ADMINISTRATION OF CRIMINAL JUSTICE: THE MANDATORY DEATH PENALTY FOR ROBBERS

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J.W. Michuki.

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ABBREVIATIONS

A.C.	Appeal Cases
CR. APP:	Criminal appeal (High Court)
W.L.R.:	Weekly Law Review.
P. C.:	Penal Code.
C.P.C.:	Criminal Procedure Code.
H.C.C.C.:	High Court Criminal Case
U.S.:	United States.

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INTRODUCTION

Crime has increased with urbanisation and rapid social change which our society has been undergoing since the start of this century. The number of criminals appearing before the courts has been increasing at an alarming rate; from the few hundrends of the 1930s to thousand in the 1970s.

In reference to the crime of robbery with violence the enactment of a law providing for capital punishment for robbers has not reduced the crime. The courts are every now and then sentencing people under the hanging section but reports of widespread robberies continue to appear in our newspapers. This paper attempts to highlight issues related to the crime of robbery with violence.

Chapter one deals with crime in general. I have attempted to show here that crime is the result of the social, economic and political setting of a country. Various theories have been raised to explain crime causation but no one theory can cover all the crimes that exist. This being the position, I have dealt with some of the theories and tried to relate them to crime in our Society. Emphasis has been laid on Socio-economic setting as playing the biggest role in crime causation. Aspects of this such as urbanisation, poverty, broken homes have been used to try and explain the causes of crime in a developing country like Kenya with a high rate of industrial and technological growth resulting in urbanisation etc.

The main theme in this chapter is that if we are to succeed in any sentencing and treatment policies, we must make sure that our judiciary is aware of these causes of crime so that a criminal is looked at from his social background or environment which is then related to the crime committed.

Chapter two tries to show that the provision of the death penalty for robbery was not justified. Here the debate in Parliament on the issue is discussed and the various arguments are highlighted and critically examined. The debate is seen in the light of debates elsewhere on the issue of capital punishment. The death penalty is opposed thro' a counter attack on the issues raised in Parliament and it is the writer's view that the enactment of that section was not justified and the issues raised to support it were based on mere wishful thinking and not on any verifiable truths or data. The question of the death penalty being a deterrent has been opposed on the view that since the death penalty was enacted the crime of robbery has not decreased. Data shows that the years after the enactment have infact seen an increase in the crime. The

enactment of the section has also been compared with abolitionist countries like Britain where the abolition of the death penalty has not made any major changes to the rate of crime.

Chapter three deals with the judicial attitude in reference to the hanging sections. Here a review has been made of various cases and matters of procedure to show the discrepancies found in sentencing the interpretation of the sections which are greatly misconstrued and the fact that a lot of injustice is caused through discrimination between persons in the same class of offenders. The causes of these factors are dealt with at length and as far as possible the writer has tried to give her own opinion of what is the correct interpretation of the section. Also through the various issues on procedure like identification, legal representation confessions, plea-bargaining the writer has given her opinion on what our judicial system, though aware of, has only paid lip-service to instead of suggesting any constructive changes.

In conclusion, I have tried to show that the enactment of a harsher sentence is not an effective way of reducing crime. Crime should be eradicated from its roots. As such the enactment of the death penalty was unjustified and the MPs reasons for enactment were baseless since no research on the issue had been done. The writer goes further to show that the administration of the death penalty is unconstitutional as it discriminates against persons in the same class of offenders. Also the various discrepancies to be found in sentencing are a breach of public belief in the administration of justice and the faith placed in the judicial system. Lastly the death penalty should be abolished and a more humane punishment substituted therefore.

CHAPTER ONE

CRIME IN GENERAL

Crime can be ascertained by examining what acts at any particular time are declared by the state to be crimes. The common features they will be found to possess is that they are prohibited by the state and those who commit them are punished. Robbery with violence and attempted robbery are such crimes as per S. 296(2) and S. 297(2) of the Penal Code respectively. These sub-sections provide for a mandatory death penalty. What causes crime and what are the guiding factors by which magistrates impose sentences?

For the success of any treatment measures which should receive prior consideration before a magistrate imposes a sentence, the causes of crime should be known. They should be identified, and isolated. Those who deal with the criminals e.g. the police, the magistrate, the prison officers, probation officers need to know the reasons why a particular criminal has been committed, the acts for which he has been arrested or charged. In other words the important question underlying the sentencing and treatment of offenders should be why crime exists.

Crime in a developing country like Kenya has been said to be due to the rapid social-economic, cultural and political changes which are taking place. With the accompanying accelerated rate of urbanisation, industrialisation and technological development, and increase in crime is inevitable. Hence it becomes important to consider how crime can be explained in relation to these factors and if there is any other explanation for this phenomenon which is threatening to become a permanent feature of our society. The number of criminals in our courts are increasing year after year and there are no signs of change. Thus the need to identify the causes of crime deserve great emphasis.

According to the earliest theories of crime causation as ennuciated by Cesare Lombroso[1)], the typical criminal is born with certain traits which distinguish him from non-criminals. Thus he could be identified by such features as high cheek-bones, a flattened nose, excessive hair or an abnormal lack of hair. Lombroso explaines crime as an atarasm a pathological regression towards the animal nature of man. The Lombrosian theory though supported by an American, Hooton, in the early years of this century has been rejected by later psycho-analysts.

In an article entitled "Is Criminality Inherited?", Erasto Muga of the Sociology Department, University of Nairobi, has concluded that:-

> Crime is not inherited; but is by and large a function of the multifarious environmental factors including the legal system prevailing in a society which impinge upon an individual who lives in such a society and which altogether creates circumstances which ultimately expose the individual to criminal and deliquent acts. (2)

One of such environmental factors is the economic structure. The question which arises is whether the economic structure of society has any bearing on crime. Bonger[3] in an article entitled "Criminality and Economic Conditions" attempted to show a statistical relationship between crime and poverty. He contended that crime is caused by the economic conditions existing in a capitalist society. The luxury of the upper class on the one hand and the widespread misery of the masses in the lower class give rise to crime. Thus criminality finds its origin in the absolute poverty brought about by the economic environment. He was affirmative in asserting that the only solution to the problem of criminality was therefore the complete transformation of the economy. As economic conditions change and there is a redistribution of poverty so criminality will diminish. Although this theory does not explain the fact that crime is everywhere even in socialist states, it however explains the fact that due to the capitalist mode of production and class differences, a lot of inequalities are caused. In capitalist states, emphasis is laid on protection of property with the result that any offence against property is heavily punished i.e. like robbery with violence where the upper class to protect their property give a mandatory death penalty to anyone who threatens that property. Bonger's economic theory has been criticised by Clifford who concludes that:

> material penury alone is not responsible for crime but a feeling of poverty combined with a variety of other social factors is probably more criminogenic. [4]

With inflationary trends resulting in high prices it is evident that very few members of the lower class make ends meet. The majority of offenders brought to courte everyday come from this lower class. Thus poverty, although not in isolation, can be seen as a key influencing factor of crime. However, poverty is not a necessary or a sufficient condition for criminality. There are in our society extremely poor people who are law abiding and also others who are well-off and still engage in crime. Poverty however tends to be a characteristic of criminals. The reason for this has been summarised by Mushanga who states that:-

> The poor tend to predominate in criminal population not because they are any more criminal than others but because of the different treatment they receive from the police, the courts and the society. The poor are more likely to be arrested, charged, found guilty and imprisoned or sentenced to death than the more affluent members of the same society. [5)]

Also the poor do not command respectability, they have no friends in the government or in the legal system who can speak to the responsible officials on their behalf and also because of their economic weakness they cannot afford to bribe the police or the judge (in societies where this helps) or to hire competent advocates to represent them. Another reason is that it is easier to apprehend the poor because of their relative immobility and relative low level of education and they usually get involved in the kind of situation that are usually relatively easy to detect and investigate unlike the "respectable" members who engage in official corruption and while collar crimes which are not easy to detect and investigate. Thus you will find a policeman stopping a man walking in the streets at night but not a man in a big car even where most likely the two men have the same motives for being in the streets at night. The difference between the two men is that because of the one who is walking being relatively immobile he is easier to apprehend. Economic affluence may also be a factor influencing crime. This can be divided into two broad categories where one commits a crime to obtain a necessity. An example of this is the case of a Mathare dweller robbing a kiosk for bread or other necessaries. The objective here is to obtain a necessity. An example of the second category is in the case of a Kenyan millionaire smuggling coffee, evading tax etc. The objective here is greed to amass more wealth and power. The necessity and the greed in this two categories is not caused by poverty but need for more.

Connected with this is Sutherland's[6)] theory of "differential association". The theory shows how a mentally normal person through stages of successive events in his life begins to engage in deviant and criminal behaviour. To Sutherland, the criminal behaviour is not inherited but is learnt in the interactions with other persons especially intimate groups. The theory is closely related to that of cultural conflict first formulated by Thorsten Sellin[7)] in the late 1930s where he argues that cultural conflict is a product of social disorganisation resulting from rapid social change. In Kenya this can also be said to be a product of non-change in the legal approach where due to illiteracy, new laws take time before reaching the people. Very few people in the country read the Kenya Gazette. The new values imposed by social change on old values create conditions under which behaviour can be variously defined. An

example of such a situation in Kenya can be seen in the massive movement of people from the rural areas to the urban centres and the loss of traditional values through the mixture in town of different communities. Undoubtedly, these theories are some causes of crime but they do not explain why, for example, following Sutherlands theory of differential association people who deal greatly with criminals like the police magistrate, prison officials are not on the whole criminals. However, it must be pointed out that in a way a number of policement acquire certain criminal tendencies as a result of this association and result to crime having learned all the technics from their daily work of investigations and dealing with the criminals.

Another influencing factor of crime causation is urbanisation. The rapid urbanisation which Kenya has experienced has followed significant changes in the socio-economic structure of our society. That urbanisation is by and large responsible for the increase in deliquency and crime is reflected by the fact that whereas the Nairobi Courts handle an average of ten to fifteen cases each day, courts in rural areas handle far much less cases.

Urbanisation has resulted in people emigrating from the rural areas in search of employment. Increasing urban population is a common feature in all the urban centres. The emigration to towns has resulted in the uprooting of people from the social values and norms obtained in traditional societies. They have become subjected to new norms and a new form of social control. Living in urban areas has led to a breakdown of tribal ties; and a weakening of the family and kinship ties. The youth in the urban setting is especially influenced by the values and codes of his contemporary group which in the disorganised setting of urban slums often function as a gang committing petty crimes and being prone to influence from the older members of that community.

