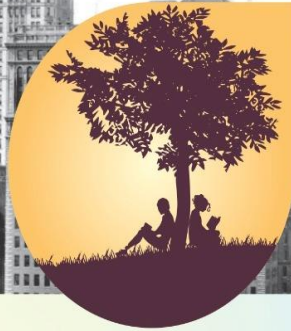


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The Problematic Practice of Prosecuting Murder Offences Exclusively at the High Court: An Access to Justice Critique

*By: Michael Sang **

Abstract

This paper examines the problematic practice of prosecuting murder offences exclusively at the High Court in Kenya and presents recommendations for urgent legal reform. It delves into the legal framework for instituting murder charges, including case law, The Constitution of Kenya 2010 and relevant sections of the Penal Code and Criminal Procedure Code, as well as the customary practice of prosecuting murder cases. The discussion explores the concept of access to justice under Article 48 of the 2010 Constitution and the accused person's right to a fair trial under Article 50. Problematic outcomes of the exclusive prosecution at the High Court are identified, including inefficient case management, reduced chances for appeal, denial of justice, and potential corruption. Specific recommendations for urgent legal reform are presented, focusing on the adoption of a reform agenda by the Kenya Law Reform Commission, interpretation of progressive precedents, amendment of criminal court practice rules, and the use of the "interests of justice" argument as an exception to the current law. These reforms aim to address the identified gaps, enhance access to justice, and ensure fair and effective prosecution of murder offences in Kenya.

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Key Words: *Prosecuting murder offences, Unlimited Original jurisdiction of the High Court of Kenya, Access to Justice, Legal Reform, Constitution of Kenya, 2010.*

1.0 Introduction

The prosecution of murder offences exclusively at the High Court in Kenya has been a longstanding practice, guided by the Penal Code and Criminal Procedure Code.¹ However, this approach has raised concerns regarding access to justice, procedural and substantive gaps, and problematic outcomes.² In this discussion, I have examined the legal framework for instituting murder charges, including case law, The Constitution of Kenya 2010 and the relevant sections of the Penal Code and Criminal Procedure Code. I have also explored the customary practice of prosecuting murder cases in Kenya, highlighting the need for reform. Moreover, I have delved into the concept of access to justice under Article 48 of the 2010 Constitution and the accused person's right to a fair trial under Article 50. Additionally, I have discussed the problematic outcomes of prosecuting murder suspects exclusively at the High Court, such as inefficient case management, reduced chances for appeal, denial of justice, and the creation of opportunities for corruption. Lastly, I have presented specific recommendations for urgent legal reform, including the adoption of a reform agenda by the Kenya Law Reform Commission, interpretation of progressive precedents by the courts, and amendment of criminal court practice rules.

¹ Penal Code Statutes' (LawAfrica Publishing Ltd, 16 October 2020) <<https://www.lawafrica.com/?product=penal-code-statutes>> accessed 24 January 2024

² Ibid

2.0 Prosecuting Murder Offences in Kenya: Legal Basis and Customary Practice

2.1 The Legal Framework for Instituting Murder Charges in Kenya

2.1.1 The Constitution of Kenya 2010

Article 165(3) of the Constitution sets out the jurisdiction of the High Court. It provides thus: "Subject to Clause (5), the High Court shall have: - (a) Unlimited original jurisdiction in criminal and civil matters." Murder being a criminal offense, this therefore implies that the High Court can hear such cases.

2.1.2 Penal Code

Section 203 of the Penal Code in Kenya defines murder as the act of causing the death of another person with malice aforethought through an unlawful act or omission. "Malice aforethought" refers to the intention to cause death or grievous harm to another person, which may be expressed or implied. The section emphasizes that the act or omission leading to death must be unlawful.

Section 204 of the Penal Code states that any person convicted of murder shall be sentenced to death. This provision reflects the traditional approach to punishment for murder in Kenya, which imposes the most severe penalty available, namely capital punishment.

In Kenya, while the law prescribes the death penalty for murder, the actual application of this punishment has evolved over time. In 2017, the Kenyan Supreme Court ruled that the mandatory imposition of

the death penalty for murder offenses was unconstitutional.³ This ruling allowed judges to exercise discretion in sentencing, taking into account the circumstances of each case:

“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.⁴ In *Woodson* as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.⁵ 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, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity⁶. ... 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.⁷ Consequently, failure to individualize the circumstances of an offence

³*Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR.

