirmation of the Constitutionality of the Life Sentence

#### 3.3.1 *Obadiah Kiriabu Magara v Republic* (2023) eKLR.

This judgment by the Court of Appeal, where the court affirmed the constitutionality of the life sentence, presents a conflicting decision to the previous cases discussed. In this case, the Court enhanced a 26-year term of imprisonment to a life sentence for the appellant's conviction of defilement of a 9-year-old child, contrary to Section 8(1)(2) of the Sexual Offences Act.

The court held as follows:

The appellant was convicted of the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act. The girl defiled was proved to have been 9 years old at the material time. That provision of law prescribes a sentence of life imprisonment for an offender who defiles a minor aged 11 years and below.<sup>48</sup>

The Supreme Court issued directions in *Francis Karioko Muruatetu & Another v Republic* [2021] eKLR to the effect that the Judgment in the case applied only to murder cases.<sup>49</sup> The appellant defiled a 9-year-old child...The sentence prescribed for that offence carried a sentence of imprisonment for life. The ODPP having given and served notice to enhance the sentence, we find that the appropriate sentence in the

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<sup>48</sup> *Obadiah Kiriabu Magara v Republic* (2023) Eklr (*Magara*) page 9

<sup>49</sup> *Ibid*

case was the sentence awarded by the trial court. We set aside that part of the Judgment of the High Court sentencing the appellant to 26 years imprisonment, substituting it with life. Accordingly, the appeal on conviction fails and is dismissed. The appellant is sentenced to serve imprisonment for life.<sup>50</sup>

The judgment in *Magara* shows that, in certain offenses where the law prescribes a life sentence, the Court of Appeal upheld the constitutionality of such sentences. The conflicting decisions from different cases might indeed lead to confusion on where the courts stand on the constitutionality of life sentences in Kenya. It reflects the complexity of the legal debate on criminal justice sanctions and underscores the need for further clarity from the higher courts on this matter.

The judiciary's treatment of life sentences in Kenya continues to be a subject of debate, and further developments and judgments are likely to shape the country's stance on this issue in the future.

### **3.3.2 *Onesmus Musyoki Muema v Republic* [2023] eKLR**

In *Onesmus Musyoki Muema v Republic*, the court opined that 'the sentence of life imprisonment imposed on the appellant is a lawful and legal sentence, and this court has no legal basis upon which to interfere with it'.<sup>51</sup> The appellant had been charged with defilement of a child aged 10 years which punishment as already described above attracts a life imprisonment.

### **3.4 Resulting Confusion and Lack of Clarity**

The paper argues that the conflicting and inconsistent judgments on the constitutionality of the life sentence in Kenya has resulted in

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<sup>50</sup> Id page 10-11

<sup>51</sup> [2023] eKLR Page 17

confusion and lack of clarity in the country's criminal justice system. This confusion has had adverse impacts on various aspects of criminal justice in Kenya:

First, the conflicting judgments create uncertainty in the sentencing of offenders, particularly those convicted of serious crimes. The lack of clear guidance on the constitutionality of life sentences leaves judges and magistrates unsure about the appropriate punishment to impose, leading to inconsistent and unpredictable sentencing outcomes.

Secondly, the lack of clarity on the constitutionality of life sentences can lead to inequality in the administration of justice. Defendants convicted of similar offenses might receive different sentences based on the jurisdiction and the specific judge presiding over the case, undermining the principle of equality before the law.

Thirdly, the confusion surrounding life sentences can result in prolonged legal battles and appeals, as defendants seek to challenge their sentences based on the divergent interpretations of the law. This can lead to delays in the dispensation of justice and contribute to the backlog of cases in the courts.

Fourthly, inconsistent sentencing decisions can also have an adverse impact on victims and their families. Victims of serious crimes may feel that justice is not being served adequately when offenders receive vastly different sentences for similar offenses, leading to feelings of frustration and disillusionment with the criminal justice system in general.

