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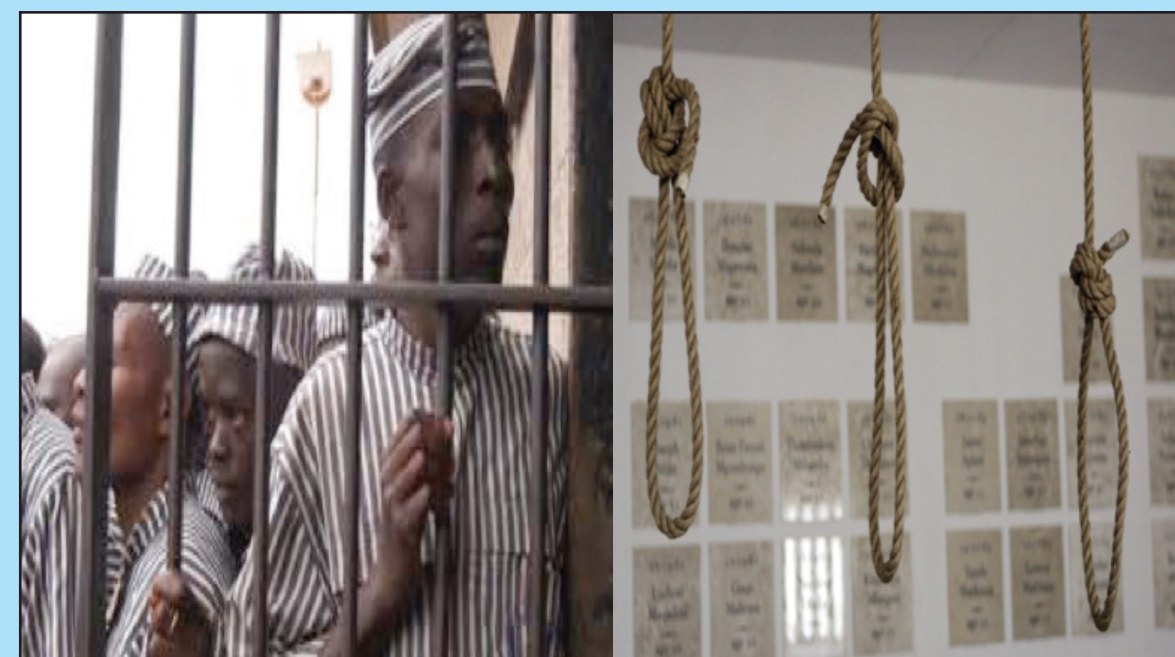


NATIONAL CRIME RESEARCH CENTRE

*Fighting Crime through Research*



## PERCEPTIONS ON CAPITAL OFFENCES AND PUNISHMENT IN KENYA



Dickson Gitonga Njiru

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PERCEPTIONS ON CAPITAL OFFENCES AND PUNISHMENT IN KENYA

# **NATIONAL CRIME RESEARCH CENTRE**



## **PERCEPTIONS ON CAPITAL OFFENCES AND PUNISHMENT IN KENYA**

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## FOREWORD

Capital offences are regarded as the most serious crimes against society. These offences attract ultimate capital punishment in most countries worldwide. Death penalty or capital punishment as a sentence continues to be justified in many jurisdictions on the basis that society needs to expunge dangerous or undesired persons to the benefit of the majority. There is no doubt that capital crimes such as murder have a harmful consequence in communities. These crimes cause unbearable pain to victims and many view death penalty for the perpetrators as the only outcome for closure and retribution to the aggrieved. Thus, death as a punishment is perceived by many as a suitable deterrence for a variety of ‘serious’ crimes. Nevertheless, there is a growing debate among communities of nations and international human rights discourse advocating for alternative forms of punishment instead of the death sentence.

Today, there is growing trajectory towards abolition of the death sentence in many countries. Despite being signatories to covenants, treaties, conventions and international resolutions that commit countries to end the practice of death penalty for all crimes, Kenya has not abolished the death penalty. To many, the right to life is the principal right that supersedes all others and therefore death sentence raises sensitive ethical, moral and religious viewpoints. The debate on abolition or retention of the death penalty across the globe is sometimes a subjective matter infused with passionate emotions. Proponents for retention strongly feel that death penalty is the ultimate punishment and deterrence to ‘serious’ crimes in human society. It is against this background that this important study was commissioned to assess public and expert opinion on the subject matter of capital offences and death penalty in Kenya.

The debate on death penalty in Kenya is not new but an on-going concern in view of the prevailing global trends and developments. The findings of this study indicate that members of the public were of the view that death sentence for murder, robbery with violence, attempted robbery with violence, treason, oathing and specified military offences should be abolished in Kenya. On the contrary, public officials favoured death sentence being retained in law. The views and perceptions on death penalty in this study were largely informed by legal, moral, class, religion, culture and other social cleavages.

This report is part of the consultative processes seeking to enrich the discourses around management of the death penalty in Kenya. It is my sincere hope that the findings and recommendations of this study will go a long way in informing Kenya’s legal trajectory and policy on the subject of the death penalty.



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**GERARD E. WANDERA**  
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## **ABBREVIATIONS AND ACRONYMS GLOSSARY**

ACHPR	African Charter on Human and Peoples' Rights
APP	African Prison Project
AU	African Union
CAT	Convention Against Torture
CP	Capital Punishment
GA	General Assembly
GSU	General Service Unit
ICCPR	International Covenant on Civil and Political Rights
ICDP	International Commission against the Death Penalty
KAF	Kenya Air Force
KDF	Kenya Defence Forces
KLRC	Kenya Law Reform Commission
KNHRC	Kenya National Human Rights Commission
LOK	Laws of Kenya
MRC	Mombasa Republican Council
NCRC	National Crime Research Centre
NPS	National Police Service
UDHR	Universal Declaration of Human Rights
OPCAT	Optional Protocol to the Convention Against Torture
PC	Penal Code
POMAC	Power of Mercy Advisory Committee
SLDF	Sabaot Land Defence Forces
SPSS	Statistical Package for Social Sciences
UDHR	Universal Declaration of Human Rights
UN	United Nations
USA	United States of America
WPA	Witness Protection Agency

## **OPERATIONAL DEFINITION OF TERMS**

### **Capital Offences**

Crimes that are punishable by death are known as capital crimes or capital offences, and they commonly include offences such as murder, treason, espionage, war crimes, crimes against humanity and genocide.

### **Capital Punishment**

This is also known as the death penalty. It is a government sanctioned practice whereby a person is put to death by the state as a punishment for a crime. The sentence that someone be punished by death in such a manner is referred to as a death sentence, whereas the act of carrying out the sentence is known as an execution.

### **Felony**

According to the Penal Code Cap 63 Laws of Kenya, felony means an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more.

### **Grievous Harm**

Means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense (Penal Code, Cap 63 LOK).

### **Harm**

Means any bodily hurt, disease or disorder whether permanent or temporary. (Penal Code, Cap 63 LOK).

### **Judicial Proceeding**

Includes any proceeding had or taken in or before any court, tribunal, commission of inquiry or person in which evidence may be taken on oath (Penal Code, Cap 63 LOK).

**Oath**

This includes affirmation or declaration (Penal Code, Cap 63 LOK).

**Offence**

Means an act, attempt or omission punishable by law.

**Victim**

A person harmed, injured, or killed as a result of a crime, accident, or other event or action.



## **EXECUTIVE SUMMARY**

The death penalty remains a sensitive and emotive subject worldwide, eliciting varied viewpoints from retentionists and abolitionists. The debate to abolish or retain death sentence in Kenya has been there for some time. Proponents of the death penalty say that it is an important tool for preserving law and order, deterring crime, and costs less than life imprisonment. They argue that retribution or "an eye for an eye" honours the victim, helps console grieving families, and ensures that the perpetrators of heinous crimes never have an opportunity to cause future tragedy. Those who oppose the death sentence on the other hand hold that it is the ultimate cruel, inhuman and degrading punishment. It represents an unacceptable denial of human dignity and integrity and its irrevocable nature can lead to great injustice where it is inflicted on innocent people.

It is on the basis of global discourses towards abolishing the death penalty that this study was conducted in Kenya to inform the debate on this subject. Any act, attempt or omission that is punishable by law results to a criminal offence. The Penal Code Chapter, 63 and Kenya Defence Forces Act (No.25) of 2012 Laws of Kenya define offences that are punishable by law and also prescribe the appropriate punishment. Offences that are 'most serious' are referred to as felony and any offence which is not a felony is referred to as a misdemeanour.

The key objective of this study was to examine opinions and perceptions on capital offences and punishment in Kenya. The specific objectives of this study were to; establish the rate of victimization in Kenya; establish the level of awareness on capital offences and capital punishment under Kenyan law; find out factors that contribute to offenders committing capital offences in Kenya; establish public perceptions on retention or abolition of capital offences and punishment in Kenya and examine victim support services in Kenya.

The study was guided by four theories of criminology. First is the Deterrence Theory, which postulates that people choose to obey or violate the law after calculating the gains and consequences of their actions. Second, is the Preventive Theory which is based on the proposition 'not to avenge but to prevent it' carrying the intent to prevent a repetition of the offence by disabling the offender's repetitive behaviour. Third, is the Retribution Theory, which is grounded on the principle that those who commit certain kinds of wrongful acts and paradigmatically serious crimes, morally deserve to suffer a proportionate punishment. Fourth, is the Rehabilitation Theory

which argues that the idea and purpose of punishment is to apply treatment and training to the offender so that he is made capable of returning to society and functioning as a law-abiding member of the community.

The study adopted a mixed method research design that involved collection and analysis of data from 47 counties. Data collection was done between the month of May and November 2016. Probability (simple random sampling) and non-probability (purposive sampling) methods were used. Respondents from 47 counties were randomly selected while public officials from agencies within the criminal justice system (were purposively selected). The study integrated qualitative and quantitative research methods. Primary data was collected using a semi-structured questionnaire and key informant interview guide. Secondary data was gathered through examining existing work and literature on capital offences and punishment locally and internationally.

The quantitative data collected was subjected to quality assurance to check for completeness, to detect and correct errors and omissions. Coding of the data was done while observing the categories or classes guided by the study's objectives. Data entry was followed by thorough analysis using the Statistical Package for Social Sciences (SPSS) software. The data is presented in this report in form of tables, charts and bar graphs among others. Qualitative data from the in-depth key informant interviews were reviewed to detect and correct errors and omissions. Then the content was analyzed, interpreted along the key objectives of the study and presented as sentiments in the report. The inferences and interpretations from both quantitative and qualitative data results form the basis of the findings of this study.

## **Key Findings**

### **i. Crime Victimization**

This study found out that more public officials were likely victims of crimes than members of public. This might imply that those in formal employment have a higher social status in the society and this could be a factor to victimization in Kenya. As such, it is plausible that people in formal employment may be more susceptible to attack and victimization of crime for different reasons. From the findings, a good proportion of the respondents had members of their family as victims of murder, robbery with violence and defilement with the lowest reporting. This could be an

indication that very few cases of defilement are reported. Other offences reported were rape, theft/stealing, burglary/house breaking, robbery and mugging.

**ii. Level of Awareness on Capital Offences and Punishment in Kenya**

A comparison was done between members of public and public officials and majority of public officials were aware that murder is a capital offence punishable by death. However, a significant number of members of the public also knew that robbery with violence and murder is a capital offence. This is because most societies outlaw killing of fellow human beings. Also, this may be attributed to the fact that previous cases from various counties reported in the media from time to time had served as a reference point of information.

**iii. Factors That Contribute to Offenders Committing Capital Offences in Kenya**

Majority of the respondents cited poverty and high cost of living as the major factors contributing the commission of capital offences, followed by drug abuse and alcoholism. Other considerable factors pointed out were unemployment, greed and lust, mental illnesses and depression, political influence and incitement, religion and radicalization, tribal animosity and tribalism.

**iv. Perception on Retention or Abolition of Capital Offences and Capital Punishment in Kenya**

Majority of members of the public supported abolition of death sentence for capital offences (such as murder, robbery with violence, attempted robbery with violence, treason, oathing and specified military offences). On the other hand, majority of public officials supported retention of the death sentence (retentionists). The findings indicated that a death sentence was preferred by majority of the respondents for all the six capital offences.

The reasons given by members of the public in support of retention were: capital punishment acts as a deterrence for future crimes, death penalty ensures that convicts are never released back into society as they may pose a threat in future and; it is the most effective means of achieving justice for the victim, their families and society. Additionally, public officials sampled indicated that capital punishment acts as a deterrence, justified that the severity of a crime should beget an equally severe punishment, and stated that capital offenders do not deserve an opportunity to reform among other reasons.

This study also established other offences that respondents thought should be classified as capital offences in Kenya. Most of members of the public sampled said rape should be punishable by death, followed by defilement, terrorism, economic crimes and corruption. Public officials recommended defilement as the most serious offence that should be considered a capital offence, followed by rape, terrorism, economic crimes and corruption. Other offences proposed by respondents to attract the death penalty to a lesser extent included abortion, unnatural sex acts, drug trafficking, cattle rustling, kidnapping, incitement, possession of illegal firearms, child abuse and human trafficking.

On alternative appropriate sentencing for capital offences in Kenya, the study established that majority of the respondents in both categories stated that life imprisonment would be a suitable alternative. Some public officials were in support of long term imprisonment (20-50 years, as appropriate). Other alternative sentencing recommended included: rehabilitation in the correctional facilities and when ready re- integration into the community, short term prison sentence (10-15 years) which includes imprisonment with hard labour beneficial to the state; corporal punishment, use of traditional community based sentences and fines.

#### **v. Awareness on Legal Provisions on Victim Support Services**

Most of the members of the public and public officials sampled were aware about victim support services. This could in part be attributed to the level of sensitization by state agencies within the criminal justice system and human rights groups through campaigns on issues of victim's services, fundamental rights and freedom of citizens under the Kenyan Constitutional dispensation.

#### **vi. Opinion on Life Sentence**

This study also aimed at finding out public perceptions on the period of life imprisonment with or without limit and appropriate duration for incarceration for the life sentence convicts. Most members of the public sampled were in favour of life imprisonment without limit, while a significant number were in support of alternative duration for life sentences. On the other hand, most public officials recommended life sentence with limits. Among the suggestions proposed on life sentence with limits, were a duration of 21-30 years and a sentence of less than 21 years as appropriate.



vii. **Opinion on Victim Support Services as Part of Restorative Justice**

On restorative justice for victims of capital crimes, members of the public and public officials recommended economic empowerment such as financial compensation, employment for victims and some guidance and counseling for the victims. Other recommendations were: that victims should be offered free medical attention; provided with security and placed under witness protection; victims should access justice and a fair hearing; be given legal assistance, free education; reconciliation be facilitated between victims, offenders and their families; relocation of offenders to reduce cases of trauma and revenge against the victim; increase awareness and sensitization of the plight of victims; religious and community support for victims and establishment of rescue centres and homes for victims.

**Key Policy Recommendations**

The study preferred the following policy actions:

- i. The state and other actors design economic programmes aimed at alleviating poverty and empowering all Kenyans by opening up employment and other opportunities. Members of public and public officials attributed poverty and high cost of living as the main causes of the commission of capital offences. These programs will improve the livelihoods of the potential offenders.
- ii. There is need to strengthen victim support services in Kenya. Respondents recommended victims support programmes that will facilitate recovery either directly or through the victims' families. Members of the public and public officials preferred guidance and counseling for victims. The need for sensitization on the available programmes, financial and legal assistance were also recommended.
- iii. A review of life sentence policy in Kenya is critical. The respondents' opinions call for a review of the penal code and sentencing policy framework to provide a determinate life sentence instead of indeterminate life sentence. For example, most of members of the public sampled suggested that a sentence of 21-30 years was a suitable alternative to life imprisonment. Sections of the public officials recommended life sentence with option of conditional parole after 10 to 25 years.
- iv. There is need to rethink about the discourse around death sentence for capital offences in Kenya. The empirical study gives a divided outcome between the two categories of respondents. This is in line with majority of opinions expressed by members of the public and public officials. The findings established that most of the public officials (53.9%) and

43.1% of the members of public were in support of retaining death sentence. On the contrary, most of members of the public (56.9%) and 46.1% of public officials took the abolitionist stance. Retentionist respondents supported capital punishment as it acts as a deterrence for future crimes and death penalty ensures that convicts are never released back into society as they may pose a threat in future. The abolitionist's view is that death penalty is a severe form of punishment and offenders should be given an opportunity to reform. They also contend that death penalty maybe abused by those in authority to suppress their critics.

- v. There's need to adopt restorative justice as a policy for victims of capital crimes in Kenya. Although the victims are entitled to compensation in law, criminal cases are mainly between the state and the accused, therefore most victims or their families are unable to file suits to demand compensation. From the study, members of the public and public officials sampled indicated that a victim or the family should be economically restituted because of the loss or damages suffered.



## CHAPTER ONE: INTRODUCTION

### 1.1 Background of the Study

#### 1.1.1 Overview of Capital Offences and Death Penalty

Every year, Kenyan Law Courts continue to convict hundreds of offenders on capital offences. Any criminal charge which is punishable by death penalty is called “capital”. The term 'capital punishment' is derived from the Latin word *caput*, meaning ‘head’ which means the defendant could lose his/her head. It originally referred to death by decapitation, but now applies generally to state sanctioned executions according to the International Commission against the Death Penalty (ICDP, 2013).

In many jurisdictions, capital offences are referred to as the “most serious crimes”. This concept emerged as a compromise during the drafting process of international law. However, the notion of “seriousness” may vary according to a national culture, religion, tradition and political context. This relativist definition approach can be problematic as it potentially undermines the concept of universally applicable normative principles in international law.

Crimes punishable by death may vary from state to state and country to country. Under the Laws of Kenya (LOK), Penal Code Chapter 63 (PC, Cap 63 LOK), offences of murder, treason and robbery with violence, including attempted robbery with violence, carry a mandatory death sentence. In addition, the Kenya Defence Forces Act No. 25 of 2012 (KDF Act, 2012 LOK) lists military offences such as treachery, spying, aiding the enemy, assisting the enemy with intelligence information, misconduct in action by others, mutiny, and unlawfully advocating for a change of government to attract death sentence. But the question to ask is, what is the object of criminal law? In broad principles, criminal law exists to deter or incapacitate potential offenders, or to give actual criminal offenders their just desserts.

Any punishment awarded by the courts, be it imprisonment, fines, community service order, probation service or a death sentence is theoretically expected to deter, incapacitate, and or reform and rehabilitate the convicts. It also serves as a retribution measure. In earlier times, the death penalty was used for a variety of reasons that today would seem barbaric. Some cultures used it as punishment for magic, violation of the Sabbath, blasphemy, a variety of



sexual crimes including sodomy and murder. In the Tenth Century A.D., hanging became the usual method of execution in Britain (Bedau, 1982).

It has been argued that the death sentence or capital punishment, as it is popularly known, is the harshest form of punishment amongst all others because it involves the intentional infliction of death on an offender by the state. From time immemorial, killing of convicted offenders has existed in almost all societies though the mode of execution has varied (Omboto, 2015). A number of countries still practise decapitation for certain offences, with varied methods of execution being employed including: crucifixion, drowning, stoning to death, burning or boiling alive, hanging and beheading, electrocution, gun shooting (firing squad) and use of lethal injection (Bedau, 1982).

Nevertheless, ethical, philosophical and religious values are increasingly shaping the debate over continued use of capital punishment. In principle, any good practice and factual evidence should inform policy making by those in authority. The contemporary debates on capital offences and discussions of death punishment have centred on topics such as cost of maintaining it and whether or not capital punishment is a deterrence. For example, Haag (1969), one of the few supporters of a deterrence argument, suggested that since death penalty is the most severe punishment, it should have the greatest deterrent effect. But more current researches on the deterrence aspects are revealing mixed perspectives. Indeed, most studies indicate that death penalty is not a general deterrent. States that have abolished capital punishment have not seen a rise in murders, and comparisons of contiguous states with and without capital punishment do not indicate any deterrent effect.

The United States, China and Japan are some of the industrialized nations that still maintain a system of capital punishment and this has been an area of interest. This, in conjunction with execution of juveniles and foreign nationals, draws heavy international criticism, particularly from Western Europe. Two other issues related to capital punishment in relation to United States that have marshalled considerable interest are racial and economic inequities in the system and wrongful convictions (Haag, 1969). Cesare Beccaria (1764, cited in Harcourt, 2013) concurred with arguments made by many criminologists that instead of the death penalty being a deterrent, it actually has a brutalizing effect, since it increases violence towards victim and or perpetrator(s) (Lustes, 2010a; Lustes, 2010b).

The research on costs suggests that capital punishment is far more expensive than life sentence without parole, due in part to the expenses related to trials as well as the cost of the appeals process. The “death is different” doctrine requires more intensive investigations by both prosecutors and defence attorneys (Haag, 1969).

### **1.1.2 Tracing the Origin of Capital Offences and Death Penalty**

The history of death penalty can be traced to the earliest and most famous example in the Code of Hammurabi which set the different punishment and compensation, according to the different class and group of victims and perpetrators. The Torah (Jewish Law), also known as the Pentateuch (the first five books of the Bible’s Old Testament), laid down the death penalty for various offences such as murder, kidnapping, magic, violation of the Sabbath, blasphemy and a wide range of sexual crimes, although evidence suggests that actual executions were rare. Another example comes from Ancient Greece, where the Athenian legal system was first written down by Draco at about 621 BC: where death penalty was applied for a particularly wide range of crimes. Later though, the Draco's code was repealed and new laws published, retaining only Draco's homicide statutes. Indeed the word ‘draconian’ gets its meaning from Draco's laws according to the Death Penalty Information Centre (DPIC, 2017).

The Romans also used death penalty for a wide range of offences by such means as crucifixion, drowning, beating to death, burning alive, and impalement. This form of punishment has existed in almost all civilizations although the modes of its execution have varied from country to country (DPIC, 2017). In medieval and early modern Europe, before the development of modern prison systems, the death penalty was also used as a generalized form of punishment. During the reign of Henry VIII of England, as many as 72,000 people are estimated to have been executed (ibid).

In the modern era of the last several centuries, the emergence of modern nation states; justice came to be increasingly associated with the concept of natural and legal rights. The period saw an increase in standing police forces and permanent penitential institutions. Rational choice theory (1987) , a utilitarian approach to criminology which justifies punishment as a form of deterrence as opposed to retribution, can be traced back to Cesare Beccaria, whose influential treatise *On Crimes and Punishments* (1764) provided the first detailed analysis of capital

punishment to demand the abolition of the death penalty (Wright, 2009). Jeremy Bentham (1789), regarded as the founder of modern utilitarianism, also called for the abolition of the death penalty. Beccaria (1764), and later Charles Dickens (1818-1883) and Karl Marx (1812-1870) noted the correlation between increased violent criminality at the time and places of executions. Official recognition of this phenomenon led to executions being carried out inside prisons, away from public view (Zimring, 2004).

### **1.1.3 Capital Offences and Death Penalty Globally**

The first formal laws on the death penalty were, however, not established until the 18th Century globally. Britain through European settlers influenced the use of the death penalty in jurisdictions such as the United States and colonial Africa in the 19<sup>th</sup> Century. The 20th century was a violent period in the world where tens of millions were killed in wars between nation-states as well as genocide perpetrated by nation states against political opponents (both perceived and actual), ethnic and religious minorities. For example, the Turkish assault on the Armenians, Hitler's attempt to exterminate the European Jews and the Khmer Rouge decimation of Cambodia among others. The British and other European settlers coming to the new world brought the practice of capital punishment. Most influenced by British is the United States of America where there is use of the death penalty more than any other country. In the US today, execution is used primarily for murder, espionage and treason (Zimring, 2004).

