

in collaboration with Non Governmental Organizations (NGOs) focusing on gender should conduct gender education in schools, public forums such as churches and so on.

The government can do this through public barazas especially in the rural areas where such forums are effective. It should be made compulsory for gender education to be included as apart of the agenda in every public meeting. Every public officer should therefore be equipped with basic gender relations knowledge to able to pass the same to members of the public.

Gender education should also be incorporated in theological learning institutions. Religion has been named as one of the culprits of perpetuating gender inequities by advocating for women subjugation. Training the clergy on the possible negative effects of such advocacy will equip them with skills for creating public awareness on the changing legal paradigms in gender relations.

Gender education should be introduced in school curriculum. It should be made one of the core units starting from primary school upto the higher levels of learning including the universities and other tertiary colleges. This will prepare both women and men from when they are very young, to move away from customary law attitudes especially where such traditional practices are against the statutory laws.

One of the legal principles is that ignorance of the law is not a defense in a court of the law. It is therefore the duty of the government to educate its citizens on any issues concerning a particular law before it is enacted. This would enable the public to participate fully in the enactment of laws which affect them and hold their legislators accountable for whatever happens in parliament.

SENTENCING IN KENYA: A SEARCH FOR THE JUDICIARY'S PREVAILING POLICY AND PHILOSOPHY AND THE CASE FOR REFORM

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1. INTRODUCTION

Sentencing is the stage of the criminal trial at which a court of law of competent jurisdiction, after finding the accused guilty of the particular offence, makes an order specifying what sanction should be imposed on him or her. Sentencing is integral to the proper functioning of the criminal justice system as it proves that the criminal law is enforced against those who have contravened it.

Parliament, through statute, specifies what constitutes an offence and prescribes the resulting penalty or range of penalties available for the court to impose upon a finding of guilt. However Parliament has largely been deficient in providing the courts with guidance on the objectives and principles to be followed in sentencing.¹ This has meant that the area has been guided almost entirely by judicial discretion and case law.

In the absence of statutory guidance, the Kenyan bench has held diverse views on the objectives of sentencing. To the keen analyst, these views are, perhaps, as manifold as the number of judicial officers who have served on the Kenyan bench. On the one hand, there are those who share ~~subscribe~~ to the view of the former Chief Justice Mwendwa CJ that:

"it is in the very nature of things that courts in Kenya should find themselves laying more emphasis on deterrence and on the protection of the public than on retribution and reformation. This is in my view what is likely to produce (the) best results in the fight against the criminal element."²

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¹ In this regard, Parliament's role has been largely construed to encompass laying down the general principles. For example, with regard to delegated legislation, this approach was captured by the High Court of Kenya in the Judicial Review case of *Kenneth Matiba v The Attorney General*, miscellaneous application number 790 of 1993 in the following words: "A delegate's power is confined to the objects of the legislature. The main reason for delegation is that the legislature itself cannot go into sufficient detail. So it makes a skeleton Act. The delegate supplies the meat, thus the intention of the Legislature must always be the prime guide to the meaning of delegated legislation." Similar views are shared by Lord Campbell CJ in *Liverpool Borough Bank v Turner* (1861) 31 I.J.CI. 379 at 380 where he said that: "It is the duty of Courts of Justice to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered".

² The Administration of Justice in Kenya, a Talk to students of AHITI Kabete, 1971.

This can be described as the classical view of sentencing and it has had many proponents including renowned legal theorists such as HL Packer.³

On the other hand, some members of the bench would find no difficulties in agreeing that reformation and rehabilitation should be the most avowed applicable policies to be pursued in sentencing. Due to the fact that every court regardless of its hierarchical position enjoys judicial discretion in choosing the appropriate sentence to impose, sentencing in Kenya has swung between these two opposing theories with no clear indication as to which principle should guide it or reign supreme. The tension between these two schools of judicial thought still exists.

In order to adequately examine the adequacy of sentencing in Kenya, this article is divided into four parts, *viz*:

- (1) The Principles of Sentencing,
- (2) Sentencing in Kenya
- (3) A sampling of experiences in other countries, and:
- (4) Proposals for reform.

2. THE PRINCIPLES OF SENTENCING

To the scholar of penal law, the instinctive thought would be that a subject as fundamental as the principles or objectives of sentencing would be an arena of near-unanimity in opinion among legal thinkers. The reality is that different scholars, judges and Parliaments hold and register different objectives. For example, while some cases proffer the objectives of sentencing as being punishment, deterrence and protection of the public,⁴ others add a fourth, rehabilitation,⁵ while modern scholars and legislation have increasingly made reference to a fifth; making reparations.⁶ This Article draws its list of sentencing principles from of all the five; and these are deterrence, retribution, protection of the public, rehabilitation and the making of reparations by the offender to the victims of his crimes.

2.1 DETERRENCE

Deterrence as a principle of sentencing is based on the general and basic belief that punishment discourages people from offending. Deterrence as a goal of criminal sentencing is best understood as having two distinct objectives:

³ For further discussion see *The Limits of the Criminal Sanction*, HL Packer, at 3.

⁴ *R v Blake* (1962) QBD.

⁵ *R v Sargeant* (1975) CA.

⁶ Legislation in England, Section 142(1) of the *Criminal Justice Act 2003*, Canada, Section 718 of the *Criminal Code*, among others.

- (a) Specific deterrence seeks to prevent recidivism⁷ by individual offenders, and;
- (b) General deterrence is aimed at deterring other individuals from committing similar offences.

The ultimate deterrent sentence is of course capital punishment. The research on the efficacy of deterrent sentences is not conclusive. On the one hand, studies in the United Kingdom have indicated that since 1965 when the death penalty was abolished as a punishment for murder there has been no readily definable impact on the rate of murders. On the other hand, American studies claim that every execution deters seven or eight other murders.⁸ There has been no comparable study of the effectiveness of deterrence in Kenya.

2.2 RETRIBUTION

Retribution rests on the notion that if a person has knowingly⁹ done wrong, he or she deserves to be punished. There is no need for the punishment to be effective in preventing recidivism or even changing the mentality of the offender. Where a rule imposes a penalty for its own breach, that penalty must be imposed when the rule is broken otherwise the rule remains worthless and is therefore dead letter.