In addition, the paper argues that uncertainty in sentencing can impact the deterrent effect of punishment and the prospects for

offender rehabilitation. If offenders perceive that sentencing outcomes are unpredictable and arbitrary, it may reduce the potential deterrent effect of the criminal justice system.

#### **4. The Way Forward: Some Proposed Reform Measures**

##### **4.1 The Case for Continued Relevance of the Life Sentence in Kenya**

The case for the continued relevance of the life sentence in Kenya is grounded in several arguments and considerations.

First, Life imprisonment serves as a severe punishment for individuals convicted of heinous crimes, such as murder, Robbery with Violence, terrorism, treason, certain categories of organized criminal activity and certain sexual offenses *inter alia*. For crimes that have caused significant harm to victims and society, there is an argument that life imprisonment ensures that offenders face appropriate consequences for their actions.<sup>52</sup>

Secondly, the imposition of life sentences may act as a deterrent to potential offenders, discouraging them from committing serious crimes due to the prospect of spending their entire lives in prison. The existence of life sentences may also contribute to public safety by keeping dangerous individuals who pose a risk to society off the streets.<sup>53</sup>

Thirdly, life sentences are often seen as a means of providing justice for victims and their families, especially in cases where the loss of life

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<sup>52</sup> Muhlhausen D: Theories of Punishment and Mandatory Minimums' The Heritage Foundation, 27 May 2010, available at <http://www.ohheritage.org/testimony/theories-punishment-and-mandatory-minimum-sentences> accessed 2 August 2023

<sup>53</sup> Ibid

is irreparable. The idea of a life sentence may offer a sense of closure and retribution to those affected by the crime.<sup>54</sup>

Furthermore, life sentences can be seen as a way to avoid resorting to capital punishment or other forms of harsh punishment. For countries that have abolished the death penalty, life imprisonment serves as an alternative that avoids state-sanctioned violence while still providing accountability.<sup>55</sup>

While there are arguments in favor of the continued relevance of life sentences in Kenya, it is essential to recognize that this perspective is not without its critics. Some of the counterarguments against life sentences include concerns about the effectiveness of long-term incarceration as a deterrent, issues of prison overcrowding and associated costs, potential for wrongful convictions, and the debate over the ethics and humanity of lengthy or indefinite detention.<sup>56</sup>

The question of whether life imprisonment remains a just and appropriate form of punishment is a complex and contentious issue that requires careful consideration and a balanced approach. As the legal and human rights landscape continues to evolve, the debate on the relevance and constitutionality of life sentences will likely persist, prompting further discussions on the appropriate balance between accountability, rehabilitation, and the protection of human rights.

#### **4.2 Statutory Amendment by Parliament**

Proposed statutory amendments by Parliament can play a crucial role in addressing the challenges and uncertainties surrounding the life sentence in Kenya. These reforms can help clarify the law, establish a

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<sup>54</sup> Ibid

<sup>55</sup> Ibid

<sup>56</sup> Ibid

consistent legal framework, and ensure that sentencing practices align with international human rights standards.<sup>57</sup>

Parliament could consider abolishing mandatory life sentences for certain offenses. This would give judges the discretion to impose appropriate sentences based on the circumstances of each case, taking into account mitigating factors and the principle of proportionality.<sup>58</sup> Parliament could introduce parole mechanisms for certain life sentences. This would allow for periodic reviews of the offender's progress and rehabilitation during their imprisonment, providing an opportunity for eventual release if it is determined that the offender is no longer a threat to society.<sup>59</sup>

In addition, Parliament could establish clear guidelines for judges to follow when sentencing individuals to life imprisonment. These guidelines could take into account the nature of the offense, the offender's criminal history, and other relevant factors to ensure consistency and fairness in sentencing.<sup>60</sup>

Statutory amendments could include explicit provisions that affirm and protect the human rights of prisoners, including those serving life sentences. This could ensure that all prisoners, regardless of the length of their sentence, are treated with dignity and provided with access to rehabilitation and support programs.<sup>61</sup>

Parliament could also institute a review of past cases where individuals were sentenced to life imprisonment under mandatory

