

ROBBERY WITH VIOLENCE: A CASE FOR
ABOLITION OF DEATH PENALTY:

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ABBREVIATIONS

1. All E.R.....All England Reports
2. Crim App.....Criminal Application
3. Crim L.R.Criminal Law Review
4. ColColumn
5. E.A.East Africa Law Reports
6. E.A.C.A.East African Court of Appeal
7. H.C.High Court
8. K.A.R.Kenya Appeal Reports
9. NBINairobi
10. NoNumber
11. N.Y.New York
12. PPage
13. RRepublic
14. VolVolume

TABLE OF CASES

1. R V Cave (1950) E.A.C.A. p. 130
2. R V Epping and Hallow Justices (1973) 1 All E.R 1011
3. Gabriel Njoroge V R 1 KAR 457
4. R V Hamilton (1985) Crim L.R. 447
5. John Munyalo Ombaka V R Crim. App. No. 150 (1970) H.C. NBI
6. Joseph Wangangu V R Crim App No. 659 (1977) H.G. NBI
7. Josephat Njagi Karanja V R Crim App No. 202 (1975)
H.C. NBI.
8. Kaluku Munyao V R Crim App No. 150 (1971) H.C. NBI
9. People V Oliver 1 N.Y 2nd (1956) P. 152
10. Stephen M'Riungi V R (1973) E.A 231
11. Sokitoleko V Uganda (1967) EA 531
12. Yowana Sebuzukira V Uganda (1965) EACA 685

INTRODUCTION

THE PROBLEM:

The subject of capital punishment has generated a very serious debate in the world. There are those people who argue for its abolition. Others argue for its retention and even the expansion of its scope.

Abolition is gaining ground; over forty percent of countries have abolished or do not use the death penalty. A United Nations survey done in 1988 revealed that there were 101 retentionist countries in the world. This number has now decreased to 96¹ with South Africa being the last country to abolish death penalty last month (June, 1995).²

Contrary to the general direction the death penalty debate in taking most countries, Kenya introduced the death penalty for the offence of robbery with violence thus increasing the scope of its application. From 1973, this offence carries a mandatory death sentence.

This study revolves around section 296(2) of the penal Code, which provides for a mandatory death sentence for all convicted of the offence of robbery with violence. The study will highlight the enactment of the law, whether they have been met and if not find the reasons why.

JUSTIFICATION OF THE RESEARCH

Life is very precious and as such it should be preserved. It is in this spirit that the constitution provides that every person has a right to life subject to a few exceptions when the

state can terminate a person's life. This, however, has to be pursuant to an order of a court of competent jurisdiction in the form of punishment for the commission of a capital offence. This, then, bears the question why punish?

The main objective of providing for capital penalty, for robbery with violence was to eradicate the crime. This goal, however, has not been achieved. On the contrary the crime is on the increase. This failure bears the question whether death penalty for robbery with violence is justifiable.

It is felt that the root cause of robbery with violence is to be traced in the socio-economic conditions of our society. Thus for one to apply any meaningful measure to curb the crime, he has to go back to the society and find out what influences the robber to commit the crime.

There are overwhelming arguments against the death penalty. The old conception that a harsh punishment, in this case death penalty, has more deterrent effect has no basis. Robbers have refused to be deterred by the threat of capital punishment and have continued to commit the offence of robbery with violence unabated. Time has now come to formulate new ways of fighting the crime.

WORKING HYPOTHESES

This study aims at proving the following hypotheses:-

- H.1 That the root -causes of robbery with violence lie in the socio-economic conditions of our society.
- H.2 That capital punishment does not have a deterrent effect.
- H.3 That instances of armed robbery continue rising instead of subsiding.

- H.4 That the offence of robbery with violence is ill-defined in the Penal Code and this causes serious practical problems.
- H.5 That the general trend in the World is towards abolition of death penalty.

METHODOLOGY OF RESEARCH

This study has been done mainly through archival research. This entails use of secondary data employed in obtaining secondary information from published and unpublished works from mainly the Parklands Campus Library, Jomo Kenyatta Memorial Library and the Kenya Government Printer(Nairobi). The writer obtained information from informal question of people who have at one time or another been convicted of robbery, the facts of their cases being such as could have passed for robbery with violence.

CHAPTER BREAKDOWN

CHAPTER ONE attempts to define the phenomenon of crime. It also discusses the theories of causes of crime and lays special emphasis on the causal factors for robbery with violence in Kenya. The chapter attempts to define the concept of punishment. Further, it gives an analysis of the traditional theories of punishment viz: retribution, deterrence, protection of the public and rehabilitation.

CHAPTER TWO revolves around the debate on the death penalty in Kenya. Firstly, a case for capital punishment is put up. Secondly, a case against capital punishment is put up and it is in this case that it is shown that the penalty does not have a unique deterrent effect. As such, the menace of armed robbery

has escalated, the threat of facing capital punishment notwithstanding. In the whole of the chapter, an analytical approach is applied.'

CHAPTER THREE deals, firstly, with the definition, interpretation and application of the law on robbery with violence in Kenya. It highlights the practical problems that arise as a result of the ill-definition of the offence in the Penal Code and also the procedural anomalies in the trial of the offence, which in certain cases may seriously compromise the possibility of a fair trial. Secondly, the chapter considers the death penalty on the international plane with the intention of showing whether the general trend is towards abolition or otherwise.

CHAPTER FOUR concludes the treatise and offers suggestions which may help to curb and finally eradicate the menace of robbery with violence.

FOOTNOTES

1. MAHARAJH, R 'The Ultimate Penalty' Index
on Censorship Vol 24 No.2 March/April 1995 P.96.
2. Daily Nation, 7th June, 1995

CHAPTER ONE

1.0 CRIME AND PUNISHMENT

1.1 WHAT IS CRIME ?

Many attempts have been made to define crime but none is universally accepted. Tappan defines crime as:

"an intentional act or omission in violation of criminal law committed without defence or excuse, and penalised by the state as a felony or misdemeanour"¹

Implicit in this definition is that the act or omission cannot amount to a crime unless it is intentional. This is not correct as there are offenses of strict liability which do not require proof of mens rea.

Crime has also been defined as:

"a fault, an act or commission of an act that is forbidden, or the omission of a duty that is commanded by a public law of a sovereign state to the injury of the public welfare and that makes the offender liable to punishment brought against him by the state by indictment information, complaint or similar criminal procedure"²

Another definition of crime is:

"an act done or omitted, in violation of public law either forbidding it or commanding it"³

This definition does not say what the consequences of the act or omission are. Also it does not say who is responsible for the enforcement of the law.

From the above definitions, it can be concluded that for an act or omission to be termed as crime, it has to have certain characteristics. One of these is that it has to have a harmful impact on society.

There has to be an act or omission Mens rea alone is not enough to constitute a crime.

Generally, the offender must have a guilty mind. It is only in offenses of strict liability where the mental element is irrelevant. Thus a person will nevertheless be held liable for the commission of an offence of strict liability inspite of the fact that he may not have a guilty mind.

The act or omission must be specifically prohibited by an existing law. Therefore, however much the general public may disapprove of the behaviour of an individual, that behaviour is not a crime unless it is specifically prohibited by the criminal law. The punishment thereto must also be prescribed by the statute prohibiting the act or omission. Therefore, there can never be a crime without a prescribed punishment.

Crimes change with laws, Rescoe Pound in reply to the question "what is law?" said that a final answer is impossible because law is a living, changing thing.⁴

This being the case with the nature of law, it follows that what is a crime today need not be so tomorrow and vice-versa. Also what is a crime in one country need not be so in another. Thus for example, adultery is a crime punishable by death in Arabia while in Kenya it is not a crime.

1.2 THEORIES OF CAUSES OF CRIME

A criminal is not always an agent of himself. There are certain factors that facilitate crime in the society and these factors have to be taken into consideration in order to arrive at a justified conclusion of how to treat the offender and also how to formulate ways of curbing crime in the society.

Different theories of causes of crime have been advanced. These theories can be classified into two pools. Firstly, there are the Theological-Biological theories; and secondly the socio-cultural theories.

The Theological-Biological theories include demonology, original sin, the doctrine of free will, heredity, mental disorders, intelligence, feeble-mindedness and abnormal behaviour, and the Freudian theory of violence.

