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## General Articles

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# Discreet discretion and moderate moderation in judicial sentencing: A commentary on Kenya's Sentencing Policy Guidelines, 2016

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### Abstract

*Criminal sentencing is an integral part in in any judicial system for the fair administration of justice. The process of sentencing and the standards applied by judicial officers has, however, been a notoriously difficult component in many criminal law systems. In Kenya, sentencing has been blamed as one of the sources of 'popular dissatisfaction with the administration of justice' to borrow from Roscoe Pound. This was the impetus for the Kenyan Judiciary to introduce the Sentencing Policy Guidelines, 2016 (SPGs). This paper is a general commentary, critique, and analysis of the SPGs. The author argues that SPGs come at an instructive epoch in Kenya's economic, socio-political, and cultural development. This contribution is not a polemic on the Kenyan SPGs. The commentary makes side-glances to various jurisdictions that have had a longer experience with sentencing guidelines. The article forecasts that Kenyan SPGs will, despite its few shortcomings, nevertheless, prove to be important for all judicial officers involved in Kenya's criminal justice system.*

Only when the judge's opinion seeks to persuade our judgments, not to coerce our wills can the decisions of our courts be called truly authoritative. H. Jefferson Powell.<sup>1</sup>

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<sup>1</sup> Powell H, *Constitutional conscience: The moral dimension of judicial decision*, University of Chicago Press, 2008, 109; see also White J, *Living speech: Resisting the empire of force*, Princeton University Press, New Jersey 2006, 212 ('Although we live in a mass culture it is nonetheless possible for our leaders-in the judiciary, in the legislature, and in the [executive] – to speak as responsible human beings, explaining themselves in a kind of expression that does not trivialize them and us but does honour to both. It is imaginable that in their expressions they could manifest minds that are honestly engaged in thought and expression of a deep and living kind, not the manipulation of formulas.').

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## 1. Introduction

Sentencing is and has been a notoriously difficult component in any criminal law system.<sup>2</sup> With a view to achieving the elusive and equally abstract notion of justice, sentencing involves a judge balancing the protection of the community with the rights of those involved in the criminal justice process.<sup>3</sup> It is in every sense where the ‘rubber meets the road’ when it comes to the administration of criminal justice.<sup>4</sup> Apart from the process of determination of the guilt of an offender, the process of meting out punishment after guilt is proven, sentencing stands out as an essential and indispensable component in the criminal justice process.<sup>5</sup> Despite this, sentencing law is, and has traditionally been, the least principled and coherent body of law.<sup>6</sup> Legislators in most of the Commonwealth have for a long time refused to endorse specific sentencing goals.<sup>7</sup> This unprincipled nature of sentencing has led to what Andrew Ashworth labelled a ‘cafeteria system’<sup>8</sup> of sentencing, which permits sentencers to choose a rationale, which seems appropriate at the time with little constraint.

There are two premises that are the foundations of criminal sentencing in Kenya that are always in perennial conflict: individualised justice and consistency.<sup>9</sup>

The first premise holds that courts should impose sentences that are just and appropriate according to all of the circumstances of each case. The second holds that similarly situated offenders should receive similar sentencing outcomes.<sup>10</sup> The result is an ambivalent jurisprudence that challenges sentences as they attempt to meet the conflicting demands of each

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<sup>2</sup> See Mallett S, ‘Judicial discretion in sentencing: A justice system that is no longer just’ 46 *Victoria University of Wellington Law Review*, 2015, 533; Bagaric M, ‘Sentencing: The road to nowhere’ 21 *Sydney Law Review*, 1999, 597 (Arguing that sentencing is probably the most important area of law, however, intellectually it is also the least sound).

<sup>3</sup> Butt A, ‘Structuring discretion in sentencing: Mandatory sentencing, guideline judgments and standard non-parole periods’ *Summer Bar News: the Journal of the New South Wales Bar Association*, 2014.

<sup>4</sup> See Martin W, ‘The art of sentencing’ *Speech at the Singapore Academy of Law & State Courts of Singapore: Sentencing Conference*, 2014, 2; See also Kinyanjui S & Akech M, ‘Towards structured sentencing in Kenya: A case for reform’ 9, *African Journal of Criminology and Justice Studies*, 1, 2016.

<sup>5</sup> See Martin, ‘The art of sentencing’.

<sup>6</sup> Bagaric, ‘Sentencing: The road to nowhere’, 597.

<sup>7</sup> Bagaric, ‘Sentencing: The road to nowhere’, 59. (Arguing that legislatures in Australia and the United Kingdom have refused to endorse specific sentencing goals).

<sup>8</sup> Ashworth A, *Sentencing and criminal justice*, Cambridge University, Cambridge, 2010.

<sup>9</sup> Krasnostein S & Freiberg A, ‘Pursuing consistency in an individualist sentencing framework: If you know where you’re going, how do you know when you’ve got there?’ 76 *Law and Contemporary Problems*, 2013, 265.

<sup>10</sup> Krasnostein & Freiberg, ‘Pursuing consistency in an individualist sentencing framework’, 265.

premise.<sup>11</sup> From the foregoing statements, there is an inherent tension between the premise of individualised justice ('individualism') and consistency ('comparativism').<sup>12</sup> Both premises are fundamental for a fair and accountable sentencing system.

This malady of incoherence when it comes to sentencing is present in Kenya. The immediate former Chief Justice, Willy Mutunga, acknowledged this problem by stating that sentencing has been a problematic area in the administration of justice in Kenya.<sup>13</sup> He further asserted that 'sentencing is one of those issues that has constantly given the Judiciary a bad name with sometimes outright absurd, disproportionate and inconsistent sentences being handed down in criminal cases.'<sup>14</sup> This, he stated, fuelled the idea that the exercise of judicial discretion in sentencing is a whimsical exercise by judicial officers.<sup>15</sup> Judges in Kenya have traditionally enjoyed considerable discretion to tailor appropriate sentences, subject to the maximum and minimum penalties prescribed by penal statutes.<sup>16</sup> Furthermore, five specific concerns are present as regards sentencing in Kenya: disparities of sentences for similar offences committed under substantially similar circumstances, unduly lenient or excessive penalties, mandatory sentences that result in injustice in certain instances, victims are not concerned in sentencing, and case law has not offered appropriate guidelines on sentencing.<sup>17</sup>

This commentary focuses on both the Kenya Sentencing Taskforce Report (Taskforce Report) and the Sentencing Policy Guidelines, 2016 (SPGs), launched by Kenya's former Chief Justice Mutunga on 25 January 2016. The investigation aims at making a general commentary, critique, and analysis of the SPGs. The article argues that SPGs come at an instructive epoch in Kenya's economic, social-political, and cultural development. With the Constitution of Kenya (2010 Constitution) about to reach its high watermark in terms of implementation, proper reform in criminal justice generally and sentencing specifically will prove to be valuable. It is important, however, to remember that sentencing comes as one of the hindmost stages in criminal procedure. If the Kenyan Judiciary is to sanctify the process at all then the entire criminal procedure process that begins with the formal presentation of a charge by the prosecution, then the Judici-

<sup>11</sup> Krasnostein & Freiberg, 'Pursuing consistency in an individualist sentencing framework,' 265.

<sup>12</sup> Spigelman j. J, 'Consistency and Sentencing' 82 *Australia Law Journal*, 2008, 450.

<sup>13</sup> Republic of Kenya Judiciary, *Report of the judicial taskforce on sentencing* (2015), 2.

<sup>14</sup> Kenya Judiciary, *Report of the judicial taskforce on sentencing*, 2015.