Urbanisation has also resulted into broken homes where usually the mother lives in the rural area and the father with some of the children lives in town. There is no parental control since the father has to work to earn a living for them and because a parent is missing in the family set up, then there is less control and discipline for the children. Where both parents are working the children are left on their own and have more free time to engage in criminal behaviour. There is no parent control and also other traditional controls are lacking. In a traditional village the behaviour of people is monitored by the informal means of installing respect for the elders of the

family and tribe. In urban areas usually there is no control and one is left to look after themselves.

Related to the phenomenon of urbanisation is the growth of Slum Areas. Crime is mostly a product of the slums which as one criminologist put it:-

> represents a way of life, all of its own creation with its social organisation and sub-cultures. With its own set of norm and values. In turn the values are reflected in the social ills of crime.[9)]

Slums are thus the breeding grounds of crime in the urban areas. People living in such areas are faced with conflicting values. On one hand, they see the filthy squarlor and poverty around them while on the other hand, the goods displayed in the shops and the bright lights of city centre, the big house of Muthaiga etc. with the "Mbwa Kali", "Hakuna Kazi" signs. This dilemma can be explained in terms of the anomie theory. According to Durkheim[10)] who first enunciated the theory, when a gap exists between aspirations and reasonable possibilities of achieving the desired goals, the individual experience a state of anomy; a feeling that there are no norms by which society operates and by which he can organise his life. The anomie theory has been amplified by Robert Merton[11)] who postulates anomy as being caused by the existence of social classes. Anomie according to him was a form of cultural chaos due to the imbalance between the approved goals of society and the legitimate means of attaining them. Most modern societies emphasise material achievements in the form of acquisition of wealth and education as the accepted status or goal but provide limited institutional means to achieve them particularly for the members of the lower class. This disjunction between the means and goals result in a situation of anomie i.e. a breakdown in the functioning of the social structures. Persons frustrated by social structure may result in stealing to achieve society goals or retreat from the goals through alcoholism, drugs,[12)] mental disorder which contribute to criminality. Thus crimes against property represent an adaptation to achieve goals that society provides only for a limited few.

One Albert Cohen[13)] in his study characterised Merton's theory as "atomistic and individualistic" in the sense that the response are those of individual to social structure and not taking account of individual response to other individuals - how one person's deviances affect other people. For Cohen, the American youth forms into gangs and make use of subculture as a mode of reaction and adjustment to a dominant middle class society that indirectly discriminates against them because

of their lower position in the society. The subculture serves lower class boys as a legitimate means of striking back at society that produces the frustrations that they have. Thus crime arises where the legitimate means to attainment of the success goals of the dominant society such as economic and educational opportunities are blocked. On this theory of anomie Clinard and Abboth stated that:-

> It is possible ..... that anomie is more applicable as a partial explanation for some of the social forces leading to increased crime in countries undergoing rapid development; for example in in developing countries, goods in considerable amounts and varieties are suddenly available only to foreigners and a small group of local persons.[14]

The low income class who cannot get these things like radios, cars, fridges, beers and other modern luxuries also want them and because the social forces do not allow them to get them, they result to illegitimate means of acquiring them. Although this state of things does not explain crimes like homicide, rape and other related crimes, it certainly explains crimes against property like theft and robbery.

None of these theories taken in isolation explain crime causation. How ever it is clear that crime generally is caused by most of these theories. Emphasis has been laid on the socio-economic theory of crime because it is the dominant explanation of why most crimes are committed. The question then is what is the importance of these theories? An understanding of why people commit crime is necessary for all those people who deal with the criminals - the advocates, magistrates, judges, police, prison officers and probation officers. It is only if they clearly understand the theories of crime causation that they can appreciate criminal behaviour in the society. The magistrates must address themselves to crime causation if they are to be beneficial to the theory of treatment of criminals. The sentences they impose should be related to such an understanding as to why one committed the crime. Emphasis should be laid on the individual criminal and not to the crime he has committed. A magistrate ought to look at a criminals social background to know what treatment is good for him before he can impose the sentence. An understanding of the causes of crime will show that the society contributes to crime causation but does not do anything to try and eradicate crime. It punishes the offender for crimes of its own creation. Thus treatment and the final eradication of crime can only be achieved if there is an understanding of the theories of crime causation so that crime can be tackled from its root causes instead of waiting for people to commit the crime so they can be treated or reformed.

CHAPTER TWO

SUB-SECTIONS 296(2) AND 297(2) OF THE PENAL CODE

A. Before Enactment

In the early days of tribal groupings, death penalty was used to cleanse the society of a dangerous evil which they believed was caused by a breach of a taboo or commission of a sacred offence. All other crimes were compensated, even murder although there were variations in different communities. As the tribal groupings grew in size and some had clan elders to ensure law and order while others had chiefs, death penalty was used to enforce rules and impose a general deterence.

In Kenya, the Kikuyu provided death by burning for murder committed through poison or witchcraft. Thieves were put to death by enclosing them in bee-hives and rolling them down a slope of a hill.[1)] At the Coast, where Mohamedan law was applied, a murder could be compensated for but sometimes execution was carried out. Generally, there was no accepted mode of inflicting death and the list of crimes which served death differed from place to place. The motive was usually punishment or revenge. Deterence also played a role in the theory and practise of capital punish-ment.

The turn of the 20th Century saw the set up of colonialism. Laws were imported to Kenya to help facilitate the economic exploitation of her national resources. After the First World War, British Colonial law provided for the death penalty for murder. For the colonialists capital punishment served as a deterrent (or so they believed) to rid society of dangerous persons who interfered with their economic exploitation. The same philosophy continued in post-independence era with the same view, the protection of property belonging to a certain class of people. Ten years after independence the death penalty was extended to robbery with violence.

B. The Enactment

The Bill extending the death penalty to robbery with violence was introduced by the Attorney-General, Mr. Charles Njonjo and it was moved to its second reading on 5th May, 1970. The Bill was referred to as the Criminal Law (Amendment) Bill and consisted of clauses amending various sections of the Kenya Penal Code. Clause 5 of the Bill refereed to punishment for robbery - S. 296 of the Penal Code. This

Clause which sought to introduce the death penalty for certain classes of robbers and also those who attempted to rob is the subject matter of the whole of this paper. Clause 5 of the Bill became law on the 22nd October, 1971 when it received Presidential assent. The date of commencement is laid down as 23rd October, 1971. It was enacted as Act No. 25 of 1971. In its preamble the Act stated:-

> An Act of Parliament to provide for the death penalty for armed robbery or attempt, thereat, in the course of which grievious harm is inflicted upon any person; to make minor amendment to the Criminal and penal law; and for matters incidental to and connected with the foregoing. [2)]

The drafters in what they referred to as a "minor" amendment sought to enact a mandatory death sentence for robbery with violence by an addition to both S. 296 and 297 of a new subsection (3) which stated:-

> If during the course of, or immediately after the commission of the offence under this section, any grievious harm is inflicted upon any person other than a participant in such offence, every person convicted of that offence who is shown to have inflicted such harm shall be sentenced to death. [3)]

This amendment was short-lived. There is no known or reported conviction under the amendment which was followed in 1973 by a further amendment referred to as the Penal Code (Amendment) Act. The date of assent is given on the Act as 4th April, 1973 and its commencement is dated 6th April, 1973. S. 2 of this amendment stated that:-

> S. 296 of the P. C. is hereby amended:-
>
> a) in subsection (2) by the deletion of everything appearing after the words "violence to any person" and the substitution therefore of the words "he shall be sentenced to death".
>
> b) by the deletion of subsection (3) [4)].

This amendment also applied to S. 297 so that after the 1973 Amendment the sub-section read:-

> S. 296(2) If the offender is armed with any dangerous weapon or offensive weapon or instrument, or in company with one or more other person or persons, or if at or immediately after the time of the robbery, he wounds, strikes, beats or uses any other personal violence to any person, he shall be sentenced to death. [5)]

S. 297(2) As in S. 296(2) Mutatis Mutandis. What led to the enactment of such a law and what had our legislators and representatives of the people to say?

The Debate in Parliament

One writer has described the debate on the Bill as having been "characterised by a lack of coherent, well argued philosophical, moral and factual issues that are inherent in debates on the subject elsewhere".[6] Most of the MPs were ignorant of the debates on the subject and their only arguments was by citing isolated incidents in their constituencies and largely repeating themselves and what others had said. Except for a few MPs the debate was full of assumptions and wishes. May be this was because of the pressure for enactment of such a bill at various public meetings chaired by the late President.

The reason for the emotional and lack of any analytical rational debate on the subject was perhaps started off by the Attorney-General himself. In his introduction speech he stated:-

> The Honourable Members will remember the case of robbery at the Meteorological Department where the people who attempted to stop the robbery, one of them at least as a result of an attack with a panga and shortgun died. This clause is aimed at this type of people. We have now very clever gangs who go about armed with revolvers, pangas injuring people sometimes maiming innocent people in the course of the robbery.[7]

Although there is no doubt that the Attorney General was aware of the various arguments for and against the death penalty, he chose not to enlighten the members on this issue. His introduction speech did not give the objectives of the amendment. Whether it was deterrence, revenge, protection of human life, protection of property, elimination of convicted robbers, etc. No research on the subject had beed carried out but the Attorney General by introducing the issue through citation of isolated cases set the ball rolling and the other MPs followed in the same wavelength.