The demonology theory makes use of the principle of other worldly power to account for what happens in our day to day life. The term demonology is derived from the "demon" which is defined as an evil spirit⁵. The proponents of this theory believe that man commits criminal acts only when possessed by an spirit.⁶

This theory of possession by the demon is still prevalent among the followers of certain churches, for example those who profess divine healing of disease. Thus the curing of disease by prayer and the laying of hands, the healing session of crusaders at which literally piles of crutches and aids of invalids accumulate and exhibit to

show that all that is needed is faith in the holy spirit.⁷

In the 19th Century, the belief in demonology led to the isolation of criminals so that they could have some quiet time to read the Bible and have time to reflect on their misdeeds. Prayers, recitation of Biblical texts and ministering to the criminals, Inter alia, were considered to be of special value in curing of criminality.⁸

Under the original sin theory, mankind is held to be tainted with original sin that was committed by Adam and Eve. Thus man is born a sinner (criminal) as is evidenced by the general curse on the woman and her offsprings by God thus:

" I will put enmity between you (serpent) and the woman, and between your offspring and hers".⁹

The doctrine of free will is related to the explanation of criminality in terms of the original sin. It states that God equipped man with the faculty of rationality, that is the ability to choose between right and wrong; and that it is because man chooses to mis-use that free-will that he continuously engages in criminal behaviour.¹⁰

In Christian theology, since man's exercise of his free will by choosing to disobey God resulted in his fall from grace, God being most merciful sent his only Son to come and die for his (man's) sins so that the latter could regain his divine grace.¹¹

An Italian criminologist, Cesare Lombrose, who was a physician and a psychiatrist in the army after an extensive

study of physical characteristics of his patients and criminals concluded that criminals had distinct physical characteristics. These are such as asymmetrical cranium, long lower Jaw, flattened nose, scanty beard just to mention a few.¹²

In late 1930s, Hooton, an American anthropologist after comparing prisoners and a number of non-prisoners found differences between the two classes and concluded that the primary cause of crime is biological inferiority. Thus criminals have a tendency of committing crime in order to overcome their inferiority and meet their needs of survival.¹³

To Lombroso and his followers, criminals are born as such and their criminal behaviour is not prompted by the environment. He generalised that criminals are less sensitive to pain and therefore have little regard for the suffering of others. Thus they can do an act knowing that it will have an adverse effect on others.¹⁴

The conception that criminals constitute a distinct physical type was challenged by an English criminologist and physician, Charles Goring, who after his own research concluded that criminals are as ordinary as any other persons in the society. Otherwise the law enforcement authorities would have no problem in picking them out from a crowd.¹⁵

Criminality has been held as hereditary¹⁶. Five methods have been used in the effort to proof this hypothesis. These are comparison of criminals with the

"savage", family trees, mendelian ratios in family trees, statistical associations between crimes of parents and of offspring and comparison of identical and fraternal twins.

Lombroso and his followers used comparisons of criminals and "savages" as their method of studying inheritance of criminality. They held that a typical criminal was born a criminal. However, Lombroso had no significant proof or explanation of the inheritance of criminality¹⁷.

Family trees have been extensively used by certain scholars in the effort to prove that criminality is inherited. In a nutshell, a trait of criminality appears in successive generations. A general argument against a conclusion from the study of family trees is that this does not prove that the trait is inherited. It only proves that the trait is present¹⁸.

Charles Goring attempted to prove by elaborate correlations that the criminalistic tendency is inherited and that environmental conditions are of slight importance to criminality. He found that criminality measured by imprisonment of fathers and sons was correlated by a coefficient of +.60, which is very nearly the same for the coefficient for stature, span, length of forearm and other physical traits; brothers had a coefficient of correlation of criminality of +.45, which also is approximately the same as for physical traits.²⁰

Identical twins, which are the product of a single egg fertilized by a single sperm, have been compared with fraternal twins, which are the product of two eggs

fertilized by two sperms. Heredity is assumed to be identical in the former and different in the latter.²¹

It has been argued that even ^{if} a difference between the two types of twins in reference to concordance in criminality is accepted, the conclusion that criminality is inherited does not necessarily follow. The difference between the two kinds of twins may be explained in whole or in part by the fact that the environments of identical twins are more nearly alike, psychologically, than the environments of fraternal twins. Because of the difficulty of distinguishing one identical twin from the other, the reactions of other persons towards them will be more nearly alike than the reaction of others towards fraternal twins.²²

These efforts to explain heredity as a cause of criminality must be judged in terms of the extent to which there are demonstrable differences between criminals and non criminals. If there are many negative cases, that is, many individuals who possess the characteristics said to be associated with crime but who do not exhibit criminal behaviour, or, if there are many criminals who do not possess the characteristic on which the theory is based, obviously the theory remains relatively inadequate and unsatisfactory.²³

Criminal behaviour is also attributed to mental disorders. These cover a wide range of behavioural types. An example is insanity which is defined by what are known as "Mc Naghten Rules"²⁴, as harmful behaviour perpetrated under circumstances in which the actor does not know the nature or quality of his act or does not know right from wrong.

Low intelligence and feeble-mindedness were commonly held to be responsible in most cases for criminal behaviours some generations ago. Harry Goddard is reported to have observed that:

"every investigation of the mentality of the criminals, misdemeanants, delinquents and other anti-social groups have proved beyond doubt the possibility of contradiction that nearly all persons in this classes are of low mentality---. It is no longer to be denied that the greatest single cause of delinquency and crime is low grade of mentality; much of it within limits of feeblemindedness"²⁵.

Freudian system of thought attempts to provide a theory for the explanation of all behaviour, including crime. It identifies three basic elements of personality that must be brought into balance namely; the id, the ego, and the superego²⁶.

Criminal behaviour, under this general theoretical orientation is to be understood, simply and directly, as a substitute response, some form of symbolic release of repressed complexes. The conflict in the conscious mind

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gives rise to feelings of guilt and anxiety with a consequent desire for punishment to remove the guilt feelings and restore a proper balance of good against evil. The criminal then commits the criminal act in order to be caught and punished. Unconsciously motivated errors (that is, careless or imprudent ways of committing the crime) leave clues so that the authorities may more readily apprehend and convict the guilty, and thus administer suitably cleansing punishment.²⁷

The socio-cultural theories include culture conflict, the Sub-Culture of violence, Anomie, Differential Association and Poverty.

Culture conflict as a theory of criminality was first formulated by Thorsten Sellin in the late 1930's.²⁸ The theory is based on contradictions or conflicts of conduct norms confronting person in certain situations. Live social disorganisation, culture conflict is used to refer to social conditions characterised by a lack of consistency and harmony in influencing individual behaviour. Sellin noted that a conflict of norms exists when more or less divergent rules of conduct govern specific life situations. Individuals are socially identified with a number of social groups each of which has its own conduct norms. Culture conflict also is a result of social disorganisation, which comes as a result of rapid social change. New values imposed on old values create conditions under which behaviour can be variously defined.²⁹

The concept of subculture of violence was originally formulated to explain violent criminal behaviour but it may also be a useful tool to explain other behaviours characteristic of human groups rather than individual persons only. A subculture is not a contra-culture; and it cannot be wholly different from the society of which it is part. A subculture of violence is so called because of its members' outward behaviour which is expressed in violence in situations in which members of other sub-cultural groups would have reacted in a non-violent manner.³⁰

The Anomie theory is also referred to as the theory of Differential Opportunity. To some sociologists, criminal behaviour results from the clash between institutional means and cultural goals in the access to a given success goal by legitimate means. Robert Merton, the proponent of this formulation points out that most modern societies emphasize material success in the form of the acquisition of wealth by education, as an accepted status goal, but at the same time they fail to provide adequate means or norms to reach these socially valued goals.³¹

The theory of differential association has been used to explain criminal behaviour. It was originally proposed by Edwin H. Sutherland. It states that criminal behaviour is developed by normal social processes common to all learning. Like all behaviour, crime is learned from friends and associates and is often influenced by areas in which one lives. Most criminal associates are of an intimate group nature such as adult criminals or business organisations.³²

In an interview carried out by the writer on a certain criminal, the criminal said that he had learned his criminal behaviour (robbery) from his colleagues who were working with him in a garage.

It is commonly believed that poverty causes crime. Poverty is a major social problem that affects health, life expectancy, infant mortality rates, housing, the quality of life and standard of living of the individual as well of the community.

Above all, individual and collective poverty limits social participation and may lead to institutional instability.³⁴ Odera Oruka³⁵ says that a community is charged to be a criminal because it is poverty strike. He emphatically asserts that there can be no doubt whatsoever, that poverty and social frustrations are the greatest causes of criminal behaviour.³⁶

It can be concluded from the preceding discussion that there is no consensus as to the causation of the crime. It is also evident that most writers on the subject of

causation of crime deal with the subject generally. It is submitted that this general approach has a shortcoming in that what may be the casual factors for a specific may not be so for another. It is in light of this shortcoming that a more specific approach is intended to be applied in dealing with the causes of robbery in Kenya.

The economic set up and economic relations has always been considered as major determining factor in the commission of crime. "Take away property without ceasing and you destroy forever a thousand factors which lead men to desperate extremities" says Morelly.³⁷

Research carried out by Clinard indicated that most crimes are committed for economic reasons. He found that in United States of America (U.S.A) property crimes like robbery and theft constituted 94.5% at all crimes of murder. Rape and assault accounted for only 5.5% of all crimes.³⁸ If these results are anything to go by, then the conclusion cannot be escaped that economic reasons play a major part in the causation of crime, more so property related crimes.

Kenya is a developing country with most of its industries concentrated in the city and towns. The capitalistic nature of our economy necessitates movement to the city and other towns to look for employment. Thus young men leave their families in the rural areas and migrate to towns and cities thus creating a large pool of unattached males whose main goal is to accumulate money.³⁹ Problems start when a person cannot get employment or gets partial

employment with meagre earnings. The cost of living is quite high in the cities and towns. Failure by a person to satisfy his basic needs like housing, food and clothing leads to frustration and this may lead him to turn to crime including robbery with violence if only to make ends meet.

