The Effects of Death Penalty in Kenya

Results of the Survey by the
Kenya National Commission on Human Rights

(Second Phase)

December 2012

1.0 Introduction
Debate around the death penalty has gone on for a number of years. Some argue that the death penalty is still necessary while others hold that it violates the fundamental right to life as elucidated in various human rights instruments.

The Kenya National Commission on Human Rights has, since 2007, been engaged in advocacy around abolition of the death penalty in a bid to see its abolition. The Commission holds that death penalty violates right to life and is cruel and degrading punishment with severe psychological and social effects to the victims and families. This position is backed by the Second Optional Protocol to the ICCPR which explicitly provides for the abolition of the death penalty (Article 1). The protocol commits state parties to take all necessary measures to abolish death penalty within its jurisdiction.

In its advocacy, the KNCHR in 2007 published a position paper on the need to abolish death penalty in Kenya on the ground that it violates the constitutional guarantees of the right to life and the right to be free from cruel and inhuman punishment. The Commission also used the international advocacy mechanisms to lobby for abolition and various UN Commitees as well as the Human Rights Council recommended to the state to abolish the death penalty.

In June 2012, the Commission began a survey to assess, observe and collect empirical information from the death row convicts on the impact of the death penalty. The first phase of the survey covered 8 prisons namely; Bungoma, Eldoret, Langata Women, Kakamega GK, Kamiti Maximum, Nyeri, Nakuru Main and Naivasha Prisons. The survey revealed that death penalty has severe physical and psychological impacts on inmates as well as their families, possibly amounting to torture or cruel, inhuman and degrading treatment or punishment.

In continuing with this work and in bid to build strong and evidence-based advocacy in this undertaking, the Commission embarked on the second phase of the death penalty survey to cover as many prisons as possible in Kenya. The survey was undertaken in December 2012 and similarly set out to observe, assess, and collect first hand information from death row convicts on their experiences, feelings and general social and psychological impacts of death penalty. However, this second phase also extended to gather if any the challenges encountered by the prison officers as the ones responsible for safe custody and security of convicts on death row. The second phase survey covered various prisons with death row convicts in Nyanza, Upper Eastern and Lower Eastern.
2.0 The Approach

The Survey was guided by a questionnaire developed with the intention of assessing and gathering information on the social and psychological impact of the death sentence. It assessed how the sentence affects the well-being of individual convicts, their families and relatives as well as gathered their views regarding the fairness or unfairness of the punishment.

In each prison, the survey teams first undertook general discussions on the subject with entire population of death row convicts. The second phase of the interview involved detailed one-on-one administering of the tool from a representative sample of the inmates. The exercise included both the male and female convicts on death row from the prisons visited. The table below shows the death row population in each prison and the sample subjected to direct interview.

2.1 Death row population the respondent samples

<table>
<thead>
<tr>
<th>Region</th>
<th>Prison</th>
<th>Total Number of Death Convicts</th>
<th>Number of convicts interviewed</th>
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<td></td>
<td></td>
<td>Male</td>
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<td>Upper Eastern</td>
<td>Thika Main</td>
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<td>Thika Women</td>
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<td>Meru Main</td>
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<td>Meru Women</td>
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<td>Embu Main</td>
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<td>Embu Women</td>
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<td>Nyanza</td>
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<td>Kodiaga</td>
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<td>Kodiaga Women</td>
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<td></td>
<td>Kisii Main</td>
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<td></td>
<td>Kisii Women</td>
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<td>Kericho Main</td>
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<td>Kericho Women</td>
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<td></td>
<td>Lower Eastern</td>
<td>Kitui Main</td>
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<td>Kitui Women</td>
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<td>Machakos Main</td>
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<td>Machakos Women</td>
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<td>Mimpsei Main</td>
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<td>Mipsei Women</td>
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It is interesting to note in the above table that most prisons in the lower Eastern (Machakos, Kitui and Mipsei counties) do not accommodate death row inmates. This was explained to be as a result of security concerns. It is also
important to observe that female population sentenced to death is relatively small. A total of 107 (96 males and 11 females) inmates on death row were directly interviewed.

3.0 Results of the Survey
The survey generated very important insights from respondents and confirmed most of the findings gathered in the first phase of the survey. The survey established that death penalty has harsh psychological and social impact to the well-being of the individual convicts, their families and also to the prison officers entrusted with the security of the convicts. It also demonstrated that death penalty contravenes the principles of correction and rehabilitation which is the primary goal of the prison department. In addition, death row convicts felt that they are more exposed to the legal and judicial lapses within the criminal justice system as regards legal representation, fair trial, mitigation and access to appeal.