Among the various arguments put forward, one dominant one used is that death penalty acts as a unique deterrent better than any other form of punishment. The debate is not clear whether the special deterrent is in reference to violence in the course of the robbery or to robbery itself although the section as seen from the Attorney General's speech is clearly aimed at excessive violence in the course of the robbery. The speakers could not distinguish between the argument that death penalty is a special and unique deterrent and the general deterrence. One writer has put this distinction clearly:-

> Special deterrence is specific and directed to a given individual in the society while general deterrent is directed to society and aims at an overall reduction in crime due to the inhibitory effect of sanctions on aggregate persons. Punishment that relates to general deterrent is of a demonstrative character and rests on the philosophy that a few must perish so that the many may learn (more appropriately fear). In order to be preventive rather than curative, sanctions aimed at general deterrent must constitute a standing threat. [8]

One MP was certain that the fear of hanging would deter others from committing violent crimes. He referred to it as "psychological deterrence", He said:-

> I also mentioned something to do with psychological deterrence .... if people are to be hanged, particularly if this had to be done in public, many people would fear that they would be hanged the same way. [9a)]

Another MP with the same view stated:-

> I do not think that anybody can convince me that by hanging these people, by passing the death sentence, this is not going to educate them: (assuming he means the would-be robbers and not those who are to hang). [9b)]

According to these MPs the death penalty was to be used to instil fear into would-be violent robbers and therefore deter them from committing the offence. There are many people who believe that the death penalty is a deterrent and especially when carried out in public. This kind of belief is based on no empirically verifiable truths; people simply believe that it is so and hope it is so. The truth is that death penalty is infact no special deterrence. A good example of this fact is England. She abolished public executions in 1868 largely because of the evidence before the Royal Commission in 1866 that, of the 167 persons who had been under the sentence of death in one town during a number of years, 164 had themselves witnessed a public execution. Far from being repelled and terrified by public executions, the people were desensitised:-

> Executions became festive occassions. Entertainers plied their diversions amidst throngs assembled; merchants often used the occassion to create a fair; there were flippant exchanges between the crowds, the victim and the executioner; the condemned person would sometimes pay the executioner to be more skillful in a preamble stating that pickpockets were operating amongst the people gathered to watch the execution of pick-pockets. [10)]

Those who advocate the death penalty believe that capital punishment is a unique deterrent, more effective than any protracted imprisonment or other alternative punishment. They state that it is a "self evident truth based on the fact that man at

nearly all costs, desires to preserve his live". However this assumption that the knowledge of punishment will deter others from committing the offence is groundless because in most cases of robbery and nearly all other offences, one commits the offence with the belief that he will not be found out, he uses violence to prevent detection and arrest. His only fear is arrest and conviction. The punishment does not come into his mind until may be after the arrest. It is not that criminals do not realise that if they are caught they would suffer the consequences of their iniquities but rather they do not contemplate detection. This was put across to the members by one MP who was against the Bill. He stated:-

> Punishment is always known by criminals; they always know there is punishment if they are caught but they always hope they will not be found. Punishment is only relevant when they have been caught.[11)]

Thus it is impossible to see how the threat of a severe punishment can deter an individual who does not expect to be caught.

The argument that death penalty is a unique deterrent although unsupported by any data was not only prevalent among the MPs who saw the Bill through. It has also been used by Prison authorities to rationalise the hanging of robbers under judiciary sanctioned state violence. Following the hanging of two convicted persons one for robbery with violence, the other for murder on 19th March, 1976, the Ex-Commissioner of Prisons, Andrew Saikwa told a press conference that:-

> These executions affirmed the government's determined efforts to rid our society of those who continue to pester law abiding wananchi .... It is hoped that these executions will clearly spell out to criminal elements who are still at large and those who have a tendency or propensity to use violence to achieve the ends that their activities will be short-lived[12)]

This was only a dream for the crime of robbery with violence instead of decreasing continues unabated. As more people were convicted to hang so did the crime of robbery with violence become more widespread. People still believed in the death penalty being a unique deterrent, no efforts were made to look at the reasons why crime was on the increase, no research on the topic was encouraged but the judges continued to give the death sentence. Discrepancies in sentencing were to be seen, discrimination of the same category of offenders continued and none of the legislators have bothered to ask themselves why the situation is as it is. Why do those charged under the hanging section not get free legal representation like in murder cases -

after all the sentence for both is the same? Why are there different corts for murders cases and for robbery with violence even whey they carry the same sentence? Yet our legal system still boasts of being the institution that administers justice. Whether this is justice will be seen in the next chapter where an attempt is made to deal with the above questions through a look at the court system and the decided cases on robbery with violence.

Those who advocated for the death penalty also argued that it is the only effective punishment. Again this proposition was based on no data but some MPs thought that this is the position. They did not state who the punishment was effective to. I think that on the individual level, you cannot punish a person who is hanged when he does not live to be able to appreciate the consequences of his misdeeds. The effective punishment refered to here is only to his dependants, friends and acquintances - innocent people - who suffer by the act of his death but never the executed person. The only punishment may be, is the time of waiting for the day of execution but otherwise the act of taking a man's life puts him far beyond the realm of human suffering. "In the final act of dying there is no punishment; punishment lies within this process of bringing about the death".[13] Punishment of the kind talked about by these MPs can only be seen if we can consider that once a person has been deprived of his life he can no longer be a menace to society but what good is this to the society left with his innocent dependant s who may also resort to crime because they too have to survive. How can you then reconcile this with the statement made by one MP that:-

> MPs if they want the Attorney General s chambers to help the magistrate to make sure that at least within a certain time, we eliminate these people, should support the Bill.[14]

Such a statement can only be seen in the light of the fact that the MP was talking in ignorance of the sufferings that the dependants of a condemned person have to go through. The same MP rejecting the idea of political re-orientation for thieves. He insisted that rehabilitation was not the objective but rather punishment. The MPs seemed to express the view that criminality is genetic and not influenced by the social economic, political and general environment of the society one lives in. They felt that once one is born a criminal, he dies a criminal and there is no room for reformation as one stated:-

> ..... they give them strokes and then they stay there for about four years because they have done grievious harm, but then they are discharged and they come back and the same thing .....[15]

Crime here was characterised rather cynically by some as a hobby just like tennis, golf or swimming except that this "hobby" is only found among the less fortunate members of our inequitable socio-economic system just like Golf and million-scale smuggling is to these same cynics. For this people who felt that the death penalty is the only punishment, rehabilitation, reformation and reintegration which are other alternatives to the death penalty were seen as a waste of government resources. Talking on this issue, one Assistant Minister stated that prisoners want to stay in and when released they commit another crime in order to go back. Giving an example he knew of a person who, had been in jail 35 times and was serving a further term of 14 years, he used this to generalise that most criminals enjoyed being in prison presumably meaning that it was better for these people to be eliminated than put in prison where they used government resources, which the government could use to make these MPs status better by raising their salaries as proposed sometimes back. However, what would be the position of these same MPs if the law was to operate unhindered. How many times would the now seemingly "innocent law-abiding" persons be in jail for smuggling, corruption, tax evasion, obstruction of justice etc. The MPs outlook, common among the affluent of the society, pinpoints to absolve society from any responsibility in criminal behaviour of its members. The less fortunate in the society "want to stay in when released" from prison. Why?; because the conditions in prison are far much better those of the community they come from and what causes this inequality is more clear among the MPs who are representatives of these same criminals but these, detached from their less fortunate brothers watch from an ivory tower and advocate for those who threaten their property - death by hanging as stated by one MP that:-

> if we are going to allow people to be victimised and their property robbed with violence by a few individuals ..... there would be no point in possessing any property in this country.[16)]

Therefore to preserve the propertied class, some people have to die otherwise there would be no point in acquiring loads of property so that the less fortunate in the society may get access to it. This is what seemed to be in the minds of most of these MPs who advocated the death penalty for robbery with violence. They were more concerned with the protection of property than protection of life of those victims. The fact came out clearly that the robbers in committing the offence and using violence were more interested in the property and not to use violence on the victim. Violence is

only used for self-protection and resisting arrest but still a harsh sentence was however needed to preserve the propertied class.

Another reason for supporting the Bill was that public opinion in Kenya had declared their wish to see those who use violence in executing a robbery to be hanged. Some members asserted that "the people in the country give full support" or "the mass of our people approve". What did this public opinion amount to in a society where most of the people are illiterate and the press is not free to play its role as a media of mass education? Public opinion in such cases can only reflect the opinion of the political leaders. This point although may be unaware of its implication was put forward clearly by one MP who stated that:-

> I would have thought that a resolution carried at a public meeting would have been sufficient representation especially when it was of this calibre. [17)]

This was the situation in Kenya. No opinion polls were ever conducted and the public opinion refered to by these MPs was that of chorus answers to leading questions asked by the late President in public meetings held at a few centres. It was stated that if a person of the President's "calibre" chaired these public meetings nobody should disapprove. The few "Kamukunjis' were taken to represent "the mass of our people". Can this justifiably be refered to as public opinion?

There were those who advocated the death penalty because they sympathised with the victim rather than the villain. The point is that by hanging the villain, society creates more burden from the dependants of the hanged person. It is true that society pays a heavy price for the death it imposes. Our emotions may cry vengeance in the wake of a horrible crime, but reason and experience tell us that killing the criminal will not undo the crime, prevent other crimes or bring justice to the victim, the criminal or the society. Those who sympathised with the victim supported their assertions with quotations from the Bible. They refered to the "eye for an eye" doctrine. Although it is not always the case that in a robbery with violence case death occurs, most MPs seemed to base their argument on the fact that death always occurs. One Assistant Minister whose sympathy was with the victim stated:-

> If we say hanging is not enough ..... are we going to say that sending them to prison is enough? Are we not going to take into account the misery of the family of the people who are butchered to death and their property taken? Are we forgetting the fact that those who have died have left behind children and so forth. [18)]

This assumption that there is always loss of live is irrelevant because where this is the case then it should not be a question of robbery with violence but that of murder. Again where robbery with violence is committed and only slight injury is caused, why should such a person hang when the punishment does not even fit the said "eye for an eye" doctrine and this is still used to support the death penalty? In rejecting its validity one MP argued correctly that killing somebody does not help the dead to come back to society. He refered to the "tooth for a tooth or an eye for an eye" doctrine as an old conception. This doctrine commonly refered to as Lex Talionis, is the most commonly cited and most misinterpreted biblical term for neither the church nor the state give any support to the idea that vengeance should have a place in our society. God himself taught forgiveness and Jesus suggested to his followers that those who trespass against them should be forgiven seventy times. Although Jesus did not say what was to be done after so many times of forgiveness we can say that he meant it to be continual. The Archbishop of Cantebury regarding the law of "an eye for an eye" doctrine stated:-

> It is well to remember that in its origin it was a restraint upon vengeance. It does not require that equivalent punishment but it says that no punishment should go beyond that limit, no more than an eye for an eye and no more than one tooth for one tooth. 19)

Those who cite the Bible to justify the death penalty should note that God did not sentence the first murderer on earth to death. When Cain killed his brother Abel, God punished Cain by branding and banishment. Other biblical quotations also show that God is against the death penalty. In the Book of Ezekiel, God advised that "As I live ..... I have no pleasure in the death of the wicked but that the wicked turn from his way and live". An "eye for an eye" doctrine therefore cannot be used to kill a robber who has not killed but the decided cases in our legal system show otherwise as we shall see later. The doctrine can be clearly illustrated by an example of a mother whose daughter had been murdered and the murderer committed to prison for trial under the death penalty where he was given a sentence of life imprisonment by a Los Angeles Court in November, 1960. This is part of the letter she wrote:-

> I cannot believe that capital punishment is a solution to abolish murder by murdering an endless chain of murdering. When I heard that my daughter's murderer was not to be executed, my first reaction was immence relief from the additional torment; if the usual catastrophe breeding more catastrophe was to be stopped it might be possible to turn bad into good ..... May be he (the murderer) became what he

> is because of unnamable humiliations and rejections. To become useful would be a way to help him ..... If it is to be an eye for an eye and a tooth for a tooth this will soon be a blind and a toothless world.[20]

Although this letter is in reference to death penalty for murder cases, the message is put through that the state should not in the name of justice continue to hang people when there exists alternative methods of punishment. The state must be warned that "savagery begets only savagery".