For the rural-urban migrant, he experiences too the breakdown of the traditional security of tribal customs in which he had the right in time of need to make demands on the tribe and extended family. With this source denied to him, he may result to crime.⁴⁰ In other words the society's failure to provide adequate goods, services and housing for everyone permits crime and other forms of deviant behaviour to develop, and economic fluctuations and maldistribution of wealth contribute to these deviations.⁴¹ It is in line with this argument that the late J.M Kariuki said in Parliament:

"As long as our economic set-up is such that the majority of our people including ourselves continue to amass property and live side by side with the poor members of the society, violent crimes will continue unabated."⁴²

Traditionally, people received their initial training in developing their value systems in a comparatively homogeneous village setting. Deviations from the daily routine were unusual and formal censure quick and compelling. This has changed:

"Urbanisation has led to the breakdown in primary control, following detribalization and the introduction of the cash economy, accelerated mobility

and personal anonymity."⁴³

The tribe is no longer that cohesive and communal society that provided moral order, the values to be preserved and which enforced rigorously any violation of its code. The disruption of the traditional mechanisms of social control has led to alienation especially of the urbanised and semi-urbanised people. The education of the youth in institutions has led to decreased parental authority. In effect the vacuum left by lack of parental care is filled by values and codes of their contemporary group mates, values which are acquired from any literature available and films. The slum areas where this social disruption is more apparent have become the breeding ground for crimes in urban centres.⁴⁴

On the impact of economic and social progress on the ordinary worker, Ploscowe says:

*"There is the relentless pressure exerted by modern industry towards the simulation of new needs, through the countless forms which advertising may take....there is the example of a leisure class openly enjoying all the advantages of modern society."*⁴⁵

Implicit in this statement is that modern industry has born new sources of leisure like televisions and radios. People who cannot acquire them legally may turn to crimes like robbery in order to get these goods. Also other people who would like to have these items but cannot afford to buy them from the 'shops' provide ready market for such items. This encourages the perpetrators of the crime of robbery.

In 1970, Daniel arap Moi, then the Vice-President and Minister of Home Affairs, following a debate on robbery with violence gave the following statistic:

"During the year 1970 there were in all a total of 1344 cases of robbery with violence throughout the republic. The total value of property including cash stolen amounted to Kshs. 4015455.50. The value of property recovered was Kshs. 390,776.05. The number of criminals involved was 2,703 and of these 1,039 persons were arrested."⁴⁶

This statistic is an indication of the gravity of the problem of robbery with violence way back in 1970 and it is submitted that the problem has escalated as of now as will be shown in the following chapters. This should be an indication as to why research should seriously be undertaken in the field of causes of crime in Kenya, for it is by knowing the causes that one can deal with the problems.

1.3 CONCEPT OF PUNISHMENT

There is no consensus as to the definition of punishment. Several attempts have been made at defining the term. One of these is that punishment is the "penalty for transgressing the law"⁴⁷

Punishment has also been defined as:-

"Physical or mental distress inflicted....The penalty for a transgression of law. The suffering or confinement inflicted on a person by authority of law

and the judgment or sentence of a court for some crime or offence committed by him"⁴⁸

Professor Jerome Hall says that:-

"First, punishment is a privation. Second, it is coercive. Third, it is inflicted in the name of the state. Fourth, punishment presupposes rules, their violation, and a more or less formal determination of that expressed in a judgment. Fifth, it is inflicted upon an offender who has committed a crime or harm, and presupposes a set of values by reference to which both the harm and the punishment are ethically significant. Sixth, the extent or type of punishment is in some defended way aggravated or mitigated by reference to the personality of the offender his motives and temptation."⁴⁹

From the above definitions, punishment can be said to be a conscious and deliberate move taken by the custodian of the law upon the violator of the same. This is done purely for the purpose of reducing incidences of criminal behaviour since the objective of criminal justice is to protect the society against criminals by punishing them under the existing law.

1.4 THEORIES OF PUNISHMENT

The generalised theories of punishment are retribution, deterrence, protection of the public and rehabilitation. Each of these theories has its own merits and demerits and has consequently received appreciation and criticism.

1.4.1 RETRIBUTION

This theory treats punishment as an end in itself. Retribution is used in the sense of 'revenge', the collective revenge that society takes upon itself upon the wrong-doer. Lord Denning says:

"The punishment for grave crimes should adequately reflect the revulsion felt by the majority of the citizens for them. It is a mistake to consider the object of punishment being deterrent or preventive and nothing else. The ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community"⁵⁰

The public revenges as trustee for these offended person. The doctrine should ideally be based on proportionality. Thus the punishment should fit the crime for which it is meted. Lord Denning says:

"there are some murders which in the present state of opinion demand the most emphatic denunciation of all; namely the death penalty."⁵¹

There is a weakness in this requirement that punishment should be proportional to the crime in that human beings are so diverse that it is not possible to have a standard measure of proportionality of pain to be inflicted. There is also a problem in assessing public revulsion.

Several American courts have ruled that retribution has no place in a contemporary system of criminal justice. New York court of Appeal in People V Oliver⁵² observed that;

"The punishment or treatment of offenders is directed towards one to or more of three ends; to discourage and act as a deterrent upon future criminal activity; to confine the offender so that he may not harm the society; there is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution"

In the United Kingdom⁵³ retribution was emphatically dismissed and it was announced that "modern penological thought discounts retribution in the sense of vengeance" Sir John Anderson in his contribution to the Royal Commission on Capital punishment said that:

"There is no longer in our regard of criminal law any recognition of such primitive conceptions as atonement or retribution. We have, over the years fortunately succeeded to a very large extent, if not entirely in relegating the purely punitive aspect of our criminal law to the background"⁵⁴

It is submitted that retribution is an out-dated theory and has no place in our modern criminal justice system. Pain in itself is a negative value to be employed in cases where there is evidently greater value to be realised.

1.4.2 DETERRENCE

This theory entails the instilling of the emotion of fear in an individual and society at large. It is directed mainly towards future behaviour. Jeremy Bentham stated that:

"General prevention ought to be the chief aim of punishment as it is its real justification. If we consider a crime which has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would be adding one evil to another. But when we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent but also and to all those who have the same motives and opportunities for entering upon it, we perceive that punishment inflicted on the individual becomes a source of security to all"⁵⁵

Implicit in this statement is that the theory is twofold. There is individual deterrence and general deterrence. Punishment of an offender instils in him fear of being punished again and this acts as an individual deterrent not to repeat commission of the offence for which he has been punished.

General deterrence means that by punishing an offender, other would be offenders are deterred from committing crime. Thus, for example, when a magistrate records the reason for sending a first offender to prison as being the prevalence of the offence in an area, it is an exercise in general deterrence. In Kaluku Munyao V. R.⁵⁶ the High Court refused to reduce the sentence of the appellant by the District Magistrate, Kitui, for a stock theft contrary to section 278 of the penal code. The justification for this refusal was that in view of the gravity and the prevalence of such offenses in the area, the court did not think the seven years and additional twelve strokes were manifestly excessive although the

appellant was a first offender.

If this theory of deterrence holds any water, then it follows that the more harsh the punishment, the greater the deterrent effect. However, the theory has been criticised as having no success. Thus for example, before the Royal commission on capital punishment, evidence was adduced that a chaplain of Bristol had found that out of 168 persons who he had prepared for death, no fewer than 161 had actually witnessed an execution.

The failure of this theory is also evidenced by criminals with more than one conviction. In the case of John Munyalo Ombaka V R⁵⁷ the offender had 16 previous convictions. This means that the punishments meted out for the previous offenses did not serve to deter him from committing more offenses.

This theory is criticised in that it does not deal with the root causes of crime. It is opined that this cannot help in reducing criminal behaviour. It is submitted that the greater need is to deal with the causes of a crime and also to reform the criminal such that he is not driven to commit crimes by the circumstances surrounding him.

1.4.3 PROTECTION OF THE PUBLIC

The objective of this theory is to detain the offender and, by so doing, physically prevent him from repeating his offence. In R.V. Cave,⁵⁸ the accused pleaded guilty to four charges of indecent assault on boys aged between 9-11 years where 11 other offenses were also taken into consideration.

The court observed that it were better for him when he is eliminated from the Society other than when left at liberty. The theory entails the segregation of persons in institutions. This has to be pursuant to a court order. The courts are limited as to the sentences they can pass for specific crimes. This theory has a loophole in that the incapacitation is temporary save in life imprisonment sentences.

This means that once the jail term is over, the criminal goes back to the society and the latter is open to suffer from the criminal's acts. This is due to the fact that segregation will not probably reform the offender.⁵⁹

1.4.4 REHABILITATION

This theory seeks to bring about a change in the attitude of the offender so as to reform him to a law abiding member of the society. Jeremy Bentham advocating the theory says that:

"It is a great merit in a punishment to contribute to the reformation of the offender not only through fear of being punished again but by a change in his character and habits"⁶⁰

Mr. A.K. Saikwa (then commissioner of prisons, Kenya) pointed out in one of his speeches that:

"There is now an urgent need to explore new methods for the prevention of crime and the treatment of offenders which would fairly reflect our society's

interest in protecting itself yet provide maximum opportunity for the individual to turn away from a career of crime. In addition to providing a secure custody for those who constitute a potential danger to the community, our treatment of the offender should aim at encouraging in each individual inmate, inmate, his positive potentials and developing them as far as possible in setting up a penal treatment towards his rehabilitation."⁶¹

The trend is towards individualistic approach to sentencing as distinct from punishment.