The major findings of the survey are detailed below. The findings are presented under two broad headings; social and psychological impacts of death penalty and the deficiencies in the criminal justice system.

3.1 Factors underpinning death penalty in Kenya
There more males than females serving the death sentence in Kenya. This could be an indication that males are more susceptible to crime than their female counterparts. For instance, it was observed in Kisii Main prison that whereas there were 35 males on death row, the women prison had only 2 death row convicts.

Robbery with violence remained the major crime committed by convicts handed death sentence. Murder featured as the second major crime for which the death sentences is handed down in Kenya. Interestingly, while most males are convicted of robbery and attempted robbery with violence, murder and/or manslaughter appears to be the main crime amongst the females sentenced to death.

Almost every death row convict is in denial of the fact that they are sentenced to death. They tend to disassociate themselves from death sentence, citing their innocence. This may partly be explained by the disquiet and secrecy that surrounds issuance of the death sentence despite the fact that it is still a legally sanctioned punishment. The prison authorities hardly divulge any useful information on death sentence to both the convicts and the public such that
even the methods of execution are rarely known and simply remain a matter of speculation.

### 3.2 Social and psychological impacts of death penalty

#### 3.2.1 Isolation and Loneliness

Inmates on death row reported that they are mainly isolated in two fronts; by the prisons authorities on one hand and family members on the other. On the side of prison authorities, the survey revealed that many convicts on death row are neither allowed to associate with other prisoners nor given the opportunity to participate in prison’s recreational activities. Inmates in Meru and Embu however reported that they are allowed to mingle with prisoners serving life sentences and are given limited time to interact with other inmates serving lesser sentences. Additionally, the survey indicated that condemned inmates are regarded as high risks to prisons’ security thus subject to high security and confinement. One woman convict in Kodiaga Women’s prison stated that the high security around death row convicts make them feel discriminated against and isolated as other prisoners describe them as 'watu wa ajabu' (mysterious people).

Whereas some prisons allows death row convicts to participate in recreational activities, this survey noted an inconsistency as to the basis on which many prison authorities deny the same group of convicts an opportunity to participate in such essential activities. Some of the inmates interviewed in Kisii, Meru and Embu indicated that they are allowed to participate in games during the weekend and sometime interact with other prisoners. On the contrary, death row convicts in Kibos Main, Kodiaga and Kericho noted that they are not allowed to mingle with other inmates. One of the convicts from Kibos prison stated:
We are always locked inside this ward; the only time we get outside this ward is when we are going to serve our meals. There is no interaction with the others at all and this makes us feel there is so much discrimination against us.

On the other hand, this survey revealed that some families abandon their relatives once they are sentenced to death. Most of the death row inmates expressed with concern that the penalty is pronounced; their families abandoned them and never visit them. These families regard the condemned inmates as ‘dead’ already.

### 3.2.2 Family disintegration and suffering

There are serious family implications posed by the death penalty. The survey indicated across the board that death penalty inflicts extreme emotional pain, agony and a feeling of neglect to family members. The families that solely depended on the convict remain unable to materially support itself hence subjected to extreme poverty posing continued stress and anxiety amongst the inmates on the families’ well-being.

Most inmates and in particular males who were married before the sentence reported that their wives abandoned them and fled to their homes. In most cases the wives fled with the children while in other cases the children are left under serious neglect, lack of parental care and love. One of the convicts intimated that;

> The society believes that I am dead. My wife ran back to their home on the premise that the husband is no more. My son was forced to drop out of school and also ran away from home and until now I can’t even tell where he is.

A number of inmates reported that death sentence results into direct and immediate breakdown of the family unit. Most of them reported that because of the sentence, hostility develops among the family members such as parents, brothers and sisters throwing family life in total disarray. This is mainly attributed to the trauma the family experiences and the socio-economic pressure arising from extra economic burden imposed on the family by the absence of a family member with dependants. According to one inmate in Kodiaga;

> My family had to sell the only piece of land we had to cater for the legal fees in my case and other financial needs arising from this sentence; an action that caused great wrangles and misunderstandings in the family.
The family is highly valued and the basic institution in our society; in this regard, this survey showed that death penalty denies young convicts an opportunity to have their own families. The convicts who were condemned while still bachelors expressed a concern that the sentence has denied them their right to have a family.