Although in the minority, some MPs who opposed the Bill managed to voice their feelings to the House, one MP stated:-

> It is a mark of primitivity and savagery to think that by imposing harsh sentenses you can thereby reform society and reduce crime.[21]

Like most abolitionists it is agreed that the death penalty does not reduce crime. Those who advocate that to preserve their property, the robbers must be hanged must bear in mind that something more should be done apart from imposing harsh sentences. These sentences will be of no consequences if nothing is done to improve the standards of those criminals and the only way to do this is not by imposing the death penalty but by increasing employment, raising their standard of living, education, equal opportunities, fair distribution of the national resources etc. As one writer put it, commented on the death penalty:-

> A state in the person of its functionaries who like all people are inclined to making superficial conclusions, who like all people are subject to influences connections, prejudices and egocentric motivations for their behaviour takes upon itself the right to the most terrible, irreversible act - the deprivation of live. Such a state cannot expect improvement of the moral atmosphere in its country ..... the contrary is true ..... that savagery begets only savagery.[22]

The opposers of the Bill also rejected the death penalty on the ground that it is final, one MP put it thus:-

> One objection I have about hanging is that it is so final. Evidence can be juggled and no human system is perfect in any criminal case ..... Somebody who is innocent may be found guilty.[23]

This statement raises questions of the administration of justice in any legal system. The courts are manned by human beings who like all of us can make mistakes, succumb to pressure from political circles and many other reasons that influences a judges mind when addressing himself to the sentence. The conviction of an innocent person can also be the result of a deliberate frame-up or misuse of police powers through interogation of suspects and using force to make these people admit offences they have not committed, or judges accepting confessions which have been extracted from

suspects through threats or actual torture. If these cases have been reported to have happened in countries where law enforcement personnel are better trained we would expect the errors of justice leading to the execution of innocent persons to be much more frequent in a country like ours where most of the population are ignorant of their rights, where poverty bars them from hiring legal Counsel and where the judicial personnel is less qualified in a sense. There are many examples from all over the world where innocent people have been hanged for wrongs they never committed. In 1950, Britain hanged one Timothy Evans for murders which were subsequently shown beyond doubt to have been committed by the multiple murderer Christie. The then Home Secretary of Britain later lamented:-

> I think Evan s case shows in spite of all that has been done since that a mistake was possible and that in the form in which the verdict was actually given on this particular case a mistake was made. 24)

Earlier in 1927, in the State of Massachussets, two Italian imigrants Nikola Sacco and Bartolomeo Vanzetti were executed after being found 'guilty' for a murder that had taken place in the course of a bank robbery. They pleaded their innocence to the end but because of the racial and political bias against them, nobody took notice. All their Italian witnesses were dismissed as perjurers. The case took 35 days and yet the jury received the case in the afternoon and were ready to return a verdict of 'guilty' immediately after the close of the case. One Herbert B. Ehrman observed 29 years later:-

> Strip the case of the then current antiradical hysteria, change the defendants into Massachusset's veterans of World War I, the identifying witnesses to Italians and the alibi witnesses into native New Englanders, and it becomes inconceivable that the weakness of the prosecution and the massive evidence of the defence would have received such a brief consideration by the jury. 25)

The Governer of Massachussets in 1977 (50 years after) wrote a statement absolving the two and admitting there was a miscarriage of justice.

In 1975, in the United States, only a year after the Supreme Court affirmed the unconstitutionality of capital punishment, two cases came to light in which six persons had been wrongly condemned. In Florida, two black men, Freddie Pitts and Wilbert Lee were released from prison after twelve years awaiting execution for a murder they had never committed. Though a white man confessed the murder, it took a nine year legal battle before the governor would grant them an acquital. 26)

Also in New Mexico four men who had spent eighteen months on death row for murder when the real killer confessed had to be released.

Although there is no known instance in Kenya where an innocent man has been condemned the possibility cannot be eradicated.

In the debate a few MPs made an attempt to address their mind to the root causes of crime. To look at the criminal rather than the crime. As seen in Chapter One, crime patterns are more often directly dictated by the prevailing socio-economic structure where there is inequitable distribution of property, unequal opportunities to exploit the country's resources, unemployment, poverty etc. Crime prevails in our slums where the less fortunate members of our society live and try so hard to survive day to day. The people are not born thieves, it is society that makes them as stated by one MP:-

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

Indeed in a society of haves and have-nots some people have to resort to illegal methods to stay alive. No doubt people will point out the cases reported in the press where large sums of money is stolen possibly by well organised gangs but we must be aware that the press reports what in their opinion is impressive to the readers. Many cases involving small amounts of money are decided in our courts but are never reported by the press.

One other objection raised about the death penalty is that it discriminates. When the MPs talked about discrimination it was only on racial grounds. They ommitted to state that discrimination apart from being racial exists among the Africans - the rich and the poor. You do not get people from Muthaiga being accused of robbery because firstly the police do not bother about them - they are the affluent in society and have the backing of the government. They also have a say in the legal system although indirectly. What about Mathare Valley as compared to Muthaiga? Geographically these two places are just a short distance from each other, but what a distance when we consider the economic standing of the two. Why are there criminals in Mathare Valley? The answer is only too obvious. It is a result of the economic structure of this country but the society which is responsible for the economic inequalities has a way out - hang the robbers, but this does not help because crime continues unabated. This shows that crime is not conditioned by how much fear of the death

penalty we try to imprint into people but other factors in the society. We must believe in the medical theory that "prevention is better than cure". We must address ourselves to the roots of crime and try to prevent it from this end instead of waiting until the crime is committed so we can provide a cure. Therefore the enactment of the death penalty for robbery with violence was not justified. The enactment has not reduced the crime rates and the administration of the hanging section leaves a lot to be desired as we shall see in Chapter Three.

CHAPTER THREE

IN THE COURTS

So far we have discussed generally what causes crime in society and to what extent these causes are related to the crime of robbery with violence. Further, we have discussed the law relating to this offence and how it came about. The arguments put forward for its enactment have been highlighted and as far as it is possible we have seen whether these arguments were valid or not. The question that remains unanswered is how this law is applied in our courts and how it relates to the theory and practice of our judicial system with an attempt to show how far administration of justice is achieved.

S. 296(2) and 297(2) both of which provide for the death penalty clearly lay down three alternative essentials which when proved are enough to convict a person under the sub-sections. This assumes that S. 295 or S. 297(2) of the Penal Code have been proved. These essentials are:

1. Being armed with any dangerous or offensive weapon or instrument or
2. Being in the company of one or more other person or persons or
3. Wounding, beating, striking or using any personal violence on any person.

Thus under (1) a robber does not have to use the weapon to qualify for the hangman's noose. Under (2) it is neither necessary to be armed nor to inflict injury to qualify for the noose. Under (3), the injury inflicted need not be inflicted by using a dangerous weapon. It follows that if an armed person walks into a house in the company of a fellow robber, places his weapon on the table and proceeds to break the occupants hands using his bare hands, he qualifies for the noose under all three categories. However, where circumstances like these exist but the attacker does not steal anything or attempt to steal (i.e. S. 295 or S. 297(1) not applicable) the fellow does not qualify under the hanging sub-section. This further shows the emphasis on protection of property rather than life given by the sections. Also since robbery is distinguished from theft by the element of use of force required in the latter, the force required may well be covered by the phrase "any personal violence" in our hanging sub-sections. The judges have the final say and they have not stated their position clearly. The decided cases show that the position is far from clear and the question

that comes to one's mind is that, given this state of facts that the section itself spells out clearly its essentials, why is it then that such disparities are found in the decided cases? A look at some of the cases will shed light on the answer to this question.

It is submitted that there is a lot of discrepancy in sentencing in our courts. This issue however should not be looked at in isolation from other issues raised later in the chapter. Discrepancy can be seen through a comparison of a few decided cases. The case of Julius Kirema Raire V R[1] whose facts are that on 10.8.77 on Juja Road, Nairobi with others not before the court, the accused robbed a police officer one Joseph Mwai of a wrist watch worth Shs. 120/- and used personal violence on him. In defence the accused denied being on the scene of the robbery on the day in question. However, the Senior Resident Magistrate did not accept his alibi and he was sentenced to death. The Senior Resident Magistrate stated that "there was only one penalty for such an offence and that was to hang as provided by the law". This case should be contrasted with that of Benjamin Kamau Njoroge V R[2] where the accused person was sentenced to prison for 3 years with strokes by a Senior Resident Magistrate for stealing an Identity Card, a Wrist Watch and using violence on the complainant using an iron bar. The complainant was also pushed into a ditch. Passing sentence the magistrate stated that the accused had been charged under the hanging sub-section but admitted an ordinary charge of robbery under S.296(1). The accused had seven previous convictions relevant to the present case. The significance of these two decisions is that two very similar cases were decided very differently. Both qualified under the hanging sub-section but one magistrate thought that the accused person deserved the mandatory sentence. We can say that this sentence is excessive and that even the doctrine of "an eye for an eye" so popular with the enactors of the sub-section was not followed far. We cannot compare property worth about 400/- and a grievious injury with the loss of life by a state act. None of the theories advanced for crime causation were referred to by the magistrate. In the first case it can be assumed that there was accidental use of violence to acquire that money however small. This was not stealing to amass wealth but to survive. The legal significance of the second case is that though clearly the case fell under S.296(2), it was decided under S.296(1) under which it was charged. The difference between the two magistrates who decided these cases is that one is overzealous in interpreting the law while the other is not. The other factor is the role played by the prosecutor who has the power to charge. The magistrate can only adjudicate on the charge brought to him.

