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肯尼亚国家人权委员会提交的材料*

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Annex

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The Death Penalty in Kenya

I. Introduction

1.1 Kenya National Commission on Human Rights

1. The Kenya National Commission on Human Rights (KNCHR) makes this submission to the Office of the High Commissioner for Human Rights ahead of the high level panel discussion on the question of the death penalty.

2. KNCHR is an independent National Human Rights Institution with 'A status' accreditation. The Commission was originally a statutory body established under the KNCHR Act of 2003. With the promulgation of the 2010 Constitution, the Commission was re-established under Article 59 (4) of the 2010 Constitution and for that reason, enjoys Constitutional protection as a Constitutional Commission.

3. Pursuant to the KNCHR Act (No.14 of 2011), the Commission is mandated to act as the principal organ of the State in promoting and protecting human rights for all in Kenya. In line with the new constitutional dispensation and in keeping with the expansive Bill of Rights, KNCHR recognizes the right to life as a fundamental human rights and is on the fore front in advocating for the full abolishment of the death penalty in law.

1.2 Overview of the Kenyan situation

4. The death penalty has been part of Kenya's legal system for the last 120 years[1]. In the East African Region, Kenya has the highest number of death row inmates (1558 –up from 1,140 by the end of 2011 (30 of these are women). Uganda by comparison had 505 prisoners on death row. The Statistics have not always been low in Kenya but helped by the commutation of some 4,000 death sentences to life imprisonment. Currently, there are around 8,000 capital punishment cases in remand, awaiting trial. The numbers of people executed from 1963 to 1987 were 280.

5. The international trend toward abolition reflects a shift in the death penalty paradigm. Whereas the death penalty was once viewed as a matter of domestic penal policy, now it is seen as a human rights issue. The 2nd Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) calls for abolition of the death penalty. Protocols 6 and 13 to the European Convention on Human Rights as well as the Additional Protocol to the American Convention on Human Rights also call for abolition of the death penalty.

6. Many human rights organizations and intergovernmental organizations, such as the European Union, see the death penalty as one of the most pressing human rights issues of our time and accordingly have taken an active role in persuading countries to halt executions.

II. Kenya and the Death Sentence

2.1 The Law

7. The Kenyan Penal Code provides for a mandatory death penalty for the crimes of murder (Section 204), robbery with violence (Section 296(2), attempted robbery with

[1] 70 years through colonialism and more than 50 years since independence

violence (Section 297(2) of the Penal Code), administering an oath purported to bind a person to commit a capital offence (Section 60 of the Penal Code) and treason (Section 40(3). The method of execution is by hanging.

8. There has been a de facto moratorium of the death penalty in force in Kenya since 1987; however the death penalty still remains in the laws of Kenya. The difficulty with the legal provisions is that the death sentence is not reserved for the most serious crimes. The sentence for robbery is 14 years imprisonment but Section 296 (2) provides that *'If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.'* The difficulty is with this broad definition of robbery with violence, which could see one end up on death row for the mere fact that he was in the company of another, even where no actual violence is used. In fact, from the survey conducted, majority of those on death row are robbery with violence offenders.

9. As the country continues to ratify international treaties, the conflict between such treaties and the domestic law becomes glaring. The International Crimes Act (Cap 16) for instance, provides that the provisions of the Rome Statute relating to penalties shall have the force of law in Kenya. The irony is that if one were to be tried under this Act, for committing genocide, crimes against humanity or war crimes, the person would be liable to a maximum sentence of life imprisonment as provided under the Rome Statute. Compare this to one sentenced to death sentence for robbery with violence and the irony becomes very clear.

