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#### **SCHOOL OF LAW**

#### MASTER OF LAWS, (LL.M) THESIS

## RIGHT TO AN ADEQUATE STANDARD OF LIVING: A CASE STUDY OF KENYAN PRISONS

BY

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# THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS, UNIVERSITY OF NAIROBI

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#### **DEDICATION**

This thesis is dedicated to the almighty God who gave me the strength and capability to undertake and accomplish this thesis.

I also dedicate it to my parents, Dr. and Mrs. Ndung'u, and siblings, Peris and Joseph who have encouraged me all through to the end of this work.

I also dedicate it to my close friend and colleague, Ian Kiptoo for his support and encouragement in undertaking this thesis.

#### **ACKNOWLEDGEMENTS**

I am grateful to God for His guidance and mercies as I set out to undertake this thesis up to its completion. For enabling me to beat every obstacle and helping me keep my faith strong and the wisdom exuded, thank you Lord.

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International Covenant on Economic, Social and Cultural Rights, 1966

African (Banjul) Charter on Human and People's Rights, 1981

#### LIST OF ABBREVIATIONS/ ACRONYMS

KHRC Kenya Human Rights Commission

GK Government of Kenya

GSU General Service Unit

USA United States of America

US United States

TV Television

CNN Cable News Network

MP Member of Parliament

ASL Adequate Standard of Living

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

KNHRC Kenya National Human Rights Commission

KHRC Kenya Human Rights Commission

UK United Kingdom

USA United States of America

UN-SMRTP United Nations Standard Minimum Rules for the Treatment of Prisoners

UDHR Universal Declaration of Human Rights

UNHCHR United Nations High Commissioner for Human Rights

UNGA-BPTP United Nations General Assembly-Basic Principles for the Treatment of

**Prisoners** 

BPPAPFDI Body of Principles for the Protection of All Persons under Any Form of Detention

or Imprisonment

MoJ-PS Ministry of Justice-Public Security

DoC Department of Corrections

DoNCS Directorate of Norwegian Correctional Service

HRVs Human Rights Violations

CAR Central African Republic

HRA Human Rights Advocates

CS Civil Society

MSP Medium Security Prison

OFFLAC Oscar Foundation Free Legal Aid Clinic

RPA Research and Policy Associate

CCJS Centre for Crime and Justice Studies

HRR-PDCC Human Rights Report on Prison and Detention Center Conditions

UN United Nations

#### **ABSRACT**

The central problem in this thesis is that despite reforms coming up in prisons over the years, there is the persistent problem of infringement of the right to adequate living standards of prisoners in the various prisons they are kept in. There has been legislative framework on prisoners' rights but implementation of the same has been a problem. Administration of prisons has clearly failed to respect the inherent dignity and humanity of these persons whom have been deprived of their liberty.

The purpose of this study is to bring to light the deplorable prison conditions and human rights violations going on in Kenyan prisons, understand the problems in the law leading to the challenges affecting prisoners as they serve their terms and to propose reforms to remedy these problems.

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#### **CHAPTER ONE: BACKGROUND**

#### **Background to the Study**

Life in prison is nothing close to a vacation, thanks to the deplorable living conditions prisoners have to endure during their imprisonment. It is a chance for reform under conditions of a shell of one's former life. Be that as it may, a prisoner is entitled to protection and upholding of all his human rights except where reasonably limited under the law. Nelson Mandela pointed out the fact that the true state of a nation only manifests in how it treats its prisoners, who are often its lowest citizens. That standard sees Kenya have a bleak future, by the means by which it treats its prisoners. The central element of the incarceration industrial complex is to rehabilitate convicts, and keep in custody individuals going through the motions of the criminal justice system while upholding their fundamental right to decent living. However, nearly 55 years post-independence, the prison system still fails to realize that one key goal<sup>2</sup>.

The right to an adequate standard of living encompasses a number of conditions that need to be fulfilled so that living can be termed as adequate. These conditions include mainly the availability and sustainability of an adequate supply of nutritious food; adequate supply of water for personal and domestic uses; housing must provide adequate shelter, which means adequate privacy, space, security, lighting and ventilation; accommodation items like beddings and

<sup>&</sup>lt;sup>1</sup> 'Nelson Mandela Rules', <a href="https://www.un.org/en/events/mandeladay/mandela\_rules.shtml">https://www.un.org/en/events/mandeladay/mandela\_rules.shtml</a> accessed 27 March 2019

<sup>&</sup>lt;sup>2</sup>Renson Mnyamwezi, Nyambega Gisesa and Bernard Sang, 'Are these Kenya's worst prisons?' (2015). < <a href="https://www.standardmedia.co.ke/article/2000169079/are-these-kenya-s-worst-prisons">https://www.standardmedia.co.ke/article/2000169079/are-these-kenya-s-worst-prisons</a> accessed 17 November 2017.

mattresses should be adequate and in good condition; prompt and sufficient medication and adequate provision of basic sanitation supplies such as toilet paper, soap, toothbrush, or towels<sup>3</sup>.

There has been established more prisons, sanitation and living conditions have been improved and we have even seen voting take place in prisons. The Mwai Kibaki administration made sweeping changes to the prison system. Amenities like computers, educational material, and television sets were made common. It redeemed the prisons' image. <sup>4</sup> These policy changes significantly improved the quality of life of people in custody the country, making prisons humane.<sup>5</sup> It became common to see fashion shows, design expos, convicts sitting national exams, medical checkups, and even the provision of things as basic as female sanitary products. <sup>6</sup> The changes to the post-2003 prison system went a long way in improving the standards of life for convicts. This however has not been maintained thereby leading to the once deplorable living conditions of prisoners creeping up again to haunt the Kenyan prison system.

However, a prisoner's dignity is usually put to test once one is put behind bars. The line between being a human being and being one undergoing correction/punishment and reform behind bars is easily blurred therefore leaving prisoners to a lot of vulnerability in relation to their human rights. These basic fundamental freedoms and rights are the rights to: adequate living standards,

<sup>3</sup> Australian Government, (Attorney-General's Department) 'Right to an adequate standard of living, including food,

water and housing' < <a href="https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-">https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-</a> scrutiny/PublicSectorGuidanceSheets/Pages/Righttoanadequatestandardoflivingincludingfoodwaterandhousing.as px> accessed 13 November 2019.

John Pinecrest, 'Prisons in Kenya' (information cradle 2019) <a href="https://informationcradle.com/kenya/prisons-in-">https://informationcradle.com/kenya/prisons-in-</a> kenya/> accessed 6 November 2019.

<sup>&</sup>lt;sup>5</sup> Ibid.

<sup>&</sup>lt;sup>6</sup> Ibid.

<sup>&</sup>lt;sup>7</sup> Ibid.

equality, non-discrimination, liberty, life, freedom from torture, personal security, and cruel treatment; right to human dignity, highest possible health standards, clean, safe water, fair public hearing, a life devoid of hunger, the freedom to practice any of belief and religion; and education<sup>8</sup>.

There are various laws enacted to protect prisoners' rights but still their implementation has become a real problem as life in prison has become a struggle for survival due to the inhuman conditions. There thus exist weaknesses in the Kenyan laws seeking to protect prisoners as violation of their human rights has become really rife. The right to adequate life standard and its protection in the Kenyan prison system is what this project will focus on. This right has been subject of a debate as whether it is an individual or group right and the researcher adopts it as an individual right since the research is on the living conditions of prisoners.

#### 1.1 Statement of the Problem

As highlighted in this project, the problem is that prisoners, as a vulnerable group, are not rightly accorded their rights, more so the right to adequate life standards in custody thus exposing them to undignified conditions of life. There is a lot of weakness in implementation of the existing Kenyan law judging by the intolerable conditions prisoners live in. Nationally, the Bill of Rights organizes these fundamental rights to provide a clear framework for the protection of the rule of law in human rights.

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<sup>&</sup>lt;sup>8</sup> United Nations, 'Human Rights' < <a href="https://www.un.org/en/sections/issues-depth/human-rights/">https://www.un.org/en/sections/issues-depth/human-rights/</a> > accessed 2 July 2019.

The Prisons Act, Cap 90 Laws of Kenya with its subsidiary legislation, mainly the Prison Rules, 1963 is the main legislation in Kenya charged with consolidation and amendment of the laws relating to prisons. The Prison Rules, 1963 provide for among others accommodation, health and treatment of prisoners as part of the attendant right.

Internationally, the UDHR, ICCPR, and ICESR all promote respect for human rights; fundamental freedoms. Prisoners' humanity entitles them to the protections of the Bill of Rights. Unfortunately that is not the case as implementation of all these laws is weak leaving prisoners exposed and vulnerable in protecting this human right.

#### 1.2 Hypothesis

The analysis assumes that an adequate living standard of prisoners are undermined and violated, thus not rightly protected and upheld due to lack of implementation in the existing law. Kenya is must protect, and preserve human rights. By the conclusion of this research project, the researcher will prove that these obligations are not being rightly honoured pertaining to prisoners' living conditions. Recent studies by institutions like the KNHRC demonstrate the inhumanity of prison living conditions, despite the reforms that prisons have undergone<sup>9</sup>.

#### 1.3 Objectives of the Research

Principally, this research aims to find out whether prisoners' right to adequate living standards is being rightly upheld, protected by the prisons' system in Kenya.

Specifically, the research aims to:

• Lay out the law governing prisoners' right to an ASL.

<sup>&</sup>lt;sup>9</sup> KHRC, Oscar Foundation Free Legal Aid Clinic Kenya, 'Human rights violations in Kenyan prisons' (2008) <a href="http://humanrightshouse.org/noop/page.php?p=Articles/5465.html&d=1">http://humanrightshouse.org/noop/page.php?p=Articles/5465.html&d=1</a> accessed 20 November 2017

- Find out how the law has been applied to the reality of violation of prisoners' right to an ASL and the problems in implementation of the law.
- A comparative analysis on best practices of how other countries approach imprisonment.
- Identify the suitable reforms needed to prevent violation of prisoners' rights.

#### 1.4 Research Questions

Prisoners have been enduring deplorable prison conditions and thereby coming out as neglected and their human rights being violated. The research questions that this thesis seeks to address are:

- What is the law governing prisoners' right to an ASL?
- What is the reality of the problems facing the move to protect prisoners' right to an ASL?
- What best practices do other countries have use to approach imprisonment?
- What are the suitable reforms needed to prevent violation of prisoners' rights?

#### 1.5 Justifying the Study

The interrogation in this paper seeks to enlighten all the stakeholders involved in the prison administration system in Kenya on the need to uphold and protect prisoners' right to an ASL. The need to investigate, condemn, and remedy HRVs in prisons arises therein. The society will thus be more knowledgeable in advocating for consistent prison reforms in Kenya on the right to an ASL for prisoners. Kenyan prisons have been facing systemic problems thus the need to address the problems through reforms<sup>11</sup>. Improving prisoners' standards of living will therefore help them live in humane conditions and uphold their human dignity and will therefore not feel

<sup>&</sup>lt;sup>10</sup>Peter Kimani Ndungu, 'Administration of the Kenya Prisons Organization'

<sup>&</sup>lt;www.unafei.or.jp/english/pdf/RS No98/No98 IP Kenya 2.pdf> accessed 20 November 2017.

<sup>&</sup>lt;sup>11</sup>KHRC, Oscar Foundation Free Legal Aid Clinic Kenya, 'Human rights violations in Kenyan prisons' (2008) <a href="http://humanrightshouse.org/noop/page.php?p=Articles/5465.html&d=1">http://humanrightshouse.org/noop/page.php?p=Articles/5465.html&d=1</a> accessed 20 November 2017.

neglected by the society despite their being incarcerated for their wrongdoings in order to reform.

#### 1.6 Theoretical Framework

The theoretical framework is hinges on sociological, natural and utilitarian schools of thought as it is concerned with how prisoners' inherent right to an ASL is violated; therefore discussing the law in that context and its interaction with the society.

The natural law school has been propounded by two main theorists, St Thomas Aquinas<sup>12</sup> and John Finnis. St. Aquinas evolved the foundational percepts of natural law from its quasi-natural origins of Stoicism, Aristotelian and Platonic doctrine. All these dogma systematically coalesce to form an interrelation that relates the metaphysics of creation to divine providence; *per Summa Theologica*.<sup>13</sup>

Natural law theory reflects the well-being of people and the communities they make. <sup>14</sup> The first perspective is directive, prescribing how people think to do and refrain for pragmatic reason. In so doing, natural law presents rationales to act or exercise self-restraint. <sup>15</sup> The integrated principles of practical reflection create a singular body of norms and moralities. <sup>16</sup> Natural law applies to this study through its advocation of principles of right action and moralities. The most pivotal of these postulations is that people must always act to grant integral human fulfillment. <sup>17</sup> People possess the virtues of natural law simply by existing. Natural law, as a theory, therefore

<sup>&</sup>lt;sup>12</sup> Thomas D. D'Andrea, 'The Natural Law Theory of Thomas Aquinas' http://www.nlnrac.org/classical/aquinas accessed 16 May 2018.

