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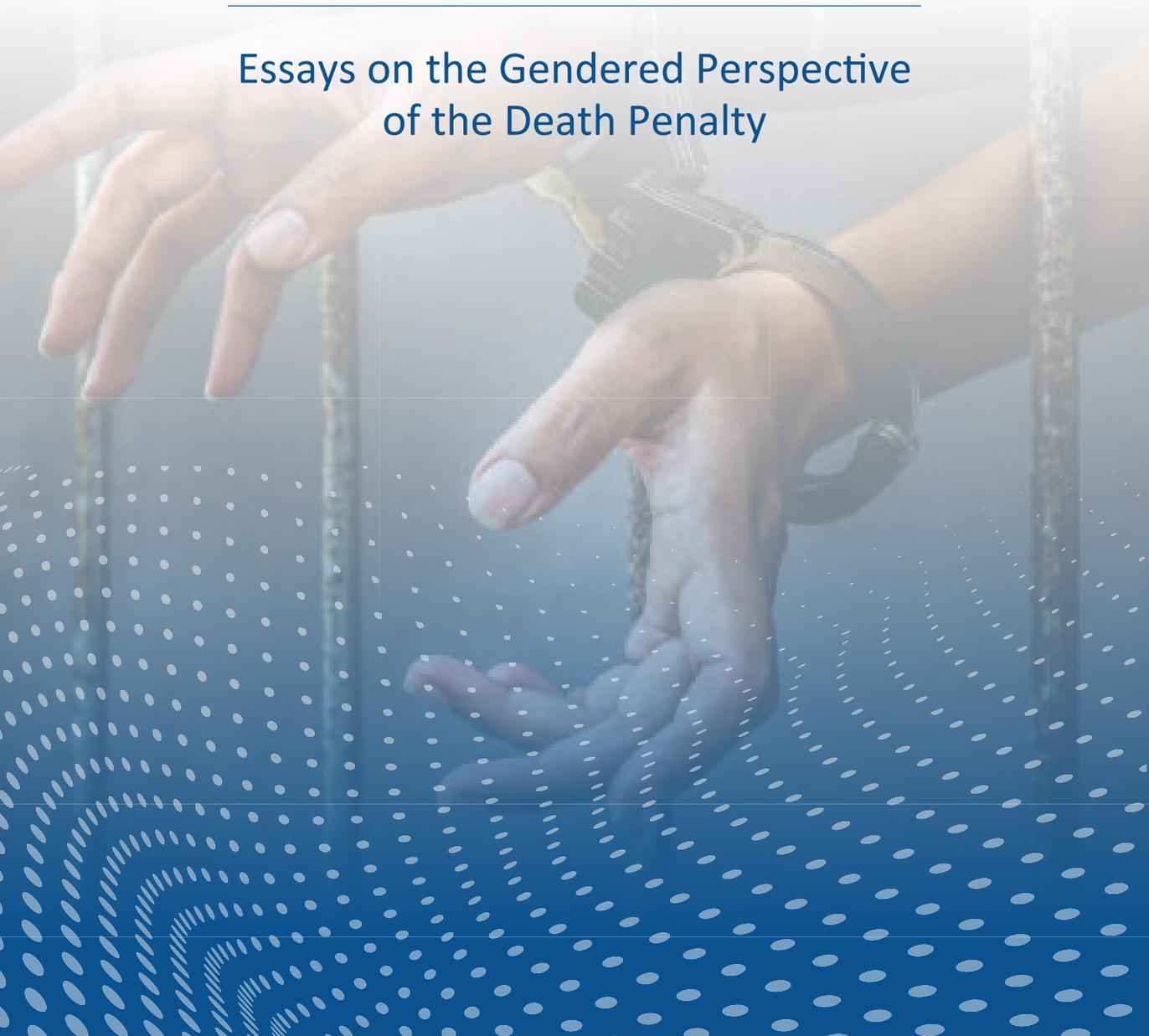
International
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KENYAN SECTION | Since 1959



WOMEN AND THE DEATH PENALTY IN KENYA

Essays on the Gendered Perspective
of the Death Penalty





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Signed,



Elsy C. Sainna
Executive Director
ICJ Kenya.

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EXECUTIVE SUMMARY

This publication seeks to make visible the gender and intersectional discrimination faced by women in the judicial process leading to the death penalty. Through the various articles in this publication, the authors bring to light the reality of women facing the death penalty through a different lens.

The first author, Shekinah Bright Kiting'a, in making a compelling case for abolition of the death penalty, explores how the death penalty uniquely affects women in the context of motherhood. Further, she highlights the rights and well-being of the children affected by their mothers' death sentences, revealing flaws in our legal and ethical systems. With the overall aim of advocating for its abolition due to its significant impact on both parenthood and children's rights, her article seeks to push for reforms that honour motherhood and prioritize children's well-being in these difficult circumstances.

Kenaya Komba dissects gender disparity in the judicial system by exploring the intersection of domestic violence and the death penalty. In making a case for a restorative approach to justice, her article analyses the impact of capital punishment on victims of domestic violence and the systemic injustice and biases they continue to grapple with. Her elaborate analysis of the Constitution of Kenya, 2010 and the Protection Against Domestic Violence Act, 2016, highlights the urgent need for reform in the legal system.

While Analyzing the role the media plays in shaping perceptions of women on death row, Patricia Chepkirui evaluates the implications of positive and negative media portrayals of such women by highlighting the ethical responsibilities of media in the coverage of women on death row cases. The article ultimately underscores the significance of responsible media coverage in ensuring that media exposure of cases of women on death row is fair, balanced, and respectful of their rights and dignity.

Alex Tamei delves into the intricacies of abuse, gender-based violence, and trauma as mitigating factors in death penalty sentencing for women. His article comparatively analyses two Kenyan cases of murder in retaliation to intimate partner violence, seeking to shed light on the plight of victims of gender-based violence. The article effortlessly brings out the nexus between the death penalty and intimate partner violence and makes solid recommendations for change.

The fifth author, Patience Chepchirchir, delves into the nexus between psychological abuse and provocation. Through her article, she brings out the scope of psychological abuse while focusing on the linkage between emotional abuse and provocation and how the same can be considered as mitigating factors. Through an elaborate analysis of case law, she makes a case for psychological abuse of women as a mitigating circumstance during sentencing.

Stella Cherono's article reflects on the intersectional discrimination faced by women in the criminal trial process leading to death row. The article highlights the complex and overlapping forms of discrimination women experience during the pretrial, trial and sentencing stages. Through her comprehensive analysis of gendered pathways to offending and imprisonment, she challenges how society perceives discrimination.

Loraine Koskei Interrogates the emerging jurisprudence on Intimate Partner Violence. Her article lays out the gendered factor in the commissioning and sentencing of women convicted of murder and offers possible recommendations.

AUTHORS' BIOGRAPHY

Shekinah Bright- The author is a dedicated law student at Kabarak University's School of Law with a profound interest in human rights, mainly focusing on law's impact on marginalised groups. She actively engages in conversations to explore innovative ways to advocate for and advance the rights of those often overlooked by society.

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Patricia Chepkirui - The author is a Kabarak University School of Law undergraduate. She also works as a research assistant and serves as the Managing Editor of the Kabarak Law Review. Her research interests include human rights law and international law.

Alex Tamei- As a driven and creative individual, the author is pursuing a law degree while gaining valuable experience as an Editorial Intern at Kabarak University Press. Possessing a passion for writing and the arts, he consistently explores new ways to express himself and contribute to the community. Whether engaged in legal research, crafting compelling content, or pursuing artistic endeavours, he is passionate about learning and growing.

Patience Chepchirchir- The author is pursuing her undergraduate degree in law at Kabarak university. Her research interests include human rights and law's impact on marginalised communities, with a keen interest in women. Through activism and social commentary, she seeks to promote conversations on the much-hushed areas where the law and society intersect.

Stella Cherono- The author is in the final year of her LLB undergraduate studies at Kabarak University. She is passionate about promoting social justice and equal rights for marginalised groups, and this paper is an excellent start in contributing towards that.

Loraine Koskei -The author is a finalist at Kabarak University School of Law awaiting graduation. She is currently a graduate assistant at the Kabarak University Press. Her interests are in women's rights, gender equality, leadership and governance, and she hopes to make a difference in Kenya and Africa.

MATERNAL AGONY: THE IMPACT OF THE DEATH PENALTY ON WOMEN AND THEIR FAMILIES

*Shekinah Bright Kiting'a**

1. Introduction

The death penalty sparks heated debate, yet there's a vital aspect often overlooked: its impact on women, especially mothers, and their children. While discussions often centre on legal and ethical angles, the unique challenges faced by women on death row as mothers remain sidelined. This article aims to uncover two critical aspects: exploring how the death penalty uniquely affects women in the context of motherhood and advocating for its abolition due to its significant impact on both parenthood and children's rights. Starting with a look back at how women have been treated in death penalty cases, we uncover biases in the legal system. Then, we'll explore the emotional toll on these women and the strain on their relationship with their children.

The article will further focus on the rights and well-being of the children affected by their mothers' death sentences, revealing flaws in our legal and ethical systems. This examination highlights these women's challenges and emphasises the crucial need to protect their children. Ultimately, this article seeks to push for reforms honouring motherhood and prioritising children's well-being in these difficult circumstances. By shedding light on these overlooked nuances, the goal is to make a compelling case for abolishing the death penalty for women.

2. Historical Perspective and Legal Framework of the Death Penalty

a) Pre-Colonial History

The death penalty in Kenya has a long history, dating back several decades. Its origins can be traced to 1893, during the pre-colonial era, although its application was not widespread. Kenyan communities had distinct approaches to punishing capital crimes in the pre-colonial era. For instance, in communities such as the Abanyore, capital crimes led to banishment as the primary punishment. However, the Luo community had a unique custom where murderers were required to marry the deceased's wife, while the Akamba community imposed a blood price paid in the form of 11 to 14 cows or one to two bulls, along with a goat. In those communities that practised executions, such actions were typically reserved for specific offences. For example, the Kisii community reserved execution for cases of sorcery, the Agikuyu for habitual murderers and major sexual offenders, and the Maasai community carried out executions only when someone from their community was killed.¹

¹ Nyambega Gisesa, 'Origin and history of death penalty in Kenya' (The Standard, 2014) <<https://www.standardmedia.co.ke/counties/article/2000126707/origin-and-history-of-death-penalty-in-kenya>> accessed on 30th October 2023.

The advent of colonialism in Kenya marked a shift from traditional capital punishment practices. Colonial authorities introduced the Indian Penal Code (IPC), considered less complex and more adaptable for administering justice in African contexts. Under the IPC, those charged with culpable homicide could be found guilty of lesser offences following a trial, such as homicide not amounting to murder, causing grievous harm, or causing injuries. Penalties for murder ranged from death to life imprisonment or fines.

In 1926, the Colonial government introduced a discretionary death penalty for rape following a shocking incident known as the "Kijabe Outrage," where a settler farmer named Julia Ulyate was raped. By 1930, the IPC was replaced by Local Penal Codes and Criminal Procedures Ordinances, which introduced a mandatory death penalty for serious crimes such as treason, instigating invasion, and murder. During the colonial period in Kenya, the majority of death sentences were imposed for murder, primarily between 1908 and 1956. This transition to a British-based legal system marked a significant change in the country's approach to crime and punishment.²

b) Post-Colonial History

Kenya finds itself at a crossroads in its legal landscape, grappling with the enduring presence of the death penalty in its Penal Code. Despite not being frequently executed, the death penalty remains a mandatory sentence under the Kenyan Penal Code, raising questions about its ethical, legal, and human rights implications. It is worth noting that there has been no execution since 1987.³ Kenya has essentially halted executions, showing hesitancy to impose the penalty. Even though executions are on hold, the fact that the death penalty is still entrenched in our penal laws raises worries about how well it aligns with changing global human rights norms.

The mandatory nature of the sentence eliminates judicial discretion, potentially leading to instances where the severity of the punishment may not align with the crime's circumstances or the offender's culpability. However, in December 2017, in the case of *Muruatetu v Republic of Kenya*, the Supreme Court of Kenya ruled that making the death penalty mandatory is against the constitution. This decision granted Kenyan courts the authority to exercise discretion when imposing the death penalty.⁴

² Stacey Hynd ' Murder and Mercy: Capital Punishment in Colonial Kenya, ca. 1909—1956' The International Journal of African Historical Studies 45 (1) 84–85.