<sup>15</sup> Kenya Judiciary, *Report of the judicial taskforce on sentencing*, 2015.

<sup>16</sup> See generally & Section 24 Penal Code, Cap 63 Laws of Kenya.

<sup>17</sup> Legal Resources Foundation, *Sentencing in Kenya: Practice, trends, perceptions and judicial discretion*, LRF, 2011) cited in *Report of the judicial taskforce on sentencing*, 2016, 6.

ary should also sanctify the entire criminal justice process. Not only the judicial criminal prosecution process but also the investigation conducted by the Kenya Police Service should also be reformed and streamlined. If the current system of police investigation conducted by under-qualified police officers with little or no skills in forensic science persists,<sup>18</sup> implementing the SPGs will be akin to trying to slay an elephant with a razor blade.<sup>19</sup>

This contribution is not meant as a polemic regarding the Kenyan SPGs. The commentary makes side-glances to various jurisdictions that have had a longer experience with sentencing guidelines. The article forecasts that Kenyan SPGs will, despite their few shortcomings, nevertheless, prove to be important for all judicial officers involved in Kenya's criminal justice system. Its critics can argue that the SPGs are to be more a tool of fettering the broad discretion granted to judges by the various penal legislations. The SPGs, however, if applied judiciously are a tool for desirable judicial discretion structuring rather than undesirable fettering. The SPGs themselves state that the guidelines structure rather than fetter judicial discretion.<sup>20</sup> Nevertheless, while the SPGs aim at streamlining and enhancing consistency in the sentencing process, the important aim of individualisation should not sacrifice the aim of consistency.

The author proceeds as follows: the first part generally introduces the SPGs. This part provides an overview of the SPGs and the Taskforce Report. The aim is to inquire into the imperatives for the SPGs, and how they fill the present gaps in criminal sentencing. The second part offers a general commentary on two of the most contentious punishments in our penal books: the death penalty and imprisonment. Here the SPGs have not offered much guidance as relates the death penalty but have attempted some judicial structuring when it comes to custodial and non-custodial sentences. However, even with these laudable attempts, the guidelines on imprisonment would still need appropriate streamlining in the near future. The last part introduces an important dichotomy on charge-offence sentencing versus real-offence sentencing that the SPGs did not mention. The argument here is that in future considerations on the inclusion of guidelines on

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<sup>18</sup> This situation may change with the national police forensics laboratory that is set to be operational by the first quarter of 2017.

<sup>19</sup> Campbell-Holt C (eds), *The pursuit of justice: Lord Woolf*, Oxford University Press, Oxford, 2008, 294 ('I emphasise that real progress can only be made if criminal justice is treated as a whole. It is the judges who determine sentences within the framework provided by parliament, but it is the police and the Crown Prosecution Service who decide who comes before the courts and the judge needs the help of the advocate to identify the most constrictive sentences.')

<sup>20</sup> *Sentencing Policy Guidelines*, 2016, para. 2.2.

this dichotomy would be important. This part also makes a general conclusion to the paper.

## 2. The Taskforce on Sentencing Policy and Guidelines

It is as a response to the challenges of sentencing stated above that, in 2014, Mutunga CJ decided to set up a taskforce on sentencing policy and guidelines. The Taskforce was to review past sentencing patterns and policies and make recommendation on how to reduce unwarranted disparity and to promote proportionality in passing judgment.<sup>21</sup> The mandate of the Taskforce was to review sentencing patterns, report on how to reduce disparity in sentencing, promote proportionality in sentencing, create and roll out a plan for suggested intervention, and engage members of the public and stakeholders in sentencing and its effectiveness.

The SPGs task the Judiciary with the arduous duty of monitoring its implementation.<sup>22</sup> The Judiciary Training Institute (JTI) will continually train judges on the application of the SPGs.<sup>23</sup> Patrick Lumumba had previously made recommendations for the establishment of a Sentencing Guidelines Authority of Kenya.<sup>24</sup> In his view, such an authority would have been the proper avenue for the development of sentencing guidelines. Since Mutunga CJ decided to go with a more *ad hoc* structure, the issue of monitoring and implementation becomes problematic. The Judiciary cannot be the gatekeeper for itself. How do we ensure that judges are accountable yet it is the Judiciary, their employer, which is tasked with monitoring and implementing the SPGs. This problem can, however, be easily cured as the SPGs, as their name suggests, are mere ‘policy guidelines’. What this means legally is that they are not binding but are only directive of the route the law should take in the future. Legislation would therefore be the next stage to codify the guidelines into binding law. Whether this is what the former CJ intended is a question to be answered with time as the current CJ, David Maraga, might either prioritise, or he may fail to pay close attention to this important development.

<sup>21</sup> Ochieng A, ‘CJ Mutunga to launch sentencing guidelines for judges and magistrates’ *Daily Nation*, 23 January, 2016.

<sup>22</sup> *Sentencing Policy Guidelines*, 2016, para. 28.1.

<sup>23</sup> *Sentencing Policy Guidelines*, 2016, para. 28.1.

<sup>24</sup> Lumumba PLO, ‘Sentencing in Kenya: A search for the judiciary’s prevailing policy and philosophy and the case for reform’ *Law Society of Kenya Journal*, 2006, 117.

### 3. The Sentencing Policy Guidelines

Part I of the SPGs begins by defining sentencing as the process by which a court imposes a penal sanction once an accused person pleads guilty or the court convicts following trial. Section 24 of the Penal Code<sup>25</sup> contemplates a list of punishments that a court may impose.<sup>26</sup> The use of the word ‘may’ here seems to buttress the discretionary powers of judicial officers. The SPGs have recognised that wide discretion whittles down uniformity and certainty. In addition, it causes disparities in sentences imposed upon offenders who have committed similar offences under similar circumstances. The SPGs specifically seek to achieve the following objectives: align the sentencing process to the 2010 Constitution, guide the process of determining sentences, link sentencing to its objectives, and address disparities in sentencing. Furthermore, the SPGs seek to provide a benchmark for assessing discretion, address the overutilisation of custodial sentences, promote restorative justice, guide sentencing for specific groups, facilitate the involvement of victims, and enhance coordination of the agencies involved in sentencing.

Sarah Kinyanjui and Migai Akech make a concerted argument for introducing the sentencing guidelines in Kenya.<sup>27</sup> They use persuasive empirical evidence to show how disparities in sentences in Kenya would call for the adoption of such guidelines.<sup>28</sup> They state that it is for similar reasons that the UK and the US enacted sentencing guidelines. While they do not state in clear terms why such comparison is necessary, it would seem it is for the reason of showing the need and urgency of adopting such guidelines. It is also important therefore to make a comparison on the views of commentators in both countries while they were taking stock of the adoption of the sentencing guidelines. Writing in 1998 when the US sentencing guidelines were marking their 10<sup>th</sup> anniversary, James Gibson and Michael Goldsmith observed, ‘many observers of the federal criminal justice system found little to celebrate about the continued existence of the revolutionary system.’<sup>29</sup> Yet they argue that the federal guidelines in the US had been a surprising success.<sup>30</sup> In 2011, the UK enacted its extensive sentencing guidelines.

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<sup>25</sup> Penal Code Cap 63 Laws of Kenya.

<sup>26</sup> Section 24, Penal Code, Cap 63.

<sup>27</sup> Kinyanjui & Akech, ‘Towards structured sentencing in Kenya’.

<sup>28</sup> Kinyanjui & Akech, ‘Towards structured sentencing in Kenya’.

<sup>29</sup> Gibson J & Goldsmith M, ‘The US sentencing guidelines: A surprising success?’ *NYU Law School Centre for Research in Crime & Justice, Occasional Paper in Crime & Justice No. 12*, 1999, 2.