Retribution also expresses society's denunciation of the offender's behaviour. His or her blameworthiness justifies the imposition of the sanction. An example of such a retributive sentence is corporal punishment, now banned in Kenya.¹⁰

2.3 PROTECTION OF THE PUBLIC/INCAPACITATION

This principle of sentencing involves preventing the offender from causing further harm to society. The most common example of this at work is imprisonment. While incarcerated, the offender is incapacitated (albeit temporarily) from committing crimes against the public.

However, once he or she is released, recidivism is likely to result, particularly because the Kenyan prison environment in most cases does not focus on rehabilitation.

2.4 REHABILITATION/REFORMATION

The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislations across the world. In the post-war period, the prevailing philosophy was to view criminality as 'an illness caused by psychological

⁷ This term is used to refer to the tendency of criminals to continue to commit crimes even after punishment.

⁸ The Home Office, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, 1999.

⁹ In the case of strict liability offences, knowledge is irrelevant.

¹⁰ The outlawing of corporal punishment in Kenya was effected through Criminal Law (Amendment) Act of 2003.

conditions' which could be 'treated' by interventions. This strong belief in rehabilitation was one of the factors that lead to the expansion of community-based sentencing options. It was also the justification for indeterminate or semi-indeterminate sentencing systems. The increasing prominence of rehabilitation in sentencing can be seen as part of the larger move towards Restorative Justice within the Criminal Justice System.

Rehabilitative sentencing aims at reducing future crime by changing the behaviour, attitudes, or skills of the offender. It assumes that offending has specific causes, and the focus is on identifying and remedying these factors. Sentencing options are assessed on the basis of the likelihood of re-socialising the offender so that he or she is less inclined to commit crimes, or to provide the offender with the skills to combat these inclinations.

This can include various types of assistance provided in prison or in the course of a probation order which are intended to help the offender to improve his social skills, his employment prospects, or his capacity to abide by the laws of the land. Community Service Orders, Probation and Police Supervision¹¹ are good examples of rehabilitative sentences.

In a recent lecture, Archbishop Desmond Tutu, an ardent proponent of rehabilitative measures, described the essence of Restorative Justice as being an attempt to heal the rift between society and the offender occasioned by his wrongs. In the words of the Archbishop;

A criminal offence has caused a breach in relationship and the purpose of the penal process is to heal the breach, to restore good relationships and to redress the balance . . . the fundamental purpose of the entire exercise is to heal.¹²

In a nutshell, a rehabilitative sentence is aimed at reintegrating the offender into society.

2.5 REPARATIONS

Reparation is a product of the Restorative Justice school of thought it aims at reconciling the victim and the offender. Restitution is based on the premise that the offender should put right the wrong occasioned by his or her conduct. This aim is often given effect through a reparation or compensation order which may be imposed as part of the sentencing process. As well as monetary payments to the victim, restitution may involve an apology or a culturally-specific and valuable act of recompense. The offender may perform a service for the victim or for a public or charitable body nominated by the victim, or make a donation to a nominated charity. Service to the community or donations to charity may also be appropriate when there are no identifiable victims.

¹¹ Also abolished by the Criminal Law (Amendment) Act of 2003, *Ibid.*

¹² The Third Longford Lecture: The Truth And Reconciliation Process - Restorative Justice.

Restitution places the victim and what the victim has suffered at the centre of the sentencing process. This contrasts with the other sentencing modes and aims, which focus on the offender and society as a whole. The offender's focus relates to his or her culpability, the risk or harmfulness of the offence, the likelihood of future offending, propensity to be deterred, and rehabilitative needs. Society's needs are to denounce and condemn past behaviour, deter or prevent future offending, and keep dangerous and persistent offenders at bay or even completely out of circulation.

Unlike deterrence, incapacitation, and rehabilitation, restitution's primary aim is not to prevent or minimise future crime though this is nevertheless regarded and claimed as a secondary benefit.

2.6 EVALUATION

These objectives of sentencing, though far from being mutually exclusive, cannot all be applied equally simultaneously. There must be a hierarchy to these principles but the exact order of this hierarchy has been a bone of contention and a subject of tremendous and divergent controversy.

On the one hand, there are those who view the offender as being a social deviant who poses a direct or indirect threat to the community. Proponents of this view favour the use of deterrent, retributive or incapacitating sanctions against the offender. Rehabilitative and reparatory sentences are less favoured or favourable in their eyes as they are seen to provide the offender with an easy let off. Thus, they would advise that at sentencing the default position should be that the courts impose one of those three sentences unless there are sufficiently persuasive mitigating factors, such as self-defence or provocation, to warrant the imposition of rehabilitative or reparatory sanctions.

The contrary view is held mainly by advocates of the Restorative Justice model or school of thought. They view the offender as a quasi-victim. Society itself is said to be partly to blame for his or her offending inclination or character and as such, the justification for imposing a custodial, deterrent or retributive punishment is reduced. The offender's crimes rightly deserve denunciation and condemnation but the sentence should aim at re-integrating and rehabilitating him or her back into society as a law-abiding member of the society. Thus, proponents of this view would advise that at sentencing the default position should be that rehabilitation and reparation-making are the pre-eminent principles that guide the process unless there are aggravating or extenuating circumstances, such as serial re-offending, that warrant the imposition of a deterrent, incapacitating or retributive sanction.

In our humble view, the latter school of thought is more compelling. In deciding what the sentence should aim to achieve the court must consider the particular circumstances of the case. However, it should do this bearing in mind that the sentence it decides to impose must be proportionate to the offence committed and the culpability of the offender. It is not right that the court, by

default, gives up hope on the offender. The court, though, can rightly recognise that a particular offender may be beyond help. In *R v Brewster*¹³, the English Court of Appeal approved a sentence of 10 years imprisonment because the appellant had convictions for 57 burglaries in the previous 10 years and had committed two more burglaries while on parole, involving property worth more than £70 000. In the words of Lawton, J. in that case:

There is no hope of rehabilitating this man. There is no hope that he will be deterred by prison sentences. All that the courts can do with him and his like is to ensure that they do not carry out raids on other people's houses for very substantial periods. That is the justification for this sentence.

Even if one feels that rehabilitation should not be the primary goal of sentencing it should be the outcome of whatever sentence is imposed. To a considerable extent, rehabilitation has often been invoked as a way of humanising the administration of sentences. If the objective of trying to help offenders is removed and only some or all of punishment, deterrence, and incapacitation are left, those who work in the system will be guided by negative impulses only and free reign will be given to the potential for abuse of power which is inherent in coercive environments, especially prisons. This is in essence an argument for having programmes in prisons, and for incorporating programmes in other sentences, rather than an argument for making the rehabilitative needs of offenders the primary determinant of sentencing decisions.