10. In 2003, the former President, Mwai Kibaki commuted 223 death row convicts to life imprisonment. This included 28 prisoners who were subsequently released after serving between 15 and 20 years on death row. The then Vice- President, Moody Awori, when releasing the 28 death row prisoners, stated his intention to introduce a Bill in Parliament to abolish the death penalty. The then Commissioner of Prisons, Abraham Kamakil, termed the 2003 mass commutation a "historic event", saying that the death penalty should be abolished because it claimed innocent lives. He observed, "We are longing for the day Parliament will remove the death penalty from our Constitution." The same views were echoed by the then Minister for Justice and Constitutional Affairs, Hon. Kiraitu Murungi, who reiterated that the death penalty, being a violation of human rights, should be abolished and death row convicts would soon have their sentences commuted to life.[2]

11. On 8 March 2009, then Vice-President Kalonzo Musyoka said the Kenyan government was reviewing the death penalty. The Vice-President said his office was consulting with the Attorney-General and the President's offices to chart the way forward. He stated that "some African countries like Rwanda have already abolished the death penalty; we may go in that direction if there is consensus."[3]

12. In 2009, President Kibaki commuted the death sentences of more than 4,000 death row in-mates. This has been termed as was the biggest known mass commutation of death sentences to life sentences anywhere in the world.[4] The President also issued a directive to all relevant Government Ministries and Departments to conduct empirical studies and engage all stakeholders urgently, to determine whether the continued existence of the death

[2] KNCHR, Position paper no 2 of 2007, para.14

[3] Penal Reform International, The abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda, pg.10. available at www.penalreform.org

[4] Ibid

penalty in the laws of the land has any value or impact in the fight against crime.[5] This was done in recognition of the fact that 'extended stay on death row causes undue mental anguish and suffering, psychological trauma, anxiety and constitutes inhuman treatment.'[6] Three years later, the results of these studies remain unknown, all indications being that such studies were never actually carried out.

13. The courts have continued to issue the death sentence. A budgetary allocation is made each year for servicing of the gallows on the understanding that for as long as the death sentence remains in the statutes, the means of execution must be available at all times. The difficulty with the Kenyan situation is that the sentences are passed but are not carried out; leading to overcrowding of the death-row blocks in the prisons.

2.2 The Judiciary

14. In 2010, the Court of Appeal egged the country towards abolition when it held in the Mutiso[7] case that the mandatory death penalty was unconstitutional. The Appeal Judges declared section 204 of the Penal Code (which provides for mandatory death sentence for murder) inconsistent with the letter and the spirit of the Constitution to the extent that it provides that the death penalty is the only sentence for murder. The Section was also declared to be antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. The Court further referred to decisions from other jurisdictions[8] which had held that holding a prisoner on death row for longer than three years amounted to cruel and inhuman treatment. The Court lamented that '*Unfortunately in this country no one, as far as we are aware, has raised the issue of whether the delay in execution of prisoners who have been on death row for a long period of time is inconsistent with constitutional provisions and such issue is not raised before us in this appeal*.' [9]

15. A reverse position was adopted by the High Court which held in 2011[10] that the death penalty was the only sentence imposable in law for murder and that the Court of Appeal's take on the issue was a significant step in the wrong direction. The Judge in this instance further described the President's commutation of 4,000 death sentences to life imprisonment as utter disregard of his constitutional duty, stating: *"The President should have exercised his cardinal responsibility of signing all the pending death warrants. To fail to exercise a legal duty is an abrogation of trust and breach of duty*." The Judge wondered why it would be said that the death penalty is cruel and inhuman, stating: *"It is also alleged that death penalty is a cruel and inhuman punishment but what about the loss*

[5] Kenya's National Report to the Human Rights Council Working Group on the Universal Periodic Review, para.38, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/110/47/PDF/G1011047.pdf?OpenElement

[6] Ibid

[7] Godfrey Ngotho Mutiso vs. Republic, available at http://kenyalaw.org/Downloads_FreeCases/76411.pdf. This was also followed in David Njoroge Macharia v Republic [2011] eKLR

[8] Specifically Catholic Commission for Justice and Peace in Zimbabwe vs. the Attorney General & Others (1993) 2LRC 277, where it was held that that the prolonged delay on the death row had adverse effect on the condemned prisoners' physical and mental state as a result of *"the death row syndrome"* which, as internationally accepted, amounts to cruel, inhuman or degrading treatment which is prohibited by the constitution. The court set a time limit of three years for holding any person on death row after completion of the appellate process.'

