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Sarah Muringa Kinyanjui
University of Nairobi

Migai Akech
University of Nairobi

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TOWARDS STRUCTURED SENTENCING IN KENYA: A CASE FOR REFORM

By
Sarah Muringa Kinyanjui
School of Law
University of Nairobi, Kenya

Migai Akech
School of Law
University of Nairobi, Kenya

Abstract

This article engages in an empirical review of sentencing in Kenya. It argues that huge disparities exist in sentencing thus undermining public confidence and the realization of the goals of the system. The development of comprehensive sentencing guidelines is recommended as a panacea to the unwarranted discrepancies in sentencing. It is argued that sentencing guidelines are not intended to impede judicial discretion but rather to provide a framework within which the discretion would be exercised.

Introduction

The efficacy of the criminal justice system is to a large extent judged on the basis of the outcome of the sentencing process. Sentences meted out either actualize or undermine the underlying objectives of criminal law. In addition, public perceptions on the objectivity and consistency of the criminal justice system are influenced by the sentences imposed. It is therefore imperative for the sentencing process to be guided and based upon clear criterion applied across the board. This kind of structured sentencing is geared towards achieving the goals underpinning the criminal justice system.

Empirical evidence reveals disparities in sentences imposed in similar cases in Kenya. These disparities cast aspersions on the sentencing process and raises concerns as to whether the goals of the criminal justice system are indeed achieved. The first part of this article presents sample disparities in sentencing. Based on interviews with judicial officers, this part also discusses how sentences are currently reached and identifies gaps in the sentencing process. The article therefore advocates for comprehensive guidelines developed through a robust process involving stakeholders in the criminal justice system..

While sentencing guidelines are increasingly being adopted in different jurisdictions, they have been challenged for undermining judicial discretion. The second part of this article

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therefore interrogates this allusion and argues that, more importantly, sentencing guidelines provide a framework for decision making.

The development of sentencing guidelines demands a robust engagement between different players in the criminal justice system. In the concluding part, this paper examines the framework that was employed by the Taskforce on Sentencing in developing the Sentencing Policy Guidelines. It further discusses and makes recommendations for a framework to develop further comprehensive guidelines.

The Sentencing Regime in Kenya

Sentencing in Kenya is largely indeterminate Departing from the Penal Code's model, the Sexual Offences Act 2006 (KEN), a statute enacted much later, provided minimum custodial sentences and, in some cases, minimum and maximum fines as alternatives to or in addition to the custodial sentences. However it is still the case that only maximum offences are provided in different statutes for the majority of cases.

However, there are exceptions to this general rule, including sections 40 and 203 of the Penal Code 1948 (KEN) which provide mandatory death sentences for the offences of treason and murder respectively. Other exceptions include sections 89 and sections 308 of the Penal Code 1948 (KEN) which set out both minimum and maximum sentences for the offences of possession of firearms and possession of dangerous or offensive weapons in preparation for the commission of a felony respectively.

Departing from the Penal Code's model, the Sexual Offences Act 2006 (KEN), a statute enacted much later, provided both minimum and maximum sentences. However, it is still the case that only maximum offences are provided for the majority of cases. Judicial officers are therefore endowed with vast discretionary powers. For instance, where only the maximum sentence of life imprisonment is provided, the judicial officer is more or less within his/her legal mandate for any sentence meted out.

In the exercise of these wide discretionary powers, judicial officers are guided by general principles provided in statutes and case law. The key pillars that should guide the sentencing process can be construed from the general provisions of the Constitution 2010 (KEN). Articles 10(1) and 10(2) direct all public officers, who include judicial officers, to adhere to the principles of good governance, integrity, transparency and accountability. State officers are further required to carry out their functions "in a manner that promotes public confidence in the integrity of the office" and to act objectively as well as with impartiality as provided by article 73(2) (b) of the Constitution 2010 (KEN). Thus, in meting out individual sentences, judicial officers ought to be guided by these broad principles.

Article 159(7) of the Constitution 2010 (KEN) also specifically calls upon judicial officers to adhere to the principles of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution. This has a bearing on the sentencing process and the judicial officers ought to promote these forms of dispute resolution at that stage as well. With specific reference to children, article 53(1) (f) of the Constitution 2010 (KEN) reiterates that they should not be detained except as a

measure of last resort, and when detained to be held for the shortest appropriate period of time”.