### 3.2.3 Social exclusion and victimization

A number of inmates interviewed across the three regions indicated that whereas they are convicted as individual family members, the society seriously victimize their families and close relatives. Most of them noted that the society mercilessly prejudices the entire family as a family of robbers, murderers and so on. Other convicts reported that because of the sentence, friends, neighbors and the community suddenly disassociate from the family on the very premise that one of its member is convicted to death. It was reported by the convicts that death penalty leaves the family with an uphill task of trying to reconcile itself with the suspicious and adamant society. According to one of the inmate in Kisii;

> My family faces serious stigmatization; they are abused by neighbors because of my sentence. My wife is labeled as ‘a murder’s wife’ Neighbors’ children are not allowed to play with my children because my children are believed to be murderers like their father. Suppose we were sentenced to death and actually killed, they could have not endured such traumatizing experiences.

Even in the prison where death row prisoners are integrated into the larger community of inmates, they continue to experience social exclusion and victimization from both the prisoners serving other sentences as well as the prison officers. It is easy for them to be identified in some prisons as their uniforms are labeled ‘CMD’ (Condemned), in red capital letters across the chest, which further stigmatizes. One of the prison officers in Kodiaga stated;

> These death row convicts are very dangerous to other prisoners serving lesser sentences and even to themselves. It is not an easy group to take care of. The label is meant to easily identify them especially in the event of escape.

The death penalty attracts varying social responses from one community to the other. One of the serious victimization reported was that some families go into mourning as soon as the death sentence is pronounced. This is followed by a
common ritual among the Luhya community where a banana stump is buried to symbolize the “death” of the persons on death row.

The uncertainty surrounding convicts of death sentence in Kenya was also identified as one the serious concern. The inmates felt that the state isolates and tortures them as they are congested in the wards, they are neither executed nor released, causing them serious psychological discomfort.

3.2.4 Health complications and death

Many inmates interviewed complained of serious health complication they and their families have developed as a result of the sentence. The inmates on death row reported that some of their close family members, particularly those who were taking care of them or depending on them, developed various diseases as a result of the sentence. Cardiovascular diseases such as hypertension and heart complications were prominently reported.

Further, given the severity of emotional pain caused by the sentence, some of the inmates in all the regions (Nyanza, Upper and Lower Eastern) indicated that amongst them there are those who have witnessed some of their kins develop mental illnesses such as insanity. According to an inmate in Kericho;

As a result of being sentenced to death, my mother became totally insane and then she fled from home.

The survey further revealed that death penalty has led to premature death of persons directly or indirectly affected. The inmates reported having lost some of their kin out of shock and trauma caused by the sentence. In Kodiaga, an inmate reported that when the judge pronounced the sentence, his father collapsed there and then in the courtroom and later died on arrival to the hospital.

Some inmates expressed a concern that mental distress and state of confusion about their fate in prison caused them to engage in sodomy and other
undesirable sexual expressions. They were concerned that this has led to high spread of HIV infection as well as other sexually transmitted infections.

3.2.5 Psychological torture and emotional discomfort
The survey indicated that psychological torture and emotional discomfort remain the most grave and widespread impacts of death sentence. Every inmate reported that the sentence subjects them together with their families and friends to what most of them termed as 'deep psychological pain, trauma and emotional breakdown'.

This survey established that the news of death sentence is met with extreme disbelief. Many death row inmates and their families received the pronouncement with great confusion and shock. None of the interviewed inmates had expected the sentence in the first instance. They thought that their alleged offenses, especially the robbery with violence charges were not serious enough to warrant death penalty.

Further, this survey revealed that inmates are totally unaware of the methods of execution increasing their anxiety and stress. Most of the inmates stated that the sentence has left them desperate and helpless, rendered their families divided and confused. Others felt that being on death row without being killed is like being subjected to a slow but painful process of death. In one of the prisons in Lower Eastern region, an inmate despondently stated;

I feel that I am already dead inside; I am physically alive but psychologically, spiritually and emotionally dead. I wish my physical body that keeps traumatizing my family is also done away with.

3.2.6 Hindered human potential and lack of rehabilitation
Inmates on death row expressed their displeasure about the fact that they are denied the opportunity to participate in any type of industry or educational activity. The survey indicated that death row inmates from all the prisons visited in Nyanza, upper and lower Eastern are exempted from being part of prisons’ industry. Most inmates complained that being deterred from the activities subject them to an awkward position of total idleness and stress. Some of them
were concerned that their skills and talents useful for prisons’ progress has been left unexploited. They wondered why the government has not taken advantage of this critical resource to boost its income through prison facilities. According to an inmate who is both an architect and engineer from Nyanza region;

Amongst us here there are great skills derived from various professions and backgrounds, but what do we see? Wasted minds, wasted potential, wasted time and killed dreams and hopes…

Another inmate stated that;

I was not able to continue with my education; I only managed to sit for the Kenya Certificate of Secondary Education (KCSE) in jail and now am growing old.