<sup>30</sup> Gibson & Goldsmith, ‘The US sentencing guidelines: A surprising success?’ (The authors make rebuttals in turn to the criticisms levelled against the US federal guidelines; dehumanising sentencing, removal of judicial discretion, the resultant long sentences, and the complexity of the guidelines).

A proper assessment on their effectiveness would therefore be too early to undertake at this stage.<sup>31</sup>

#### 4. The basic sentencing principles

The SPGs offer six principles that should underpin sentencing in Kenya: proportionality, equality/uniformity, accountability/transparency, inclusiveness, respect for human rights and fundamental freedoms, and adherence to domestic and international law with due regard to recognised standards on sentencing.<sup>32</sup> This section focuses on two specific sentencing principles; proportionality and uniformity. It argues for the introduction of simplicity as a policy goal for sentencing in Kenya. The need for simplicity as a sentencing principle is important especially with the introduction of the SPGs.

The principle of proportionality simply requires that sanctions should be commensurate with the offence. This principle is part of the concept of ‘just deserts’, which means that an offender should face no more or less punishment than they deserve. The claim that the offender should face their just deserts is not a novel idea. It ties to the retributive justice theory that is one of the objectives of the SPGs 2016. Stated this way; it seems acceptable to apply the principle of just deserts narrowly. Such a narrow application of just deserts has, however, not received complete support in public perception as relates to sentencing.<sup>33</sup> There are other factors considered instructive by the public that are unrelated to the harm inflicted.<sup>34</sup> A good example is whether the convict expresses remorse for the crime committed and apologises to the victim. Such a factor should affect the sentencing outcome. Studies have shown that expression of remorse and apology decreases the severity of sentences that the public would recommend.<sup>35</sup> As we shall see later in this article, the SPGs have included remorsefulness of the convict as one of the mitigating factors. This policy move goes to the dichotomy on charge-offence sentencing and real-offence sentencing, discussed later in this chapter.

<sup>31</sup> See Roberts JV, ‘Sentencing guidelines in England and Wales: Recent developments and emerging issues’ 76:1 *Law & Contemporary Problems*, 2013.

<sup>32</sup> *Sentencing Policy Guidelines*, 2016, para. 3.1-3.6.

<sup>33</sup> Hough M, *et al*, ‘Public attitudes to the principles of sentencing’ 6 *Sentencing Advisory Panel Research Report*, 2009, 3.

<sup>34</sup> Hough M, *et al*, ‘Public attitudes to the principles of sentencing’, 3.

<sup>35</sup> Robinson D, Smith-Lovin L, & Tsoudis O, ‘Heinous crime or unfortunate accident?: The effects of remorse on responses to mock criminal confessions’ 73 *Social Forces*, 1994, 175-190.



When it comes to equality and uniformity of sentencing in Kenya, the script reads like a tragedy. To take one simple illustration, on 20 September 2012, the prosecution charged Robert Kinara with stealing six kilogrammes of maize worth Ksh. 600. The court sentenced him to a jail sentence of seven (7) years after trial and conviction. This is despite his pleading for leniency, saying he was only 17 years of age and a first offender.<sup>36</sup> Only a few days before Kinara's sentencing, an accused in the multi-billion shilling Anglo-Leasing scam had been given a non-custodial sentence and a fine of KES 3 million after being convicted for his role in the corruption scandal.<sup>37</sup> While an advocate for individualised sentencing might dismiss such comparisons as unfair or even not convincing, it is important to note that social stratification embeds public perception on sentencing. With mega-corruption scandals having plagued Kenya in the recent past, there has been a lingering feeling in the public space that rich and politically connected Kenyans do not get their just deserts when it comes to criminal offence sentencing. In highly racially stratified communities like parts of South Africa and the US, the question whether unequal sentencing leans on one race has been persistent.<sup>38</sup>

Simplicity as a principal policy goal in sentencing has not been included in the SPGs. At this early stage in the introduction of sentencing guidelines in Kenya, the imperative for the introduction of such a principle is not urgent since the SPGs do not have grids and tiered-matrices like those in some US states that are overly complex. The Taskforce did not foresee any such complexities in the implementation of the SPGs. Inadvertently, therefore, it seems as if the SPGs have taken the path of simplicity without necessarily acknowledging it as a principle. The SPGs provide a list of seventeen (17) aggravating factors and ten (10) mitigating factors. These are modest requirements that might leave enough leeway for judicial discretion.<sup>39</sup> Yellen has argued that modest sentencing guidelines goals result in a workable system that achieves considerable consistency and allows appropriate individualisation of sentences.<sup>40</sup>

Part II of the SPGs provide for penal sanctions, and offer policy directions for their application. It includes the penal sanctions enumerated in the Penal

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<sup>36</sup> Mutiga M, 'Justice system cries out for equality' *Daily Nation* 13 October 2012.

<sup>37</sup> Mutiga, 'Justice system cries out for equality'.

<sup>38</sup> See Daly K and Tonry M, 'Gender, race, and sentencing' 22 *Crime & Justice*, 1997, 201-243.

<sup>39</sup> *Sentencing Policy Guidelines*, 2016, para. 23.7-23.8.

<sup>40</sup> Yellen D, 'Reforming the federal sentencing guidelines: Misguided approach to real-offence sentencing' 58 *Stanford Law Review*, 2006, 275.

Code;<sup>41</sup> the Criminal Procedure Code,<sup>42</sup> the Security Laws (Amendment Act),<sup>43</sup> the Alcoholic Drinks Control Act,<sup>44</sup> the Environmental Coordination and Management Act (EMCA),<sup>45</sup> and the Narcotic Drugs and Psychotropic Substances Act.<sup>46</sup> The death penalty and imprisonment as forms of punishments have been controversial in the recent past. According to the SPGs the only penal and corrective sanctions recognised in Kenya are: Death penalty, imprisonment, community service orders, probation orders, fines, payment of compensation, forfeiture, finding security to keep the peace and being of good behaviour,<sup>47</sup> absolute and conditional discharge, suspended sentences, restitution, suspension of certificate of competency in traffic offences, police supervision, revocation/forfeiture of licences, and committal to rehabilitation centres. Due to limits on space, this commentary will only address the death penalty.

#### 4.1 Death penalty

The SPGs correctly stipulate that death penalty applies to those found guilty of murder, treason, administration of unlawful oaths to commit capital offences, capital robbery or attempted capital robbery. It is a mandatory sentence.<sup>48</sup> The mode of administering the death penalty in Kenya is by hanging.<sup>49</sup> The exceptions to the death penalty are children<sup>50</sup> and pregnant women.<sup>51</sup>

The SPGs appreciate that the law recognises mandatory death penalty.<sup>52</sup> The State last executed Hezekiah Rabala Ochuka and Pancras Oteyo Okumu in

<sup>41</sup> Penal Code, Cap 63.

<sup>42</sup> The Criminal Procedure Code, Chapter 75, Laws of Kenya.

<sup>43</sup> Security Laws (Amendment Act), No. 19 of 2014.

<sup>44</sup> Alcoholic Drinks Control Act, No. 4 of 2010.

<sup>45</sup> Environmental Coordination and Management Act (EMCA), Act No. 8 of 1999.

<sup>46</sup> Narcotic Drugs and Psychotropic Substances Act No. 4 of 1994.

<sup>47</sup> Declared unconstitutional in *Anthony Njenga Mbuti & 5 others v Attorney General & 3 others* [2015] though the SPGs 2016 do not mention this unconstitutionality and the provisions are yet to be revised in the Penal Code, Cap 63.