Other general guidelines are found in the Penal Code 1948 (KEN), such as section 35, which directs the judicial officers to take into account the circumstances of the offence and the character of the offender. To do this, the judicial officers are enabled by the Criminal Procedure Code 1948 (KEN) to obtain further relevant information. Under section 329 of the Criminal Procedure Code 1948 (KEN), they are mandated to receive victim impact statements and any other evidence that would enable them to order an appropriate sentence. Section 4 of the Probation of Offenders Act 1943 (KEN) outlines factors to be considered when contemplating a probation order. These are: youth, character, antecedents, home surroundings, health or mental condition of the offender, the nature of the offence and any extenuating circumstances in which the offence was committed. Similar to the Criminal Procedure Code 1943 (KEN), section 3(3) of the Community Service Orders Act 1998 (KEN) entitles judicial officers to request community service officers for more information on the circumstances of the offence and the offender. These general sentencing guidelines are reiterated in case law. While appreciating that sentencing is a matter of discretion, Justice Makhandia aptly summarized that this discretion is not exercised arbitrarily but is guided by principles. He stated:

Sentencing is a matter for the discretion of the trial Court. The discretion must however, be exercised judicially. The trial Court must be guided by evidence and sound legal principle. It must take into account all relevant factors and exclude all extraneous or irrelevant factors (*Fatuma Hassan Salo v. Republic*, 2006).

Further general sentencing guidelines are outlined in the *Bench Book for Magistrates in Criminal Proceedings* (2004). These guidelines relate to general considerations relating to decisions such as: the appropriateness of non-custodial orders; the treatment of first offenders; imposition of fines when offences attract imprisonment and setting of fines (Judiciary, 2004, p.75-77).

The Constitutional and statutory provisions, judicial precedents and the guidelines set out in the *Bench Book for Magistrates in Criminal Proceedings* are of course very general and do not adequately guide the judicial officers. In light of this, there have been huge disparities in sentences meted out by judicial officers in similar cases.

Empirical research carried out by the authors revealed this. The authors conducted the research in fifteen court stations in Kenya.¹ In eleven of these stations, namely Nyeri, Kisumu, Mombasa, Kakamega, Garissa, Nairobi, Nakuru, Meru, Embu and Migori, interviews were conducted with probation officers, magistrates, prison officers and convicted offenders. They also engaged and trained research assistants who conducted

¹ The research was commissioned by the Legal Resources Foundation and was carried out between the months of December 2010 and March 2011.

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focus group discussions amongst convicted offenders and prison officers were also carried out by research assistants in these stations. In the remaining four stations, namely Eldoret, Kajiado, Kisii and Machakos, informal discussions on sentencing were held with judicial officers and probation officers. These stations were selected with a view to obtaining a good representation of the different regions in Kenya.

With the vast discretionary powers held by the judicial officers, the authors enquired from the respondents how exactly the sentences are reached at. How, for example, does a judicial officer sentence an offender to three year as opposed to two years imprisonment if the maximum set out in law is fourteen years imprisonment?

Interviews with judicial officers, whose identity is withheld due to their position, confirmed that they took into account the general guidelines but these were inadequate in light of the wide discretionary powers. The officers interviewed explained that their decisions were guided by general considerations such as: the nature and circumstances of the offences; nature of injuries and harm caused; health status of the offender; age of the offender; criminal history of the offender; family circumstances; frequency/prevalence of the offence in an area; remorsefulness of the offender. These considerations however provide broad guidance and the judicial officers have to make a decision on the precise sentence. This is of course challenging where the discretion is extremely wide such as where only the maximum life sentence is provided.

Table 1.0 below illustrates the huge disparities in sentences ordered in similar cases.