⁴ *Ibid* para 48

⁵ *Ibid* para 49

⁶ *Ibid* para 50

⁷ *Ibid*, para 53

or offender may result in the undesirable effect of ‘over punishing’ the convict.”⁸

The court in *Philip Mueke Maingi & 5 Others v. DPP & Another* stipulated that Sentencing is a matter within the discretion of the trial court.⁹ The court’s assertion was supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that: Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.¹⁰

Indeed, the Criminal Procedure Code emphasizes this concept. Section 216 provides:

“The Court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.” Section 329 of the Criminal Procedure Code provides: “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.” This is further buttressed in *Edwin Wachira & 10 Others vs. Republic*¹¹ which stipulated that

“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

⁸ Ibid

⁹ Petition E017 of 2021

¹⁰ Ibid para 96

¹¹ [Petition No. 97 of 2021] para 20

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.”¹²

The court therefore came up with five principles that courts should adhere to in sentencing and punishments. The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court.¹³ The second, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person.¹⁴ The third principle is that sentencing remains a discretionary power, exercisable by the court and it involves the deliberation of the appropriate sentence.¹⁵ The fourth principle is that court’s advantage centers on the fact that they try individual cases and they can thus make sentencing decisions based on the particular facts of each case as they possess information pertaining to a particular accused.¹⁶ The fifth principle is that the citizen in a given case of mandatory/minimum sentence has a right to put in a plea in mitigation to show that the imposition of the mandatory minimum sentence is not warranted in his case.¹⁷

¹² Ibid, para 20

¹³ Ibid, para 24

¹⁴ Ibid, para 24

¹⁵ Ibid, para 25

¹⁶ Ibid, para 27

¹⁷ Ibid, para 32

2.1.3 Criminal Procedure Code

Section 4 of the Criminal Procedure Code in Kenya provides a general guideline regarding the courts that have jurisdiction to try offenses under the Penal Code, including murder. According to this section, an offense under the Penal Code may be tried either by the High Court or by a subordinate court if the offense is shown in the fifth column of the First Schedule to be triable by that particular subordinate court.

The First Schedule of the Criminal Procedure Code lists various offenses from the Penal Code along with the corresponding courts that have jurisdiction to hear those offenses. However, murder does not have a specific court indicated in the fifth column of the First Schedule. This absence of a specific court listed for trying murder cases implies that murder offenses are considered to be exclusively within the jurisdiction of the High Court. As a result, murder cases are typically prosecuted and tried at the High Court level in Kenya.¹⁸ The decision to assign murder cases exclusively to the High Court may be due to the seriousness of the offense and the potential for severe punishment, including the death penalty. High Courts are generally considered to have greater resources, infrastructure, and expertise to handle complex cases like murder.¹⁹

¹⁸ Muthoga, Rachel, and Robert Bowman. "A Brief Survey of Sentencing Law and Its Practice in Kenya." *Federal Sentencing Reporter*, vol. 22, no. 4, 2010, pp. 249–53. *JSTOR*, <https://doi.org/10.1525/fsr.2010.22.4.249> Accessed 1 July 2023.

¹⁹ *Ibid*

The court in *Peter Kariuki Muibau & 11 others v Attorney General & another*²⁰ had the opportunity to interpret the constitutionality of this section. It stipulated thus:

“Going by the dictum in the above cited cases on jurisdiction, the principles of interpretation of the Constitution and the provisions of Article 165 (3), it is clear to me that the jurisdiction of the High Court, to hear murder trials and indeed any other criminal trial for that matter is a mandate that is prescribed and regulated by the Constitution. The commencement of other criminal trials before the Subordinate Court, as opposed to the High Court, is a matter that is regulated by statute, in this case, section 4 of the CPC and the impugned Schedule. To my mind therefore, the mere fact that trials of all criminal cases, except murder and treason, commence before the lower court does not make section 4 of the CPC unconstitutional.” However, as shall be discussed, the assignment of murder cases exclusively to the High Court has raised concerns regarding access to justice. It places a significant burden on the High Court, potentially leading to delays in the disposal of cases and causing backlogs. This situation can impede timely justice for both the accused and the victims’ families.²¹

2.1.4 ODPP Manual

The Office of the Director of Public Prosecutions (ODPP) Manual is a comprehensive guidebook that provides guidance and instructions to prosecutors in Kenya. The ODPP is responsible for conducting

²⁰ 2018] eKLR para 32

²¹ Muthoga, Rachel, and Robert Bowman. “A Brief Survey of Sentencing Law and Its Practice in Kenya.” *Federal Sentencing Reporter*, vol. 22, no. 4, 2010, pp. 249–53. *JSTOR*, <https://doi.org/10.1525/fsr.2010.22.4.249> Accessed 1 July 2023.

criminal prosecutions on behalf of the state and plays a crucial role in the criminal justice system.²²

The ODPP Manual serves as a reference document for prosecutors, outlining the procedures, principles, and best practices to be followed during the prosecution process.²³ It provides guidance on various aspects of criminal prosecution, including case management, evidence collection, charging decisions, trial preparation, and courtroom advocacy. The manual aims to ensure consistency, fairness, and efficiency in the prosecution of criminal cases. It provides prosecutors with a framework to make informed decisions based on the available evidence and the applicable laws and regulations. By following the guidelines outlined in the manual, prosecutors are expected to uphold the principles of justice, fairness, and the rule of law.²⁴