<sup>48</sup> Section 259(1), Penal Code, Cap 63.

<sup>49</sup> Section 69, Prisons Act, Cap 90 (When any person is sentenced to death, he shall be hanged by the neck until he is dead and the sentence shall be carried out in such manner as the Commissioner shall direct).

<sup>50</sup> Section 90, Children's Act, Cap 141.

<sup>51</sup> Section 211, Penal Code, Cap 63; Article 6(5) *International Covenant on Civil and Political Rights* (ICCPR); African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, para. 9(c).

<sup>52</sup> *Sentencing Policy Guidelines*, 2016, para. 6.4.

1987.<sup>53</sup> Even with this *de facto* moratorium, courts still pass the death sentence, as it is still present in Kenyan statutes.

Additionally, divergent views in the courts with regard to the constitutionality of the death penalty have emerged. The Court of Appeal in the case of *Joseph Njuguna Mwaura and others v Republic*<sup>54</sup> found that courts do not have discretion in respect to offences that attract the mandatory death sentence. However, in the case of *Godfrey Ngotho Mutiso v Republic*,<sup>55</sup> the Court of Appeal found the mandatory death sentence to be unconstitutional. Following this decision, there have been divergent views with some courts imposing custodial sentences for offences attracting the death penalty.<sup>56</sup> The Court of Appeal in *Joseph Njuguna Mwaura v Republic* sought to settle the debate by emphasising that courts do not have discretion in respect to offences, which attract a mandatory death sentence. Furthermore, some offenders imprisoned at the President's pleasure are held indeterminately with no recourse.<sup>57</sup>

According to SPGs, in the absence of law reform or the reversing of the decision in *Joseph Njuguna Mwaura and others v Republic*, courts must impose the death sentence in respect to capital offences in accordance with the law.<sup>58</sup> To curb the situation of the indeterminate imprisonment at the President's pleasure, the court's recommendation was for the President to act pursuant to section 25(3) of the Penal Code. This recommendation requires that the President should review a case after a fixed period.<sup>59</sup> The guidelines direct that where a court convicts an accused person of several counts of capital offences, the court must pass a death sentence on each count and direct that the first be held in abeyance.<sup>60</sup> The mandatory death sentence penalty continues to be debatable especially on issues concerning its constitutionality.

The SPGs remain silent on the constitutionality of the death sentence in view of the 2010 Constitution. Admittedly, this is difficult to fathom, as the

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<sup>53</sup> Asiema J, Ongoya E, 'The application of the death penalty in Kenya: A case of torturous de facto abstinence' [http://www.biicl.org/files/2196\\_country\\_report\\_kenya\\_asiema.pdf](http://www.biicl.org/files/2196_country_report_kenya_asiema.pdf), accessed 9 March 2016; *Sentencing Policy Guidelines*, 2016, para. 6.4.

<sup>54</sup> *Joseph Njuguna Mwaura and others v Republic*, Criminal Appeal No. 5 of 2008 [2013] eKLR.

<sup>55</sup> *Godfrey Ngotho Mutiso v Republic*, Criminal Appeal No. 17 of 2008 [2010] eKLR.

<sup>56</sup> *Republic v John Kimita Mwaniki* [2011] eKLR; *Republic v Stephen Wekesa Wasike* [2014] eKLR, *Sabastiam Okwaro Mrejfu v Republic* [2014] eKLR.

<sup>57</sup> Section 25 (2) Penal Code, Cap 63; *Sentencing Policy Guidelines*, 2016, para. 6.2.

<sup>58</sup> *Sentencing Policy Guidelines*, 2016, para. 6.5.

<sup>59</sup> *Sentencing Policy Guidelines*, 2016, para. 6.5.

<sup>60</sup> *Okwaro Wanjala v Republic* [1978] KLR 114, *Shah v Republic* [1985] KLR 674, *Moses Atila Othira v Republic* [2009] eKLR.

SPGs would be pre-empting questions that might come or are currently being adjudicated in Kenyan courts. Defenders of the death penalty would argue that this view is incorrect, since the SPGs stipulate that the mandatory death penalty remains constitutional as long as *Joseph Njuguna Mvaura and Others v Republic* remains good law. That should be the end of the discussion but for the fact that the issues on the death penalty have been known to be universally divisive, impassioned, and controversial.<sup>61</sup> Human rights defenders are of the now codified international law view that such a penalty should be abolished immediately and unconditionally.<sup>62</sup> In South Africa, after the *locus classicus* decision in *State v Makwanyane and another*,<sup>63</sup> the death penalty is now unconstitutional for being a cruel, inhuman, and degrading punishment. Justice Chaskalson stated in *Makwanyane* that,

by [South Africa] committing herself to a society founded on the recognition of human rights [then she] was required to value [the right to life and dignity] above all others.<sup>64</sup> And this must be demonstrated by the State in everything that it does, including the way it punishes criminals.<sup>65</sup>

Tanzania, like Kenya, is now a *de facto* abolitionist State with the last execution having taken place in 1994. Therefore, death row inmates in Kenya and Tanzania face uncertainty as to whether they will eventually face the hangman.

In the US where it is still federally constitutional, the liberal wing of the Supreme Court has been on a quest for decades to convince the nation and the global community that such punishment is unconstitutional.<sup>66</sup> In 1963, Justice Arthur Goldberg<sup>67</sup> did an unusual act in the US Supreme Court practice. He circulated to each Justice a memorandum for six capital punishment cases

<sup>61</sup> Chenwi L, 'Towards the abolition of the death penalty in Africa: A human rights perspective' Unpublished LLD Thesis, University of Pretoria, 2005; Fine T, 'Moratorium 2000: An international dialogue toward a ban on capital punishment' 30 *Columbia Human Rights Law Review*, 1999, 42; Greenberg F & West V, 'Siting the death penalty internationally' 33 *Law & Social Inquiry*, 2008; Hochkammer W, 'The capital punishment controversy' 60 *Journal of Criminal Law and Criminology*, 3, 1970; Smit DVZ, 'The death penalty in Africa' 4 *Human Rights Law Journal*, 2004; Marcus P, 'Capital punishment in the United States and beyond' 31 *Melbourne University Law Review*, 2007.

<sup>62</sup> Nowak A, 'Capital sentencing in Southern Africa: A human rights perspective on the doctrine of extenuating circumstances in death penalty cases' 14 *African Human Rights Law Journal*, 2014, 24.

<sup>63</sup> *State v Makwanyane and another* (CCT3/94) [1995] ZACC 3.

<sup>64</sup> *State v Makwanyane and another*, para. 144.

<sup>65</sup> *State v Makwanyane and another*, para. 144.

<sup>66</sup> *Tennessee v Garner*, 471 US 1, 13 fn 11 (White J for Brennan, White, Marshall, Blackmun, Powell and Stevens JJ) (1985); *Witherspoon v Illinois* 391 US 510 (1968); *Furman v Georgia* 402 US 183 (1971).