[9] Ibid,para.19

[10] Republic vs. Dickson Mwangi Munene and another, available at http://kenyalaw.org/CaseSearch/view_preview1.php?link=294557420841295534803 01

of life, as a result of the unlawful act of the accused. In my view loss of someone's life is equal and amounts inhuman treatment. The person who is responsible for the loss must pay for it in equal measure or commensurate to the suffering of the victim or his family.''

16. The legal system cannot be full proof and mistakes in the administration of justice will be made as was noted in the case of Joan Chebichii Sawe[11] who had been sentenced on circumstantial evidence. As Justice Thurgood wrote[12], "no matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony and human error remain too real". It is not easy to determine how many innocent persons have been executed in Kenya but given that the judiciary has not been perceived as faultless, it is certain that there are many innocent people who have been sentenced to death.

2.3 International Efforts; 'We want to abolish, but the public is not with us'

17. In 2007, 2008 and 2010, Kenya abstained from voting on the United Nations (UN) General Assembly (GA) resolutions calling for a moratorium on the use of the death penalty. However, although Kenya did not vote in favour, it did not sign the *Note Verbale of Dissociation.*

Before various UN bodies, Kenya has maintained a now familiar refrain of wanting to abolish the death sentence but not being able to convince the public to agree to abolition.

2.3.1 CAT Committee (2008)

18. When the State was reviewed by the statement to the UN Committee against Torture in 2008, the Kenyan representative stated that *"[w]e are aware that this [the de facto moratorium] is still not a satisfactory situation, but until a new constitutional dispensation is agreed upon, this is the most humane* option *so far available. The Government and the Kenya National Commission on Human Rights, in collaboration with civil society organizations, have been educating Kenyans on the global trends on the issue of the death penalty. The Government expects these efforts will be fruitful and that eventually the citizens will be won over and Kenya can then become a signatory to the Second Optional Protocol to the International Covenant on Civil and Political Rights*.''[13]

19. The Committee in its concluding observations urged the State to take the necessary steps to establish an official and publicly known moratorium of the death penalty with a view of eventually abolishing the practice. The State party should take the necessary measures to improve the conditions of detention for persons serving on death row in order to guarantee basic needs and rights.

2.3.2 Universal Periodic Review (2010)

20. In February 2010, Kenya notified the United Nations Human Rights Council that the de facto moratorium on the death penalty would remain in place, although it rejected calls to abolish the practice.

[11] Joan Chebichii Sawe V Republic, Criminal Apeal no 2 of 2002

[12] Furman v Gergia, 408 U.S 238, 367-68 [1972]

[13] Statement by the Minister for Justice, National Cohesion and Constitutional Affairs, Hon. Martha Karua, at the Presentation of Kenya's Initial Report under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Geneva, 13–14 November, 2008

21. In May 2010, during its review by the UN Human Rights Council Working group under the UPR, a number of states urged Kenya to abolish the death penalty.[14] The State initially disregarded these recommendations, stating again that it could not abolish the death penalty since the Kenyan public had overwhelmingly rejected the abolition of the death penalty for the most serious crimes. The Government, in collaboration with the Kenya National Commission on Human Rights and other stakeholders, continued to raise public awareness regarding the abolition of the death penalty.[15]

22. In September 2010 at the adoption of its Report by the Human Rights Council, the State indicated that it had totally rejected only one recommendation (on the rights of sexual minorities). This implied therefore that the recommendations on abolition of capital punishment were accepted.

2.3.3 Human Rights Committee (2012)

23. In July 2012, during the review of the State report by the Human Rights Committee, the State indicated that it had continued the policy of non-execution since 1987. However, it had not been able to remove the death penalty from the statute books due to the cultural situation as the public remains anti-abolitionist.[16] The State further indicated that it was working with civil society, religious organizations and KNCHR to create awareness on the issue and it was confident that the position of *Macharia* and *Mutiso* will prevail regardless of the conflicting cases.

2.3.4 CAT Committee, 2013

24. In May 2013, Kenya's Second Periodic Report was reviewed by the Committee against Torture. Again, the Committee raised the issue of abolition of the death penalty but the state's response was that the public was not willing to abolish and that the constitution of Kenya, passed in 2010, allowed for the death penalty. As such, the state was unable to abolish the sentence. In its concluding observations, the Committee again urged the state to work towards abolition of the death penalty.