In China, human trafficking and serious cases of corruption are punishable by death. Several militaries around the world impose the death penalty for desertion, mutiny and even insubordination. In Middle-Eastern countries, rape, adultery, incest and sodomy carry the death penalty and so does apostasy (the act of renouncing the state religion). While most industrialized countries utilize lethal injection or the electric chair for capital punishment, many others still use hanging, beheading or stoning. In some states in the USA, death by firing squad is also still used according to Criminal Justice Degree Schools report (CJDS, n.d.).

### **1.1.4 Death Penalty in Africa**

#### **1.1.4.1 Pre Colonial and Colonial**

In pre-colonial Africa, death penalty was among the forms of punishment. But this could only apply to the most serious offences. The application of the punishment, however, varied

according to times and depended on what a particular community considered a serious offence punishable by death. The method of execution lacked uniformity and also a prescribed method of determining which crimes were punishable through imposition of the death sentence or not (CJDS, n.d.).

The customary laws practised by Africans were unwritten or oral law, presenting problems of ascertaining its exact content. However, it has been argued from the writings of scholars on African law that the death penalty existed in all pre-colonial African communities. It was normally available for serious crimes including: patricide, fratricide, other unlawful homicide, and witchcraft. For example, in the chiefdom societies of present-day Burundi and Rwanda, the death sentence was surprisingly even applicable to cases of pregnancy before marriage. In all highly centralised African societies for example (the Buganda in Uganda, Yoruba in Nigeria, Ashanti of Ghana, Zulu of South Africa), adultery with any of the chief's wives attracted the death penalty. In communities where cattle constituted the main form of wealth, notorious cattle thieves were sometimes put to death. Cannibalism also attracted the death penalty (Elias, 1956).

Methods of execution in pre-colonial Africa were varied. They included decapitation, spearing to death, administration of poison, and being buried alive. In some communities, the capital offender was publicly executed and gotten rid of in the manner or same means as that employed by the offender. Some were hanged by the neck from a tree along a public path to serve as a warning to other potential wrongdoers. In other communities, a person found to be a witch or wizard was led to a forest and tied to a tree, the body lacerated and red pepper rubbed into the wounds, and the person abandoned to die a slow and painful death. Another common form of execution involved forcing the condemned person to drink an infusion of a poisonous plant (Baker, 2012).

In pre-colonial Africa, the philosophy behind the death penalty for deliberate killing was restoration of a life for a life (literal retribution) or complete removal of the offender from the ranks of the tribe (permanent incapacitation). Both aimed at serving as deterrent measures. A less culpable form of homicide was not punishable by death. It attracted the award of compensation (blood-money) to the family of the deceased. The philosophy behind this benignity was the practical necessity to assuage the anger of the victim's family for the loss

suffered and to promote peace and reconciliation. In fact, some communities saw no point in sacrificing a second life for one already lost because that meant causing the loss of another breadwinner and creating in the process more orphans and widows or widowers (Baker, 2012).

In the colonial Africa era, death penalty for a variety of offences was a prominent feature of colonial legislation in Africa. Britain and France colonised most African Countries. A sizable part of the continent went to Portugal. Belgium made off with the enormous territory of the Congo, previously the private property of the Belgian King, Leopold; and the former German territory of (*Ruanda-Urundi*). Spain had a little foothold in the Western Sahara and Equatorial Guinea. There was a brief period of German rule (1884-1914) in German East Africa (Baker, 2012).

In 1900, Germany extended to its African colonies the 1871 Imperial German Criminal Code. The Code in Germany provided for the death penalty (and in the colonies a similar Code which provided for capital offences punishable by hanging) including crimes of forcible resistance to a German official in the discharge of his duties, rape of a white woman, unlawful homicide, attempt to endanger railway trains, resistance to colonial rule, and rebellion against German authority. Great Britain influenced the use of the death penalty in all its African colonial territories by introducing their legislation on and practice of the death penalty as reported in Ghana Human Right Watch Report (1992). These laws still exist in these former British colonies even up to date while the Great Britain itself abolished the death penalty in 1969. However, although British colonial legislation limited the death penalty to intentional killing and the rarely committed crime of treason, the post-colonial independent states expanded the list of offences punishable by death to include certain drug offences and “*economic sabotage*” offences (ibid).

France also influenced the use of the death penalty in the French African colonies. The death penalty always existed in French law for many political and ordinary crimes. Capital punishment was practiced in France from the middle ages until 1977 when the last execution took place by guillotine, being the only legal method since the French Revolution (with exception of firing squad for some crimes). The last person to be executed in France was Hamida Djandoubi who was put to death in September 1977. The death penalty was abolished in French law in 1981. It is now also forbidden by the French Constitution and by several

human rights treaties to which France is a party. Portugal did not include the death penalty in its colonial legislation because by 1870 Portugal had abolished the death penalty for both political offences and ordinary crimes (Worthington, 2014).

### **1.1.5 The Death Penalty in Kenya**

#### **1.1.5.1 Past and Present**

The death penalty practice was first introduced in Kenya in 1893, but it was not widespread during the pre-colonial era. Pre-colonial Kenyan societies were not eager to take away the life of another person even in the situation where murder was involved. The practice among the Abanyore clan of the Luhya ethnic group involved trying of offenders and punishment methods could be banishment or ostracism for crimes of witchcraft and sorcery. In the trial process, suspects were either acquitted, given a life sentence or executed. The Kisii community practised beating of the accused suspects or execution of witches. In Maasai community, a man could only be found guilty of murder if he killed someone from the Maasai ethnic group and the penalty was compensation in terms of cattle (Gisesa, 2014).

Among the Turkana, witchcraft and incest were the main offences that deserved execution. The offences were treated as the most serious crimes. For the Kikuyu community, capital punishment was reserved for habitual murderers and major sexual offenders who were bound and left to die out of harsh weather exposure. Among the Luo, there was compensation for murder in the form of the killer marrying the wife of the victim. Among the Kamba "blood price" ensured that a murder, manslaughter or accidental death was solved through payment of between 11 and 14 cows, one or two bulls and a goat. But with the advent of the white man, these traditions eventually fizzled out (Gisesa, 2014).

The notion of punishment during colonial period in Kenya was perceived in the context of "good governance, justice, and civilization" by the British rule. Therefore, violence and excessive punishment meted by colonial regimes were tools often used to control the operation of the state (Gisesa, 2014). The application of the death penalty in colonial Kenya was heightened during the struggle for independence. It is during this period that the country adopted British concepts of crime and punishment. This saw birth of the Penal Code that resulted in the abolishing of customary and common-law offences. By the late 19th century,

Great Britain had instituted the death penalty in Kenya for the crimes of murder, treason and other violent felonies (ibid).

In the mid-1920s, the so-called "black peril" laws introduced capital offences. This was punishment on a black man who raped a white woman. The trials were carried out haphazardly. The relatively high rate of mercy resulted in only 459 people being executed, excluding Mau Mau-related crimes, over 48 years - between 1908 and 1956. Although during the 20th century, the colonial government sparingly employed the death penalty for political crimes, with the exception of the period between 1952 and 1958, during the Mau Mau emergency, which witnessed the execution of over 1,090 freedom fighters out of 2,509 who were tried on capital charges. Sir Evelyn Baring, Governor-General of Kenya in 1953, imposed the death penalty for persons who administered the Mau Mau oath. Kenya by then being a colony of United Kingdom where the death penalty was applied until 1965 (Gisesa, 2014).

Abolition of the Death Penalty Act suspended the death penalty for murder for a period of 5 years. In 1969, the House of Commons voted by 343 to 185 to reaffirm its decision that capital punishment for murder should be permanently abolished. By the time of abolition of the death penalty in Britain, most of her colonies, including Kenya, had attained independence. That meant that it was the choice of respective independent former colonies to either follow the trend of Britain to abolish the death penalty or retain it. Kenya chose to retain the death penalty (Worthington, 2014).

The country inherited the death penalty, a relic of 19th century from Britain, upon independence. From the time Kenya got its independence, available reports indicate that from 1963 to 1987 alone, 280 persons out of 3,584 people sentenced to death had been executed. About 135 prisoners had benefited from the presidential pardon of mercy and their sentences commuted to life imprisonment. It is believed that the last execution was carried out in 1987 against John Ochuka who was convicted for the offence of treason (Gisesa, 2014). Presently, the high number of successful appeals against the death sentence provides evidence that a number of people may have been wrongly convicted and even possibly executed due to a flawed justice system or lack of fair trial.



## **1.1.6 Death Penalty and Legal Framework**

### **1.1.6.1 The International and Regional Legal Framework**

There has been a global shift towards abolishing the death penalty. More than two-thirds of the countries in the world have now abolished the death penalty both in law and in practice. From the early 1960s, although a majority of countries still used the death penalty, the drafters of the International Covenant on Civil and Political Rights (ICCPR, 1976) had already begun crusade for its abolition in international law. By 1971, the UN General Assembly had passed a resolution affirming that “in order to fully guarantee the right to life, provided for in Article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to abolishing this punishment in all countries”. This is as per a report from the Office of the High Commissioner for Human Rights (OHCHR, 2015).

Although Article 6 of the ICCPR permits the use of the death penalty in limited circumstances, it also provides that “nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant”. In 1989, 33 years after the adoption of the Covenant itself, the UN General Assembly adopted the Second Optional Protocol to the ICCPR that gave abolition of death penalty a decisive new momentum. Member States which became parties to the Protocol agreed not to execute anyone within their jurisdictions (ICCPR, 1976). The United Nations 62nd General Assembly introduced a second resolution for a moratorium on the use of the death penalty in December 2008, 106 members voted for, 46 against, and 34 abstained in the voting.

During the recent 6th World Congress Against the death penalty in Oslo in 2016 organized by Together Against the Death Penalty- *Ensemble Contre la Peine de Mort* (ECPM, 2016), it was observed that since the Madrid World Congress in 2013, only 6 countries have abolished the death penalty for all crimes. These countries are Madagascar, Mongolia, Nauru, Fiji, the Republic of Congo, and Surinam while in USA the trend towards abolition continues. In addition the death penalty abolitionist movement continues to grow and diversify, with 158 member states in 2017.

It was noted that the World had come together against the death penalty from states, regions, and national coalitions, all uniting various organizations and actors from civil society, parliamentarian networks, academic networks, national human rights institutions and businesses. More to this, some abolitionist states were integrating the aspect of universal abolition into their international relations policies and ties were being strengthened among actors from civil society and intergovernmental, regional, and international organizations with the aim of establishing or reinforcing the state of law (ECPM, 2016).

The move towards universal abolition of death penalty has also not left out the African continent. Regionally, Article 4 of the African Charter on Human and Peoples' Rights, which provides for the right to life and bodily integrity, demonstrates a trend towards abolition. This safeguards and guarantees protection of the rights of even those facing the death penalty. By 1990, Cape Verde was the only country that had abolished the death penalty. As at now, out of the 54 member states of the African Union, 20 have abolished the death penalty in law. In addition 18 other countries no longer execute those sentenced to death. Therefore in principle, 38 countries are abolitionist in law or in practice and 16 States still retain the death penalty as a punishment. The Republic of Congo and Madagascar abolished the capital punishment in 2015 and Guinea was the last African country to join the list of abolitionist countries on 4 July, 2016 (ECPM, 2016).

#### **1.1.6.2 Kenyan Legal Perspective**

Kenya is party to many international human rights instruments relevant to the death penalty. The death penalty has been part of Kenya's legal system for the last 115 years (70 years through colonialism and more than 54 years since independence). On 1<sup>st</sup> May 1972, Kenya acceded to the International Covenant on Civil and Political Rights (ICCPR), but is not a signatory to the First or Second Optional Protocols to the ICCPR. On 21<sup>st</sup> February 1997, it also acceded to the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) without any reservations, but is not a signatory to the Optional Protocol to the Convention Against Torture (OPCAT). It ratified the Convention on the Rights of the Child on 30 July 1990, and the Rome Statute of the International Criminal Court on 15<sup>th</sup> March 2005 as detailed in the Penal Reform International report (PRI, 2013).

Kenya also ratified the African Charter on Human and Peoples' Rights on 23<sup>rd</sup> January 1992, the African Charter on the Rights and Welfare of the Child on 25<sup>th</sup> July 2000, and the Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa on 6<sup>th</sup> October, 2010 as a regional commitment. In 2007, 2008 and 2010, Kenya abstained from voting on the United Nations (UN) General Assembly (GA) resolutions calling for a moratorium on the use of the death penalty. However, although Kenya did not vote in favour, it did not sign the *Note Verbale of Dissociation* (PRI, 2013).

Article 26(3) of the Constitution provides that “[1] every person has the right to life” and “[3] a person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law” (Constitution of Kenya, 2010) . Although the Constitution of Kenya recognises the right to life, the Kenyan Penal Code imposes a mandatory death sentence for five offences as follows:

1. Murder: Section 204 of the Penal Code (PC, Cap 63).
2. Treason: Section 40 of the Penal Code (PC, Cap 63). Treason can include a variety of acts, including sedition, an intention to undermine or overthrow the government, harm or kill the President or instigate or engage in war against Kenya.
3. Aggravated robbery: Section 296(2) of the Penal Code (PC, Cap 63).
4. Attempted robbery with violence: Section 297(2) of the Penal Code (PC, Cap 63).
5. Administering an Oath: Section 60 of Penal Code (PC, Cap 63)

On the other hand, the military offences punishable by death are outlined in Part VI of the Kenya Defence Forces Act, No.25 of 2012 (KDF Act, 2012). According to the Prisons Act Cap 90, sec. 69, Laws of Kenya, executions are to be carried out by hanging (KPS Act, Cap 90). The alternative to the death penalty in Kenya is life imprisonment without the possibility of parole.

There have been legal arguments on whether all capital offences convicts should get death penalty especially in light of identified shortcomings in Kenya's penal code. A three-judge bench directed by Parliament and the state law office in September 2015 to amend some

sections of the penal code to meet constitutional thresholds found that there is no distinct clarity to differentiate between degrees of aggravation of the offence of robbery, the offence of robbery with violence and attempted robbery with violence with sufficient particularities (The Star Newspaper 2017, May 3). One of the judge had this to say:

*“sections that define robbery, simple robbery and robbery with violence, and attempted robbery and attempted robbery with violence are ambiguous..... Justice Lesiit. (ibid)*

According to Justice Lesiit, the limitations or the challenges the judicial officers face is not in the sentence to give but in the lack of clarity and lack of differentiation between the manner in which the offence is committed and the kind of weapons used in the offences of robbery. The Attorney General, Prof. Githu Muigai, also supported the repealing of some sections of the Penal Code to remove generalities that anchor inherent unfairness. He was quoted saying;

*“The law should be amended to distinguish between a person who is the principal perpetrator of the crime and the person who is a victim of circumstances by being at the same place at the same time with the person who commits the crime. Our law must catch up with the most recent thinking globally, about crime and punishment.... “right now if you are with a person who intends to rob somebody but you don’t know his intention, then he uses violence, you are also an accomplice and you will be charged with capital robbery”(The Star Newspaper 2017, May 3).*

Although Kenya has *not de jure* abolished capital punishment, practice *de facto* testifies to the presence of an unofficial moratorium on executions (Kenya has not carried out an execution since 1987).

Most recently, the Supreme Court of Kenya in Nairobi, by its judgment dated 14<sup>th</sup> December 2017 in *Francis Karioko Muruatetu v. Republic of Kenya*, declared the mandatory nature of the death penalty contained in section 204 of the Penal Code to be unconstitutional because it violates the right to a fair trial in Article 50(2) of the Constitution of Kenya, 2010. The Court further found out that a life sentence should not necessarily mean the natural life of the prisoner; rather it could also mean a certain minimum or maximum time to be set along established parameters. The Court directed the Attorney General, the Kenya Law Reform

Commission and the Speakers of the National Assembly and Senate to give effect to its judgment on the mandatory nature of the death sentence and parameters of what ought to constitute life imprisonment through any necessary amendments, formulation and enactment of statute law. The Court further granted the Attorney General and Director of Public Prosecutions twelve (12) months to prepare a progress report identifying an appropriate framework to address sentence re-hearings for other persons subject to the mandatory death penalty (KLRC, 2017).

Despite these developments, Kenyan courts continue to hand down death sentences and as at August 2017, there were 517 prisoners on death row in Kenya according to Kenya Prison Service (2017). In the last ten years, progressive steps have been taken at the national and international level to indicate a commitment towards positively reducing and restricting the application of the death penalty in practice, leading to its eventual abolition.

## **1.2 Problem Statement**

Capital punishment has always been a contentious issue. Some argue it is needed in order to serve as an example to other criminals, as well as to obtain retribution on behalf of the victims involved (Henderson, 2005). But some citizens believe that punishment should not have to come down to such drastic and cruel measures. There have been progressive steps undertaken at the national and international level in the last ten years, indicating a commitment towards positively reducing and restricting the application of the death penalty in practice, which would lead to its eventual abolition.

In addition, by 31st December 2016, all correction facilities in Kenya had 109 inmates under presidential pleasure. In the same year, 24 death row prisoners were discharged from prisons. According to Kenya Prison Service (KPS, 2017) report, of the 6744 inmates who were on life imprisonment by August 2017; 6613 were males and 131 were females. Previously, in 2003, The President had commuted 223 death row convicts to life imprisonment. This included 28 prisoners who were subsequently released after serving between 15 and 20 years on death row convictions. The then Vice President, when releasing the pardoned 28 death row prisoners, stated his intention to introduce a Bill in Parliament to abolish the death penalty.

The then Commissioner of Prisons, termed the 2003 mass commutation a ‘historic event, saying that the death penalty should be abolished altogether since it claimed innocent lives (PRI,2013).

**Table 1.1: Situation of Death Penalty in Kenya**

Status	Year											
	2012		2013		2014		2015		2016		2017	
	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female
<b>Sentenced to Death</b>	714	27	778	31	2708	49	998	61	742	18	494	23
<b>Life Sentence</b>	1994	44	2111	45	2582	42	1074	87	1087	120	6613	131

**Source: 2017 Economic Survey, Kenya National Bureau of Statistics**

In 2009, the President further commuted another 4,000 death row prisoners to life imprisonment. This was the biggest known mass commutation of condemned prisoners anywhere in the world. He stated that he made the decision following the advice of a constitutional committee, on the basis that commuting death sentences would alleviate the “undue mental anguish and suffering, psychological trauma and anxiety that come from extended stays on death row” (ibid). Recently in October 2016, the President commuted the death sentences of 2,747 death row inmates to life imprisonment.

The debate on the possibility of abolishing the death penalty in Kenya resurfaced again during the drafting of the current (2010) Constitution of Kenya. The constitutional drafters undertook a public survey on various issues, among them public opinion on the retention of the death penalty. Majority of those surveyed supported the retention of the death penalty, which explains the limitation imposed on the right to life in Article 26(3) of the Constitution. However, following the past commutation by the state, it is evident that public opinion supported by empirical studies are necessary in order to aid the Kenyan government make an informed decision on these critical issues of the death penalty both in practice and law. It is

against this background that this study sought to examine the public perceptions on capital offences and punishment in Kenya.

### **1.3 Objectives of the Study**

#### **1.3.1 General Objective**

The general objective of this study was to examine public perceptions on capital offences and punishment in Kenya.

#### **1.3.2 Specific Objectives**

The specific objectives of the study were to:

- i. Establish the rate of victimization in Kenya.
- ii. Establish the level of awareness on capital offences and capital punishment in Kenya.
- iii. Find out factors that contribute to offenders committing capital offences in Kenya.
- iv. Establish public perceptions on retention or abolition of capital offences and punishment in Kenya.
- v. Examine victim support services in Kenya.

### **1.4 Justification of the Study**

This study is justified on the basis that Kenya has adopted an abolitionist approach to death penalty in practice but not in law for close to three decades now. Though there has been a moratorium in the practice of death penalty by law, from a legal perspective the country cannot justify this position. Capital punishment as known from the foregoing discussion remains very sensitive and complex matter globally. During the 61<sup>st</sup> Session of the UN Commission on Human Rights in 2005, Kenya was among the countries that abstained from voting for a UN Draft Resolution calling for abolition of the death penalty as reported by Kenya National Commission on Human Rights (KNCHR) report (KNCHR, 2017). Yet, Kenya has also not been executing the death penalty sentences for a substantial period of time now. More so, most of these convictions are commuted to life imprisonment and in various cases, some death row convicts have been discharged from the prisons through judicial review of cases.

This study will help to inform the policy direction the country may take with regards to capital offences and the death penalty. The study provides the empirical base informed by present



moral, social and political debates in Kenya. Further, it provides a reference point in the court of public opinion on the subject of death penalty.

It is critical to mention that several other studies earlier conducted and supported by many ethical, legal and scientific arguments, saw Kenya embrace moratorium on death penalty execution. The findings of this study will significantly contribute to the growing body of literature to assist the Government of Kenya and other stakeholders make informed decisions in policy and law on the critical subject matter of capital offences and death penalty in Kenya.

### **1.5 Assumptions of the Study**

The questions of ‘why punish’ and ‘how punish’ are located within political and social theories for which the relationship between the state and the criminal offender is anchored. In this study, it was assumed that the respondents will competently give their views on the circumstances under which the imposition of death punishment to the offender by the state can be justified, if at all, where it cannot and what limitations should be placed upon the form and duration of punishment in the case of life sentence. It was also anticipated that the study will get fair reception and unbiased viewpoints from various state and non-state stakeholders, given the likely sensitivities and contestations that the subject of death penalty would elicit.

### **1.6 Scope of the Study**

The study was conducted in the 47 counties in Kenya. The population of the study consisted of members of the public and public officials (adult males and females) drawn from the 47 counties. The study was conducted between May and November 2016.

## **1.7 Theoretical Framework**

### **1.7.1 Introduction**

Theoretical arguments in support of and against capital punishment have been informed by several theories. This study adopted four theoretical viewpoints that postulate that any punishment awarded by the courts be it imprisonment, fines, community service order, probation service, and death sentence is theoretically expected to deter, incapacitate and/or reform and rehabilitate the convicts. The punishments also serve as a retribution measure, thus,

theories of punishment comprise of policies regarding handling of crime and criminals (Omboto, 2015).

### **1.7.2 Deterrence Theory**

Proponents of Deterrence theory believe that people choose to obey or violate the law after calculating the gains and consequences of their actions. But, generally it is difficult to prove the effectiveness of deterrence since only those offenders not deterred come to the notice of law enforcement. Thus, it may be rather difficult to conclusively know why others do not offend. This theory as cited by Harcourt (2013) can be traced to the early works of classical philosophers such as Thomas Hobbes (1588–1678), Cesare Beccaria (1738–1794), and Jeremy Bentham (1748–1832). The three theorists protested against the legal policies that had dominated European thought for more than a thousand years, and against the spiritualistic explanations of crime on which they were founded. In addition, these social contract thinkers provided the foundation for modern deterrence theory in criminology (Lustes, 2010c).