³ Jackline Macharia, 'Death row: Only 280 convicts have been hanged in Kenya' (Nation, 13 February 2023) < <https://nation.africa/kenya/news/death-row-only-280-convicts-have-been-hanged-in-kenya-4120674> > accessed on 31st October 2023.

⁴ Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] KESC 31 (KLR) [2021] petition no. 15 of 2015 [112 a]

The death penalty violates the inherent right to life.⁵ Those in favour of the death penalty often argue that individuals who take another person's life should face a similar fate.⁶ They believe that executing convicted murderers fulfils the victims' need for justice or revenge, especially for crimes deemed exceptionally heinous.⁷ However, supporting the death penalty implies that violence and killing are acceptable means of addressing serious crimes. Contrary to the claims of capital punishment proponents, the death penalty does not alleviate the pain suffered by the victim or their family.

In the case of *Francis Muruatetu v State*, it was highlighted that on a global scale, many jurisdictions have ruled that both mandatory and discretionary death penalties are unconstitutional.⁸ The Court referred to the *Roberts v. Louisiana case*, where the U.S. Supreme Court, upon appeal, deemed the compulsory death sentence unconstitutional.⁹ This decision was based on the statute's failure to consider specific mitigating factors when determining whether to impose the death penalty. The Supreme Court of Kenya underscored the importance of courts considering the evidence, the nature of the offence, and the circumstances of the case to determine an appropriate sentence. It emphasised the need to consider mitigating factors that could influence the sentencing process.¹⁰

3. Impact of the death penalty on women and their families

The death penalty has severe effects on inmates and their families, causing feelings of isolation, loneliness, exclusion, victimisation, family breakdown, and mental torment. Prison authorities in Kenya often isolate death row convicts from other inmates, and many families abandon them, leaving them feeling rejected by both the system and their loved ones. A survey conducted by the Kenya National Commission on Human Rights revealed that the most significant and prevalent consequences of the death penalty are psychological torture and emotional distress.¹¹ Each surveyed inmate expressed that the sentence inflicts profound psychological pain, trauma, and emotional breakdown not only on themselves but also on their families.¹² The death sentence is perceived as incredibly shocking for both inmates and their families. It feels like a slow and painful process for those on death row who are also prevented from working or getting an education while serving a sentence¹³. Many inmates are frustrated because they have skills that they can't utilise, and this idleness affects their ability to support their families and contribute to the economy, especially when they are the primary providers.¹⁴

⁵ Amnesty International, 'The Death Penalty – Your Questions Answered' (Amnesty International,) < <https://www.amnesty.org/en/what-we-do/death-penalty/the-death-penalty-your-questions-answered/> > accessed on 31st October 2023.

⁶ Kenya National Human Rights Commission, *Abolition of Death Penalty in Kenya* (Position Paper 2, 2007) para 22.

⁷ Ibid.

⁸ Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] KESC 31 (KLR) [2021] petition no. 15 of 2015 [31]

⁹ Ibid.

¹⁰ Ibid.

¹¹ Kenya National Human Rights Commission, *Effects of Death Penalty in Kenya: Results of the Survey by Kenya National Human Rights Commission* (Second Phase, 2012) 4.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

The application of the death penalty sentence significantly affects motherhood, impacting not just incarcerated women but also their children and families in various ways. For female inmates on death row who are mothers, the experience is particularly challenging. These women often battle with psychological and emotional distress, fearing for their children's well-being and the uncertainty of their future. The strain of facing death row intensifies the mental health challenges they experience, impacting their ability to cope and be present, even within the constraints of a correctional facility.¹⁵ Mothers on death row mention feeling the absence of being present for crucial moments in their children's growth, daily activities, and routines.¹⁶ The enforced separation and loss of control contribute to psychological distress among these mothers, adding to the mental health challenges commonly observed in death row inmates.¹⁷ Incarcerated parents with young children often grapple with increased levels of depression and cognitive difficulties, like hallucinations, unconventional thoughts, and self-harming tendencies.¹⁸ The prevalence of mental health symptoms among parents in custody is three to five times higher than that of the general population, with a notable occurrence of multiple mental health issues simultaneously.¹⁹

The consequences also profoundly affect the children of incarcerated mothers. They endure the absence of maternal care and guidance, often experiencing trauma and emotional turmoil due to the separation. These children are at a higher risk of mental health issues, social stigmatisation, and struggling with the absence of a parental figure in their lives. The arrest, sentencing, and potential execution of a parent profoundly impact children. Young children with parents on death row face a unique burden due to state actions, experiencing the threat and reality of losing a parent to state-sanctioned violence. This situation causes significant physiological and emotional trauma for the child. The anguish of knowing a loved one faces execution can be worsened by public indifference or hostility, with authorities neglecting the emotional needs of these children. Children may become disillusioned with the state, rejecting its authority and becoming hostile, leading to social isolation and stigmatisation. Even after an execution, children may continue to be associated with their executed parent and lack proper support. Accessing a parent on death row is challenging, involving intensive security procedures and limited or no physical contact. Visits may require travelling long distances, and contact options like phone calls may be restricted or forbidden.²⁰

¹⁵ Monika Dargis and Arielle Mitchell-Somoza, 'Challenges associated with Parenting while incarcerated: A review' (2021) 18(18) Int J Environ Res Public Health < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8469117/#B56-ijerph-18-09927> > accessed on 31st October 2023.

¹⁶ Zoe Milavetz, Kaitlyn Pritzl, Luke Muentnes and Julie Poehlmann-Tunan, 'Unmet Mental Health Needs of Jailed Parents with young Children' [2021] Family Reform, para 4, 132.

¹⁷ Zoe Milavetz, Kaitlyn Pritzl, Luke Muentnes and Julie Poehlmann-Tunan, 'Unmet Mental Health Needs of Jailed Parents with young Children' [2021] Family Reform, 141.

¹⁸ Ibid.

¹⁹ Zoe Milavetz, Kaitlyn Pritzl, Luke Muentnes and Julie Poehlmann-Tunan, 'Unmet Mental Health Needs of Jailed Parents with young Children' [2021] Family Reform, 132.

²⁰ Child Rights Connect, *Children of Parents Sentenced to death: How are they affected, How can they be supported* (Working Group on Children of Incarcerated Parents, 2013) 4-6.

4. Case studies

a) Malawi

Alice Nungu, a victim of severe abuse, was sentenced to death in Malawi for defending herself against her abusive husband. He brutally attacked her one night, and in self-defence, she wrested an axe from him and unintentionally caused his death. Despite her immediate report to the police, Alice was charged with murder and received the mandatory death penalty sentence. She endured twelve years on death row, suffering from deteriorating health due to HIV contracted from her husband, inhumane conditions, and food scarcity. In 2015, the High Court of Malawi acknowledged her history of abuse and poor health and ordered her release. Tragically, Alice passed away shortly after returning to her village.²¹ Although Alice's case is from Malawi, it highlights similar injustices faced by Kenyan women on death row.

A significant number of women facing death sentences are victims of sexual and gender-based violence, a factor that unfortunately often fails to serve as a substantial mitigating consideration during sentencing. Gender-based violence is a recurring element in the backgrounds of women sentenced to death, especially in cases involving the murder of family members attributed to such violence.²² A substantial portion of women currently on death row in Kenya have been convicted within the context of gender-based violence. Despite the gathering and presenting evidence in Court during trial, courts often do not consistently consider these factors as mitigating circumstances during sentencing.²³

However, there has been some progress in recognising gender-based violence as a relevant factor in mitigating sentences. In the 2021 case of *State v Truphena Ndonga Aswani*, the woman sentenced to death for murdering her abusive husband had her domestic violence history considered on appeal. This consideration contributed to reducing her sentence, and she was ultimately sentenced to a non-custodial term of one-day imprisonment.²⁴

²¹ Portside 'Women on Death Row: Invisible Subjects of Gender Discrimination' (November 2018) < <https://portside.org/2018-11-05/women-death-row-invisible-subjects-gender-discrimination> > accessed on 30th October 2023.

²² International Commission of Jurists 'Pressure Mounts For Kenya To Abolish Death Penalty' (ICJ, 9 October 2023) < <https://icj-kenya.org/news/pressure-mounts-for-kenya-to-abolish-death-penalty/#:~:text=Most%20women%20sentenced%20to%20death,to%20ICJ%20Kenya%20executive%20director.> > accessed on 31st October 2023.

²³ World Coalition Against Death Penalty 'Reflecting on the links between the death penalty and gender-based violence' (ICJ, 25 November 2022) < <https://icj-kenya.org/news/reflecting-on-the-links-between-the-death-penalty-and-gender-based-violence/> > accessed on 31st October 2023.

²⁴ *State v Truphena Ndonga Aswani* [2021] criminal case no. E011 of 2020, [51].

b) Kenya

Kenyan courts have taken a significant stride in recognising mitigating factors in the death sentences of women. In the *state v Truphena Ndonga Aswani case*, a noteworthy step was taken towards acknowledging gender-based violence (GBV) as a mitigating factor for women.²⁵ Truphena Aswani Ndonga, the accused, faced a murder charge after confessing to killing her husband. Truphena, who had been a victim of GBV, acted in self-defence when her intoxicated husband demanded the title deed to land left to her by her father-in-law. Refusing to surrender the deed, Truphena defended herself with a machete, resulting in her husband's fatal injuries. Truphena's case mirrors those of many women facing murder charges in Kenya. During her sentencing, considerations included her responsibility for the deceased's four children and her 10-year-old son fathered by the deceased.

Despite being sentenced to a non-custodial sentence, her status as a mother played a crucial role. This decision granted her the opportunity to care for her young son.²⁶ However, numerous women on death row may not receive such consideration, especially considering that they often serve as the primary providers and caregivers for their children. Given the challenges surrounding motherhood, as discussed earlier, the death penalty profoundly impacts both the mothers and their children. Denying these children their right to parental care and protection under the Constitution of Kenya adds another layer of complexity to the consequences of capital punishment.

5. Conclusion

The nexus between motherhood and the death penalty sheds light on a troubling aspect of Kenya's criminal justice system. The plight of battered women on death row, often convicted in the context of gender-based violence, underscores the pressing need for a reevaluation of capital punishment, especially for women.

The profound impact of the death penalty on motherhood extends beyond the condemned woman to her child. Not only do these children witness the horrors of gender-based violence against their mothers, but they also face the impending loss of a parent through state-sanctioned execution. This perpetuates a cycle of trauma, as society often fails to recognise the nuanced circumstances that lead to such tragic outcomes. Kenya, as an abolitionist in practice, leaves inmates in a state of limbo, violating their right to life and subjecting them to cruel, inhumane, and degrading treatment. This situation induces significant mental distress in the convicts, a distress that inevitably affects the children of mothers on death row.

²⁵ N 23 above..

²⁶ N 24 above.

While Kenyan courts have taken a positive step by declaring the mandatory death penalty unconstitutional, more comprehensive efforts are needed towards the complete abolition of the death penalty.²⁷ The current state of limbo experienced by death row inmates, coupled with the societal and emotional distress faced by their children, necessitates urgent reform. Protecting the rights of both mothers and children is essential, ensuring a more just and compassionate legal system.

²⁷ Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] KESC 31 (KLR) [2021] petition no. 15 of 2015 [112 a].

REIMAGINING JUSTICE: DEATH PENALTY AND DOMESTIC VIOLENCE AGAINST WOMEN IN KENYA

*Kenya Komba**

1. Introduction

Domestic violence has been a long-standing problem in Kenya, particularly in rural areas. The Protection Against Domestic Violence Act (2015) defines domestic violence as abuse that may include child marriage, female genital mutilation, forced marriage, forced wife inheritance, interference from in-laws, sexual violence within marriage, virginity testing, and widow cleansing.²⁸ Section 204 of the penal Code in Kenya states that 'any person who is convicted of murder shall be sentenced to death.'²⁹

Women currently make up less than 5% of the global death row population; a closer examination of their profiles and the crimes for which they face capital punishment exposes the pervasive influence of gender biases in the implementation of the death penalty.³⁰ According to ICJ Kenya's Executive Director, Ms. Elsy C. Sainna, most women sentenced to death are victims of sexual and gender-based violence, which unfortunately does not become a sufficient mitigating factor during sentencing.³¹

This study will discuss the gender disparities in the death penalty system. It will explore the intersection of domestic violence and the death penalty as it relates to women. It will also delve into the disproportionate impact of capital punishment on women who have been victims of partner violence in their lifetime.