The ODPP Manual is periodically updated to reflect changes in legislation, legal precedents, and evolving best practices in criminal prosecution. These updates are necessary to keep the manual relevant and aligned with the dynamic nature of the criminal justice system. The manual serves as a valuable resource for both experienced prosecutors and those new to the profession, providing them with guidance and support throughout the prosecution process. It helps ensure that prosecutors adhere to the highest professional standards and that the interests of justice are served.²⁵

²² Article 157 of the Constitution of Kenya 2010

²³ ODPP Manual Kenya

²⁴ Ibid

²⁵ Ibid

2.2 The Customary Practice of Instituting Murder Charges in Kenya

The practice in our courts has been that trials of all criminal cases commence before the lower courts except trials for the offences of murder and treason which commence before the High Court. Indeed, the impugned column of the First Schedule of the CPC is categorical that trials for all offences except murder and treason may commence before the lower court.²⁶

2.3 Access to Justice and the Current Procedural; and Substantive Gaps

2.3.1 The Concept of Access to Justice

Under Article 48 of the 2010 Constitution of Kenya, the concept of access to justice is recognized and protected. The article states that the state has an obligation to ensure access to justice for all individuals. It also emphasizes that any fees required for accessing justice should be reasonable and should not hinder or impede individuals' ability to seek justice.

Access to justice is a fundamental principle that ensures equal and effective participation in the legal system, regardless of a person's socio-economic status, gender, ethnicity, or other factors. It encompasses not only the ability to initiate legal proceedings but also the availability of fair and impartial processes, legal aid services, and remedies.²⁷

²⁶ *Peter Kariuki Muibau & 11 others v Attorney General & another* [2018] eKLR para 26

²⁷ Okiro, P. M. (2018). Access to Justice in Kenya: An Overview of the Legal Aid Act, 2016. *The Comparative and International Law Journal of Southern Africa*, 51(1), 59-81.

While Article 48 enshrines the right to access to justice, there are procedural and substantive gaps that can hinder its realization in practice. These gaps can include:

1. **Affordability:** The cost of legal proceedings, including court fees, legal representation, and related expenses, can pose a significant barrier to accessing justice, particularly for individuals from disadvantaged backgrounds. Despite the constitutional requirement that fees be reasonable, their affordability remains a challenge for many.²⁸

2. **Geographical Accessibility:** Unequal distribution of courts and legal services can limit access to justice, particularly in remote or marginalized areas. Limited physical infrastructure and transportation options can make it difficult for individuals to reach courts or legal aid offices, thereby restricting their ability to seek justice.²⁹

3. **Procedural Complexity:** The complexity and technicality of legal processes can be intimidating and confusing for individuals without legal expertise. Lack of legal literacy and limited access to legal information can impede meaningful participation and understanding of one's rights and responsibilities within the justice system.³⁰

4. **Delays and Backlogs:** Lengthy court procedures, case backlogs, and administrative inefficiencies can undermine access to justice.

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

Prolonged delays can hinder individuals' ability to have their cases heard in a timely manner, causing frustration and discouragement.³¹

2.3.2 The Accused Person's Right to Fair Trial

Article 50 of the 2010 Constitution of Kenya guarantees the right to a fair trial for every accused person. The article outlines various rights and safeguards that ensure fairness and due process throughout the trial process including presumption of innocence, notification of charges, adequate time for defense, expeditious trial, right to appeal among others.

These provisions aim to safeguard the accused person's rights to a fair trial, ensure due process, and prevent miscarriages of justice. It promotes transparency, accountability, and the protection of individuals' fundamental rights within the criminal justice system. 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 25I 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.³²

2.3.3 Procedural and Substantive Gaps in Instituting Murder Charges in Kenya

In the context of instituting murder charges in Kenya, there can be procedural and substantive gaps that impact the effectiveness and

³¹ Ibid

³² *Edwin Wachira & 10 Others vs. Republic* [Petition No. 97 of 2021], para 47

fairness of the criminal justice system. These gaps can hinder the proper investigation, prosecution, and adjudication of murder cases. For instance, insufficient or flawed investigation procedures can result in a lack of crucial evidence or the failure to identify and apprehend the responsible parties. Incomplete or poorly conducted investigations can weaken the case and undermine the prospects of a successful prosecution.³³

Secondly, Limited forensic capabilities and inadequate evidence handling procedures can compromise the integrity and reliability of evidence. Proper collection, preservation, and analysis of evidence are essential for building a strong case and establishing the guilt or innocence of the accused.³⁴

Thirdly, protecting witnesses, especially in high-profile murder cases, is crucial for ensuring their safety and willingness to come forward and testify. Failure to provide adequate witness protection measures can result in intimidation, threats, or even violence, which can hinder the prosecution's ability to present a compelling case.³⁵

In addition, overburdened courts, case backlogs, and lengthy trial proceedings can delay justice and cause frustration for both the accused and the victims' families. Delays can result in prolonged pretrial detention and may compromise the fairness of the trial due to fading memories or the unavailability of witnesses.³⁶