The deterrence theory of punishment posits that any punishment awarded to an offender should make him or her, and others who witness the punishment to avoid committing crime again after being punished based on fear. The case for the offender is referred to as specific deterrence while the one for the witnesses is regarded as general deterrence. The theory of deterrence that developed from the work of Hobbes, Beccaria, and Bentham as cited in Harcourt (2013) relies on three components: severity, certainty, and celerity. The theory contends that punishment should be harsh, inevitable and awarded without delay. This thought is based on the more likely premise that a rationally calculating human being will desist from criminal acts. To prevent crime, therefore, criminal law must emphasize penalties to encourage citizens to obey the law (Lustes, 2010c).

This theory, therefore, aims to create terror in the mind of the criminal thereby safeguarding the society. It emphasizes harsh punishment like exile, death penalty and imprisonment. The theory, was widely accepted in the medieval period. Criticism of this theory is that it fails in the case of hardened criminals because the severity of punishment hardly has any effect on them. It also fails in cases where crimes are committed in a spur of the moment without any prior intention.

### 1.7.3 Preventive Theory

Prevention theory, also known as Incapacitation is a proponent of justification of punishment. The theory as cited in Malik (2013) is traced in the work of Jeremy Bentham (1748–1832) who argued that the general prevention ought to be the chief end of punishment as its real justification. Bentham's theory was based on a hedonistic conception of man and that man as such would be deterred from crime if punishment were applied swiftly, certainly, and severely (ibid).

However, being aware that punishment is evil, he argued that:

*“..if the evil of punishment exceeds the evil of the offence, the punishment will be unprofitable; he will have purchased exemption from one evil at the expense of another” (ibid).*

This is at variance with the deterrence theory which Malik had also contributed to, where the basic idea is to deter both offenders and others from committing a similar offence. Bentham's preventive theory was the idea that punishment would also provide an opportunity for reform. The theory holds that social harmony is best served by minimizing the possibility of future harm and likelihood of future transgressions (Malik, 2013).

The theory refers to when the offender's ability to commit further offences is removed. The desire to incapacitate an offender is normally achieved by removing the offender from the society. This can be through imprisonment where his or her freedom will be restricted as a prisoner, or by death sentence. It is a forward-looking justification of punishment that anticipates future reductions in re-offending as sufficient ground for the punishment. This can occur in one of the two ways; the offender's ability to commit crime can be physically removed, or the offender can be geographically removed (Law notes, n.d.).

The purpose is to prevent a repetition of the act by the wrongdoer by disabling the offender. It is based on the proposition ‘not to avenge but to prevent it’. Its objective is to deprive the offender either temporarily or permanently, of the power to repeat the offence through measures such as imprisonment, death sentence, exile, forfeiture of office among others. According to Justice Holmes cited in (Maharjan,2010) *‘there can be no case in which the law-*

*maker makes certain conduct criminal without showing a wish and purpose to prevent the conduct*'. Despite this, prevention is predominantly thought of as incarceration (Maharjan, 2010).

However, critics of this theory indicate that a person may commit crime under some psychological stress and in such cases he or she has very little chances of repeating it. Therefore in such condition, preventive theory seems meaningless. Preventing the offenders might even develop the tendency in the offender to commit the crime again. The goal of reformation and rehabilitation is to change the character and personality of the offenders, and to make them fit back into the society as law abiding citizens (Maharjan, 2010).

#### **1.7.4 Retribution Theory**

The theory of Retribution is traceable to the work of Professor Herbert Lionel Adolphus Hart (1959 cited in Harcourt, 2013). Retribution is one of the oldest and most basic justifications for punishment which involves the principles of revenge. This equation of punishment with the gravity of the offense is embedded in the Judeo-Christian tradition in the Mosaic laws of the Old Testament that emphasize the idea of *"an eye for an eye"*. Neither constrained by questions of offender culpability nor directed at preventing future wrongdoing; offenders under a retributive philosophy simply get what they deserve. Punishment is justified on its own grounds, a general principle that has remained popular throughout Western history in both law and widespread public beliefs about how justice should be dispensed in democratic societies. The classical retributive principle of *"let the punishment fit the crime"* was the primary basis for criminal sentencing practices in much of Western Europe in the nineteenth century (Lustes, 2010d).

According to Kant (1887 cited in Harcourt, 2013) on retributive theory, he argued that:

*"punishment is not justified by any good results, but simply by the criminal's guilt. Criminals must pay for their crimes; otherwise an injustice has occurred. Furthermore, the punishment must fit the crime"*. Kant asserts that the only punishment that is appropriate for the crime of murder is the death of the murderer. As he puts it, *"Whoever has committed a murder must die"*.

Retribution is the practice of "getting even" with a wrongdoer, the suffering of the wrongdoer is seen as good in itself, even if it has no other benefits. One reason for societies to include this judicial element is to diminish the perceived need for street justice, blood revenge and vigilantism. Retribution sets an important standard on punishment; the transgressor must get what he deserves, but no more. Therefore, a thief put to death is not retribution; a murderer put to death is. In old times when a man injured another, it was considered to be the right of the injured person to take revenge on the person causing injury. Since the formulation of the Hammurabi's Code, "an eye for an eye and a tooth for a tooth" has been accepted by the general public, that is, the criminal deserves to suffer according to Kant (1887, cited in Harcourt, 2013).

Later in 1759, this stance changed as, Smith who is credited as the father of Welfare Economics, wrote extensively about punishment. In his view, an important reason for punishment is not only deterrence, but also satisfying the resentment of the victim. Moreover, in the case of the death penalty, the retribution goes to the dead victim, not his family. One great difficulty of this approach is that of judging exactly what it is that the transgressor 'deserves'. For instance, it may be retribution to put a thief to death if he steals a family's only means of livelihood; conversely, mitigating circumstances may lead to the conclusion that the execution of a murderer is not retribution (Smith, 1759).

In the case of death sentence as a punishment; the theories of Incapacitation and Retribution are mainly in its support. The first is retribution; for instance, convicts of heinous crimes are sentenced to death to fulfil our human desire for vindictive revenge. That is, death sentence is seen to be the only proportionate punishment to the crime committed particularly where life has been lost. It is based on the feeling that the offenders who have taken the life of other human beings must also not be allowed to live. Death sentence has also been supported because of its incapacitating power; its ability to stop the offender once and for all from committing more crimes since when the convict is killed as ordered by the courts, he or she will never come back again to bother the society (Smith, 1759). This is unlike the case of imprisonment where such vicious offenders may one day be released, and get back to the society due to a possibility of a pardon which is guided by the Power of Mercy Act of 2011 in the Kenyan case.

It is also argued that death sentence has a symbolic value of power for the law enforcement officials who arrest and prosecute the capital offenders; thus in its absence, extra-judicial executions by law enforcement officers become rampant because they may, in frustration feel that the capital offenders when arrested and presented in courts of law will not be adequately punished. Opposition to death sentence is based on the theory that it does not offer the vital specific deterrence, and do not rehabilitate the offender. Punishment, it is argued, should make the offender in question fear to commit crime in future, and or offer the offender a chance to be reformed and rehabilitated (Smith,1759).

The opponents also reasoned that when an offender is put to death, the real sufferers are his or her dependants such as a spouse, children, and parents among others, who never committed the crime. Such individuals may suffer great psychological anguish, social and economic loss; more so if the convict was a bread winner to the family, and the other dependants. However, in support for, and opposition of death sentence; God's position is mentioned by both sides. For instance; the bible's ten commandments "Do not kill", the death sentence abolitionists say, means God is against any kind of killing; be it of those who have committed heinous crimes such as murder, while the pro-death sentence normally rely on verses such as Exodus 21:12 "*anyone who strikes a man and kills him shall surely be put to death*" (Exodus, 21:12 The New King James Version) to justify death sentence for convicted murderers.

#### **1.7.5 Rehabilitation Theory**

The term "rehabilitation" itself simply means the process of helping a person to readapt to society or to restore someone to a former position or rank. Gendreau and Ross (1987) in their book "*Revivification of Rehabilitation*" identified the rehabilitation model as the process of re-integration into society of a convicted person. The main objective of modern penal policy is to counter habitual offending, referred to as criminal recidivism. The theory comprises alternatives to imprisonment such as community service, probation orders, including guidance and aftercare towards the offender. This theory is well embraced currently by the correction facilities in Kenya where inmates are taken through reformation and rehabilitation programs (Lustes, 2010d).

However, the argument in favour of considering rehabilitation as a part of punishment is that it is something that is imposed on the individual by the state, and in that sense, entails suffering

for the individual. This argument has been stated by Raffaele Garofalo (1914 cited in Wah, 2002) a notable Italian criminologist belonging to the Positive School of criminology. He argued that:

*"The mere deprivation of liberty, however benign the administration of the place of confinement, is undeniably punishment. Measures that subject individuals to the substantial and involuntary deprivation of their liberty contain an inescapable punitive element, and this reality is not altered by the fact that the motivations that prompt incarceration are to provide therapy or otherwise contribute to the person's wellbeing or reform. No matter how humane the intentions of the officials providing reformatory treatment, it will be accompanied by some compulsion and carry elements of stigma and rebuke"* (Sechrest, 1981).

A classical case is that of Peter Ouko released from Kenyan prison on 24<sup>th</sup> October, 2016. In his case *Peter Manson Okeyo Ouko v Republic* was convicted and sentenced to death for the offence of murder contrary to section 203 as read with section 204 of the Penal Code in High Court Criminal Case No. 54 of 1999 (KLRC, 2014).

After going through a rehabilitation process, Ouko pioneered "Crime Si Poa" (Crime isn't Good) group that educates the youth on the ills of crime. The initiative is a lobby and campaign group that he runs in response to the spiralling crime rate in the country as well as recidivism amongst released inmates. The group is funded by African Prisons Project (APP) which was started by Alexander McLean in 2004 to provide education and healthcare for prison inmates. Its aim was to bring immediate improvements to prisoners' welfare and to create models for rehabilitation as this theory proposes. Most prisoners indicated to have benefited from this program as one of the inmates had this to say (African Prisons Project [APP], 2004).

*"..APP has given me motivation to want to see tomorrow, because I want to make an impact. I feel I'm empowered, and able to bring change in the society. Much more especially, to impact that very person who is in dire need the same I was..."* (ibid)

The Project Director in Kenya mentions that they empower men and women in prison with information on their rights and obligations in the justice process, and the prisoners are



encouraged to become peer advocates. According to the APP Director, very often, it's the poorest and least educated who find themselves in prison. And often their lives have been incredibly difficult and they have not had opportunities. And their inherent potential and gifts and talents have not been realised during their childhood or their adult life before entering prison.

## **CHAPTER TWO: STUDY METHODOLOGY**

### **2.1 Introduction**

This chapter addresses the research design, methods and tools of data collection and management, methods of data analysis and ethical considerations.

### **2.2 Research Design**

The study on capital offences and punishment used a mixed method research approach. The strength of this methodology is that it permits a more complete and synergistic utilization of both quantitative and qualitative data collection and analysis.

This approach was instrumental in obtaining public perceptions on capital offences and punishment in Kenya; the level of understanding on crimes considered to be capital offences; opinion on abolition or retention of death penalty; views on offences that should be categorised as capital offences and those that should be excluded; appropriate alternatives capital offences; opinion on life sentence; views on restorative justice for victims of capital crimes; factors contributing to capital offences; effectiveness of capital punishment in the justice system; challenges of death penalty as a remedy for capital offences and how they can be addressed.

The sample for the study consisted of adult male (2840) and female (1863) members of the public who were resident in particular counties at the time of the study as indicated in Table 2.1. The study also involved interviews with public officials and other key informants as indicated in Table 2.2. The survey utilised both probability and non-probability sampling techniques. Selection of the survey sites employed simple random sampling and purposive sampling for the key informant's respondents. It was assumed that capital offences are likely to occur in any County, thus this study was carried out in the 47 counties purposively. Public officials including key stakeholders in the criminal justice system were selected purposively. Both urban and rural areas dynamics were covered in the all the study counties. Purposive sampling was used during interviews with members of the public. Key informants included officials from: The National Police Service who comprised officers in charge of Police Divisions and Stations; Kenya Prisons Service officers in charge of penal institutions and their deputies.

**Table 2.1: Distribution of Sample Respondents by County and Gender**

County of Residence	Gender		Total Frequency and Percentage of Total Sample
	Male	Female	
Narok	67(68.4%)	31(31.6%)	98(2.1%)
Kajiado	65(63.7%)	37(36.3%)	102(2.2%)
Baringo	59(53.6%)	51(46.4%)	110(2.3%)
Nakuru	61(61.0%)	39(39.0%)	100(2.1%)
Bomet	57(57.0%)	43(43.0%)	100(2.1%)
Kericho	65(64.4%)	36(35.6%)	101(2.1%)
Laikipia	76(70.4%)	32(29.6%)	108(2.3%)
Lamu	72(65.5%)	38(34.5%)	110(2.3%)
Tana River	54(50.0%)	54(50.0%)	108(2.3%)
Kilifi	75(63.0%)	44(37.0%)	119(2.5%)
Kwale	63(63.0%)	37(37.0%)	100(2.1%)
Mombasa	53(52.5%)	48(47.5%)	101(2.1%)
Taita Taveta	60(59.4%)	41(40.6%)	101(2.1%)
Kisumu	68(64.2%)	38(35.8%)	106(2.3%)
Siaya	65(61.9%)	40 (38.1%)	105(2.2%)
Homabay	64(62.1%)	39(37.9%)	103(2.2%)
Migori	62(62.0%)	38(38.0%)	100(2.1%)
Kisii	58(57.4%)	43(42.6%)	101(2.1%)
Nyamira	57(56.4%)	44(43.6%)	101(2.1%)
Trans Nzoia	61(67.0%)	30(33.0%)	91(1.9%)
West Pokot	58(61.1%)	37(38.9%)	95(2.0%)
Turkana	65(69.9%)	28(30.1%)	93(2.0%)
Uasin Gishu	67(68.4%)	31(31.6%)	98(2.1%)
Nandi	61(61.0%)	39(39.0%)	100(2.1%)
Elgeyo Marakwet	64(64.0%)	36(36.0%)	100(2.1%)
Samburu	46(50.5%)	45(49.5%)	91(1.9%)
Marsabit	59(63.4%)	34(36.6%)	93(2.0%)
Isiolo	60(60.0%)	40(40.0%)	100(2.1%)
Meru	56(55.4%)	45(44.6%)	101(2.1%)
Tharaka Nithi	57(58.2%)	41(41.8%)	98(2.1%)
Embu	58(61.1%)	37(38.9%)	95(2.0%)
Machakos	53(54.6%)	44(45.4%)	97(2.1%)
Makueni	58(59.8%)	39(40.2%)	97(2.1%)
Kitui	66 (66.7%)	33(33.3%)	99(2.1%)
Garissa	59(63.4%)	34(36.6%)	93(2.0%)
Wajir	56(56.0%)	44(44.0%)	100(2.1%)
Mandera	71(71.0%)	29(29.0%)	100(2.1%)
Kakamega	52(58.4%)	37(41.6%)	89(1.9%)
Bungoma	60(57.1%)	45(42.9%)	105(2.2%)
Vihiga	62(64.6%)	34(35.4%)	96(2.0%)

County of Residence	Gender		Total Frequency and Percentage of Total Sample
	Male	Female	
Busia	58(61.7%)	36(38.3%)	94(2.0%)
Murang'a	48(49.0%)	50(51.0%)	98(2.1%)
Kiambu	49(52.7%)	44(47.3%)	93(2.0%)
Nyeri	65(60.7%)	42(39.3%)	107(2.3%)
Kirinyaga	56(55.4%)	45(44.6%)	101(2.1%)
Nyandarua	65(61.9%)	40(38.1%)	105(2.2%)
Nairobi	49(49.0%)	51(51.0%)	100(2.1%)
<b>Total</b>	<b>2840 (60.4%)</b>	<b>1863(39.6%)</b>	<b>4703(100.0%)</b>

From the Judiciary were Judges and Magistrates and Prosecutors from the Directorate of Public Prosecutions. County and Sub County Probation officers were also interviewed. The Ministry of Interior and Coordination of National Government representatives were: County Commissioners and Assistant County Commissioners. Other public officials were government officials from the Children's Department, Higher Institutions of Learning and County government officials and representatives from constitutional and rights based commissions.

**Table 2.2: Distribution of Public Officials Respondents by Institution of Affiliation**

Institution of Affiliation	Frequency	Percent
National Police Service	65	25.4%
National Government Administration Office	54	21.1%
Probation and Aftercare Services	48	18.8%
Kenya Prisons Service	27	10.5%
Judiciary	19	7.4%
Children Services	18	7.0%
Office of the Director of Public Prosecutions	16	6.3%
County Government Administration	7	2.7%
Teachers	2	0.8%
<b>Total</b>	<b>256</b>	<b>100.0</b>

In the study, 256 members of public officials were interviewed as shown in Table 2.2. The public officials sample respondents by institution of affiliation shows that 25.4% were drawn

from National Police Service (NPS); 21.1% from the National Government Administration Office, 18.8% from Probation and After Care Service and 10.5% from the Kenya Prisons Service.

The principal goal of having the two data sets was for comparison of perceptions, opinions, and perspectives on the death penalty in Kenya between members of the public and public officials.

## **2.3 Methods and Tools of Data Collection**

### **2.3.1 Data Collection Methods**

The survey utilized primary and secondary sources of data. Primary data was collected from members of the public, public officials, and key informants in the various study counties. Data from members of the public was collected through individual face to face interviews.

Key informant interviews were conducted in the offices of target institutions. This approach encouraged confidentiality, ensured validity of the data collected and helped create rapport with the interviewed respondents. Secondary method of data collection was also used in mining information from various sources such as book, journals, government records, internet and relevant photographs were taken.

### **2.3.2 Data Collection Tools**

Data collection tools included questionnaires, interview schedules and key informant guides. The questionnaire used had closed and open ended questions. A key informant guide was used to collect information from key informants. Photography, field note books and pens were used in recording information.

## **2.4 Data Collection and Management**

National Crime Research Centre (NCRC) and Power of Mercy Advisory Committee (POMAC) who had public hearings on abolition or retention of the death penalty running concurrently worked closely with institutions such as the Kenya National Human Rights Commission (KNHRC), Judiciary, National Police Service, State Department of Correctional

Services and the Ministry of Interior and Coordination of National Government among others in realizing the objectives of this study.

Researchers from the National Crime Research Centre conducted a pre- test of the tools before the actual field work data collection exercise. This was to establish reliability and validity of the tools. Qualified research assistants were identified, trained, allocated study sites and facilitated with required resources (funds, data collection tools and authority letters). Supervision and quality assurance control for the exercise was done by the National Crime Research Centre. After collection of data from the field, data was cleaned, coded, entered into the statistical package for social sciences (SPSS) and Microsoft excel software and thereafter analyzed.

## **2.5 Methods of Data Analysis**

This survey utilised both qualitative and quantitative data analysis methods. The questionnaires were first cleaned, coded, entered and thereafter analysed using the statistical package for social sciences (SPSS) software and Microsoft excel. Quantitative data was analysed using descriptive statistics and the information presented in distribution frequency and percentage tables and figures (bar graphs and pie charts). Qualitative data was analysed through interpretation of responses from key informants along the research objectives. Analysed data is presented in this report thematically guided by research objectives.

## **2.6 Ethical Considerations**

The survey considered the following ethical issues:

- i. Authority to collect data was sought from all the relevant institutions targeted before commencement of the exercise.
- ii. Informed consent: respondents were briefed on the purpose of research and thereafter requested to participate voluntarily.
- iii. Confidentiality was upheld by treating sensitive information with utmost confidentiality from victims and perpetrators of capital crimes.
- iv. In areas where there was language barrier, a local village elder was used to assist in the interpretation to the respondents' dialect.
- v. Confidentiality and identity of the respondents along with the information provided was safeguarded and their rights respected.

- vi. Adequate orientation and training of research assistants and their supervisors was undertaken to acquaint them with professional and ethical issues of conduct during the survey.
- vii. The convenience of respondents in regards to interview venues was ensured. Arrangement for meetings and facilitation for the respondents especially in focus group discussion was done on time.



## **CHAPTER THREE: RESULTS AND DISCUSSION**

### **3.1 Introduction**

This chapter presents the results and discussion of the data collected from questionnaires, key informant interviews and focus group discussions. The sample respondents for this study comprised 4703 members of the public and 256 public officials.

### **3.2 Socio-Demographic Characteristics of Respondents**

In terms of the gender of the members of the public sampled, 60.4% were male and 39.6% were female. In regards to age, 18.6% of the respondents were aged between 18-25 years; while 26.1% of the respondents were aged 26-33; 22.6% were between 34-41 years; 17.2% of the respondents were under the age bracket of 42-49; 9.2% were aged between 50-57 years; 3.8% of the respondents were aged between 58-65 years, whereas 2.4% were aged 66 years and above. The findings indicate that the majority of respondents were youthful.

On marital status, the survey established that 68.1 % of the respondents were married; 25.1% were single; 3.4 % were separated; 0.9% were divorced and 2.4 % were widowed. On the level of education of the respondents, the findings showed that, 37.0% had secondary education level of form 1-4; 21.7% had primary school education; 2.7% had secondary level of form 5-6; 16.0% had middle level college education; whereas 15.2% had university education. Moreover 4.8% had never been to school, while 2.1% had never gone beyond pre-primary school level. This finding indicates that the majority of the sampled population was generally literate and could give informed opinions on the subject of capital offences and punishment in Kenya.

Majority of the respondents (83.6%) were Christians while Muslims constituted 14.8%. The rest of the respondents professed traditional, Hindu and other religious faiths. On occupation, 35.7% of the respondents were business persons; permanent employees in the public sector constituted 22.8% and 13.5% were casual/temporary employees. The rest of the respondents worked in other categorized occupations including subsistence farming and permanent employment in the private sector as indicated in Table 3.1.

In terms of residency in the areas the study was undertaken, 48.7% of respondents had been residents in their respective locality for more than 13 years; 14.7% had resided in their areas

between 1-3 years; 14.0% had been residents between 4 – 6 years; 7.8% of the respondents had been resident in their locality for a period of 7-9 years while 7.5% had stayed for 10-12 years. Likewise, 7.3% of the respondents had been resident in the locality for a period of less than 1 year. This finding is indicative of the fact that a good proportion of the study respondents had lived longer in the areas covered by this study and therefore knowledgeable and well versed to give informed views on topical social issues including capital offences and punishment in their localities. These findings are indicated in Table 3.1 below.