It is crucial to shed light on this issue and advocate for reforms addressing the systemic biases and injustices these women face. By doing so, we can work towards achieving gender equality and the abolition of the death penalty.

²⁸ Protection Against Domestic Violence Act (No 2 of 2015), section 3(8).

²⁹ Kenya, Penal Code, section 204, chapter 63 .

³⁰ World coalition against the death penalty, <<https://worldcoalition.org/2023/08/15/advocating-for-the-recognition-of-women-sentenced-to-death-in-the-fight-for-womens-rights/>> 15 August 2023.

³¹ N 23 above

2. Legislative Framework

a) The Constitution of Kenya, 2010

The Constitution of Kenya 2010 provides for the right to life of every person except in cases where the individual has been sentenced to the death penalty by a court of law for committing a criminal offence such as treason, murder, or robbery with violence.³² The introduction of capital punishment in Kenya traces back to 1893 under the British colonial government. However, before colonial influence, most pre-colonial African communities upheld restorative justice.³³ African communities rarely resorted to the use of death sentences, except for cases where offenders posed an enduring threat to their community.³⁴ Under the British-imposed Penal Code, offences such as murder, treason, and armed robbery mandated a mandatory death penalty. During the Mau Mau rebellion, the colonial government documented approximately 1,090 executions.³⁵

The last executions in Kenya took place in 1987. Consequently, significant developments have occurred in Kenya's judicial landscape. In 2010, the Court of Appeal abolished the mandatory death sentence for murder in the landmark case of *Mutiso v. Republic*.³⁶ In addition, 2747 death row inmates were commuted to life imprisonment in 2016, and the year 2017 marked a pivotal moment when the Supreme Court of Kenya declared the mandatory death penalty unconstitutional, signalling a decisive step toward the abolition of the death penalty.³⁷ The move to commute death sentences to life imprisonment in Kenya is a reflection of the growing recognition worldwide that everyone has the right to life and deserves a chance for rehabilitation. This shift aligns with international human rights principles, emphasising the importance of treating everyone with dignity and respect. Specific laws in Kenya, including the Constitution of 2010, affirm the right to life for all, underscoring the significance of preserving human dignity.

b) Protection Against Domestic Violence Act, 2015

The Protection Against Domestic Violence Act defines domestic violence in relation to any person, to mean violence against that person, or threat of violence or of imminent danger to that person, by any other person with whom that person is, or has been, in a domestic relationship.³⁸ It is broad, and it covers various forms of abuse, such as physical, emotional, psychological, and economic abuse, as well as sexual violence within domestic relationships.

³² Constitution of Kenya (2010) Article 26.

³³ Gisesa Nyambega, 'Origin and history of death penalty in Kenya', *The Standard*, retrieved 8 November 2016.

³⁴ Hynd, Stacey (2012), 'Murder and mercy: Capital punishment in Colonial Kenya, ca. 1909–1956', *The International Journal of African Historical Studies*, 81–101.

³⁵ *Ibid.*

³⁶ Novak, Andrew (2012). "Constitutional reform and the abolition of the mandatory death penalty in Kenya", *Suffolk University Law Review*, 285.

³⁷ 'The death penalty should be abolished in Kenya', 25 January 2023, retrieved 17 May 2023.

³⁸ <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%202%20of%202015>

The Act also establishes provisions for protection orders, emergency protection orders, and confidentiality, offering legal remedies and safeguards for victims of domestic violence. The Protection Against Domestic Violence Rules (2020) 2(1) complements the Act by providing detailed guidelines and procedures for implementing its provisions.³⁹ In addressing these critical areas, the rules enhance the Act's ability to combat domestic violence, protect victims, and ensure a fair and just process by abolishing the death penalty for women involved in domestic violence cases.

In addition, Kenya has also formulated policies to address domestic violence; for instance, the national policy on gender-based violence is the National Policy on the Eradication of Gender-Based Violence (GBV). It was developed to address the widespread issue of gender-based violence in the country and aims to eliminate all forms of violence against women and girls, including domestic violence, sexual violence, and harmful practices like female genital mutilation and child marriage.⁴⁰ The policy focuses on promoting gender equality, empowering women, implementing prevention and response strategies, and raising awareness about domestic violence issues. While the legal framework provides the necessary structure and guidelines, organisations offer critical on-the-ground support and services to victims, fostering a safer and more just society for all Kenyan citizens.

3. Case Study: State V Truphena Ndonga Aswani

In State v Truphena Ndonga Aswani [2021] eKLR⁴¹, the accused person, Truphena Ndonga Aswani, a female adult of sound mind was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

In this case, the Court considered instances of domestic violence that the accused had undergone over the years, occasioned by her deceased husband, who is described as an irresponsible, violent, brutal and torturous human being who did not treat the accused with any dignity or respect at all. He constantly butchered her from time to time and never provided for the family, but she persevered and neither took revenge nor deserted him for her safety.

The Court considered the accused's mitigating circumstances and sentenced her to serve a non-custodial sentence of one-day imprisonment. In this case, the Court applied the subjective test and concluded that the accused acted in self-defence to save her life, as the threat and fear of death were imminent. The Court recognised the need to address the specific circumstances of the case, considering the years of domestic violence endured by the accused. In addition, the Court emphasised the importance of providing the accused with counselling to aid her recovery from the traumatic experience she had undergone. In its judgment, the Court aimed to give the accused and others who have experienced or are experiencing domestic violence a voice.

³⁹ The Protection Against Domestic Violence Rules (2020), section 2(1).

⁴⁰ Gender-based violence(violence against women and girls), World Bank , 25 September 2019 <<https://www.worldbank.org/en/topic/socialsustainability/brief/violence-against-women-and-girls>>.

⁴¹ State v Truphena Ndonga Aswani [2021] eKLR,

This decision was lauded in all quarters as it considered the physiological and emotional status of the accused that led to the commission of the offence. It is an isolated case; however, it portrays the importance of considering mitigating circumstances by judicial officers before passing a sentence.

4. Restorative Justice Approach.

Truphena Ndonga Aswani's case is an example of how the principles of restorative justice align with the Court's approach to addressing domestic violence. The emphasis on the victim's experiences, rehabilitation over punitive measures, and community involvement reflects the core values of restorative justice. However, it also highlights the challenges in fully implementing restorative practices within the existing legal system. By recognising these connections and challenges, there is potential for further exploration and integration of restorative justice approaches in the redressal of domestic violence cases in Kenya.

Restorative justice involves bringing together the victim, offender, and community members to discuss the harm caused and work together to find a solution that addresses all parties' needs.⁴² One of the main benefits of restorative justice is that it can help to reduce recidivism rates.⁴³ By supporting offenders to help them reintegrate into society, restorative justice can help reduce the likelihood that offenders will re-offend. In addition, restorative justice can be more cost-effective than traditional court systems.⁴⁴ Despite the challenges to implementing restorative justice in Kenya, it is essential to note that the formal penal system in Kenya is not designed to promote restorative justice, a victim-centred approach to justice that aims to repair the harm caused by crime or conflict.

In contrast, African customary law, often based on oral traditions and unwritten rules, is more conducive to restorative justice. However, the unwritten nature of customary law poses a challenge to its implementation in Kenya.⁴⁵ The Kenyan Constitution requires that all offences and penalties be in writing, which means that the customary restorative justice system may not be recognised or enforced in the formal legal system.⁴⁶

5. Conclusion

The intersection between domestic violence, the death penalty, and the pursuit of justice for women in Kenya highlights the urgent need for reform in the legal system. Acknowledging the systemic biases and gender disparities present in the enforcement of capital punishment underscores the critical importance of adopting restorative justice measures. The recent case of Truphena Ndonga Aswani serves as a beacon of hope, emphasising the significance of victim-centric approaches and the power of rehabilitation over punitive measures.

⁴² Development Services Group, 'Restorative Justice, literature review Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention', 2010.

⁴³ 'The benefits of restorative justice for victims and offenders', Restorative Solutions, 2020.

⁴⁴ Sherman and Strang, 2007; Shapland et al., 2008, based on a study conducted by Shapland et al.

⁴⁵ Bwire B, 'Integration of African customary legal concepts into modern law, restorative Justice: A Kenyan example', University of Nairobi, 2019, volume 9(1), 17.

⁴⁶ Constitution of Kenya (2010), Article 50(2)(n).

Initiatives such as those undertaken by Civil Society Organizations are instrumental in fostering a supportive environment for survivors and advocating for their rights. By promoting holistic solutions, addressing trauma, and empowering women, we can strive towards a society that upholds the dignity and well-being of all individuals. Together, through collaborative efforts, we can build a more just and compassionate future for all Kenyan women because justice is a term with a feminine essence.

THE ROLE OF MEDIA IN SHAPING PERCEPTIONS OF WOMEN ON DEATH ROW

*Patricia Chepkirui**

'... 'If it bleeds, it leads'...' – Susan

1. Introduction

The media significantly influences public perceptions and attitudes toward diverse societal issues. Conceivably, it can sway masses toward '*bias-poles*' of their preference. In many cases, the media exploits its power of influence to get more clicks, which translates to more profit. The consequences of such impact are far-reaching, especially when the topic is sensitive and inflammatory. A case in point is women on the death row.

Society's stance on women is that they are more nurturing and less aggressive. Consequently, when a woman commits a capital offence, and the Court sentences her to death, the media is likely to pathologise and 'demonise' her in an attempt to justify her actions.⁴⁷ The consequences of 'demonising' women on death row are many. Negative media coverage can indirectly influence legal outcomes, such as contributing to harsher sentences or reducing leniency for these women. Besides, negative media portrayal can instigate stigmatisation of these women, leading to their isolation. The psychological impact of negative media coverage of women on death row is extensive, noting that these women suffer from mental health and self-esteem issues. Moreover, in the wake of the possibility of release, the prospects for such women to reintegrate into society are adversely affected. Nonetheless, the media can positively broadcast cases of women on death row, leading to favourable outcomes such as reduced sentences.

In analysing the role of media in shaping perceptions of women on death row, this paper seeks to evaluate the implications of positive and negative media portrayals of such women and, in doing so, highlight the ethical responsibilities of media in the coverage of women on death row cases. The article will also underscore the significance of responsible media coverage in ensuring that media exposure of cases of women on death row is fair, balanced, and respectful of their rights and dignity.

This paper covers the issues outlined above in five sections. The first part studies the media concept, looking at new dynamics in the media sphere, such as the numerous and diverse media platforms born out of technological advancement. This aims to provide a background to the assertion that media has immense influence in society and that consumption of media content is extensive amongst individuals. The second part highlights media coverage of cases of women on death row. This section studies patterns in how media broadcasts such cases. The question of whether there are express biases in the coverage of women in death cases is answered in this section.

⁴⁷ Eileen Berrington and Paivi Honkatukia, 'An evil monster and a poor thing: female violence in the media' (Journal of Scandinavian Studies in Criminology and Crime Prevention 3(1)) 50-72.

Moreover, this part seeks to provide a background on the role that media plays in shaping perceptions of women on death row. The third section comprehensively discusses the implications of media coverage of women on death row cases. The negative and positive portrayals of these women by the media and the consequences of such depictions are analysed. The fourth section seeks to answer the question of whether there are any ethical responsibilities with which the media should be compliant within the coverage of women on death row cases. Lastly, this paper will conclude by highlighting the significance of responsible media coverage in ensuring that media exposure of cases of women on death row is fair, balanced, and respectful of their rights and dignity.

2. Context

Media broadly describes all communication channels, from printed paper to digital data.⁴⁸ Intrinsicly, it is a conduit through which voices, perspectives, and lives are brought into the public sphere.⁴⁹ Since immemorial, people have heavily relied on the media to access and deliver information for social and business purposes. This is partly because it is nearly impossible for people to gather all the news themselves or disseminate their information to the masses most effectively.

Inherently, society cannot downplay the media's role and its incredible importance in day-to-day life. Like everything else, the media is continually evolving. Traditional sources of media encompassing printed materials are slowly becoming obsolete, and digital media is taking over in substitution.⁵⁰ Modernisation in the media province has brought along cosmic impacts. Chiefly and remarkably, it has spiralled the accessibility to and dissemination of information to staggering degrees.⁵¹ Whereas one needed to buy or borrow newspapers, books, or magazines to obtain information in the past, news is simply at your fingertip in today's world because of technological advancement.⁵² Research on social media shows that there are 4.8 billion users worldwide, representing 59.9% of the global population and 92.7% of all internet users.