³³ Owino, P. O., & Odhiambo, G. O. (2018). Prosecution of Homicide Offences in Kenya: The Dilemma of Jurisdictional Competence. *Journal of Legal Studies*, 6(1), 1-23

³⁴ Ibid

³⁵ Ibid

³⁶ Ibid

Addressing these procedural and substantive gaps requires comprehensive reforms and targeted interventions. It involves strengthening investigative capacities, improving forensic capabilities, providing adequate legal aid services, ensuring witness protection mechanisms, addressing case backlogs, and enhancing training and expertise among justice sector professionals.³⁷

3. Problematic Outcomes of Prosecuting Murder Suspects Exclusively at the High Court

3.1 The Difficulty of Prosecuting Multiple Offences in the Same Transaction

Prosecuting murder suspects exclusively at the High Court can lead to problematic outcomes, particularly when multiple offenses are involved in the same transaction. To illustrate this, I consider a hypothetical case study involving charges of murder, rape, torture, and indecent exposure.

In this case, the difficulty arises from the fact that all the offenses fall under different legal frameworks and require distinct elements to be proven. The High Court, while capable of handling serious offenses like murder, may not possess the specialized knowledge and resources to effectively address each offense individually within a single trial.

Prosecuting multiple offenses within the same transaction involves complex legal proceedings. Each offense requires a separate examination of evidence, witnesses, and legal arguments. The High Court, which primarily focuses on murder charges, may face

³⁷ Ibid

challenges in efficiently addressing the complexities and nuances of each offense, potentially resulting in delays and increased legal complexities.³⁸

The High Court's capacity may be strained when dealing with multiple offenses within the same trial. The court may face challenges in managing the increased workload, including the need for additional resources, expertise, and time. This can potentially impede the court's ability to provide prompt justice and contribute to case backlogs.³⁹

Bundling multiple offenses in the same trial can also impact the fairness of the proceedings. The accused may face challenges in mounting a proper defense due to the varied nature of the charges and the need to address distinct legal and factual aspects. This can potentially undermine the accused's ability to present a robust defense for each offense.⁴⁰

Given these challenges, it may be more appropriate to consider alternative approaches for cases involving multiple offenses within the same transaction. This could include exploring the possibility of separate trials, specialized courts or divisions, or streamlining procedures to ensure each offense receives the necessary attention and expertise for a fair and effective adjudication.

³⁸ Owino, P. O., & Odhiambo, G. O. (2018). Prosecution of Homicide Offences in Kenya: The Dilemma of Jurisdictional Competence. *Journal of Legal Studies*, 6(1), 1-23

³⁹ Ibid

⁴⁰ Ibid

3.2 Problematic Outcomes of Exclusive Prosecution of Murder Suspects at the High Court

3.2.1 Inefficient Case Management

One of the problematic outcomes of exclusively prosecuting murder suspects at the High Court is inefficient case management.⁴¹ This inefficiency can manifest in various ways and can have significant implications for the timely resolution of cases.

The High Court may already have a heavy caseload, including matters beyond murder cases. When murder cases are exclusively prosecuted at the High Court, it can further contribute to case backlogs, resulting in delays in the administration of justice. The backlog of cases may lead to prolonged pretrial detention for the accused, undermining their right to a speedy trial.⁴²

Furthermore, murder trials often involve complex evidence, multiple witnesses, and intricate legal arguments.⁴³ These factors, combined with limited resources, can result in protracted trial proceedings at the High Court. Lengthy trials not only contribute to the backlog of cases but also place a burden on the accused, victims, witnesses, and their families, as well as the overall efficiency of the justice system.⁴⁴

⁴¹ Comms IK, 'Ensure Fairness during Trial of GBV Victims Accused of Murder - ICJ Kenya' (ICJ Kenya - International Commission of Jurists, 11 October 2023) <<https://icj-kenya.org/news/ensure-fairness-during-trial-of-gbv-victims-accused-of-murder/>> accessed 24 January 2024

⁴² Maina, M. N. (2017). Administration of Criminal Justice System in Kenya: Challenges and Prospects. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 9(2), 04517007.

⁴³ Ibid

⁴⁴ Ibid

In *Charles Henry Nyaoke v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 4 others*⁴⁵ the court was categorical as follows:

“Nevertheless, we take judicial notice that murder trials take an unduly long time to be concluded at the High Court. Some of the reasons have to do with other players in the justice chain; and, the limited number of judges’ vis a vis the volume of criminal and civil cases filed annually. Article 48 of the Constitution obligates the State to ensure access to justice for all persons. We thus find that from the standpoint of access to and expeditious delivery of justice, murder suspects would significantly benefit if their trials were held in the magistrates’ court. As we have stated earlier, there is no longer sufficient justification for holding these trials at the High Court.”⁴⁶ However, the court in *Peter Kariuki Muibau & 11 others v Attorney General & another*⁴⁷ was of a different view. It stipulated thus:

“Lastly, the setting of the hierarchy of courts is for administrative efficiency so that minor matters are heard locally or by lower courts and major matters by higher courts. This ensures that the administration of justice is streamlined thereby reducing court delays, backlog and costs because court personnel under such a system have specialized knowledge and can process cases quickly.”⁴⁸ The court went on as follows:

⁴⁵ [2020] eKLR

⁴⁶ *Ibid* para 134 and 135

⁴⁷ [2018] eKLR

⁴⁸ *Ibid* para 42

“My take, however, is that the law makers had valid reasons for placing murder and treason cases in a different category from other criminal cases and this must have informed their decision to make provisions that their trials commence before the High Court. The seriousness of a murder charge cannot be gainsaid as it is an offence that may pose danger to the very existence of the human race if left unchecked.”⁴⁹

The court was however alive to the fact that:

“In view of the fact that currently, all subordinate courts are manned by magistrates and prosecutions conducted by state counsel who in most cases have the same training and experience in law as judges of the High Court, perhaps it is a high time that the law makers relooked the impugned section 4 of the CPC with a view to amending so as to make it relevant to the present realities and to make it possible for murder trials to commence before the magistrates court.”⁵⁰

3.2.2 Reduction of Chances for Appeal and Discriminatory Effect

Another problematic outcome of exclusively prosecuting murder suspects at the High Court is the reduction of chances for appeal and the potential for a discriminatory effect. By prosecuting murder suspects exclusively at the High Court, there are limited opportunities for appeal.⁵¹

⁴⁹ Ibid para 43

⁵⁰ Ibid para 44

⁵¹ Charles Henry Nyaoke v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 4 others [2020] eLR

Appeals serve as a crucial safeguard to rectify errors, ensure fairness, and address any miscarriages of justice.⁵² However, when lower courts are bypassed, the accused may be deprived of the chance to have their case reviewed by higher judicial authorities. This can undermine the principle of due process and the right to a fair trial.⁵³ In *Charles Henry Nyaoko v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 4 others*⁵⁴ the court stipulated thus:

“But the point to be made is that initiating a murder trial in the High Court compromises an essential element of the right to a fair trial. We thus readily find that under the hierarchy of courts provided by Articles 162 and 169 of the Constitution, a murder convict is denied a vital step in the appellate chain.”⁵⁵

However, the court in *Peter Kariuki Muibau & 11 others v Attorney General & another*⁵⁶ was of a different opinion. It held as follows:

“In the instant case I note that the petitioners’ complaint was not that they were denied an opportunity to appeal, but rather that they were not able to have a second chance on appeal as other suspects whose hearings commenced before the subordinate court. I am however not persuaded by the petitioners’ argument that because they did not have a chance to a second appeal, this amounted to the denial to a right to fair hearing as Article 50 (2) (q) of the Constitution

⁵² Ibid

⁵³ Maina, M. N. (2017). Administration of Criminal Justice System in Kenya: Challenges and Prospects. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 9(2), 04517007.

⁵⁴ [2020] eKLR

⁵⁵ Ibid para 116

⁵⁶ [2018] eKLR

on the right of appeal does not stipulate that such a right must occur twice.”⁵⁷

Focusing exclusively on the High Court for murder prosecutions can have a discriminatory effect on individuals who may face additional barriers in accessing justice. For example, marginalized groups or those with limited financial resources may struggle to navigate the complexities of the High Court system, including securing legal representation or presenting a robust defense. This can lead to an imbalance in the justice system, perpetuating inequalities and potential discrimination in the treatment of murder suspects.⁵⁸

3.2.3 Abuse of Process/Denial of Justice

Another problematic outcome of exclusively prosecuting murder suspects at the High Court is the potential for abuse of process and denial of justice. This can occur when the prosecution takes advantage of procedural loopholes or engages in unethical practices to secure a conviction. The high-stakes nature of murder cases, coupled with limited scrutiny in lower courts, may create an environment conducive to such abuses. This undermines the integrity of the justice system and compromises the rights of the accused.⁵⁹

Exclusive prosecution at the High Court can create a heightened focus on securing convictions, potentially overshadowing the pursuit

⁵⁷ Ibid para 41

⁵⁸ Maina, M. N. (2017). Administration of Criminal Justice System in Kenya: Challenges and Prospects. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 9(2), 04517007.

⁵⁹ Ibid

of justice.⁶⁰ The pressure to obtain a guilty verdict in high-profile murder cases may lead to rushed investigations, compromised evidence, and a diminished commitment to ensuring a fair trial. This emphasis on conviction rates can undermine the principle of presumption of innocence and compromise the overall integrity of the justice system.⁶¹

Furthermore, The High Court, with its caseload and limited resources, may have difficulty giving individualized attention to each murder case.⁶² Defendants' unique circumstances, such as mental health issues, trauma, or other mitigating factors, may not receive sufficient consideration when cases are exclusively prosecuted at the High Court. This can result in less nuanced and tailored judgments, potentially leading to disproportionate or unjust outcomes.⁶³