Over crowded prisons and high rates of recidivism is clear evidence that simply locking people up, or trying to deter and punish them does not reduce crime or offending. The offender must be viewed as an individual, deserving, unless very good reasons for acting to the contrary exist, of the opportunity to amend his ways. This must be the guiding philosophy behind sentencing.

3. THE PROCESS OF SENTENCING IN KENYA

The Kenya state as known today is a colonial construct. Prior to the advent of the English rule, Kenya was home to diverse Nations or as the colonialists baptised them, 'tribes', which conducted their affairs distinctly. The concept of 'prison' was alien to all these communities but there was a criminal justice system philosophically underpinned by the notions of reparation, retribution and rehabilitation.

However, the colonisers imposed on the country laws and processes of sentencing that did not reflect the indigenous legal systems rather the customs and legal traditions of England. Upon independence, these were transmitted seamlessly into the post-colonial republic.

¹³ (1998) 1 Criminal Appeal R (5) 181.

Upon a finding of guilt in the Kenyan court, the trial moves into the sentencing phase. The court invites the prosecution to make submissions to the court regarding the sentence. The prosecutor is required, by law, to limit these submissions to the past convictions of the accused, if any, and the particular circumstances of the case that may be considered aggravating factors. The prosecutor is not permitted to inform the court that the offence is serious as that is for the court to determine.¹⁴

The accused is then given an opportunity to address the court in reply. This is not the time to plead innocence since guilt has already been found, but to plead with the Magistrate or Judge for leniency. The accused sets out what may amount to mitigating factors. Common reasons offered in mitigation include:

- (i) The accused is a first offender,
- (ii) The accused is the sole breadwinner in the family, or
- (iii) The accused is remorseful,
- (iv) The offence committed may have been a technical one or that the accused was ignorant that his actions amounted to criminal conduct
- (v) External factors such as provocation,
- (vi) Internal factors such as stress.

Some of these reasons are by and large more successful than others. For example, pleading that one is a first offender is more likely to influence the towards leniency than to plead that one's culpability was reduced by virtue of stress. *Alusa Salim v Republic*¹⁵ involved an appeal against a sentence to serve seven years imprisonment for stock theft contrary to section 278 of the Penal Code; the High Court substituted the trial sentence with a sentence of 3 years with hard labour as the appellant was a first offender. Kenyan courts have been reluctant to consider stress in itself as an adequate mitigating factor. The reason for this is that stress is considered part of every day human life unworthy of special consideration.

The court is not allowed to question the accused during this mitigation address other than to clarify something that the accused has said. This rule is based on two principles; firstly that the accused should not be compelled to prejudice his own case and secondly, that the judge is an independent arbiter in the adversarial trial and according to the well known metaphor the court "should not descend into the arena and have its vision clouded by the dust of the conflict"¹⁶ by examining the accused.

¹⁴ *Shiani v R* [1972] EA 55 (HCK).

¹⁵ Criminal appeal 20 of 2014, High Court.

¹⁶ *Yuill v Yuill* [1945] 1 All ER 183 (CA) at 189B.

The Court is, however, permitted to summon, as a witness, any person whose evidence appears to be essential to the reaching of a just decision in the case.¹⁷ This power is especially useful at sentencing if neither the prosecution nor the defence have called a witness, whose evidence would benefit the court in reaching its decision. The caution expressed in the metaphor above was answered by the Court of Appeal for East Africa in the case of *R v Muriu and others*,¹⁸ in the following words:

It has been said that a judge must not descend into the arena so that his judgement becomes warped by the dust of conflict, conversely a judge cannot sit in splendid isolation above the conflict and not intervene even when he detects a lacuna or ambiguity in the evidence.

The Court of Appeal, however, struck a cautionary note in a later case, stating emphatically that this power must be used sparingly.¹⁹ South African courts are similarly authorised to play an active role in determining the facts on which the sentence is to be based. Section 186 of the South African Criminal Procedure Act 1977 gives the presiding officer the power to call witnesses if in the view of the court, it is in the interests of justice. For example, in *S v Mazibuko*²⁰ Labe J called witnesses when he considered the submissions of the defence and prosecution to be inadequate for the formulation of a just sentence. Kenyan judges do not exercise this power²¹ as frequently as their South African brothers.

Needless to reaffirm, in the absence of statutory sentencing guidelines, judicial discretion and precedent guide sentencing in Kenya. It is incumbent upon the Superior Courts of Record, the High Court and the Court of Appeal, to correctly review illegal or inappropriate sentences handed out by subordinate courts to offenders. The High Court and Court of Appeal have frequently affirmed the long standing principle pronounced in *Ogalo s/o Oiwura v R*²² that an appellate court should not alter or set aside a sentence imposed by the trial court unless it is shown that the trial court overlooked some material factor, took into account some immaterial factors, acted on a wrong principle, or imposed a manifestly excessive sentence.²³

The mere fact that the appellant court would have imposed a different sentence had it been the court of first instance is not sufficient grounds to review the sentence because the trial court has discretion to choose which sentence to impose.

17 Section 150 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya.

18 (1955) 22 EACA 417.

19 *Murimi v R* [1967] EA 542 CA

20 1997 1 SACR 255

21 *Supra* note 17.

22 (1954) 21 EACA 270

23 *Wanjema v R* [1971] EA 493 (HCK)

Several decisions demonstrate how the review jurisdiction set out in *Ogalo* has been exercised:

- (1) They found, *inter alia*, that this was sufficient reason to overturn the appellant's conviction for manslaughter and the sentence imposed thereto.
- (2) In *Mutambua Mbaluka v Kenya*²⁴, the High Court deemed the use of poisoned arrows as an aggravating factor at sentencing for the offence of manslaughter. This was an improper consideration, as the arrows were not in fact poisoned. Thus, Court of Appeal set aside the sentence of ten years imprisonment and substituted it with one of seven years.
- (3) In *Muthengi v R*²⁵, the High Court frowned upon the trial magistrate's *ratio decidendi* that the accused's failure to plead guilty in a case where his guilt was very clear was legal justification for imposing a more severe sentence than normal. The ruling, if upheld, would have in effect negated the presumption of innocence and denied the accused his right to appeal²⁶. The erroneous principle was rejected and the sentence was amended accordingly.
- (4) In *Onuochi v R*²⁷, the Court of Appeal substituted the sentence of four years' imprisonment for manslaughter with a non-custodial one. Their Lordships considered the initial sentence as manifestly excessive considering that the appellant was a "young man of good character"²⁸ who had been unarmed and had been attacked by the deceased. He had also been in custody for fifteen months at the time of the initial sentence.