Further, 150 million new social media users were registered between April 2022 and April 2023 – a 3.2% increase year-over-year.⁵³ Breaking these numbers down, they equal approximately 410,000 new social media users daily and 4.7 every second. Conclusively, social media platforms and their content consumption are prevalent.

⁴⁸ Linda Rosencrance, 'Media: What does media mean?' < <https://www.techopedia.com/definition/1098/media> > accessed on 9 November 2023.

⁴⁹ N 42 above.

⁵⁰ Arifah Fasha Rosmani, Ariffin Abdul Mutalib, and Siti Mahfuzah Sarif, 'The evolution of information dissemination, communication media and technology in Malaysia' (Journal of Physics: Conference Series, 2019).

⁵¹ Ibid.

⁵² Ibid.

⁵³ Annabelle Nyst, 'General social media statistics' (Search Engine Journal, July 14 2023).

People increasingly shape their opinions by accessing and discussing content shared on typical mainstream media sources and social networking websites.⁵⁴ According to social influence theory, an interaction between social agents typically reduces the difference between their opinions.⁵⁵ Where the influence is immense, one social agent can wholly sway the stance of another social agent so that the other fully conforms to the first's stance in the -context of the subject. As a social agent, the media plays a key role in forming and shaping opinions.

In light of the massive coverage that media benefits from, mainstream media often influences society's collective viewpoint on various issues.⁵⁶ On multiple occasions, it can potentially manipulate how people think about vital subjects, including local and international politics. This manipulation stems from media bias. Media bias, which refers to the unjust favouritism and reporting of specific ideas and standpoints, excluding others, is pervasive on all media platforms. A keen observation of media broadcasts will reveal undeniable internal biases. The biases are informed by diverse factors, including an outlet's political and ideological stance, the target audience, and its profit-oriented nature.⁵⁷ Where an outlet's profit-oriented nature influences its media production, content selection will align with the audience's interests, fueling this profit; the upshot is disregarding issues and problems that would guarantee fewer earnings.⁵⁸

3. The role of the media in reporting capital offence cases against women

Researchers have noted that besides forming and influencing societal opinions, the media plays a leading role in reinforcing stereotypes, especially on issues of gender, religion, and culture.⁵⁹ Several stereotypes surround each gender, and the expectations of these stereotypes shape individuals' behaviour and reactions to others. Historically, the media's portrayal of women in film, print, and other outlets has served to reinforce traditional gender stereotypes, which prescribe women's nature as maternal and passive.⁶⁰ Consequently, when women commit crimes, particularly violent crimes, the media depicts them as 'doubly deviant' because they have both broken the law as well as violated cultural expectations of femininity.⁶¹ To reconcile the conventional perception of a woman as non-violent and the commission of a capital offence by a woman, the media pathologies the woman.

⁵⁴ Valentina Pansanella, Alina Sirbu, Janos Kertesz and Giulio Rossetti 'Mass media impact on opinion evolution in biased digital environments: a bounded confidence model' (Scientific reports, 5 September 2023) 1.

⁵⁵ Mehdi Moussaid, Juliane E. Kammer, Pantelis P. Analytis, Hansjorg Neth, 'Social influence and the collective dynamics of opinion formation' (Plos One, November 2013)2.

⁵⁶ N 54 above

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ N 42 above

⁶⁰ David Croteau and William Hoynes, 'The business of Media: Corporate media and the public interest' (Pine Forge Press, 2006).

⁶¹ Eileen Berrington and Paivi Honkatukia, 'An evil monster and a poor thing: female violence in the media' (Journal of Scandinavian Studies in Criminology and Crime Prevention 3(1)) 50-72.

The death penalty is a masculine institution.⁶² A person being executed has to have the qualities of being frightening and relatively quickly dehumanised.⁶³ For condemnation to be palatable to the masses, a female subject needs to have lost her femininity. The media and, subsequently, court actors easily masculinise women who do not conform to traditional notions of femininity, the result of which makes their death sentence more agreeable to sentencing judges, as well as the public at large.⁶⁴

Kelsey M Collins pens down a stellar example of how the media ‘demonises’ violent women. He notes that Judi Bueanano, a woman convicted and executed for the murder of her husband, was repeatedly referred to as the ‘Black Widow’ by the media.⁶⁵ Specifically described as an ‘evil man-hater’ who fed upon the men in her life, killing them for the life insurance benefit,⁶⁶ Bueanano received no mercy from the media’s demonisation agenda.⁶⁷ Numerous cases complement Kelsey’s example, creating an apparent pattern that solidifies the theory of media’s ‘demonisation’ and ‘masculinisation’ of violent women.

When Ruth Kamande stabbed her boyfriend 22 times at Buruburu estate, Nairobi, in 2015, media houses took to covering her story relentlessly. This coverage persisted through her appeal to the Court of Appeal, where the Court upheld her death sentence.⁶⁸ Ruth was depicted as ‘psychotic’. Media platforms fixated on the fact that she did not stab the victim in quick succession, that she stabbed the deceased one at a time as if she was sampling with pleasure every stab that she inflicted on him. Besides the depiction, the relentless press coverage worked to ‘demonise’ Wanjiku.

Unrelenting press coverage, as argued by Gado, is one out of many demonstrations in which the media ‘demonises’ women on death row.⁶⁹ Wanjiku’s scenario replayed in the case of *Republic vs Maxine Wahome (2022)*, a rally driver whom the prosecution accused of the murder of her late boyfriend, Asad Khan, and in Jackie Maribe’s murder case.

4. Role of the media in shaping societal perceptions of women and the death penalty.

Jewkes propounds that in news concepts, crime is a gendered concept.⁷⁰ As such, when a woman commits a violent act, her sexual orientation is the focus of the narrative surrounding the crime, and biological drives are commonly used as an explanation when reporters speculate about her possible motives.⁷¹

⁶² Joan W. Howarth ‘Executing white masculinities: Learning from Karla Faye Tucker’ (Oregon Law Review, Vol.1 2002).

⁶³ Ibid.

⁶⁴ Kelsey M. Collins, ‘Too feminine for execution?: Gender Stereotypes and the media’s portrayal of women sentenced to death’ (St. Mary’s College 2015) 6.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ruth Wanjiku Kamande v Republic 2020, Criminal Appeal 102 of 2018, Judgment of the Court of Appeal, Kenya.

⁶⁹ Gado, ‘Death row women: Murder, justice, and the New York Press’ (Prager Publishers 2008).

⁷⁰ Jewkes, ‘Media and crime: Key approaches to criminology’ 2 Ed. London, (Sage Publications, 2001).

⁷¹ Doerner, J. K. and Demuth S. ‘The Independent and joint effects of race/ethnicity, gender, and age on sentencing outcomes in US federal courts’ (Justice Quarterly, 27 (1))1-27.

This focus on likely internal drives results in stories that paint these women as either ‘evil monsters’ or hapless victims incapable of making autonomous decisions due to mental health struggles.⁷²

The media, in the case of *Truphena Aswani (2021)*, portrayed the accused as a woman with battered woman syndrome. In emphasising the fact that she was a victim of domestic violence and that she killed the deceased in self-defence, the press painted her as a hapless victim who has a mental disorder. In this case, the media influenced the public to sympathise with her. The support that Truphena got was apparent when many Kenyans applauded the one-day non-custodial sentence she received as punishment for her crime.

Conversely, a study by *Olivia Kaserran (2023)*⁷³ reveals a massive disparity in how the media portrayed Truphena and the accused in this case. Stanley Ngotho, in an article published by Nation Media Group, wrote the following in the first sentence; “A woman who butchered and cannibalised her daughter has blamed her low self-esteem for the horrific crime that she carried inside her parents house in Kitengela.”⁷⁴ Frankly, there is a clear manifestation of Olivia’s depiction as a monster through the phrase “butchered and cannibalised her daughter.” In painting her as a villainous woman, the media risks influencing Kenyan society to see her through this lens even when she is yet to tell her story.

Portrayal of mothers who kill their children

The condemnation of women who kill their children surpasses that of murder of other persons. Empirical research shows that women who kill their children are framed as mad, suffering from some form of maternal defect at the time of the crime.⁷⁵ Further, researchers have found that newspapers grapple with mothers killing their children by explaining the offence as only occurring among the “sickest of women”.⁷⁶ These women are “sick/mad/bad” not only because they have committed murder but also because they have destroyed the construction of motherhood by murdering their children.⁷⁷

Media and society’s structure of motherhood expects women to become loving, nurturing mothers. When the news of Olivia’s murder of her child reached media outlets, the public was shocked. According to a news article published by the Nation Media Group, neighbours watched in horror as the woman stabbed and dismembered her. Both the public and the media shared sentiments of shock and horror.⁷⁸

⁷² N 64 above

⁷³ State v Olivia Kaserran (ongoing case) Olivia was arraigned on April 25, 2023, over the murder of her own child.

⁷⁴ Stanley Ngotho, ‘Kitengela woman who killed, ate her child blames low self-esteem’ *Daily Nation* (Nairobi, April 26 2023).

⁷⁵ Easta P. Bartels L. Nelson N. Holland K. ‘How are women who kill portrayed in newspaper media? Connections with social values and the legal system’ (Women’s Studies International Forum, 51) 31-41.

⁷⁶ Barnett B. ‘Perfect mother or artist of obscenity? Narrative and myth in a qualitative analysis of press coverage of the Andrea Yates murders’ (Journal of Communication Inquiry, 29(1)) 9-29.

⁷⁷ Crawford M. and Unger R. ‘Women and gender: A feminist psychology’ (New York, 4 Ed McGraw Hill).

⁷⁸ N 78 above

Gladys Kerubo (2013) confessed in tears to the murder of her daughter in an interview done by Hope Media Network.⁷⁹ Explaining that she did not intend to kill her daughter when disciplining her, there was a portrayal of a woman remorseful and in regret of what transpired. Most of the comments left by viewers sympathised with her situation. Nonetheless, another category of people harshly condemned her, asserting that she deserved to be in prison because she murdered her child.

Reflecting on all the case scenarios discussed in this section, one gets the hint that sentencing women to death who transgress traditional notions of femininity serves to reinforce gender norms as well as legitimise their capital punishment.

5. Implications of media coverage of women on death row cases

Press coverage of women on death row cases has the potential to influence legal outcomes, societal attitudes, and accused persons' perceptions of themselves. Research indicates that rulings and appeals can be biased because of media portrayals of women charged with capital offences.⁸⁰ When media coverage paints a bleak picture of a woman's character or crime, there is a likelihood that the media will sway public opinion and consequently influence legal proceedings. Scholars have remarked that when a case receives a large amount of media coverage, there is a tendency for judges to sentence more punitively, in comparison to when a case is less publicised.⁸¹ This phenomenon, known as 'media trial', can lead to a lack of leniency in sentencing, undermining the principles of fair and impartial justice.

Stigmatisation and social isolation of women on death row because of factors including negative media portrayal is a sad actuality. In an interview conducted by Citizen TV, an inmate on death row recounted how convicts who were 'condemned' were stigmatised and isolated by other convicts as well as the prison guards.⁸² Another inmate in Kodiaga Women's Prison spoke of how the 'condemned' were regarded as mysterious people and how this label made the prison community fear and shunned them.⁸³ In confirming the attitude toward women on death row, a prison guard stated that she was scared of the condemned since they were 'dangerous'. Isolation and stigmatisation are systemic and institutionalised, as evidenced by reports from the Kenya National Commission on Human Rights, which indicate that individuals on death row are not allowed to mingle with other prisoners.⁸⁴ It is critical to note at this juncture that families of women who have been sentenced to death are also stigmatised by society.⁸⁵ Isolation and stigmatisation of women on death row not only compound the psychological impact on the individuals but also hinder opportunities for rehabilitation and support.

⁷⁹ Hope Media Network, 'Why I killed my daughter' (4 October 2013) < <https://www.youtube.com/watch?v=sRiH3EhAnlw&pp=ygUYd2h5IGkga2lsbGVkiG15IGRhWdodGVy> > accessed on 14 November 2023.

⁸⁰ Capital Punishment in Context, 'Media influence in capital cases' 1.

⁸¹ Ibid.