3.2.4 Creation of Opportunities for Corruption

Another problematic outcome of exclusively prosecuting murder suspects at the High Court is the creation of opportunities for corruption. Concentrating murder cases solely at the High Court can increase the risk of corruption within the judicial system.⁶⁴

⁶⁰ Accessing justice in Kenya: An analysis of case backlog in Nakuru ...
<<https://su-plus.strathmore.edu/server/api/core/bitstreams/33ef4a59-6082-449e-ab0a-27d8bc82b903/content>> accessed 24 January 2024

⁶¹ Ibid

⁶² Ibid

⁶³ Ibid

⁶⁴ Kenya administration of Justice suffers generally from inadequate ...
<https://www.icj.org/wp-content/uploads/2001/08/kenya_attacks_justice_2000.pdf> accessed 24 January 2024

Murder cases are often high-profile and carry significant social, political, and emotional weight.⁶⁵ The gravity of these cases, combined with the potential for intense public scrutiny and media attention, can create an environment where corruption becomes more likely.⁶⁶ Individuals may be tempted to engage in corrupt practices to influence the outcome of the case or manipulate the judicial process.⁶⁷ In addition, Murder cases, especially those that garner public attention, may involve substantial financial resources, including legal fees, expert witnesses, and other related expenses.⁶⁸ The prospect of financial gain can incentivize corruption, such as bribing officials, influencing the selection of judges, or tampering with evidence. Exclusive prosecution at the High Court can amplify these financial incentives, as the stakes are higher, increasing the potential for corruption to take place.⁶⁹

Corruption can also thrive within patronage networks, where influential individuals or groups seek to exert undue influence over the judicial system. The exclusive prosecution of murder cases at the High Court may provide an opportunity for these networks to exert

⁶⁵ Goldberg SG, 'Getting Away with Murder: Acquittals in High-Profile Cases' (2014) 5959 *PsychCRITIQUE*

⁶⁶ *Ibid*

⁶⁷ Karanja, D. W. (2013). The Prosecution of Offences: An Analysis of Prosecutorial Discretion and the Doctrine of *Nolle Prosequi* in Kenya. *University of Nairobi Law Journal*, 3(1), 83-108

⁶⁸ Thompkins G, 'High-Profile Murder Case Holds Kenya's Attention' (NPR, 27 November 2006)

<<https://www.npr.org/templates/story/story.php?storyId=6542590>> accessed 24 January 2024

⁶⁹ *Ibid*

their influence, leading to compromised judicial decisions, biased outcomes, and a lack of justice for the parties involved.⁷⁰

4. Specific Recommendations for Urgent Legal Reform

4.1 Adoption as a Reform Agenda by the Kenya Law Reform Commission

The adoption of urgent legal reform as an agenda by the Kenya Law Reform Commission can play a crucial role in addressing the problematic outcomes of exclusively prosecuting murder suspects at the High Court. The Kenya Law Reform Commission should undertake a comprehensive review of the criminal justice system, with a specific focus on the prosecution of murder cases. This review should assess the effectiveness, efficiency, and fairness of the current system and identify areas in need of reform.⁷¹

The Commission can recommend expanding the jurisdiction of lower courts to handle murder cases. This would ensure that defendants have the opportunity for a fair trial and access to justice at multiple levels of the judicial system. It would also help alleviate the burden on the High Court, allowing it to focus on complex and high-profile cases.⁷²

The Commission can recommend procedural reforms to streamline the process of prosecuting murder cases. This may include improving case management, ensuring timely and efficient trial proceedings, and implementing measures to protect the rights of the accused.

⁷⁰ Ibid

⁷¹ Odhiambo, G. O., & Kivai, E. W. (2018). Criminal Justice Reforms in Kenya: Challenges and Prospects. *Journal of African Law*, 62(1), 1-25.

⁷² Ibid

Procedural reforms should prioritize fairness, transparency, and adherence to due process principles.⁷³

The Commission can also explore the potential for alternative dispute resolution mechanisms in murder cases. This could involve encouraging mediation, reconciliation, or restorative justice approaches, particularly in cases where the parties involved express a willingness to engage in such processes. Alternative dispute resolution can provide opportunities for healing, closure, and community involvement in the justice process.⁷⁴

Furthermore, The Commission should actively engage with relevant stakeholders, including legal professionals, civil society organizations, and the public, to solicit their input on the urgent legal reform agenda. This will help ensure that the reforms are comprehensive, inclusive, and responsive to the needs and aspirations of the society.⁷⁵

Finally, The Commission should establish mechanisms for monitoring and evaluating the impact of the recommended legal reforms. This will help assess the effectiveness of the reforms, identify any challenges or unintended consequences, and make necessary adjustments to improve the justice system continuously.⁷⁶

4.2 Interpretation by Courts of Progressive Precedents

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

One important aspect of urgent legal reform is the interpretation by courts of progressive precedents.