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<sup>57</sup> Manahan J and Skeem J (2015) Risk Assessment in Criminal Sentencing', *Berkeley*

<sup>58</sup> *Ibid*

<sup>59</sup> *Ibid*

<sup>60</sup> *Ibid*

<sup>61</sup> *Ibid*

sentencing laws. This review could identify cases where the imposition of the life sentence might have been unjust or disproportionate, leading to potential remedies or resentencing.<sup>62</sup>

Parliament could explore alternatives to long-term incarceration, such as community-based rehabilitation programs, restorative justice initiatives, or diversionary measures for non-violent offenders. These alternatives may be more effective in promoting rehabilitation and reducing recidivism.<sup>63</sup>

Furthermore, as part of the reform process, Parliament could engage in public consultation and seek input from relevant stakeholders, including legal experts, human rights organizations, victims' advocates, and the general public. This would help ensure that any proposed reforms are comprehensive and reflect the diverse perspectives on the issue.<sup>64</sup>

Finally, Parliament could look to international best practices and experiences of other countries in handling life sentences and sentencing reform. Learning from the experiences of other jurisdictions can provide valuable insights and guide the development of effective and fair reforms.<sup>65</sup>

#### **4.3 Request for Advisory Opinion from the Supreme Court**

Requesting an advisory opinion from the Supreme Court of Kenya can be a valuable approach to address the confusion and lack of clarity surrounding the constitutionality of the life sentence.<sup>66</sup>

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<sup>62</sup> Ibid

<sup>63</sup> Ibid

<sup>64</sup> Ibid

<sup>65</sup> Ibid

<sup>66</sup> Ibid

By seeking an advisory opinion, the government or relevant authorities can ask the Supreme Court to provide a definitive interpretation of the constitutionality of the life sentence. This would give the court an opportunity to thoroughly examine the legal and constitutional aspects of life imprisonment and issue a comprehensive opinion that can serve as a guiding precedent for lower courts and stakeholders.<sup>67</sup>

An advisory opinion would help unify the legal interpretation of life sentences in Kenya. All parties involved in the criminal justice system would have a clear understanding of the constitutionality of life imprisonment, helping to promote consistency and fairness in sentencing.<sup>68</sup>

In addition, The Supreme Court can take into account international human rights standards and comparative jurisprudence when rendering its advisory opinion. This would enable the court to align Kenya's approach to life sentences with evolving global human rights principles, ensuring that the country's legal system reflects international best practices.<sup>69</sup>

Requesting an advisory opinion from the Supreme Court can also encourage legal and public engagement on the issue. Various stakeholders, including legal experts, human rights organizations, academics, and the public, can provide their perspectives and arguments, enriching the court's understanding of the matter.<sup>70</sup>

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<sup>67</sup> *In the Matter of Interim Independent Electoral Commission* [2011] eKLR para 93

<sup>68</sup> *Ibid*

<sup>69</sup> *Ibid*

<sup>70</sup> *Ibid*

#### **4.4 Comprehensive Review of Sanctions for Serious Crimes by Kenya Law Reform Commission**

A comprehensive review of sanctions for serious crimes by the Kenya Law Reform Commission (KLRC) is a proactive and systematic approach to address the challenges related to sentencing, including the life sentence.<sup>71</sup> This review process involves a thorough examination of the country's criminal laws and penalties, with the goal of recommending appropriate reforms and aligning the legal framework with evolving societal values and international human rights standards.

The KLRC is a body of legal experts and professionals with specialized knowledge and expertise in law and criminal justice. A comprehensive review led by the KLRC would involve in-depth research, analysis, and consultations, resulting in well-informed and evidence-based recommendations.<sup>72</sup>

The review would not focus solely on life sentences but would take a holistic approach to examine all sanctions for serious crimes in Kenya. This approach ensures that the entire spectrum of sentencing options, from fines and probation to imprisonment, is thoroughly evaluated.<sup>73</sup> The review would assess the existing legal framework, including statutes, regulations, and guidelines related to sentencing. It would identify areas of inconsistency, ambiguity, or potential conflicts within the current laws.<sup>74</sup>