While it is welcome that the superior courts intervene in this way to ensure justice is done, the reality is that given their caseload they can only review a limited number of cases. Additionally, if the accused does not appeal, either due to lack of funds to continue paying his advocate, or because he has resigned himself to the sentence, or that he is mindful that the appellate court is entitled or may be inclined to increase the sentence if, in its opinion, the sentence imposed by the trial court was manifestly inadequate as to amount to a miscarriage of justice; the appellate courts would be deprived of a chance to correct any errors made by the trial court.

True, the High Court can exercise its revisionary powers without the convicted person having to appeal as they are supplementary to its appellate powers.²⁹ However, the fact that revision of a sentence can only initiated by

24 Criminal appeal number 176 of 1975 EACA.

25 [1972] EA 86 (HCK)

26 Section 348 Criminal Procedure Code (Cap 75 Laws of Kenya) "No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."

27 (1980) KLR 113

28 *Ibid.*

29 Section 364, Criminal Procedure Code.

petition, the action of the subordinate court or by the High Court perusing the monthly returns of the cases of the subordinate courts means that the Court can only revise a very small number of wrong sentences. The Court of Appeal does not have revisionary powers and so it cannot ease the burden on the High Court.

An area of particular concern is the issue of disparity in sentences. If two persons commit the same or broadly similar offences they should receive the same sentence unless there is a legally acceptable distinguishing factor between the two offenders, for example one is a first offender while the other is a serial offender.³⁰ In *Marando v R*³¹, the appellant was sentenced to four years' imprisonment for manslaughter while his co-accused person was only sentenced to a day's imprisonment. The Court of Appeal reduced the sentence of four months to one of three months having considered the disparity between the two sentences too large in light of the circumstances.

Many legal scholars have decried the lack of certainty in judicial decisions in Kenya. Ahmednasir Abdullahi, a one time Chair of the Law Society of Kenya, comments thus:

Every judge is his (own) 'Sultan'. He can disregard, depart from, distinguish (rarely do they bother) from any other decision including his own. The tragedy even in this regard is that the same judge may disregard his own decision in a similar case because the litigants are different.³²

These concerns were also raised in an analysis of the quality of decisions made at the Court of Appeal, the High Court and in subordinate courts carried out between the years 2000 and 2003. The report found a high level of inconsistency in similar matters. This has led to "confusion both in the legal profession and the general public."³³

The appellate courts cannot interfere with the discretion of the trial courts by instructing them to adopt particular sentences. Court circulars are advisory only and it is left to each judge to decide if the circular is appropriate for the case before them.

Additionally the appellate courts can only review cases where the disparity is manifestly excessive, leaving like offenders to receive dissimilar sentences as long as the margin isn't manifestly too large. This situation leaves a lot to be desired, as it is up to each court to decide what is manifestly excessive and many cases are simply not subjected to appeals, for the appellate courts to even get the opportunity to make this finding. The heavy caseload of the High Court precludes it from proactively seeking out such sentences through revision.

30 *Felix Muoria Murimi and another v Republic* [2005] eKLR. (criminal appeal 263 and 264 of 1998, HC).

31 (1980) KLR 114 (CA).

32 The Lawyer, Issue number 26 October 2000 page 10.

33 Strengthening Judicial Reforms in Kenya, Volume VIII, Page 27.

Kenya's sentencing system leaves too much to the reviewing capability of the High Court as well as the appeal process. The High Court has the demands of the cases where it has exclusive jurisdiction, such as election petitions, as well as its regular caseload. It simply cannot be expected to meaningfully engage in the bureaucratic exercise of reviewing all the decisions of the subordinate courts. Perusing the monthly returns is considerably at variance with a thorough examination of the returns. It means that some erroneous sentences may disastrously escape the attention of the court. The revisionary power of the High Court is discretionary and as such the Court cannot be compelled by any person or body in Kenya to consider a particular case for review unless such a compelling power was expressly created by the National Assembly through legislation.

The current system thus relies heavily on appeals to the High Court and the Court of Appeal to correct the sentencing errors or wrongs of the lower courts. It should be noted, however, that the Republic has no right of appeal against the sentence imposed and must either petition the High Court to revise the sentence or raise the issue if the accused appeals.³⁴ The accused is not normally constrained by law but by financial and logistical constraints. Appealing against a sentence can be a costly affair as it can take a long time for the appeal to be determined, all the while, one is required to remunerate his/her advocate. Review of sentences is rightly in the hands of the courts rather than some quasi-judicial body. However, believably, there can be no denying that the Judiciary would welcome assistance in identifying inappropriate or illegal sentences made by the lower courts.

The eclectic character of sentencing in Kenya necessitated further fundamental reforms which can be discerned and distilled from a sampling of experiences in other jurisdictions.

4. COMPARATIVE ASPECTS: A BRIEF SURVEY OF EXPERIENCES IN OTHER COUNTRIES

As noted above, in order to focus logically on a reform agenda for sentencing in Kenya, a sampling of the experiences of South Africa, England and Wales as well as Sweden will be undertaken in the proceeding paragraphs. The choice of these particular countries has not been informed by any specific objective criteria but simply because of the evident dynamism in their systems.

4.1 THE REPUBLIC OF SOUTH AFRICA

South Africa employs a broadly similar sentencing system to Kenya's. In both jurisdictions the courts have to exercise judicial discretion within the boundaries set by the legislature³⁵ in order to determine an appropriate sentence, based on a

34 Sections 354 (3)(h) and 364(1)(u) of the Criminal Procedure Code.

35 The benchmark for this reasoning seems to proceed from the classical view that the chief aim of statutory interpretation is to decipher the intention of the legislature.

balancing of all the different factors present in the particular case. However, in South Africa the discretion is exercised against the background of a well-established system of appeal against sentences imposed in all the trial courts. Superior courts in South Africa are more active in reviewing the decisions of the lower courts than their Kenyan counterparts and this has substantially influenced the decisions of the lower courts.