In most robbery with violence cases the judges mostly address themselves to the amount of violence required to constitute an offence under S. 296(2) or 297(2). Most magistrates and judges although aware that this is just one of the essentials of the sub-sections address their minds to it as an alternative to the other two. The issue of violence has been discussed (although not adequately) in various court decisions. In the case of Dismas Wanyonyi V Rep[3] the appellant was charged and convicted of capital robbery. The actual violence used in this case is that the appellant and others who were armed with rungus, simis and iron bars and beat the complainant with the flat side of the simi and twisted his ears. On appeal counsel for the appellant contended that only simple robbery under S. 296(1) was proved. Rejecting this ground of appeal, the court sought to distinguish simple robbery from capital robbery under S. 296(2). It was stated that "actual violence" for the definition of simple robbery was any "unjustifiable force" while;

> capital robbery occurs when in addition to simple robbery it is proved that the offender was armed with a dangerous or offensive weapon or instrument or was in company with one or more other person or persons or if, or at or immediately before or after the time.[4]

The courts interpretation of the Wanyonyi case is that they distinguish simple robbery from the more serious robbery provided under S. 296(2). The court held that capital robbery together with one or more of the three essentials laid down by S. 296(2). The court rejected the defence counsel's argument that in this case only simple robbery was proved. He contended that the violence was not enough and so capital robbery was not proved. The counsel was saying in other words that the only determining criteria was violence and all the essentials were cumulative and not alternatives. This argument was supported by the state counsel who (unknowingly?) contended that the requirements are cumulative and not independent of one another and that as far as violence is required it must be aggravated. The court rejected the above argument on the ground that to prove simple robbery and any or all of the other essentials. The court in this case tried to differentiate if from the English case of Smith Desmond and Another[5] where the House of Lords held it to be robbery with violence where the accused persons locked up a night-watchman in a lavatory while they stole. It was contended however that our definition of robbery differs from the English. They stated that they were unable to accept that before you can have the more serious robbery there must be an overt demonstration of violence amounting to

grievious harm. However, the judge went on to state that:-

> It is only right that we should say that we have dealt with appeals where the facts proved were more serious than those before us but only simple robbery was charged. [6)]

The court did not distinguish the Smith case and the difference between our interpretation of violence and that of the English courts was not shown. The court also admitted the fact that there are lots of discrepancies to be found in cases and that the section is not strictly followed. The court gave its reasons for this state of affairs as that:-

> a court of trial must however, in the ordinary course of events accept the charge put before it and adjudicate on the facts thereof within the framework of the applicable law, and if its conviction is entered, this court in its turn and on first appeal can but adjudicate upon that conviction in the light of the applicable law and the recorded evidence. It can do no more, it must do no less. [7)]

This case is a clear indication that the courts are ready to reach some kind of justice but their hands are tied by the discretionary powers of the prosecutors to charge. The fact that the section, clearly lays down the essentials required gives the judges no chance to use their discretionary powers. The law provides for only one sentence and where evidence has been adduced by the prosecution witnesses which proves any of the essentials then the judge can only convict on those facts. The only way out for a judge or magistrate is to convince the prosecutor that where the offence is not serious then a charge should be brought under S. 296(1) but still this is left to the prosecutor to agree or not agree. In some cases where a charge is brought under S. 296(1) and the facts adduced clearly show that they fall under S. 296(2) the judges try to reach a fair justice by convicting under the charge infront of them. The big question here is what then is the use of a section which can be greatly misinterpreted? We can therefore say that there is no administration of justice in our judicial system as concerns robbery with violence if even the High Court can admit that the court has no control on how an accused person is charged and their work is only to sit and wait for the prosecutors to come up with any charge even sometimes where the facts clearly do not deserve such a charge. The fact that once the prosecutor has framed a charge the judges "can do no more, it must do no less" but follow the footsteps of the prosecutors is an admission that leave a lot to be desired from our judges.

S. 296(2) does not define the degree of violence needed to amount to an offence

under the section. Although this is not necessary since violence is only one of the essentials needed and a conviction can be reached where the other essentials are proved, the issue has been taken up in various court decisions. In the case of Joseph Wangangu V Rep[8] the facts as per charge sheet were that on the 24th of April, 1977 at Kabazi Estate, Kiambu District, the appellant jointly with others not before the court robbed Karanja Njau of 20 bags of coffee valued at KShs. 42, 000/- and at or immediately after the robbery used personal violence on the complainant. They were charged under S. 296(1). The gangsters were armed with a club, rungu and sword and they drove to the estate where they surrounded the complainant who was on duty there. They pushed him towards an electric light pole and tied him while they began to steal the coffee. The police who lay in ambush came and arrested them. The appellant was only sentenced to 4 years and 10 strokes. The trial magistrate dealing with the question of violence held that there was no more than a tying up of the complainant and as such tying up is incapable in law of amounting to violence under S. 296(2). The High Court did not agree with the trial magistrate's ruling that only simple robbery was proved but they upheld his decision on the ground that although the particulars of the offence supported a more serious type of robbery provided by S. 296(2) i. e. robbery with violence, only simple robbery under S. 296(1) was charged and the violence used was catered for by S. 295 of the Penal Code which states that:-

> Any person who steals anything, and at or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen, or prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.[9]

This is punishable under S. 296(1). The High Court in upholding the magistrate's decision misdirected itself in law by stating that only robbery under S. 295 was proved when the facts state clearly that the appellant and his gang were armed with dangerous weapon in company of others and an amount of violence was used. This is seen further by their acceptance of the High Court judges of the magistrates statement that:-

> Considering what happened to the watchman one cannot say that there was no force used ..... they led him to an electricity post and tied him up ... He was threatened that by making any noise he would be harmed. These people had a rungu and pangas ... These were offensive weapons to show that these four were serious with their threat to harm should the watchman shout. Hence the circumstances clearly show that this was robbery and nothing else.[10]

In this case the magistrate stated and the judges agreed that the gang was armed with offensive weapons, they were more than one and then the magistrates stated that "hence the circumstances clearly show that this was robbery and nothing else". Again the misinterpretation of the sub-section is apparent and because of the fact that the judges hands are tied by the charging powers of the prosecutor, the misdirection is only up to the extent that the judges did not deal with the issue of the essentials necessary although they are well aware of them. The essentials of the section are clearly ignored and more concern is laid on the charge before the magistrate. This causes discrimination as we shall see later between persons in the same class of offenders. The courts in their interpretation of the sub-section have not laid down any clear interpretation of the sub-section. In my view a correct interpretation of the violence required to constitute capital robbery was given in the Wanyonyi case. This is a contrast of the Wangangu case where the court was of the view that only aggravated violence constitutes robbery for the purpose of S. 296(2).

Connected with the issue of the degree of violence needed to convict under S. 296(2) which as we have seen is not clear is the interpretation of "offensive weapon". This was discussed in the case of Mohamed Luima V Rep.[11] In this case a driver was in his employer's car outside the Hilton Hotel in Nairobi when two persons emerged and ordered him out of the car at gun point. They drove away in the car and were later arrested at a police road-block and charged with robbery with violence. They were found guilty and sentenced to death.

On appeal, the defence counsel confered with the prosecutor who agreed to abandon the charge under S. 296(2) and substitute it with one under simple robbery saying that there was only simple robbery and not an aggravated one". The appellant was sentenced for six years with six strokes. In this case the court did not address itself to whether a pistol amounts to an offensive weapon or whether the fact that the appellant was accompanied by another person satisfied one of the essentials of the section. Again we see how the courts try to attain justice by going round the sub-section or following strictly the charge that is before them. The judges try to mitigate the harshness of the sub-section by convicting the accused persons of simple robbery instead of convicting them of robbery with violence. However, this very much depends on the cooperation they get from the prosecutors.

From 1973 when the amendment for the death penalty was passed in Parliament, the police have had the ultimate discretion to charge accused persons. In the mid-1978 in the case of Francis Munene V Rep.[12] decided by Mulli and Simpson J. J. a recommendation was made that all cases on robbery with violence be refered to the Deputy Public Prosecutor who was to decide on the appropriate charge. Before this recommendation the police prosecutors had the sole discretion to charge under the section or not. What usually happened is that in their ignorance of the correct interpretation of S. 296(2), they charged anybody arrested for robbery under this section. This resulted into very many charges under the section which were later withdrawn as a result of further scrutiny sometimes from the Attorney-Generals chambers or on appeal where the prosecutors did not support the conviction. It was revealed through an interview with one of the magistrates involved in many robbery with violence cases that some magistrates although they had no power to change the charge before them, advised the prosecutor that on given facts, the charge should come under S. 296(1). Where grievious harm had been caused, the prosecutor was advised to enter an alternative charge of "causing grievious harm". The prosecutor has the power to ignore or agree with this advice. In some courts the magistrates do not scrutinise the charges or advice the prosecutors. They just proceed with the trial under the given charge. The discretionary power given to prosecutors apart from limiting a magistrate's power to give a lesser sentence results in injustice. There is a lot of discrepancy in charging as different prosecutors interprete the section differently. The recommendation given by Mulli and Simpson J. J. shows that the judges are aware that the section can be misused by prosecutors. The position today is that discrepancies still exist due to the fact that the section has been so widely interpreted. The result is that most of the cases tried before the magistrates fall under S. 296(2) but if they are not charged under that section then a lesser sentence is given. An example of this is the Wangangu case where the court clearly stated that:-

> the charge was badly framed in that the statement of offence is unambiguously laid down under S. 296(1) of the Penal Code for robbery whilst the particulars of offence support one of the more serious types of robbery provided by S. 296(2) of the Code.[13]

However, the court in this case went on to state that this could not have occasioned prejudice or a failure of justice since the magistrate before any evidence was recorded addressed himself to the fact that the accused persons were charged with robbery contrary to S. 296(1) of the Penal Code. It was also countended in another case that

"it was up to the prosecution as to which charge they prefer against an accused person".[14] This results in discrimination against an accused person who is charged under S. 296(2) although the offence committed is similar. Is there a need to keep a law that discriminates between persons in the same class of offenders?