It is crucial to provide comprehensive and ongoing training to judges and legal professionals on interpreting and applying progressive precedents. This training should emphasize the principles of equality, human rights, and access to justice. By enhancing the understanding of judges regarding progressive legal concepts and evolving societal norms, the courts can contribute to more consistent and equitable interpretations of the law.⁷⁷

Public awareness and education about progressive precedents and their implications are essential. Efforts should be made to inform the legal community, including judges, lawyers, and legal academics, as well as the general public about landmark judgments and their potential impact on the justice system. This can be achieved through publications, workshops, seminars, and other forms of outreach.⁷⁸

The Kenya Law Reform Commission can develop guidelines or directives for courts on the interpretation of progressive precedents. These guidelines should provide a framework for judges to apply principles of equality, non-discrimination, and human rights in their decision-making process. Clear and well-articulated guidelines can promote consistency and predictability in the interpretation of progressive precedents across different courts.⁷⁹

4.3 Amendment of Criminal Court Practice Rules

⁷⁷ Mulwa, A. M. (2014). Judicial Reforms in Kenya: The Journey so Far. *Journal of Law, Policy and Globalization*, 26, 77-90.

⁷⁸ Ibid

⁷⁹ Ibid

Amending the criminal court practice rules is another important aspect of urgent legal reform. The criminal court practice rules should be amended to introduce streamlined procedures for the prosecution of murder cases. This includes setting clear timelines for various stages of the trial, ensuring efficient case management, and minimizing delays in the justice process. Simplifying and expediting the procedures can contribute to more timely and effective resolution of murder cases.⁸⁰ They should also be amended to specify that magistrate's courts can also hear murder cases, with well outlined procedural guidelines.

By amending the criminal court practice rules, the legal system can adapt to the specific needs and complexities of prosecuting murder cases. The aim should be to ensure fairness, efficiency, and access to justice for all parties involved while upholding constitutional rights and principles.⁸¹

4.4 Use of The 'Interests of Justice' Argument as an Exception to the Current Law

The use of the "interests of justice" argument as an exception to the current law can be a significant recommendation for urgent legal reform. Introducing the "interests of justice" as a discretionary exception allows judges to consider individual circumstances and the broader context of a case. This flexibility enables them to deviate from strict application of the law when necessary to achieve a just outcome. It recognizes that the law cannot always anticipate every unique

⁸⁰ Ibid

⁸¹ Ibid

situation and provides judges with the discretion to act in the interest of justice.⁸²

The "interests of justice" argument allows judges to balance various factors, such as fairness, equity, and the specific circumstances of the case. This includes considering the severity of the crime, the vulnerability of the parties involved, the impact on the victim and the community, and any mitigating or aggravating circumstances. By taking a holistic approach, judges can ensure that justice is served in individual cases, even if it means deviating from strict application of the law.⁸³

While the "interests of justice" exception provides flexibility, it is essential to establish clear guidelines and principles to ensure consistent and principled decision-making. This can be achieved through the development of case law, judicial training, and regular monitoring and evaluation of how the exception is applied. Transparent and accountable use of the exception helps guard against arbitrary or discriminatory decisions.⁸⁴

In addition, for the effective use of the "interests of justice" exception, it may be necessary to have legislative support and clarity. This can be achieved through legislative amendments or the formulation of guidelines that outline the scope and considerations to be taken into account when invoking the exception. Legislative backing provides a

⁸² Odhiambo, G. O., & Kivai, E. W. (2018). Criminal Justice Reforms in Kenya: Challenges and Prospects. *Journal of African Law*, 62(1), 1-25.

⁸³ Ibid

⁸⁴ Ibid

solid foundation for the proper implementation of the exception within the legal system.⁸⁵

5. Conclusion

The exclusive prosecution of murder offences at the High Court in Kenya has revealed several areas of concern that require urgent legal reform. The existing legal framework, while providing the basis for prosecuting murder cases, exhibits procedural and substantive gaps that hinder access to justice. The customary practice of prosecuting murder cases also raises issues regarding fairness and effectiveness. The concept of access to justice, as enshrined in Article 48 of the 2010 Constitution, emphasizes the need for reasonable fees and unhindered access to justice for all individuals. Additionally, Article 50 underscores the accused person's right to a fair trial, encompassing various rights and safeguards. However, the exclusive jurisdiction of the High Court for murder cases poses challenges to these fundamental principles.

The problematic outcomes associated with prosecuting murder suspects exclusively at the High Court include inefficient case management, reduced chances for appeal, denial of justice, and the potential for corruption. These outcomes undermine the goal of achieving timely and fair resolution of murder cases. To address these challenges, urgent legal reform is recommended. The Kenya Law Reform Commission should adopt a reform agenda focused on comprehensive changes to the existing legal framework. The interpretation of progressive precedents by the courts can guide the application of the law in a manner that aligns with constitutional principles and promotes access to justice.

⁸⁵ Ibid

Amendment of the criminal court practice rules is also essential to ensure streamlined procedures, fair disclosure of evidence, protection of witnesses and vulnerable individuals, and the provision of adequate legal aid. Furthermore, considering the "interests of justice" as an exception to the current law can enable judges to address unique circumstances and achieve just outcomes on a case-by-case basis.