III. KNCHR's work on abolition of the Death Sentence

25. Kenyan National Commission on Human Rights (KNCHR) has been in the fore front for advocating against the death penalty in Kenya. In 2007, KNCHR published a position paper[17] advocating the abolition of the death penalty on grounds that it violates the constitutional guarantees of the right to life and the right to be free from cruel and inhuman punishment. The Position Paper called upon the Government to take immediate steps to fully abolish the death penalty in law and practice and implement life sentences for the

[14] Recommendations included 'Amend national legislation to abolish the death penalty so it is completely prohibited, and sign and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights (Spain); establish a de jure moratorium on capital punishment, with a view to abolishing the death penalty (Belgium); take all measures to abolish the use of the death penalty (Uruguay); abolish the death penalty (Ireland, Austria, Germany); suspend the application of the death penalty and definitely abolish it (Argentina);

[15] Kenya, Report of the Working Group on the Universal Periodic Review, para.104, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/144/88/PDF/G1014488.pdf?OpenElement

[16] Though this is the claim by the State, there has been no public survey conducted to establish the credibility of this assertion.

[17] Kenya National Commission on Human rights: Position Paper N0. 2 on the Abolition of the Death Penalty>Available on http://www.knchr.org/Portals/0/CivilAndPoliticalReports/PP2%20-%20Abolition%20of%20the%20death%20penalty%20-%20final.pdf

most serious offences as well as amend all laws[18] that permit death penalty. In its Occasional Report19 published in 2012, KNCHR again expounded on the Right to life and called for abolition [of] the death sentence.

26. Internationally, KNCHR advocated for recommendations on abolition of the death penalty during the State's first review under the Universal Periodic Review in May 2010 and the Human Rights Committee in July 2012. Interestingly, in both forums, the State indicated that while the public was anti-abolitionist, it was working with KNCHR to create awareness on the need for abolition.

27. KNCHR's concern is that there has never been a survey undertaken to determine the public's views on capital punishment. Reliance is often placed on the fact that having passed the new constitution[20] which permits limitation of life, the public voted for retention of capital punishment. However, capital punishment was not isolated as an issue for discussion during the referendum[21,] and it would be safe to say that the public may not have appreciated the import of Article 26 of the Constitution with regard to capital punishment.

28. In the last half of 2011, KNCHR conducted surveys[22] amongst death row inmates to determine the effects of the sentence on the inmates and their families. The results of this survey revealed an urgent need to address capital punishment. KNCHR found that the death penalty has severe physical and psychological impacts on inmates, possibly amounting to torture or cruel, inhuman and degrading treatment or punishment under international law.

29. Inmates felt that the death penalty causes significant "mental displacement", as one inmate termed it, because they are not certain about if or when they will be executed. They explained that many of them had developed ulcers and other stress-related illnesses since being condemned to death. The indecisiveness of the government was aptly captured by one of the inmates who stated *"I live cursing the government every other day due to the treatment we get arising from this sentence…There are only two options the government has in regard to this sentence: either hang or commit a person to a term sentence. Let the government take a stand"*

30. The survey also revealed serious deficiencies in the criminal justice system with regard to legal representation, fair trials, access to appeal, and the opportunity to mitigate sentences. The majority of inmates interviewed lacked any form of legal representation during their trials or appeals. This presents a serious problem as most criminal defendants find the legal process and legalese difficult to understand and cannot adequately represent themselves in court.

31. Currently, state-funded legal representation is only officially provided for murder suspects, despite the fact that suspects for robbery with violence also face the death penalty. While most inmates reported that they had been allowed to offer mitigating circumstances during sentencing, several also indicated that they did not offer any mitigating circumstances because they believed it would amount to a confession of guilt. Indeed,

[18] Sec 204, 40(3), 296(2) and 297(2) of the Penal Code, CAP 63 Laws of Kenya.