<sup>67</sup> Justice Goldberg served as Associate Justice for the short period from 28 July 1965 to 24 June 1968.

for which certiorari petitions<sup>68</sup> were pending.<sup>69</sup> This began the liberal wing's contest against the death penalty that persists to date. Justice Goldberg never convinced his fellow justices to grant certiorari in any of the cases. However, he wrote a dissent from denial of certiorari in *Rudolph v Alabama*,<sup>70</sup> joined by former Justices William Douglas and William Brennan both of whom were liberal justices opposed to the death penalty. Justice Goldberg was then the first to make the argument that the death penalty was inconsistent with the 8<sup>th</sup> Amendment's<sup>71</sup> prohibition of cruel and unusual punishments. Justice Brennan put it thus:

On the death penalty, for example, I interpret the eighth amendment, its prohibition against cruel and unusual punishments embodies to a unique degree moral principles that substantively restrain the punishments governments of our civilized society may impose on those convicted of capital offences. Foremost among the moral principles inherent in the constitutional prohibition is the primary principle that the state, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. A punishment must not be so severe as to be utterly and irreversibly degrading the very essence of human dignity.<sup>72</sup>

Justice Stephen Breyer a current justice in the US Supreme Court, clerked for Justice Goldberg.<sup>73</sup> He is evidently one of the strongest proponents against the death penalty, continuing the project begun by Justice Goldberg.

To show the entrenched nature of the *de facto* abolition of the death penalty in Kenya, the last execution in Kenya took place in 1987. The question remains as to what purpose the death penalty serves in Kenya. If it does not seem to be in use, what is its purpose? Does it meet any of the six objectives of sentencing highlighted in the SPGs? Moreover, if the answer to this question were in the affirmative, which specific objective does it meet? Furthermore, it is important to note that the debate in Kenya has not been on the constitutionality of the death penalty *per se* but on the abolition of the mandatory death sentence. Therefore, the debate in Kenya has not been one for the abolition of the death penalty but

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<sup>68</sup> These are the petitions drafted by appellants to the US Supreme Court requesting the court to accept to hear the cases fully on their merits.

<sup>69</sup> Brennan J, 'Constitutional adjudication and the death penalty: A view from the Court' 100 *Harvard Law Review*, 1986, 314.

<sup>70</sup> *Rudolph v Alabama* 375 US 889 (1963).

<sup>71</sup> 8<sup>th</sup> Amendment, US Constitution (Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted).

<sup>72</sup> Brennan J, 'In defense of dissents' 50 *Hastings Law Journal*, 1999, 680.

<sup>73</sup> Ray L, 'The legacy of a Supreme Court clerkship: Stephen Breyer and Arthur Goldberg' 115, *Penn State Law Review*, 1, 2010 (Arguing that Justice Breyer was in ideological harmony with Justice Goldberg).

has been on the removal of the mandatory death sentence as violating the 2010 Constitution.<sup>74</sup>

The situation is markedly different in Uganda. While the death penalty remains embedded in and is constitutional in Uganda,<sup>75</sup> the celebrated case of *Susan Kigula & 416 others v Attorney General*<sup>76</sup> declared the mandatory nature of the death penalty unconstitutional. The decision was and still is a significant constitutional moment in Uganda and the East African regional at large. The Ugandan Constitutional Court held that the mandatory death sentence unreasonably fetters judicial discretion and thus does not allow a judge the opportunity to consider the individual circumstances of the convict. Furthermore, the Constitutional Court held that any convict who did not receive a conviction within three years had to have their sentence commuted to life sentence. These are regional developments that the Taskforce conveniently ignored and wrote the guidelines as if Kenya was a legal isolated island and could not select from progressive developments elsewhere. I call these developments progressive as Kenya has recently boasted a progressive constitution after the enactment of its 2010 Constitution. Yet the Taskforce did not see it fit to mention that the mandatory death sentence could be invidious to the extent of declaration of unconstitutionality in Uganda. Admittedly, the Taskforce could argue that such deep incisions of the law were not part of their terms of reference.

It would be important, however, to remember that even though Uganda's decision in *Susan Kigula* is a cause of celebration<sup>77</sup> the State still has the highest number of offences that are punishable by capital punishment at 28 offences (civilian and military).<sup>78</sup> Kenya has 5 offences, Tanzania has 4, while the shining

<sup>74</sup> Gathii T, *The contested empowerment of Kenya's Judiciary, 2010-2015: A historical institutional analysis*, Sheria Publishing Press, Nairobi, 2016, 163; (Showcasing how the debate on the death penalty in Kenya has revolved around its mandatory nature using the following cases: *See Mutiso v R* [2010] eKLR; *Joseph Njuguna Mwaure & 2 others v Republic* [2013] eKLR; *Jackson Maina Wangui & Another v Republic* [2014] eKLR).

<sup>75</sup> See Constitution of the Republic of Uganda, 1995, section 22(1) (No person shall be deprived of life intentionally except in *execution of a sentence* passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court).

<sup>76</sup> *Susan Kigula & 416 others v Attorney General*, Constitutional Petition No. 6 of 2003, [2005] UGCC 8 (10 June 2005).

<sup>77</sup> *Attorney General v Susan Kigula & 417 Others* (Constitutional Appeal No.3 of 2006) [2009] UGSC.

<sup>78</sup> Nantume L, 'The death penalty in Uganda: Obstacles to the adoption of the Draft Protocol and strategies the civil society could undertake to mitigate them' *Round table on the draft Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the death penalty in Africa. World Congress against the Death Penalty*, 2016.

unicorns in the Eastern Africa region are Rwanda and Burundi, which have both abolished the death penalty. The approach in Uganda did not deal a complete blow to the death penalty, but such an approach can be termed ‘incrementalist’ and might in future see the abolition of the death penalty.<sup>79</sup> The SPGs, however, point to the case that might just easily deal a blow to the mandatory nature of the death penalty in Kenya. The case, which at the time of writing has gone through oral hearings at the Supreme Court of Kenya, is that of *Francis Karioko Muruatetu & Wilson Thirumbu Mwangi v Republic*.<sup>80</sup> The case will put the highest court in the land to the test in developing progressive jurisprudence as regards the death penalty.

The Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)<sup>81</sup> was adopted on 15 December 1989 but Kenya has neither signed nor ratified it to date. This means that Kenya is not party to obligations requiring it to abolish the death penalty. This further means that under international law, Kenya has not formally committed itself to the abolition of the death penalty *de jure*. ‘If the death penalty is constitutional, [therefore in Kenya], there must be a constitutional means of carrying it out,’ as Justice Samuel Alito of the US Supreme Court has counselled.<sup>82</sup> Even further, if it is constitutional, the courts must impose it and the executioner must carry it out. The ‘unconscionably long delays [are] undermining the death penalty’s penological purpose.’<sup>83</sup> It is for this reason that, twice in the past decade, Kenya’s current and former Presidents have exercised their powers under the prerogative of mercy to commute all the death sentences to life imprisonment.

Under Kenyan and Ugandan law, the mode of execution of capital punishment is through hanging. The mode of execution has been one of the motives for attacking of the death penalty. Different jurisdictions used the firing squad at different points in history.<sup>84</sup> States have used other methods argued to be more humane, including; electrocution, lethal gas, and the lethal injection.<sup>85</sup> The ques-

<sup>79</sup> See Gathii T, *The contested empowerment of Kenya’s Judiciary, 2010-2015: A historical institutional analysis*, Sheria Publishing Press, Nairobi, 2016, 10-23 (Making appropriate arguments on theories that might explain judicial empowerment).

<sup>80</sup> *Francis Karioko Mwangi and Wilson Thirumbu Mwangi v Republic*, constitutional petition 15 & 16 of 2015.

<sup>81</sup> *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty*, 1642 UNTS 414.

<sup>82</sup> *Glossip v Gross* 576 US \_ (2015) (Justice Samuel Alito, Majority Opinion).

<sup>83</sup> *Glossip v Gross* 576 US \_ (2015) (Justice Breyer, Dissenting Opinion).

<sup>84</sup> Dieter R, ‘Methods of execution and their effect on the use of the death penalty in the United States’ XXXV *Fordham URB Law Journal*, 2008, 793.