Inmates on death row have no chance for rehabilitation. Most inmates noted with concern that whereas the overriding vision of prison department is to rehabilitate offenders, death penalty is punitive and ultimate sentence that offers no chance for rehabilitation. One inmate from Nyeri wondered what the death sentence is desired to achieve. Additionally, given that death row inmates are not given chance to participate in prison educational and industrial activities, they stand no chance to reform their behavior or develop their skills despite the massive commutation so far witnessed in Kenya and the probability of the inmates securing acquittal through an appeal or other legal means.

3.3 Deficiencies in the criminal justice system

3.3.1 Disproportionate sentences

An overwhelming majority of inmates interviewed were convicted of the crime of robbery with violence under Section 296(2) of the Penal Code. Most of them felt that the death penalty is not commensurate punishment to the crime. They felt it is too harsh and inappropriate for robbery with violence particularly when the circumstances surrounding the crime are not critically assessed. The crime of ‘robbery with violence’ is quite vague as currently prescribed in law in the sense that even minor robbery offences are misconceived as violent in nature thus attracting death as the legally prescribed punishment.

Many of them further asserted that death penalty as sentence contravenes article 26(1) of the constitution that guarantees every Kenyan the right to life.

3.3.2 Lack of legal representation and unreliable legal personnel
The survey established that lack of legal presentation is one of the serious problems across the regions. Majority of inmates interviewed lacked any form of legal representation during their trials and/or appeals. This, in their view exposed them to unfair trials and to what some of them described as 'substantial injustice'. The inmates further indicated that state-funded legal representation is currently available only for those charged with murder whereas robbery with violence and other capital offenses also attract death penalty. Further, to hire an advocate is too expensive and most of them cannot afford. One of the inmates stated;

"We find ourselves in a situation where you have no advocate and no money to hire one. I approached an advocate who wanted Kshs 40,000 that I could not afford."

Even those who were given state-advocates expressed discomfort with the system. They were concerned that courts assigned advocates to them without consulting them. They felt that court-appointed advocates are imposed on them given as their freedom to choose an advocate they are comfortable with is usurped. Moreover, majority those represented by state advocates intimated that such advocates demonstrated great incompetence. They reported that the representation was unreliable and most advocates failed to consult with the inmates, only appeared on the day of the trial and failed to effectively handle the cases. Inmates in Kisii, Kibos, Kericho and Machakos had these to say:

' The state lawyer I assigned was constantly absent during the hearings and for the times we met, it was only in the court; he never bothered to brief me or to even visit me client in the prison.'

'I had a government advocate whom I only saw and heard from when the charge sheet was read in court.'

'I never had the opportunity to even talk with the lawyer as I could have desired, I only met him in courtroom and he never bothered to brief me before we appeared in court. '

'The lawyer took money from both sides of the case and abandoned me. My lawyer was not present at the time judgment was being issued. '

**3.3.3 Poor knowledge and lack of access to relevant legal information**

A number of death row convicts interviewed cited poor knowledge of legal matters and lack of access to information relevant to their cases and criminal procedures as some of the primary reasons that obscured them from fair trial
and sentence. They argued that many of them were not conversant with how to legally argue a case in court and given that most of them lacked of legal representation, they felt that they were unjustly convicted.

Other inmates interviewed in Machakos and Kibos Main Prisons reported that they are less aware of the legal rights guaranteed to them as prisoners. They further intimated that most of them are not even conversant with some of the very basic rights such as the right to food including the recommended dietary allocations to them.

### 3.3.4 Concerns about the criminal justice system

A number of inmates from all the regions felt that there are still serious lapses in the courts hindering fair trial and justice. Death row inmates bitterly complained about court processes taking too long. They reported that the appeals have no value because they take too long. According to an inmate from one of the prisons in Nyanza;

> There is a big problem in our law courts. Delays in the appeal process are worrying. One year is already gone since I filed my appeal and there is no determination as yet.

In expressing discomfort with the courts, another inmate reported that;

> I have stayed for 5 years in remand. The case began at Bungoma and ended in Kakamega because my file was, in unclear circumstances, transferred by the magistrate.