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<sup>71</sup>Mbote P and Akech M, (2011) Kenya: The Justice Sector and the Rule of Law, *The Open Society Initiative for Eastern Africa*

<sup>72</sup> Ibid

<sup>73</sup> Ibid

<sup>74</sup> Ibid

The KLRC would take into account international human rights instruments and jurisprudence, as well as comparative practices in other jurisdictions. This would help ensure that the proposed reforms align with Kenya's human rights obligations and international best practices.<sup>75</sup>

In addition, a comprehensive review would involve engagement with the public, legal practitioners, human rights organizations, victims' advocates, and other stakeholders. Public consultations and soliciting feedback from relevant groups would allow for a diversity of perspectives and ensure a transparent and inclusive process.<sup>76</sup>

Based on the research and analysis, the KLRC would make recommendations for potential sentencing reforms. These may include changes to mandatory sentencing laws, the introduction of alternative sentencing options, and measures to ensure proportionality and individualization of sentences.<sup>77</sup> The KLRC could draft legislative proposals to enact the recommended reforms. These proposals would be submitted to Parliament for consideration and potential enactment into law.<sup>78</sup>

## 5. Conclusion

The debate on the constitutionality and relevance of life sentences in Kenya's criminal justice system is a complex and multifaceted issue.<sup>79</sup> The paper's comprehensive exploration has shed light on the various aspects surrounding this contentious topic, ranging from domestic legal provisions to international human rights standards and the

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<sup>75</sup> Ibid

<sup>76</sup> Ibid

<sup>77</sup> Ibid

<sup>78</sup> Ibid

<sup>79</sup> Ibid

impacts of conflicting judicial decisions. The domestic law on life sentences in Kenya reveals a range of offenses that attract severe punishment. However, the lack of clear guidelines and the absence of judicial discretion in some cases have led to inconsistent sentencing practices and confusion within the legal system.<sup>80</sup>

Internationally, the evolution of views on criminal justice sanctions has emphasized the importance of fair trial rights, individualized sentencing, and the protection of human dignity.<sup>81</sup> This growing recognition has challenged the notion of mandatory life sentences, advocating for more nuanced and proportional approaches to punishment. Inconsistent judicial decisions have created uncertainty and adverse impacts on the criminal justice system.<sup>82</sup> Victims, offenders, and society at large bear the consequences of a fragmented approach to sentencing, causing delays, inequality, and potential human rights violations.<sup>83</sup>

Proposed reform measures, such as statutory amendments, seeking advisory opinions, and comprehensive reviews, present viable ways forward to address the confusion surrounding life sentences. These measures, coupled with public and stakeholder engagement, aim to foster clarity, consistency, and fairness in sentencing practices while upholding human rights principles.<sup>84</sup> Amidst the various perspectives on the continued relevance of life sentences, the challenge lies in striking a balance between the pursuit of justice for serious crimes and the need to safeguard individual rights and dignity. It is imperative to consider alternative sentencing

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<sup>80</sup> *Christopher Ochieng v Republic* [2018] eKLR

<sup>81</sup> *Supra* note 2

<sup>82</sup> *Public International Law and Policy Group*, 'The Legality of Life Imprisonment: Comparative Analysis of International, European and Dutch Law'

<sup>83</sup> *Supra* note 81

<sup>84</sup> *Supra* note 2

approaches, embrace rehabilitative measures, and ensure that the punishment fits the crime while promoting a just and humane criminal justice system.

As Kenya moves forward, it must seize the opportunity to reform its sentencing practices, guided by international human rights standards and the principle of proportionality. By charting a path that acknowledges the complexities of the issue and engaging in robust public dialogue, Kenya can strengthen its criminal justice system, ensuring fairness, transparency, and respect for the rights of all individuals involved. Ultimately, a holistic approach that respects the rule of law, protects human rights, and seeks the rehabilitation and reintegration of offenders can pave the way towards a more equitable and just society. As Kenya embarks on this journey, the pursuit of a balanced and compassionate criminal justice system remains an ongoing endeavor—one that acknowledges the evolving landscape of justice and human rights in the pursuit of a better, more harmonious future.