The reformists advocate humane treatment of inmates inside the prison institutions. They suggest proper training of prisoners to adjust themselves to the free life in the society after their release. Agencies such as parole and probation are recommended as the best measures. In R.V. Hamilton⁶², a man aged 38 years, caught in the act of breaking into a shop and who had 14 previous convictions for dishonesty, had his sentence of 3 years imprisonment varied to probation. A probation officer had said that he thought the appellant had a sincere wish to reform, and the court agreed that it was worth taking a chance in the hope that he would be diverted from a continued life of crime. The award of such agencies as probation, parole, absolute or conditional discharge in most cases depends on the attitude of the offender towards the crime and also the nature of the crime.

In Josephat Njagi Karanja V R⁶³ the appellant had been charged and convicted for theft which theft was infinitesimal and one committed within the family. The High Court held that the offender behaved in a repentant way and this showed that he was reformable. It therefore set aside the custodial sentence which had been imposed by the District Magistrate court, and substituted it with an order absolutely discharging the appellant. Thus the appellant had been given a second chance.

A close analysis of the preceding discussion brings out two opposing approaches: the Philosophical and the legal. The former is engaged in asking why we punish while the latter asks whether punishment is achieving its objectives.

As stated earlier, every crime must have a prescribed penalty. Both the crime and penalty thereto must be expressly provided for in the penal code of the particular state. It is submitted that the proposals enunciated in this debate by the various philosophical schools should be a starting point for lawyers and penologists in instituting empirical research programmes and formulating drafts of penal codes. It is in this respect that the justification for the introduction of capital punishment in Kenya for the crime of robbery with violence will be examined. This end will be realised by examining the Kenya Legislative response to the introduction of the death penalty for the offence of robbery with violence.

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CHAPTER TWO

2.0 PARLIAMENTARY DEBATES

This chapter attempts to appraise the arguments that have been projected in support of or against the death penalty in Kenya. There have been two parliamentary debates in Kenya since independence. The first one was in the early 1970's and it was in relation to the offence of robbery with violence. The second debate was held last year (1994) and this dealt with the subject of death penalty generally.

2.1 THE DEBATE IN THE 1970'S

2.1.1 THE CASE FOR CAPITAL PUNISHMENT:

From the debate, one can gather a number of arguments that were advanced by the members of parliament (MPs) in support of death penalty. Some of these are: that it is a unique deterrent, that it physically eliminates convicted robbers, that there is no better alternative, that public opinion demands its imposition, that the doctrine of "an eye for an eye" should apply, and that when punishing sympathy should be with the victim rather than villain.

The Attorney-General, Mr. Charles Njonjo, in reply to Mr Kasanga Mulwa, s concern about the equal treatment of first and Habitual offenders by providing for a minimum sentence of 14 years with hard labour, inter alia said:

"....In fact Mr Speaker, the President at the last Madaraka day speech did suggest that the law should be

amended so that these people can face capital punishment: to be hanged on the trees so that others can fear. Instead of bringing an amendment that my learned friends wishes to bring I am going to bring an amendment to provide for capital punishment." ¹

The argument is that by punishing offenders, other would be offenders would be deterred. This is what is called general deterrence and it rests on the philosophy that a few must perish so that many may fear.

It seems that in the opinion of the president, the harsher the punishment the greater the deterrent effect. Thus if any punishment could deter violent robbers, it was public execution of their convicted lot.

"... if people are to hanged, particularly if this had to be done in public, many people would fear that they would be hanged the same way" ²

However, evidence available shows that public executions do not have a unique deterrent effect. In England, for example, evidence was adduced before the Royal Commission³ to the effect that of 167 persons who had been on the death row in Boston, 164 of them had witnessed a public execution.

Daniel Arap Moi, then Vice-President and Minister for Home Affairs stated that:

"...the intention of the Bill is to deter those who have been embarking on...robbing from this business"⁴

This belief was not based on empirical data. There were no statistics provided to advance this argument that death

penalty Constitutes a unique and therefore effective deterrent.

Another argument for the imposition of the death penalty for violent robbers is that the penalty serves to eliminate such persons from the society once and for all. The case was put thus:

"...MP's if they want the attorney general's chamber to help the magistrates to make sure that, at least within a certain time, we eliminate these people should support the Bill."⁵

This argument of elimination of violent robbers is valid in that once a convicted robber is executed, the society gets rid of him once and for all. However, it overlooks the fact that new members are taking the 'career' of violent robbery every day. Thus the execution of a few robbers would not make much difference to the actual number of violent robbers.

It was argued by some MP's that death penalty is more economical than punishments like life imprisonment in that it does not involve the expense of maintaining a criminal for life. Mr Shikuku in his contribution to the Bill⁶ stated that "putting him (robber) there (prison) obliges everybody to pay tax to feed him"⁷ He felt that prison had become home for some persistent criminals.

"Prisoners want to stay in, when released they commit another crime in order to go in".⁸

This attitude shows that the legislators took issues on their face value. Thus, for example, if a criminal had many

convictions and consequently many jail sentences, this was basis for concluding that prisoners commit crime out of choice in order that they may be sent back to prison. Such a statement as Shikuku's in effect purports to absolve Society from any responsibility of the Criminal behaviour of its lot.

Some MP's argued that other punishments had failed to deter violent robbers. They thus saw capital punishment as the final option. Later on during the debate for a mandatory death sentence in 1973, Mr Nyamweya, then Minister for works, stated that:

"...the Government has not restored to this measure for the sake of doing so but because every other form of punishment has failed to eliminate the menace."⁹

The law had been amended¹⁰ to provide for the sentences of a minimum of 14 years imprisonment with hard labour and a maximum of 20 years with strokes barely two years prior to the introduction of the Bill.¹¹ Thus the effectiveness of these sentences had not been amply tested.

It was argued by the supporters of the death penalty that public opinion demanded the hanging of robbers. They made statements like "...the mass of our people demand today..."¹²

The then President, Mzee Jomo Kenyatta was allegedly given a public mandate to hang robbers in public.¹³ He solicited this mandate in a couple of public rallies he addressed by phrasing his questions in such a way as to get affirmative chorus answers.

The local press also played a significant role in building the storm that culminated in the introduction of death penalty for armed robbery. The stories carried out in the newspapers misled the members of public that that was the general will of the Kenyan public. Such an allegation was unsupported by any empirical evidence as no opinion polls were ever conducted to determine public opinion. Further, even in the few public rallies conducted that addressed the issue of armed robbery, the public was not enlightened on the arguments on the subject of death penalty.

Polls or no polls, it is contended that public demand for justice does not justify the introduction or retention of the death penalty. While as a matter of practical politics no government can be oblivious to the feelings of the Governed, the mere existence of a desire to see justice done, which means to see those who commit certain acts suffer certain punishment does not automatically justify its gratification. Where an actual offender is punished pursuant to the aim of prevention of crimes, the demand for justice may be incidentally satisfied. But to punish merely in order to satisfy this demand is no more justified than to ill_treat one person in order to gratify the sadistic desire of another. Clear approval of use of the death penalty by public is thus not an argument in its favour for a law-maker.¹⁴

Some MP's took refuge in the doctrine of "an eye for an eye" as a justification for the death penalty.

"...these robbers who use undue violence, undue killers....should be hanged or should abide by the law of moses, that is an eye for an eye." ¹⁵.

The MPs did not put up any argument to back the doctrine. All that they did was recite the Bible or simply repeat the adage.

It was argued that the criminal sympathy should be with the victim rather than the villain. In his contribution Shikuku said:

"...If we say hanging is not enough....are we just going to say that sending them to prison is enough ? Are we not going to take into account the misery of the family of the people who were butchered to death and their property taken? Are we forgetting that those who have died have left behind their children and so forth?"¹⁶

Whereas the above argument is acceptable, one finds it difficult to be persuaded that by imposing death penalty on the violent robber, sympathy is won for the victim. on the contrary, popular sympathy may be diverted from the victim of the crime to the offender who is awaiting execution.

It can be argued that politics played a major role in the debate. This argument has its foundation in the informal *de facto* relationship that existed between the legislators and the president. Reporting on the late president's speech on Kenyatta Day in 1971, a local daily head column read:

"...President Kenyatta declared that he was personally

in support of public executions of those convicted of robbery with violence...saying Kenya was a democratic country where freedom of expression was guaranteed under the constitution, he asked those opposed to the public execution of robbers to say so at the rally."¹⁷

The power that went with the institution of the presidency and the president's charismatic nature acted to ensure that no one dared take the challenge.

Some MP's felt that the fact of the President supporting the Bill was reason enough for them to support the same. Mr Kase stated:

"Perhaps the Attorney General will tell us that it is what the Mzee wants and if it is, then I have no alternative but to agree"¹⁸

This statement clearly shows the willingness to compromise their honest opinion about the death penalty if only to please the president.