<sup>13</sup> Ihid

<sup>&</sup>lt;sup>14</sup> P. Robert George Harvard Journal of Law & Public Policy Vol

<sup>31&</sup>lt;www.law.harvard.edu/students/orgs/jlpp/Vol31 No1 Georgeonline.pdf> accessed 26 September 2017.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>&</sup>lt;sup>17</sup> Ibid.

exhorts governments and societies alike to respect human dignity. <sup>18</sup> The theoretical contribution to this paper is thus that reason and freedom are two fundamental traits of human rights, and that both must be used to maintain the dignity of humanity. Natural law therefore explores pragmatic measures of being good, for individuals and governments living within a society. <sup>19</sup> That becomes especially necessary when conflict requires justice by a consistent set of rules.

Sociological thinking, therefore, is adapted to the exclusion of positivist law because this paper examines the relationship between the state and the society. It is based on operation of the law between members of the society and thus law cannot be viewed in isolation but in the society in which it operates. This paper is more concerned with how state actors enforce and implement the law to uphold and protect prisoners' human rights.

The sociological school of thought is said to have emerged as a result of historical jurisprudence evolving to consider the pragmatic elements of a social consciousness as the basis for creating the law. Von Jhering (1818-1892), Von Erhrlich (1862-1922) and Roscoe Pound (1870-1964) are the major proponents of this approach. The jurisprudence from this school of thought relates to the attitudes, implementation, and interaction of the law and order in a society. According to Von Jhering, a German jurist, the origin and object of law is to be a tool of sustainable social control. Von Erhrlich, an Austrian jurist, proposed that the law does not have its source in legislation of decided cases but rather in the common experience of a community. He further

<sup>&</sup>lt;sup>18</sup> Ibid 6.

<sup>&</sup>lt;sup>19</sup> John Finnis, *Natural Law and Natural Rights* (Clarendon Law Series, 2nd edn, Oxford 2011).

<sup>20</sup> Ihid

<sup>&</sup>lt;sup>21</sup> Omony John Paul, *Key Issues in Jurisprudence; An In-Depth Discourse on Jurisprudence Problems* (1<sup>st</sup> edn, Law Africa, 2014).

<sup>&</sup>lt;sup>22</sup> Ibid 86.

added that the law is living and therefore must accommodate changes in the social order, maintaining social control at all times.<sup>23</sup>

This sociological approach will help facilitate understanding of the weakness in the law protecting and upholding of prisoners' right to an ASL. It will help explain the shortfall in the state actors such as prison administrators implementing the laws on ASL. It will shine the spotlight on how the law and the society and morality interact in regard to prisoners. Sociological approach talks of law in practice and thus echoes what sociological theorists have argued, that laws are to be formulated in a way that is not unjust to the lowest ranking members of the society. Therefore, this echoes the need to have prisoners' right to an ASL upheld by those laws implemented rightly; as prisoners as a group are vulnerable.

Utilitarianism theory is also applied in this study as it goes by the formula of maximizing pleasure and the converse minimization of pain. Bentham; Mill, and Sidgwick were the main proponents of utilitarianism.<sup>24</sup> Increasing happiness is central to the theory. The consequentialist theory involves weighing the consequences of an act or omission to validate it. The net validating consideration of this consequentialist theory is therefore about the avoidance of pain/sadness<sup>25</sup>.

Utilitarianism therefore makes statements on how individuals ought to act in every situation.<sup>26</sup> When prisoners have to go through deplorable living conditions in prisons, the prisons' administrators are not acting in a way that produces the best consequences possible but in the complete opposite. These administrators of prisons should therefore implement laws that result

<sup>&</sup>lt;sup>23</sup> Ibid 88.

<sup>&</sup>lt;sup>24</sup> Nigel E Simmonds, *Central Issues in Jurisprudence* (3rd edn, Sweet & Maxwell, 2008).

<sup>&</sup>lt;sup>25</sup> Ibid.

<sup>&</sup>lt;sup>26</sup> Encyclopaedia Britannica, 'Utilitarian Theory-Utilitarianism',

<sup>&</sup>lt;a href="https://www.utilitarianism.com/utilitarianism.html"> accessed 5 December 2017.</a>

in upholding of prisoners' rights in a dignified manner always. By protecting and implementing prisoners' right to an ASL, the administrative systems therefore promote happiness by also ensuring that dignity of prisoners is upheld.

#### 1.7 Research Methodology

The study applies various methods comprising desktop based research methodology, case study and comparative analysis. It is a case study because it focuses on the situation of prisoners' living conditions in Kenya. It includes a comparative analysis because it will compare how another country, Norway, a developed country, is upholding and protecting the right to an ASL for prisoners. Though Kenya is a developing country, it can progressively learn to employ these best practices given that its infrastructure and finances are not as adequate as Norway's, a developed country. Its choice is from its exemplary practices in administration of its prison system and it even has one of the most powerful countries, the USA, learning from its best practices.

The legal sources of the desktop research include primary sources such as Constitutions, Acts of Parliament, international legal regime, and judicial precedents on the right to an ASL for prisoners. The study also uses secondary sources such as books, journals, encyclopedias, law reviews and articles from the library and the internet. The research will not include primary sources of data but secondary sources of data since the researcher was not able to do field work because of the limited time for the research.

#### 1.8 Literature Review

Violation of prisoners' human rights has been addressed in various studies. Individuals and institutions have looked at this problem, identified the challenges and suggested recommendations.

Victor Hassine, a former inmate at the Pennsylvania Department of Corrections authored Life Without Parole Living in Prison Today<sup>27</sup>. This author lays out his experience in prison in various chapters such as prison life, his conviction and stay in prison; interviews with various inmates who were victims of, say: sexual assault, drug addicts, AIDS victims and pressing problems facing American prisons today. Especially on problems facing American prisons, he gives his social-activist view of the prison system. Of importance to this project from Victor Hassine's book is prison overcrowding<sup>28</sup> where he begins with noting the ubiquity of the state in penitentiaries all around the country. Despite its commonness as a descriptive word, there is rarely any exposition graphic enough for widespread comprehension. Instead, a vague detailing denigrates the actual state of prisons to a euphemism of the actual conditions in the prisons. The author points out how unfortunate it is for this travesty to remain an enigma to people outside prisons. He tells of his personal experience when he forcefully got an inmate to share his cell. The author breaks down the condition to anecdotes of constant conflict endemic to individuals forced into squeezed quarters. These arguments, from bunk beds to hygiene, thievery of personal items, to property storage all meant that overcrowded prison setting always led to conflict.<sup>29</sup>The author goes ahead to state that since the prison staff was somewhat taken by surprise by this sudden overpopulation. As such, there were no contingencies to accommodate the increased prisoner population. Cell availability, race, and even age were the only apparent parameters for celling. Nor did an inmate have any opportunity to screen potential cellmates<sup>30</sup>. In the absence of a voluntary roommate, one would be picked for you at random. The policy shortfall made

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<sup>&</sup>lt;sup>27</sup> Victor Hassine, *Life Without Parole: Living in Prison Today* (Inmate AM4737 Pennsylvania Department of Corrections, 2nd edn, Roxbury Publishing Company 1999).

<sup>&</sup>lt;sup>28</sup> Ibid 129.

<sup>&</sup>lt;sup>29</sup> Ibid.

<sup>&</sup>lt;sup>30</sup> Ibid 131.

double-celling very complicated, especially where one still had to consider whether the other cell-mate was a predator.<sup>31</sup>

A history of prison and confinement in Africa<sup>32</sup> by Florence Bernault is another book that talks about prisoners' living conditions across prisons in Africa. She notes the neglect that prison systems suffer across the African content, with the exception of some maximum security facilities in South Africa and Ghana. The modernization of penal facilities has generally lagged behind in the national budgeting culture. That is a reflection of the consistent degradation of penal philosophies in many countries in Africa. Particularly, it is about the failure to reform penal systems with time, something that 'outsiders' would quantify as a pathological decline. However, the author deems it to be more of a 'calcification' of colonial penal practices that is a parallel of failed Western attempts at effective incarceration. The only distinction between Africa and the West is that all the reform has only been to improve inmate living conditions, instead of venturing into the more prodigious aspects of the incarceration process. There are exceptions to this, however. For instance, in Niger and Congo-Brazzaville the prisons are still colonial; and lack maintenance. The situation is so dire that prison administrators often have to look to charity or inmates' families for the subsistence of the prisoners or remandees. But then that precipitates another reality for the prisoners.

There is an increased permeability of the incarceration. <sup>33</sup> Families and donors visit prisons at will. Prisoners too can leave the premises of the jail for walks, visits, work, and even for casual conversations with visitors. Obviously, that contributes to a milder experience of incarceration compared to other prisons that do not practice the 'open' model. Therefore, while they seem toe

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<sup>&</sup>lt;sup>31</sup> Ibid 132.

<sup>&</sup>lt;sup>32</sup>Florence Bernault, A history of prison and confinement in Africa (Heinemann, 2003).

<sup>&</sup>lt;sup>33</sup> Ibid.

nothing more than outdated avatars of the western incarceration system from long ago; they are a sustainable solution for sanctioning prisoners' physical liberty while preserving their sociological ties to free society.

There is yet another manifestation colonial incarceration, a dark one. In places like Guinea, the CAR, and even Uganda, there are prisons that are monuments to human torture. They are colonial legacies that only existed to mete out HRVs, and whose unfortunate legacies persist to date. There direct similarities between the Soviet gulags, Nazi camps to: the Ngaragba prison in the CAR, Camp Boiro in Conakry, or Idi Amin's Kampala torture chambers.

The next book to be reviewed is titled *Emerging Issues in Prison Health*<sup>34</sup> by Bernice S. Elger, Catherine Ritter and Heino Stöver. This book talks about the hard truths facing the inmate health. Even basic healthcare is absent in prisons, despite the fact that international standards mandate an equal standard of healthcare as would be out in the free community. The authors argue or equity in healthcare provision, making it possible to match prisoner needs with the available healthcare facilities. The authors identify this as an uphill battle that future HRAs should tackle head-on; actualizing the mantra-'Prisoner Health is equivalent to Public Health'. <sup>35</sup>

The most significant contribution of this work is the collection of concerns on prisoners' health at both general and specialized levels. Various manifestations of this lack result in prisoners enjoying a substantially lower level of care compared to general populations. In the UK for instance, there are settled procedures to handle elderly patients who are inmates, by transferring them to secure psychiatric healthcare facilities if the prison hospitals cannot handle the individual's condition succinctly. However, there are also challenges to caring for at-risk patients in developed countries. These ethical questions revolve around the use of resources to care for

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<sup>&</sup>lt;sup>34</sup> Bernice S Elger, Catherine Ritter and Heino Stöver, *Emerging Issues in Prison Health* (Springer Science+Business Media Dordrecht, 2017).

<sup>35</sup> Ibid xxi.

these patients, using less security compared to other prison facilities. Both the CS and prison administrations are encouraged to learn prisoner health issues and innovate ways of delivering a cost-effective and efficient service.<sup>36</sup>

Colonial Systems of Control: Criminal Justice in Nigeria<sup>37</sup>by Viviane Saleh-Hanna has chapters on people's personal experiences in prisons. In chapter six, one Clever Akporherhe, talks of his eighteen-month sojourn at an MSP in Kirikin. He speaks how he was tortured, being a newcomer inmate, the terrible sleeping arrangements as they were lined up like mints in a packet, with no food that day. As for the health clinic, Clever states its utter uselessness; bereft of both medicine and healthcare professionals. On complaining to the authorities, he was thrown in a solitary cell that they called Angola. <sup>38</sup> The only reason the author claims helped him survive was the food that Christian churches brought during fellowship. <sup>39</sup> The lack of clean water, sanitation, overcrowding, and draconian administration are serious issues in prison administration. The labour was hard, and went on unrelenting. Many people lost their lives while serving their sentences. The author completes his book by calling to attention the plight of prisoners in Nigeria.

Next in line is a book titled *Introduction to Prisons and Imprisonment*<sup>40</sup> authored by Nick Flynn. The book in its foreword overcrowding is making it progressively harder to address prison reforms. Coming back to this scene after ten years doing other things, I am struck again by the large number of intelligent and committed people who are involved in and around prisons: magistrates, probation officers, Boards of Visitors, charities like the Prison Reform Trust, and of

<sup>&</sup>lt;sup>36</sup> Ibid 8.

<sup>&</sup>lt;sup>37</sup> Viviane Saleh-Hanna, *Colonial Systems of Control: Criminal Justice in Nigeria* (University of Ottawa Press, 2008).

<sup>&</sup>lt;sup>38</sup> Ibid 128.

<sup>&</sup>lt;sup>39</sup> Ibid 129.

<sup>&</sup>lt;sup>40</sup> Nick Flynn, *Introduction to Prisons and Imprisonment* (ISBN Paperback 1 872 870 37 6, Waterside Press 2002).

course the Prison Service itself. In all these organizations there is a wealth of experience and good sense, far removed from the caricature sometimes drawn of prison reformers as cloudy idealists.<sup>41</sup>

In the book's chapter 5, Nick talks of the conditions in which prisoners are held. It starts to describe the physical conditions to include cramped cells and in-cell sanitation which is a hygiene problem due to toilets being in the cells<sup>42</sup>. There is also personal hygiene which includes lack of taking showers daily; clothing that is not adequate for warmth and good health and food that does not comprise of a varied and healthy diet<sup>43</sup>.