[19] Making the Bill of Rights Operational: Policy, Legal and Administrative priorities and considerations> Available at http://www.knchr.org/Portals/0/OccasionalReports/MAKING_THE_BILL_OF_RIGHTS_Operational.pdf

[20] Constitution of Kenya, 2010> Available at http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf

[21] A constitutional referendum was held in Kenya on 4 August 2010 where Kenyans turned out in large numbers to vote for the new Constitution

[22] Survey conducted by KNCHR in 2011 in Kenya prisons.

without legal representation, it is unlikely that most defendants can actually take advantage of mitigating opportunities during sentencing.

32. A number of inmates felt that the courts of first instance were biased against them, perhaps because of their physical proximity to the communities where the alleged crimes took place. Inmates reported substantial delays in the appeal process, with several noting that people could spend up to 10 years waiting for their appeals to go through.

33. The Penal Code of Kenya provides for a mandatory death penalty for the crimes of murder and robbery with violence. In 2010, however, the Court of Appeal held in the *Mutiso* case that the mandatory death penalty for murder violated the right to life and was a form of inhuman punishment. The decision allowed for murder defendants to mitigate their sentence and stated that holding a prisoner on death row for longer than three years would no longer be permitted. The Court also stated that the reasoning in the decision should extend to other crimes like robbery with violence and treason where the death penalty is mandatory. Despite this decision, the Penal Code has not been revised to eliminate the mandatory death penalty, and it is unclear whether judges are aware of and apply the ruling in *Mutiso* to cases before them.

34. Despite the moratorium on the death penalty and the ruling in the *Mutiso* case, death sentences continue to be issued and exact a serious toll on inmates. The adverse psychological effects of the death penalty are compounded by injustices within the criminal justice system. These include a lack of legal representation for indigent defendants, delays in the appeal process, and lack of judicial capacity, among others.

35. As a continuing part of this work, KNCHR undertook prison visits at the end of June 2012 in various parts of the country to observe and collect first-hand information from death row convicts on their experiences, perceptions, feelings and general psychological impacts of being on death sentence. This prison visits were among other KNCHR's efforts aimed at informing the shadow report on Kenya to the UN Committee against Torture (CAT Committee). The prison visits and survey undertaken by KNCHR is also a pointer towards an evidence-based advocacy on the death penalty and penal reforms.

3.1 Summary of prison visits

36. The results of the survey indicated that the death penalty has serious psychological effects on inmates. Many of the inmates interviewed stated that they felt they were being "strangled" every day that they were on death row, while others stated that they had essentially been killed the day they were condemned to death.

This section details the various ways in which the death penalty and being on death row indefinitely affects inmates physically and psychologically.

i) Inmates' lack of understanding about their sentences

37. Many inmates reported that they were not told how their death sentence would be carried out, and this caused them a great deal of anxiety. Many inmates relied on accounts from fellow inmates on how people had been executed in the past, and were told that others had been executed by machines in the past. Again, this second hand information only served to increase their pain and fear about their sentence.

38. Furthermore, the inmates at Nairobi's Kamiti Maximum Security Prison reported that they had initially been unclear as to their sentence because the judge was inaudible during sentencing, delayed issuing the sentence, or refused to issue the sentence in open court. Inmates also reported that they were shocked when they received the death sentence.

39. Inmates felt that the death penalty causes significant "mental displacement", as one inmate termed it, because they are not certain about if or when they will be executed. They

explained that many of them had developed stress-related illnesses since being condemned to death. There was a consensus among inmates that the death penalty should be abolished and prisoners given sentences with definite end dates that would allow them to return to their families and communities.

ii) Death row inmates held in isolation

40. Once the death sentence is issued, inmates noted that they were quickly removed from the courthouse and taken to prison without having the opportunity to see their families. The inmates at Kamiti Maximum Security Prison reported that they were held in an isolation chamber for two weeks after receiving their sentences. They reported that this cell was close to the gallows, which were still functional. They reported that, while being held in isolation, they could hear the engine of the machine while it is being serviced and that this caused them distress.