**Table 3.1: Socio-Demographic Characteristics of Members of the Public Sampled**

Demographic Characteristics		Frequency	Valid Percent
Age of Respondents in Years	18-25	874	18.6%
	26-33	1226	26.1%
	34-41	1065	22.6%
	42-49	811	17.2%
	50-57	435	9.2%
	58-65	180	3.8%
	66+	112	2.4%
Marital Status	Single	1182	25.1%
	Married	3203	68.1%
	Separated	162	3.4%
	Divorced	42	0.9%
	Widowed	114	2.4%
Level of Education	None	228	4.8%
	Pre-Primary	98	2.1%
	Primary	1020	21.7%
	Secondary 1-4	1740	37.0%
	Secondary 5-6	126	2.7%
	Middle Level College	751	16.0%
	University	714	15.2%
	Adult Literacy	14	0.3%
	Other	12	0.3%
Religion	Traditional	54	1.1%
	Christian	3930	83.6%
	Islam	697	14.8%
	Hindu	4	0.1%
	Other	18	0.4%
Nationality	Kenyan	4673	99.4%
	Non Kenyan	30	0.6%

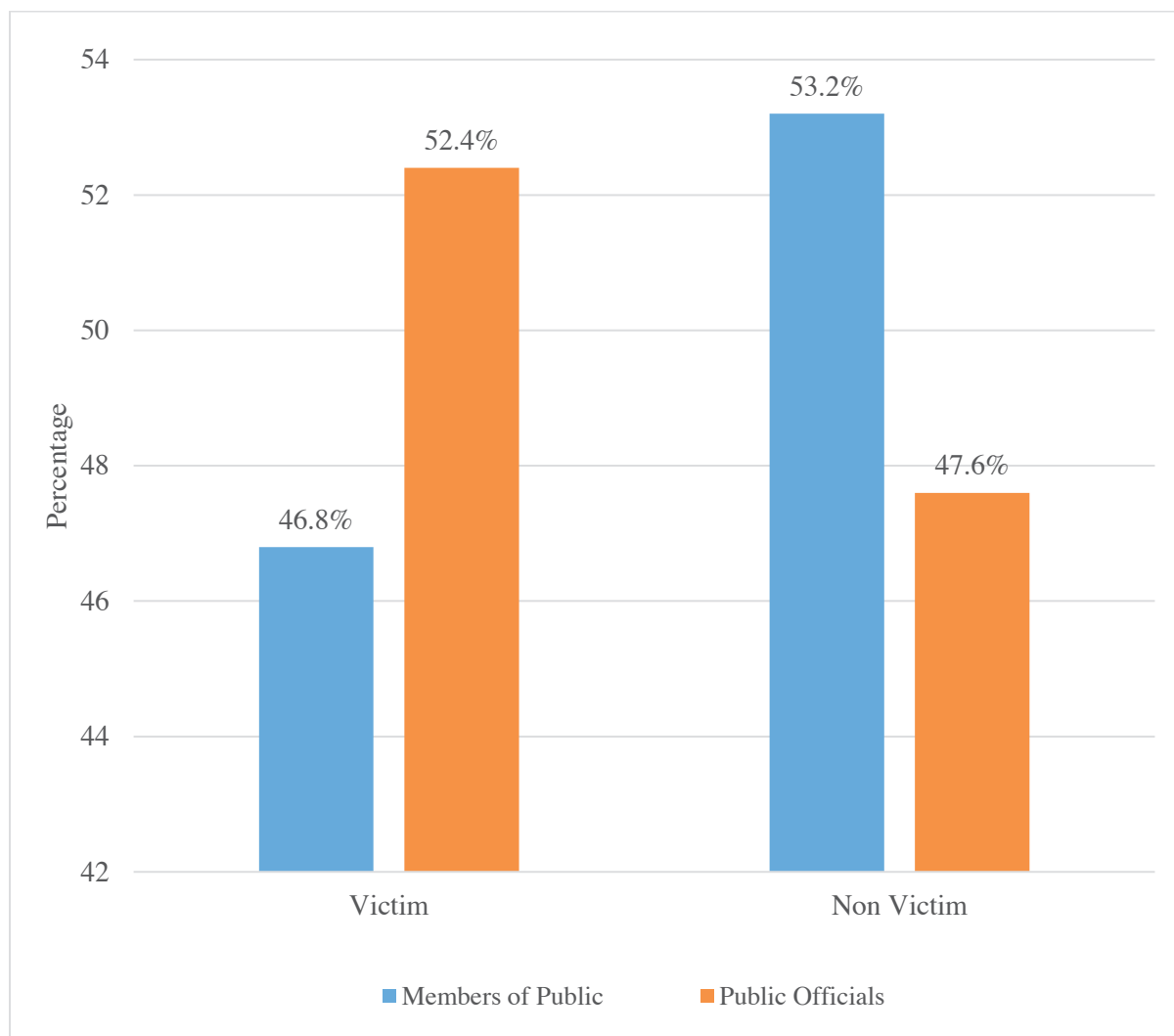
Demographic Characteristics		Frequency	Valid Percent
Main Occupation	Permanent Employment-Private Sector	320	6.8%
	Permanent Employment-Public Sector	1073	22.8%
	Casual/temporary employment	637	13.5%
	Business Person	1680	35.7%
	Subsistence Farming	444	9.4%
	Other Specify	549	11.7%
Length of stay in current residence	Below 1 Year	345	7.3%
	1-3 Years	689	14.7%
	4-6 Years	659	14.0%
	7-9 Years	367	7.8%
	10-12 Years	354	7.5%
	13+	2289	48.7%

### 3.3 Crime Victimization in Kenya

#### 3.3.1 Victims of Crime

A key objective of this study was to establish victimization in terms of crimes. The respondents were asked whether they or their family members had ever been victims of a crime. As indicated in Figure 1, it was established that 46.8% of members of the public had been victims of crime, while 53.2% of them had not been victims. On the other hand, 52.4% of public officials had been victims of crimes, while 47.6% of them had not been victim of crimes. This finding points out that the study respondents have been victims of crimes in one way or the other. It could also conceivably mean that people in certain social stratum in the society like those who work (public officials) are more likely to experience crime for various reasons.

A similar study on victimization by Walsh 2008 (Cited in World Development Report, 2014) found out that higher crime rates have been associated with higher inequality and poverty. Nevertheless, there remains an ambiguity over the most prominent socio-economic factors that increase crime rates, and consequently individual victimization.



**Figure 1: A Comparison Analysis of Victims of Crime**

### 3.3.2 Types of Crimes Experienced

The study sought to understand the typologies of crimes experienced by respondents or members of their families. From the findings indicated in Table 3.2, it was found out that 31.5% of members of the public and 32.0% of public officials and family members experienced theft or stealing as the most outstanding crime. In addition, members of the public experienced the following crimes: burglary/house breaking (17.4%); robbery (14.4%); assault (11.2%); murder (6.7%); cattle rustling/stock theft (6.2%); robbery with violence (6.1%); rape (3.4%). On the other hand, public officials reported being victims of assault (15.5%); burglary (13.4%); robbery (13.4%); murder (9.3%); robbery with violence (8.2%) among other crimes.

**Table 3.2: Types of Crimes Experienced by Victims**

Type of Crime Experienced	Members of Public		Public Officials	
	N	Percent of Cases	N	Percent of Cases
Theft/Stealing	667	31.5%	82	32.0%
Burglary/House Breaking	368	17.4%	34	13.4%
Robbery	306	14.4%	34	13.4%
Assault/Affray	238	11.2%	40	15.5%
Murder	143	6.7%	23	9.3%
Cattle Rustling/Stock theft	134	6.3%	5	2.1%
Robbery with Violence	129	6.1%	20	8.2%
Rape	71	3.4%	-	-
Fraud/Conning	46	2.2%	3	1.0%
Land Grabbing	35	1.7%	3	1.0%
Possession of Illicit brew/drug	33	1.6%	3	1.0%
Carjacking/Hijacking	29	1.4%	8	3.1%
Destruction of Property/ Trespassing	21	1.0%	8	3.1%
GBV/Sexual Harassment	21	1.0%	-	-
Defilement	13	0.6%	-	-
Dangerous Driving	9	0.4%	5	2.1%
Defamation	9	0.4%	5	2.1%
Kidnapping	9	0.4%	-	-
Manslaughter	7	0.3%	5	2.1%
Attempted Robbery	6	0.3%	-	-
Negligence	6	0.3%	-	-
Terrorism	4	0.2%	3	1.0%
Attempted Suicide	2	0.1%	-	-
Corruption	2	0.1%	3	1.0%
Procuring Abortion	1	0.0%	-	-

From these findings, it is evident that members of the public and public officials in this study experienced various crimes including serious capital offences punishable by the death penalty like robbery with violence and murder as reflected in Table 3.2 above.

### 3.4 Perceptions on the Purpose of Sentencing

The survey sought to understand the perceptions of the respondents on the purpose of sentencing offenders. Majority (77.4%) of the members of the public and (82.2%) of public officials sampled said the purpose of sentencing is to change offender's behavior and attitude (rehabilitation). Equally, (67.0%) of members of the public and (75.6%) of public officials perceived the purpose of sentencing as the punishment of offenders. Pointedly, 50.6% of members of the public and 80.3% of public officials' viewed sentencing as a deterrence on the offender to commit further crimes; while 40.6% members of the public and 54.0% public officials considered sentencing as a mechanism to restrict offenders' opportunity to re-offend.

Additionally, 32.1% members of the public and 49.8% of public officials considered sentencing as a way to scare the offender so that he/she won't do it again; 27.9% members of the public and 46.9% of public officials said the purpose of sentencing is to make amends to the victims for harm done/justice. Likewise, 21.2% members of the public and 37.6% public officials consider sentencing to be a way of expressing society's disapproval of offence/crimes. These findings are indicated in Table 3.3.

**Table 3.3: Purpose of Sentencing Offenders**

Purpose of Sentencing	Members of Public		Public Officials	
	N	Percent of Cases	N	Percent of Cases
Punish an Offender	3094	67.0%	161	75.6%
Restrict Offenders' opportunity to re-offend	1875	40.6%	115	54.0%
Change Behaviour/attitudes of an Offender to prevent re-offending (Rehabilitation)	3575	77.4%	175	82.2%
Deter others from committing the same crime	2338	50.6%	171	80.3%

Purpose of Sentencing	Members of Public		Public Officials	
	N	Percent of Cases	N	Percent of Cases
Make amends to the Victims for harm done/justice	1291	27.9%	100	46.9%
Express Society's Disapproval	979	21.2%	80	37.6%
Scare the Offender so that he/she won't do it again (Individual deterrence)	1484	32.1%	106	49.8%
Maintain law and order	54	1.2%	3	1.4%
To reduce crime rate	49	1.1%	3	1.4%
Reduce/Prevent cases of revenge	15	0.3%	1	0.5%

These findings imply that Kenyans disapprove wrong doing and consider sentencing of offenders as serving the goal of rehabilitating and punishing offenders. Concurrently, in a Kenyan court, in a case of, *John Shikoli Atsunzi v Republic*, the judge in his ruling argued that the objective of sentencing should also be to deter repeat offenders. The judge gave a very elaborate description of what constitutes a sentence as:

*“Above and beyond punishing an offender, the purpose of a sentence is also to reform the offender..... in order to reduce instances of repeat offences, sentences should be given while putting into consideration other similar offences and the situation of the offender”.* (Cr.App, 139, 2014).





**Figure 2: A Reformed Prisoner Mr. Peter Ouko at Kamiti Maximum Prison in Kenya receiving a Recognition Certificate from Attorney General, Prof. Githu Muigai (Source: POMAC)**

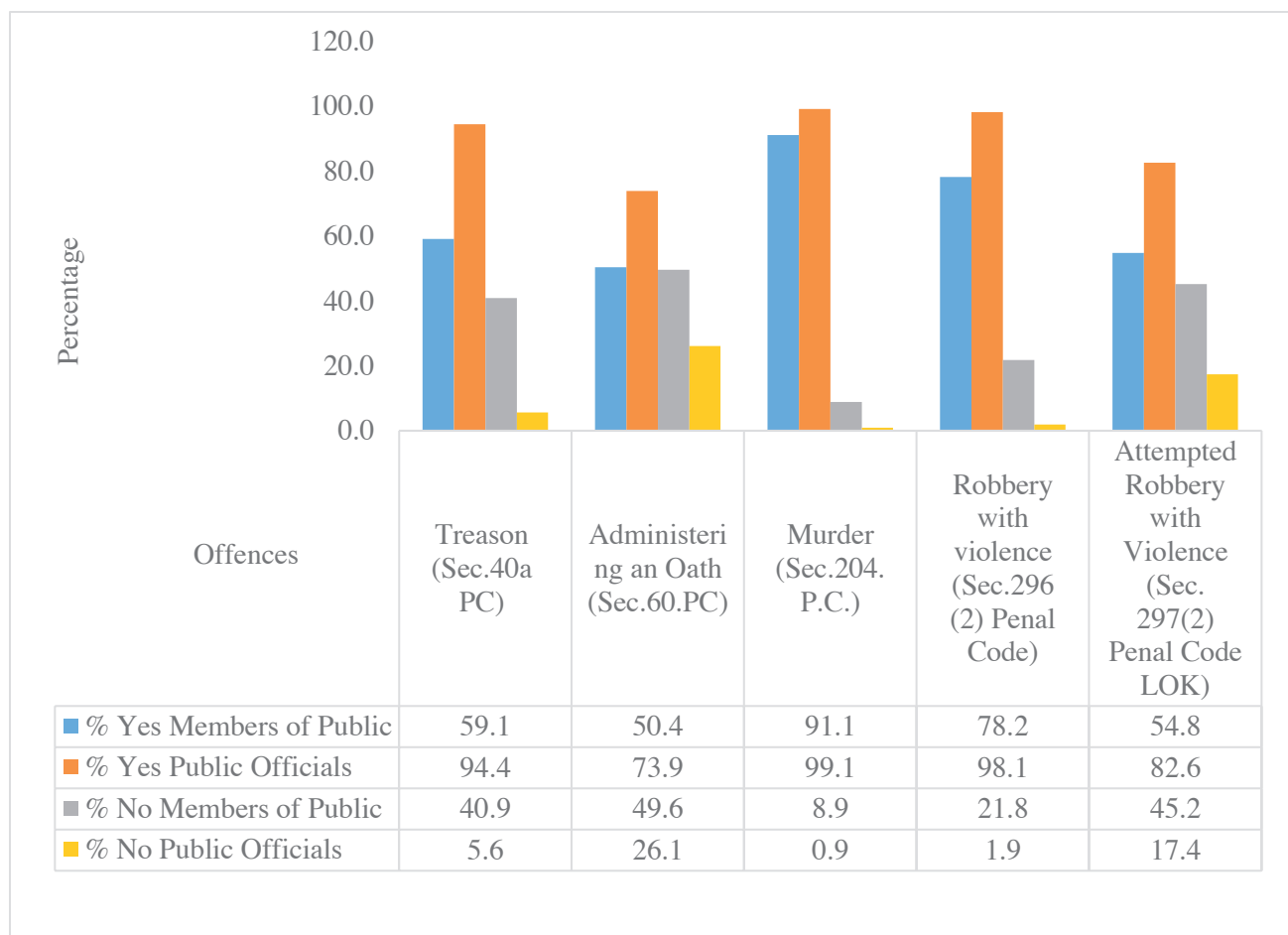
### **3.5 Awareness Levels of Capital Offences Punishable by Death in Kenyan Law**

A comparison of responses was done between members of the public and public officials on the level of awareness of capital offences punishable by death in Kenya. The results indicate that most public officials were aware of the capital offences punishable by death, with murder (99.1%) as the highest reporting by public officials and 91.1% for members of public. Members of the public indicated awareness of robbery with violence (78.2%) as a capital offences punishable by death.

Also, from the findings, 94.4% public officials were aware that treason is a capital offence while 59.1% members of the public were aware that treason attracts capital punishment. Likewise, 82.6% Public officials' indicated awareness that robbery with violence attracts



capital punishment while only 54.8% members of the public indicated awareness of robbery with violence attracting capital punishment. From the study, 73.9% of public officials and 50.4% members of the public pointed out awareness that administering oath is a capital offence. The findings as shown on Figure 3 indicate that public officials were more informed about capital offences as compared to members of public. This could be due to the fact that some of them interact with these issues in their line of duty as most public officials in this study were drawn from the criminal justice agencies and other national government administrative areas.



**Figure 3: Level of Awareness of Capital Offences in Kenya**

### **3.5.1 Comparison of County Awareness Levels on Capital Offences Punished by Death in Kenyan Law**

A comparison was conducted on the level of awareness in the Counties on the six capital offences punishable by death in Kenyan law and the results are as provided in Table 3.4.

### 3.5.1.1 Treason (Sec.40 (3) Penal Code, LOK)

When the respondents were asked if they were aware that treason was a capital offence, the findings were as follows: that 59.1% of the respondents were aware that under Kenyan Law treason is a capital offence punishable by death, while 40.9% respondents did not know. Majority of the respondents in Mandera County (90.0%), Garissa (88.0%), West Pokot (83.2%), Kitui (76.8%), Turkana (76.1%) and Trans Nzoia 70.1% were aware that in Kenyan law treason is a capital offence. In contrast, in Elgeyo Marakwet (29.0%), Baringo (30.9%), Uasin Gishu (30.6%), Kakamega (34.0%), Kiambu (35.2%) and Busia (37.2%), a relatively low level of respondents were aware that treason was a capital offence as indicated in Table 3.4.

Article 3 (3) of the Constitution of the United States, spells out what is considered treason in the United States as:

*“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. .... Life of the Person attainted” (Constitution of the United States).*

As reported by Scott (2017), one of the most recent American citizens charged with treason was Adam Yahye Gadahn, the California-born spokesman for al-Qaida. In 2006, Gadahn was indicted in the Central District of California for treason and giving material support to Al-Qaida.

**Table 3.4: Awareness of Capital Offences Punishable by Death in Kenyan Law for Members of Public- Counties Analysis**

County of Residence	Treason (Sec.40 (3) PC)		Administering an Oath (Sec.60.PC)		Murder (Sec.204. PC)		Robbery with violence (Sec.296 (2) PC)		Attempted Robbery with Violence (Sec. 297(2) PC)		Military offences (Kenya Defences Act, No.25, 2012)	
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
1 Narok	59.2%	40.8%	55.1%	44.9%	95.9%	4.1%	88.8%	11.2%	66.3%	33.7%	63.3%	36.7%
2 Kajiado	58.8%	41.2%	49.0%	51.0%	96.1%	3.9%	88.2%	11.8%	53.9%	46.1%	60.8%	39.2%
3 Baringo	69.1%	30.9%	58.2%	41.8%	88.2%	11.8%	78.2%	21.8%	62.7%	37.3%	65.5%	34.5%
4 Nakuru	50.0%	50.0%	43.0%	57.0%	89.0%	11.0%	60.0%	40.0%	42.0%	58.0%	49.0%	51.0%
5 Bomet	48.0%	52.0%	60.0%	40.0%	91.0%	9.0%	88.0%	12.0%	76.0%	24.0%	64.0%	36.0%
6 Kericho	56.4%	43.6%	60.4%	39.6%	96.0%	4.0%	86.1%	13.9%	67.3%	32.7%	56.4%	43.6%
7 Laikipia	48.1%	51.9%	50.0%	50.0%	88.0%	12.0%	74.1%	25.9%	52.8%	47.2%	61.1%	38.9%
8 Lamu	57.3%	42.7%	52.7%	47.3%	95.5%	4.5%	71.8%	28.2%	41.8%	58.2%	56.4%	43.6%
9 Tana River	46.3%	53.7%	48.1%	51.9%	82.4%	17.6%	66.7%	33.3%	51.9%	48.1%	52.8%	47.2%
10 Kilifi	53.8%	46.2%	55.5%	44.5%	86.6%	13.4%	78.2%	21.8%	52.1%	47.9%	59.7%	40.3%
11 Kwale	66.0%	34.0%	58.0%	42.0%	91.0%	9.0%	77.0%	23.0%	49.0%	51.0%	48.0%	52.0%
12 Mombasa	56.4%	43.6%	43.6%	56.4%	90.1%	9.9%	73.3%	26.7%	36.6%	63.4%	59.4%	40.6%
13 Taita Taveta	63.4%	36.6%	42.6%	57.4%	89.1%	10.9%	74.3%	25.7%	51.5%	48.5%	57.4%	42.6%
14 Kisumu	62.3%	37.7%	50.9%	49.1%	88.7%	11.3%	67.0%	33.0%	35.8%	64.2%	55.7%	44.3%
15 Siaya	56.2%	43.8%	42.9%	57.1%	91.4%	8.6%	76.2%	23.8%	43.8%	56.2%	60.0%	40.0%
16 Homabay	58.3%	41.7%	45.6%	54.4%	92.2%	7.8%	80.6%	19.4%	43.7%	56.3%	62.1%	37.9%
17 Migori	48.0%	52.0%	41.0%	59.0%	95.0%	5.0%	76.0%	24.0%	42.0%	58.0%	51.0%	49.0%
18 Kisii	51.5%	48.5%	48.5%	51.5%	94.1%	5.9%	80.2%	19.8%	43.6%	56.4%	55.4%	44.6%
19 Nyamira	65.3%	34.7%	40.6%	59.4%	95.0%	5.0%	79.2%	20.8%	54.5%	45.5%	64.4%	35.6%
20 Trans Nzoia	70.1%	29.9%	70.2%	29.8%	89.7%	10.3%	84.3%	15.7%	69.7%	30.3%	65.0%	35.0%
21 West Pokot	83.2%	16.8%	77.9%	22.1%	87.4%	12.6%	84.2%	15.8%	72.6%	27.4%	66.7%	33.3%
22 Turkana	76.1%	23.9%	75.8%	24.2%	85.9%	14.1%	80.4%	19.6%	76.1%	23.9%	75.0%	25.0%
23 Uasin Gishu	69.4%	30.6%	58.0%	42.0%	96.9%	3.1%	93.9%	6.1%	72.4%	27.6%	72.9%	27.1%
24 Nandi	61.0%	39.0%	52.0%	48.0%	96.0%	4.0%	91.0%	9.0%	72.0%	28.0%	70.0%	30.0%

	County of Residence	Treason (Sec.40 (3) PC)		Administering an Oath (S.60.PC)		Murder (Sec.204.PC)		Robbery with violence (Sec.296 (2) PC)		Attempted Robbery with Violence (Sec. 297(2) PC)		Military offences (Kenya Defences Act, No.25, 2012)	
		Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
25	Elgeyo Marakwet	71.0%	29.0%	47.9%	52.1%	91.0%	9.0%	83.0%	17.0%	59.0%	41.0%	74.7%	25.3%
26	Samburu	54.9%	45.1%	37.9%	62.1%	92.2%	7.8%	75.8%	24.2%	53.8%	46.2%	38.8%	61.2%
27	Marsabit	58.2%	41.8%	37.8%	62.2%	89.0%	11.0%	63.7%	36.3%	48.4%	51.6%	42.4%	57.6%
28	Isiolo	69.0%	31.0%	33.0%	67.0%	92.0%	8.0%	73.0%	27.0%	43.0%	57.0%	49.0%	51.0%
29	Meru	57.4%	42.6%	45.5%	54.5%	90.1%	9.9%	66.3%	33.7%	41.6%	58.4%	45.5%	54.5%
30	Tharaka Nithi	66.3%	33.7%	32.7%	67.3%	93.9%	6.1%	77.6%	22.4%	45.9%	54.1%	49.0%	51.0%
31	Embu	62.1%	37.9%	54.4%	45.6%	80.0%	20.0%	65.3%	34.7%	53.7%	46.3%	59.6%	40.4%
32	Machakos	61.9%	38.1%	52.7%	47.3%	79.4%	20.6%	63.9%	36.1%	53.1%	46.9%	57.3%	42.7%
33	Makueni	57.7%	42.3%	48.4%	51.6%	76.3%	23.7%	67.0%	33.0%	47.9%	52.1%	49.5%	50.5%
34	Kitui	76.8%	23.2%	74.0%	26.0%	97.0%	3.0%	89.9%	10.1%	84.8%	15.2%	83.5%	16.5%
35	Garissa	88.0%	12.0%	72.5%	27.5%	90.1%	9.9%	84.8%	15.2%	76.1%	23.9%	78.9%	21.1%
36	Wajir	65.0%	35.0%	44.9%	55.1%	96.0%	4.0%	68.0%	32.0%	37.0%	63.0%	36.7%	63.3%
37	Mandera	90.0%	10.0%	83.8%	16.2%	94.0%	6.0%	85.9%	14.1%	70.4%	29.6%	87.9%	12.1%
38	Kakamega	34.8%	65.2%	31.7%	68.3%	90.9%	9.1%	80.9%	19.1%	57.3%	42.7%	33.3%	66.7%
39	Bungoma	41.9%	58.1%	40.0%	60.0%	95.2%	4.8%	80.0%	20.0%	61.9%	38.1%	45.7%	54.3%
40	Vihiga	49.0%	51.0%	39.8%	60.2%	97.9%	2.1%	96.8%	3.2%	66.3%	33.7%	54.8%	45.2%
41	Busia	37.2%	62.8%	29.3%	70.7%	95.7%	4.3%	76.6%	23.4%	53.2%	46.8%	18.7%	81.3%
42	Murang'a	40.8%	59.2%	42.3%	57.7%	89.8%	10.2%	86.7%	13.3%	45.3%	54.7%	53.1%	46.9%
43	Kiambu	35.2%	64.8%	49.4%	50.6%	95.6%	4.4%	90.1%	9.9%	52.7%	47.3%	62.6%	37.4%
44	Nyeri	61.3%	38.7%	44.2%	55.8%	92.3%	7.7%	65.4%	34.6%	49.0%	51.0%	61.6%	38.4%
45	Kirinyaga	61.4%	38.6%	39.5%	60.5%	90.1%	9.9%	80.8%	19.2%	44.8%	55.2%	51.1%	48.9%
46	Nyandarua	62.0%	38.0%	50.5%	49.5%	88.9%	11.1%	72.0%	28.0%	53.0%	47.0%	53.8%	46.2%
47	Nairobi	45.0%	55.0%	57.1%	42.9%	93.0%	7.0%	91.0%	9.0%	57.0%	43.0%	65.0%	34.0%
	<b>Total</b>	<b>59.1%</b>	<b>40.9%</b>	<b>50.4%</b>	<b>49.6%</b>	<b>91.1%</b>	<b>8.9%</b>	<b>78.2%</b>	<b>21.8%</b>	<b>54.8%</b>	<b>45.2%</b>	<b>57.7%</b>	<b>42.3%</b>

The offence of treason mainly cited in Kenya is the case of the 1982 Kenyan *coup d'état attempt* to overthrow former President Daniel Arap Moi's government. At midnight on Sunday, 1<sup>st</sup> August 1982, a group of soldiers from the Kenya Air Force took over the Voice of Kenya radio station and announced that they had overthrown the government. The group tried to force a group of Air Force fighter pilots to bomb the State House at gunpoint (The Standard 2004, March 17).