The writings of the authors above are more into informing the society on the prisons' situation but don't dwell on what can be done to remedy that plight. This is the key difference that is going to come out of this project work is that the researcher has gone into depth to show the problems in the reality of the situation intertwined with how the law is applied to the situation on the ground, the problem in implementation of the concerned laws and propose reforms that could actually work if really enforced and save the terrible face of prisoners' right to an ASL.

Kenyans too have descriptive, analytical, and anecdotal works that speak to their ASL with regards to the role of law and social justice. Ngugi wa Thiong'o, while in detention in 1977 in Kamiti, wrote a book titled *Detained: A Writer's Prison Diary*. Kiggia Kimani's book titled *Prison is Not a Holiday Camp* offers concise views of prison life. But they all bear striking similarities with regard to their gruesome states. For others like Maina wa Kinyatti, in his book

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<sup>&</sup>lt;sup>41</sup> Ibid.

<sup>&</sup>lt;sup>42</sup> Ibid 85.

<sup>&</sup>lt;sup>43</sup> Ibid 86.

titled *Kenya -A Prison Notebook* the author noted that only poetry kept him focused on justice through his harrowing prison experience.<sup>44</sup>

The above real life experiences even after being narrated to the country have not impacted the stakeholders in prisons administrations to immensely effect prisons reforms in the country to date. This study will thus seek to highlight the retrogressively adverse conditions, and lack of reform implementation in the Kenyan prison system.

A research study done by an author by the name of Omboto John Onyango titled *Challenges* facing rehab of prisoners in Kenya and the Mitigation Strategies<sup>45</sup> identified the challenges facing prisoners and even suggested the recommendations to solve them but did not identify the challenges in implementation which is yet to fully materialize as human rights of prisoners are still being violated.

There has also been a report by KHRC and OFFLAC titled *HRVs in Kenyan prisons*<sup>46</sup>. It sought to highlight the violations arising therein and sought to advise the need for prison reform *per* international law. However there is a problem with the prisons' administration system as these challenges are still ongoing even after being raised and reforms suggested. The loopholes that exist in the law are the result of failure in implementation and that is what the author did not discuss.

<sup>&</sup>lt;sup>44</sup> Kimani wa Wanjiru, 'Prison literature in Kenya' < <a href="https://www.pambazuka.org/arts/prison-literature-kenya">https://www.pambazuka.org/arts/prison-literature-kenya</a> accessed 5 December 2017.

<sup>&</sup>lt;sup>45</sup> Omboto John Onyango, 'The Challenges Facing Rehabilitation Of Prisoners In Kenya And The Mitigation Strategies' (2013) Vol 2 International Journal of Research In Social Sciences <a href="https://www.ijsk.org/uploads/3/1/17/3117743/criminology">www.ijsk.org/uploads/3/1/17/3117743/criminology</a> 6.pdf> accessed 20 November 2017.

<sup>&</sup>lt;sup>46</sup> KHRC, Oscar Foundation Free Legal Aid Clinic Kenya, 'Human rights violations in Kenyan prisons' (2008) < <a href="http://humanrightshouse.org/noop/page.php?p=Articles/5465.html&d=1">http://humanrightshouse.org/noop/page.php?p=Articles/5465.html&d=1</a> accessed 20 November 2017.

Internationally, and books have also been written highlighting the living conditions of prisoners. An investigative study was conducted by Arianna Silvestri, an RPA at the CCJS, titled *Prison* conditions in the  $UK^{47}$  talking about the state of incarceration around Europe. Issues surrounding the administration, prisoner resident rights and freedoms, were studied. Specifically, how they affect prisoners.

These were seen to be key issues in their day to day living conditions which require the utmost protection by the law. This was simply an investigative study to highlight the problems prisoners are living with.

There was also a report by the UN titled *United Kingdom 2016 HRR-PDCC*. This report contained the human rights practices in relation to prison conditions. It conceded the minimal compliance to international custodial standards, but nevertheless pointed out serious problems. The conditions were characterized as "grim and getting worse." This saw a new independent monitoring system of Scotland's prisons unveiled that would begin to assess the conditions and treatment levels for prisoners.

The Human Rights Watch Prison Project did a report titled *Prisons in the USA*<sup>49</sup> that gave a report on how confined individuals suffered from physical and psychological mistreatment and lack of adequate healthcare. The practice was systemic, making it a cultural issue in prison administrations all around the country.

 $<sup>^{</sup>m 47}$  Arianna Silvestri, 'Prison conditions in the United Kingdom'

<sup>&</sup>lt;a href="https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/Prison%20conditions%20in%20the%20UK">https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/Prison%20conditions%20in%20the%20UK</a>.pdf> accessed 5 April 2018.

<sup>&</sup>lt;sup>48</sup>U.S Department of Justice, 'United Kingdom 2016 Human Rights Report'

https://www.state.gov/documents/organization/265700.pdf accessed 13 April 2018.

<sup>&</sup>lt;sup>49</sup> Human Rights Watch Prison Project, 'Prisons in the United States of America' <a href="https://www.hrw.org/legacy/advocacy/prisons/u-s.htm">https://www.hrw.org/legacy/advocacy/prisons/u-s.htm</a> accessed 13 April 2018.

Having looked at literature from domestic and international levels on the living conditions of prisoners, this study will therefore go in depth to show the problem in implementation of the laws on prisoners' right to an ASL and propose reforms having been further informed so that Kenya can incorporate international best practices in line with human rights in its prison system.

#### 1.9 Limitations of the Study

This study is on prisoners' right to an ASL and how this specific right is being upheld and protected in Kenya. Prisoners have each and every right available to a human being but because focusing on all them would be too wide for the study, the researcher chose to focus on the right to an ASL to the exclusion of the other rights.

This study will also limit its research to secondary sources of data, comparative analysis and a case study on the laws in Kenya on prisoners. The study will be so limited because of the tight schedule of doing the thesis and coursework hence the use of a descriptive approach.

#### 1.10 Chapter Breakdown

Chapter 1 introduces the paper through a systematic research proposal that breaks down the scope and rationale of the research paper into segments that identify all the substantive components of a thesis.

Chapter 2 focuses on prisoners' ASL will identifying the reality of the situation on the ground of living conditions of prisoners in Kenya, and also the overarching regulatory and controlling framework behind the *status quo*.

Chapter 3 analytically evaluates the reality of violation of prisoners' right to an ASL and the problems in implementation of the law. It will consist of legislation and how it's coming in to address this problem of the right to an ASL of prisoners. It will therefore focus on an analysis of how the law has been applied to the reality of violation of prisoners' right to an ASL.

Chapter 4 on comparatively analyzes Kenyan and Norwegian incarceration systems; borrowing bet practices contextually relevant and viable in Kenya from Norway.

Chapter 5 summarizes the study findings, concluding the analysis, and makes appropriate recommendations. It will consist of the summary of the research findings, the conclusion of the case study and the recommendations that suggest solutions to the research findings in the case study.

#### CHAPTER TWO: THE LAW IN RELATION TO PRISONERS' RIGHT TO AN ASL

#### 2.0 Introduction

The right to an ASL encompasses a number of conditions to be fulfilled so that it can be termed as adequate. These include mainly the consistent and sufficient adequate offering of nutrition; adequate supply of water; proper housing; accommodation items like beddings and mattresses should be adequate and in good condition; prompt and sufficient medication and adequate provision of basic hygienic provisions such as toilet paper, soap, toothbrush, or towels<sup>50</sup>. These requirements fall mainly under the thematic areas of food, accommodation, health and housing. In this chapter, I am going to analyze the law in relation to prisoners' right to an ASL by looking at the scope of the right infringed and the boundaries in the statutory provisions.

There are various laws governing prisoners' right to an ASL, both domestically and internationally. The domestic laws and their provisions will be looked at on one part, and then the international laws on the other. The laws will be looked at in regard to how they have been abused in the reality of the situation on the ground concerning prisoners' right to an ASL. There are various other rights connected to the right to an ASL and will be discussed as seen below.

#### 2.1 Kenyan Laws Governing Prisoners' Right to an ASL

#### 2.1.1 Constitution of Kenya, 2010

As the premier legal instrument of the country, it provides for various provisions encompassing human rights of prisoners more so on prisoners' right to an ASL as follows:

<sup>50</sup> Australian Government, (Attorney-General's Department) 'Right to an adequate standard of living, including food, water and housing' < <a href="https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttoanadequatestandardoflivingincludingfoodwaterandhousing.as">https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttoanadequatestandardoflivingincludingfoodwaterandhousing.as</a> px> accessed 13 November 2019.

#### National Values and Principles of Governance

Prisoners living in deplorable conditions contravene Article 10<sup>51</sup>. Furthermore their human rights are violated all the time they continue to live in these deplorable conditions such as contracting diseases and not being afforded any medical care therefore leading to deaths. Prisoners are thus denied the privileges within the society which should be accorded to them without delay as they are a vulnerable group without much they can do to counter these situations compared to persons who are free and not incarcerated. Fundamental freedoms against inhumane treatment are unabrogable.<sup>52</sup> Prisoners should not be beaten, tortured or treated cruelly by prisons' wardens and officers. They should not also be made to do work that is outside their scope, for example working for the benefit of wardens and officers.

#### Access to justice

The Article 48 right ought to be guaranteed by the state. Prisoners should be able to access justice at all times. Where prisoners cannot afford legal representation, legal aid should be provided to them always. Prisoners should also be presented in courts duly and served documents and also informed of the ongoing court processes that involve them.

#### Rights of persons detained, held in custody or imprisoned

Article 51 states that persons in the government's custody retain all their rights, except to the extent that any is clearly incompatible with their custodial status<sup>53</sup>. When prisoners cannot access certain rights due to their being imprisoned, the limitations should be utmost justifiable and reasonable, restricted to those limited rights alone.

#### Economic and social rights<sup>54</sup>

<sup>&</sup>lt;sup>51</sup> ibid article 28.

<sup>&</sup>lt;sup>52</sup> Constitution of Kenya, 2010, article 25.

<sup>&</sup>lt;sup>53</sup> Ibid.

<sup>&</sup>lt;sup>54</sup>ibid article 43.

These are also pertinent to prisoners' right to an ASL. Inalienable access to housing, reasonable hygiene includes prisoners in its ambit. Their living conditions which encompass the cells and the prison at large should be adequate. Sanitation refers to public hygiene, and the provision of clean drinking water and adequate sewage disposal<sup>55</sup>. Prisoners' cells should always be kept clean and be hygienic. The drainage and sewage systems should reflect good sanitation.

#### 2.1.2 Prisons Act No.49 of 1962

There is also the Prisons Act consolidates all previous laws relating to the running of prisons and other forms of criminal corrective initiatives by the government. The Act establishes the prisons department of government to discipline errant individuals from all sectors saves for the armed forces. It has a subsidiary legislation, which provides for accommodation and general management of prisons as will be seen below.

#### Sleeping Accommodation

Under the recommendation of a medical officer, prisoners may sleep communal wards or in cell blocks for individuals.<sup>56</sup> The only absolute to this arrangement is that make and female prisoners must be held in different facilities.

Prisoners should not be kept more than is required in a single cell or their communal wards. This leads to overcrowding which leads to sanitation problems which in turn are a health hazard to the prisoners. The communal wards and cells should be spacious with enough room for prisoners to sleep and stay in comfortably. As for a sick prisoner, they should be isolated from the rest so as to ensure fast and smooth recuperation and also prevent spreading of diseases.

#### Sanitation<sup>57</sup>

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<sup>&</sup>lt;sup>55</sup> Chambers 21<sup>st</sup> Century Dictionary.

<sup>&</sup>lt;sup>56</sup> Prisons Rules, 1963, Part IV section 32.

<sup>&</sup>lt;sup>57</sup> ibid section 33.

It is the singular responsibility of every prisoner to maintain reasonably high levels of hygiene

and neatness in their quarters, and in the environment that constitutes their common areas. <sup>58</sup>To

that effect, prisoners must comply with every order made to clean their surroundings.

This section provides that prisons should be well maintained to ensure their cleanliness at all

times. This covers the utensils they use, their rooms, their beddings, the yards and passage ways

that they commonly use. It is an obligation on both the prisoners and the prison administration to

ensure that cleanliness of prisons and everything therein is maintained. Prisoners, so that they

can fulfill this obligation ought to be provided with cleaning materials such as brooms, gumboots

and detergents. The administration through its various staff ought to ensure that items such as

utensils, passages, beddings and rooms are regularly maintained.

Cleanliness of prisoners: beddings<sup>59</sup>

Again, each prisoner serving a custodial sentence must have adequate warmth based on the

medical officer in charge's recommendation.<sup>60</sup> Every prisoner ought to be provided with

adequate bedding so that they can keep warm and thus be protected from cold. Sometimes more

or alternative beddings should be provided on the recommendation of a medical officer

especially for sick prisoners. Prisoners should therefore not have to share beddings or have in use

old worn out ones.