⁸² Citizen TV Kenya 'Monday Special: Crimes of passion (26 July 2016) < <https://youtu.be/MCriFu4jtU0?si=tEMnYZ06nU4-OFL3> > accessed on 15 November 2023.

⁸³ Kenya National Commission on Human Rights, *The effects of death penalty in Kenya: Results of the Kenya National Commission on Human Rights (Second phase)* (December 2012) 5.

⁸⁴ Ibid.

⁸⁵ Kenya National Commission on Human Rights, 'The effects of death penalty in Kenya: Results of the Kenya National Commission on Human Rights (Second phase)' (December 2012) 7.

Negative media coverage has substantial and grave psychological impacts on women on death row.⁸⁶ The constant exposure to negative portrayals contributes to anxiety, depression, and a diminished sense of self-worth. This, among other things, dramatically impedes their ability to cope with the challenges of incarceration and legal proceedings. In an interview, one inmate disclosed that life ceased to have meaning when the Court passed their death sentence.⁸⁷ They continued to state that they considered themselves dead spiritually and mentally, adding that they were only waiting for their physical bodies to be given away.⁸⁸ This is a sentiment shared by many who are condemned, noting that there is no hope of having an ordinary life for them, even when their sentences are reduced to life sentences. The psychological toll on these women has led to some committing suicide.

Conclusively, media scrutiny greatly exacerbates the psychological burden of women on death row, increasing the likelihood of these women suffering from mental health and self-esteem issues. If it is inevitable for women on death row to have their sentences reduced, it is even harder for them to be pardoned or acquitted on appeal. Nonetheless, women facing capital offence charges could have their cases ruled in their favour and, therefore, be released from remand. What happens, then, when they get back to their communities?

Beatrice narrates how reintegrating into society was hard for her soon after she was acquitted of the murder of her boyfriend.⁸⁹ Intending to complete her high school studies, she struggled so much to get a school that would accept her. She revealed that she only got an opening after her father's friend recommended her to the principal of a particular school.⁹⁰ Finding a school aside, Beatrice had to persevere through severe stigmatisation and isolation in that school.⁹¹ She disclosed that her schoolmates constantly mocked and bullied her, and had it not been for the deputy principal and her class teacher, she would not have survived the agony.⁹² For women like Beatrice, reintegrating into society is a nightmare. Public perceptions, influenced by the media, create barriers to employment, housing, and community acceptance. This makes it a challenge for these women to rebuild their lives post-release.

Acknowledging that this paper has intentionally given much focus to negative media coverage and its consequences, it is crucial to note that the media, on certain occasions, provides positive press coverage of women on death row or accused persons. As Susan observes, the media, at times, may facilitate empathetic connections and may humanise and create compassion for an accused or condemned person, as it did with Karla Faye Tucker and Andrea Yates.⁹³

⁸⁶ Kenya National Commission on Human Rights, *The effects of death penalty in Kenya: Results of the Kenya National Commission on Human Rights (Second phase)* (December 2012) 9.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Shared Moments with Justus '16 year-old girl charged with murder while heavily pregnant' (8 December 2020) < <https://youtu.be/WontQmWA8q0?si=HQLkTWOonnIKzdiWt> > accessed on 12 November 2023.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Susan Bandes, 'Fear Factor: The role of media in covering and shaping the death penalty' (Ohio State Journal of Criminal Law) 593.

The case of *Truphena Aswani* can be argued to have been given positive press coverage owing to the excellent outcome of the case.⁹⁴ Technically, cases where the media highlights mitigating factors, rehabilitation efforts, or wrongful convictions can produce more favourable results. Responsible media reporting can contribute to reduced sentences, increased public support, and improved chances of successful reintegration.

6. Ethical responsibilities of media in press coverage of women on death row cases

Numerous legal instruments regulate media and media personnel, including the Constitution, the Kenya Information and Communications Act and the Media Council Act. Media regulatory bodies and the relevant legal instruments mandate media personnel to comply with media ethics.⁹⁵ In the context of press coverage of women on death row, journalists are obliged to present news with integrity and common decency, respecting the dignity and intelligence of the audience as well as the subject of the information.⁹⁶ The import of the section providing this is that the media is expected to respect the dignity of the women on death row or those facing capital offence charges. Many times, the press will forego this rule. The consequence is the dragging of their names and lives in mud, along with their dignity and respect.

Moreover, media personnel must balance the public's need for information against potential harm or discomfort.⁹⁷ The pursuit of news is not a license for arrogance or undue intrusiveness.⁹⁸ In many high-profile cases, media platforms intrude into the lives of the accused persons, even where the intrusion is unwarranted. For instance, there are cases where media personnel have gone after the families of accused persons intending to obtain personal information. This conduct is illegal and demonstrates unacceptable professional practice. Section 21 of the Code of Conduct for the Practice of Journalism in Kenya speaks to this by stipulating that the media shall not identify relatives or friends of persons convicted or accused of a crime unless reference to them is necessary for the full, fair, and accurate reporting of the crime or the legal proceedings.⁹⁹

The Code of Ethics for the Society of Professional Journalists mandates the media to balance a suspect's right to a fair trial with the public's right to know.¹⁰⁰ Negative media portrayal of a suspect facing a capital offence charge can negatively affect the accused's right to a fair trial. A biased ruling is likely due to media influence in the courtroom. Besides, the media and media personnel are expected to consider the long-term implications of the publication's extended reach and permanence.¹⁰¹ Thus, they ought to be careful with the content they choose to broadcast since their power of influence is enormous.

⁹⁴ See the author's argument in page 4 above.

⁹⁵ Media Council Act (Second schedule of the Media Council Act 2013: Code of Conduct for the Practice of Journalism in Kenya).

⁹⁶ Ibid.

⁹⁷ Society of Professional Journalists *Code of Ethics*, (6 September 2014).

⁹⁸ Ibid.

⁹⁹ Media Council Act (Second schedule of the Media Council Act 2013: Code of Conduct for the Practice of Journalism in Kenya) s 21.

¹⁰⁰ N 97 above

¹⁰¹ N 97 above

Section 2(1) of the Code provides that media personnel should determine news content solely through editorial judgment and not the result of outside influence.¹⁰² The decision to broadcast cases on women on death row should not primarily be because such coverage is popular among audiences, translating to more views and more profit or other hidden agendas. A journalist should resist self-interest or peer pressure that might undermine journalistic duty and service to the public.

Lastly, media personnel should avoid stereotyping.¹⁰³ Journalists should be cautious of reinforcing gender stereotypes, primarily when these stereotypes work to the disadvantage of the subject gender. In any case, the media should use its influential position to help break such stereotypes.

7. Conclusion

The media's influence on legal outcomes, stigmatisation, psychological well-being, and reintegration prospects for women on death row is an underrated issue. Negative media coverage can have detrimental effects on these vulnerable women. In light of this, media professionals must recognise the power they hold in shaping narratives and, subsequently, work toward a more informed, compassionate, and responsible portrayal of women facing the death penalty. Responsible journalism can challenge stereotypes, humanise the individuals involved, and significantly promote a more nuanced understanding of their circumstances.

¹⁰² N 99 above

¹⁰³ N 97 above

GENDER-BASED VIOLENCE: AN ANALYSIS OF MITIGATING FACTORS IN DEATH PENALTY SENTENCING FOR WOMEN

*Alex Tamei**

1. Introduction

The number of women facing the death penalty around the world is relatively small, and their pathways to incarceration and experiences in the legal system have received far less attention than those of men.¹⁰⁴ Research reveals that gender-based violence is a defining element in the profiles of women sentenced to death.¹⁰⁵ Many of these women have been convicted in the context of gender-based violence, particularly cases of murder in retaliation to intimate partner violence.¹⁰⁶ This linkage is particularly evident when examining the circumstances surrounding these women convicted of crimes related to the murder of family members, often attributed to GBV.¹⁰⁷

Elsy C. Sainna from ICJ Kenya highlights the prevalence of this pattern, shedding light on cases where women, many of whom are victims of domestic violence and intimate partner violence, resort to murder as an act of self-defence.¹⁰⁸ A similar pattern emerged in Uganda, where, as of November 2022, three women were on death row with similar circumstances.¹⁰⁹ In the United States, a majority of women on death row have experienced more than one incident of GBV in their lifetime.¹¹⁰ Research from the Cornell Centre on the Death Penalty Worldwide further underscores that the primary motive for women serving the death sentence are often convicted of murder, which is mainly intertwined with experiences of gender-based violence.¹¹¹

Consequently, the judicial system has often ignored the extensive trauma that the GBV victims have endured throughout their lives and its effects on their legal and moral culpability.¹¹² To this end, the circumstances leading to the women committing offences attracting the death sentence are often disregarded as mitigating factors.¹¹³ In the trial process, the prosecution often fails to present evidence of GBV in women's capital trials. When they do introduce such evidence, they fail to fully present the nature of the accused victimisation and the harm they have suffered as a result thereof.¹¹⁴ Moreover, prosecutors frequently rely on gendered tropes to discredit women's accounts of violence, such as childhood sexual abuse, rape, and intimate partner violence.¹¹⁵

¹⁰⁴ Sarah Babcock and Natalie Greenfield, 'gender violence, and the death penalty' 53 *California Western International Law Journal*, 2023 330.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ World Coalition Against the Death Penalty, 'Reflecting on the links between the death penalty and gender-based violence' *ICJ Kenyan section*, November 28, 2022. - < <https://icj-kenya.org/news/reflecting-on-the-links-between-the-death-penalty-and-gender-based-violence/>>

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ N 104 above

¹¹¹ N 107 above

¹¹² N 104 above

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Babcock and Greenfield, 'gender violence, and the death penalty' 333.

2. An analysis of the nexus between the death penalty and Intimate Partner Violence.

Women who experience intimate partner violence are often trapped in a cycle of abuse, fear, and despair.¹¹⁶ Some women, driven to the brink by relentless abuse, resort to retaliatory murder as an act of self-defence.¹¹⁷ However, the legal system often fails to recognise the full context of their actions. A significant gap exists in the legal system's understanding of the emotional and psychological toll that GBV takes on these women, which can lead to miscarriages of justice.¹¹⁸

In Kenya, for instance, the sentencing policy guidelines provide for a situational analysis of the death penalty. The guidelines assert that courts lack discretion in imposing mandatory death sentences, which may overlook the importance of considering individual circumstances for a fair and just sentencing.¹¹⁹ The guidelines also highlight concerns related to indeterminate imprisonment, stating that: *"...Some offenders imprisoned at the President's pleasure are held indeterminate with no recourse,"*¹²⁰ While the guidelines recognise the absence of law reform in the death penalty context, they do not provide a clear path for addressing this concern.¹²¹ The policies explicitly exempt children and pregnant women from the death penalty; the excerpt states: *"Children in conflict with the law cannot be subjected to the death penalty."*¹²²

The guidelines, however, do not expressly address other potentially vulnerable groups, such as individuals with mental health issues or, in this case, women who are victims of GBV.¹²³ The gaps in the legal framework regarding women facing the death penalty are further reflected in judicial decisions.

Women in conflict with the law, especially those accused of murder, often rely on the Battered Woman Syndrome (BWS) as a defence. It is rooted in the understanding that women who are victims of intimate partner violence experience severe psychological distress.¹²⁴ BWS is classified as a psychiatric condition, connecting a woman's exposure to violence with a deteriorating psychological state that impairs her ability to perceive or choose alternatives to violence.¹²⁵ Traditional use of BWS in defence of women accused of killing abusive partners, based on psychological distress from intimate partner violence, is outdated.¹²⁶ BWS mainly focuses on physical abuse, missing the significant impact of non-physical abuse.

¹¹⁶ Vito Zepinic, Battered Woman Syndrome: The Iceberg of Domestic Violence 14(1), *Beijing Law Review* March 2023.

¹¹⁷ *Ibid.*

¹¹⁸ N 115 above

¹¹⁹ Republic of Kenya Judiciary, Sentencing Policy guidelines, page 17.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ N 116 above

¹²⁵ N 116 above

¹²⁶ Babcock and Greenfield, 'gender violence, and the death penalty' 333.