**Figure 4: Senior Private Hezekiah Ochuka, with hand in pocket, being escorted to a court martial over the August 1, 1982, attempted coup in Kenya (Source: Destination Magazine)**



### 3.5.1.2 Administering an Oath to Commit a Capital Offence (Sec.60. Penal Code, LOK)

The study sought to establish whether respondents were aware that administering an oath to commit a capital offence is an offence punishable by death under Kenyan law.

The study findings in Table 3.4 indicated that 50.4% of the respondents were aware that the offence of administering an oath to commit a capital offence attracted the death sentence while 49.6% were not aware.

Additionally, awareness was high in Mandera (83.8%), West Pokot (77.9%) and Tana River 75.8%. In Central Kenya where Government has been suppressing outlawed “mungiki” sect, level of awareness was at (49.4%) in Kiambu and 42.3% in Muranga. For the respondents who were not aware, it emerged that 60.5% of respondents in Kirinyaga and 55.8% of respondents in Nyeri were not aware.



**Figure 5: Security Officers inspect paraphernalia allegedly used in oath taking by members of the outlawed Mungiki sect, impounded from a home in Kirinyaga district, Central Kenya (Source: Daily Nation 2010, October 20)**

Although it is an offence to administer oath to commit a capital offence in Kenya, oathing for purposes other than committing a crime has been used in African societies to promote the African cultural beliefs and practices, harmony and mutual responsibility and in justice administration. The practice of oathing is prevalent in Africa and cases of some Africans professing religion using oath is not a rare occurrence. For instance the Kamba community's traditional practice of oaths has been used in conflicts resolution and has even been ordered by the courts. On 23rd October 2003, More than 3000 members of Kwa Mating'i Coffee Farmers Cooperatives Society in Machakos Town Sub-County administered a Kamba traditional oath against those who torched its more than 25 acres of coffee trees (Muliro, Theuri & Matheka, 2015).

### **3.5.1.3 Murder (Sec. 204 Penal Code, LOK)**

On murder as a capital offence punishable by death, the findings as indicated in Table 3.4 showed that, 91.1% of all the respondents were aware, while 8.9% of the respondents were not aware. Vihiga County had the highest number of respondents who were knowledgeable on the issue at 97.9%, while Makueni County had the least number of respondents who were aware at 76.3%.



**Figure 6: A Murder Suspect being Arraigned to Take Plea (Source: Reuters, T.Mukoya)**

Moreover, 95.6% of the respondents in Kiambu County were aware that murder was a capital offence that attracts the death sentence, in Isiolo and Tana River Counties, 92.0% and 82.4% of the respondents indicated awareness respectively. Generally, the high level of awareness could be indicative of the high rate of the crime of murder and the many cases in the country and the publicity such incidents tend to generate in the media. According to the National Police Service Annual Crime Report 2016 murder cases reported in 2015 were 1777, while in 2016, 1879 murder cases were reported with an increase of 6% (National Police Service, 2016).

#### **3.5.1.4 Robbery with Violence (Sec.296 (2) Penal Code, LOK)**

This study also sought to find out awareness levels on robbery with violence as a capital offence in Kenyan law as indicated in Table 3.4. Violence is described as an;

*“exercise of physical force so as to inflict injury or damage to person or property”. So when section 296 (2) of the Penal Code provides for robbery with violence it indicates that, “if the offender is armed with any dangerous or offensive weapon or instrument or is in company of one or more other persons or if immediately before or after the time of robbery he wounds, beats, strikes or uses any personal violence to any person, he is guilty of robbery with violence and shall be sentenced to death” (PC Cap 63,).*

The study established that 78.2% of the members of the public sampled in the County analysis were aware that under Kenyan law robbery with violence is a capital offence punishable by death, while 21.8% were not aware. As per the county analysis indicated in Table 3.4, respondents in Vihiga indicated the highest (96.8%) level of awareness on this, followed by respondents in Uasin Gishu at 93.9%. In Nakuru the level of awareness was at 60.0% while in Marsabit it was at 63.7%, these two counties showed the least level of awareness that robbery with violence is a capital offence that attracts the death sentence.

In exposition of the elements of robbery with violence, the case law is worth noting for its material contribution. For example in *John Kamau Wambugu and 2others v Republic*, a toy pistol was said to be a dangerous or offensive weapon falling under section 296 (2) of the Penal Code. Another case in *Isaac Karanja Mwangi v Republic* the court held that being pushed out



of a moving vehicle thus sustaining injuries was sufficient proof of violence. Therefore, the appellant's conviction and penalty for robbery with violence was well deserved and thus the court did not overturn but upheld it (Cr.App 152, 2009; Cr.App 35, 2009).

In *Osbon Onditi Ouko and Another v Republic*, the appellants were just the two when they robbed the complainants in this case. They did not injure them but were armed with a dangerous weapon, an A.K 47 rifle. The facts of the case were that; they threatened to use violence on their victims. The duo were charged and convicted for robbery with violence. In both cases all the elements of robbery with violence need not be present in one alleged act for it to be robbery with violence (Cr.App 173, 2006). According to the National Police Service Annual Crime Report 2016, cases of robbery in 2015 recorded were 712, while in 2016, 653 cases were reported indicating a decline of -8%.

#### **3.5.1.5 Attempted Robbery with Violence (Sec. 297(2) Penal Code, LOK)**

The study sought to establish respondents' awareness levels on attempted robbery with violence as an offence punishable by death under Kenyan law. The findings in Table 3.4 showed that 54.8% of the respondents were aware that it is a capital offence punishable by death, while 45.2% of them were not aware.

This finding indicates a comparatively lower level of knowledge relative to the other capital offences. The County analysis as indicated in Table 3.4 revealed that the level of awareness on attempted robbery with violence as capital offence was highest in Kitui County (84.8%) followed by Turkana and Garissa counties at 76.1% each. Wajir (37.0%), Mombasa (36.6%) and Kisumu (35.8%) counties had the least level of awareness.

#### **3.5.1.6 Military Offences Punishable by Death (Kenya Defence Act, No.25, 2012, LOK)**

The respondents were also asked to state awareness of specific military offences in Kenyan Law (such as treachery, spying, aiding the enemy, assisting the enemy with intelligence information, misconduct in action by others, mutiny and unlawful advocating for a change of governments) were capital offences punishable by death under the Kenya Defence Forces Act.

The findings were that 57.7% of the respondents were aware while 42.3% were not aware. In the Counties as indicated in Table 3.4, awareness was highest in Mandera (87.9%), followed by Kitui and Garissa at 83.5% and 78.9% respectively. Busia (18.7%), Kakamega (33.3%) and Wajir (36.7%) counties registered the lowest level of awareness in regard to the military offences punishable by death.

### **3.5.2 Comparison of Demographic Characteristics of Members of the Public on Awareness of Capital Offences Punished by Death in Kenyan Law**

From the findings, Table 3.5 provides detailed findings of the study by demographic of the respondents. A summary of analysis based on demographic awareness for the offence of treason based on age indicated that, 68.7% of the respondents categorized between 58-65 years of age were aware that treason was an offence that attracted the death penalty while 31.3% were unaware. Most of the respondents (50.7%) between 18-25 years were not aware that treason was punishable by death. This could be attributed to the fact that the last execution for the offence of treason in Kenya was conducted in 1987; thus older respondents are likely to be more aware of the incident in comparison to younger ones.

Further, demographic analysis of the awareness of members of the public that administering an oath to commit a capital offence is a capital offence based on their age category, indicated that a majority of those between 58-65 years (58.9%) were aware that administering an oath to commit a capital offence attracted the death penalty while 41.1% of the same category of respondents were unaware. Also, 53.3% of respondents above the age of 66 years affirmed awareness of the sentence that the offence of oathing attracted capital punishment while 46.7% of them in the same age category were not aware. On the other hand, 44.7% of respondents' aged 18-25 years were aware that the offence was punishable by death while 55.3% of respondents in this age category were not aware. The findings imply that older respondents were more aware perhaps due to past incidents in the country that might have occurred and reported involving oathing to commit capital offences by outlawed groups like Mungiki, MRC and SLDF. See Table 3.5.

According to the study findings on Table 3.5 on demographic analysis comparison, 93.0% of males who participated in the study were aware that under Kenyan law, murder is a capital offence punishable by death while 7.0% were unaware. The results also showed that 88.1% of females who participated in the study were aware about the fact while 11.9% were not.

Analysis based on religious affiliation showed that the majority of Hindu respondents (100%) were aware that murder was a capital offence that attracted death sentence under Kenyan law. Christian respondents (91.3%) also answered that they were aware that murder was punishable by death while 8.7% of the same category of respondents were not aware. Muslims respondents (89.9%) answered that they were knowledgeable on the issue of death penalty in relation to the offence of murder while 10.1% of respondents who subscribed to the same faith were unaware. Analysis based on the level of education of respondents showed that 85.5% of those with no formal education were aware that murder was a capital offence that attracted the death sentence while 14.5% of the same category of respondents was not.

Further analysis based on the main occupation of respondents showed that 94.9% of those who were permanently employed in the public sector were aware that that the offence of murder attracted the death sentence while 5.1% of the same category of respondents were not aware. Moreover, 94.9% of respondents who were permanently employed by the private sector indicated that they were knowledgeable of the fact while 90.6% of those engaged in subsistence farming also answered that they were aware. From the demographic analysis on Table 3.5 as indicated, 88.4% of the respondents in public sector employment were more aware than those in private sector employment (85.0%) that robbery with violence is a capital offence. Also, 79.6% of the victims were aware while 77.0% were not aware, this could imply that victims had an experience of the criminal justice system and charges that are applicable to the suspects if caught and brought before a court of law.

**Table 3.5: Demographic Characteristics of the Respondents Awareness That Capital Offences are Punishable by Death for Members of the Public**

Demographic Characteristics		Treason (Sec.40 (3) PC)		Administering an Oath (Sec.60.PC)		Murder (Sec.204. PC)		Robbery with violence (Sec.296 (2) PC)		Attempted Robbery with Violence (Sec. 297(2) PC)		Military offences (Kenya Defences Act, No.25, 2012)	
		Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
Gender	Male	66.1%	33.9%	54.5%	45.5%	93.0%	7.0%	82.4%	17.6%	59.4%	40.6%	62.5%	37.5%
	Female	48.5%	51.5%	44.3%	55.7%	88.1%	11.9%	72.0%	28.0%	47.9%	52.1%	50.2%	49.7%
Age of Respondent in years	18-25	49.3%	50.7%	44.7%	55.3%	86.5%	13.5%	66.8%	33.2%	43.6%	56.4%	50.9%	48.9%
	26-33	53.7%	46.3%	49.5%	50.5%	90.8%	9.2%	77.4%	22.6%	52.8%	47.2%	55.6%	44.4%
	34-41	62.3%	37.7%	51.1%	48.9%	92.8%	7.2%	80.7%	19.3%	56.5%	43.5%	58.3%	41.7%
	42-49	66.7%	33.3%	53.9%	46.1%	94.1%	5.9%	84.8%	15.2%	62.0%	38.0%	60.7%	39.3%
	50-57	66.4%	33.6%	52.5%	47.5%	92.4%	7.6%	83.9%	16.1%	59.7%	40.3%	64.7%	35.3%
	58-65	68.7%	31.3%	58.9%	41.1%	92.2%	7.8%	85.5%	14.5%	65.2%	34.8%	66.3%	33.7%
Marital Status	66+	66.1%	33.9%	53.3%	46.7%	85.7%	14.3%	72.3%	27.7%	59.8%	40.2%	63.3%	36.7%
	Single	52.8%	47.2%	47.3%	52.7%	87.7%	12.3%	70.4%	29.6%	46.9%	53.1%	54.9%	45.0%
	Married	62.7%	37.3%	52.4%	47.6%	93.0%	7.0%	82.1%	17.9%	58.5%	41.5%	60.1%	39.9%
	Separated	50.0%	50.0%	45.6%	54.4%	92.0%	8.0%	75.3%	24.7%	52.5%	47.5%	46.5%	53.5%
	Divorced	50.0%	50.0%	47.6%	52.4%	78.6%	21.4%	76.2%	23.8%	52.4%	47.6%	47.6%	52.4%
	Widowed	37.7%	62.3%	33.3%	66.7%	78.9%	21.1%	55.3%	44.7%	37.7%	62.3%	41.1%	58.9%

Demographic Characteristics	Treason (Sec.40(3) PC)		Administering an Oath (Sec.60.PC)		Murder (Sec.204. PC)		Robbery with violence (Sec.296 (2) PC)		Attempted Robbery with Violence (Sec. 297(2) PC)		Military offences (Kenya Defences Act, No.25, 2012)	
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
Level Education	None	54.4%	45.6%	44.2%	55.8%	14.5%	62.6%	37.4%	40.8%	59.2%	45.5%	54.5%
	Pre-Primary	57.1%	42.9%	48.5%	51.5%	12.2%	77.6%	22.4%	52.0%	48.0%	54.2%	45.8%
	Primary	48.6%	51.4%	43.0%	57.0%	11.5%	72.7%	27.3%	51.2%	48.8%	49.2%	50.8%
	Secondary 1-4	58.5%	41.5%	51.0%	49.0%	8.2%	79.3%	20.7%	55.8%	44.2%	57.6%	42.4%
	Secondary 5-6	69.0%	31.0%	54.5%	45.5%	4.0%	85.7%	14.3%	68.3%	31.7%	61.8%	38.2%
	Middle Level College	61.0%	39.0%	55.4%	44.6%	8.2%	81.0%	19.0%	55.1%	44.9%	62.8%	37.2%
Religion	University	73.2%	26.8%	55.7%	44.3%	5.4%	85.2%	14.8%	60.0%	40.0%	68.4%	31.5%
	Adult Literacy	92.9%	7.1%	76.9%	23.1%	7.1%	71.4%	28.6%	50.0%	50.0%	61.5%	38.5%
	Other	50.0%	50.0%	-	-	33.3%	66.7%	33.3%	66.7%	33.3%	58.3%	41.7%
	Traditional	64.8%	35.2%	52.8%	47.2%	9.3%	77.8%	22.2%	51.9%	48.1%	60.8%	39.2%
	Christian	58.2%	41.8%	49.7%	50.3%	8.7%	78.9%	21.1%	55.5%	44.5%	58.2%	41.8%
	Islam	64.1%	35.9%	54.1%	45.9%	10.1%	74.5%	25.5%	51.4%	48.6%	55.3%	44.7%
	Hindu	75.0%	25.0%	50.0%	50.0%	0.0%	100.0%	0.0%	50.0%	50.0%	50.0%	50.0%
	Other	38.9%	61.1%	55.6%	44.4%	11.1%	72.2%	27.8%	55.6%	44.4%	38.9%	61.1%

Demographic Characteristics		Treason (Sec.40 (3) PC)		Administering an Oath (Sec.60.PC)		Murder (Sec.204. PC)		Robbery with violence (Sec.296 (2) PC)		Attempted Robbery with Violence (Sec. 297(2) PC)		Military offences (Kenya Defences Act, No.25, 2012)	
		Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
Main Occupation	Permanent Employment- Private Sector	57.2%	42.8%	53.6%	46.4%	94.1%	5.9%	85.0%	15.0%	55.7%	44.3%	64.7%	35.3%
	Permanent Employment-Public Sector	76.9%	23.1%	61.0%	39.0%	94.9%	5.1%	88.4%	11.6%	65.5%	34.5%	69.7%	30.3%
	Casual/temporary employment	54.1%	45.9%	46.4%	53.6%	88.3%	11.7%	71.2%	28.8%	52.3%	47.7%	51.0%	49.0%
	Business Person	52.9%	47.1%	48.8%	51.2%	90.9%	9.1%	76.7%	23.3%	53.3%	46.7%	54.7%	45.3%
	Subsistence Farming	52.5%	47.5%	40.9%	59.1%	90.6%	9.4%	78.1%	21.9%	50.1%	49.9%	50.1%	49.9%
Ever been a Victim of Crime	Other Specify	55.5%	44.5%	44.6%	55.4%	86.0%	14.0%	67.6%	32.4%	44.7%	55.3%	52.4%	47.4%
	Yes	60.2%	39.8%	49.5%	50.5%	92.8%	7.2%	79.6%	20.4%	53.7%	46.3%	57.1%	42.9%
	No	58.2%	41.8%	51.2%	48.8%	89.6%	10.4%	77.0%	23.0%	55.8%	44.2%	58.2%	41.8%
Total		59.1%	40.9%	50.4%	69.6%	91.1%	8.9%	78.2%	21.8%	54.8%	45.2%	57.7%	42.3%

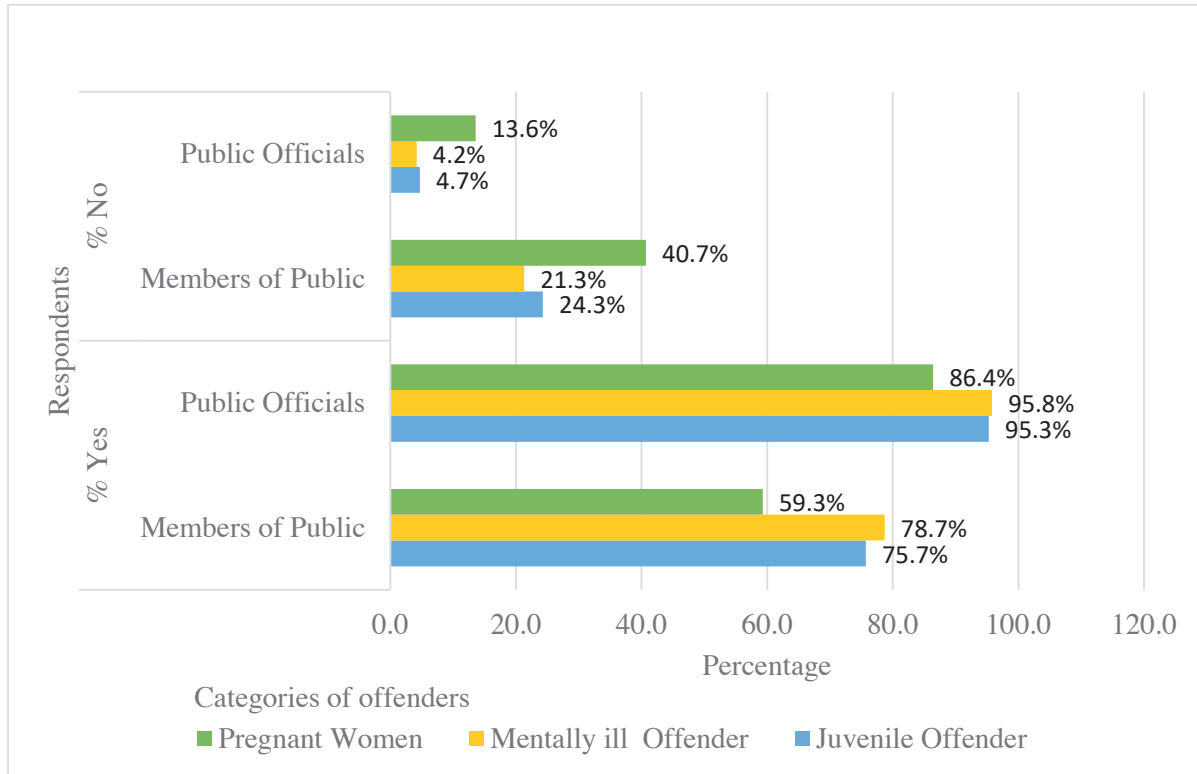
Demographic analysis in Table 3.5 showed that married couples (58.5%) were more aware that attempted robbery with violence is a capital offence than 53.1% of respondents who were single and did not know. This can be attributed to information sharing between the families for married couples. The analysis of findings based on the demographic characteristics of respondents show that 54.8% of all respondents were aware that under Kenyan law attempted robbery with violence is a capital offence punishable by death while 45.2% of respondents were not aware. Further analysis based on gender indicates that 59.4% of male respondents were knowledgeable of the fact while 47.9% of all female respondents were also aware that attempted robbery was a crime that was punishable by death. A review of results based on the religious affiliation of respondents showed that 55.5% of Christians, 51.4% of Muslims and 51.9% of respondents who subscribed to traditional beliefs were aware that attempted robbery was an offence that attracted the death sentence in Kenya.

The demographic analysis of the awareness on specific military offences that attract capital offence as indicated in Table 3.5 showed that more Christians (58.2%) were aware than Muslims (55.3%) that there are specific military offences that attract the death penalty. Furthermore, from the respondents who believed in their Traditional religion, 60.8% of them had knowledge that specific military offences attract death penalty and 39.2% did not have that information. Interestingly, Hindu had an equal number of respondents (50.0%) (50.0%) for those who had information and the ones who did not know respectively that specific military offences attract death penalty. The demographic findings in Table 3.5 generally indicated lower levels of awareness among all respondents at 57.7%. This could be attributed to the fact that the judicial process for prosecuting offending military officers remains largely out of the public domain.