Cleanliness of prisoners: clothing<sup>61</sup>

58 Ibid.

<sup>59</sup> Prisons Rules, 1963, Part V section 47.

<sup>61</sup> ibid section 48.

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The Act directs that prisoners change and wash their clothes at least weekly, or at the behest of the officer-in-charge. In case some clothes need to be discarded, they must be thoroughly washed and dried before being returned to the store before subsequent re-issuing. Prisoners' beddings are infested with lice for lack of being cleaned, aired, disinfected and changed regularly. Good sanitation practice requires their being cleaned as often as possible to prevent prisoners from even falling sick and maintaining a hygienic environment for their stay in prison.

# 2.2 International Laws Governing Prisoners' Right to an ASL

# 2.2.1 The UNDR, 1948

Kenya is a party to the declaration, it has ratified and acceded to the substance of its provisions; to which every person enjoys is equal entitlement as spelt out below.

# Torture or cruel, inhuman or degrading treatment or punishment<sup>64</sup>

All prisoners must be accorded the treatment that is reasonably humane. The convention precipitates a spirit of benevolence towards prisoner affairs, with the rule of law being the yardstick to measure the extent of reasonable treatment. The idea is to preserve the human dignity of everyone, including prisoners, and any other individual in the government's custody. That is inalienable.

# Recognition before the law as a person<sup>65</sup>

It applies to everyone<sup>66</sup>. Prisoners should be treated as persons before the law at all times thus the need to protect their rights always. In spite of being incarcerated, prisoners are human beings to

<sup>63</sup> Ibid.

<sup>&</sup>lt;sup>62</sup> Ibid.

<sup>&</sup>lt;sup>64</sup> UNDR, 1948, article 5.

<sup>65</sup> Ibid article 6.

<sup>66</sup> Ibid.

whom self-respect is inherent. This self-respect ought to be upheld to offer the legal mechanisms of criminal and civil redress the moral legitimacy of a sovereign.

# Right to an ASL<sup>67</sup>

Prisoners may not have all rights accorded to them the same as liberated people but their standard of living should be adequate, that is housing, clothing, medication should be abundant and kept hygienically.

## 2.2.2 The ICCPR, 1966

# Treating persons deprived of liberty<sup>68</sup>

Prisoners should always be treated in ways that do not degrade them as human beings, despite being imprisoned. Human dignity is inherent in all human beings and theirs should be respected always.

# Right to equal recognition of one's humanity<sup>69</sup>

The Convention makes it a fundamental right for every person<sup>70</sup>. Prisoners have recourse to the law as they are recognized as persons before the law just like everyone else. This should therefore deter other people from frustrating them legally just because they are imprisoned. This would include availing legal aid to them and due process of the law. Basic legal education is also important to enable prisoners be more cognizant of the law and their rights most importantly. Furthermore, that recognition before the law must be equal, offering everyone brought before a bench the opportunity to plead their case.

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<sup>&</sup>lt;sup>67</sup> Ibid article 25 (1).

<sup>&</sup>lt;sup>68</sup> International Covenant on Civil and Political Rights, 1966, article 10.

bis Ibid article 16

<sup>&</sup>lt;sup>70</sup> Ibid.

#### 2.2.3 The Nelson Mandela Rules (UN-SMRTP)

# General principles of application<sup>71</sup>

These Rules provide for general principles of application in relation to the hosting facilitation of the humane detainment of individuals that are in governmental custody that must be with an inherent abeyance to their humanity.<sup>72</sup> Their safety and security should always be ensured by the prison system<sup>73</sup>. Administration of prisons should also be done impartially without any discrimination to prisoners by dint of: sex, professed faith, ethnicity, origin, tongue, or colour. All prisoners should be accorded the same fair treatment.<sup>74</sup>

The prison system should treat prisoners in a way that does not aggravate their suffering in prisons. Already prisoners are incarcerated and are not at liberty to go about their lives as free persons do. Life in prison is disheartening for prisons as one is locked up paying the price for their wrongs. It is therefore the duty of the prison's system to ensure that their stay in prison does not add to their anguish as imprisoned persons.

Part II makes provision for rules applicable only to the special categories dealt with in each section. The rules under section A are applicable to prisoners under sentence. This part provides for a standard of living of prisoners that is adequate in relation to their living quarters, their beddings, and access to medical services that are adequate and their personal cleanliness.

# 2.2.4 The UNHCHR: Human Rights and Prisons: A Pocketbook of International Human Rights Standards for Prison Officials, 2005

This handbook provides for special categories of prisoners who include individuals serving long sentences and on death row. It also goes on to provide for the need for administration of prisons

<sup>&</sup>lt;sup>71</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners ((Nelson Mandela Rules), 1955, part 1.

<sup>&</sup>lt;sup>72</sup> Ibid.

<sup>&</sup>lt;sup>73</sup> Ibid.

<sup>&</sup>lt;sup>74</sup> Ibid.

in humane ways. Prisons should be run in ways that are kind and humanitarian to prisoners. This is because prisons house human beings, who before being prisoners are human beings naturally. This humane administration should reflect on their living quarters, their duties in the prison, their interaction with the administration and the outside world.

#### **2.2.5 The UNGA-BPTP of 1990**

This handbook advocates for, dignity, equal protection: of the law and without discrimination of the incarcerated. There can never be enough laws to emphasize on the need to treat prisoners with respect and dignity, inherent in them as human beings. They should not be discriminated against just because they are imprisoned and being penalized for the various wrongs they've committed. The law should also be available to them for their protection capable of affording them remedies where the outcome of the justice system dictates so.

# 2.2.6 The United Nations General Assembly-BPPAPFDI, 1988

Being deprived of one's liberty leaves a person feeling helpless and at the mercy of those in charge. <sup>75</sup> The prison's administration mainly and everyone at large are tasked with treating prisoners with the utmost compassion as their fellow human beings.

## **2.2.7 The ICESCR of 1966**

Everyone is entitled an ASL.<sup>76</sup> Prisoners need to be provided with sufficient clothing, beddings, shelter, good sanitation, medical care, adequate food so as to enable them have an ASL during their time in prison.

In addition, everyone ought to experience the best practical ASL, particularly with regards to the mental and physical health<sup>77</sup>. Incarcerated individuals are particularly vulnerable to neglect in

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<sup>&</sup>lt;sup>75</sup> United Nations General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988.

<sup>&</sup>lt;sup>76</sup> International Covenant on Economic, Social and Cultural Rights, 1966, article 11.

this regard. When prisoners fall ill, they should be promptly tended to and if need be admitted in hospitals to ensure full recuperation. Medicine should also be adequate within the prison for the less serious illnesses. There should be mental checkups for those exhibiting symptoms of mental illness. These checks should be regularly done to prevent prisoners from falling ill which sometimes becomes fatal due to neglect by prisons' officers.

### 2.3 Conclusion

It is clear from the above domestic and international laws that prisoners' rights mainly, the right to an ASL is provided for. The situation on the ground however tells of a different tale of how there is a weakness in the existing law judging by the intolerable conditions prisoners live in. This is what the next chapter will be looking at, the law applied to the reality to establish where the gaps in the law are in relation to prisoners' right to an ASL.

<sup>&</sup>lt;sup>77</sup> Ibid article 12.

# CHAPTER THREE: THE ANALYSIS OF HOW THE LAW HAS BEEN APPLIED TO THE REALITY OF VIOLATION OF PRISONERS' RIGHT TO AN ASL

#### 3.0 Introduction

There is definitely law that has been enacted to protect prisoners' right to an ASL. In Kenya, there is the Constitution and attendant Act. This problem of ASL in prisons hasn't started yesterday. The enactment of the Constitution heralded prison reform. Through it, more human rights have been recognized and therefore the rights of prisoners should be more recognized with more legislation enacted in order to uphold and protect them.

Below I am going to lay out the reality of the situation on the ground in relation to prisoners' living conditions and give a few cases that have been brought to courts arising from violation of this right to an ASL of prisoners.

# 3.1 The Reality of Violation of Prisoners' Right to an ASL

Investigations have been carried out by various bodies and established the deplorable living conditions prisoners continue living with. They have to grapple with problems of inadequate food, tattered beddings and mattresses, overcrowding, insufficient medication, lack of toiletries, lack of legal aid and inhuman and degrading treatment. Below are various reports and article excerpts on investigations conducted to bring to light prisoners' deplorable living conditions. The deplorable living conditions have been grouped below under various themes that include food, accommodation, health, inhuman treatment, clothing and bedding and access to justice.

## 3.1.1Clothing and Bedding

#### Tattered beddings and mattresses

An example of prisoner mistreatment can be seen at Kodiaga GK Prison in Kisumu West. There is an acute shortage of beddings. Similarly, Wundanyi GK Prison also reflects the sorry state of affairs in prisoner welfare. Often, prisoners degenerate to physical confrontations over the

meagre spreads. Furthermore, the communal wards are lice-infested. Administrative cruelties such as wardens stealing inmate beddings also cause artificial shortages of beddings. It forces some to sleep on cold floors. In 2015, a visit by the parliamentary Security Committee unearthed the torrid conditions of inmate welfare at the jail. The situation was so dire that the Officer-in-Charge told the members of the committee that the inmates resorted to pinching off pieces of their mattresses to use as tissue paper. Exonerated individuals like Omar are on record, saying that there the congestion was so bad that inmates had to sleep in just so they could find space to turn or lie down. The situation was so they could find space to turn or lie down.

#### **3.1.2 Food**

## Inadequate food

The food rations are hardly enough at Kodiaga GK Prison in Kisumu West<sup>80</sup>. At Wundanyi, inmates often go hungry under the guise that there is not enough food to feed the prison population.<sup>81</sup> However, the prisoners allege that unscrupulous wardens often take that opportunity to extort money from the inmates for money, since the rations are adequate. The prisoners pointed this out during investigations on the same.<sup>82</sup>

A former prisoner speaks of his experience at Manyani, where he served his sentence before exoneration in 2017. The 64-year-old revealed that being a cook was a coveted position in the prison community. <sup>83</sup> One had to be strong, sane, well-mannered, and have served a majority of

<sup>&</sup>lt;sup>78</sup> Ibid.

<sup>&</sup>lt;sup>79</sup> Lyndsay Nyawira, 'Prison tales shed light on grim life of inmates' (2019) < <a href="https://www.the-star.co.ke/news/2019-04-20-prison-tales-sheds-light-on-grim-life-of-inmates/">https://www.the-star.co.ke/news/2019-04-20-prison-tales-sheds-light-on-grim-life-of-inmates/</a> accessed 6 November 2019.

<sup>80</sup> Ibid.

<sup>&</sup>lt;sup>81</sup> Ibid.

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<sup>&</sup>lt;sup>83</sup> Lyndsay Nyawira, 'Prison tales shed light on grim life of inmates' (2019) < <a href="https://www.the-star.co.ke/news/2019-04-20-prison-tales-sheds-light-on-grim-life-of-inmates/">https://www.the-star.co.ke/news/2019-04-20-prison-tales-sheds-light-on-grim-life-of-inmates/</a> accessed 6 November 2019.

their sentence. <sup>84</sup> Cooking for the entire population is a delicate duty, and as such only a chosen few would be deemed to qualify to care for the food of both wardens and the prison populace. The meals typically consisted of maize or millet meal and accompaniments in the evening. <sup>85</sup>

#### 3.1.3 Accommodation

### **Overcrowding**

Many prisons are currently running at twice or triple their inmate capacities. For instance, Kodiaga GK prison in Kisumu has a population of 2650, more than double the capacity. The jail is particularly noted for its soul-crushing conditions for inmates. In Mombasa County, Shimo la Tewa is host to a mixed remandee, prisoner, and suspect population of at least 2, 600. That precipitates a violent environment known for vicious fights and even more daring escape attempts. Set up in 1932, Kakamega GK prison holds 1, 205 individuals, from the originally intended number of 500.

A report by the OFFLACK, published after a 2006 visit to Thika prison revealed systemic problems in the prison framework pertaining to overcrowding. <sup>89</sup> A former inmate expressed the discomfiture of having to shower in rooms full of men young enough to be his grandchildren; in addition to the intense overcrowding, which meant that people would constantly rub against each other while showering. <sup>90</sup> Wards measuring fifteen by ten feet would hold as many as 176 individuals. To make matters worse, there were 80 blankets and 67 mattresses. <sup>91</sup> The sanitation was deplorable as well, with the ablution blocks outside being in a deplorable state. It led the

85 Ibid.

<sup>84</sup> Ibid.

<sup>&</sup>lt;sup>86</sup> Ibid.

<sup>&</sup>lt;sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>&</sup>lt;sup>89</sup> KHRC, Oscar Foundation Free Legal Aid Clinic Kenya, 'Human rights violations in Kenyan prisons' (2008) <a href="http://humanrightshouse.org/noop/page.php?p=Articles/5465.html&d=1">http://humanrightshouse.org/noop/page.php?p=Articles/5465.html&d=1</a> accessed 20 November 2017. <sup>90</sup> Ibid.