<sup>85</sup> Dieter R, ‘Methods of execution and their effect on the use of the death penalty in the United



tion has been which mode is the most humane to carry out this punishment. Kenya has avoided this debate and the SPGs do not even mention the issue. The reason is perhaps that the terms of reference for the Taskforce did not require them to delve this deep. However, both proponents and opponents have to deal with the issue of method if the debate on the death penalty is to settle. The truth of the matter is that so long as the capital punishment remains, then the risk of pain will have to endure. The argument of having a painless death has been a difficult one to sustain; in fact, the argument for complete abolition is easier to make than that of reducing the risk of pain in executions.

## 4.2 Imprisonment

According to the SPGs, courts have the discretion to impose a sentence shorter than that prescribed by the relevant provision except where the penal statute prescribes mandatory or minimum sentences. The Penal Code provides maximum sentences in most cases.<sup>86</sup> Statutes such as the Sexual Offences Act<sup>87</sup> provide minimum and maximum sentences.<sup>88</sup> The Security Laws (Amendment) Act<sup>89</sup> provides minimum sentences in some instances.<sup>90</sup> In the event that the courts convict a person of more than one offence, the sentences imposed for each of the offences run consecutively except where the court directs that they run concurrently.<sup>91</sup> The court can also order that part of the custodial sentence be served in a rehabilitation centre, where the court is satisfied that an offender is addicted to narcotic drugs or psychotropic substances and that s/he is in possession of those substances only for his/her own consumption.<sup>92</sup>

There are notable disparities in the length of imprisonment of offenders committing the same offences in more or less similar circumstances. The lack of uniformity and certainty in the sentences has contributed to the negative

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States', 791, 793, 797.

<sup>86</sup> Section(s) 30, 36, 46, 53(1), 66A(1), 66A(2), 77(2), 96, Penal Code, Cap 63.

<sup>87</sup> Sexual Offences Act, No. 3 of 2006.

<sup>88</sup> Section 3(2), Sexual Offences Act No.6 of 2006 (A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life); Section 6, Sexual Offences Act (imprisonment for a term which shall not be less than five years).

<sup>89</sup> Security Laws (Amendment) Act, 2014.

<sup>90</sup> Section 13, 14, 39 Security (Amendment) Act (Section 39 amends the section 12 of the Traffic Act, Cap 403... imprisonment for a term not exceeding twelve months or both).

<sup>91</sup> Section 37, Penal Code, Cap 63; Section 14, Criminal Procedure Code, Cap 75.

<sup>92</sup> See generally *Sentencing Policy Guidelines*, 2016, para. 7.



perception against the Judiciary and lends support to claims of corruption and unprofessionalism.<sup>93</sup> Another problem is overcrowding in prisons caused by over-utilisation of custodial sentences. There have also been divergent practices in respect to the impact of time served in custody during trial and what impact this has on the final sentence imposed.<sup>94</sup> Moreover, courts need to address the question as to whether sentences should run concurrently or consecutively.<sup>95</sup> The general rule under the Penal Code<sup>96</sup> is that the sentences run consecutively unless otherwise directed by the court. Further, the courts should consider the possibility of committing offenders to drug rehabilitation centres.

The SPGs direct that in determining the period of imprisonment, the court must take into account the period in which the offender is in custody during the trial.<sup>97</sup> If an offender is convicted of a misdemeanour and had been in custody throughout for a period equal to or exceeding the maximum term of imprisonment provided for that offence, they should be discharged absolutely under section 35(1) of the Penal Code.<sup>98</sup>

With regard to concurrent and consecutive sentences, where the offences emanate from a single transaction, the sentences should run concurrently.<sup>99</sup> However, if they are committed in the course of multiple transactions and there are multiple victims, the sentences should run consecutively.<sup>100</sup> The discretion to impose concurrent or consecutive sentences lies with the court.<sup>101</sup> In the case of imprisonment in default of payment of a fine, the sentence cannot run concurrently with a previous sentence.<sup>102</sup>

In the event that the law provides mandatory minimum sentences, then the court cannot impose a sentence lower than what the penal statute prescribes.<sup>103</sup> The SPGs point out that these mandatory sentences can cause undue injustice in light of individual circumstances.<sup>104</sup> This, the policy stipulates, can only be

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<sup>93</sup> *Sentencing Policy Guidelines*, 2016, para. 7.5.

<sup>94</sup> *Sentencing Policy Guidelines*, 2016, para. 7.6.

<sup>95</sup> *Sentencing Policy Guidelines*, 2016, para. 7.8.

<sup>96</sup> Penal Code, Cap 63, section 37.

<sup>97</sup> *Sentencing Policy Guidelines*, 2016, para. 7.10; Section 333(2) Criminal Procedure Code, Cap 75.

<sup>98</sup> *Sentencing Policy Guidelines*, 2016, para. 7.12.

<sup>99</sup> *Sentencing Policy Guidelines*, 2016, para. 7.13.

<sup>100</sup> *Sentencing Policy Guidelines*, 2016, para. 7.13.

<sup>101</sup> *Sentencing Policy Guidelines*, 2016, para. 7.14.

<sup>102</sup> Section 37, Penal Code, Cap 63.

<sup>103</sup> *Sentencing Policy Guidelines*, 2016, para. 7.17.

<sup>104</sup> *Sentencing Policy Guidelines*, 2016, para. 7.17.

resolved through law reform.<sup>105</sup>

It is further in accordance with policy that where the option of non-custodial sentence is available, courts should reserve custodial sentence for a case in which the objectives of sentencing cannot be met through a non-custodial sentence.<sup>106</sup> This is keeping in mind the high rates of recidivism.<sup>107</sup>

The SPGs require that courts take into account the following factors in deciding whether to impose a custodial or non-custodial sentence:

- (a) A sentence of imprisonment should be avoided with regard to misdemeanours;
- (b) First offenders should be considered for non-custodial sentences in the absence of other factors impinging on the suitability of such a sentence – repeat offenders should be ordered to serve a non-custodial sentence only when it is evident that it is the most suitable sentence in the circumstance;
- (c) For children in conflict with the law, custodial orders should only be meted out as a measure of last resort;
- (d) Non-custodial sentences are best suited for offenders who are already remorseful and receptive to rehabilitative measures;
- (e) A non-custodial sentence may not be most appropriate where there is evidence that the offender is likely to pose a threat to the community; and
- (f) Where committing an offender to a custodial sentence is likely to unduly prejudice others, particularly vulnerable persons who depend on him/her, the court should consider a non-custodial sentence if, in light of the gravity of the offence, no injustice will be occasioned.<sup>108</sup>

Where the court is satisfied that an offender convicted of an offence under the Narcotic and Psychotropic Substances (Control) Act<sup>109</sup> is a drug addict, it should make an order requiring the offender to serve a term in a rehabilitation

<sup>105</sup> *Sentencing Policy Guidelines*, 2016, para. 7.17.

<sup>106</sup> *Sentencing Policy Guidelines*, 2016, para. 7.18.

<sup>107</sup> Legal Resources Foundation, *Sentencing in Kenya: Practice, trends, perceptions and judicial discretion*, LRF 2011, 37 cited in *Sentencing Policy Guidelines*, 2016, para. 7.18.

<sup>108</sup> *Sentencing Policy Guidelines*, 2016, para. 7.19.

<sup>109</sup> Narcotic and Psychotropic Substances (Control) Act, No. 4 of 1994.

centre.<sup>110</sup> The court should give reasons upon imposing a sentence of imprisonment.<sup>111</sup> The court should also impose a maximum penalty of imprisonment where there are grave circumstances justifying the imposition of such a sentence.