### **3.6 Categories of Offenders to Whom Death Penalty Cannot be Applied**

The study also delved into exemptions of death penalty under Kenyan law. This research sought to gauge awareness levels among Kenyans on the different categories of offenders on whom the death penalty cannot be applied. Death penalty cannot be applied to some offenders because of their special circumstances such as juveniles, pregnant women and the mentally ill. The findings indicated that (95.8%) of public officials were aware that mentally ill persons cannot be subjected to capital punishment compared to 78.7% of members of the public. From the results, 95.3% of public officials were aware that juveniles cannot be punished for capital offences compared to

75.7% of members of the public. For pregnant women, the awareness was 59.3% and 86.4% for members of the public and public officials respectively. Figure 7 shows levels of awareness of categories of offences that are exempted from capital punishment.



**Figure 7: Level of Awareness of Categories of Offenders That Capital Punishment Cannot be Applied in Kenya**

A study on the question of exemptions of certain types of offenders from the death penalty conducted in China by Dietrich Oberwittler and Shenghui Qi (2007/2008) revealed lack of knowledge and understanding of important legal rules, both nationally as well as internationally. Even for persons below 18 years of age at the time of commission of the crime, for whom the Chinese Criminal Law forbids the imposition of death penalty, only 33.0 % of them thought that they should be excluded from this punishment in every case.

In their study they noted that, there is a general support for the principles of the rule of law in death penalty cases, although some inconsistencies between answers indicated both a degree of ignorance and lack of rationality on the subject of capital punishment. The Chinese study recommended that the government should be very cautious when trying to use public opinion as the reference point for criminal policy making. Moreover, the irrational appeals drawn from



public opinion should never be used as a reason or excuse to delay or prevent the reforms of death penalty as for the case in China (Oberwittler & Qi, 2008).

### **3.6.1 County Analysis on the Awareness of Categories of Offenders to Whom Death**

#### **Penalty Cannot be Applied**

The analysis by Counties on members of the public's awareness of categories of offenders to whom death penalty cannot be applied as shown in Table 3.6, indicated that a majority of Kenyans are knowledgeable about these categories. The specific findings were as follows:-

##### **(a) Mentally Ill**

The findings of the study indicated that most of the respondents (78.7%) were aware that under Kenyan Law the death penalty cannot be applied to the mentally ill because of their special circumstances while 21.3% of respondents were not aware. Mombasa, Mandera and Taita Taveta Counties showed a high level of awareness at 97.0%, 95.0% and 93.1% respectively. In contrast, Samburu, Tharaka Nithi and Busia Counties showed a comparatively lower level of awareness on the issue at 58.2%, 58.2% and 54.3% respectively.

##### **(b) Juvenile**

The results based on analysis by County showed that 75.7% of all respondents who participated in the study were aware that under Kenyan law, juveniles could not be sentenced to death because of their special circumstances while 24.3% of respondents had no knowledge on the issue. Further analysis by County indicated that the level of awareness was high in Kajiado (92.2%), Narok (90.8%) and Uasin Gishu (89.8%) counties. In Embu County, it was at 60.6%, Migori County (65.0%) and Tharaka Nithi County (65.3%). The comparatively low level of awareness was in Busia County, where only 57.4% of the respondents indicated awareness of juvenile exemption from the death sentence regardless of the offence.

##### **(c) Pregnant Women**

The study as well sought to establish whether respondents were aware that under Kenyan law, death penalty cannot be applied to pregnant women because of their special circumstances. The findings by Counties generally indicated that 59.3% of all respondents were aware that pregnant capital offenders could not be subjected to the death penalty under the Kenyan law while 40.7% of them were not aware. Uasin Gishu (72.2%), Kisumu (73.6%), Bomet (76.0%) and Mandera (85%) Counties showed high levels of awareness in regard to this matter. In contrast, respondents in Busia, Kakamega, Isiolo, Muranga, Meru, Bungoma, TharakaNithi, Kiambu, Vihiga and

Embu Counties indicated low levels of awareness in regard to the application of the death penalty on pregnant capital offenders as shown in Table 3.6.



**Figure 8: Women Serving Prison Sentence (Source: POMAC, 2016)**

**Table 3.6: County Analysis on Members of Public Awareness of Categories of Offenders to Whom Death Penalty Cannot be Applied**

County of Residence		Juvenile Offender		Mentally ill Offender		Pregnant Women	
		Yes	No	Yes	No	Yes	No
1	Baringo	75.5%	24.5%	80.0%	20.0%	70.0%	30.0%
2	Bomet	82.0%	18.0%	86.0%	14.0%	76.0%	24.0%
3	Bungoma	65.7%	34.3%	70.5%	29.5%	45.2%	54.8%
4	Busia	42.6%	57.4%	54.3%	45.7%	35.1%	64.9%
5	Elgeyo Marakwet	75.0%	25.0%	78.0%	22.0%	62.0%	38.0%
6	Embu	60.6%	39.4%	76.6%	23.4%	48.9%	51.1%
7	Garissa	78.3%	21.7%	77.2%	22.8%	66.3%	33.7%
8	Homabay	74.8%	25.2%	84.5%	15.5%	58.3%	41.7%
9	Isiolo	70.0%	30.0%	64.0%	36.0%	41.0%	59.0%
10	Kajiado	92.2%	7.8%	88.2%	11.8%	69.6%	30.4%
11	Kakamega	68.5%	31.5%	77.5%	22.5%	37.1%	62.9%
12	Kericho	76.2%	23.8%	84.2%	15.8%	55.4%	44.6%
13	Kiambu	81.3%	18.7%	85.7%	14.3%	47.3%	52.7%
14	Kilifi	76.5%	23.5%	71.4%	28.6%	60.5%	39.5%
15	Kirinyaga	77.8%	22.2%	79.4%	20.6%	68.7%	31.3%
16	Kisii	78.2%	21.8%	78.2%	21.8%	54.5%	45.5%
17	Kisumu	82.1%	17.9%	87.7%	12.3%	73.6%	26.4%
18	Kitui	79.4%	20.6%	79.4%	20.6%	59.8%	40.2%
19	Kwale	75.0%	25.0%	91.0%	9.0%	63.0%	37.0%
20	Laikipia	71.3%	28.7%	75.0%	25.0%	53.7%	46.3%
21	Lamu	73.6%	26.4%	73.6%	26.4%	59.1%	40.9%
22	Machakos	74.2%	25.8%	75.3%	24.7%	53.6%	46.4%
23	Makueni	76.3%	23.7%	86.6%	13.4%	56.7%	43.3%
24	Mandera	96.0%	4.0%	95.0%	5.0%	85.0%	15.0%
25	Marsabit	68.1%	31.9%	63.7%	36.3%	57.1%	42.9
26	Meru	72.3%	27.7%	58.4%	41.6%	44.6%	55.4%
27	Migori	65.0%	35.0%	75.0%	25.0%	59.0%	41.0%
28	Mombasa	89.1%	10.9%	97.0%	3.0%	69.3%	30.7%
29	Murang'a	71.4%	28.6%	79.6%	20.4%	41.8%	58.2%
30	Nairobi	79.8%	20.2%	81.0%	19.0%	51.0%	49.0%
31	Nakuru	77.0%	23.0%	78.0%	22.0%	62.0%	38.0%
32	Nandi	85.0%	15.0%	83.0%	17.0%	66.0%	34.0%
33	Narok	90.8%	9.2%	92.9%	7.1%	69.4%	30.6%
34	Nyamira	78.2%	21.8%	82.2%	17.8%	58.4%	41.6%
35	Nyandarua	77.5%	22.5%	82.4%	17.6%	69.6%	30.4%
36	Nyeri	79.4%	20.6%	82.4%	17.6%	59.4%	40.6%
37	Samburu	71.4%	28.6%	58.2%	41.8%	53.8%	46.2%

County of Residence		Juvenile Offender		Mentally ill Offender		Pregnant Women	
		Yes	No	Yes	No	Yes	No
38	Siaya	81.9%	18.1%	92.4%	7.6%	71.4%	28.6%
39	Taita Taveta	83.2%	16.8%	93.1%	6.9%	69.3%	30.7%
40	Tana River	70.4%	29.6%	71.3%	28.7%	59.3%	40.7%
41	Tharaka Nithi	65.3%	34.7%	58.2%	41.8%	45.9%	54.1%
42	Trans Nzoia	69.8%	30.2%	75.9%	24.1%	56.3%	43.7%
43	Turkana	77.2%	22.8%	79.3%	20.7%	65.2%	34.8%
44	Uasin Gishu	89.8%	10.2%	88.8%	11.2%	72.2%	27.8%
45	Vihiga	64.2%	35.8%	76.8%	23.2%	48.4%	51.6%
46	Wajir	66.0%	34.0%	66.0%	34.0%	65.7%	34.3%
47	West Pokot	76.6%	23.4%	80.9%	19.1%	62.8%	37.2%
	<b>TOTAL</b>	<b>75.7%</b>	<b>24.3%</b>	<b>78.7%</b>	<b>21.3%</b>	<b>59.3%</b>	<b>40.7%</b>

### 3.6.2 Awareness Levels on Categories of Offenders to Whom Death Penalty Cannot be Applied Based on Demographic Characteristics of Members of the Public Respondents

Further analysis was conducted based on demographic characteristics of members of the public sampled in the study. Table 3.7 provides results of the analysis on awareness levels among the respondents. From the findings, male respondents (81.6%) were aware that mentally challenged offenders cannot be subjected to capital punishment compared to female correspondents (74.2%). In addition, older respondents (81.0%) of age between 58 and 65 years were aware that juveniles cannot be sentenced to death than the youthful population (69.7%) of between 18 and 25 years. The difference in level of awareness between the two categories of ages could have been influenced by maturity, accumulated knowledge and life experience among the older respondents. Also, 77.0% of married respondents were aware that juvenile offenders cannot be subjected to capital punishment compared to 74.7% of single respondents. This could be attributed to sharing of information on children rights amongst married couples.

In terms of level of education, respondents with university level education (87.1%) and those in adult literacy programmes (92.9%) were well versed on this issue than their counterparts with other levels of education. On awareness levels of the mentally ill offenders as not being subject to death penalty, more male (81.6%) than female (74.2%) were aware. Additionally, more male (61.7%) were aware than female (55.6%) that pregnant women cannot be subjected to the death



penalty. Most of those who have never been victims of crime (76.6%) knew that juveniles cannot be subjected to the death penalty than those who had been victims (74.6%).

**Table 3.7: Demographic Analysis on Awareness of Categories of Offenders to Whom Death Penalty Cannot be Applied (Members of the Public)**

Demographic Characteristics		Juvenile Offender		Mentally ill Offender		Pregnant Women	
		Yes	No	Yes	No	Yes	No
Gender	Male	78.4%	21.6%	81.6%	18.4%	61.7%	38.3%
	Female	71.5%	28.5%	74.2%	25.8%	55.6%	44.4%
Age of Respondent in years	18-25	69.7%	30.3%	74.8%	25.2%	53.6%	46.4%
	26-33	75.3%	24.7%	78.3%	21.7%	56.6%	43.4%
	34-41	77.2%	22.8%	80.4%	19.6%	60.2%	39.8%
	42-49	77.5%	22.5%	79.7%	20.3%	62.7%	37.3%
	50-57	79.0%	21.0%	81.3%	18.7%	64.4%	35.6%
	58-65	81.0%	19.0%	81.0%	19.0%	68.2%	31.8%
	66+	75.9%	24.1%	75.0%	25.0%	62.5%	37.5%
Marital Status	Single	74.7%	25.3%	78.6%	21.4%	57.4%	42.6%
	Married	77.0%	23.0%	79.8%	20.2%	60.8%	39.2%
	Separated	69.6%	30.4%	75.0%	25.0%	52.8%	47.2%
	Divorced	71.4%	28.6%	78.6%	21.4%	64.3%	35.7%
	Widowed	58.8%	41.2%	57.0%	43.0%	45.6%	54.4%
Level Education	None	65.4%	34.6%	62.7%	37.3%	52.9%	47.1%
	Pre-Primary	69.4%	30.6%	72.4%	27.6%	55.1%	44.9%
	Primary	68.3%	31.7%	70.8%	29.2%	53.0%	47.0%
	Secondary 1-4	74.7%	25.3%	79.1%	20.9%	58.1%	41.9%
	Secondary 5-6	81.7%	18.3%	81.7%	18.3%	61.6%	38.4%
	Middle Level College	79.9%	20.1%	82.5%	17.5%	61.6%	38.4%
	University	87.1%	12.9%	90.5%	9.5%	70.2%	29.8%
	Adult Literacy	92.9%	7.1%	100.0%	0.0%	85.7%	14.3%
	Other	75.0%	25.0%	66.7%	33.3%	66.7%	33.3%
Religion	Traditional	79.6%	20.4%	77.8%	22.2%	55.6%	44.4%
	Christian	75.7%	24.3%	79.1%	20.9%	58.6%	41.4%
	Islam	74.9%	25.1%	75.9%	24.1%	62.6%	37.4%
	Hindu	75.0%	25.0%	100.0%	0.0%	75.0%	25.0%
	Other	94.4%	5.6%	94.4%	5.6%	77.8%	22.2%

Demographic Characteristics		Juvenile Offender		Mentally ill Offender		Pregnant Women	
		Yes	No	Yes	No	Yes	No
Main Occupation	Permanent Employment-Private Sector	78.8%	21.3%	86.3%	13.8%	64.6%	35.4%
	Permanent Employment-Public Sector	85.5%	14.5%	89.1%	10.9%	72.4%	27.6%
	Casual/temporary employment	70.9%	29.1%	71.9%	28.1%	54.4%	45.6%
	Business Person	73.6%	26.4%	77.1%	22.9%	53.9%	46.1%
	Subsistence Farming	69.1%	30.9%	69.7%	30.3%	56.1%	43.9%
	Other Specify	71.5%	28.5%	73.4%	26.6%	54.5%	45.5%
Ever been a Victim of Crime	Yes	74.6%	25.4%	77.2%	22.8%	56.0%	44.0%
	No	76.6%	23.4%	80.0%	20.0%	62.2%	37.8%
<b>Total</b>		<b>75.7%</b>	<b>24.3%</b>	<b>59.1%</b>	<b>21.3%</b>	<b>59.3%</b>	<b>40.7%</b>

### 3.7 Factors Contributing to Capital Offences

The study sought to understand respondents' view points on the factors that push offenders to commit capital offences. From the findings, members of the public cited poverty/high cost of living (38.1%); drug abuse/alcoholism (27.5%); unemployment(23.7%); greed/lust(16.8%); mental illness/depression (13.3%); bitterness/anger (11.6%); desire for revenge (11.5%); peer influence/pressure (10.7%);ignorance(8.3%); rivalry/love triangle (7.9%);and idleness/laziness (7.2%) as some of the major factors that lead to the commission of capital offences by the offenders. Conversely, public officials listed poverty/high cost of living (42.7%); drug abuse/alcoholism (28.6%), greed/lust (22.6%); ignorance (17.1%);desire for revenge (16.7%); unemployment (15.4%); peer pressure (14.1%); lack of moral values/lawlessness (11.5%); bitterness/anger (11.1%); rivalry/love triangle (9.0%); and incitement/political influence (8.5%) as factors contributing to commission of capital offences as indicated in Table 3.8.

**Table 3.8 Factors That Contribute to Offenders Committing Offences That Attract the Death Penalty**

Factors	Members of Public		Public officials	
	N	Percent of Cases	N	Percent of Cases
Drug abuse/alcoholism	1256	27.5%	67	28.6%
Mental illness/depression	603	13.3%	35	15.0%
Poverty/high cost of living	1722	38.1%	100	42.7%
Self defense	34	0.8%	6	2.6%
Rivalry/love triangle	359	7.9%	21	9.0%
Provocation	89	2.0%	16	6.8%
Unemployment	1073	23.7%	36	15.4%
Greed/lust	760	16.8%	53	22.6%
Incitement/political influence	236	5.2%	20	8.5%
Tribalism/tribal animosity	112	2.5%	5	2.1%
Idleness/laziness	325	7.2%	5	2.1%
Ignorance	376	8.3%	40	17.1%
Malice/jealousy	216	4.8%	8	3.4%
Peer influence/pressure	482	10.7%	33	14.1%
Justice denied/corruption	151	3.3%	13	5.6%
Lack of moral values/lawlessness	225	5.0%	27	11.5%
Poor parenting/upbringing	126	2.8%	16	6.8%
Bitterness/anger	524	11.6%	26	11.1%
Religion/cult/radicalization	195	4.3%	11	4.7%
Illiteracy	222	4.9%	16	6.8%
Hereditary factors/family criminal history	215	4.8%	11	4.7%
Lifestyle/culture	178	3.9%	21	9.0%
Desire for recognition, glory and fame	48	1.1%	8	3.4%
Property dispute	333	7.4%	36	15.4%
Desire for revenge	518	11.5%	39	16.7%
Lack of law enforcement	119	2.6%	10	4.3%
To conceal information	30	0.7%	0	0
Media influence	6	0.1%	1	0.4%
Marginalization/unequal distribution of resources	57	1.3%	6	2.6%
Family conflicts	124	2.7%	18	7.7%
Possession of illegal small arms	13	0.3%	0	0

These findings are in tandem with past studies and criminological theories on the causes of criminal behaviour. The Differential Association Theory of Crime by Edwin Sutherlands (1939) postulates that criminal behaviour is learned through social interactions. In Kenya, political influence is also a factor contributing to commission of capital offences as was the case with 2007/2008 post-election political violence.

Critically, high levels of poverty, use of drugs and alcohol have continuously contributed to criminal incidences in many parts of the country. Mental illness and depression has a relationship to crime commission. However, many other factors such as marginalization and high unemployment certainly increase poverty thereby accelerating crime. A study by Daniel Lederman, Norman Loayza and Pablo Fajnzylber, (2002) found out that crime rates and inequality are positively correlated within countries and also between countries. In their findings, they argued that the correlation is a causation of inequality that induces crime rates. That way, inequality has a relationship with poverty as well as unemployment. This may lead to more crime due to depression associated with being unemployed. Personal income per capita, which is inversely correlated with poverty levels, increases crime since greater wealth means greater benefits to thieves and robbers (Lederman et.al, 2018).

Gary Becker (2018) posit that an increase in income inequality has a big and robust effect of increasing crime rates. A country's economic growth (GDP rate) has significant impact in lessening incidences of crimes. Since reduction in income inequality gap and a richer economy has an alleviating effect on poverty level, it implies that poverty alleviation has a crime-reducing effect (Becker, 2018). Furthermore, because of social class gaps, personal income per capita rates affect poverty to a great extent (the income may be concentrated in a small percentage of the population). It might even accentuate the difference between the upper and lower classes, thereby inducing more crime. Variations in the composition of population can affect crime in different ways. First, adolescents are often responsible for most crimes committed. The poor delinquent child is more likely to be expelled from school or have a police record than a well-to-do delinquent. A higher percentage of inhabitants under the age of 25 years may lead to higher crime rates. On the other hand, the elderly, because of their possessions and vulnerability, are believed to be more vulnerable to crime (Taylor, 2006).





**Figure 9: Scene of the Kenya Post-election Violence in 2007/2008 (Source: AP Photo/Karel Prinsloo, 2008)**

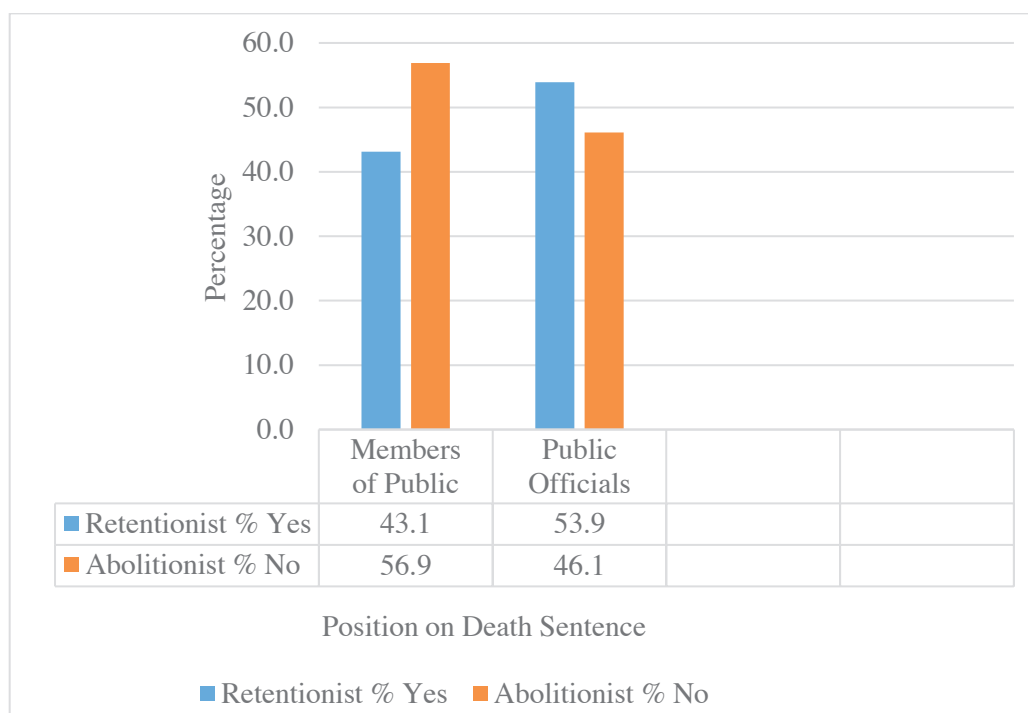
### **3.8 Respondent's Perceptions on Retention or Abolition of Death Sentence**

The study sought to establish the position of respondents in regard to the death penalty for capital offences. This being a sensitive question, a comparison analysis was done at two levels; members of the public and later public officials. The opinions from members of the public were further analysed by County against demographic characteristics of respondents.

#### **(a) A Comparison of the Position on Death Sentence Between Members of the Public and Public Officials**

Analysis of the findings indicated that 56.9% of members of the public were of the view that death sentence for capital offences (murder, robbery with violence, attempted robbery with violence, treason, oathing and specified military offences) should be abolished in Kenya. In contrast, 43.1% of members of the public supported retention of the death sentence for capital crimes in the country.

Conversely, 53.9% of public officials were in favor of retention of death sentence for capital offences (murder, robbery with violence, attempted robbery with violence, treason, oathing, specified military offences) in Kenya, while 46.1% of Public officials' respondents were for the abolition of death sentence as shown in Figure 10. Public officials who were mainly drawn from agencies within the criminal justice system supported retention of capital punishment which could have been influenced by their specific institutional mandate.