The death row convicts further complained that despite the reform processes, some judges are yet to reform. Allegations of corruption on the part of some judges and magistrates were reported. Some of the respondents asserted that the rich persons frustrate the poor as they buy justice with money. According to one of the convict in Kisii, the courts are biased against the poor; the poor suffer more whilst the rich are favored. They challenged the survey team to point at any rich person in prison, citing instances when the ‘rich’ have been charged with murder yet not convicted.

Poor investigations were also cited as a concern by a number of death row convicts. In some prisons, inmates indicated that courts interfere with
investigation processes. In fact, a number of inmates believe that they were erroneously sentenced to death due to lack of proper investigations.

The inmates explained that in some regions, there is only one judge handling cases from various places thus slowing down the hearing and determination of cases. Inmates also complained of arbitrary transfers to other prisons which as a result ejects them from their home locations where their family members can easily access them. Inmates explained that this takes a physical and psychological toll on them.

Some inmates interviewed also reported unexplained loss of files, which results in delays in determination of their cases or appeals.

3.4 Concerns of Prison officers working with death row convicts

Prison officers dealing with death row inmates reported a number of challenges and difficulties. They felt that death row inmates are not only a security threat to other prisoners with lesser sentences but also a greater threat to the prison officers. They stated that they live in great fear of their lives as death row inmates may do them any unexpected harm. They further reported that the punishment prescribed for the prison officers in the case of security lapse involving death row convicts such as escape are extremely punitive and equally threatening to their job security.

Additionally, some of the prison officers lamented that the death sentence traumatizes both the inmates and the officers. They indicated that besides being prescribed in law, death sentence is morally disturbing and even the prison officers silently wish that it is abolished.

3.5 Alternative sentence

A greater number of inmates who were interviewed felt that death penalty should be abolished.

It should be noted that a few among the convicts interviewed posited that death sentence should be retained. However, this school of thought was quick to state the conditions on which it should be retained; one, that the executions are immediately carried out and two, that the circumstances surrounding robbery with violence remain the overriding factor of investigations before punishment is meted out.

Those against the death penalty strongly opposed both death sentence and life sentence describing them as same and punitive punishments which are not only
non-rehabilitative but also shattering convicts prospects in life. They noted that the law should go further to define what life sentence is and cap it at a number of years, possibly 10 – 15 years. This limited number of years would allow convicts especially the young convicts to reform and get reintegrated back to the society. Additionally, the inmates observed that they are negatively affecting the economy from the fact that the security required to guard them is too expensive and they consume food and access various government services but totally do nothing beneficial to promote the economy.

3.6 Recommendations
Based on the findings and observation, the following recommendations are made (Some of the recommendations generated by the survey conducted during the phase one are herewith restated):

- KNCHR to conduct a public inquiry or a survey on capital punishment to verify the perception that majority of Kenyans support retention of the death penalty. The outcome of the survey or inquiry will inform future interventions on the death penalty.

- KNCHR should consult with the judiciary to facilitate processes of strengthening the appeal system especially for those on death row. In the same breath, investigation mechanisms and processes should be strengthened to ensure that miscarriage of justice is prevented.

- The state should provide and fully pay competent advocates to represent every convict charged with an offence leading to the death penalty. The restriction of state lawyers to murder suspects only should be reviewed to cover all capital offences.

- The fact that the death provides no opportunity for the convict to rehabilitate should be addressed. KNCHR should advocate to on their behalf so that a policy is introduced to allow them to participate in prison industry and recreational activities and a policy.

- The State and other actors should create a permanent program intended to provide psychosocial and other relevant support to the families of death row convicts. Services such as counseling and other social support measures should form the basis of the program.

- The situation of death row inmates while in prison should not be deteriorated simply because they are condemned. Their
accommodation, food provision and entire living conditions should be improved.

- The judiciary should ensure that cases involving capital offences are presided by only most qualified, highly experienced and competent judges in criminal law and procedure to avoid judicial lapses that lead to miscarriage of justice.

- A holistic approach need to be taken to tackle some of the socio-economic deficiencies leading to the high number of death row inmates in the country.

- Periodic review of the conduct of the convicts particularly the young offenders should be instituted in bid to pardon the most rehabilitated ones from time to time.

- KNCHR should advocate against labeling inmates’ clothing with the term “condemned” since this stigmatizes the prisoners and could amount to cruel, inhuman or degrading treatment.

- If the death penalty is to remain, the women should not be subjected to the sentence. Most inmates held that the sentence has more impact on women and that the number of women death row is even insignificant and therefore an alternative sentence should be considered for them.