Discrimination can be seen in a wider scale in the kind of courts elected to try robbery with violence cases. It is to be noted that robbery with violence and murder both carry a mandatory death penalty but are tried in different courts. Murder is tried by the High Court while robbery with violence is tried by the Resident Magistrates Courts. It is clear that followijg the hierarchy of courts the High Court has more experienced personnel than magistrate courts meaning that murder cases are more previleged. Similarly for a murder charge to be tried in the High Court the accused must have legal representation. If he cannot afford any, this is provided at state expense. In robbery with violence cases most of the accused person are poor and few can afford to employ an advocate. The Attorney-General has recognised the need to provide state representation for robbery with violence cases but so far, nothing has been done. As regards onus of proof this is greater in the case of murder where the prosecution must adduce evidence that apart from the fact that murder was committed (actus reus) there was an intention or the state of mind was such that the accused intended to commit the act. In robbery with violence cases, it is not necessary to show whether there was intention of committing the robbery or to use violence. The prosecution is bound to prove that the offence was committed and that one or all of the essentials under S. 296(2) was present. It does not matter whether the violence was not intended, whether it was in self-defence or whether the robbery itself was accidental in that a person can enter into a house and find a radio and use violence on the owner who attempts to detain him even if there was no intention to steal when he went into the house. The prosecution does not have to prove intention which is usually assumed like in the case of John Kinyanjui Mutonga and Another V. Rep[15] where the Court concluded that the evidence adduced by the prosecution leaves no doubt that the robbers shared a common intention to commit robbery with violence, that all were armed with dangerous weapons which they were prepared to use in the prosecution of the unlawful purpose.

Discrimination can also be seen in the light of the fact that when a robbery results in death, the case is treated as one of murder and given the above privileges.

This shows that courts have accepted that murder is a graver offence and needs special treatment while robbery with violence which is of course a lesser offence is given the same sentence but not the same treatment. The High Court has recognised the fact in various decisions. In the case of Siro Ole Giteiya and Another V Rep[16] the accused persons were members of an armed gang which raided a homestead to steal cattle with the common intention of using violence to achieve their purpose. In the course of the robbery one man was speared and later died as a result. The accused persons were convicted of murder and given the above privileges. Also the case of Sebastian Raphael Kongu V Rep[17] where the appellant broke into the deceased's house and stole money and property. As the deceased tried to leave he was knocked down and later died. The appellant was charged with murder and the High Court held that the killing of the deceased was a probable consequence of the common intention formed to prosecute a felony. If the two offences, murder and robbery with violence carry the same mandatory death sentence, then their importance as grave offences should go together. However, if the courts are not ready to recognise this fact, then it means they admit that robbery with violence is a less grave offence and does not deserve the harsh sentence imposed to suit and protect the property of the upper class.

In robbery with violence cases there are some matters of procedure which might cause confusion, prejudice or injustice on the part of the accused person. Most evidence adduced by the prosecution in robbery with violence cases concerns identification of the accused persons. The High Court demands a very high degree of proof in identification by witnesses which is not always followed especially by trial magistrates. This is necessary because of the risk of mistaken identity which is very probable as most robberies are committed at night. The High court has insisted that trial courts are to proceed with the greatest of care when considering the evidence of identification particularly when the offence occurs at night and conditions for identification may be expected to be unfavourable. The possibility of mistaken identification must be satisfactorily excluded and any possibility of false incrimination of an accused person by the complainant must be carefully guarded against. What is the position as regards the question of identification? Hancox J. in the case of Reuben Taabu Anjononi V Rep[18] quoted an English case R. V. Turnbull[19] which following reports which hord Derlin s Committee made to the Secretary for Home Department in Britain, in April 1976 laid down nine rules to be applied to identification evidence. Although these rules are mostly applicable to the English Courts who have

a jury system they can also be applied here with a direction to the judge instead of the jury. They are:-

1. Wherever the case against an accused depends wholly or substantially upon the correctness of one or more identifications, which correctness is disputed by the defence. the trial judge must specifically warn the jury of the special need for caution before convicting on reliance upon identification evidence alone;

2. The trial judge should further explain the reasons for such special caution, namely that even apparently convincing witness may be mistaken;

3. The jury should be directed to consider closely the circumstances in which the identification was made;

4. The jury should be invited to consider inter alia whether there is any material discrepancy between the description given by a witness to the police and the actual appearance of the accused (if the prosecution consider that such a discrepancy exists, they should supply the defence with particulars thereof);

5. Where the quality of the evidence is good, such as when the identification is made after a long observation or by someone who knows the accused well, the case can safely be left to the jury to consider upon the identification evidence alone;

6. Where the quality of such evidence is poor, such as when the idenficication depends upon a fleeting glance or was made in difficult circumstances, the trial judge should withdraw the case from the jury unless there is some other supporting evidence which need not necessarily be "corroboration" in the accepted sence; "odd coincidences can if unexplained be supporting evidence";

7. The trial judge should indicate to the jury what evidence there is, if any, to support the identification evidence;

8. In dealing with an alibi, the judge should remind the jury that proving that the accused has put forward a lying alibi does not by itself prove that the identification evidence is correct;

9. "A failure to follow the guidelines is likely to result in a conviction being quashed and will do so if ..... on all the evidence is either unsatisfactory or unsafe. It is accepted that similar considerations apply to identifications in Kenya with the proviso that instead of a direction to the jury it must be apparent from the judgement that the trial court has properly warned itself as to these (where they are appropriate to the circumstance) before making a finding of guilty.

I have quoted these guidelines in full to show how identification of an accused person in robbery with violence is extremely relevant as the bulk of robbery with violence cases revolve on the issue of identification. How far these guidelines are followed in our courts depends on particular cases. An example of a case which relied wholly on identification was that of George Mugo Kinyanjui V Rep.[20] The prosecution case against the appellant was based purely on the finding of one of his finger-prints on a glass counter in the complainant's shop by a finger-print expert on the day of the robbery where 163 wrist watches were stolen. This was among 18 finger and palm prints from the scene. The appellant stated in defence that he had visited several shops including the complainant's shop with a lady friend in order to buy a watch for her and therefore could have accidentally left his finger-prints in the complainants shop. The trial magistrate rejected this defence by relying on the evidence of the complainant that he cleans the counter every morning before the shop was opened and that he could not have left some finger print marks left there the previous day because he cleaned the counter thoroughly. Further the appellant in defence stated none of the 3 prosecution witnesses was able to pick him out at an identification parade although they had witnessed the robbery. The court commented that this failure "does not mean that he did not participate in the robbery" because he was not arrested until a year later. The appeal was dismissed although apart from the one finger-print belonging to the appellant no attempt was made to identify the other prints although the shop was open to members of the public and visited lawfully by many people. The appellant had been sentenced under the hanging sub-section. Clearly in this case none of the guidelines were followed and because a lot of lip-service is given to them we can only say that they are important and are to be strictly followed.

Their other importance especially here in Kenya is that usually the accused is not represented. He does not have the legal know how to draw the courts attention to any discrepancies between the evidence of the various prosecution witnesses. This is made even worse by the fact that the accused who is familiar with the procedures of the court and their legal significance may sometimes decide not to ask questions or if he does, ask questions that are not helpful to his case.

An important point to note is that in most cases where an accused is told to give evidence and given a choice between sworn statement he will be cross-examined. Because of the fear of cross-examination, he does not take the benefit of it which in

some cases helps to bring out the truthfulness of his evidence. Also when he is asked to make his defence, usually he does not know what is expected of him so instead of trying to refute the prosecution evidence and to prove them wrong, he tells a different story altogether.

Another issue related to procedure which is very common is delay before the accused is brought to trial. There are very many instances where the prosecutor asks the court for an adjournment on the grounds that he has not "received directions to proceed on the case from the Attorney General's Chambers". Usually because the accused is unrepresented, there is nobody to raise any objections against this kind of delay unless the trial magistrate raises it (which is not very often). What -this means is that the accused is kept in custody all this time since bail is usually not granted to robbery with violence cases. The prosecutors contend that they are very grave offences and the accused might refuse to turn up. An example of this delay before trial can be seen in the case of John Kiwanuka Kintu and Another V Rep[21] where one of the grounds of appeal was that there was a delay in bringing them to trial. The facts were that they were arrested on 5th March and did not appear before the trial magistrate until 11th May 1978 two months later. This is a breach of S.72(3) of the Constitution and S.33 and S.36 of the Criminal Procedure Code which require the production of persons arrested without a warrant before a court within 24 hours or as soon as it is reasonably practicable. The trial -magistrate made no enquiry into the reasons for this apparent delay and no satisfactory explanation was given by the police. The appelants contended that they were so badly beaten by the police that the police did not dare bring them before a court and that in order to cover up their misdeeds, the police kept them in custody while they framed a false case against them. Dismissing this ground of appeal the High Court held that they did not believe that this is what happened but there would have been no room for speculation had the trial magistrate inquired into the reasons for the apparently inordinate delay in producing the appelant before him. This is a clear indication of refusal by the High Court to accept that the police treat the accused persons in an inhuman manner by administering severe beatings. The significance here is that delay before bringing accused persons to trial is by the police to extract evidence and confessions usual through torture. In this case the court agreed that there was a breach of S.72(3) of the constitution which further states that where a person is not brought before a court within 24 hours of his arrest, the burden of proving that the person arrested has been brought before a court as soon as is reasonably

practicable shall rest upon the person (in this case the prosecution) who is alleging that the section has been complied with. This was not done and the appellant were sentenced to death. A clear breach of their constitutional rights which the courts did not even bother to look carefully into. Who is going to administer the right kind of justice if the judges in our high courts ignore such fundamental constitutional rights? Although it was decided in the case of Kutuma Kaniu V Rep[22] that where an action is illegal but not prejudicial to a conviction, then the conviction stands. It is worth to note that the circumstances in the Kiwanuka Case were an apparent breach of constitutional rights and the High Court should have discussed the issue fully or laid down some principle helpful to accused persons who are delayed before being brought to court otherwise there is no need of having the above two sections in our laws if nothing happens where they are not complied with.

The other issue is that of confessions. Everyday in court somebody retracts a confession on the ground that he was induced by threats and beatings to make the confession. This is a defect in our legal system that is greatly ignored by the magistrates. Although most magistrates contend that a confession must be corroborated and that infact very little reliance is placed on it, what happens in practice is that once a confession has been retracted, a trial within a trial is held in which the inspector who took the confession gives evidence to the fact that the accused person was not beaten (of course we do not expect him to say otherwise). The accused person is asked to prove that what he said about being beaten is true and because he cannot show any scars or any apparent wound fromthe beating, the magistrate then accepts the inspectors evidence and accepts the confession.[23] The position given to our courts was stated by Trevelyan J. in Rep. V Samuel Kamau and Another.[24]

> A confession (as defined) is not admissible in evidence if it was induced Evidence Act S. 26. Where an accused makes a retraction which the court rejects, there should nonetheless be corroboration subject as aforesaid. It is a very favourable rule to an accused An invitation to retract. But is a court limited to acting on a statement only if it is true. I believe not. The criterion must be whether the statement represents what its maker has said. It may or may not be, but is entitled to go in a part of the evidence in the case generally without corroboration. unless there are circumstances making such corroboration desirable.