Understanding patterns of coercion, even without physical abuse, is vital for grasping the mental health consequences of gender-based violence.¹²⁷ Traumatic experiences can isolate individuals, impair reasoning, and affect their intent for a crime.¹²⁸ Though not a complete defence, this understanding can influence jurors towards alternative sentences over the death penalty. The necessity for a paradigm shift in the analysis of circumstances of women facing the death penalty is displayed in the below two cases:

3. **Republic vs Truphena Ndonga Aswani**¹²⁹

In the case of *R v Truphena Ndonga Aswani*, where the accused was charged with murder. The circumstances, in this case, are that the accused killed her husband in self-defence due to the continuous chronic acts of violence meted out to her by her deceased husband. The Court, recognising the incidences of gender-based violence meted out to her, sentenced the accused to a non-custodial sentence of one day's imprisonment.

This case underscores the need for a nuanced approach to sentencing in cases involving self-defence and domestic violence, where the circumstances and the history of violence must be considered. It is an isolated case; however, it is a positive shift in jurisprudence as it assesses in depth the psychological state and trauma of individuals before sentencing.

This case is essential in consideration of GBV victims on death row as it is arguably the first instance where the Court took into consideration the magnitude of abuse and the effect of said abuse as a mitigating circumstance during sentencing. Through the Court's reasoning in this case, a formula of sorts can be created, to be applied to similar instances. The necessity for such a formula is represented in the following case study.

4. **Republic vs Ruth Kamande**¹³⁰

The accused, Ruth Wanjiku Kamande, was convicted of murder, an offence governed by section 203 of the Penal Code, which carries a mandatory death penalty. The sentencing judgment encompassed an assessment of various pertinent factors. Notably, Ms Kamande was accorded the status of a first-time offender by the state, and her youth was acknowledged, with claims that she was approximately 21 years old at the time of the crime. Furthermore, her period of pre-trial incarceration, which extended to 2 years and nine months, was considered.

The defence presented various mitigating factors, including the accused's newfound devotion to religion and her educational pursuits while in custody. The defence offered certificates attesting to her participation in theological courses, modelling, and paralegal training. Additionally, her defence emphasised her diverse talents in modelling, dance, poetry, scriptwriting, and her participation in State functions. It was underscored that she was disciplined and the sole financial support for her single mother.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ *Republic vs Truphena Ndonga Aswani*, Criminal case no. E011 of 2020, judgement of the High Court Siaya, 2021eKLR.

¹³⁰ *Republic v. Ruth Wanjiku Kamande*, Criminal Case No. 93 of 2015, Judgement of the High Court,

Reference was made to a Supreme Court decision, Petition No. 15 of 2016, which declared the mandatory death penalty unconstitutional, thereby granting courts the authority to explore alternative sentencing options.

Conversely, the prosecution contended that the victim was an orphan and the sole breadwinner for his family. Ruth was portrayed as lacking remorse, and her claim that the victim was HIV positive was dismissed. The sentencing judge drew guidance from the Supreme Court's directive in the case of *Francis Kariko Muruatetu & another v Republic*, which delineated the parameters for considering mitigating factors in murder cases. These factors encompassed the offender's age, first-time offender status, the potential for remorse, and the prospect of rehabilitation and societal reintegration.

5. **Comparative analysis of Republic vs Truphena Ndonga Aswani and Republic vs Ruth Kamande**

The discrepancy between these two cases lies in how the courts treated mitigating factors. *Truphena Ndonga Aswani's case* highlights a more compassionate and nuanced approach, taking into account the history of abuse and domestic violence. The Court considered her self-defence in the context of her traumatic experiences, resulting in a non-custodial sentence. In contrast, *Ruth Kamande's case*, despite the presentation of multiple mitigating factors, ended with a mandatory death penalty sentence. The Court emphasised the gravity of the crime and the need for deterrence, even in the presence of potential factors indicating rehabilitation and remorse.

This underscores the inconsistency in how courts handle similar cases and the varying degrees of importance placed on mitigating factors. It also highlights the potential need for a more standardised approach to sentencing in cases involving murder, especially when there are mitigating factors that may warrant a less severe penalty. The discrepancy in mitigation approaches underscores the importance of developing clear guidelines or formulas to ensure more consistent and fair sentencing in such cases.

6. **Recommendations**

a. ***Increasing availability of legal services***

Modern constitutions enshrine the right to legal representation at state expense, particularly in cases where the death penalty is entrenched in penal laws.¹³¹ In the realm of legal representation, it is imperative for several measures to ensure that women facing the death penalty receive the support they need.¹³² The establishment of public defender programs is essential to guarantee access to legal representation for indigent defendants, especially women who find themselves in dire circumstances facing the death penalty.¹³³ Currently, only South Africa and Nigeria have established public defender programs; otherwise, public interest law firms, state-funded legal clinics, or pro bono representation by practitioners fill the remaining gaps of indigent representation.¹³⁴

¹³¹ Andrew Novak, *The Death Penalty in Africa: Foundations and Future Prospects*, Palgrave Macmillan, New York 2014, 80.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

In regions where resources are scarce, innovative approaches involving legally trained non-lawyers, such as paralegals or law students, assist in providing legal aid.¹³⁵ This approach ensures that legal assistance is extended to women who do not have access to legal representation, thus reducing their vulnerability within the legal system.¹³⁶

b. *Gender-sensitive Legal Training*

Understanding the dynamics of intimate partner violence is vital for legal professionals, including judges, lawyers, and law enforcement officers, to gain a deep understanding of the dynamics of intimate partner violence.¹³⁷ It goes beyond the surface and delves into the intricate factors that influence women's actions in such cases. This comprehension is essential for preventing misconceptions and biases in the legal process.¹³⁸ Gender-sensitive legal training equips legal professionals with the tools to recognise the impact of trauma on these women and consider it as a mitigating factor during legal proceedings.¹³⁹ This recognition is pivotal in ensuring that the legal system is responsive to the specific needs of these survivors.¹⁴⁰

Gender-sensitive legal training challenges stereotypes and biases within the legal system. It fosters an environment where the legal process is not influenced by preconceived notions about women's roles or behaviour in abusive relationships.¹⁴¹ This training actively works to eliminate victim-blaming and ensure that women are treated with the respect and dignity they deserve.¹⁴² Gender-sensitive legal training creates a legal environment that is supportive of women facing the death penalty in cases of retaliatory murder due to intimate partner violence.¹⁴³ It empowers legal professionals to navigate these complex cases with empathy and fairness, recognising these women's unique challenges.¹⁴⁴

c. *Civil Society intervention*

In the realm of addressing the plight of women facing the death penalty in cases of retaliatory murder due to intimate partner violence, the role of civil society is pivotal. Civil Society Organisations, comprising non-governmental groups, activists, and concerned individuals, can make a substantial impact through multifaceted interventions to achieve justice and support for these vulnerable individuals.¹⁴⁵

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice 9 (2) Michigan Journal of Gender & Law, University of Wyoming College of Law 2003*,209.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ UNODC, *Gender-related Judicial Integrity Issues, Global Judiciary Integrity Network 24 February 2020* 5.

¹⁴¹ Ibid.

¹⁴² Andrew Novak, *The Death Penalty in Africa: Foundations and Future Prospects*, Palgrave Macmillan, New York 2014 ,80.

¹⁴³ UNODC, *Gender-related Judicial Integrity Issues, Global Judiciary Integrity Network 24 February 2020* 25.

¹⁴⁴ Ibid.

¹⁴⁵ N 142 above .

Civil society can champion the recognition of self-defence as a valid legal argument in these cases. Many women who find themselves in such situations are acting to protect their own lives or their children's lives.¹⁴⁶ Advocating for self-defence as a legitimate legal defence is crucial to ensure that these women are not unjustly penalised for protecting themselves and their families.¹⁴⁷

Another critical facet is the consideration of past trauma as a mitigating factor during legal proceedings. The cumulative trauma experienced by victims of intimate partner violence can have a profound impact on their actions.¹⁴⁸ Civil society organisations can push for the legal system to recognise the lasting effects of trauma, which can help ensure fairer outcomes in Court. Survivor-led organisations and networks are a powerful force for change in these circumstances. Civil society can bolster their efforts in several ways. These organisations empower women to share their stories, offering a platform for their voices to be heard.¹⁴⁹ Survivors' narratives are invaluable in raising awareness about the issue and humanising the individuals affected. These women share their experiences to help dispel misconceptions and provide insights into their challenges.¹⁵⁰

¹⁴⁶ World Coalition Against the Death Penalty, 'Reflecting on the links between the death penalty and gender-based violence' *ICJ Kenyan section*, November 28, 2022. - < <https://icj-kenya.org/news/reflecting-on-the-links-between-the-death-penalty-and-gender-based-violence/>>

¹⁴⁷ Runyan CW, Casteel C, Moracco KE, Coyne-Beasley T. US women's choices of strategies to protect themselves from violence.

¹⁴⁸ McColgan, Aileen. "In Defence of Battered Women Who Kill." *Oxford Journal of Legal Studies*, vol. 13, no. 4, 1993, pp. 508–29.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

GENDER-BASED VIOLENCE: THE NEXUS BETWEEN PSYCHOLOGICAL ABUSE AND PROVOCATION

*Patience Chepchirchir**

1. Introduction

A study conducted by ICJ Kenya in 2022 and data from Kenyan prisons indicates that a large percentage of women on death row who have been charged and convicted of murder were attributed to be victims of gender-based violence.¹⁵¹ ICJ Kenya Executive Director Ms Elsy Sainna highlights the case of many women being victims of intimate partner violence committing murder as a form of self-defence during.¹⁵²

The European Commission explains gender-based violence as violence directed against a person because of that person's sexual orientation or violence that affects persons of a particular gender disproportionately.¹⁵³ Women and girls are more prone to these acts of violence as they are the most vulnerable and at-risk members of society. The Declaration on the Elimination of Violence Against Women defines «violence against women» as any act of gender-based violence that results in or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.¹⁵⁴

2. Understanding the scope of abuse against women

Abuse is spoken about in murmurs; one would almost think it is taboo. One would think it is practically non-existent due to the advancement in equality and human rights. There is little research on these phenomena, which affect women daily. The parameters for physical and sexual abuse are all clearly laid down. Physical abuse includes slaps, punches, choking and kicks, and beating with sticks, clubs or whips. The use of fire or acid to inflict pain and long-term harm, through to homicide or any action to inflict bodily harm.¹⁵⁵ On the other hand, rape, sexual harassment or coercion by a party lording power over the victim to engage in sexual acts or any unwarranted sort of sexual behaviour or advances would broadly describe sexual abuse.

¹⁵¹ N 146 above

¹⁵² Ibid.

¹⁵³ European Commission, What is Gender Based Violence (European Commission) (accessed on 28/10/2023) <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-based-violence/what-gender-based-violence_en#:~:text=Gender%2Dbased%20violence%20is%20violence,of%20a%20particular%20gender%20disproportionately/>.

¹⁵⁴ Declaration on the Elimination of violence against Women 1993, Article 2.

¹⁵⁵ Amnesty International, Women, violence and health, (February 2005) pp

A gray area is, however, seen in the definition of psychological abuse because perception varies, making it a subjective issue. However, that should not impede defining it. Black's Law Dictionary refers to it as mental abuse or emotional abuse.¹⁵⁶ That being said, psychological abuse would be any behaviour aimed at causing mental harm and or distress to the victim. The scope of this form of abuse is extensive, ranging from threats of violence, deliberate public humiliation, name calling with the aim of degradation, excessively controlling behaviour, manipulation, a phenomenon that has recently come to be known as gaslighting and much more. It could also be argued that psychological abuse is a direct result of physical and sexual abuse, a classic example of a cause-and-effect reaction.

A study by Albert Biderman conducted on released U.S. prisoners of the Korean War was used to explain the cycle of torture. A link can be established to draw a comparison to the dynamics of violence against women¹⁵⁷. For instance, in cases of isolation, where the abuser deliberately isolates the victim from their friends and family by consciously controlling the victim's time, the physical environment and, in some cases, finances.¹⁵⁸ It then develops into the monopolisation of perception, where the abuser sabotages or disables the victim's opportunities to work or have interests outside the relationship and failure to comply results in an abusive episode.¹⁵⁹ Third would be inducing physical and mental exhaustion by giving the victim a multitude of tasks or picking random fights.¹⁶⁰ Four, threats are unpredictable responses with drastic mood changes or sudden emotional outbursts leading to terror and fear as to what could happen next.¹⁶¹

In the fifth instance is the occasional indulgences by the abuser to keep the victim hooked. The abuser reverts to their original behaviour before the abuse, promising change and appears to be increasingly loving, supportive and apologetic, all in a façade to keep the victim by their side.¹⁶² The sixth stage is demonstrating omnipotence by reminding the victim of their dependency on the abuser and that they have no one else to turn to. That develops further into degradation characterised by verbal assaults, berating, belittling, criticism and humiliation.¹⁶³ Lastly would be enforcing trivial demands on the victim whereby failure to meet them is not taken kindly by the abuser.¹⁶⁴

From the above instancing, these victims, battered women, have learned to be attentive to the signs of escalating violence and to modify their behaviour in response to these danger signals to pacify violent husbands.