The SPGs note that in most cases courts mete out imprisonment punishment.<sup>112</sup> Imprisonment is also the sentence that is most unstructured and most reliant on judicial discretion. Consequently, there are notable disparities in the length of imprisonment of offenders committing the same offences in more or less similar circumstances.<sup>113</sup> Kinyanjui and Akech illustrate this variance in courts around the country and demonstrate the uncertainty and lack of uniformity.<sup>114</sup> The SPGs note five factors that need review to ensure certainty and uniformity when it comes to custodial sentencing in Kenya.<sup>115</sup> The most important of these is the disparities in the length of imprisonment of offenders committing the same offences in more or less similar circumstances.<sup>116</sup>

The SPGs point to legislative guidance that has structured custodial sentencing. Judicial practice shows an adherence to section 333(2) of the Criminal Procedure Code (CPC), which obliges courts to take into account the time already served by the convicted person during the trial.<sup>117</sup> This is in recognition of the principle of just deserts, which advocates for punishment proportional to the offence. Courts also adhere to the requirements under section 37 of the Penal Code on concurrent and consecutive sentencing and section 26 on mandatory minimum sentences. Despite these, the disparities in custodial sentencing remain and the SPGs seek to remedy the existing problem by providing detailed directions to ascertain factors influencing custodial sentencing.<sup>118</sup>

The SPGs describe the process judges are to use to arrive at a determination of custodial sentences. Courts should do this by ascertaining the starting point as 50 percent of the maximum custodial sentence provided for by the statute for a particular offence. A court should then either lessen the term because of mitigating factors or increase the term because of aggravating circumstances. Where there are both aggravating and mitigating factors, a court should

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<sup>110</sup> *Sentencing Policy Guidelines*, 2016, para. 7.20.

<sup>111</sup> Musyoka W, *Criminal Law*, Law Africa, Nairobi, 2013.

<sup>112</sup> *Sentencing Policy Guidelines*, 2016, para. 7.1.

<sup>113</sup> *Sentencing Policy Guidelines*, 2016, para. 7.5.

<sup>114</sup> Kinyanjui & Akech, 'Towards structured sentencing in Kenya'.

<sup>115</sup> *Sentencing Policy Guidelines*, 2016, para. 7.5-7.9

<sup>116</sup> Kinyanjui & Akech, 'Towards structured sentencing in Kenya.'

<sup>117</sup> *Sentencing Policy Guidelines*, 2016, para. 7.10.

<sup>118</sup> *Sentencing Policy Guidelines*, 2016, para. 23.7-23.9

determine which of the two outweighs the other. Where the mitigating factors outweigh the aggravating factors, the court is to proceed as if there is a single mitigating circumstance. Where the aggravating factors outweigh the mitigating circumstances, the court is to proceed as if there is a single aggravating circumstance. The SPGs attempt a non-exhaustive list of mitigating and aggravating circumstances. However, it is the courts' discretion to determine whether a factor is mitigating or aggravating.<sup>119</sup>

The determination of a 'starting point' to ascertain the term of a custodial sentence is invaluable for the actualisation of uniformity, impartiality, accountability and transparency principles set out in the SPGs.<sup>120</sup> The proposed standardised calculation of sentences from the starting point will engender coherence, which the courts will consequently make in the process that leads up to the sentencing rather than in the substantive sentences themselves. This structure does not deprive the court of its discretion but rather delimits the extent of its exercise. Despite the change, courts will still retain much discretion. An example of such unfettered discretion is seen in cases where the maximum sentence is life imprisonment. It is impossible to ascertain the starting point, since the law of Kenya has not defined the term 'life imprisonment'.<sup>121</sup> Moreover, the courts' determination of the mitigating and aggravating factors; though the SPGs list examples, is a factor that demands individual assessment and hence, judicial discretion. The proposal to help a court discern whether to recognise a single mitigating circumstance or a single aggravating circumstance, though helpful, is not alive to the individualised context of each case.

The individualised nature of sentencing in each case outweighs the demand for consistency. However, this has not prevented the courts themselves from recognising the need for streamlined custodial sentencing. In the case of *Republic v Philip Muthiani Kathiwa*,<sup>122</sup> Justice Edward Muriithi stipulated that it is accepted practice that same offences should attract similar consistent penalties. In the cases of *Andrew v R*,<sup>123</sup> *Orwochi v R*<sup>124</sup> and *Muoki v R* the court had similar sentiments.<sup>125</sup> Justice Edward Muriithi proceeded to find similarity between the case and that of *Muoki v R*, hence commuting the sentence to a non-custodial one. The practice

<sup>119</sup> *Sentencing Policy Guidelines*, 2016, para. 23.7-23.9.

<sup>120</sup> *Sentencing Policy Guidelines*, 2016, para. 23.9.

<sup>121</sup> *Sentencing Policy Guidelines*, 2016, para. 23.10.

<sup>122</sup> *Republic v Philip Muthiani Kathiwa* [2015] eKLR.

<sup>123</sup> *Andrew v Republic* [1976-1980] eKLR 1688.

<sup>124</sup> *Orwochi v Republic* [1976-1980] eKLR 1638.

<sup>125</sup> *Muoki v Republic* [1985] KLR 323.

of judges has formed a structure, though pervious, that is able to respond to the need for individualisation of cases without abandoning the need for uniformity and consistency on two fronts. The first is in the appeal stage and the second is while the High Court exercises its revision powers. The Task Force should have studied these developing practices to design a structure that not only responds to but also completes judicial practice endeavours to create greater coherence.

The trial court's discretion in sentencing is inviolable for two reasons. First, the trial court interacts the most with an accused person.<sup>126</sup> In the case of *Haron Mandela Naibei v Republic*,<sup>127</sup> the judge of the High Court, acting as an appellate court, stipulated that there are only two avenues that justify interference with the discretionary power of the trial court as regards sentencing. The first is when it takes into account irrelevant matters, and the second, when it takes into account a relevant matter. Short of these, he propounded, the exercise would not only be unwarranted, but also wrong.<sup>128</sup> In the case of *Fatuma Hassan Salo v Republic*,<sup>129</sup> the court included other factors such as where the court had acted on a wrong principle, where the sentence imposed was manifestly inadequate and where it was manifestly excessive. The Court of Appeal asserted these factors in *Diego v Republic*<sup>130</sup> and *Dismas v Republic*.<sup>131</sup> In the aforementioned cases, the appellate court had to first ascertain whether it was properly interfering with the trial court's jurisdiction and then, comparing other 'like cases', impose a sentence that was consistent and uniform. This way, the Court of Appeal was able to arrive at factors that would require it to exercise its jurisdiction to revise a custodial sentence for the sake of uniformity and consistency.

The High Court's revision powers are the other front that has been availed to ensure uniformity and consistency.<sup>132</sup> In the case of *Republic v Mohammed Rage Shide*,<sup>133</sup> the High Court laid down the grounds for exercising revision powers without prejudicing the trial court's findings.<sup>134</sup> The first is that the party that is entitled to appeal cannot insist or maintain a cause for a criminal revision where an appeal lies and another party has not appealed.<sup>135</sup> The second is that a court

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<sup>126</sup> See *Okeno v Republic* [1973] EA.

<sup>127</sup> *Haron Mandela Naibei v Republic* [2014] eKLR.

<sup>128</sup> *Felix Nthwa Munyao v Republic* Criminal Appeal 187 of 2000.

<sup>129</sup> *Fatuma Hassan Salo v Republic* [2006] eKLR.

<sup>130</sup> *Diego v Republic* [1985] KLR 621.