This is not to say that the superior courts in South Africa do not respect the need for the lower courts to exercise a measure of independence in sentencing. In *R v Mapumulo*, it was stated that:

The infliction of punishment is pre-eminently a matter for the discretion of the trial Court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than the appellate tribunal.³⁶

The South African Supreme Court of Appeal reiterated this view more recently, finding that:

It is trite that sentence is a matter best left to the discretion of the sentencing court. A court sitting on appeal on sentence should always guard against eroding the trial court's discretion in this regard, and should interfere only where the discretion was not exercised judicially and properly.³⁷

4.2 THE EXPERIENCE OF ENGLAND AND WALES

True, the judicial tension in Kenya resulting from the uncertainty as to what the guiding principles of sentencing should be is absent in the England and Wales as the sentencing policy is governed by statute, the *Criminal Justice Act 2003*. Section 142(1) of the Act stipulates the purposes of sentences as;

- (1) The punishment of offenders,
- (2) The reduction of crime (deterrence),
- (3) The reform and rehabilitation of offenders,
- (4) The protection of the public, and;
- (5) The making of reparations by offenders to persons affected by their offences

Section 143(1) further requires a court to pass a sentence commensurate with the seriousness of the crime as determined by the culpability of the offender and the harm caused or risked by the offence. The different elements of the two criteria are set out in the section.

The Act also establishes the Sentencing Guidelines Council that sets guidelines that the courts must have regard to when sentencing including specific examples of

³⁶ 1920 AD 56 at 57.

³⁷ *S v Bamurd* 2004 (1) SACR 191 (SCA) paragraph 9.

mitigating and aggravating circumstances. The council's general guidance to the courts on the objectives of sentencing is that they should seek to compensate the victim and reform and rehabilitate the offender unless the offence is very serious in which case, protecting the public, punishing the offender and prevent crime (deterrence) will take precedence.

4.3 THE EXPERIENCE OF SWEDEN

Swedish criminal law allows courts to impose sentences below the statutory minimum when mitigating circumstances are present. The current sentencing principles were introduced into the Swedish Penal Code in 1989 with the aim of increasing the predictability and consistency of penal decision-making. The law sets forth "penalty scales" with maximum and minimum sentences specified individually in relation to each crime. A number of aggravating and mitigating circumstances are provided in a manner similar to the prevailing situation in England and Wales.

5 PROPOSALS AND HORIZONS FOR REFORM

In considering the question of reform of sentencing in Kenya, one needs to re-examine both the process of sentencing as well as the available sentences. Though it would not be apt for the Kenyan jurisdiction to blindly ape the legal developments of other countries, it must surely be accepted that there are lessons to be learnt from the manner in which sentencing operates in these countries, in perspective, the experiences of the countries discussed above.

5.1 REFORM OF THE SENTENCING PROCESS

5.1.1 THE ROLE OF JUDGES AND MAGISTRATES

To make sentences as effective as possible, the courts need the best possible information on the effectiveness of different sentences in reducing recidivism and its relative costs. Kenyan judges should be encouraged to shed their reluctance to adopt the quasi-inquisitorial role allowed by the *Criminal Procedure Code*,³⁸ during the sentencing phase. This would greatly enhance the fairness of the trial as it would allow the judge to base the sentence on all the facts and circumstances without being solely dependant on the submissions of the prosecution and the defence.

5.1.2 THE ESTABLISHMENT OF A SENTENCING GUIDELINES AUTHORITY FOR KENYA

A legislative guide to sentencing would promote equity by ensuring consistent treatment of like cases.³⁹ The *status quo* lacks the clarity, certainty and consistency

³⁸ Section 150.

³⁹ This is enshrined in the legal doctrine of precedent and *stare decisis*.

that is the advantage and *sine qua non* of a statutory scheme. Members of each of the three judiciaries in East Africa have called for the establishment of a body to supervise sentencing in their countries.⁴⁰ A sentencing guidelines authority would free the judiciary from the administrative burden of inspecting and reviewing inappropriate sentences while providing guidelines to ensure uniform sentencing of like offenders. The proposed Sentencing Guidelines Authority would be charged with:

- (i) Establishing sentencing policies and practices, including guidelines which the courts would consult when determining the appropriate form and severity of punishment for the convicted offender;
- (ii) Inspecting sentences issued by subordinate courts and referring inappropriately sentenced cases to the High Court for review. The remit of the Authority would be limited to inappropriate sentences only. Cases where there have been unsafe convictions and possible miscarriages of justice would be handled by the relevant bodies or possibly by establishing a Criminal Cases Review Commission that would refer such cases to the Court of Appeal;
- (iii) Collecting statistics on sentencing, which the Chief Justice could use to monitor performance and increase efficiency in the judiciary, and;
- (iv) Collecting, analysing, researching, and distributing information on crime and sentencing issues to Parliament, the Judiciary, legal practitioners and the general public. This information would allow proper assessment of sentencing patterns and would provide an invaluable resource in the formulation of sentencing policies.

The sentencing guidelines established by the Authority should incorporate the purposes of sentencing, i.e., just punishment, deterrence, incapacitation/protecting society, rehabilitation and making reparations to victims. The Authority would then give general guidance to the courts as to which objectives should take precedence. In cases of violent crime, for example, the guidance could be that the first three take priority while in cases of petty offending, the objectives of rehabilitation and reparation making would be paramount.

The guidelines would ensure certainty and fairness by avoiding unwarranted sentence disparity among offenders with similar characteristics convicted of similar crimes, while permitting sufficient judicial flexibility by requiring the courts to have regard to them rather than making them binding. Judicial discretion to take into account relevant aggravating and mitigating factors, an essential cog in the machinery of the justice system, would not be fettered. In *United States v Flowers*⁴¹, the defendant was a twenty one year-old African-American single mother who pleaded guilty to conspiring to possess, import and distribute cocaine. The federal sentencing guidelines prescribed a sentence of 37-46 months. However, because

⁴⁰ See, for example, *Criminal Justice in Kenya: Legal and Social Challenges* by The Hon. Lady Justice Rawal, <http://kenyalawreports.or.ke/articles>.

⁴¹ 983 F Supp 159 (EDNY 1997).

the guidelines were not binding on the court, it instead sentenced her to probation. The fact that she had no prior criminal record and had only become a drug dealer to pay for her education and support her family were considered as sufficient mitigation to warrant leniency.