¹⁵⁶ 'How to sue for mental abuse' The law dictionary <<https://thelawdictionary.org/article/how-to-sue-for-mental-abuse/>>

¹⁵⁷ Marisa Silvestri and Chris Crowther -Downey, Gender and Crime (1st edn Sage publications 2008) pp 101.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

Subtle motions or threats that might not signify danger to an outsider or a trier of fact acquire added meaning for a battered woman whose survival depends on the intimate knowledge of her assailant.¹⁶⁵ Pushed to the corner, humiliated and devastated, like a wounded animal, her instinct would be to fight back to put an end to this nightmare and restore a modicum of her dignity. If such a victim is to commit a heinous crime such as murder, should the Court take into consideration the abuse she suffered?

A look at 3 cases will help draw a picture as to whether there is any connection between psychological abuse and provocation and whether courts should consider such instances as mitigating factors during trial.

3. The intersection between emotional abuse and provocation

In *Smiti Manju Lakra v State of Assam*, where the accused's husband came home in his usual drunken state and started beating the accused with a lathi (a kind of stick), unable to bear the attack as she usually did, she snatched away the lathi her husband was using to assail her. She turned it on him, which resulted in his death due to the injuries he sustained.¹⁶⁶ The Court considered the issue of grave and sudden provocation as an exception in determining whether the accused had committed murder or culpable homicide provided for under Section 300 of the Indian Penal Code¹⁶⁷. The effect of this is that there is an exception to the murder charge where the accused was deprived of his power to self-control and, out of extreme anger, caused the person's death. An essential requisite in this condition is that the provocation must be grave and sudden, rendering a person incapable of reasoning.¹⁶⁸

The Court further stated that at the same time, there may be circumstances that existed in a case before the crime of murder in which the Court could conclude that the deceased had committed an act that was so great in the deceased's mind causing the accused to lose his mental balance and provoked a fatal attack. Courts recognise these precedents as culpable homicide, which is not comparable to murder and impose a lesser sentence for the crime because they notionally believe that the deceased facilitated his death by prompting the defendant to have a lethal reaction.¹⁶⁹ In this matter, there was an appeal where the Court overturned her previous sentence, life imprisonment, to a fine worth Rs 1000, equivalent to a 5-year jail term.

In *R v Ahluwalia*, the accused suffered years of physical, psychological and sexual abuse from her husband and, as a result, attempted suicide twice.¹⁷⁰ The abuse was so dire that Croydon County instituted two injunctions barring the deceased from further harming the accused.¹⁷¹

¹⁶⁵ Elizabeth M Schneider, *Battered Women and Feminist law making* (Yale University Press 2000) pp 634.

¹⁶⁶ *Smiti Manju Lakra v State of Assam* [appeal 116 of 2007].

¹⁶⁷ Section 300 of the Indian Penal Code Act No. 45 of 1860.

¹⁶⁸ Nidhi Pandey, Whether the defence of grave and sudden provocation be applied in the cases of prolonged provocation, September 2 2022, < <https://www.scconline.com/blog/post/2022/09/02/whether-the-defence-of-grave-and-sudden-provocation-be-applied-in-the-cases-of-prolonged-provocation/#fn3> >.

¹⁶⁹ *Smiti Manju Lakra v State of Assam* [appeal 116 of 2007] para 73.

¹⁷⁰ *R v Ahluwalia* [1992] 4 ALL ER 889.

¹⁷¹ *Ibid.*

The accused chose not to terminate her union with her deceased husband due to pressure from her family and for the sake of her two sons born before the marriage.¹⁷² She attempted to talk to her husband, who threatened to beat her if she failed to pay the phone bill. He also threatened to burn her face with a hot iron. Fretted by her husband's refusal to speak to her, the accused, who had bought some caustic soda and a can of petrol a few days before, mixed these two substances to form napalm¹⁷³ she doused the room with the mixture and threw a candle into the room, which killed her husband. As a result, she was convicted of murder.¹⁷⁴

On appeal, her lawyers argued that the Court did not adequately consider the meaning of provocation and that the judge had erred in asking the jury to consider the accused's characteristics.¹⁷⁵ The Court believed that for provocation to be considered, there must exist sudden and temporary loss of control, and that was not applicable in this case as the accused had a thought-out plan. It was also noted that the accused had a moment to calm down between when the provocation occurred and when the act was committed.¹⁷⁶ The Court found diminished responsibility, lessening her sentence to manslaughter.¹⁷⁷

In the Kenyan context, in *Republic v Elizabeth Kemunto Ooga*, the accused had a disagreement with the deceased, which resulted in a physical altercation, leading to the accused stabbing the deceased with a knife.¹⁷⁸ The Court was convinced that she was utterly overpowered by the deceased, lost the power of self-control and was provoked into action. As she was being assaulted, the accused person must have acted in the heat of passion, as it is clear there was no time to cool down.¹⁷⁹ The Court established the provocation manifested in this case, thus substituting the charge of murder with manslaughter.¹⁸⁰

From these cases drawn from various jurisdictions, it is clear that prolonged instances of abuse against women can ignite in them a need for self-preservation that they believe at the moment can only be achieved by killing their abuser. The courts agree that for provocation to be considered, the deceased needs to have placed the accused in a situation that would cause loss of self-control and that the mental state of the accused culminating from the deceased's acts towards them ought to be committed in the heat of passion before there is time to cool off.

¹⁷² Ibid.

¹⁷³ R v Ahluwalia [1992] 4 ALL ER 889.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Republic v Elizabeth Kemunto Ooga, Criminal case 20 Of 2015, Judgement of the High Court at Migori, Para 4.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

4. Psychological abuse of women as a mitigating circumstance during sentencing

Courts should consider the long-standing implications of abuse to the victim during sentencing. Most of these women are most likely to have developed psychological disorders such as Post-Traumatic Stress Disorder (PTSD), anxiety, depression and much more. A purely custodial term might serve more of a corrective purpose or would be a deterrent, but it would not do much to rehabilitate the victim.

The Sentencing policy guidelines in Kenya elaborate on the approach the courts should undertake during sentencing. First, judicial officers should consider the sentencing option laid out by the specific statute creating the offence¹⁸¹ and then invoke their discretion in deciding whether to give a custodial or non-custodial sentence.¹⁸²

Paragraph 23.8 provides mitigating circumstances to mean instances that warrant a more lenient sentence. They include a great degree of provocation, commitment to repairing the harm caused by the offender's conduct, mental illness, age, being a first offender, remorsefulness, commission of a crime in response to gender-based violence, pleading guilty at the earliest opportunity and cooperation with the prosecution and the police.¹⁸³ From the premise of the sentencing guidelines, the Court can be convinced to lower the sentence of an accused person if there were extreme cases of provocation or if it was a result of gender-based violence. As earlier mentioned, years of abuse by their tormenters leave these battered women in great mental distress, which could be argued to show that during the commission of the crime, they had impaired judgment because of trauma.

A prime example of the Court's progressive approach to sentencing such victims would be in *State v Truphena Ndonga Aswani*, where the accused, on appeal of her case, was sentenced to a non-custodial sentence. The Court considered that she was a victim of domestic violence and had killed her husband in self-defence and that the situation required her to act in the way she did. The trial judge also recognised the need to address domestic violence and the need to treat the victims as such, not just as accused persons, and consider the impact of such abuse.¹⁸⁴

Courts need not forget that in as much as these women are offenders, they are also victims in need of rehabilitation to aid in their re-entry back into society after they have served their sentences. Court-mandated mental assessments during their sentence and visits to psychiatrists and psychologists would be a stride in the right direction in ensuring this is achieved.

¹⁸¹ The Judiciary, Sentencing policy Guidelines pp 5.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ Republic v Truphena Ndonga Aswani, Criminal case no. E011 of 2020, judgement of the High Court of Siaya.

WOMEN AND THE DEATH PENALTY: INTERSECTIONAL DISCRIMINATION IN THE JUDICIAL PROCESS.

*Stella Cherono**

1. Introduction

Advocates, activists, and scholars have long neglected the plight of women facing capital punishment, whose unique needs and challenges are often overlooked in criminal legal systems designed by and for men and are not gender-responsive.¹⁸⁵ The criminal justice system has historically been created by men and for men, which has often meant that laws and policies fail to consider the pathways to female incarceration and their mitigation.¹⁸⁶ Women encounter particular challenges in all stages of the criminal justice system due to the male-dominated and male-oriented design and delivery of the criminal justice system.¹⁸⁷ Women in contact with the law, specifically women sentenced to death, experience intersectional discrimination. This discrimination is based on gender stereotypes, stigma, harmful and patriarchal cultural norms, and gender-based violence. Certain factors affect women differently and disproportionately than men; conversely, Courts often disregard these factors.¹⁸⁸

Understanding the gendered pathways to offending and imprisonment is crucial to achieving a gender-sensitive perspective, which begins with the recognition that criminal codes can be inherently discriminatory towards women. Identified ways of women into crime include economic marginalisation, arrest histories, spousal abuse, cultural and societal norms, and marital problems.¹⁸⁹ While incarcerated, both women and men face a host of concerns, which include mental health issues, addiction, a lack of educational and vocational preparation, and histories of violence. However, research demonstrates that women suffer from these issues at significantly higher rates than men.¹⁹⁰ The plight of these women is often overlooked as their distinctive needs and challenges are not considered in criminal legal systems. This paper will highlight how women on death row face intersectional discrimination throughout their trial process, from the point of arrest to death row.

2. Pre-trial and Investigation stage

Intersectional discrimination manifests throughout the entire criminal trial process leading up to the death sentence upon conviction and even while on death row. The crimes for which women are condemned to death reveal patterns connected to gender inequality¹⁹¹ and gender bias is present at the investigation stage.¹⁹² For instance, women accused of

¹⁸⁵ Cornell law school, 'The Alice project', 2020.

¹⁸⁶ N 140 above

¹⁸⁷ N 140 above

¹⁸⁸ Sarah Babcock, Natalie Greenfield, 'Gender violence and the death penalty', California Western International Law Journal, 73.

¹⁸⁹ Caroline Agboola, Erasmus Kofi Appiah, Helen Namondo linonge-Fontebo, 'Women's pathways into crime and incarceration: Insights from South Africa', Cogent Social Sciences, vol 8, 2022.

¹⁹⁰ Jennifer K. Wesley, Susan C. Dewey, 'Confronting gendered pathways to incarceration: Considerations for reentry programming', social justice, vol. 45.

¹⁹¹ Penal Reform International, Cornell Centre on the death penalty, 'A factsheet on prison conditions for women facing the death penalty', 2018, 2.

¹⁹² World Coalition Against the Death Penalty, 'Making gender discrimination in capital punishment visible',

committing offences attracting the death sentence are often not accorded the right to communicate with an advocate or any other person whose assistance is necessary.¹⁹³

3. Trial stage

Many women have been convicted and sentenced to death in unfair trials that have often failed to follow due process or consider mitigating factors, such as long-term abuse, violence, and sexual assault.¹⁹⁴ By sentencing these women to death, justice systems around the world are not only perpetuating an abhorrent and cruel punishment, but they are also making women pay the price for authorities' failures to address diverse forms of discrimination.¹⁹⁵ In addition, a lack of transparency around the use of the death penalty means the cases we know are just the tip of the iceberg.¹⁹⁶ This is attributed to the fact that published court cases are difficult to access, and few death penalty scholars have written about the topics of women on death row worldwide.¹⁹⁷ The failure of authorities to act on specific complaints and end discriminatory practices has created a culture of abuse of women on death row, forcing them to continue enduring further marginalisation. Many women cannot access a fair trial at the trial stage due to a lack of or minimal financial resources¹⁹⁸ moreover, a majority of the women on death row are from ethnic and racial minorities and are non-literate.¹⁹⁹

According to the U.N. Office of the High Commissioner for Human Rights, harsh socio-economic deprivation has an adverse impact on the ability of women to gain access to justice on an equal basis with men.²⁰⁰ Additionally, the vast majority of women on death row are indigent, which directly affects the quality of legal representation they will receive.²⁰¹ Defence against a capital charge requires a well-trained and prepared lawyer, but most women cannot afford such a lawyer, forcing them to rely on overstretched legal aid.²⁰²

4. Sentencing stage

Most women on death row have been sentenced to death for the crime of murder in the context of gender-based violence.²⁰³ Women facing capital prosecutions arising out of domestic abuse suffer from gender discrimination on multiple levels.²⁰⁴

¹⁹³ Article 49 (1) (c), Constitution of Kenya, 2010

¹⁹⁴ Amnesty International, 'World day against the death penalty: Women on death row face despicable discrimination', 2021.