<sup>131</sup> *Dismas v Republic* [1984] KLR 634.

<sup>132</sup> Section 362 Criminal Procedure Code, Cap 75.

<sup>133</sup> *Republic v Mohamed Rage Shide* [2016] eKLR.

<sup>134</sup> *Republic v Mohammed Rage Shide* [2016] eKLR.

<sup>135</sup> Section 364 Criminal Procedure Code, Cap 75 of 2010.

shall not order criminal revision that will prejudice an accused person's right to a fair hearing unless s/he has had an opportunity to be heard either personally or through an advocate in his own defence. Nothing, however, shall apply to an order made where a subordinate court has failed to pass a sentence, which it was required to pass under the written law creating the offence concerned.<sup>136</sup> The third is that the High Court cannot convert a finding of acquittal into one of conviction. This delimits the extent to which the High Court can exercise its powers to ensure consistency, and uniformity in custodial sentencing. In the *Mohamed Rage case*, the High Court proceeded to find the sentence lenient, compared to other 'like cases,' but was unable to alter the sentence as a result of the fetters placed on it.

The discretion of trial courts during custodial sentencing is not easily fettered. However, the SPGs attempt to lay down a rubric to provide structure in the exercise of this discretion as seen above. The exercise of appellate powers by the higher courts and revision powers by the High Court are advertently more capable of ensuring uniformity and consistency as their decisions do not only bind but also guide deliberation by lower courts. Better guidelines would stipulate clearly areas in which superior courts can interfere with the decisions by lower courts for the sake of uniformity and consistency in custodial sentencing. They would also provide for better mechanisms for exercise of the High Court's revision and supervisory powers to structure greater coherence in custodial sentencing, while clarifying the meaning of the terms 'manifestly inadequate sentences' and 'manifestly excessive sentencing'. The courts ought to strike a balance between respecting the individuality of cases and achieving the legal system's aim of uniformity, predictability and consistency. It is only then that justice will be done.

#### 4.3 *Charge-offence versus real-offence sentencing*

The question of what range of information judges consider when sentencing is a disturbingly difficult one when making any sentencing guidelines. At one extreme is the requirement that offenders convicted of violating the same statute receive identical sentences. At the other end, is the requirement that judges take into consideration all the available information about an offender's life including previous convictions.<sup>137</sup> These two extremes provide the two polarities of

<sup>136</sup> Section 364 Criminal Procedure Code, Cap 75 of 2010.

<sup>137</sup> Yellen D, 'Illusion, illogic, and injustice: Real-offence sentencing and the Federal Sentencing Guidelines' 78 *Minnesota Law Review*, 1994, 403.

charge-offence and real-offence sentencing. Charge-offence sentencing requires that prosecutors charge an offender with the conduct that constitutes the elements of the offence for which the accused allegedly committed. Real-offence sentencing, on the other hand, requires that courts sentence accused persons upon the actual conduct in which the defendant was engaged regardless of the charges the prosecutor proffers.<sup>138</sup>

To illustrate the difference between charge-offence sentencing and real-offence sentencing, an example will suffice. A person uses a gun in committing a burglary, shoots and injures a security guard, steals KES 100,000, and then refuses to stop at a police road check, and races away damaging property during the escape. A real-offence sentencing system will be concerned with all events and conduct of the accused in issuing an appropriate sentence. The real-offence sentencer will go further to inquire into the antecedents of the accused person, the amount of harm caused, the levels of personal culpability, and the degrees of danger of the accused person to the community. It will not matter that the prosecutor cannot and will not prove certain elements of the *de facto* offences allegedly committed. A charge offence system on the other hand would overlook certain acts that do not rise to the level or do not possess the criminal elements of criminal conduct prescribed in the Penal Code. So that if the prosecutor cannot prove certain elements of malicious destruction to property in the example above, the judge should not substantively consider the accused person's alleged offence of destruction of property during the commission of the offence. Charge-offence sentencing thus focuses on setting a sentence based entirely on the penal statute of conviction.<sup>139</sup> The consideration of any additional information about the offence or the offender introduces real-offence sentencing.

David Yellen argues that this dichotomy is not of binary alternatives.<sup>140</sup> The two forms of sentencing represent two extreme end points in a continuum of possible sentencing information.<sup>141</sup> The two forms of sentencing would easily evoke the image of two end points of an accordion where sentencing guideline drafters might stretch and squeeze to produce different results.<sup>142</sup> It is possible to see that real-offence is centred on a more individual-oriented approach towards

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<sup>138</sup> United States Sentencing Commission, *Federal Sentencing Guidelines Manual*, 1993, chapter. 1, pt. A(4)(a).

<sup>139</sup> Yellen D, 'Reforming the Federal Sentencing Guidelines' misguided approach to real-offence sentencing' 58 *Stanford Law Review*, 2006, 268.

<sup>140</sup> Yellen, 'Illusion, illogic, and injustice', 404.

<sup>141</sup> Yellen, 'Illusion, illogic, and injustice', 404.

<sup>142</sup> This [meaningless but apt] metaphor is borrowed from the WTO Dispute Appellate Body Report on *Japan-Alcoholic Beverages*, International Trade Law Reports (ITLR) Vol. 1, Iss. 2, 11 July 1996, 231.

judicial sentencing. It gives the judge wide discretion to consider information on how and in what circumstances and context the offence was committed. Implementing it would be complex and administratively burdensome. It might also lead to outcomes that are manifestly unfair. Charge-offence on the other hand undermines the goals of individualisation and proportionality. The system of charge-offence sentencing, however, promotes consistency as a sentencing goal if applied uniformly. However, such uniform application is in most circumstances difficult or almost impossible to achieve. This system also overly enhances the role played by the prosecutor in the selection of the charge. In a charge-offence sentencing system, the offender usually deems the sentence delivered when the prosecutor proffers the charge. This has been the practice in Kenya. The prosecutors have a lot of control when it comes to proffering charges.

The SPGs do not mention this dichotomy on a polycentric level in order to guide the courts on what factors or information to consider during sentencing. This essentially means that the Taskforce did not regard this as a pivotal task or issue when developing the SPGs. However, probation and children officers are required to provide information not limited to the following: the circumstances under which the offence was committed; the offender's background; the offender's family; the offender's past criminal history; the responsibilities the offender has in society and whether s/he is a primary care giver; the offender's health status; the offender's means of livelihood; the offender's social status; the offender's attitude towards the offence/remorsefulness; the likelihood of the offender reforming; the impact of the offence on the victim; and any other relevant information. The SPGs in this case point to section 329 of the CPC and United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), para 16.1.<sup>143</sup> Section 329 of the CPC makes provision for the court to consider victim impact statements.

## 5. Conclusion

This contribution has made a general commentary and introduction to the SPGs. We have seen that the SPGs come at an important time for the criminal justice system in Kenya. The guidelines outline and codify the objectives and principles of sentencing that before only statute and case law outlined. The article has pointed out that there are some issues that the guidelines do not deal with;

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<sup>143</sup> *Sentencing Policy Guidelines*, 2016, para. 22.8-23.15.



however, this contribution is not intended as sparking a polemic on the SPGs. As it stands now, the SPGs are an important starting point and the stakeholders can make numerous improvements on them. It is most urgent to have a standing administrative authority established by an Act of Parliament to develop, monitor, and implement the SPGs. The article also analysed the two contentious areas of criminal punishment; the death penalty and imprisonment. While the SPGs seem to have offered some helpful direction on imprisonment (including non-custodial sentences), the death penalty still remains one of those thorny issues that will need to be addressed urgently.