By implementing these specific recommendations, Kenya can foster a more equitable and efficient system for prosecuting murder offences. It is imperative to prioritize access to justice, safeguard the accused person's right to a fair trial, and address the challenges and gaps that currently exist within the legal framework. Initiating murder trials at the magistrates' courts will significantly lower the costs of the trial, reduce the distance to court and expedite delivery of justice. This will result in better realization of access to justice which is a fundamental right guaranteed by Articles 48, 50 and 159(2)(a) and (b) of the Constitution.⁸⁶

Reforming the prosecution of murder offences in Kenya is necessary to enhance access to justice, promote fairness, and ensure effective criminal justice outcomes. The proposed recommendations, if implemented, have the potential to improve the system and better serve the needs of all stakeholders involved in murder cases.

⁸⁶ *Charles Henry Nyaoke v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 4 others* [2020] eKLR para 108 and 109

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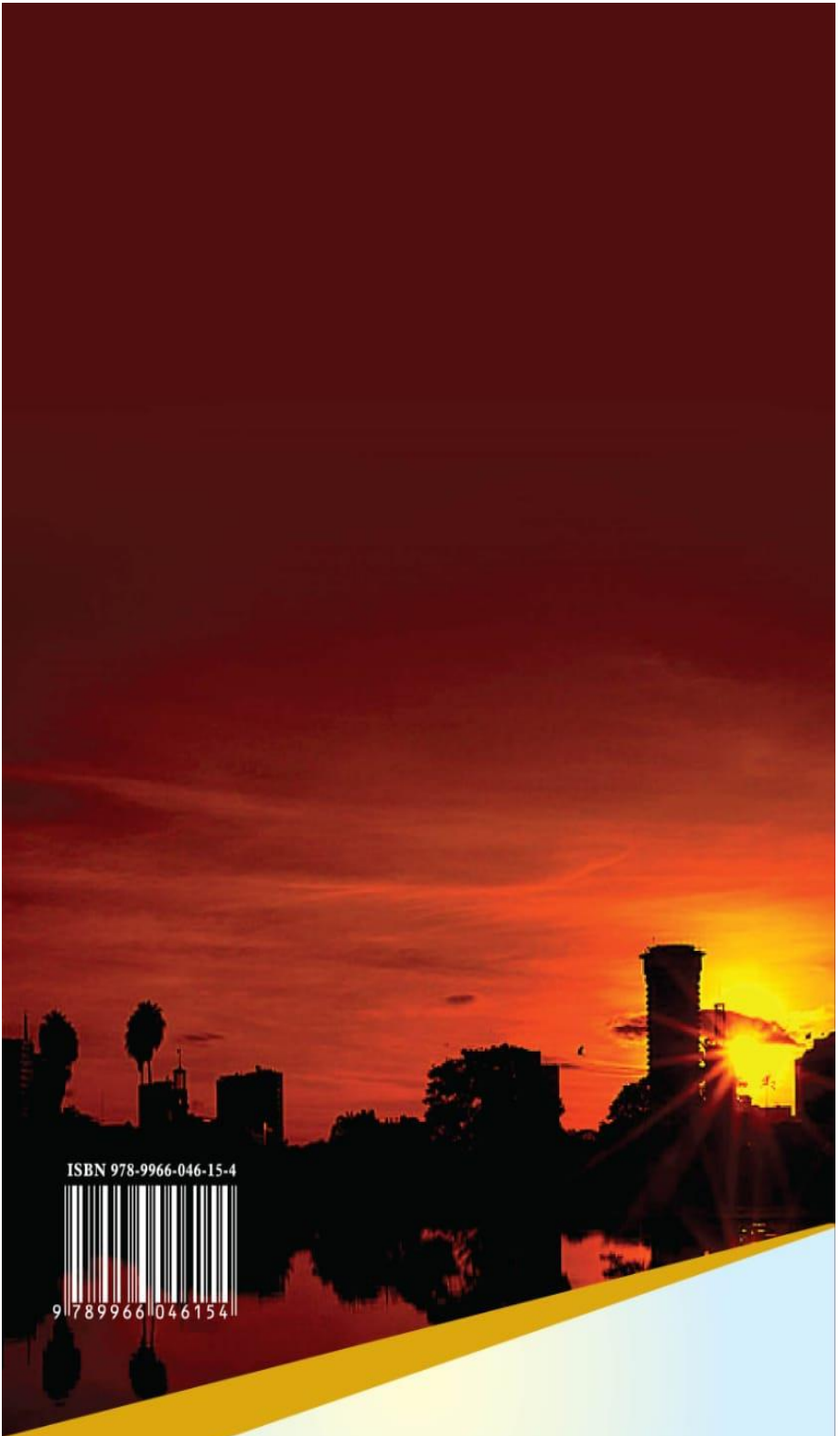
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