¹⁹⁵ Rajat Khosla, Amnesty International's senior director for research, advocacy and policy, 'Women on death row face despicable discrimination', speech ahead of the World Day Against the Death Penalty, 2018.

¹⁹⁶ Ibid.

¹⁹⁷ N 104 above

¹⁹⁸ World Coalition Against the Death Penalty, 'Making gender discrimination in capital punishment visible', 2023.

¹⁹⁹ Ibid.

²⁰⁰ UN Office of the High Commission for Human Rights, 'Death penalty disproportionately affects the poor', 2017.

²⁰¹ Delphine Lourtau, Sharon Pia Hickey, 'Judged for more than her crime: A global study of women facing the death penalty', penal reform international, 2018.

²⁰² Ibid.

²⁰³ Penal Reform International, Cornell Centre on the death penalty, 'A factsheet on prison conditions for women facing the death penalty', 2018, 2.

²⁰⁴ Ibid.

At the sentencing stage, gender-related antecedents and circumstances of the crime, such as the history of gender-based violence, are not considered.²⁰⁵ Courts do not routinely consider abuse, gender-based violence, and trauma as mitigating factors during sentencing.²⁰⁶

In Egypt, for instance, prosecutors typically ignore women's experience of gender-based violence and discrimination that they are subjected to from various angles in making decisions.²⁰⁷ In mandatory death penalty jurisdictions such as Tanzania, Nigeria, Ghana, Iran and Malaysia, a woman's experience of childhood sexual abuse, rape, and intimate partner violence is considered irrelevant to a court's sentencing decision, which is automatically imposed upon convictions of certain crimes.²⁰⁸ Intimate partner violence would only be relevant in guilt-phase defences such as provocation or self-defence. Still, they have a high burden in establishing that their use of lethal force was justifiable.²⁰⁹

5. Post-trial stage

Once in prison, women's specific needs, including sexual and reproductive health, medical and mental health care, protection from gender-based and sexual violence, and substance use harm reduction services, are frequently ignored. This is attributable to gender discrimination and stereotypes of women embraced by the criminal justice system.²¹⁰ This ignorance is even more pernicious in the case of women on death row.²¹¹ Most facilities are designed with the majority male population in mind; the unique needs and vulnerabilities of women are overlooked.²¹² Detention conditions in most states that retain the death penalty fall far short of the minimum standards. Yet, women tend to remain on death row for increasingly extended periods in prisons that are not designed for women generally.²¹³

Nandana Manatunga of ICJ highlights this situation in Sri Lanka by noting that women prisoners live in tiny cells, are given thin mats to sleep on and have no access to hygiene products. Furthermore, the temperatures in unventilated rooms reach dangerously high levels, and visits are limited to one per year.²¹⁴ The prison staff is mixed, and this situation exposes women on death row to ongoing risks of gender-based violence perpetrated by male prison staff, such as abusive searches, physical and psychological violence and rape.²¹⁵ This situation cuts across African countries.²¹⁶

²⁰⁵ World Coalition Against the Death penalty, 'Making gender discrimination in capital punishment visible', 2023.

²⁰⁶ Ibid.

²⁰⁷ Babcock, Greenfield, 'Gender violence and the death penalty', 69.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Olivia Pope, 'Popular as a victim, forgotten as a defendant', Penal Reform International, 2013.

²¹¹ Ibid.

²¹² Penal Reform International, Cornell Centre on the death penalty, 'A factsheet on prison conditions for women facing the death penalty', 2018, 3

²¹³ Ibid.

²¹⁴ World Coalition Against the Death Penalty, 'Reflecting on the links between the death penalty and gender-based violence', ICJ Kenya, 2022.

²¹⁵ N 22 above

²¹⁶ Penal Reform International, Cornell Centre on the death penalty, 'A factsheet on prison conditions for women facing the death penalty', 2018, 3.

In Sierra Leone, there are reports that prison guards and other prisoners abuse female prisoners with mental health disorders.²¹⁷ In Tanzania, there are some cases where predatory and arguably coercive relationships ensue; women on death row may even be required to perform sexual acts to receive necessities, such as food.²¹⁸

In a survey conducted by the Kenya National Commission on Human Rights, inmates on death row revealed that the high security around death row convicts makes them feel discriminated against and isolated, as they are not even allowed to interact with other prisoners.²¹⁹ They are stigmatised and may face rejection from their families and communities, which causes them to suffer from mental and psychological torture. Once the death penalty is passed, most of their families abandon them and never visit them as these families regard them as 'dead' already.²²⁰

6. Conclusion

This article exposes the complex and overlapping forms of discrimination women on death row face and how it intersects with their multiple social identities. An intersectional analysis is a critical tool in challenging how discrimination is perceived by society and at any legal level, as it helps in making the experiences of women on death row visible and the particular vulnerabilities they may face.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Kenya National Human Rights Commission, 'Effects of death penalty in Kenya', 2012, 5.

²²⁰ Ibid.

JUSTICE UNDER SCRUTINY: INTERROGATING EMERGING JURISPRUDENCE ON INTIMATE PARTNER VIOLENCE AND THE DEATH PENALTY IN KENYA.

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1. Introduction

Intimate partner relationships may be passionate to the point that they may brew positive outcomes in good times and extreme negativity in hard times. Intimate partner violence and battered woman syndrome go hand in hand. In Kenya, Intimate Partner Violence (IPV) is mainly presented as domestic violence. The Protection against Domestic Violence Act defines domestic violence as violence against a person, or threat of violence or of imminent danger to that person, by another individual with whom that person is, or has been, in a domestic relationship.²²¹ IPV can have psychological effects on victims, thus leading to the commission of offences against their partners. More often than not, the victims of IPV tend to be women.

Statistics from the Kenya National Demographic Health Survey 2022 indicate that marital status is linked to experiences of violence against women. Moreover, the most commonly reported perpetrator of physical violence among women who have ever been married or ever had an intimate partner was their current husband or intimate partner (54%), followed by a former husband/intimate partner (34%)²²².

2. Case study: Republic V Ruth Kamande

In a case of intimate partner violence, Ruth Kamande stabbed her boyfriend, Farid Mohamed Halim, on 25 September 2015.²²³ As indicated in her statements, the accused claimed to have suspected infidelity, which led with the deceased. In addition, she also stated a history of assault and the possibility of HIV infection by her deceased boyfriend.²²⁴ After a heated argument, Ms Kamande, overcome with passion, stabbed her boyfriend with a knife 25 times, leading to his death. The accused was convicted of murder and sentenced to death.²²⁵

This is a classic case of intimate partner violence. Intimate partner violence manifests from one person to another within an intimate relationship that causes physical, sexual or psychological harm where the partner in question can be a current or former spouse or a partner.²²⁶ In dealing with intimate partner violence, the courts, in an almost similar case, *Republic vs Truphena Ndonga Aswani*, considered the history of gender-based violence occasioned on the accused by her deceased husband. The Court sentenced her to a one-day non-custodial sentence.²²⁷

²²¹ Protection against Domestic Violence Act 2015, Section 3(2).

²²² <https://dhsprogram.com/pubs/pdf/PR143/PR143.pdf>

²²³ Republic vs Ruth Kamande (2020) eKLR.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ World Health Organisation, 'Intimate partner violence', <[Violence Info – Intimate partner violence \(who.int\)](#)> accessed on 08 November 2023.

²²⁷ Republic vs Truphena Ndonga Aswani, [2020] eKLR.

In the case of Ruth Kamande, however, the battered woman syndrome was not brought into consideration in the trial court.

The analysis below will critically examine the appeal developments in the Republic vs Ruth Kamande case with the aim of creating a nexus between gender-based violence and the death penalty. It further seeks to interrogate whether the Supreme Court will overturn the death sentence in this case.

3. Interrogating Intimate Partner Violence and the death sentence.

In Ruth Kamande's case, her statements reveal a narrative of threats and attacks, suggesting a backdrop of potential intimate partner violence. The accused's assertions indicate not only suspicions of infidelity but also a history of earlier arguments and assault.²²⁸ Crucially, the absence of *mens rea* in Ruth's decision to fatally attack her partner points to the potential influence of psychological distress, a facet often overshadowed in legal analyses. Psychological or emotional manipulation can inflict trauma, prompting extreme reactions in self-defence, a phenomenon commonly associated with the battered woman syndrome.²²⁹ Examining the mitigating factors and *mens rea* in this case, Ruth Kamande emerges as a first-time offender at 21 years of age during the commission of the crime.²³⁰ Her remorsefulness, willingness to plead guilty to manslaughter, and a context of domestic and gender-based violence further illuminate the complex circumstances surrounding the case.

As the Supreme Court prepares to analyse and provide guidance on battered woman syndrome and self-defence as mitigating factors, the information above emphasises the effects of disregarding the aspects of psychological violence in the initial proceedings. Failure to recognise the potential influence of psychological trauma and the battered woman syndrome may have led to an incomplete understanding of Ruth Kamande's actions. The Supreme Court's forthcoming decision has the opportunity to rectify this oversight, setting a landmark precedent for the consideration of similar circumstances, particularly for women facing the death penalty.

4. Recommendations.

As the issues in *Republic vs Ruth Kamande* will be canvassed in the Supreme Court, some of the considerations the apex court should consider include the social impact. *Republic vs Truphena Ndonga Aswani* developed a landmark decision on gender-based violence and the death sentence for women.²³¹ It came in as a saviour for women who have constantly faced gender-based violence and ended up inflicting harm or killing their partners because of the repeated abuse they face.

²²⁸ Republic vs Ruth Kamande (2020) eKLR.

²²⁹ Republic vs Truphena Ndonga Aswani, (2020), eKLR.

²³⁰ Republic vs Ruth Kamande (2018) eKLR.

²³¹ Republic vs Truphena Ndonga Aswani, (2020) eKLR.

In this regard, If the Supreme Court upholds the current jurisprudence on battered women and interprets it further, it will help influence how society views gender-based violence and take into account the psychological effects of constant battery as a mitigating factor. Moreover, the Court will also be exercising its mandate of transformative constitutionalism.

5. Conclusion

We cannot escape the gender factor when it comes to the commission and sentencing of offenders. In many cases of women who were sentenced to death, there was a lack of adequate protection against gender-based violence and other forms of discrimination before the crime was committed.²³² Globally, the major crimes that get women convicted to death are murder, drug offences, sexual immorality, terrorism and witchcraft.²³³ More often than not, the charges do not consider circumstances arising from gender-based discrimination.²³⁴ In regards to the analysis of women on death row, a majority of them are convicted on account of the commission of murder in the context of intimate partner violence.²³⁵

In a quest to abolish the death penalty in Kenya, Courts should consider gender-based violence as a mitigation circumstance during sentencing because, more often than not, women commit murder with no intention. In addition, the Supreme Court should further give direction on how to handle mitigating circumstances of self-defence and battered woman syndrome.

²³² Amnesty International, 2021 World Day against the death penalty, 'The additional burden of the death penalty on women'.

²³³ World Coalition Against the death penalty, 'Women sentenced to death: An invisible reality', 5.

²³⁴ World Coalition Against the death penalty, 'Women sentenced to death: An invisible reality', 5.

²³⁵ ICJ-Kenya, 'Reflecting on the links between the death penalty and gender based violence', [Reflecting on the links between the death penalty and gender-based violence - ICJ Kenya \(icj-kenya.org\)](https://www.icj-kenya.org/reflecting-on-the-links-between-the-death-penalty-and-gender-based-violence) Accessed on 15 October 2023.

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