<sup>&</sup>lt;sup>91</sup> Ibid.

organization to empirically illustrate the inhumanity of the prison. <sup>92</sup> IN other instances, prisoners at Kodiaga GK prison had zero access to sanitary provisions of any kind, in addition to sleeping in quarters with leaking roofs, exposing them to the elements. <sup>93</sup>

The KHRC reiterates the spirit of the OFFLACK findings by holding Kenyan prisons are overcrowded by an average of 300%. The KHRC proposed a means of depopulating the prison population by avoiding jailing remandees. OFFLACK determined that the bulk of the population at Thika were remandees, who were not separated from the convicts. Thika Prison lacked a drainage system, had poor ventilation in sleeping quarters, and had stagnant pools of water that act as vectors for disease carrying insects<sup>94</sup>.

According to the KHRC, the prisons in Kenya are holding three times the capacity the facilities are designed to hold. The KHRC has suggested that alternatives to imprisonment ought to be considered, especially for prisoners that have yet to be tried in a court of law, referred to as "remandees." The Oscar Foundation found that remand offenders in the Thika prison constituted the bulk of prisoners and were not separated from convicted prisoners<sup>95</sup>. The report on Thika

A former inmate pointed the inhumane treatment of prisoners, regardless of state. A 64 year old ex-convict was made to wake up early and squat or up to six counting rounds throughout the day. Now a free man, the elderly Omar Ismael notes that he developed a knee problem as a result of the prolonged squatting he had to do in his nine-year stint at Manyani GK Prison. The scarcity of

<sup>92</sup> Ihid

<sup>&</sup>lt;sup>93</sup> Renson Mnyamwezi, Nyambega Gisesa and Bernard Sang, 'Are these Kenya's worst prisons?' (2015) <a href="https://www.standardmedia.co.ke/article/2000169079/are-these-kenya-s-worst-prisons">https://www.standardmedia.co.ke/article/2000169079/are-these-kenya-s-worst-prisons</a> accessed 17 November

<sup>2017.</sup> <sup>94</sup> Ibid.

<sup>95</sup> Ibid.

sanitary provisions bred many fights, with the constant squabbles creating divisions between the prison population.<sup>96</sup>.

#### **3.1.4 Health**

#### Insufficient medication

At Kodiaga GK Prison in Kisumu West, lack of medicine often results in fatalities.<sup>97</sup> An impromptu check by the Standard News team and MPs discovered that the medical center had no medicine; even simple drugs like antibiotics were absent. 98 Even fresh water was unavailable, making the health center rely on neighboring healthcare centers for syringes and other basic equipment. The medical officer, Esther Masai noted that the situation saw prisoners getting sicker due to the inability to arrest these health complications early on. It forced the inmates to request relatives to acquire necessary medication since the inmates could not leave to get the medication themselves.<sup>99</sup>

#### 3.1.5 Access to Justice

#### Lack of legal aid

A manifest lack presented in the Thika GK Prison as OFFLACK found out <sup>100</sup>.

# 3.1.6 Inhuman and degrading treatment

Wundanyi GK Prison is known for brutal guards who use regularly and severely assault inmates. 101 In other instances, senior officers misuse the inmates for free domestic labor, the Standard verified independently. 102

<sup>96</sup> Ibid.

<sup>&</sup>lt;sup>97</sup>Renson Mnyamwezi, Nyambega Gisesa and Bernard Sang, 'Are these Kenya's worst prisons?' (2015)

<sup>&</sup>lt;a href="https://www.standardmedia.co.ke/article/2000169079/are-these-kenya-s-worst-prisons">https://www.standardmedia.co.ke/article/2000169079/are-these-kenya-s-worst-prisons</a> accessed 17 November 2017

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> lbid.

# 3.2 Case Law in Kenya showing the Reality Arising from Violation of Prisoners' Right to an ASL

Kenneth Stanley Njindo Matiba v Attorney General [2017] eKLR

During his detention, the Petitioner stated that he was subjected to torture, inhuman and degrading treatment. He said that he slept on the floor and was exposed to cold weather without having warm and protective clothing. He added that he was subjected to solitary confinement for more than five months and that he was transferred to a block where there were condemned prisoners who engaged in loud, tortured screams and shouts throughout the day and night, which affected him psychologically.

The Petitioner stated that while on detention, he was subjected to a poor diet which was unsuitable for his state of health. He explained that he had a mild blood pressure condition prior to his detention which was poorly managed during detention and it escalated to a stroke from which he did not fully recover.

The Court held that not every prison condition amounted to torture and inhuman treatment especially where treatment was equally experienced by other prisoners. However, there were peculiar circumstances in the Petitioner's detention. For example, he was subjected to solitary confinement and was held in a block where condemned prisoners screamed and shouted at each other from dusk to dawn. Those conditions inflicted deep psychological wounds. There was an admission from the Respondent in relation to solitary confinement and the Petitioner's stay in the block near the condemned prisoners. Therefore, the Petitioner was subjected to torture, cruel and inhuman treatment which affected his physical, mental and psychological well-being. The Court

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

found that the Petitioner's right to be free from torture, cruel and inhuman treatment under section 74(1) of the repealed Constitution was violated by agents of the State.

## Samuel Chege Gitau & 283 Others v Attorney General [2016] eKLR

The Claimants were commissioned officers and servicemen of the Kenya Air Force within the Kenya Armed Forces and they had served for a number of years when their services were terminated on diverse dates. They stated that after the attempted coup d'état of 1<sup>st</sup> August, 1982, they were kept in prison custody without trial for months. They also averred that while in prison they were tortured, beaten, stripped naked and sustained permanent physical injuries. Additionally, they claimed to have been subjected to trials or court martial in which they were subjected to biased treatment, tortured to confess, not accorded legal representation or advice and decisions were made against them without being given an opportunity to defend themselves. In their dismissal from service, they lost all their dues and terminal benefits including pension, gratuity and unpaid salaries.

The Claimants were awarded Kshs. 1, 000, 000/= each for wrongful imprisonment, torture, inhuman and degrading treatment and violation of their rights to a fair hearing.

## Mwandawiro Mghanga v Attorney General [2017] eKLR

The Petitioner filed the Petition claiming that his fundamental rights and freedoms as were enshrined in Sections 72(1) and (3), 74(1), 77(2) and 79 of the Repealed Constitution were violated by Special Branch Police Officers at Nyayo House and in various Kenyan police stations and prisons in 1982, 1985 and 1986 to 1991. The Petitioner claimed that he was first arrested on 18<sup>th</sup> August 1982 by officers from the Special Branch Police Department at his parents' home in Werugha in Taita District. The following day, he was taken to the General Service Unit Training College, Embakasi (GSU Embakasi) where he was interrogated for several

days. Instead of being charged, in any Court, he was detained without trial at Sungura dormitory, at the said Training College, for one hundred and eleven days and held incommunicado and members of his family thought he was dead.

He claims further that during his time there, he was kept hungry, cold and was beaten until he collapsed and had to be taken to Kenyatta National Hospital for treatment. He was allegedly later charged in Court with the offence of organizing and addressing illegal meetings and participating in an unlawful assembly before being remanded at Kamiti Maximum Security Prison. At the said Prison, he was allegedly kept naked in a water logged cell for two weeks and prison warders would splash cold water on him at midnight and before dawn every day. That also he was kept hungry most days and he only had five meals in two weeks.

It was also his case that on 3<sup>rd</sup> April 1986, police officers invaded his home in Werugha in Taita, mounted a search for any *Mwakenya* related pamphlets before being arrested by the aforesaid police officers together with his brother and taken to Wundayi Police Station where he was abused and mocked in the presence of his younger brothers. Thereafter, he stated that he was bundled into a motor vehicle and driven to Voi in cold weather while dressed in a shirt and trousers and yet the police would not allow him to dress warmly. At the police station, he was received by Special Branch police officers who hurled insults at him before he was taken to Mariakani Police Station where he was locked up with mad people as well as robbery and murder suspects. He was later transported to Nairobi and locked up at Kileleshwa Police Station where he slept in a cell without blankets or warm bedding.

It was the Petitioner's further case that at 5.00am the following day, he was blind folded then bundled into a waiting land rover vehicle and ordered to lie down like a dead person. He was

then taken around the city of Nairobi for two hours before eventually being taken to a place he later came to discover was the Nyayo House basement. Here, he was allegedly locked up in a small cell which was extremely dark and was kept there for a period of one month and he would only leave that cell on the days he would be blindfolded and taken to the 25<sup>th</sup> floor of Nyayo House for further interrogation which was punctuated with beatings and other forms of inhuman treatment.

The holding of the Petitioner in detention for a longer period than 24 hours in the aforesaid three incidents without trial was held to be unlawful and in clear violation of Section 72 of the Repealed Constitution. Those acts could not be justifiable if looked at in the context of the definition of torture above and they indeed amounted to torture. The Petitioner was subjected to torture contrary to Section 74(1) of the Repealed Constitution.

# Koigi Wamwere vs Attorney General (2012) eKLR

In this case, the bench noted that prison conditions violate the petitioner's right to ASL in prison. The court tool the time to detail the averments of the petitioner that amounted to physical and psychological torture. These acts were meted out against him while in custody, and by agents of the state acting with the authority of what could only be the state. That was the case during the petitioner's internment during his two trials. Regretfully, the court found no ill-treatment in the proven submissions of the petitioner. But then the value of the proceedings of that case comes from the fact that the admitted averments of the petitioner would constitute gross dehumanization by the present constitutional standards. In effect, they are vestiges of a draconian colonial administration that Kenya had inherited, but had not yet deemed fit to change. A poor diet, with lack of the basic human needs amount to degrading treatment by a government that is in full cognizance of its role as a protector of its wards' human rights.

#### 3.3 Conclusion

The case law and general legal framework that this chapter has illustrated is proof that the law was and continues to be largely lacking in protecting prisoners' right to an ASL despite the gradual regulatory reform. On one hand the law is not adequate to protect this human right of prisoners seeing that we only have the Constitution and Prison's Act as the domestic Acts providing on prisoners' rights. There needs to be more stringent legislation and measures in order to protect prisoners' right to an ASL. In the next chapter, I will look at the research methodology, how the research will be undertaken and the analysis of the research findings will be laid out. It is here that the problem of violation of prisoners' right to an ASL will be studied, the research objectives attained and the research hypotheses confirmed.

# CHAPTER FOUR: COMPARATIVE ANALYSIS: NORWEGIAN PRISON SYSTEM V **KENYAN PRISON SYSTEM**

#### 4.0 Introduction

The Norwegian penitentiary system is one of the best, globally. Its focus that contrasts it with other prisons is that the aim of incarceration is to rehabilitate offenders instead of overwhelmingly punish them with just dessert 103. The system is geared towards making the convicts re-enter society as functional individuals, rather than hardened and psychologically scarred criminals<sup>104</sup>. The Norwegian prison system is what the researcher has opted to use as it engages some of the best international practices in administration of the prison system and thus the Kenyan prison system can really learn a lot from it.

The researcher will proceed to look at the Norwegian prison system and show how it is run differently from the Kenyan prison system; USA learning from Norway will then be looked at with USA being a country whose prisons make headlines and lastly the researcher will look at the valuable lessons Kenya can acquire and contextualize from this advanced incarceration system to show the milestones Norway has achieved in order to realize the right to an ASL for prisoners.

Though Kenya is a developing country, it can progressively learn to employ these best practices given that its infrastructure and finances are not as adequate as Norway's, a developed country. The country has thus been chosen because of its exemplary practices in administration of its prison system and it even has one of the most powerful countries, the USA, learning from its best practices.

<sup>103</sup> International Centre for Prison Studies, 'Norway; World Prison Brief Data' http://www.prisonstudies.org/country/norway accessed 11 February 2019.

104 lbid.

## 4.1 Norwegian Penitentiaries

Norway's MoJ-PS and DoC run prison administrations all over the country. The total number of individuals in custody in all phases of the criminal justice system stands at around 3,373<sup>105</sup>.

In total, Norway has just 4,000 cells spread out over the cardinal points of the nation. Kriminalomsorgen, the DoNCS, has the four cardinal points as administrative regions, with the Southwestern region forming the fifth administrative region. Ullersmo, the largest facility holds 400 cells, with the smallest being just 13 cells big. <sup>106</sup> With only five jails being female, the rest are male and overall; two thirds are maximum security facilities. <sup>107</sup>

# 4.1.2 Goal of Imprisonment: Rehabilitation not punishment

The Norwegian correctional system focuses on rehabilitation, rather than deterrence or just dessert. <sup>108</sup> It is a unique approach, but the empirical data shows that it is effective, more effective than the common punitive approach that the vast majority of other countries practice. The country has an already lower-than-average crime rate. And the correctional approach sees it register an even lower recidivism rate of less than 20% <sup>109</sup>. That is a stark difference to the percentages of recidivism in countries like the USA where it hovers annually anywhere from 60-75% <sup>110</sup>. Overall, Norwegian correctional institutions seek to make convicts 'better neighbors' upon re-entry into society. That is a unique ethos observable anywhere, from the rehabilitative activities of the inmates, to the layout of the prisoners' quarters. <sup>111</sup>

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>&</sup>lt;sup>107</sup> Ihid

<sup>&</sup>lt;sup>108</sup> Life in Norway, 'Prisons in Norway: Inside a Norwegian Jail' < <a href="https://www.lifeinnorway.net/prisons/">https://www.lifeinnorway.net/prisons/</a>> accessed 11 February 2019.