Table 1.0: Sample Sentences Meted Out

Offence	Station	Length of the sentence/
Manslaughter	Eldoret	10 years imprisonment
	Eldoret	5 years imprisonment
	Eldoret	8 years imprisonment
	Eldoret	Life imprisonment
	Eldoret	4 years imprisonment
	Meru	8 years imprisonment
	Meru	3 years imprisonment
	Meru	10 years imprisonment
	Meru	3 years imprisonment
	Meru	5 years imprisonment
	Nyeri	8 years imprisonment
	Nyeri	8 years imprisonment
	Nyeri	20 years imprisonment
	Nyeri	5 years imprisonment
	Nyeri	5 years imprisonment
	Nakuru	7 years imprisonment
	Nakuru	10 years imprisonment
	Nakuru	4 years imprisonment

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	Rongo	10 years imprisonment
	Ukwala	Life imprisonment
	Kisumu	10 years imprisonment
	Nairobi High Court	2 years imprisonment
	Nairobi High Court	1 year imprisonment
	Nairobi High Court	3 years imprisonment
	Nairobi High Court	4 years imprisonment
Stealing	Eldoret	14 months imprisonment
	Eldoret	12 months imprisonment
	Eldoret	2 years imprisonment or Kshs. 50,000/= fine
	Eldoret	15 months imprisonment
	Eldoret	18 months imprisonment or Kshs. 30,000/= fine
	Eldoret	2 years imprisonment
	Eldoret	1 year probation
	Eldoret	Kshs. 10,000/= fine I/D 12 months
	Eldoret	3 years imprisonment
	Kandara	2 months imprisonment
	Thika	18 months imprisonment
	Thika	9 months imprisonment
	Yatta	1 month imprisonment
	Thika	2 years imprisonment
Possession of Narcotics	Thika	9 months imprisonment
	Thika	18 months imprisonment
	Thika	8 months imprisonment
	Thika	12 months imprisonment
	Winam	2 months imprisonment
	Bondo	6 months imprisonment
Obtaining by False Pretences	Narok	4 years imprisonment or Kshs. 100,000/ fine
	Nairobi Law Courts	18 months imprisonment
	Makadara	18 months imprisonment
	Nairobi Law Courts	1 year imprisonment
	Makadara	5 years imprisonment
Defilement	Mwingi	14 years imprisonment
	Thika	25 years imprisonment
	Nkubu	Life imprisonment

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	Eldoret	20 years imprisonment
	Eldoret	Life imprisonment
	Eldoret	4 months custodial sentence at Kamiti Youth Corrective Centre
	Eldoret	10 years imprisonment
Attempted Rape	Eldoret	Life imprisonment
	Eldoret	5 years imprisonment
Threatening to Kill	Eldoret	2 years probation
	Eldoret	3 years imprisonment

Legend: I/D – in default

The disparities occur at two levels. First, in respect to the length of custodial sentences. Second, in the decision whether to order a custodial or a non-custodial sentence. In respect to the latter case, the field research revealed that the decision largely depended on the individual judicial officer's incline (see also Lumumba, 2005, p. 156; Muhoro, n.d.). For instance some magistrates intimated that non-custodial sentences should be ordered in all cases involving petty offences. Others indicated that their preference for non-custodial sentences in these cases is premised on the need to decongest prisons (LRF, 2011, P.26). The research further revealed that custodial sentences were ordered in some very petty offences. The table below shows instances where custodial sentences as short as one month were ordered. This illustrates the use of custodial sentences for petty offences. It is worth noting that in some cases the short custodial sentences are in default of payment of fines.

Table 1-1: Inmates Serving Less Than 3 Years

Station	Prison Capacity	Total Number of Inmates	Total No. of Inmates Serving Less Than 3 Years	Breakdown of Inmates Serving Less Than 3 Years
Garissa	64	240	69	18 mths < 3 yrs - 21 12 mths < 18 mths - 4 6 mths < 12 mths - 10 3 mths < 6 mths - 15 1 mth < 3 mths - 0 1 mth - 19
Eldoret Main Prison	600	1438	261	18 mths < 3 yrs - 114 12 mths < 18 mths - 73 6 mths < 12 mths - 19 3 mths < 6 mths - 23 1 mth < 3 mths - 25 1 mth - 7

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Machakos main Prison	270	861	200	18 mths < 3 yrs -	67
				12 mths < 18 mths -	41
				6 mths < 12 mths -	33
				3 mths < 6 mths -	46
				1 mth < 3 mths -	9
				1 mth -	4

Source – Prisons' Documentation Offices

While the use of custodial or non custodial sentences can be justified by the judicial officers, there is need to provide specific guidelines to create objectivity and predictability in the sentencing process. With wide discretionary powers, judicial officers are deemed to have acted within their powers as long as the sentence is within the prescribed range. The concern however, is in respect to the huge disparities in sentences ordered in similar cases. Disparities in sentencing, occasioned by the exercise of judicial discretion, is not a unique Kenyan problem. Similar concerns in jurisdictions such as the United Kingdom and the United States of America led to the development of sentencing guidelines (Jaros and Mendelsohn, 1967, p.471; Travis, 1996, p. 533; Schulhofer, 1980, p. 734).