If courts are not ready to accept the fact that accused persons are beaten in police cells and induced to make confessions and still these confessions "go in as part of the evidence generally without corroboration", this will result in a miscarriage of justice. In my view, once a confession has been retracted a judge or magistrate should caution himself as to how much weight such evidence should carry. Also the magistrate should not depend only on the question whether the confession is true or untrue, he should look at the surrounding circumstances in which the confession was made and access its evidential worth.

Related to the issue of confessions in the method of plea - bargaining used by the prosecutors to get the accused persons to plead guilty so that they can get a lesser charge. Plea - bargaining is a double edged instrument - where two persons are arrested, one is released and his evidence is used to convict the other person. This is a popular method used by the police to get evidence against an accused person. Plea- bargaining is also positively used to get the accused person to plead guilty to a lesser charge especially in robbery with violence where one is charged under S. 296(2) and is asked to plead guilty to a lesser charge under S. 296(1). One American writer commenting on this method of plea-bargaining stated that:

> it is "trial by trick and deceit". In a typical plea-bargaining situation the prosecutor will pile on felony charges, regardless of whether he has evidence to support them in order to pose a threat of long years in the penitary should the accused put the state to the expense and trouble of a trial and be found guilty. The defendant who, unable to raise bail, has already spent months in jail under atrocious conditions, will be delighted to plead guilty to one of the many offenses he is charged with even if he is in fact innocent of any crime, in exchange for a promise of or a short sentence with credit for term served. [25]

Although the writer was summing up the position in America, this is also true in Kenya. An accused person who has pleaded not guilty but charged under S. 296(2) which carries a death penalty will be attracted by a promise by the prosecutor that if he were to plead guilty to a lesser charge would be prefereed against him. The accused person who most probably is not represented will certainly fall for this "trick and deceit". This further shows how important legal representation is for all accused persons. This fact was recognised by the High Court in the case of Chrisphine Mburu Karanja V Rep[26] where the appellant had asked the trial magistrate for an adjournment so he could employ an advocate. This was opposed by the prosecutor on the ground that all the prosecution witnesses were in court on that day and an adjournment would create inconviniences. The trial magistrate ruled that the accused had, had

enough time to engage an advocate and that he is an English speaking educated person (meaning that he could defend himself). On appeal the High Court considered this aspect of the case and held that since the accused was in remand the case should have been adjourned to enable him to employ an advocate since a refusal would be contrary to S. 77(2) of the constitution which provides that:-

> Every person who is charged with a criminal offence shall, inter alia, be permitted to defend himself before the court in person or by a legal representative of his own choice.

It was also contrary to S. 193 of the Criminal Procedure Code which provides that an accused person "may of right be defended by an advocate". The High Court ordered the case to be tried by another magistrate of competent jurisdiction. Here the judges agreed that an accused person need a legal representative who is conversant with the law and the court procedures so that justice may be reached especially in view of the gravity of the charges. However, as we saw earlier, the state unlike in murder cases, does not provide free legal aid for robbery with violence cases. Most of the accused persons are poor people who cannot afford advocate fees and most of them are un-educated and do not understand the gravity of their offence until it is explained to them. Because of their status in society, they are given a second class type of justice with no advocate to raise objections where necessary and they do not have the legal know how to corss-examine the prosecution witnesses or to point out discrepancies to the magistrates. This means that because of their status in society they are discriminated upon because they cannot afford bail, legal representation while those who have the money can afford all these and therefore get a fair hearing from the magistrates.

This chapter has raised issues which attempt to show that all is not well in our judicial system with special reference to cases that are charged under S. 296(2). Most of the issues raised also refer to the general administration of justice in the courts. We have seen that S. 296(2) has been greatly misinterpreted although sometimes this is positively in an attempt to reach fair justice. Judges at the expense of legality have misconstrued the essentials of the section to convict under a lesser offence like imprisonment instead of hanging. Apart from the fact that the death penalty is not justified as seen from the issues raised on the sub-section in the debate in Parliament, its administration in our courts further highlights this fact. The sub-section discriminates between persons in the same class of offenders and

is greatly misused. This is more apparent when one looks at the various decided cases. A lot os discrepancy is to be found. This is further seen through the charging system where the prosecutors have the sole discretion to charge under S. 296(2) or not. This leaves no room for the judges to use their discretionary powers in an attempt to administer fair justice. Although this state of affairs is a serious cause of injustice, it has never been questioned by the judges. This silence on such a fundamental issue which revolves on the law that gives the prosecutor such wide powers is a very disturbing one indeed!

CONCLUSION

In this paper we have endeavoured to show that crime in a developing country like Kenya, is a result of the social, economic, cultural and political changes that are taking place, accompanied by the accelerated rate of urbanisation, industrialisation and technological development. We have also shown that none of the propounded theories on crime causation per se can explain crime causation. All these theories must be taken together to explain generally why crime exists. We have also tried to show that in the Parliamentary debate on the death penalty for robbers these causes were not considered. Further, that the debate was characterised by a lack of coherent well argued, philosophical, moral and factual issues that are inherent in the debates on the subject elsewhere. The paper also dealt with the issue of administration of the hanging sub-sections highlighting issues on whether justice is administered. On this issue the paper has dealt with matters of interpretation of the section and also the procedural aspects of the crime of robbery with violence.

Today the death penalty is a reality. It was made law in April 1971 through the Criminal Procedure Code (Amendment Act) after a lengthy debate in Parliament which has been dealt with at length in Chapter two. Among the various arguements put forward in the debate, a dominant argument was that the death penalty is a unique deterrent and its effect is to instil fear into would-be robbers and therefore deter them from committing the offence because at nearly all costs man desires to preserve his life. There are many people who believe that the death penalty is a deterrent and especially when carried on in public. However, it is submitted here that it is a factual issue that persons who commit murder and other crimes of personal violence either pre-meditate them or they do not. If they do not, then it is impossible to imagine how any punishment could deter. The vast majority of capital crimes is committed during a moment of great emotional stress, in fear or under the influence of drugs or alcohol when logical thinking is suspended. Impulsive or expressive violence is inflicted by persons heedless of the consequences to themselves as well as to others. In cases where the crime is premeditated, the criminal ordinarily expects to escape detection, arrest and conviction. It is difficult therefore, to see how the threat of a severe punishment can deter an individual who does not expect to be caught. Trying to cope with these

offences by threatening death for robbers leaves untouched the underlying causes and ignores the many ills that society itself creates and which are contributing factors to the commission of these crimes. Although inflicting the penalty guarantees that the condemned person will commit no further crimes this only acts as a deterrent not to the would-be robbers or the society in general but to the condemned person whose elimination ensures beyond doubt that he will never commit another crime. It is worth noticing here that examples of abolitionist countries have proved the fact that the death penalty is not a deterrent. In the 19th Century capital punishment existed in England for over 200 different offences including defacing Westminister Bridge, cutting down a tree, shoplifting, etc. Whenever it was suggested that capital punishment should be abolished this was always opposed on the grounds that it was obviously a greater deterrent than any other punishment and therefore if it was abolished, the crime in question would increase. In opposition to one of the abolitionists' bill the Chief Justice at that time stated:-

> If we suffer this Bills to pass we shall not know whether we are upon our heads or our feet .... Repeal this law and see the contrast, no man can trust himself for an hour out of doors without the most alarming apprehension that on his return every vestige of his property will be swept off by the hardened robber.[1]

Today, Britain has abolished capital punishment (1971) except for treason and such calaminities have befallen the country as foretold. In Kenya it is approximately eight and a half years since the Hanging sub-sections became law. The first victims of this law were hanged in November 1975. In 1976 the Standard Newspaper reported an estimate of 13 cases and 18 cases in 1977. The number rose to an estimate of 21 cases in 1978. These figures do not take into account acquittals or cases that were not prosecuted under the sub-sections. The figures do not include cases in which the suspects were shot dead on the spot by the police. The first two months of 1979 show that there is continued increase of robbery with violence - the newspapers are full of accounts of armed gangasters raiding houses and shops. Many of these are sentenced to hang in our courts. The crime however continues. The special deterrent effect of capital punishment has proved to be what it really is "an unverified hypothesis supported by neither history nor criminal phychology".[2]

Death penalty is also opposed here on the ground that it is uniquely irrevocable. This means that an innocent person may be convicted of a capital offence under the genuine mistake or he may be convicted as a result of a deliberate frame-up or even a misuse of police powers of interrogation of suspects. In U.K. and America as we saw earlier, this has been proved as a matter of fact. There is no reported instance in Kenya where this has happened but the possibility of such an error cannot be ruled out. History reminds us that the possibility of a mistake is a real possibility rather than a mere hypothesis. This fact remains to haunt any society that insists on using the death penalty. What about the legal system itself - the overzealous prosecution, mistaken eye-witness testimony, faulty police work, inept defence counsel, public pressure for conviction. These factors help to explain why the legal system cannot guarantee that justice will never be miscarried. To retain the death penalty in the face of the demonstrable failure of the system is unreasonable especially since there are no strong counter-balancing factors in favour of the death penalty. Capital punishment also denies a condemned person due process of law. Since its imposition is irrevocable, it forever deprives an individual of the benefits of new law or new evidence that might affect a conviction. Further the death penalty violates the constitutional guarantee of equal protection of the laws since it is imposed almost exclusively against members of the low class, the poor and uneducated who are unable to afford the expert legal counsel that is available for those with means since as we saw unlike in murder cases, the state does not provide legal representation for robbery with violence although they carry the same sentence.