It should be noted that the continued spate of robberies was causing Kenya embarrassment on the international scene. Mr Charles Njonjo, the then Attorney General said:

"We do not want to have a bad name....we do not want tourists in this country to be scared away by these thugs"¹⁹

Thus this state of affairs warranted all possible measures to eradicate the menace so that foreigners would have no fear in coming to and investing in Kenya. To the Attorney General and his likes, death penalty was the ultimate solution.

THE CASE AGAINST DEATH PENALTY

The main arguments of the opposers of the death penalty were: that it is not a unique deterrent, that it is final and irrevocable, that it is unjust and discriminatory, and that the doctrine of an eye for an eye is as irrelevant as it is useless.

In rejecting the argument that death penalty was a unique deterrent, Kariuki J.M said:

"We can learn from history that in countries as near as Uganda, death is prescribed for armed robbery. We also know that this factor has not had a significant effect on the rate of armed robberies... In countries like Nigeria where public execution is the penalty for armed robbery, the crime rate has not been on the decrease, to the contrary it is on the increase."²⁰

Research carried out elsewhere seems to support Kariuki's assertion that death penalty has no significant effect on the rate of armed robbery. Professor Thorsten Sellin, after a research on whether death penalty had a greater deterrent effect in the case of murder of policemen concluded thus:

"The claim that if data could be secured they could show that more police are killed in abolition states than in Capital Punishment states is unfounded. On the whole, the abolition states... seem to have fewer killings, but the differences are small. If this is then the argument upon which the police are willing to rest their opposition to the abolition of capital

punishment,...it lacks any factual basis."²¹

Some MPs were of the opinion that the real deterrence was not in the severity of the sentence but the certainty of arrest and conviction. When committing their crimes, the perpetrators do not contemplate their detection. It was argued that :

"Punishment is always known to the criminals; they always know that there is punishment if they are caught, but they always hope that they are not going to be caught..."²²

Gachuki's view is that the certainty of conviction is inversely related to the barbarity of the punishment. He gives two main reasons for this; firstly, the burden of proof required to convict both in law and in practice is that of establishing the guilt of the accused "beyond reasonable doubt". This is not an easy task.²³

In 1924, the British Home office did state that:

"In consequence of the strong proofs of guilt necessary for crimes punishable by death, the proportion of acquittals for murder is higher than most other crimes, and an acquittal does not necessarily imply failure to detect the perpetrator of the crime."²⁴

Secondly, the judges (including Magistrates) and prosecutors, being human beings, cannot react the same way. Some of them do not support the death penalty and ^{as} such their feelings may be reflected in the stringency of the court or laxity of the prosecution in prosecuting the case.

Gardener argued in 1956 that the reason why there were only 12 executions in respect of 145 murders was not principally because of an increase in the percentage of reprieves, but principally because juries were becoming more reluctant to convict.²⁵

The argument that death penalty is irrevocable was not lost on the MPs:

"...it is so final. Evidence can be juggled and no human being is perfect in any criminal case ...Somebody who is innocent may be found guilty."²⁶

Two separate but related issues may be drawn from the above statement. An innocent person may be convicted of a capital offence as a result of a deliberate frame up or even misuse of police powers of interrogation of suspects, for example forced confessions. A conviction may also be as a result of a genuine mistake. This possible miscarriage of justice is underscored in a 1927 case²⁷ at Massachusetts in United States. In this case, two Italian migrants, Nikola Sacco and Batholomeo Vanzetti were convicted of a murder that had taken place in the course of a bank robbery and executed. They protested their innocence throughout the trial which was ridden with racial prejudice. This case took 35 days yet the jury received the case in the afternoon and was reportedly ready to return a verdict of guilty immediately after the close of the case. 50 years later the Governor of Massachusetts issued an apology because evidence had been adduced absolving the two of any guilt.²⁸

A 1987 study found that 23 innocent people had been executed in the USA alone this century.²⁹ This shows that there is always a possibility of convicting an innocent person in any criminal case. The reason for such a conviction notwithstanding, the fact remains that once capital punishment has been administered on a person, he is eliminated from the society once and for all and nothing can be done to bring him back to life. Apology can never be a remedy for the miscarriage of justice once it has occurred.

The argument of the validity of the doctrine of "an eye for an eye" was dismissed as an old conception and of no help.³⁰ Killing the criminal does not undo the crime or bring justice to the victim or the society. The attitude should be as expressed by a mother of a murdered daughter whose killer was imprisoned for life by a Los Angeles Court in November 1960 though he had been committed to the court for trial under the death penalty law. She wrote:

"I cannot believe that capital punishment is a solution to abolish murder by murdering an endless chain of murdering (sic). When I heard that my daughter's murderer was not to executed my first reaction was immense relief from the additional torment. If the usual catastrophe was to be stopped it might be possible to turn bad into good...maybe he (the murder) became what he is because of humiliation and rejections. To become useful would be a way to help him....if it is to be an eye for an eye and a tooth for a tooth, this will soon be a blind and toothless world"³¹

Mr Seroney, opposing the introduction of the death penalty for robbery with violence, said:

"I believe it is a mark of primitiveness and savagery to think that by imposing harsh sentences you thereby reform society and reduce crimes."³²

The argument is that the considerations which led to the abolition of the more savage accompaniment of executions and to the restriction of the number of capital offenses

especially those involving murder and theft are:

"...In those countries where there is definite disparity in economic wealth within the community. In Kenya, you will not find an Asian being accused of robbery with violence. You will not get an European being accused...It is because they have it-have the wealth. It is only among the Africans where you will get this stealing...and it is because we are the have-nots in this country"³⁷

The argument is that armed robbers are not so because they were born robbers, rather they are forced by economic factors to do it. Thus unless the economic factors are addressed, then robbery with violence is here with us to stay. Kariuki put it thus:

"As long as our economic set up is such that the majority of our people, including ourselves (MPs) are continuing to ~~a~~ mass property and live side by side with the poor members of the society, even if the Bill is passed, armed robbery will never miss in this country."³⁸

should operate to guard against introduction of the death penalty for new crimes. better still, they should operate to move us to abolish the penalty altogether. To kill a prisoner in cold blood according to an inexorable ritual is to do something that should not be done to any person whatever his crime as our respect for human beings in general demands.³³

Kariuki in his contribution pointed out that:

"...if the criminal suspects possibility of arrest, he will try to eliminate anyone who might live to tell the story."³⁴

Those who think that they are going to be executed for a crime may kill more recklessly to avoid capture than those who believe that any other punishment,³⁵ for example life imprisonment, is the maximum punishment. Thus a penalty which we believe is necessary to maintain conformity to the law at its maximum may convert the offender into a hardened enemy of the society.

A few MP's made an attempt to address the root causes of the crime of robbery with violence; to look at the criminal rather than the crime. Kariuki said that:

"Before we consider the appropriate penalty we should ask ourselves, why do they become criminals? Do they become thieves because there is necessity to steal or because they are born thieves?"³⁶

Mwangale cautioned the House not to take the Bill merely on its face value, but to consider the background of the robbers in the country. He said that violent crimes,

Another argument that stems from the above arguments is that the death penalty is unjust and discriminatory. Advancing the argument, Nthenge stated:

"Some people are poor and they cannot afford the best lawyers and they are not well defended and at end they get the punishment even though they may be innocent."³⁹

The truth of these words is not hard to get in our criminal justice realities. Suffice to say that while those with political or money power are more likely to influence the officers of the court to their advantage and therefore escape the death penalty, the poor do not have this advantage and it is upon them that the penalty is often pronounced and applied.

In spite of these arguments against death penalty which, it is submitted, had more weight than the arguments for the imposition of the death penalty, parliament amended the law in 1971 to provide for death punishment for robbery with violence. The debates that followed were on whether the penalty should be made mandatory. The Bill went through parliament. It was assented to by the president on 4th April, 1973 and commenced its' operation on 6th April 1973 as the Penal Code (Amendment) act No 1 of 1973.

THE LATEST DEBATE

The latest parliamentary debates on the death penalty took place during the Month of December, 1994. A Motion was moved by Kiraitu Murungi calling for an out-right

abolition of capital punishment which exists in the Penal Code. It read:

"That given the fact that death penalty is archaic, inhuman and unjustifiable in today's world, this House resolves that sections 40(3), 204 and 296(2) of the Penal Code which impose mandatory death punishment for the offenses of the reason, murder and armed robbery respectively be repealed, varied or otherwise amended to exclude any reference to the death penalty,"⁴⁰

This Motion has no mention of section 60 of the Penal Code which provides for the death penalty for administration of unlawful oaths to commit capital offenses.

The motion was seconded by Dr Mukhisa Kituyi who said that the death penalty could not be a punishment because of its finality. It is based on vengeance as it is meant to give satisfaction to aggrieved relatives that the murderer has been killed.⁴¹

It is pointed out that it was wrong for the MP to make a statement that suggests that murder always results in the course of commission of the three capital offenses. For example, the offenses of robbery with violence and treason can be constituted without necessarily involving murder.

The Attorney General, Mr Amos Wako, amended the motion to read as follows:

"That the House urges the Government to undertake an early review of sections 40(3), 204 and 296(2) of the Penal Code which impose mandatory death punishment for the offenses of treason, Murder and armed robbery respectively and all other laws which provide for death Penalty with a view to abolishing the death penalty in Kenya."⁴²

This amended motion called for a review of all the laws that provide for the death penalty with a view of abolishing the death penalty in Kenya.