5.1.3 A RETHINK OF MINIMUM AND MANDATORY SENTENCES

The Swedish approach to minimum sentencing allows justice to be better served than the Kenyan scheme. Parliament essentially ties the hands of the court by setting a mandatory minimum sentence. Legislation should be passed enabling courts to sentence below the statutory minimum where the mitigating circumstances to justify this exist. Alternatively, Parliament can remove minimum sentences from most offences retaining them only for the most serious of crimes. Minimum sentences, in the words of the Honourable Chief Justice of Uganda "create injustices by unnecessarily restricting judicial discretion without accomplishing other functions ascribed to them."⁴²

The court should be able to choose a sentence that fits each individual offender, with aggravating or mitigating factors being applied to the guideline sentence.

For certain crimes, such as murder, treason, robbery with violence or attempted robbery with violence, Parliament prescribes that a mandatory punishment be imposed upon a finding of guilt. There can be no deviation from the mandatory sentence. This was made clear by Platt JA giving the Judgment of the Court of Appeal in *Kinuthia v Republic*.⁴³ The appellant was one of two persons convicted of capital robbery contrary to section 296(2) of the *Penal Code* and sentenced to death. He appealed against the sentence. The Court found that by virtue of section 361 of the *Criminal Procedure Code*, its function was limited to examining issues of law and not the appropriateness of the sentence. Additionally, because the sentence imposed by the High Court was the mandatory punishment required by statute, the appeal was dismissed. Where a court deviates from the mandatory sentence a superior court would set aside the sentence and impose the mandatory one.

Minimum sentences, and more so mandatory sentences, unduly restrict the discretion of the court to impose that sentence which constitutes the most appropriate punishment in the circumstances of the particular case. It may be that two persons charged with the same offence have equally satisfied the *actus reus* and *mens rea* requirements of the particular offence but their culpability is far from equal. Theoretically, the prosecution should bring a lesser charge against the less culpable of the two but the worldwide reality is that prosecutors will tend to

⁴² Benjamin J Odoki, CJ, The Need for Reform of the Sentencing Regime in Uganda *Makere Law Journal* (February 2003), Page 143

⁴³ Criminal appeal number 2148 of 1986

charge a suspect with the highest offence they think they can secure a conviction for. By demanding that the court impose a set punishment regardless of the circumstances, Parliament makes the trial a mechanical exercise of application of the law devoid of consideration of the human element of the crime.

In the premise, it is suggested that mandatory sentences be replaced entirely by guidelines issued by the proposed Sentencing Guidelines Authority while minimum sentences be reserved only for the most serious of crimes.

5.1.4 REFORM OF THE AVAILABLE SENTENCES

Any reform of the sentencing system would be inadequate without a re-evaluation of the sentences available under the law. The sentences allowed under Kenyan law are drawn from section 24 of the Penal Code⁴⁴, Acts of Parliament, the Criminal Procedure Code⁴⁵ and the common law. Reform of sentences needs to take threefold dimensions. Some sentences need to be abolished, others modernised while others need to be emphasised and used more frequently.

5.1.5 SENTENCES THAT SHOULD BE ABOLISHED

The banning of corporal punishment in Kenya was hailed as a long over due owing to the appreciation and recognition of its degrading and inhumane nature. The Criminal Law (Amendment) Act 2003 provides for numerous amendments to the Penal Code and the Criminal Procedure Code abolishing corporal punishment as a lawful sentence in Kenya. Two other punishments currently provided for at law have been criticised as having no place in modern Kenya.

1. **Capital punishment:** It is the mandatory penalty for murder, treason and robbery with violence or attempted robbery with violence. Though the law remains in the statute books, Kenya can be described as being a *de facto* abolitionist country due to the fact that no executions have been carried out since the mid-1980s. Since that time Kenyan presidents have regularly exercised the prerogative of mercy vested upon them by the Constitution⁴⁶ to release death row prisoners and commute a number of death sentences to life imprisonment.

Not all persons can suffer the death penalty. The Children Act 2001⁴⁷ expresses in statute the long standing principle that no person under eighteen years of age may be executed. Instead, the child is detained at the President's pleasure.⁴⁸ The law also specifies that where a woman convicted of an offence

⁴⁴ Chapter 63, Laws of Kenya

⁴⁵ *Supra* note 17.

⁴⁶ See Constitution of Kenya Sections 28-29 Revised Edition 1998 (1992).

⁴⁷ Chapter 586, Laws of Kenya.

⁴⁸ *Kuisa v R* [1975] EA 260 and more recently *Kimambo v Republic* [2003] 2 EA 532 (CA)⁴⁹ at 535.

punishable with death is found to be pregnant, the sentence to be passed on her shall be life imprisonment.⁵⁰

Some proponents of the death penalty contend that it is justifiable because it has a deterrent effect on future crime. This assertion has not been supported by any known or credible empirical study. On the contrary, research indicates that there is no correlation between the use of the death penalty and the reduction of capital crimes.⁵¹ Since the efficacy of capital punishment is in doubt, it is germane that the state should replace it with life imprisonment without the possibility of parole or a prison term of such length as to reflect the seriousness of the particular offence.

The Government of Kenya has accepted the arguments against capital punishment and has committed itself to abolishing capital punishment by its adoption of the Second Optional Protocol to the Covenant on Civil and Political Rights. However, a Bill to make this commitment part of municipal law and domesticate⁵² the protocol has never been tabled before the House. It is hoped that the Government will honour its commitment on abolishing the death penalty in Kenya sooner rather than later.

2. **Detention in Detention Camps:** True to its colonial origin, the Detention Camps Act⁵³ provides that a person, who is convicted of an offence that would adequately be punished by a fine or imprisonment for not more than six months, may instead be sentenced to detention in a detention camp for a period up to six months. It can also be used to detain offenders who have been convicted of offences for which the prescribed punishment is only a fine or a fine and imprisonment but the offender defaults on paying the fine.

Detention camps were once very popular as an alternative to imprisoning petty offenders but because of the introduction of alternatives such as Extra-mural Penal Employment (EMPE)⁵⁴ and the Community Service Orders scheme⁵⁵, the number of detainees in detention camps has declined. It is hoped that the number will

⁴⁹ Sections 211-212 *Penal Code*.

⁵⁰ *Sentencing Theory, Law and Practice*, Nigel Walker and Nicola Padfield, Page 79-109.

⁵¹ Kenya follows the dualistic approach to treaty implementation under which a ratified convention must be domesticated and implemented through national legislation.

⁵² Chapter 91, Laws of Kenya.

⁵³ The Prisons Act, Chapter 90, Laws of Kenya.

⁵⁴ The Community Service Orders Act 1998.

decline even further with Parliament eventually abolishing this archaic punishment.