iii) Stigma against death row inmates within the prison

41. Even once death row prisoners are integrated into the larger inmate community, many of them continue to be isolated from prisoners with lesser sentences. The prisoners in Kamiti Maximum, for example, noted that they are only allowed to mingle with other inmates at church on Sunday. Additionally, the condemned women in Kakamega Women's Prison[23] were made to wear uniforms with "Condemned" embroidered in red on their chests. This labelling further separates them from their fellow prisoners and stigmatizes them.

iv) High security and limited movement within prisons

42. Inmates also reported that their physical movement within the prison was highly curtailed. They were always accompanied by guards, and if they had to leave the prison compound they had to be chained. They reported that the constant monitoring and regulation of their movements caused them psychological distress. Some prisoners also reported that they were concerned that people from their communities would see them chained and guarded while outside the prison.

43. Officers stationed at the prisons reported that death row inmates were a higher security risk because they did not care about the future due to their sentence. One inmate in Bungoma24, for example, stated:

I have tried to escape twice from this prison but I have been caught and brought back in both occasions. But that is not the end of it because I am still making such attempts and the day I will succeed no one could wish to know what I will do to someone before I am re-arrested because I am sure I will.

v) Separation and emotional impact on families

44. Separation from their families also caused the inmates a great deal of mental anguish. Several inmates explained that their families were not aware of their whereabouts and that their families believed that they were dead. This resulted in a breakdown of the family unit with spouses either falling ill, dying of stress-related diseases, or running away to start a new family. The result was that children grew up in broken homes without the guidance and support from one of their parents. Many of these children are labelled as "children of killers", according to inmates in Kakamega Main Prison. In Nyeri Prison[25], one condemned woman was in prison with her eight month old baby.

[23] Located in the Western region of Kenya.

[24] Bungoma is a town located in Bungoma County in Western Kenya.

[25] Located in Central Kenya

45. Inmates also felt great distress over the fact that they could not support their families while in prison. According to one inmate:

vi) The separation [from family] is hard. One of my children had to leave school because we could not pay the school fee [since he went to prison].

46. The separation and inability to support their families caused continued stress and anxiety amongst the inmates, most of who were bread winners and now remained uncertain of their families' well-being. Families often go into mourning as soon as the death sentence is pronounced; for example, in the Luhya community, a banana stump is buried to symbolize the "death" of the person who is on death row.

47. Many inmates reported that their families did not visit them in prison. When they did, the inmates were restricted behind bars while chained and unable to move freely. According to one inmate in Bungoma:

My children visit me so at least I feel that my family cares for me. But we have to talk through barbed wires. If only we could sit around a table and eat and talk.

vii) Health concerns in prisons

48. Some inmates expressed concern that the stress in prison caused prisoners to engage in sodomy or to trade sexual favors. They expressed concern that this led to high rates of HIV infection as well as other sexually transmitted infections. Inmates in Kakamega Main Prison also stated that conditions for aging inmates should be improved. One of the condemned inmates at Kakamega was a man of about 60 years of age who was on a catheter. According to one inmate:

We are facing great health risks here, kuna watu kazi yao ni kuambukiza tu wengine ugonjwa. Wengine wetu walikuja hapa tukiwa sawa na sahii wako na ugonjwa na hata hawezi jua sababu hakuna mtu hujali mambo ya kupimwa gerezani (there are people bent to infecting others with HIV. Some of us came here when free of HIV but are now infected but they are not aware because no one cares about HIV test for prisoners).

viii) Lack of rehabilitative services

49. Inmates in Bungoma and Kakamega reported that they did not have the opportunity to participate in any type of industry or educational activity. This was because they were either seen as high risk inmates or because of their ambiguous status hence no chance at rehabilitation was afforded to them because it was not clear what their sentence was desired to achieve. Indeed, even where their sentences have been commuted to life, their files still read 'death sentence' and as such they were still limited in their movement and the type of activities they could participate in.

ix) Treatment in prisons

50. The majority of prisoners surveyed reported that they were not mistreated by the prison authorities, though at least one prisoner reported that the guards occasionally beat prisoners. Many inmates noted that they were not allowed to work or read, were limited in their ability to move freely around the prison yard, and were segregated from other convicts. According to one of the condemned prisoner in Bungoma;