While moving the amendment, the Attorney General pointed out that we must ensure there is a consensus by Kenyans before we can move to abolish the death penalty in our statutes.⁴³ He said that because death penalty is so

serious it should be imposed only for serious crimes.⁴⁴

Unlike in the debates in the early 1970s, the Attorney General made an attempt to enlighten the members of Parliament on the campaigns throughout the world to abolish the death penalty. He said that some countries viewed the death penalty as a violation of Human life while others considered it a deterrent to crime. He pointed out that there is no consensus on the issue for the time being.⁴⁵

The Amendment was seconded by an Assistant Minister in the Office of the President, Mr Julius Sunkuli, who said that if the death penalty was abolished there would be no safeguards. He said that we have few murders today because potential murderers fear the consequences of the law.⁴⁶ This statement suggests that there are a few murders due to the presence of the death penalty in the statutes. One finds difficulty in being persuaded that this is the position in Kenya as reports in the Media on murders committed show otherwise.

Mr. Sunkuli said that the abolition of the death penalty should be gradual and suggested that it be abolished in respect of robbery with violence. He appreciated the confusion that is caused by the definition of the offence of robbery with violence, which confusion will be addressed in the following chapter. He observed that:

"The word 'armed' as regards robbery is not defined in the statutes and somebody armed with a panga might be sentenced to death."⁴⁷

Mr Murungi argued strongly for the abolition of the death penalty in all its aspects. He said that Capital Punishment is not effective in deterring the crime. He pointed out that as parliament debated the matter, 500 people jailed at Kamiti Prison were waiting to be hanged.⁴⁸ This figure shows that the executions are not as frequent as the passing of the sentences. One wonders why we have a punishment which the authorities are reluctant to administer.

Kiraitu said that there was a link between economics and the death penalty. He said that the root cause of murder and robbery is in poverty. Kenyans who live below the poverty line are mainly the victims of death penalty. Calling for an equitable distribution of resources, he observed that so long as 10% of Kenyans continue to monopolise the National wealth. While 90% wallow in poverty, there will never be a permanent solution to robberies and murders.⁴⁹

In a nutshell, one can say that the 1994 debates on the death penalty were reminiscent of the debates in the 1970s as discussed in the first part of this chapter. Both the original and amended motions were opposed overwhelmingly and voted out on 7th December, 1994.⁵⁰ Thus as of now, the death penalty remains mandatory for the offenses of robbery with violence, murder and treason.

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CHAPTER THREE

3.0 THE LAW ON ROBBERY WITH VIOLENCE IN KENYA AND THE DEATH PENALTY ON THE INTERNATIONAL PLANE

3.1 THE LAW ON ROBBERY WITH VIOLENCE IN KENYA

As noted in the preceding chapter, the Penal Code¹ (amendment) Act No.1 of 1973 made death penalty the mandatory sentence for the offence of robbery with violence. This part of the chapter discusses this offence with the intention of highlighting some of the problems arising out of the law on the crime of robbery with violence. It is intended to demonstrate firstly, that the crime is ill-defined in the penal code and this poses serious practical problems in the application of the law. Secondly, to show how the Courts have interpreted and applied section 296(2). Thirdly, to show that the trial of the offence in certain cases is subject to procedural anomalies which seriously compromise the possibility of a fair trial.

3.1.1 DEFINITION, INTERPRETATION AND APPLICATION

It should be noted from the onset that robbery with violence does not exist as a separate offence from the offence of robbery. The law on robbery is found in sections 295 and 296(2) of the penal code, which state as follows: section 295. Any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing

stolen or to prevent or overcome resistance to it's being stolen or retained, is guilty of the felony termed robbery. section 296(2). 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.

A close analysis of the above sections reveals that the offence of robbery with violence is committed when a person who would otherwise be guilty of robbery:

- (i) Is armed with any dangerous or offensive weapon or instrument, or
- (ii) Is accompanied by one or more person or persons, or
- (iii) Wounds, beats, strikes or uses any other personal violence to any person immediately before or immediately after the time of the robbery.

These three ingredients of armed robbery are independent of each other, that is they are alternatives as opposed to being cumulative. This is so because there is the use of a comma after each ingredient and the word 'or'. Therefore, the prove of one ingredient suffices to prove the offence of robbery with violence.

There is a quagmire between sections 295 and 296 (2). The first ingredient of armed robbery, as noted above is the possession of any dangerous or offensive weapon or instrument during the commission of the offence. The act

of possession may reasonably cause the victim to fear that the weapon or instrument will be used against him or property and this amounts to a threat. It follows, therefore, that this act of possession also discloses an offence of robbery under section 295 which provides Inter alia that a threat to use actual violence to any person or property at or immediately after or immediately before stealing anything constitutes an offence of robbery.

The third ingredient of armed robbery under section 296 (2) is the wounding, beating, striking or using any other personal violence by the offender in the course of his illegal enterprise. Under section 295, the use of actual violence to any person by the perpetrator of the illegal enterprise amounts to an offence of simple robbery.

An analysis of the above discussion shows that what amounts to a crime of simple robbery under section 295 also amounts to an offence of robbery with violence under section 296(2). This gives the prosecution a discretion as to what section the accused person will be charged under. The cause of concern here is that a person who is charged under section 295 will only be liable to imprisonment for 14 years together with corporal punishment not exceeding twenty-eight strokes² if convicted while a person convicted under section 296 (2) shall be sentenced to death. This means that a person who is charged under the latter section will suffer an injustice.

It is difficult to ascribe logic to the second element that changes ^{robbery to} robbery with violence. Where a person

forcefully steals from another person, this amounts to an offence under section 295. If however, the perpetrator of the offence is accompanied by another person, a willing participant, all other circumstances of the offence remaining the same, the penal code directs that this would amount to robbery with violence. In other words it is not correct to convict more than one person for robbery under the penal code as mere numbers transform the offence to robbery with violence.

There are a number of questions that arise from the definitions of the offences of simple robbery and robbery with violence and whose answers cannot be derived from the penal code. These are questions like; what amount of violence will constitute robbery and not robbery with violence? What is a weapon or offence instrument for purposes of section 296(2). To answer such questions, decided cases have to be considered.

The confused definitions of these offenses create practical difficulties in the application of the law as is readily illustrated by case law.

In Gabriel Njoroge V R,⁵ the accused was convicted of the offence of robbery. The facts of the case were that on the material night the complainant was about to drive away in his car when the accused suddenly grabbed him and pointed a gun at him. The accused fired bullets from his gun and finally overpowered the complainant and made away with his car. The trial court found that the accused had been armed with a gun, that he was in the company of another

person during the commission of the offence, and that the accused's accomplice struck the complainant. Any of these facts established should have sufficed for a conviction of robbery with violence. The court, nevertheless, convicted the accused of simple robbery.

In the case of Joseph Wangangu V R,⁶ the appellant had been charged with and convicted of the offence of robbery. It was alleged that on the material night, the accused together with 3 others not before the court, had pushed the watchman on duty towards an electricity pole and tied him while they stole. They were alleged to have been armed with clubs and swords. The trial magistrate on the question of violence held that there was no more than tying up the complainant and this was incapable of amounting to violence under section 296(2). He stated:

"Considering what happened to the watchman, one cannot say there was force used. They led him to an electricity post and tied him up... He was threatened that by making any noise he would be harmed.... These people had runkus and pangas.... These were offensive weapons to show that the four were serious with their threat to harm should the watchman shout. Hence, the circumstances clearly show that this was robbery and nothing else...."

This is a clear misdirection of interpretation of the facts. All the ingredients of armed robbery were present yet the learned magistrate concluded it was simple robbery.

The High Court did not agree with the trial

magistrate's ruling that only simple robbery was proved but upheld his decision on the ground that although the particulars of the offence supported a more serious type of robbery, only simple robbery was charged and the violence used was catered for in section 295 which sets out the ingredients of simple robbery which is punishable under section 296(1). Their Lordships admitted that section 296(2) is not strictly followed and in their reasoning, they blamed it on the charging powers. They stated :

".... a Court of trial must however, in the ordinary course of events accept the charge put before it and adjudicate on the facts thereof within the framework of the applicable law and its conviction is entered, this court (H.C.) in its turn and on its first appeal can but adjudicate upon the conviction (based on the charge) in the light of applicable law and the recorded evidence. It can do no more, it must do no less"

This case is a clear indication that the accused's life hangs precariously in the hands of the charging officers. They have power to prefer charges under section 295 or section 296(2) with the accompanying disparity of consequences. It is not evident from the wording of the said sections what criteria they use to do so.

Cases decided in Kenya, for example the Joseph Wangangu Case,¹ reveal one broad practice: the police tend to charge the offender with robbery where no personal injury was inflicted on the victim whatever the other

circumstances of the case, but they tend to prefer robbery with violence where some personal injury was inflicted in the course of the offence.⁸

In the Ugandan case of Sokitoleko V Uganda⁹ the accused with others not in court had robbed the complainant on a highway. The trial magistrate had established that the accused, or his accomplices, had beaten their victim in the course of the offence, that the accused had been armed with a stick which the court held to be a dangerous weapon and, moreover, that the accused had been in the company of other people though they were not charged. Nevertheless, the magistrate proceeded to convict the accused for robbery under a provision Par Materiam with section 295 of Kenya's penal code.