<sup>&</sup>lt;sup>109</sup>Ibid.

<sup>&</sup>lt;sup>110</sup> Ibid.

<sup>&</sup>lt;sup>111</sup> Ibid.

# 4.1.3 Standard of living of prisoners

## Offering Inmates an Alternative lifestyle

The success of the Norwegian correctional system arises from the variety of activities that are available to inmates both during their occupied and free tie. 112 Even in those jails that have courses common throughout the world, what stands out is the insistence on socially acceptable activities to perform after work. There is a plethora of these setting the penal system aside from all others in the world. 113 The inmates' free time is made as rich as possible, showing the inmates that a law –abiding life can be very enjoyable. Individuals are cognitively tuned to become better neighbors to those that they meet. In other words, the system makes them better, more functional members of society<sup>114</sup>.

#### Accommodation

Often prison architecture pays no heed to aesthetics, preferring instead a melancholic functionality that dehumanizes the process of correctional incarceration by barring in the convicts, intentionally separating them from the outside world. That is far from the case in Norwegian prisons. The buildings are still designed to make the inmates feel as I they are people, despite their criminal mistakes. The typical dorm layout has cubicles that offer a reasonable degree of privacy to the inmates. 115 That often translates to amenities such as personal toilets, showers, above-par hygienic standards, and all other amenities that would be found in the outside world. The idea is that prison ought to mimic membership to functional society as much as possible. Thus, imprisonment is preparation for being a law-abiding citizen. 116 That is the essence of the rehabilitative spirit of Norwegian correction. That extends even to the nutrition

<sup>&</sup>lt;sup>112</sup> Ibid.

<sup>&</sup>lt;sup>113</sup> Ibid.

<sup>&</sup>lt;sup>114</sup> Ibid.

<sup>&</sup>lt;sup>115</sup>lbid.

<sup>116</sup> Ibid.

that these convicts use. They use the full range of cutlery available to the general public, with minor alterations for safety purposes.

# The Maximum Norwegian prison sentence 117

Apart from the 30-year jail term imposed on convicted war criminals to fulfill the Rome Statute<sup>118</sup>; the maximum jail term in all Norwegian criminal law is twenty-one years. Even then, the incarceration focuses so much on molding the individual into a better, more functional person that inmates get parole over weekends after completing a third of their sentence. Most are eligible for permanent absolution after serving two-thirds of their sentences. In effect, most do not serve more than 14 years. 119 However, felonies carry a mandatory decade imprisonment record before one can be considered for parole. 120

## 4.2 Norway's prisons in a nutshell:

# 4.2.1 Halden Prison<sup>121</sup>

The Erik Møller-designed building is made to embrace nature: so much so that it was nominated the 'world's most humane prison' by the TIME Magazine. 122 There are no bars, access to full kitchens and art placed around the common areas to foster a respect for the inherent dignity that should accrue to every individual by dint of their humanity. Interviews with the prison warders reveal the rationale behind this policy decision. The Norwegian correctional system prepares individuals to embody the fundamental elements of the Norwegian social contract. The facility is set on a sprawling 75-acre site. 123 The Norwegian ethos around incarceration is that the denial of freedom is bad enough, thus allowing inmates all other forms of normalcy as the only route to

<sup>118</sup> Ibid.

<sup>&</sup>lt;sup>117</sup> Ibid.

<sup>&</sup>lt;sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

rehabilitation and means o reconnecting with society on release. The facility is so progressive that it regularly receives praise for a brand of corrective justice called 'radical humanity'. 124 The availability of multiple amenities is a testament of the national Norwegian philosophy towards criminal rehabilitation and forgiveness. 125

# 4.2.2 Bastøy: the prison on an island

In line with most of the prison campuses policies, Bastøy takes an open campus layout. The layout is the same as that of minimum security penitentiaries, only that this time the fence is a large water body. In essence, that means that the prison effectively has no fences. 126 The prison has 70 staffers, only five of whom spend the night on campus. The prison island comprises of a forest, farmland, and about eighty buildings that serve various administrative and logistical purposes. 127 The inmate residences are wooden cabins, and the main activity on campus is working on the prison farm and engaging in other extra-curricular activities. There is even provision for visitors, who can stay over the weekend, but only by prior arrangement. <sup>128</sup> All these amenities saw the institution bag the 2014 Blanche Major Reconciliation Prize or its ardent promotion of human values, tolerance, and forgiveness. 129

One of the most unique elements of this paradigm in correctional facilities is the concept of 'human ecology'. The essence of the approach is that human beings are innately connected to each other and to nature. 130 From the website, that approach is clear, with wardens being expected to have full cognizance of the principles of human relations. That is because the staffers

<sup>124</sup> ibid

<sup>125</sup> ibid

<sup>126</sup> ibid

<sup>127</sup> ibid

<sup>128</sup> ibid

<sup>129</sup> ibid

<sup>130</sup> ibid

play a facilitative role in influencing the prisoners to nurture a respect for themselves and others through the nature around them.<sup>131</sup>. The prison governor, Arne Kvernvik Nilsen offered a particularly unique response when queried on the apparent luxury in which the convicts live in at the island. In her opinion, it did not matter whether the convicts got a holiday in return for their crimes. All that the penitentiary was interested in was a decimated risk of re-offending, hence the inviolability of their approach <sup>132</sup>.

# 4.2.3 Norwegian prisons in the world's media <sup>133</sup>

Many of the world's biggest media outlets have covered the Norwegian system extensively, often focusing on what is reported as "luxury" conditions compared to the USA. Presumably because of its beautiful natural environment, the minimum security facility at Bastøy gets a lot of attention<sup>134</sup>.

The Guardian reported that on Bastøy prison island in Norway, the prisoners, some of whom are murderers and rapists, live in conditions that critics brand 'cushy' and 'luxurious'. Yet it has by far the lowest reoffending rate in Europe. Some prisoners get schooling in a yellow Bavarianstyle building near the center of the island <sup>135</sup>.

CNN has reported finding on a recent afternoon, three young men learning to use computer programs to create 3-D models of cars. All expressed interest in doing this sort of work after their prison terms end 136.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

# 4.3 USA learning from Norway<sup>137</sup>

## Prison approach

It has to be said that the relaxed approach Norway's criminal justice system takes is doing something right. Few Norwegians ever end up in prison and the few that do usually don't make a return visit<sup>138</sup>. Heated floors, bike rides and five-star cooking classes, welcome to prison in Norway. It looks nothing like most prisons in the US. That's because Norway's prison system is designed with three core values in mind: normality, humanity and rehabilitation. The point of incarceration in Norway, they say, is to make inmates "better neighbors" once they are released and they take that mission very seriously<sup>139</sup>.

In the US, prison is generally seen as punishment for crimes committed. But Norway might change that. As part of a CNN go special, "Welcome to Prison," it was witnessed how one state has been trying to make dramatic reforms back home <sup>140</sup>.

In 2015, prison directors and lawmakers from North Dakota traveled to see Norway's prisons for themselves. The trip was part of a program that takes state officials to visit the country, which has one of the lowest recidivism rates in the world. When the leaders returned, North Dakota slowly began making changes to its prison system<sup>141</sup>. The move has been controversial with some prison staff, and has raised a lot of questions about the role prisons play in society. The

<sup>137</sup> Ibid.

<sup>&</sup>lt;sup>138</sup> Life in Norway, 'Prisons in Norway: Inside a Norwegian Jail' < <a href="https://www.lifeinnorway.net/prisons/">https://www.lifeinnorway.net/prisons/</a>> accessed 11 February 2019.

<sup>139</sup> Ibid.

<sup>&</sup>lt;sup>140</sup> CNN, 'American prison Reform Inspired by Norway's Approach' <a href="https://edition.cnn.com/2018/03/08/us/prison-reform-north-dakota-norway/index.html">https://edition.cnn.com/2018/03/08/us/prison-reform-north-dakota-norway/index.html</a> accessed 11 February 2019.

<sup>141</sup> Ibid.

changes called for different dynamics between inmates and corrections officers, causing one of them to leave over what he believed was a fundamental shift in their training <sup>142</sup>.

Beyond the Frisbee games and free pizza, North Dakota's prison directors say the benefit in the long run; reducing the state's recidivism rate is worth giving this new approach a chance. If the goal is to make them better neighbors, North Dakota inmate Jonathan McKinney stated that it's working 143. He spent more than two years in and out of solitary confinement during part of his 17-year sentence for murder and other serious charges. Because of Norway's influence, prison officials allowed him to transfer to medium security when he showed good behavior -- a move that he would not have been able to make as easily before 144.

As Bastoy prisoner governor Arne Wilson, also a clinical psychologist, explained to The Guardian: "In closed prisons we keep them locked up for some years and then let them back out, not having had any real responsibility for working or cooking <sup>145</sup>. In the law, being sent to prison is nothing to do with putting you in a terrible prison to make you suffer. The punishment is that you lose your freedom. If we treat people like animals when they are in prison they are likely to behave like animals. Here we pay attention to you as human beings <sup>146</sup>."

All of these characteristics are starkly different from America's system. When a retired warden from New York visited Halden, he could barely believe the accommodation. "This is prison

<sup>143</sup> Ibid.

<sup>&</sup>lt;sup>142</sup>lbid.

<sup>144</sup> Ihid

thejournal.ie, 'Why Norway's prison system is so successful' < <a href="https://www.thejournal.ie/norway-prison-system-1831097-Dec2014/">https://www.thejournal.ie/norway-prison-system-1831097-Dec2014/</a> accessed 13 February 2019.
146 Ibid.

utopia," he said in a documentary about his trip. "I don't think you can go any more liberal other than giving the inmates the keys<sup>147</sup>."

In general, prison should have five goals, as described by criminologist Bob Cameron: retribution, incapacitation, deterrence, restoration, and rehabilitation. In his words though, "Americans want their prisoners punished first and rehabilitated second "148."

Norway adopts a less punitive approach than the US and focuses on making sure prisoners don't come back. A 2007 report on recidivism released by the US Department of Justice found that strict incarceration actually increases offender recidivism, while facilities that incorporate "cognitive-behavioral programs rooted in social learning theory" are the most effective at keeping ex-cons out of jail 149.

# Prison Numbers 150

In Norway, fewer than 4,000 of the country's 5 million people were behind bars as of August 2014. That makes Norway's incarceration rate just 75 per 100,000 people, compared to 707 people for every 100,000 people in the US<sup>151</sup>.

On top of that, when criminals in Norway leave prison, they stay out. It has one of the lowest recidivism rates in the world at 20%. The US has one of the highest: 76.6% of prisoners are rearrested within five years 152.

<sup>148</sup> Ibid.

<sup>&</sup>lt;sup>147</sup> Ibid.

<sup>&</sup>lt;sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

# Recidivism<sup>153</sup>

Norway also has a relatively low level of crime compared to the US, according to the Bureau of Diplomatic Security<sup>154</sup>. The majority of crimes reported to police there are theft-related incidents, and violent crime is mostly confined to areas with drug trafficking and gang problems. Based on that information, it's safe to assume Norway's criminal justice system is doing something right<sup>155</sup>. Few citizens there go to prison, and those who do usually go only once. So how does Norway accomplish this feat? The country relies on a concept called restorative justice, which aims to repair the harm caused by crime rather than punish people. This system focuses on rehabilitating prisoners <sup>156</sup>.

# Sentences<sup>157</sup>

The maximum life sentence in Norway shows just how serious the country is about its unique approach. With few exceptions (for genocide and war crimes mostly), judges can only sentence criminals to a maximum of 21 years 158. At the end of the initial term, however, five-year increments can be added onto to the prisoner's sentence every five years, indefinitely, if the system determines he or she isn't rehabilitated 159.

That's why Norwegian extremist Anders Behring Breivik, who killed 77 people in a bombing and mass shooting, was only sentenced to 21 years. Most of the outrage and incredulity over that sentence, however, came from the US<sup>160</sup>.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

<sup>&</sup>lt;sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

<sup>&</sup>lt;sup>160</sup> Ibid.

Overall, Norwegians, even some parents who lost children in the attack, seemed satisfied with the sentence. Still, Breivik's sentence, as is, put him behind bars for less than 100 days for every life he took, as The Atlantic noted. On the other hand, if the system doesn't determine Breivik "rehabilitated," he could stay in prison forever<sup>161</sup>.

To those working within Norway's prison system, the short sentences and somewhat luxurious accommodations make complete sense. As Are Hoidel, Halden Prison's director, puts it: A question has been posed: Every inmate in Norwegian prison is going back to the society. Do you want people who are angry or people who are rehabilitated 162?