5.1.6 A SENTENCE IN DIRE NEED OF MODIFICATION: INCARCERATION

This is the most frequently imposed sentence. For most offences Parliament only sets the maximum custodial period that can be imposed thus leaving the court with wide discretion to decide what custodial period, if any, should be served.

Courts may, when sentencing the convicted person, order that in addition to the period s/he will serve in prison, they should also be subjected to hard labour. This additional measure is imposed where the court feels the offence was aggravated and thus requiring a more severe sanction.

Generally, a sentence of imprisonment will not be imposed on a first offender unless the offence was particularly grave, aggravated or prevalent in a particular area.⁵⁵ Due to the factor of the prison population nearing full capacity, Parliament passed the Community Service Orders Act 1998 to provide an alternative to jail. Petty and first time offenders were sentenced to work in the community instead of going to prison. They carry out their sentences by working in areas designated by the provincial administration such as hospitals, government offices and the like and then go home in the evening. The programme hopes to help decongest prisons across the country. Although it was only launched in early 2000, by March of 2001 over 60 000 offenders had passed through the programme, a clear measure of its success.

Imprisonment needs to be viewed as a sentence of last resort; utilised only if other sentencing options are either inappropriate or have been exhausted. Kenya should not be left behind by the global trend of moving away from custodial and punitive sentences to reformative and rehabilitative sentences.

5.1.7 SENTENCES THAT NEED TO BE USED MORE FREQUENTLY: NON-CUSTODIAL SENTENCES

In addition to Community Service Orders, there are other non-custodial sanctions available at law such as absolute or conditional discharge, probation, compensation and fines. Non-custodial sanctions are best employed against petty and first offenders.

1. Absolute and Conditional Discharges: Section 35 of the Penal Code provides that if a court is of the opinion that it is inexpedient to imprison an offender and that a probation order is inappropriate, it may absolutely or conditionally discharge the offender. The period of conditional discharge is a maximum of twelve months. The offender is released on condition that he

⁵⁵ Supreme Court of Kenya Circular to Magistrates number 13 of 1956, 29 (K.L.R) 205. This colonial position is still valid today.

does not re-offend for the discharge period, failure of which would render him liable to be sentenced in respect of the offence he was discharged on. This sentence is the ideal non-custodial sentence as it involves few state resources and affords the petty or first offender a golden chance to reform whilst remaining a fully productive member of society.

2. Probation: Probation has been described as a combination of both treatment and punishment. It is a community-based rehabilitative sentence. Offenders receive counselling and guidance in an attempt to bring them back to acceptable social life. In Kenya probation is governed by the Probation of Offenders Act.⁵⁶ Section 4 of the Act specifies that where a court is of the opinion that it is expedient to release the offender on probation it may make convict him and make an order to that effect. While on probation, the offender must abide by the conditions of the probation order amongst which is that he must not commit any other offence.

If the order is breached, the offender is brought before the court where evidence of his breach is adduced. The offender is then allowed to present his defence before the court makes a final order.

3. Compensation and Fines: Section 31 of the Penal Code empowers the court to order a convict to compensate particular persons injured by his offence, either in addition to or in lieu of any other penalty. Under the provisions of section 175 of the Criminal Procedure Code, compensation can only be awarded out of an imposed fine. However, the courts have always held that a heavy fine should not be imposed merely to create a compensation fund.⁵⁷

A question for consideration at this point is whether one is liable to imprisonment in default of making good the order of compensation. The case of *R v Lokidilio s/o Laiigou*⁵⁸ though tangential, is germane. The accused was convicted of killing an animal with the intent to steal it and was sentenced to eighteen months' imprisonment and also ordered to pay KShs 2-50 as compensation, in default of which, the accused was to serve a further three months' imprisonment. The record was then transmitted to the Supreme Court for confirmation. It was held, *inter alia*, that there is no provision in the Criminal Procedure Code for ordering imprisonment in default of payment of compensation. Thus, that order was illegal.

Because compensation can only be paid out of the fine imposed, the principle applied to fines that the court must ensure that the convict is able to pay as ordered

⁵⁶ Chapter 64, Laws of Kenya.

⁵⁷ *Ahmed Mohamed v R* [1959] EA 1087.

⁵⁸ Confirmation case number 344 of 1958; reported as [1958] EA 138.

applies. Should he refuse to make good the court's order despite being able to pay, the court may exercise its discretionary power under section 335 of the Criminal Procedure Code to commit the accused person to prison.

The provisions for compensation in Kenya are not adequately utilised as frequently because of the attitude of the Judiciary towards financial rewards in criminal cases. The traditional position has been that the power to award compensation in criminal cases:

... should only be used in the dearest cases; as when a person has suffered a comparatively minor physical injury or has been deprived of property or whose property has suffered damage, and such deprivation or damage is of readily ascertainable and comparatively small value.⁵⁹

Furthermore, courts are reluctant to make vigorous use of the compensatory provisions provided for by the Criminal Procedure Code. They have taken the view that fines should be calculated exclusively for the purposes of punishment and not then increased in size to accommodate the compensatory element. This is despite the fact that the compensatory fine was provided for specifically to avoid the necessity of having to seek compensation in a subsequent civil proceeding.

Against the foregoing background, it is suggested that these lacunae be removed and the provisions relating to compensation should be strengthened further to provide that:

- (i) During the sentencing stage, the financial loss suffered by the victim(s) be assessed,
- (ii) The courts have the power to require the performance of personal services for the victim as adequate reparation or compensation. This is a traditional African penalty found in many communities and its usage in the modern judicial context would be welcome,
- (iii) There should be no limit to the amount of compensation that the court can order. This would enable the court to provide genuinely adequate compensation rather than mere token awards. This provision should however be applied subject to the offender's capacity to pay, and;
- (iv) If the court is not able to convict the accused on the criminal standard of beyond reasonable doubt or by virtue of an aspect of the criminal offence not being met but the court has established that a civil wrong has been committed, it should be able to order the accused to pay compensation. This negates the need for a further civil trial with all the duplication of effort that this entails.

Courts should recognise that crime has a financial effect on the victim and that it is unfair for the victim to suffer a monetary loss because of such unsolicited injury or violation. As stated above, where the accused is unable to pay the appropriate compensation he or she should be obliged to perform some form of service(s) for

⁵⁹ *Muhindia v R* [1966] EA 425.

the victim or a charity nominated by the victim. The traditional sentences view the state or society in general as the entity to whom the offender must make amends or be punished for harming. Taking into account the victim's interests during sentencing, through compensation for example, will encourage more people to report crime and to willingly participate in the criminal justice process as they will feel valued by the justice system.