On appeal, the High Court of Uganda observed that on the facts the proper charge should have been robbery with violence.

The above case is one of the very few decisions in which a court has made an attempt at analysing the law on robbery in East Africa. Cases decided have tended to regard the law as well-settled and thus needing no amplification. The effect is that the courts have never come to terms with the reality of the law they purportedly apply. The probable reason for this is that the courts, on analysis, would come to the conclusion that the offence of robbery is practically non-existent and only that of robbery with violence exists. This would mean that every person charged under this law would be sentenced to death

if convicted. Rather than have to sentence people to death the judges have, it is thought, opted to connive at the deficiency in the law.¹¹

It is evident from the above discussion that the offenses of robbery and ^{robbery with} violence are ill-defined in the penal code. This poses serious practical problems in the application of the law. To avoid this confusion, the offenses should be defined more clearly. The court should also make an attempt to interpret what the law actually is. This judicial interpretation will serve to limit the discretion of the charging officers to prefer charges which discretion, it has been noted, can be mis-used.

3.1.2 PROCEDURAL ANOMALIES

The penal code carries four offenses for which the prescribed sentence is death. These are murder, treason, robbery with violence and administration of unlawful oaths to commit capital offenses. The last of these offenses is hardly used, but still it remains a capital offence under section 60 of the penal code.

Until 1969, the High court had exclusive jurisdiction to try a person charged with capital offence. Section 6 of the Criminal Law (Amendment) Act (No 3 of 1969) amended Section 7 of the criminal procedure code (C.P.C)¹² so as to empower subordinate courts to pass, among others, the death sentence under section 296(2) of the Penal Code. Section 7 (1) (a) states that:

"A subordinate court of the first class held by: a Chief Magistrate, Principal Magistrate or Senior Resident Magistrate may pass any sentence authorised by law for any offence triable by the court".

What Parliament had done was to merely increase the powers conferred on certain subordinate courts.¹³ When robbery with violence was made a capital offence it was triable by subordinate courts.

Subject to the provisions of section 220 CPC, murder and treason are the only offenses that are triable only by the High Court. This has certain implications. For example, that these are the only offenses that are mandatory subject to committal proceedings, and subsequent trial by the High court. Section 230(a) of the CPC provides that:

"A subordinate court shall hold committal proceedings.....where a person appears before that court charged with an offence which is triable only by the High Court."

The function of committal proceedings is to ensure that no one should stand trial unless a prima facie case has been set up¹⁴. Section 233(1) of the C.P.C states that:

"Where, having read the committal documents, the magistrate considers that there are insufficient grounds for committing the accused person for trial, the magistrate shall discharge him.

Another function of committal proceedings is that an opportunity is offered for the charge to be properly

explained to the accused person by the magistrate. This serves to avoid unfortunate instances, for example pleading guilty by accused persons and thus earning the death penalty summarily.

People charged with robbery with violence are triable only by subordinate courts and therefore not subject to committal proceedings. As such, the safeguards arising therefrom are not afforded to them.

It has been a long established rule of practice, though not of law, in East Africa that no other count should be joined to a count of murder or manslaughter except where the two are based on precisely the same facts. This was given judicial recognition in the case of Yowana Sebuzukira V Uganda.¹⁵ The appellants had been charged in one information with two offenses, one of murder and the other of arson and was convicted on both counts. The two offences were founded on the same facts as the murder charge in count one resulted from the arson charged in count two. Per Law J.A:

"It is not ordinarily desirable that the trial of such grave offenses be complicated by the introduction into the proceedings of additional matter to which consideration must necessarily be given by the judges and assessors, and which might distract attention from the main issue."¹⁶

What makes the judge to refer to the offenses of murder and manslaughter as grave are, it is thought, the penalties which they carry. Robbery, just like murder,

carries a mandatory death sentence and as such it can also be referred to as grave offence. However, while the practice in the trial of murder remains that only one count may be preferred, that in robbery with violence is that an alternative charge of handling stolen goods is invariably included.¹⁷ The danger of distracted attention is, therefore, ever present.

The practice in Kenya, though devoid of any legal basis, is that all persons triable only by the High Court are provided with an advocate at the expense of the state if they cannot afford their own legal representation. Suspects of robbery with violence do not benefit from this practice. As a result, most of them conduct their own defence. Even when they appeal to the High court, persons sentenced to death for robbery with violence are not given legal representation by the state.¹⁸ This disparity is certainly prejudicial to them given the rigours of our criminal justice system.

It may justifiably be concluded that when death penalty was introduced for the offence of robbery with violence not much thought was given to providing a fair trial for persons charged with the offence. The result is that a grave offence has not been accorded the serious treatment it deserves.

3.2 DEATH PENALTY ON THE INTERNATIONAL PLANE.

Generally the world can be said to have reacted in four different ways to the death penalty. First, there are

those countries which retain and use the death penalty for ordinary crimes. Secondly, there are those countries which have abolished for ordinary crimes only; that is, their laws provide for the death penalty only for exceptional crimes such as under military law or crimes committed in exceptional circumstances such as wartime. Fourthly, there are those states that are de facto abolitionist, that is, they retain the death penalty for ordinary crimes but have not executed anyone for at least a decade.¹⁹

In 1988, when the last United Nations Survey was done, the total number of 'retentionist' countries was 101. The number had decreased to 97 by the end of April.²⁰ South Africa has now joined the growing club of countries which have outlawed capital penalty thus further decreasing the number of retentionist countries.²¹

Western Europe has the largest number of countries which have abolished the death penalty for all crimes. Cyprus, Malta, Spain and United Kingdom have abolished capital punishment for ordinary offenses only while Belgium and Turkey are de facto abolitionist. This means that the Western Europe countries do not mete out the death penalty for ordinary crimes at all.²²

In South and Central America, eight countries have abolished the death penalty for all crimes. Five countries have abolished for ordinary crimes only. Bolivia is de facto abolitionist while only Belize and Guatemala retain and use the death penalty for ordinary crimes.²³

In North America, Canada and Mexico do not retain the

death penalty in their laws. The United States of America has retained the penalty. In this country, the current climate makes pro-penalty rhetoric a definite vote-winner.²⁴ Polls suggest that an overwhelming majority of Americans now favour the death penalty²⁵. Public opinion is constant at around 80% of the public for the death penalty²⁶.

In Eastern Europe, 14 countries have retained the penalty while 7 have abolished it²⁷. The trend in this part of the world is unclear; countries which abolished after the collapse of communism now find themselves with an alarming crime rate and renewed calls for the ultimate penalty²⁸. However, there has been a call by the parliamentary body of the 32 member Council of Europe for a treaty abolishing the death penalty for all crimes, without exception. States within the council currently retaining the penalty would be obliged under the new treaty to set up commissions of inquiry with a view to abolition.²⁹

In Asia and the Pacific Region, 10 countries have completely done away with the death penalty, 10 are de facto abolitionists, 2 are abolitionists for ordinary crimes only and 23 are retentionist. The main practitioners of the penalty in this region - Japan, Pakistan and China - are among the countries with the highest executions in the world, and show no signs of changing policy.³⁰ China, for example has well over 1500 people executed every year.³¹

In Sub-Saharan Africa, 8 countries have abolished the penalty for all crimes. Twelve are de facto abolitionist

and 1, the Seychelles, has abolished for ordinary crimes. 27 countries retain and use the death penalty for ordinary crimes. Though a number of countries have abolished the death penalty since 1988 and this is an indication that the trend is towards abolition, there is still strong support for the penalty in some countries.³² In Nigeria, for example, on 2 August 1994, 38 convicts were executed.³³

In the Caribbean, two states, Haiti and the Dominican Republic, are abolitionist for all crimes and only one country, Bermuda is de facto abolitionist. All other countries retain the death penalty.³⁴

In Middle East and North African region, only Israel has abolished the penalty for ordinary crimes while Bahrain is de facto abolitionist. All other countries retain the penalty under Islamic Law.³⁵

Most countries in the world are members of the United Nations. Since its foundation, the U.N has continuously expressed its concern over the question of capital punishment. Thus, in 1959, the General Assembly³⁶ invited the Economic and Social Council to initiate a study on capital punishment.³⁷

The General Assembly in 1971³⁸ affirmed that the main objective to be pursued in this area was that of progressively restricting the number of offenses for which capital punishment may be imposed, with a view of abolishing this punishment in all countries.³⁹

In 1983, the Council⁴⁰ requested the committee on crime control to further study the question of the death penalty

which did not meet the acknowledged minimum legal guarantees and safeguards. On the recommendation of the committee, the Council⁴¹ adopted the safeguards, on the understanding that they should ^{not} be invoked to prevent or delay the abolition of capital punishment. The safeguards cover the basic guarantees to be respected in criminal justice proceedings to ensure the rights of the offenders charged with capital offence. They also state, inter alia, that capital penalty can be imposed only for the most serious crimes.⁴²

In 1990, the Council⁴³ requested the Committee on Crime Control and Prevention to keep the question of capital punishment under review and asked the Secretary General to draw on all available data, including available criminological research, in preparing the future report.⁴⁴