# 4.4 The Kenyan prison system and the valuable lessons Kenya can learn from Norway

#### 4.4.1 Introduction

The prison system in Kenya falls under the Ministry of Interior and Coordination of National Government. Prison administration is under the Kenya Prisons Service. As at September 2018, the office of the Director of Public Prosecutions placed the prison population at 54,000. The number was inclusive of pre-trial detainees / remand prisoners 163. In 2003, when former president Kibaki came to power, prisons underwent major reforms that saw television sets, computers, educational facilities and even food<sup>164</sup>. The prison service cultivated a good public image and the department changed the face of prisons in Kenya but these reforms were not maintained yet it showed that as a country, we can change the face of our prisons, progressively and continuously.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>&</sup>lt;sup>163</sup> International Centre for Prison Studies, 'Kenya; World Prison Brief Data' <a href="http://www.prisonstudies.org/country/kenya">http://www.prisonstudies.org/country/kenya</a> accessed 25 February 2019.

<sup>&</sup>lt;sup>164</sup> John Pinecrest, 'Prisons in Kenya' (information cradle 2019) <a href="https://informationcradle.com/kenya/prisons-in-">https://informationcradle.com/kenya/prisons-in-</a> kenya/> accessed 6 November 2019.

## 4.4.2 Goal of Imprisonment: Punishment not rehabilitation

In Kenya, the goal is definitely punishment as compared to rehabilitation. There have been reports of inmates falling sick or dying mysteriously making one conclude that once a person is behind bars in Kenya, they cease being viewed and treated as a human being. Investigations have been carried out by various bodies and established the deplorable living conditions prisoners continue living with. They have to grapple with problems of inadequate food, tattered beddings and mattresses, overcrowding, insufficient medication, lack of toiletries, lack of legal aid and inhuman and degrading treatment. Eight prisoners died of cholera at Kamiti in 2009 and more were feared to be infected due to congestion in the cells. There have also been reports of deaths of prisoners from cholera in Kodiaga and Shimo la Tewa prisons<sup>165</sup>. Kenya needs to learn that the goal of imprisonment is rehabilitation and should gear its focus towards making better neighbours of prisoners once they leave prison and so should adopt the prison designs and activities Norway employs for their prisoners. This will ensure prisoners in Kenya are not treated as pariahs by the society making them react negatively and find solace in commission of more crimes.

# 4.4.3 Standard of Living of Prisoners

#### Food

The food rations are hardly enough at Kodiaga GK Prison in Kisumu West. Wundanyi is also one of the prisons where inmates go hungry as the food rations are inadequate. The prisoners allege that the authorities are converting the two pieces of meat they are entitled to money <sup>166</sup>.

"They keep on lying that we are eating enough meat. The truth is that part of the meat is

<sup>&</sup>lt;sup>165</sup>Beauttah Omanga and Cyrus Ombati, 'Eight prisoners die of cholera at Kamiti'

<sup>&</sup>lt;a href="https://www.standardmedia.co.ke/business/article/1144028867/eight-prisoners-die-of-cholera-at-kamiti">https://www.standardmedia.co.ke/business/article/1144028867/eight-prisoners-die-of-cholera-at-kamiti</a> accessed 3 August 2018.

<sup>&</sup>lt;sup>166</sup>Renson Mnyamwezi, Nyambega Gisesa and Bernard Sang, 'Are these Kenya's worst prisons?' (2015) < <a href="https://www.standardmedia.co.ke/article/2000169079/are-these-kenya-s-worst-prisons">https://www.standardmedia.co.ke/article/2000169079/are-these-kenya-s-worst-prisons</a> accessed 17 November 2017.

converted into money by the prison officers charged with the responsibility to buy the food," claimed the prisoners <sup>167</sup>. The quality of food in Kenya needs to be improved greatly in order to have well nutritioned prisoners and this can also be achieved by having small groups of prisoners get together to cook their own food to maintain the quality instead of cooking it all at once.

#### Accommodation

#### **Overcrowding**

Prisoners in Kodiaga GK Prison in Kisumu West described the jail that currently houses more than 2,650 prisoners, over double its capacity, as one of the worst places to be incarcerated. It has one of the worst suicide rates of any prison in Kenya due to its hostile, sanity-destroying atmosphere <sup>168</sup>.

Shimo La Tewa holds 2,600 inmates who include prisoners, suspects and remandees; the facility is notorious for its daring jail breaks and violent fights<sup>169</sup>.

Kakamega Main prison was built in 1932 with colonial government and houses 1,205 inmates above the recommended  $500^{170}$ .

In 2006, the Oscar Foundation Free Legal Aid Clinic in Kenya visited the Thika prison to investigate the poor conditions at the facility. Soon after the visit, the Oscar Foundation published a human rights report on their findings<sup>171</sup>. The foundation established that the Kenyan prison was facing systemic problems such as: immense overcrowding. The report demonstrated

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lbid.

<sup>&</sup>lt;sup>168</sup> Renson Mnyamwezi, Nyambega Gisesa and Bernard Sang, 'Are these Kenya's worst prisons?' (2015)

<sup>&</sup>lt; https://www.standardmedia.co.ke/article/2000169079/are-these-kenya-s-worst-prisons > accessed 17 November 2017.

<sup>169</sup> Ibid.

<sup>&</sup>lt;sup>170</sup> Ibid.

KHRC, Oscar Foundation Free Legal Aid Clinic Kenya, 'Human rights violations in Kenyan prisons' (2008) <a href="http://humanrightshouse.org/noop/page.php?p=Articles/5465.html&d=1">http://humanrightshouse.org/noop/page.php?p=Articles/5465.html&d=1</a> accessed 20 November 2017.

that overcrowding was one of the main reasons for the deplorable prison conditions. According to the Foundation's findings, the male wing of the prison consisted of one ward measuring 15 by 10 feet 172. The ward held 176 inmates. There were only 67 mattresses and 80 blankets to be shared among the 176 inmates. There was no internal toilet or shower, and the external toilets and showers were in deplorable condition<sup>173</sup>.

The report on Thika Prison by Oscar Foundation Free Legal Aid Clinic in Kenya stated that the overcrowding at this prison was at a level that can only be described as inhuman and degrading<sup>174</sup>.

According to the KHRC, the prisons in Kenya are holding three times the capacity the facilities are designed to hold. The KHRC has suggested that alternatives to imprisonment ought to be considered, especially for prisoners that have yet to be tried in a court of law, referred to as "remandees." The Oscar Foundation found that remand offenders in the Thika prison constituted the bulk of prisoners and were not separated from convicted prisoners <sup>175</sup>.

#### Lack of toiletries

The report on Thika Prison by Oscar Foundation Free Legal Aid Clinic in Kenya stated that inmates were not provided with basic sanitation supplies such as toilet paper, soap, toothbrush, or towels<sup>176</sup>.

## **Poor Housing**

<sup>173</sup> Ibid.

<sup>172</sup> Ibid.

<sup>&</sup>lt;sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>&</sup>lt;sup>176</sup> KHRC, Oscar Foundation Free Legal Aid Clinic Kenya, 'Human rights violations in Kenyan prisons' (2008) <a href="http://humanrightshouse.org/noop/page.php?p=Articles/5465.html&d=1">http://humanrightshouse.org/noop/page.php?p=Articles/5465.html&d=1</a> accessed 20 November 2017.

Inside Kodiaga GK Prison in Kisumu West, inmates stay in dormitories with leaking roofs<sup>177</sup>. The cells at Thika Prison lacked a drainage system, and floors were covered with potholes that trapped water and bred insects. Furthermore, there was poor ventilation<sup>178</sup>.

## Health: Insufficient medication

Instances where prisoners have run out of water or basic commodities like drugs or worse, died are alarming at Kodiaga GK Prison in Kisumu West<sup>179</sup>. During a tour of the prison last month together with MPs, the Standard team discovered that the health centre had run out of basic drugs as well as equipment including syringes for the better part of the year. The facility lacked simple drugs like antibiotics<sup>180</sup>. Requests for fresh supply were yet to be honoured months later. Instead of getting official supply of medicine, the health centre was forced to beg for the items from neighbouring health facilities to enable prisoners get medication<sup>181</sup>.

Esther Masai, the Officer in Charge of Health Centre said the shortage had resulted in the situation of sick prisoners getting worse due to missed medication. As a result, a number of them were forced to request their relatives to buy drugs for them. She said that it was a desperate situation considering that those were detainees who had to be kept within the facility and they could not be allowed to go out to buy them <sup>182</sup>.

Medication should be adequate and time frequencies of seeking medical attention adequate to avoid deaths of prisoners which paints a very inhumane picture of how a country treats its citizens.

<sup>&</sup>lt;sup>177</sup> Renson Mnyamwezi, Nyambega Gisesa and Bernard Sang, 'Are these Kenya's worst prisons?' (2015) < <a href="https://www.standardmedia.co.ke/article/2000169079/are-these-kenya-s-worst-prisons">https://www.standardmedia.co.ke/article/2000169079/are-these-kenya-s-worst-prisons</a>> accessed 17 November 2017.

<sup>178</sup> Ibid.

<sup>&</sup>lt;sup>179</sup> Ibid.

<sup>&</sup>lt;sup>180</sup> Ibid.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

#### Prison Numbers

Prisoners in Kodiaga GK Prison in Kisumu West described the jail that currently houses more than 2,650 prisoners, over double its capacity, as one of the worst places to be incarcerated. It has one of the worst suicide rates of any prison in Kenya due to its hostile, sanity-destroying atmosphere<sup>183</sup>.

Shimo La Tewa holds 2,600 inmates who include prisoners, suspects and remandees; the facility is notorious for its daring jail breaks and violent fights <sup>184</sup>.

Norway has clearly shone globally because of the milestones it has achieved through ensuring that its prisons are vastly different from others in the world and not viewed in the same negativity as the rest of prisons in the world. Kenya should strive to attain these great heights especially in Africa where prisons have themselves painted a very poor frustrating picture to the world.

#### Recidivism

The rate of recidivism in Kenya is high as we have seen a lot of cases of ex-convicts reoffending. For example, a person sentenced due to theft when released goes ahead to steal, others even go to murder those they feel or think made them be incarcerated such as neighbours, police officers or relatives. This can only be reversed through Kenya changing its focus of imprisonment from punishment to rehabilitation so that when prisoners are released they come out with positive attitudes and as better neighbours in the society.

#### Sentences

<sup>&</sup>lt;sup>183</sup> Ibid.

<sup>&</sup>lt;sup>184</sup> Ibid.

The maximum sentence in Kenya is the death sentence for capital offences such as murder, treason and robbery with violence. There has been an outcry that the sentence needs to be abolished as it goes against humanity and it was last practiced in 1987. There has also been case law calling for the mandatory nature of the death sentence provided in Section 204 of the Penal Code to be abolished.

This was seen in the case of *Francis Karioko Muruatetu & another v Republic*, *Petition No. 15* of 2015 at the Supreme Court of Kenya. The Petitioners' case was that the mandatory nature of the death penalty under section 204 of the Penal Code jettisoned the discretion of the trial forcing it to hand down a sentence pre-determined by the Legislature thus fouling the doctrine of separation of powers. The Supreme Court upheld their petition and it can only be hoped that the other courts will follow the decision and ultimately the country will see the abolition of the death sentence.

In comparison to Norway, Kenya needs to seriously review the death sentence and even life imprisonment to lesser terms as prisoners should be in prison to reform and not to be punished making them feel the weight of the society's hatred towards them thus impacting them very negatively.

## Lesson learnt

As has been stated above, the five goals of prison should be retribution, incapacitation, deterrence, restoration, and rehabilitation. The problems experienced in prisons are not unique to Kenya, even Norway has problems in that as much as their prison system is so successful, crimes are still committed and thus prisoners still exist. But it's the approach Norway has taken that has resulted in very low recidivism and made their prison system actually work.

Kenya too unfortunately wants its prisoners punished first then rehabilitated. This is what leads to prisoners as a vulnerable group be treated in inhuman ways by the Kenyan Prison system. As a result of this, prisoners' right to an ASL is continuously violated. The Kenyan prison system needs to change its approach to imprisonment and have its goals oriented to rehabilitation where they ensure prisoners are treated as human beings in there through ensuring that their accommodation, health, food, clothing and bedding are not left to the dogs and that they have access to justice at all times. The reforms once introduced in 2003 should be revisited so as to be continuously and progressively improved.

Prisoners in Kenya should be made to feel more human through where they stay as they spend most of their time there. A decent amount of privacy, adequately spacious, clean and well ventilated cells which can be divided into cubicles are what should be the face of the cells as compared to the degrading concrete buildings with very poor aerated, dirty and small cells.

#### 4.5 Conclusion

Kenya still has a long way to go to being at par with Norway but it can start adopting the best practices of the Norwegian prison system starting with the help of the government at both levels. This can be achieved through disbursement of adequate financially help and through enactment of strict laws while ensuring the existing ones are implemented in order to do away with the problem of lack of implementation of laws relating to prisons in Kenya. In conclusion, the next chapter the researcher will look at the findings of the thesis and suggest recommendations that will ensure that the right to an ASL of prisoners is respected, promoted and upheld in Kenya.