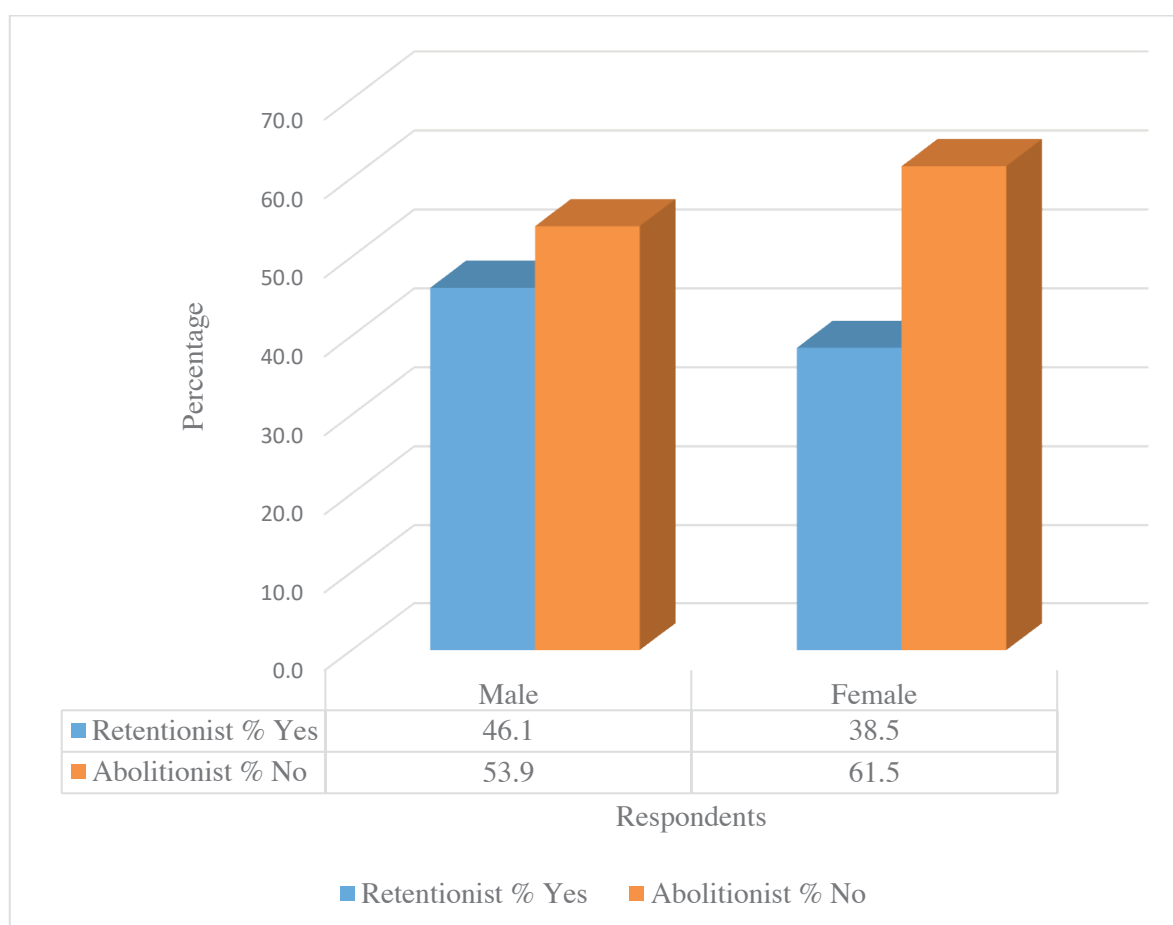
**Figure 10: A Comparison of Response on Whether Capital Offences Should Attract Death Sentence**

On further probing of the general members of the public who supported retention of death sentence on specific offences, majority supported retention of death sentence on all capital offences. The results from members of public were further scrutinised and then subjected to cross tabulation against different demographic variables. The results are as follows:

**i. Cross-tabulation by Gender**

The results indicated that 38.5% females supported death penalty for capital offences (murder, robbery with violence, attempted robbery with violence, treason, oathing) in Kenya while 61.5% of female respondents were for abolition of the sentence. In contrast, 46.1% of male respondents

supported the retention of death penalty while 53.9% were for abolition of the death sentence as indicated in Figure 11 below.



**Figure 11: Responses by Gender on whether Capital Offences Should Attract Death Sentence**

## ii. Cross-tabulation by County

Table 3.9 below shows that the majority of respondents in 10 counties including Wajir (66.0%), Migori (62.0%), Garissa (61.3%), Kitui (56.6%) and Nandi (55.0%) supported retention of the death sentence. Additionally, the majority of respondents in 37 counties including Kisii (72.3%), Samburu (71.4%), Nakuru (69.0%), Murang'a (68.4%) and TaitaTaveta (67.3%) were for the abolition of the death sentence in Kenya.

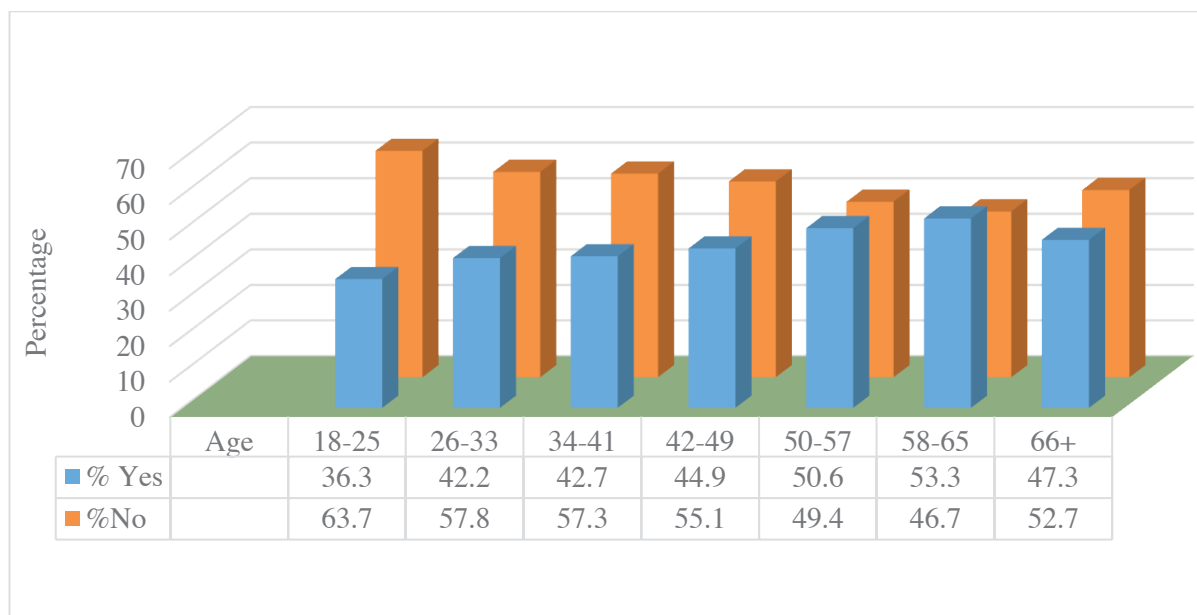
**Table 3.9: Response on Death Sentence by County Analysis for Members of Public**

County of Residence	Response on Death Sentence for Capital Offences (Murder, Robbery With Violence, Attempted Robbery with Violence, Treason, Oathing, Specified Military Offences) in Kenya	
	Yes	No
Wajir	66.0%	34.0%
Migori	62.0%	38.0%
Garissa	61.3%	38.7%
Kitui	56.6%	43.4%
Nandi	55.0%	45.0%
Trans Nzoia	52.7%	47.3%
Embu	51.6%	48.4%
Kwale	51.0%	49.0%
Narok	51.0%	49.0%
Nyamira	50.5%	49.5%
Turkana	49.5%	50.5%
Bungoma	49.5%	50.5%
West Pokot	47.4%	52.6%
Lamu	46.4%	53.6%
Kericho	45.5%	54.5%
Kirinyaga	45.5%	54.5%
Makueni	45.4%	54.6%
Machakos	44.3%	55.7%
Uasin Gishu	43.9%	56.1%
Kakamega	43.8%	56.2%
Mombasa	43.6%	56.4%
Kisumu	43.4%	56.6%
Nyeri	43.0%	57.0%
Bomet	43.0%	57.0%
Elgeyo Marakwet	43.0%	57.0%
Vihiga	42.7%	57.3%
Siaya	41.9%	58.1%
Baringo	41.8%	58.2%
Mandera	41.0%	59.0%
Homabay	40.8%	59.2%
Kilifi	40.3%	59.7%
Busia	38.3%	61.7%
Isiolo	38.0%	62.0%
Nairobi	37.0%	63.0%
Laikipia	37.0%	63.0%
Tana River	37.0%	63.0%
Tharaka Nithi	35.7%	64.3%
Meru	35.6%	64.4%
Kajiado	33.3%	66.7%

County of Residence	Response on Death Sentence for Capital Offences (Murder, Robbery With Violence, Attempted Robbery With Violence, Treason, Oathing, Specified Military Offences) in Kenya	
	Yes	No
Marsabit	33.3%	66.7%
Kiambu	33.3%	66.7%
Nyandarua	33.3%	66.7%
Taita Taveta	32.7%	67.3%
Murang'a	31.6%	68.4%
Nakuru	31.0%	69.0%
Samburu	28.6%	71.4%
Kisii	27.7%	72.3%
<b>TOTAL</b>	<b>43.1%</b>	<b>56.9%</b>

### iii. Cross-tabulation by Age

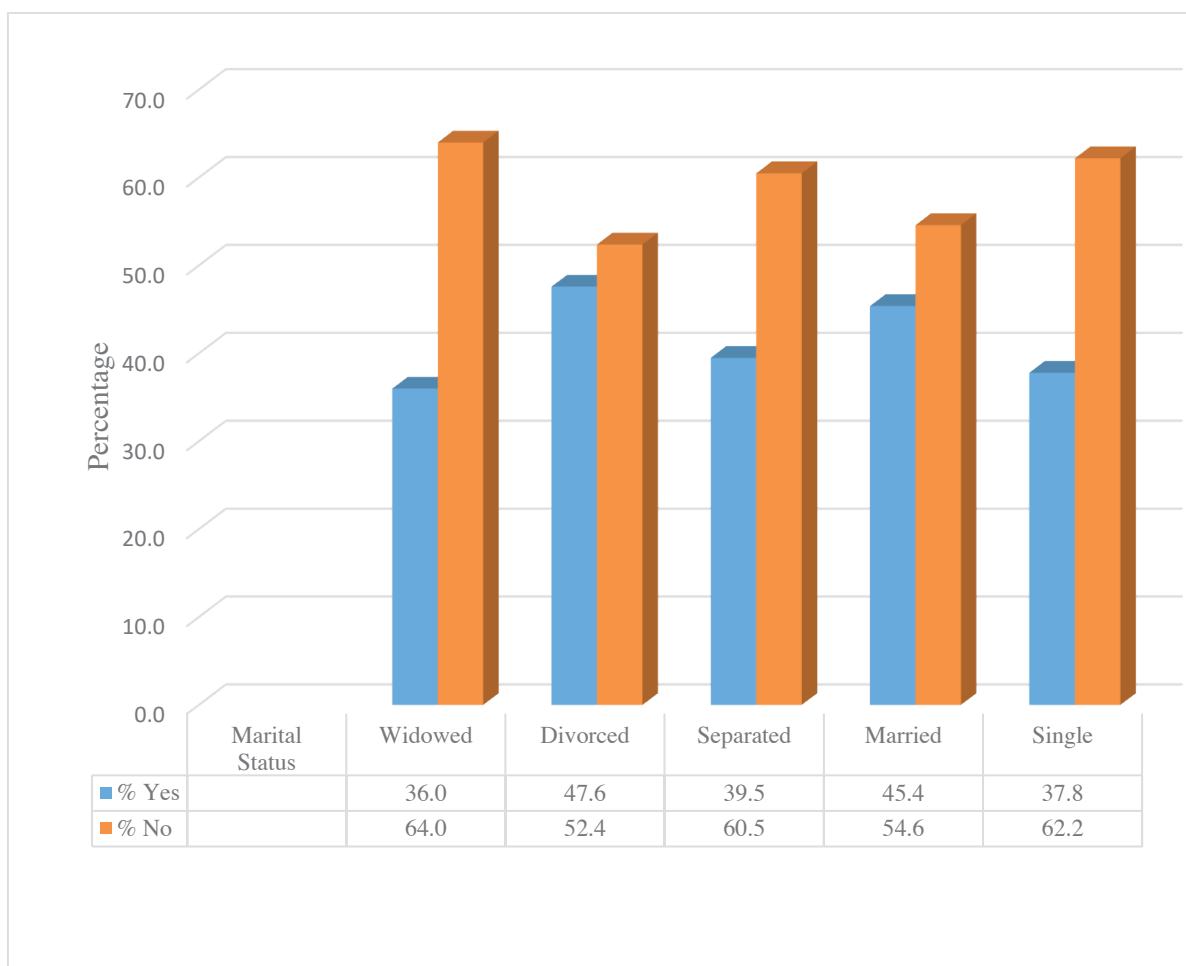
The results as indicated in Figure 12, illustrate that 53.3% of adults of the ages between 58-65 years supported death sentence on capital offences and 50.6% of those between 50-57 years also supported retention of death sentence. These age groups being more mature and with a lot of life experience may explain their reasons for supporting capital punishment. On the other hand, respondents between the ages of 18-25 years, 26-33 years and 34-41 years did not support retention of death sentence for capital offences at 63.7%, 57.8% and 57.3% respectively.



**Figure 12: Response by Age on Whether Capital Offences Should Attract Death Sentence**

#### iv. Cross-tabulation by Marital Status

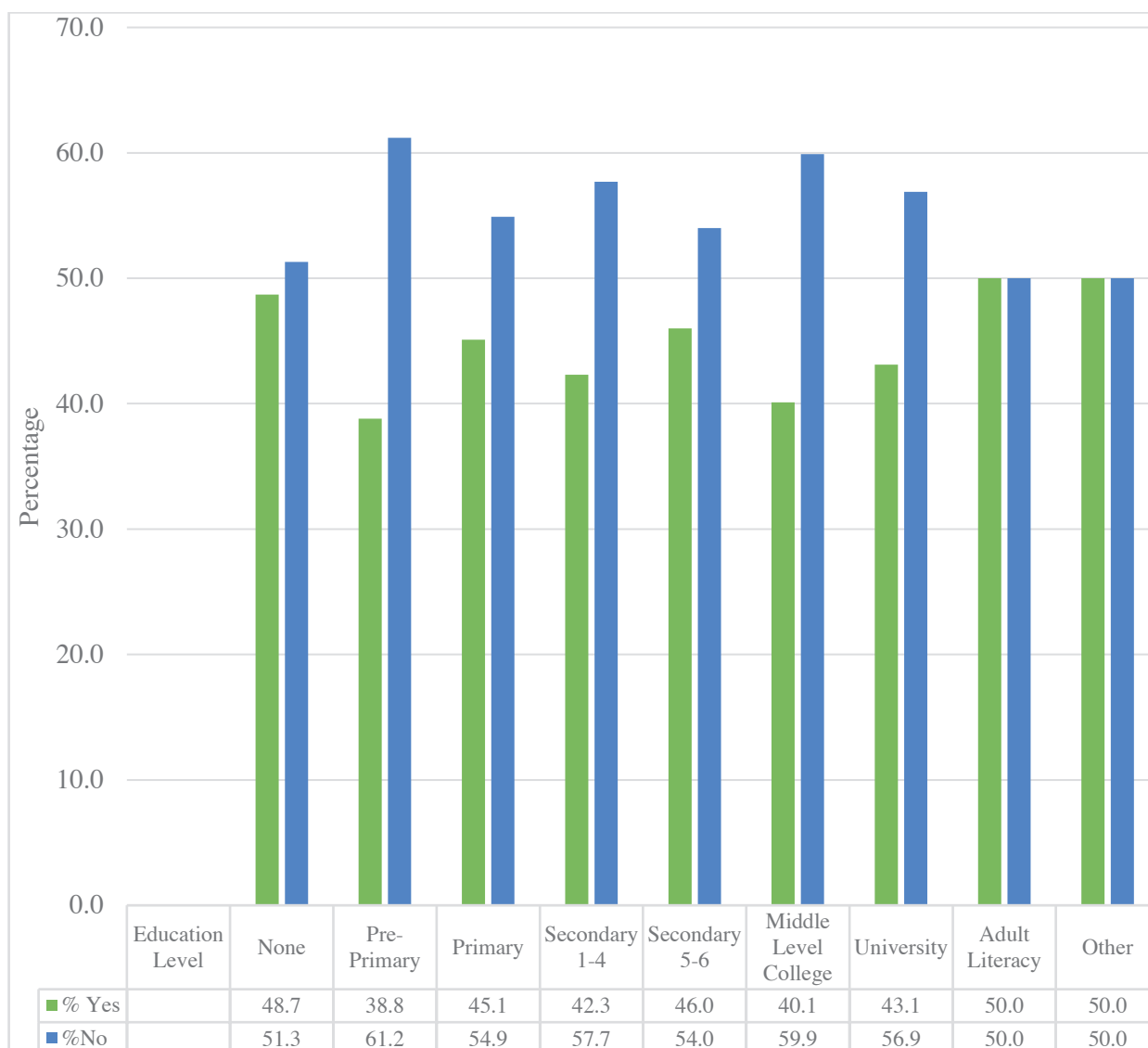
Irrespective of the marital status, as indicated in Figure 13, the study respondents do not support retention of death sentence. The findings are as follows: single (62.2%), married (54.6%), separated (60.5%), widowed (64.0%) all against death sentence.



**Figure 13: Responses by Marital Status Whether Capital Offences Should Attract Death Sentence**

#### v. Cross-tabulation by Level of Education

The findings established that 50.0% of respondents who have adult literacy levels of education supported retention of death sentence while 61.2% of respondents with pre-primary level of education did not support death sentence. Also, 59.9% of respondents with middle level college education did not support death sentence as indicated in Figure 14.



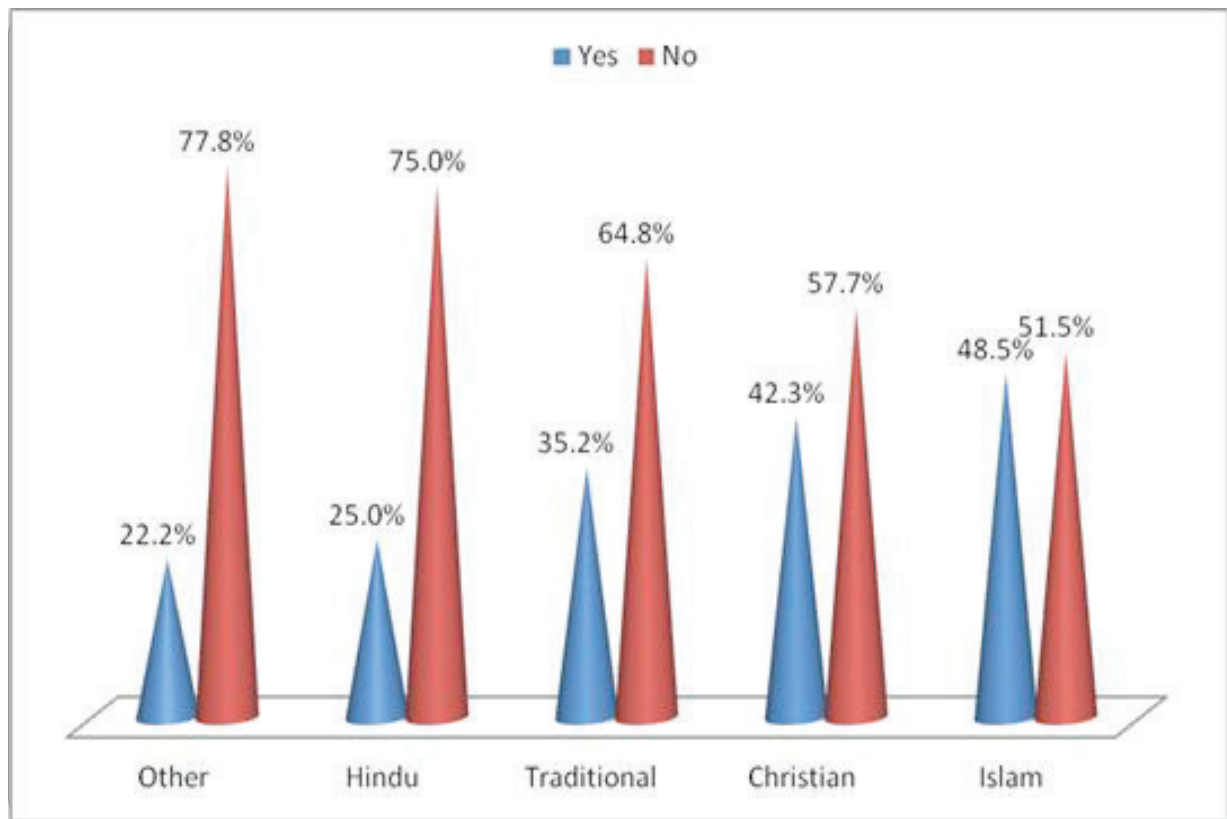
**Figure 14: Responses by Level of Education Whether Capital Offences Should Attract Death Sentence**

#### **vi. Cross-tabulation by Religion**

The results indicated that 48.5% of Muslims supported death sentence. This could in part be attributable to religious teachings based on the (Quran 6:151. The Holy Quran-Al Islam). ...*Take not life, which God has made sacred, except by way of justice and law. Thus does He command you, so that you may learn wisdom.* Majority (57.7%) of Christians did not support death sentence while 42.3% supported it. In the bible Exodus 20: 13 (The New King James Version) says “*Thou shalt not kill*”. From the Christian biblical teachings, devoted and staunch Christian will not support death penalty. Equally, 77.8% respondents who did not profess any religion did



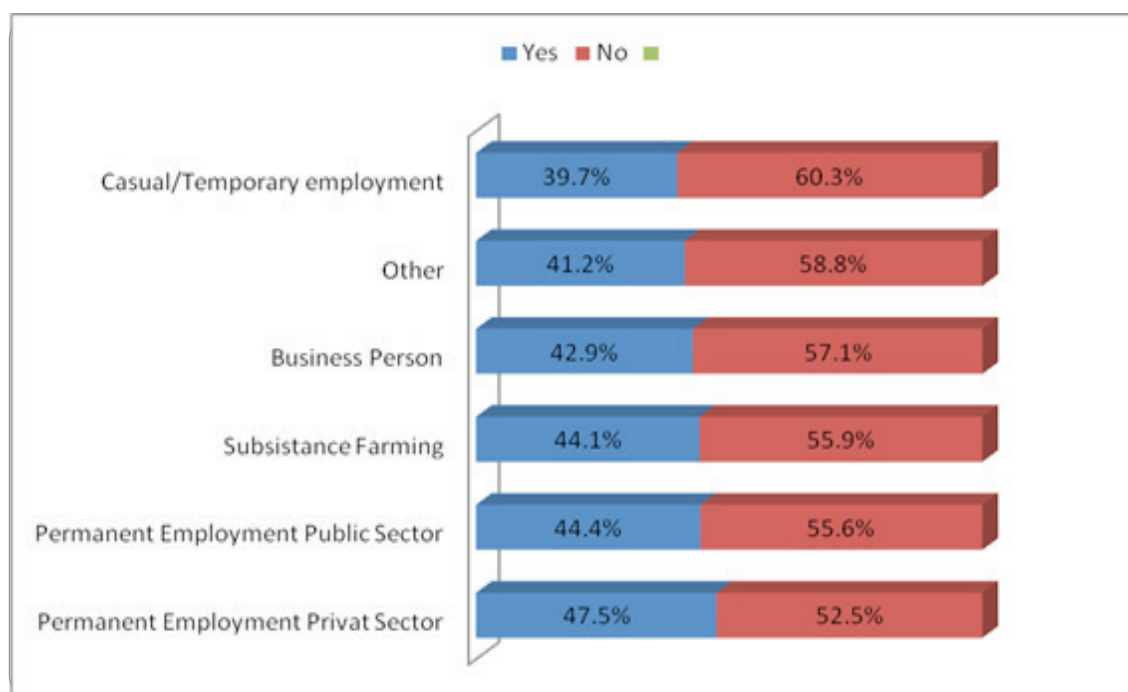
not support capital punishment. Also, 75.0% of those professing Hindu faith did not support the death penalty. The other responses by religion criteria are as indicated in Figure 15.