Since World War II, and the Universal Declaration of Human Rights, which recognised each person's right to life, the campaign for abolition has been growing steadily. The Sixth Protocol to the European Convention on Human Rights being the first international agreement when it came into force in 1985, to abolish the death penalty for all peace time offenses.⁴⁵

FOOTNOTES

1. Chapter 63, Laws of Kenya.
2. Section 296(1)
3. Section 296(2)
4. KEGORO G.M, "The Law on Robbery in Kenya: A case For Reform "University of Nairobi Law Journal Issue No. 1, 1994 P. 14.
5. I.K.A.R. 457
6. Crim app. No 659 of 1977 H.C Nairobi.
7. Ibid
8. Supra note 4 P.15.
9. (1967) EA 531.
10. For example David Lamosi and others V. R I K.A.R. 457.
11. Supra note 4 P. 15.
12. Chapter 75, Laws of Kenya.
13. Stephen M'Riungu VR (1973_) EA 230
14. R V Epping and Harlow Justices (1973) 1All E.R. 1011.
15. (1965) E.A.C.A 685.
16. Ibid
17. Supra Note 4. P. 17
18. Ibid
19. MAHARAJH,R: "The Ultimate Penalty"Index on Censorship vol 24 no 2 March/April 1995 P. 96.
20. Ibid

21. Daily Nation , 7th June, 1995 P. 6
22. Supra Note 19 P. 97
23. Ibid
24. Supra note 19.
25. NEIER, A "A Special Cruelty" Index on Censorship
vol 24 No 2 March/April 1995 P. 107.
26. BEDAU, H "Dangerous Liaisons " Index on Censorship
vol 24 No 2 March/April 1995 P. 110.
27. Supra note 19
28. Ibid
29. MOOREHEAD, C. "Dead Man Walking " Index on
Censorship vol 24 No 2 March/April 1995
P. 93.
30. Supra Note 19
31. Supra Note 29
32. Supra note 19
33. Supra note 29.
34. Supra note 19.
35. Ibid
36. In its resolution 1396 (xiv) of 20 November 1956.
37. Compendium of United Nations Standards and Norms
in Crime Prevention and Criminal Justice,
United Nations, New York 1992 P. 218.
38. Resolution 2958 (xxvi) of 20 December, 1971.
39. Supra
40. Resolution 1983/24 of 16 May, 1983.
41. Resolution 1984/50 of 25 May, 1984
42. Supra note 37.

43. Resolution 1990/29 of 24 May, 1990.

44. Supra note 37 p.219.

45. Supra note 29 p.92.

CHAPTER FOUR

4.0 CONCLUSION AND RECOMMENDATIONS:

The dissertation begun by examining what crime is. After an examination of various attempts by writers to define punishment, it was concluded that none is universally accepted since each of the attempted definitions had flaws. It was, however, agreed that crimes are a creation of the law and as such they change with the latter. It was also observed that since not all laws are universal, what is a crime in one country may not be so in another.

It was observed that a criminal is not always an agent of himself. There are certain factors that facilitate crime in the society and these factors have to be taken into consideration in order to arrive at a justified conclusion on how to treat the offender and also how to formulate ways of curbing crime in the society. It is on this note that the theories of causes of crime were examined and the conclusion was arrived at that there is no consensus as to the causation of crime. The offence of robbery with violence was give special attention and it was concluded that the causes of the crime are deeply rooted in the economic status of the accused person.

The concept of punishment was examined. It was observed that several attempts have been made at defining the term, some of which were examined, and the conclusion was drawn that there is no consensus as to the definition of

punishment will be dependent on his approach to the goals justifying punishment.

The generalised theories of Punishment viz, retribution, deterrence, Protection of the public and rehabilitation were discussed. Each of these theories has its own merits and demerits and has consequently received appreciation and criticism. These were highlighted in the text. Thus for example, retribution was emphatically dismissed as an outdated theory that has no place in our modern criminal justice system.

The second chapter dealt with the Parliamentary debates in Kenya on the death penalty. The first debate was in the early 1970s. It is in this debate that it was sought to introduce the death penalty for robbery with violence, and later on, in 1973, to make it the mandatory penalty for those convicted of the offence.

Arguments that were advanced by the Members of Parliament, for or against the death penalty, were brought out in the chapter. In analysing these contributions, arguments in other countries which have researched on the subject of death penalty were brought in, either to support the arguments or to disprove them. It is evident from the debate that the MPs did not address the causes of the crime of armed robbery while legislating against it. They introduced the death penalty for the offence in the mistaken belief, innocent or otherwise, that it would help to solve the problem. This is far from the truth. The crime rate is on the increase as is evidenced by reports in the

local daily newspapers.

The Daily Nation dated 30th May, 1994 on Pages 1 and 2, for example, reported that there had been a spate of armed robberies in which gangsters had robbed banks and individuals of millions of shillings in less than a week. On the 27th of May, 1994, armed gangsters had raided the Koinange Street branch of Habib Bank in Nairobi and stolen more than Shs. 1.3 million. The previous Tuesday, armed robbers had stolen Shs. 4.4 million from the bank of Baroda. A man was robbed of Shs. 200,000 less than 30 minutes after the bank raid. On the same day in Nairobi, an engineer with the Ministry of Agriculture, one Mr. Charles Nderi Nyaga, was shot dead outside the Bank of India and robbed of a briefcase containing Shs. 150,000. On the following day, Wednesday, a garment dealer was robbed of a briefcase containing Shs. 180,000 in a Mombasa street. On May 9th, armed robbers fled with more than Shs. 1 million from the First American Bank in Mombasa, and, three days later, Shs. 1.1 million was stolen from the Commercial Bank of Africa branch also in Mombasa. This is just a tip of the iceberg as reports on robberies are carried out in the newspapers almost on a daily basis.

The second and latest Parliamentary debate on the death penalty in Kenya was in December 1994. A motion was moved calling for an outright abolition of capital punishment which exists in the Penal code. The Attorney General amended the motion to provide for the death penalty with a view to abolishing the penalty in Kenya. Both the

original and amended motions, it was observed, were overwhelmingly opposed and voted out. Thus, ^{as} of now the law on robbery with violence remains as it was in 1973.

It was observed in Chapter Three that the offence of robbery with violence is ill-defined in the Penal Code and this poses serious practical problems. It was shown that the offence of robbery is a subject of the offence of robbery with violence. In essence this means that the former offence is non-existent. This shortcoming of the law leaves the charging officers with the discretion to prefer charges which discretion, it was shown, can be mis-used.

It was also shown that the trial of the offence in certain cases is subject to procedural anomalies which seriously compromise the possibility of a fair trial. The accused person is not subjected to committal proceedings and therefore the safeguards arising there-from are not afforded to them. It was also shown that the practice in the trial of armed robbery is that an alternative charge of handling stolen goods is invariably included. The danger of distracted attention is, therefore, ever present.

It was observed that all persons triable by the High court in Kenya are provided with Legal representation at the expense of the state. Suspects of the offence of robbery with violence do not benefit from this practice since it is an offence triable by subordinate courts. This is certainly prejudicial to them given the rigours of our criminal justice system.

Lastly, the position of the death penalty on the international plane was considered. It was shown that the general trend is towards abolition. However a few countries that had abolished the death penalty have re-introduced it or are figuring to re-introduce it. Thus for example a number of federal states in the United States of America have re-introduced the death penalty.

It is in light of the discussion in the underlying chapters that a plea for the abolition of death penalty for robbery with violence is made. The penalty has failed to meet its objective, that is, to curb and finally eradicate the menace of armed robbery. It has failed to deter violent robbers. Time is therefore ripe to look for alternative ways of solving the problem.

A definite period of incarceration, it is thought could give an allowance for a reformatory programme to be administered as indicated in chapter one. The state should take the responsibility of ensuring that it engages in a programme which will be of benefit to the individual criminal and to the society at large. This can be done by imparting in him basic knowledge in skills like masonry and tailoring. If a professional man he should be made to appreciate the value of his knowledge and how to make better use of it instead of wasting himself in criminal activities.

The Government of Kenya has prison farms. These should be used for introducing and imparting agricultural knowledge to the inmates. There is also the prison industry

section. The prison industries should be enlarged and strengthened in their educational roles to the inmates. These should not only be used for teaching the offender a trade but should also give wages to the convict which wages should be banked or invested for him. Whatever he turns out should be sold and proper percentage of the proceedings banked for him after the price of the material used and the cost of maintaining him in the reformatory are deducted. This scheme would enable the convict after say 15-20 years, to have a sizeable amount of savings to help him start a-fresh and also a trade he can continue at.

As noted earlier the causal factors of the offence of robbery with violence are deeply rooted in the socio-economic conditions of our society. So unless these conditions are addressed, an attempt to legislate against the crime will be a self-defeating exercise. The state should create more job opportunities and come up with projects that generate better wages. This could uplift the living conditions of the majority of our population.

Lastly, there should be a fair distribution of wealth. Therefore, if the rich people continue monopolising the national wealth while the poor majority wallow in poverty, then the conclusion cannot be escaped that there will never be a permanent solution to the problem of robbery with violence.

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