## CHAPTER FIVE: GENERAL CONCLUSION AND RECOMMENDATIONS

#### **5.0 General Conclusion**

The recourse to an ASL by prisoners is provided for and protected mainly under both the domestic and international instruments. The prison system is thus expected to fully uphold it, as has been aptly made out for in these laws and develop the law further to enable full implementation of these laws.

The right to an ASL has also been protected under various schools of thought. Under the natural theory of law<sup>185</sup>, doctrines that promote integral human fulfilment: avoid HRVs, both as a matter of justiciability and maintenance of the moral authority of a sovereign. The prison administration should therefore view prisoners as human beings despite being incarcerated and punished for their crimes and respect their rights simply by dint of their humanity.

Under the sociological school of thought<sup>187</sup> there is the operation of the law between members of the society and thus law cannot be viewed in isolation but in the society in which it operates. State actors ought to enforce and implement the law to uphold and protect prisoners' human rights. There is also the utilitarian theory which is based on what a man ought to do. Its answer is that he ought to act so as to produce the best consequences possible<sup>188</sup>. The prison authorities should learn that neglecting prisoners is an action that does not produce good consequences but stark violation of rights of human beings.

<sup>&</sup>lt;sup>185</sup> John Finnis, *Natural Law and Natural Rights* (Clarendon Law Series, 2nd edn, Oxford 2011).

<sup>186</sup> Ibid.

<sup>&</sup>lt;sup>187</sup>Encyclopaedia Britannica, 'Utilitarian Theory-Utilitarianism',

<sup>&</sup>lt;a href="https://www.utilitarianism.com/utilitarianism.html">https://www.utilitarianism.com/utilitarianism.html</a> accessed 5 December 2017.

<sup>188</sup> Ibid.

#### **5.1 Research Findings**

## 5.1.2 Findings on the law governing prisoners' right to an ASL

The law governing prisoners' right to an ASL are protected under the: UNDR, ICCPR, ICESC, the Banjul, the Constitution of Kenya, and the Prisons Act. Each of these laws provides for prisoners but the implementation is what is lacking. Without implementation of the existing laws, the law cannot even be further developed in order to ensure that prisoners do not continue being treated like pariahs in Kenya.

The Prisons Act, Cap 90 Laws of Kenya should also be amended further in order to move with the times. The various reforms seen in prisons such as voting, having televisions should be included in the Prison Rules 1963 or be enacted as separate additional laws so as to ensure that they are completely implemented across the board in the country.

# 5.1.3 Findings on the analysis of how the law has been applied to the reality of violation of prisoners' right to an ASL

Articles 10, 25, 27, 28, 43, 48 and 51 of the Constitution of Kenya have provisions to protect the right to an ASL for prisoners but when one goes to the reality of the situation, that is to the prisons, all one can get is violation and infringement of this human right. Prisons such as Wundanyi GK Prison, Kakamega Main Prison, Thika Prison, Kodiaga GK Prison and Shimo la Tewa Prisons have prisoners living in dehumanizing conditions.

The law is not being applied to the reality of violation of prisoners' right to an ASL. That is why the findings through investigative studies and written articles reveal intolerable prison conditions that prisoners only have to bear with because they have no choice.

The accommodation in prisons includes overcrowding and very poorly built cells lacking the requisite facilities resulting in to cases of suicides even for example in Kodiaga GK Prison<sup>189</sup>. The food is hardly adequate and prisoners often go hungry such as in Wundanyi GK Prison<sup>190</sup>. Their health is not taken seriously as there are very many cases of deaths such as in Kamiti Maximum Prison where 9 prisoners died of cholera at Kamiti in 2009<sup>191</sup>. Wundanyi GK Prison is a hell of a place to live. Prisoners are forced to fight for mattresses and blankets. The wards are also infested with lice. The clothing and beddings there is made up of tattered mattresses and blankets infested with lice<sup>192</sup>.

The country got a new Constitution promulgated in 2010 in order to realize the rights of the common mwananchi. Despite being the supreme law of the land and its provisions governing prisoners' right to an ASL, these laws are not being implemented as ought to be.

# **5.1.4** Findings on the Comparative Analysis between Kenyan and Norwegian Correctional Systems

The Norwegian prison system is very efficient in its approach towards prison and the recidivism rate there is very low as a result. Prisoners have adequate food, activities to keep them busy and their accommodation is structured in a way that mimics the outside world in order for prisoners not to feel neglected. The goal of this prison system is to provide rehabilitation as lack of freedom is taken as just dessert. The aim in Norway is to make better neighbours to the open

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<sup>&</sup>lt;sup>189</sup>Renson Mnyamwezi, Nyambega Gisesa and Bernard Sang, 'Are these Kenya's worst prisons?' (2015) < <a href="https://www.standardmedia.co.ke/article/2000169079/are-these-kenya-s-worst-prisons">https://www.standardmedia.co.ke/article/2000169079/are-these-kenya-s-worst-prisons</a>> accessed 17 November 2017.

<sup>190</sup> Ibid

<sup>&</sup>lt;sup>191</sup> Beuttah Omanga and Cyrus Ombati 'Eight prisoners die of cholera at Kamiti' <a href="https://www.standardmedia.co.ke/business/article/1144028867/eight-prisoners-die-of-cholera-at-kamiti">https://www.standardmedia.co.ke/business/article/1144028867/eight-prisoners-die-of-cholera-at-kamiti</a> accessed 3 August 2018.

<sup>&</sup>lt;sup>192</sup>Renson Mnyamwezi, Nyambega Gisesa and Bernard Sang, 'Are these Kenya's worst prisons?' (2015) < <a href="https://www.standardmedia.co.ke/article/2000169079/are-these-kenya-s-worst-prisons">https://www.standardmedia.co.ke/article/2000169079/are-these-kenya-s-worst-prisons</a> accessed 17 November 2017.

society so that when prisoners are released they can be assimilated into the society easily and feel welcome and not outsiders. Though Kenya is a developing country, it can progressively learn to employ these best practices given that its infrastructure and finances are not as adequate as Norway's, a developed country.

In Kenya, prisoners are treated like outsiders once they get out of prison and it is no wonder some commit other or worse offences due to rejection by the society. They cannot be wholly blamed as they need to survive while starting life afresh thus the only easy way out after the reception they get is to turn to a life of stealing, theft and robbery sometimes resulting into murder. Though some prisoners come out rehabilitated, the numbers are not impressive as the goal is to punish people liable to be sentenced and they are viewed very negatively by the prison system hence the lack of care and neglect when they are imprisoned.

This negativity impacts negatively on the prisoners leading to their isolation with the society. The result of this is ex-convicts who are hell bent on revenging against the society that has turned their back on them once incarcerated. Some prisoners are never visited by their relatives or friends once imprisoned hence their negative reaction once released.

#### **5.2 Recommendations**

#### **5.2.1 Long term Recommendations**

Principally the research informs and sensitizes both the lay and scholarly society about these present and deplorable prison conditions and the resultant HRVs going on in Kenyan prisons. The following are the long term recommendations:

First, the Prisons Act needs to be amended in its 1963 Prison Rules in order to include reforms that have taken place such as voting and having entertainment through televisions so as to ensure

these reforms become law and thus have that command in order to ensure they are followed. The amendments shouldn't end here but should go on and also include ways of combatting overcrowding, inmates' death from diseases and the goal of imprisonment being reform and not punishment realized in making prisoners feel more human. Policies should also be drafted in order to realize full and continuous transformation of prisons through various reforms over the years.

Second, more prisons should be built which are larger and modern in order to accommodate the high number of prisoners to avoid congestion. This will in turn limit the number of deaths resulting from spread of diseases and suicide rates from the intolerable conditions. Prisons built like they house human beings should be built and the existent ones renovated to reflect the same. They should be able to simulate functional society so that even when prisoners are released back into the society they don't feel lost or like outsiders.

Third, well equipped hospitals should be built inside prison grounds so that prisoners can get immediate medical attention as at need be. Prisoners face delay when in need of medical attention, sometimes urgent and these hospitals that will be built inside the grounds will solve that problem. The medication which may at times be inadequate in these other hospitals will also be available to them in any case. Also the hospitals will be dedicated to prisoners alone who are more vulnerable as they have no means of getting medical aid on their own thus ensuring they are not made more miserable from lack of means to seek medical attention.

Fourth, prisoners should be regularly educated especially on basics of matters law which will be helpful when they need to appeal or learn more about their cases and the need to follow up on their cases in court. A prisoner who has gained basic knowledge in law will be able to track their

cases in court. They will have a better understanding of the ongoing and not necessarily have to rely on advocates who might at times put their needs second to more money making cases thus neglecting them.

Fifth, there exists the Probation and Aftercare Service, which is a government department in the Ministry of Interior and Coordination of National Government, State Department for Correctional Services. It provides advisory reports to court and other agencies for the purpose of determining bail and bond terms and for decision-making on sentencing and release of offenders. It also supervises, resettles, reintegrates and rehabilitates offenders serving various non-custodial sentences in the community. In the management of offenders, it works with victims of crime and the public in ensuring public-safety<sup>193</sup>.

For better working of this department, the Public Service Commission advertised one thousand posts for the recruitment of new Probation Officers. This drive comes at a time when the department has been facing staffing gaps arising from new and increased roles, mandates, and increased demand for existing services. In addition, Section 40A (2) of the Prevention of Terrorism Act was amended vide Statute Law Miscellaneous Amendment Act No. 12 of 2019 to expand the membership of the Counter-Terrorism Centre to include in paragraph (j) "Probation and Aftercare Services Department<sup>194</sup>."

There should therefore be also enacted an Act solely for the purpose of parole of offenders should be enacted in Kenya, say like the Probation of Offenders Act, Cap 64 Laws of Kenya. This Act would govern the practice of parole in Kenya which would probably fall under the department of Probation and Aftercare Service to ensure a flexible parole system, maybe have

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<sup>&</sup>lt;sup>193</sup> Ministry of Interior and Coordination of National Government; State Department for Correctional Services, 'Probation and Aftercare Service' <a href="http://www.probation.go.ke/">http://www.probation.go.ke/</a> accessed 13 November 2019.

<sup>194</sup> Ibid.

regulations enacted to provide adequately for parole where prisoners can be released early on grounds of good behavior other than just waiting for the President's pardon. Other jurisdictions, Norway included have flexible paroles even when prisoners have served just a third of their sentences and this will go a long way to reduce congestion in prisons and realize the goal of reform rather than punishment.

#### **5.2.2 Short term Recommendations**

First, there should be regular training courses offered to prisons' authorities in order to be educated on how to handle administration of prisons and prisoners most importantly. The training should lean on humane ways of treating prisoners and focus on seeing prisoners as human beings and not just people that deserve punitive, deterrent just dessert. There have been numerous cases of prisoners dying in the hands of prison wardens, facing degrading treatment under the same people who should treat them humanely as they interact daily with to enable them, as human beings reform and go on with their lives back in the society. This result becomes very disheartening as entrusting them with these lives is a complete failure at times.

Second, courts should ensure that light offenders are sentenced to community service and probation and not jailed so as to reduce the number of prisoners in prisons and greatly reduce overcrowding. There is a lot of community work that light offenders can do. For example governors should work together with prison authorities to ensure their cities are clean as light offenders can provide these services in a cost effective way which becomes a win-win for both sides.

Third, courts should fast track cases maybe through legal service weeks throughout the country in order to reduce remandees and pre-trial detainees waiting for their cases to be decided. This will also reduce their numbers in jails and avoid congestion in cells. The number of backlog

cases at the judiciary is yet to reduce making the citizens lose faith in getting justice. Justice delayed is justice denied and clearing the backlog will definitely remedy this.

Fourth, the Government of Kenya through the treasury should endeavor to disburse more funds to prisons so that prisoners are adequately catered for in regard to more prisons being built, medication being available and the beddings and clothing regularly changed so that it cannot be in tattered conditions always. Policy makers and the relevant stakeholders should address the budgetary issue of prisons so as to ensure more money is advanced therein to improve the facilities. They should also ensure that the money is not embezzled but is put to maximum use to change the face of Kenyan prisons. Kenya has a lot of money stolen by corrupt officers which can be put to very good use in administration of prisons.

Fifth, there should be days set for fun activities where prisoners and prison authorities interact and engage in order to be able to co-exist in harmony. This will help the two sides understand each other better instead of the animosity and negativity that is usually experienced. The tension between the two sides can be greatly reduced through regularly holding of these activities such as sporting events.

Recommendation to the general public is not to treat prisoners as pariahs but as human beings in need of rehabilitation. They should accept them and not abandon them once incarcerated, especially for relatives, friends and human rights bodies. This will help them greatly in their transition as they serve their sentences and go on to be reformed. Their rights which they possess by the simple virtue of their humanity should always be upheld, promoted and protected. Anyone can go to prison; it is not set aside for the poor and no one knows of tomorrow as crimes range from meditated to crimes of passion. Prisoners are not children of a lesser God in any way.

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