Unjustifiable disparities impact upon public perceptions on the objectivity and impartiality of the judicial officers. This is particularly crucial in Kenya where there have been allegations of corruption of public officers as illustrated in the bribery indexes in the Transparency International Website (<http://www.tikenya.org>). It also plays a role in the realization of the objective of deterrence as the punishment meted out to offenders is certain.

In light of this, there is need for more comprehensive and specific sentencing guidelines to create uniformity and certainty in the sentencing regime. Indeed the majority of judicial officers interviewed expressed the need for such guidelines which would assist them in the sentencing process.

Reforming Sentencing in Kenya: Determinate/Structured Sentencing and Judicial Discretion

The empirical findings make a case for structured sentencing through the use of comprehensive sentencing guidelines in Kenya. However, there are arguments for indeterminate/unstructured sentencing as found in the Kenyan regime. The rationale behind this form of sentencing is that it presents the judicial officer with the opportunity to take into account the unique circumstances in each case and subsequently order the most appropriate sentence. For instance, the offence of manslaughter attracts a maximum sentence of life imprisonment in Kenya as set out in section 202 of the Penal Code 1948 (KEN). The law does not provide a minimum sentence. Thus, the judicial officer is able to take into account diverse factors and circumstances which are usually very diverse. Such discretion has been particularly useful in the Kenyan context where economic status is a key motivation towards crime.

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In a bid to address the unwarranted disparities in sentencing, the Sexual Offences Act 2006 (KEN) set out minimum sentences. This mandatory sentencing model curtails judicial discretion and has resulted in undesirable outcomes in some cases. For example, under section 8 of the Sexual Offences Act 2006 (KEN), consensual sexual relations between young persons have resulted in long custodial sentences for men as young as nineteen years, in line with the mandatory minimum sentence for defilement.

This argument notwithstanding, comprehensive sentencing guidelines are still desirable in the Kenyan context. Some argue that this kind of determinate sentencing reduces judicial discretion. For instance, Freed, analyzing the USA federal guidelines states that:

"Displacing much of the discretion available in the past, the Guidelines Manual, together with the underlying statute, holds the judge accountable for every sentencing choice. He must state reasons for each sentence, including a "specific reason" for some sentences, and his decision is subject to appellate scrutiny" (1992, p.1697) ... "Congress clearly intended to structure and narrow judicial discretion by developing guidelines"(1992, p. 1698).

From this analysis of the American context, it would seem then that sentencing guidelines are geared to strip judicial officers of their discretion. A discussion on this political intent undermines appreciation of the potential of sentencing guidelines in making sentencing more objective and manageable. The guidelines provide a framework for the exercise of judicial discretion; they facilitate the exercise of judicial discretion in a manner that ensures uniformity and certainty. This debate has been held in other jurisdictions which have now adopted determinate sentencing (see Travis, p. 533; Reinganum, 2000, p.63; Schmalleger, 2009, p. 388).

In any justice system uniformity and certainty are fundamental; without them justice would not be seen to be done. The key objective of the sentencing guidelines is therefore to do away with unwarranted disparities (see Lowenthal 1993, p.63; Ashworth, 1992, p.183; Tonry, 1988, p. 269; Freed, 1992, p.1685). There is evidence from other jurisdictions that indeed sentencing guidelines can reduce unwarranted disparities in sentencing (Tonry, 1988, p.293).

Debates on the need for uniformity and certainty leading to the development of sentencing standards are not new. As early as the 1840s, concerns were being raised about the unwarranted disparities in sentencing and hence the need to develop guidelines for judicial officers in the United Kingdom (Radzinowicz and Hood , 1979, p. 1307). These sustained discussions explain the sentencing reform in favor of structured sentencing in countries such as the United Kingdom and the United States of America (see Aharonson, 2013).