Case law has also shown that the death penalty is unpredictably used. The magistrates and judges in most cases accept that certain given facts fall under the offence catered for by S. 296(2) but due to the discretion given to the prosecutors to charge accused persons, this means that the trial magistrate can adjudicate only only the charge brought before him. This is a constant source of discrimination between persons in the same class of offenders. On the other hand it is probably a blessing in disguise for it enables a loophole for mitigating the rigours of this draconian law especially in the case where facts of a case fall under S. 296 (2) but the charge is brought under S. 296 (1). What is the significance of a law that discriminates and can be so unpredicably used depending on different prosecutors? It is submitted here that the application of the hanging sub-sections in our courts is

unconstitutional and should be abolished. This is supported by an American case. Furman v Georgia[3] where the majority of the judges agreed that the death penalty is a cruel and unusual punishment because it is imposed infrequently and under no clear standard and the purpose of the penalty whether it be retribution or deterrence, cannot be achieved when it is so rarely and unpredictably used. Also because of the way it is administered, it serves no social purpose. Although this decision received a lot of opposition it can be said to be of good application to Kenya. In the third chapter we saw that there is a lot of discrepancy in sentencing. This is a result of the wide discretionary powers given to prosecutors curtailing those of the trial magistrate who has to adjudicate in the light of the charge before him. As a result it is difficult to predict the result of a case on any given facts since this will depend on what section the case is charged. This brings the general practise in our courts under the umbrella of Furman V Georgia. In the light of this decision what is the position of our courts as regards administration of justice. The application of the hanging sub-sections is unconstitutional firstly because of the various discrepancies found in sentencing where due to lack of clear standards in the interpretation of the sub-sections, the charges brought before the magistrate and upon which he must adjudicate often differ even where the facts of some cases are the same. This is further a cause of discrimination among the same class of offenders. Discrimination is further seen in the kind of courts that try robbery with violance cases. Although murder and robbery with violence carry the same sentence, murder is tried by the High Court while robbery is tried by a Resident Magistrate. Also whereas in murder cases free legal representation is provided it is not the case for robbery with violence cases. A farther source of discrimination can be seen through the fact that the death penalty is inflicted mostly on the less fortunate members of society, that is the poor, the less educated and those with little or no political influence. In this country capital punishment can be seen as an extension of the class laws that are promulgated to suppress the oppressed group. This was indirectly admitted in the debate where it was stated that these robbers must be eliminated so that the propertied class would ensure that there is no interference with their property.

Some procedural aspects of the crime of robbery with violence which have been paid a lot of lip-service by our courts are also sources of unjustice in our legal system. The issue of identification which is extremely relevant as the

bulk of robbery with violence depends on it not given careful consideration. This is evident from the many grounds of appeal under the question of identification. As we have seen there are guidelines laid down in the English case of R V Turnbull[4] and quoted in a Kenyan case of Reuben Taabu Anjononi v R[5] and it is the writer's view that these guidelines should be followed more strictly even to an extent of becoming regulations. This is to ensure that there is no possibility of mistaken identity or any possibility of false incrimination of an accused person. Other matters that should be carefully guarded against are confessions. The judges and magistrate must bear in mind that there is a lot of beating and torture in police cells to extract confessions from accused persons. It is my view that all confessions whether retracted or not must be corroborated and even then not much weight should be given to them except in the light of other evidence.

We have seen that the enactment of the death penalty for robbers was not justified and further that its application in our courts is onconstitutional and unfair. This being the state of affairs, then the death penalty should be abolished for the crime of robbery with violence.

ALTERNATIVES

Nations that have not abolished the death penalty have often argued that there is no suitable secondary punishment; that the death penalty is a unique penalty with deterrent value; that it is the only way to rid society of dangerous elements. However it is my submission that life imprisonment is obviously the best alternative to the death penalty. Life imprisonment means imprisonment for a period of time and never means that the prisoner shall be kept in prison until he dies. The actual periods are determined by government officials in accordance with individual cases. Arguments have been raised against life imprisonment that it is cruel and it is much kinder to hang these offenders than to leave them in prison in conditions in which they tend to deteriorate after some years. This arguement overlooks one important observation that human beings are capable of adjustment; that when men are kept in prison, they quickly adjust remarkably well and they get sufficiently socialised to be able to cope with prison conditions. The only problem is when they are eventually released, the prisoner may find it difficult to adjust to life in a free society but certainly this is more human than the death penalty. This problem can however be overcome by making prison life relevant to life in the

society.

Life imprisonment has also been opposed on the ground that it is unfair to the taxpayer since it is a greater financial burden and obviously more expensive than hanging. However, this is only true of one does not take into account all the relevant costs. A capital trial generally takes longer than one which the death penalty is not involved. Also lengthy appeals always follow. Trial and appeal costs including the time of judges, prosecutors, prosecution witnesses and the high cost of briefs are all borne by the taxpayer. If the cost of all this is compared with the amount spent on an individual prisoner the difference is very slight. Data show that it is a fact that "an economically valid and comprehensive cost - accounting of capital punishment versus life imprisonment"[5] does not make either more costly than the other. In any case even if life imprisonment were costly we cannot compare taxpayers economic burden with the loss of life. This latter argument can of course be traced to the affluent of the society who would prefer the loss of life by hanging than that their money be used to keep a person in prison. This reminds one of the words of B.S. Markasey who stated:

> Hanging to me is a symbol of the imperfections and hypocricy of our affluent society. I say this because I know too many people who find security and salve for their conscience in the mistaken belief that hanging produces for them at least a degree of protection against what they seem to think is a segment of society with which they have nothing in common, and will never come into contact.[6]

We must bear in mind therefore that life is the basic gift or possession man has on earth and is not a property of exchange for wrong conduct in society. In the act of putting a person to death for whatever offence he has committed, the state engages itself in criminal homicide in which the victim has no avengers. The state cannot hope to reduce or eradicate whatever crime it punishes with the penalty of death by itself enginging in criminal homicide.

CHAPTER ONE: Footnotes

1. Cesare Lombroso, L'Uomo Delinquente, Milan: Hoepli, 1976

2. Erastus Muga, "Is Criminality Inherited", Survey of Contemporary Theories (1972) Vol. 2. No. 2 Journal of East African Research and Development p. 125.

3. Bonger: Criminality and Economic Conditions (an extract). For a criticism of the economic theory of Bonger, see William Clifford, An introduction to African Criminology; p. 44-45

4. William Clifford, An Introduction to African Criminology, p. 60.

5. Mushanga, T. M. Crime and Deviance; Ch. 2.

6. Sutherland and Cressey, Criminology; p. 194

7. Thorsten Sellin, Culture Conflict and Crime.

8.

9. Clinard and Abbott, Crime in Developing Countries; p. 85

10. Emile Durkheim, The Normality of Crime.

11. Robert Merton, Social Theory and Social Culture.

12. Alcohol and Drugs are intoxicating drugs which impair ones nervous system especially when taken in excess. Addiction may lead to broken homes, loss of jobs and related conduct which are directly connected with crime causation.

13. Albert Cohen, Deliquent Boys: The Culture of a Gang. (cf: Lyall: Anomy Theory and Deviant Response with special Reference to African Socialist States (1970) 3. E.A.L.R. p. 25.

14. Clinard and Abbott; Crime in Developing Countries.

CHAPTER TWO: Footnotes

1. Jomo Kenyatta, Facing Mount Kenya.

2. Act No. 25 of 1971.

3. Ibid

4. Penal Code Amendment Act.

5. Penal Code S. 296(2).

6. D.W. Gachuki; The Hanging Bill, Kenya's Legislative Response to The Crime of Robbery. p. 3.

7. National Assembly Debates Vol. 20, Part I, 1970, p. 236.

8. D.W. Gachuki, The Hanging Bill, p. 5.

9. (a) National Assembly Debates p. 307.
   (b) Ibid at p. 263.

10. W. Clifford, International Norms Affecting The Death Penalty, Amnesty Conference p. 2.

11. National Assembly Debates p. 263.

12. Standard Newspaper, 27th March, 1976.

13. T. M. Mushanga, The Death Penalty and Its Alternatives p. 5.

14. National Assembly Debates p. 245.

15. Ibid at p. 246.

16. Ibid at p. 315.

17. Ibid at p. 316.

18. Ibid at p. 237.

19. The Archbishop of Cantebury in a debate in Parliament in 1948 quoted by T. M. Mushanga, the Death Penalty and its Alternatives p. 8.

20. National Assembly Debates p. 5259.

21. Andrei Sakharov, Letter to the Organising Committee of the Conference on the Abolitoon of the Death Penalty: Stockholm, 1977.

22. National Assembly Debates p. 260.

23. T. M. Mushanga, the Death Penalty and its Alternatives, Stockholm 1977.

24. Ibid p. 9.

Chapt. 2. Footnotes Cont'd

25. National Assembly Debates p. 37.

CHAPTER THREE: Footnotes

1. Standard Newspaper, 15th September, 1977; 4th March, 1978
2. Standard Newspaper, 14th March, 1978
3. CR. APP. No. 612 of 1977
4. Ibid p. 6.
5. 1966 A.C. 96
6. CR. APP. No. 612 of 1977 at p.7.
7. Ibid
8. CR. APP. No. 659 of 1977
9. S. 295 Penal Code
10. CR. APP. No. 659 of 1977 at p.3.
11. CR. APP No. 465 of 1978
12. CR. APP. No. 257 of 1978
13. CR. APP. No. 659 of 1977 at p.4.
14. CR. APP. No. 693 of 1978
15. CR. APP. No. 73 of 1976
16. CR. APP. No. 56 of 1976
17. CR. APP. No. 26. of 1977
18. CR. APP No. 480 of 1978
19. (1976) 3 W.L.R. 106
20. CR. APP. No. 642 of 1978
21. CR. APP. No. 18 of 1978
22. (1954) E.A.
23. Although this has been proved as a fact and a lot of lip-service paid to it by the magistrates and judges, no constructive action has been taken.
24. Eldoret H.C.C.C. No. 300 of 1965.
25. Jessica Mitfold, Kind and Usual Punishment p. 96.
26. CR. APP. No. 359 of 1978.

CONCLUSION: Footnotes

1. Gerald Gardner: Capital Punishment as a Deterrent and the alternatives p. 24.

2. D.W. Gachuki, Hanging Bill, p. 15.

3. 408 U.S. 238, decided in 1972. The Supreme Court declared that under then existing laws "the imposition and carrying out of the death penalty ... constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments". Reference should also be made to the case of Woodson V. North Carolina decided in 1976 where death penalty was declared to be unconstitutional. Potter J. of the Supreme Court argued that the mandatory death statutes treat all persons convicted of a given offence:-

   > not as uniquely individual human beings, but as members of a faceless undifferentiated mass to be subjected to the blind infliction of the penalty of death.

4. (1976) 3. W.L.R. 106 - these guidelines are laid out in full in Chapt. 3 p. 9.

5. Hugo A. Bedau, The Case Against The Death Penalty, p. 23.

6. Thorsten Selling, Capital Punishment, p. 92.

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