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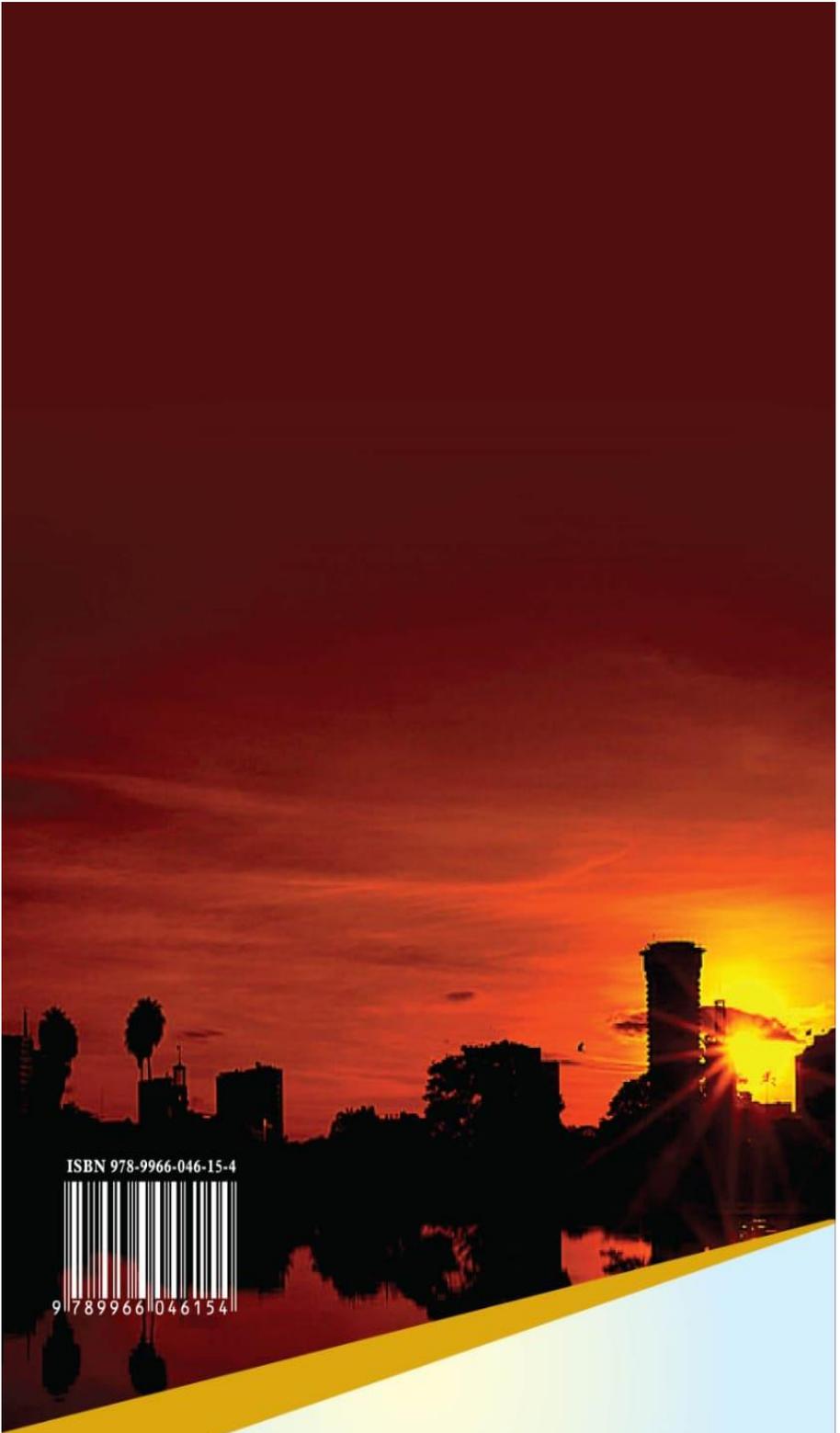
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