The increased use of these non-custodial remedies would not only lower rates of recidivism by offenders but also conserve judicial and penal resources, both in terms time and money, which could then be re-focussed on serious crimes. This is not to say that custodial sentences are no longer of value. Some criminals commit offences of such severity, with such a level of malice, odium, contempt or disregard for their fellow citizens that they are more deserving of society's condemnation and harsh punishment than attempts at rehabilitation. Where the offence is serious the courts should apply custodial sentences with hard labour but where the accused can be dealt in the community, such punitive and deterrent sentences should be ordered.

It has been said that 'the sentence must fit the crime'. While this is true it is suggested that the court should also endeavour to ensure that the sentence fits the sentenced. The jurisprudence in *Felix Mworia Mururu and another v Republic*⁶⁰ to the effect that an inquiry into the subjective characteristics of the accused is necessary before the determination of sentence is therefore sound.

6. CONCLUSION

Although the current sentencing system is not inherently unjust, it is nonetheless unsatisfactory. The Court of Appeal has noted a trend wherein maximum and manifestly harsh sentences of imprisonment have been imposed on convicted persons on the wrong basis. The appellate court is of the opinion that the trial courts must adopt a uniformity of approach.⁶¹ This uniformity can be best achieved by adopting a statutory framework for sentencing that allows courts to sentence below the minimum sentence as appropriate coupled with increased use by the courts of their power to gather information during sentencing.

The Children Act 2001 introduces a wide range of reforms to juvenile sentencing, for example the creation of the Children's Court that has jurisdiction to hear criminal cases involving child offenders except where the child is charged with murder or is jointly charged with an adult(s). These reforms have far outstripped reforms in the wider sentencing system. They show that Parliament is not antagonistic to bringing the centuries-old sentencing system in line with the cutting edge demands of the modern criminal justice system. Reform should not be limited to one section of sentencing, rather it should take the form of a comprehensive review of the system in its totality. As juvenile sentencing proves, we can improve

⁶⁰ Criminal appeal 263 and 264 of 1998; reported as (2005) KLR.

⁶¹ *George Omondi Oloo v Republic* criminal appeal 137 of 2004.

on the current system without compromising its efficacy as a central pillar of the justice system.

The recent Report of the Judiciary Sub-Committee on Ethics and Governance suggested a long list of reforms to the judicial system in Kenya; including the creation of a Supreme Court as the highest court in the land as well the end of the role of assessors. It is disappointing that this report did not make recommendations seeking a modernisation of sentencing in Kenya by establishing a sentencing guidelines authority, for example. There has been a trend in legal reforms to ignore sentencing despite the fact that it is pivotal to the proper functioning of the criminal justice system.

The need for more thoughtful, constructive and informed discussion, both in the National Assembly and among members of the legal fraternity, about what the guiding philosophy behind sentencing in this country should be cannot be gainsaid. This Article is of the considered opinion that striking the right balance between the society's right to punish the offender, to protect itself and deter future crime on the one hand and the need to reform the offender on the other hand is not an easy task, but it must be sought and pursued. This tension was eloquently expressed by AK Saikwa, Commissioner of Prisons (as he then was) when he commented that:

There is now an urgent urge to explore new methods for the prevention of crime and the treatment of offenders which would fairly reflect our society's interest in protecting itself and yet would provide maximum opportunity for the individual to turn away from a career of crime. In addition to ensuring the secure custody of those who constitute a potential danger to the community, our treatment of offenders should aim at discovering in each individual inmate his positive potentials and developing them as far as possible in the setting of penal treatment towards his rehabilitation.⁶²

Lord Bingham once remarked that "courts cannot and should not be unmindful of the important public dimension of criminal sentencing and the importance of maintaining public confidence in the system."⁶³

In Kenya, public dissatisfaction with sentencing is endemic and even notorious. Sentences are not perceived to be appropriate nor are they seen to be consistent.⁶⁴ Comprehensively reforming and updating the sentencing system would go a long way towards restoring the public trust and confidence in the criminal justice system. In the circumstance, an open and transparent sentencing regime, guided by statute and providing penalties consistent with the modern democratic society's respect for human rights, is long overdue.

62 An Approach to Penal Administration in East Africa. *East African Law Journal* (1966) Volume 2 pp 25.

63 *R v Huwells et al.*, *The Times*, 31 July 1998, (5).

64 Strengthening Judicial Reforms in Kenya, Volume VIII, Page 24-29.

THE LAW OF CONTEMPT IN KENYA: A CASE FOR REVIEW

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1. INTRODUCTION

The law of contempt applicable in Kenya has its basis on the English law of contempt, by virtue of the Judicature Act Section 5(1) of the Judicature Act imports the law applicable in England and gives the High Court and Court of Appeal in Kenya the same power to punish for contempt as that "...for the time being been exercised by the High Court of England".

The Judicature Act came into force on 1 August 1967. At this time the law applicable in England was as contained in the Administration of Justice Act of 1960¹. The procedural provisions were contained in Order 52 of the Rules of the Supreme Court, which came into operation in 1966. These laws were thus directly imported into the Kenyan legal system.

How well our courts have embraced and applied the English law is a subject of concern. Even more is the concern for the need to come up with a comprehensive statute regulating the law of contempt and also the need to come up with and build jurisprudence on the subject. A local jurisprudence will save the courts from a deeper well of confusion than has already been experienced.

Part of such confusion arises from the evident failure on the part of the courts to distinguish between the traditional concept which was essentially the common law position regarding contempt, from the statutory position now found in the English Contempt of Court Act (1981).

The common law wrong of contempt was a strict liability wrong. The inception of the 1981 Contempt of Court Act changed the position in England and relaxed the rules on strict liability. At common law contempt of court was seen as an act or omission calculated to interfere with the due administration of justice². This definition has also been given a wider meaning by the Contempt of Court Act. The wrong now encompasses many more deeds and spoken words. It is also from common law that the traditional classification of contempt as civil and criminal emanates. This is one area that has continued to haunt jurisdictions that have still stuck to the differentiations.

Several other questions arise. For instance with reference to criminal contempt, who exactly do the proceedings protect? Is it the court or is it the person of the

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1 Sections 11, 12 and 13 thereof.

2 *AG v Butterworth* [1963] 1 QB 696.