Uniformity and certainty are also at the very core of the principles of equity, transparency and accountability espoused in article 10 of the Constitution 2010 (KEN). These would also promote and sustain the integrity of the judiciary as envisaged by article 73(1)(a)(4) of the Constitution. Certainty in sentencing is also necessary for the system to meet the overarching goal of deterrence (see Schulhofer, 1980, p. 734)

Modalities of Sentencing Guidelines

Different jurisdictions that have embraced structured sentencing have adopted different models. For instance, the United Kingdom adopted sentencing guidelines which are developed and continuously revised by the Sentencing Council (Easton and Piper, 2013, p. 47; <http://sentencing.council.judiciary.gov.uk>). This Council develops considerations to be taken into account in respect to specific offences.

Section 125(1) of the Coroners and Justice Act 2009 (UK), requires judicial officers to adhere to these guidelines "unless the court is satisfied that it would be contrary to the interests of justice to do so". This model reflects early ideas expressed by Cox:

By affixing a certain punishment to the offence as a general rule, when nothing appears either to increase or reduce its criminality, and then having a scale of additions or reductions for such attendant considerations, I think it would be very possible to construct a scale of punishments which would materially assist in guiding the judgment of the Judge, and produce more uniformity than exists at present in the punishments inflicted by the various tribunals (1872, p.1319).

With this model, the categories set out in the guidelines remove arbitrariness and provide some structure in the exercise of discretion. Therefore, judicial officers retain their discretion to a large extent but the determination of the precise sentence is guided by the guidelines.

Another model used in common law jurisdictions is the use of guideline judgements. In this case, superior courts set out guidelines to be applied in sentencing in their judgements (Easton and Piper, 2013, p.47). This has been to a small extent adopted in Kenya. However, the guidelines set out in cases have echoed the general guidelines as opposed to offering specific guidance. The bottleneck with the use of guideline judgements is that the guidelines are developed gradually and are dependent on the initiative of the judges. Guidelines may also be developed in respect to particular cases and not in others. A further concern is that sentencing guidelines do not take into account useful views from other stakeholders in the criminal justice system (Ashworth, 1992, p.203). For instance, based on their experiences, prison officers may provide useful guidance on "what works" in respect to offenders of particular kind.

At the other end of the spectrum is the United States of America model whereby federal sentencing guidelines are based on arithmetic computation. This is a development from the 1980s when Federal sentencing guidelines were based on levels as opposed to a precise computation scheme. An accused person would be categorized at a particular level, hence a particular sentence, based on the circumstances of the case. In this regime, federal judges departing from the guidelines were required to record reasons from doing (see Travis 1996, p. 536; Tonry, 1988 p.276).

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Under USA computation model, calculation is based on laid out factors is done to determine a specific sentence grid under which the case falls (see Bushway and Morrison, 2001, p.739; Spohn, 2009, p.239). Assessing this model Spohn argues that:

"Judges and other criminal justice officials calculate the sentence using a standardized worksheet that, at least in theory, guides everyone to the same sentence. However, critics charge that this process is overly rigid and mechanical" (2009, p.239).

The model that best suits the Kenyan context is sentencing guidelines that structure the discretion thus providing an objective framework for sentencing while at the same time giving room for the unique circumstances that are usually presented. These sentiments were echoed by respondents in the research the authors conducted as well as by the Taskforce on Sentencing which is discussed further in the next section.

Towards Structured Sentencing

Informed by research and institutional analysis, the Chief Justice appointed a Taskforce on Sentencing. The mandate of the Taskforce as set out in Kenya Gazette Notice dated 16th June 2014, was to:

- a) review past sentencing patterns, policies and outcomes.
- b) report on how to reduce unwarranted, disparity, increase certainty and uniformity; and promote proportionality in sentencing.
- c) create and roll out a plan for suggested intervention; including educating and engaging members of the public and other stakeholders on the sentencing system and its effectiveness.

The Taskforce carried out extensive desk and field research. Expert and stakeholder consultations were carried out and forums to engage the public were conducted (Judiciary, 2016a, p.7). The following groups of respondents were engaged: judges and magistrates, Court Users Committees with membership drawn from the different players in the criminal justice system, prisoners, and prison officers. The composition of the Taskforce on Sentencing was broad, bringing together representatives from the judiciary, academia, Probation and Aftercare Services, Office of the Director of Public Prosecutors, the Kenya Prison Service, the National Council for the Administration of Justice, the Law Society of Kenya, Civil Society and international organizations (Judiciary, 2016a, p. 6-7). The diverse representation is fundamental as the sentencing process requires a well-designed balancing of different interests. It was therefore commendable for the judiciary to work together with the other players in the criminal justice system in addressing the sentencing problem in Kenya.