"I live cursing the government every other day due to the treatment we get arising from this sentence…There are only two options the *government has in regard to this sentence: either hang or commit a person to a term sentence. Let the government take a stand"*

IV. Deficiencies in the Criminal Justice System

xi) Lack of legal representation

51. The majority of inmates interviewed lacked any form of legal representation during their trials or appeals. This presented a serious problem as most criminal defendants find

the legal process and legalese difficult to understand and cannot adequately represent themselves in court. Currently, state-funded legal representation is only officially provided for murder defendants, despite the fact that defendants for robbery with violence also face the death penalty. Interviews in Bungoma and Kakamega indicated that prisoners often relied on other prisoners who had already completed their appeals to assist them with the paperwork for their own appeals. Some of the inmates interviewed at Eldoret[26] had received legal representation from the State but felt that the representation was incompetent and noted that their advocates had not bothered to offer mitigating circumstances or explain the sentence to their client in simple terms.

52. The Constitution of Kenya 2010 provides that every accused person has the right to receive the assistance of an advocate at the State's expense "if substantial injustice would otherwise result" (Section 50(2) (h)). It is clear that a substantial injustice results when an accused person is convicted and sentenced to death without having the opportunity to put forward an adequate defense with the assistance of a trained advocate.

xii) Problems with accessing bond

53. An inmate in Kakamega Main Prison reported that it was very difficult for most defendants to pay the high bond required for robbery with violence. Other inmates advocated that they should be able to access bond during their appeal process.

xiii) Disproportionate sentences and problems with the sentencing process

54. The majority of inmates interviewed were condemned for the crime of robbery with violence, and many inmates indicated that they thought the death penalty was a disproportionate sentence for this offense. The interviews at Nyeri Men's and Women's Prisons indicated that people may be charged and convicted of robbery with violence for less serious offenses, such as wielding a pen knife while stealing a cell phone. Again, these accounts seriously call into question whether the death penalty is a proportionate sentence for such crimes.

55. Additionally, several inmates at different sites were under the impression that the death sentence is still mandatory for murder and robbery with violence in Kenya, despite the fact that the Court of Appeals in the *Mutiso* case found that the mandatory death penalty violated the right to life and amounted to inhuman punishment. The mandatory death sentence is still a part of the Penal Code despite the *Mutiso* decision.

xiv) Delays in the appeal process

56. Inmates reported substantial delays in the appeal process, with several noting that people could spend up to 10 years waiting for their appeals to be heard and determined. Inmates interviewed in Eldoret had been on death row for 3-5 years on average were all waiting for their appeals to go through. Several inmates noted that files are often lost or are not transferred with prisoners when they are taken to a different prison. They also stated that they often must pay bribes to registry clerks in order to ensure that their files were transferred properly.

xv) Lack of judicial capacity

57. The inmates explained that in some places such as Bungoma, there was only one judge. This presented a problem since some reviews and appeals required a two judge bench. Without two judges, the inmate must be transferred to another prison for their review or appeal hearings. Inmates explained that this could take a physical and psychological toll since different prisons have different rules and regulations depending on their security level and administration.

[26] Eldoret is located in the Rift Valley region of Kenya.

58. Furthermore, inmates reported that the presiding judge or magistrate was transferred in the middle of their trial and replaced with a different official. Thus, the judge or magistrate that issues the final ruling often does not experience the full trial and this may hinder their ability to rule fairly on the case.

V. Alternative to the Death Penalty

59. Most of the inmates interviewed thought that the death penalty should be abolished and replaced with a set sentence, perhaps of 10 years, with the opportunity for parole. It should be noted that some inmates did support the death penalty for the crime of murder. Many inmates strongly opposed life sentences, which they saw as a living equivalent of the death penalty. The inmates also thought that, during sentencing, the judge should take into account the age of the person so that young people can have an opportunity of reforming and reintegrating back into their communities.

60. It was further noted that the death penalty contributes to congestion in prisons, since condemned inmates do not have the opportunity for parole. Additionally, the security required to guard a large population of condemned inmates is quite expensive for the prisons.