The inquiry carried out by the Taskforce confirmed the finding that there were "significant, disproportionate and unjustified disparities" in sentencing. In view of this, the Taskforce developed Sentencing Policy Guidelines which seek to, among other objectives,

"provide a framework within which courts can exercise their discretion during sentencing a manner which is objective, impartial, accountable, transparent and

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which would promote consistency and uniformity in the sentences imposed.” (Judiciary, 2016b, p.11).

During the robust engagements with judges and magistrates, the need for sentencing guidelines was established. However, strong reservations were registered against “prescriptive, stringent and mechanical guidelines”. Instead, they preferred guidelines that would “provide judicial officers with a structure within which to exercise their discretion as opposed to fettering it” (Judiciary, 2016a, p.16).

The Sentencing Policy Guidelines were developed with a view to ensuring that the objectives of sentencing are met (Judiciary, 2016, p.5). They are intended to provide a foundation within which the sentencing regime is to operate. The Guidelines are a policy statement that seeks to articulate the aspirations of the criminal justice system. In developing the Sentencing Policy Guidelines, the Taskforce asked respondents critical questions such as: what are the objectives of the criminal justice system in Kenya? From experience, which approach should be embraced in Kenya: a utilitarian approach which focuses on the unique circumstances in individual cases? Or, should we focus on deterrence and retribution? Should we embrace restorative justice? The answers to these questions guided the Taskforce as it developed the Sentencing Policy Guidelines.

Extensive guidance is provided by the Sentencing Policy Guidelines on the following aspects. Firstly, in establishing whether a custodial or non-custodial sentence is the most suitable sentence in light of the specific circumstances of the case. Secondly, judicial officers are guided on establishing the actual time to be served with respect to both custodial and non-custodial sentences. Thirdly, the Sentencing Policy Guidelines provide guidance on sentencing specific categories of offenders namely: “children, offenders with disability and terminal or mental illnesses, elderly, female offenders and accused persons who plead guilty” (Judiciary, 2016b, p.5)

The Sentencing Policy Guidelines are however not exhaustive. It is envisaged that offence – specific guidelines, grounded upon these Sentencing Policy Guidelines, will be developed gradually (Judiciary, 2016a, p.11). There is therefore need to establish a sentencing committee that would then begin developing the offence–specific sentencing guidelines, in consultation with the relevant players and in particular the judiciary (Judiciary, 2016a, p.16-17). This committee should also be mandated to continuously review the guidelines. In terms of membership, the committee should draw from the judiciary and the other players in the criminal justice system. The potential of broad membership of the committee) is seen as one of the advantages over the use of guidelines being developed in judgments (see Ashworth, 1992, p.205).

Having been launched in January 2006, the Sentencing Policy Guidelines are yet to impact the sentencing regime. In light of the robust engagement with judges and magistrates at every stage, it is hoped that they will adhere to the Guidelines thus addressing the concerns that have been raised relating to sentencing. There is also need for extensive training on the Sentencing Policy Guidelines. The training should target judges, magistrates,

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probation officers, prosecutors and advocates. This would ensure a harmonized approach during the sentencing process. Appreciation of the Guidelines by all the players would also contribute towards compliance with the Guidelines.

These Sentencing Policy Guidelines are not an end in themselves. The drafting of Sentencing Guidelines in Kenya was premised on the need for uniform and definite sentences that reflect an objective and impartial regime. It should be seen as part of the broad initiatives to reform the criminal justice system. Whilst judges and magistrates administer sentencing, the effectiveness of the sentencing regime is dependent upon the other players in the criminal justice system. Some of the disparities in sentencing have been attributed to concerns purely related to the other players in the criminal justice system. For instance, some judicial officers are reluctant to utilize non-custodial sentences as they are concerned about the supervision of the sentences. Thus, the judiciary must continue to engage with the other institutions and work together towards reforming the sentencing regime in Kenya.

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