**Figure 15: Responses by Religion of Affiliation on Whether Capital Offences Should Attract Death Sentence**

#### **vii. A Cross-tabulation by Main Occupation**

Majority of respondents engaged in casual/temporary employment (60.3%) did not support the death sentence while (47.5%) of those in permanent private sector employment were in favour of death sentence. On the same breadth, 44.4% of respondents in permanent public service employment also supported death penalty. Generally, all occupational categories seem to not support the death sentence. The responses by main occupation categories are indicated in Figure 16.

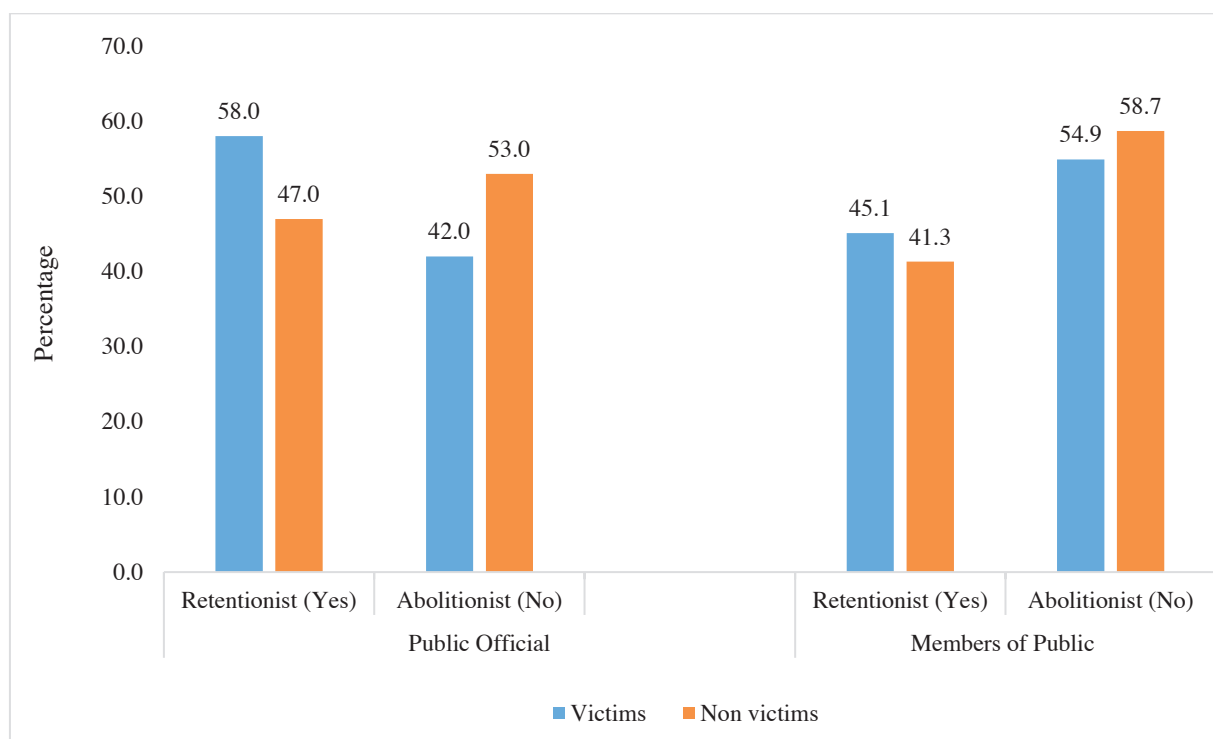


**Figure 16: Responses by Work Occupation on Whether Capital Offences Should Attract Death Sentence**

#### **viii. Cross-tabulation by Victimization**

The results for public officials and members of public respondents as victims of crimes were as follows: 54.9% of members of public who had been victims of crime were not in favour of the death sentence, while 45.1% of members of the public who had been victims of crime were in favour of death sentence. Also, 58.7% of members of public who were not victims did not support the death sentence while 41.3% of non victim members of public supported death sentence as indicated in Figure 17.

For the public officials (58.0%) who had been victims of crime were of the opinion that capital offences should attract capital punishment hence retentionist. On the other hand, the non victim public officials (53.0%) indicated that capital offences should not attract capital punishment thus abolitionists.



**Figure 17: Responses by Victims Both Public Officials and Members of Public on Whether Capital Offences Should Attract Death Sentence**

#### **ix. Cross-tabulation by Type of Crime Experienced**

The results of cross tabulation on members of public based on type of crime experienced indicated that 100% of victims of terror attack supported retention of death, while victims of corruption, defamation and procuring abortion did not support capital punishment at 100%. Other results are as indicated in Table 3.10. Therefore it can be deduced that victims of capital offences support death sentence as a form of retribution.

In comparative jurisdictions, African countries appear to be following the emerging global consensus that not all murders are equally heinous and deserving death sentence; that the right to a fair trial includes a sentencing hearing, and that a sentence disproportionate to a crime is cruel and degrading punishment. For example, Zimbabwe's Constitution promulgated in 2013, abolished mandatory death sentences and limited the death penalty to cases of murder "committed in aggravating circumstances" (The Standard, 2016 September 25).

**Table 3.10: Response by Members of Public Based on Type of Crime Experienced and Whether Capital Offences Should Attract Death Sentence**

Crimes Respondents Who Have Been Victims of	Position on Death Sentence for Capital Offences in Kenya Based on Crime Experienced	
	Yes	No
Terrorism	100.0%	0.0%
Gender based violence	57.1%	42.9%
Murder	55.9%	44.1%
Fraud/conning	54.3%	45.7%
Rape	53.5%	46.5%
Burglary/house breaking	50.3%	49.7%
Attempted suicide	50.0%	50.0%
Robbery with violence	48.1%	51.9%
Defilement	46.2%	53.8%
Possession of illicit brew/drug	45.5%	54.5%
Robbery	44.4%	55.6%
Dangerous driving	44.4%	55.6%
Theft/stealing	43.3%	56.7%
Carjacking/hijacking	41.4%	58.6%
Assault/affray	40.8%	59.2%
Cattle rustling/stock theft	40.3%	59.7%
Land grabbing	40.0%	60.0%
Destruction of property/trespassing	33.3%	66.7%
Kidnapping	33.3%	66.7%
Negligence	33.3%	66.7%
Manslaughter	28.6%	71.4%
Attempted robbery	16.7%	83.3%
Corruption	0.0%	100.0%
Defamation	0.0%	100.0%
Procuring abortion	0.0%	100.0%
<b>Total</b>	<b>45.2%</b>	<b>54.8%</b>

Similarly, Death Penalty Project (2018 cited in Sato, 2018) conducted a survey in Zimbabwe; to gauge public's attitudes towards the death penalty, to investigate the reasons for support or opposition, what factors influence these positions, and how people might respond to any change in public policy. The findings were based on the views of 1,200 Zimbabweans aged 18 years and above.

The result of the survey revealed that 61.0% supported retention and 33.0% supported abolition. A majority of respondents (84.0%) knew that the death penalty was recognised in Zimbabwe. However, only 17.0% knew that there had been no executions in the past 10 years and 54.0% knew that the method of execution was hanging. Smaller proportions (34.0%) believed they would be ‘very likely’ or ‘somewhat likely’ to campaign to bring it back. Also, (13.0%) of the respondents said that they do not to report crimes to the police if they were victimized and (10.0%) took justice into their own hands if a family member was murdered. According to the report, these results hardly depict a society where the legitimacy of the criminal justice system rests on retention of the death penalty as per the study by Death Penalty Project (2018, cited in Sato 2018).

### **3.9 Perceptions on Offences That Should Attract Death Sentence**

In this study, it was equally important to understand the respondents perception on capital offences that should attract death penalty in law. Respondents were asked if the capital offences as currently in law should still attract the death penalty.

The findings largely established that majority of respondents (both members of public and public officials) perception was that all capital offences should still attract death sentence. These findings are displayed in Table 3.11.

The results further show that 80.4% of members of public respondents and 69.6% of public officials held that treason offence should be punishable by death. For the offence of administering an oath to commit a capital offence, 86.9.0% of members of public respondents and 80.2% public officials respondents supported the offence as one that should attract the death penalty. See Table 3.11.

For the offence of murder respondents of all categories overwhelmingly supported it be punishable by death, that is, 96.4% of members of public respondents and 92.5% of public officials. A majority of respondents were also of the opinion that other offences such as robbery with violence, attempted robbery with violence and military offences should as well attract the death penalty as indicated in Table 3.11.

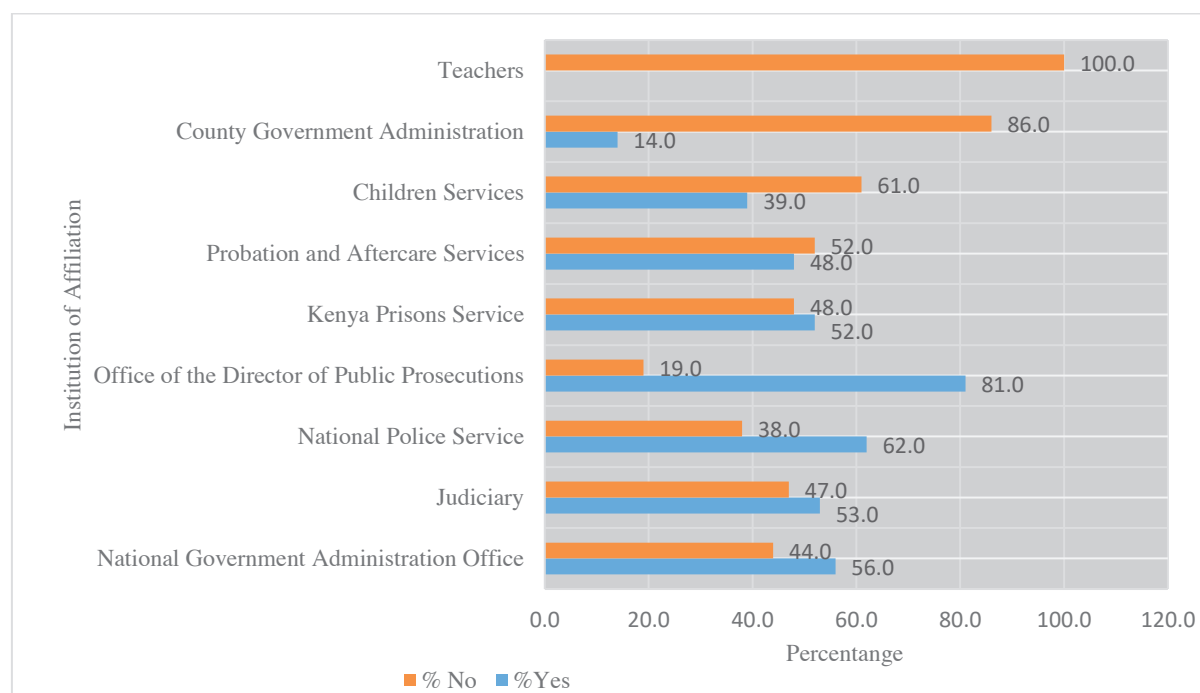
**Table 3.11: Views on Capital Offences That Should Attract Death Penalty**

	<b>Members of Public</b>		<b>Public Officials</b>	
	<b>Frequency</b>	<b>Valid Percent</b>	<b>Frequency</b>	<b>Valid Percent</b>
<b>Should Treason (Penal Code 40 (3) P.C.) Attract Death Sentence</b>				
Yes	1586	80.4%	94	69.6%
No	387	19.6%	41	30.4%
<b>Should Administering an Oath to commit a capital offence (S.60.PC) Attract Death Sentence</b>				
Yes	1700	86.9%	101	80.2%
No	257	13.1%	25	19.8%
<b>Should Murder (Sec.204. P.C.) Attract Death Sentence</b>				
Yes	1906	96.4%	124	92.5%
No	72	3.6%	10	7.5%
<b>Should Robbery with violence (Sec. 296(2) P.C.) Attract Death Sentence</b>				
Yes	1811	91.2%	113	85.6%
No	175	8.8%	19	14.4%
Total	1986	100.0%		
<b>Should Attempted Robbery with violence (Sec. 296 (2) P.C.) Attract Death Sentence</b>				
Yes	1489	75.9%	88	66.7%
No	472	24.1%	44	33.7%
<b>Should Military Offences not resulting into death Attract Death Sentence</b>				
Yes	1726	89.9%	96	72.7%
No	194	10.1%	36	27.3%

Comparatively, a similar study in China, where respondents were asked more concretely about their support level for the death penalty for specific crimes, 78.0% of the respondents supported the death penalty for murder (The Gallup World Poll, 2007). In the United State of America, a Gallup poll of 2007 indicates that 69.0% of Americans respond "yes" when asked: "Are you in favor of the death penalty for a person convicted of murder?" (ibid).

A further cross tabulation on the position of death sentence by institution of affiliation of public officials was done. The results of those who favoured death sentence for capital offences per

institution of affiliation are shown in Figure 18. From the results, 81.0% of public officials from the Office of Director of Public Prosecution were in support of death sentence.



**Figure 18: Institutional Affiliation and Public Officials on Whether Capital Offences Should Attract Death Sentence**

Respondents from National Police Service (62.0%), National Government Administrators (56.0%), Judiciary (53.0%) and Kenya Prison Service (52.0%) were in favour of death sentence for all capital offences.

An administration Police officer from Narok County shared his sentiment stating that:

*“death sentence should be retained in cases where loss of life of an individual or a group of people is involved.... even the bible provides for death punishment where major offence has been committed.... punishment was also meted on Sodom and Gomorrah”.*

Teachers, County Government Administrators and Children Service Department Officials were against death sentence for capital offences at 100.0%, 86.0% and 61.0% respectively as shown in Figure 18.





**Figure 19: Prison Officer Giving his Opinion at a Public Forum. (Source: Photo/NCRC, 2016)**

### **3.10 Reasons for Supporting Retaining of Death Penalty**

The survey sought to understand reasons why respondents were in favour of death sentence as punishment for capital offences. A comparative analysis for members of public and public officials was undertaken as follows.

#### **3.10.1 Support for Retention of the Death Sentence**

The following are some of the reasons advanced by respondents as indicated in Table 3.12 in support of the death sentence. From the results, 25.0% of members of public indicated that capital punishment acts as a deterrence for future crimes; ensures that convicts are never released back into society as they may pose a threat in future (20.0%); most effective means of achieving justice for the victim and provides closure to the victim, their families and society (17.0%); severity of a crime should mandate an equally severe punishment (15.7%); those accused of capital crimes do not deserve an opportunity to reform (8.3%); reduces the chances of convicts escaping from prison (6.3%).

**Table 3.12: Reasons for Supporting Retention of Death Penalty**

<b>Reasons for supporting retaining of Death Penalty</b>	<b>Members of Public</b>		<b>Public Officials</b>	
	<b>N</b>	<b>Percent of Cases</b>	<b>N</b>	<b>Percent of Cases</b>
Capital punishment acts as a deterrence for future crimes	1462	25.5%	109	82.6%
Ensures that convicts are never released back to the society as they may pose a threat in future	1157	20.0 %	0	0%
It is the most effective means of achieving justice for victims & provides closure to Victims, family and society	976	17.0%	68	51.5%
The severity of a crime should mandate an equally severe punishment	898	15.7%	71	53.8%
Those accused of capital crimes do not deserve an opportunity to reform	475	8.3%	22	16.7%
Reduces the chances of convicts escaping from prison	364	6.3%	14	10.6%
May impose less financial burden on the state	144	2.5%	66	50.0%
Ensures jails are not overpopulated/overcrowded	132	2.3%	17	12.9%
Prison infrastructure is adequate to accommodate such prisoners	95	2.0%	3	2.3%
Ensure the convict does not have a chance to threaten victims/witnesses	22	0.4%	20	15.2%
Ensure convicts do not have a chance to get out through corrupt means	9	0.2%	4	3.0%

Public officials respondents supported retention of death penalty because: it act as a deterrence for future crimes (82.6%); severity of a crime mandates an equal severe punishment (53.8%) ; death penalty is the most effective means of achieving justice for victims and provides closure to victims, family and society (51.5%); imposes less financial burden on the state (50.0%); those accused of capital offences do not deserve an opportunity to reform (16.7%); ensures the convict does not have a chance to threaten victims/witnesses (15.2%); ensures jails are not overpopulated/overcrowded (12.9%); reduces the chances of convicts escaping from prison (10.6%). These findings are highlighted in Table 3.12 .

In the United States, Robert Macy, District Attorney of Oklahoma City, in his arguments justifying retribution justice in one of his cases had this to say: *“In 1991, a young mother was rendered helpless and made to watch as her baby was executed. The mother was then mutilated and killed. The killer should not lie in some prison with three meals day, clean sheets, cable TV, family visits and endless appeals. For justice to prevail, some killers just need to die.”*(Macy, 1991).

Bowers (1993) argued that support for the death penalty may reflect a general desire for harsh or even harsher punishment. It is often assumed that the criminal victimization and fear of crime predict attitudes towards the death penalty. Research has shown that opinions about capital punishment are embedded into wider social and political attitudes and concerns. The goal of rehabilitation has been found negatively related to the support of the death penalty which would be expected for abolitionists.

Nearly 80.0% of respondents in China (2007) study agreed to the basic statement of retributive punishment, *“people who take a life deserve to be punished by having their own life taken”*. However, retribution does not preclude an elasticity of death penalty attitudes. Furthermore, (Hood, and Hoyle, 2008) argue that the views on “a life for a life” were often strongly held in European culture before the death penalty was abolished.

### **3.10.2 Reasons for Opposing Death Penalty for Varied Capital Offences**

The main reason cited by members of public opposing capital punishment for robbery with violence offenders is that they need rehabilitation (53.6%) and some felt that giving alternative sentences (46.4%) as appropriate. For the offence of murder, 52.8% of members of public said that it was highly likely the murder was unintentional while 24.5% recommended an alternative form of punishment. Additionally, 48.8% said that alternative form of punishment should be given to those found guilty to have committed capital offence under the military law, 30.6% responded that offenders should be rehabilitated and given opportunity to reform. The members of public respondents also felt that attempted robbery with violence offenders should be given opportunity to reform (47.2%), 27.4% said they should be given an alternative sentence while, (25.4%) argued that the offender did not succeed in committing the crime as indicate on Table 3.13.

Most of the public officials' favoured retention of death penalty as indicated in Table 3.13. Some of the members of public respondents indicated that death penalty is less severe form of punishment. Moreover, depending with the criminal justice system, death penalty maybe abused by those in authority to suppress their critics.

**Table 3.13: Reasons for Opposing Death Penalty for Varied Capital Offences**

Reasons for opposing Death Penalty for varied capital offences		Members of Public		Public Officials	
		N	Percent of Cases	N	Percent of Cases
Treason	Is less severe/petty	62	25.0%	4	1.6%
	Can be abused by those in power to punish those urging for change/rivals	73	29.4%	10	3.9%
	Not clearly defined in the law what is treason	16	6.5%	5	2.0%
	Give alternative sentence to the offender	98	39.5%	4	1.6%
Administering Oath	Want the member to be rehabilitated/reformed	51	45.5%	6	2.3%
	Alternative form of sentence should be given/used	44	39.3%	3	1.2%
	Offender might have been negatively influenced	18	16.1%	4	1.6%
Murder	Some are committed unintentionally	28	52.8%	5	2.0%
	May be as a result of mental illness	5	9.4%	0	0.00%
	May have been committed out of self defense	4	7.5%	2	0.8%
	Alternate form of sentence should be given	13	24.5%	2	0.8%
	It is against God's command	3	5.7%	0	0

Reasons for opposing Death Penalty for varied capital offences		Members of Public		Public Officials	
		N	Percent of Cases	N	Percent of Cases
Murder	Some are committed unintentionally	28	52.8%	5	2.0%
	May be as a result of mental illness	5	9.4%	0	0.00%
	May have been committed out of self defense	4	7.5%	2	0.8%
	Alternate form of sentence should be given	13	24.5%	2	0.8%
	It is against God's command	3	5.7%	0	0
Robbery with Violence	Alternative form of sentence should be given	52	46.4%	7	2.7%
	Offender should be rehabilitated and given opportunity to reformed	60	53.6%	3	1.2%
Attempted Robbery with Violence	Offender should be rehabilitated and given opportunity to reform	160	47.2%	8	3.1%
	Alternative form of sentence should be given	93	27.4%	5	2.0%
	Offender did not succeed in committing the crime	86	25.4%	13	5.1%
Military offences	Alternative form of sentence should be given	59	48.8%	12	4.7%
	Offender should be rehabilitated and given opportunity to reformed	37	30.6%	2	0.8%
	Some of them are not serious offences	25	20.7%	3	1.2%

### 3.10.3 Other Offences That Should also Attract Death Penalty

This study also sought to establish the respondents' views on other offences currently not punishable by death but which in their opinion should be subjected to the death penalty. From the study findings, respondents pointed out the following offences for inclusion into capital offences status and which should therefore attract the death penalty:

a) Rape: 54.6% of members of public and 31.4% public officials said the offence should attract death penalty.

b) Defilement: 41.0 % of members of public and 58.1% public officials' respondents indicated that defilement should attract the death penalty.

c) Terrorism: 8.9 % of the members of public and 12.8% of public officials were of the opinion that terrorism should be included as capital offence.

d) Economic crimes and corruption: 8.6% of members of public and 8.1% public officials' respondents suggested that economic crimes and corruption should be considered capital offences.

Other offences that the respondents cited to a lesser percentage as to attract the death penalty also included abortion, unnatural sex acts, drug trafficking, cattle rustling, kidnapping, incitement, possession of illegal firearms, child abuse and human trafficking. These are indicated in Table 3.14 below.

**Table 3.14: Other Crimes That Should be Punishable by Death**

Other crimes that should be Punishable by Death	Members of Public		Public officials	
	N	Percent of Cases	N	Percent of Cases
Rape	625	54.6%	27	31.4%
Defilement	469	41.0%	50	58.1%
Terrorism	102	8.9%	11	12.8%
Economic Crimes/corruption	99	8.6%	7	8.1%
Abortion	29	2.5%	-	-
Unnatural Sexual Acts e.g. bestiality and incest	28	2.4%	6	7.0%
Drug trafficking	27	2.4%	3	3.5%
Cattle rustling/stock theft	25	2.2%	3	3.5%
Kidnapping	21	1.8%	0	0%
Incitement/hate speech	18	1.6%	-	-
Possession of illegal/unlicensed Firearm	17	1.5%	-	-
Child Abuse/torture	17	1.5%	1	1.2%
Human trafficking	13	1.1%	-	-
Land grabbing	10	0.9%	-	-
Attempted murder	9	0.8%	4	4.7%
Man slaughter	9	0.8%	3	3.5%

Other crimes that should be Punishable by Death	Members of Public		Public Officials	
	N	Percent of Cases	N	Percent of Cases
Witchcraft	9	0.8%	-	-
Obstruction of justice	6	0.5%	-	-
Stealing	5	0.4%	-	-
Poaching	3	0.3%	-	-
Burglary	3	0.3%	-	-
Infidelity	1	0.1%	-	-

From the findings, majority of respondents want sexual-related offences of rape and defilement to attract the death penalty.

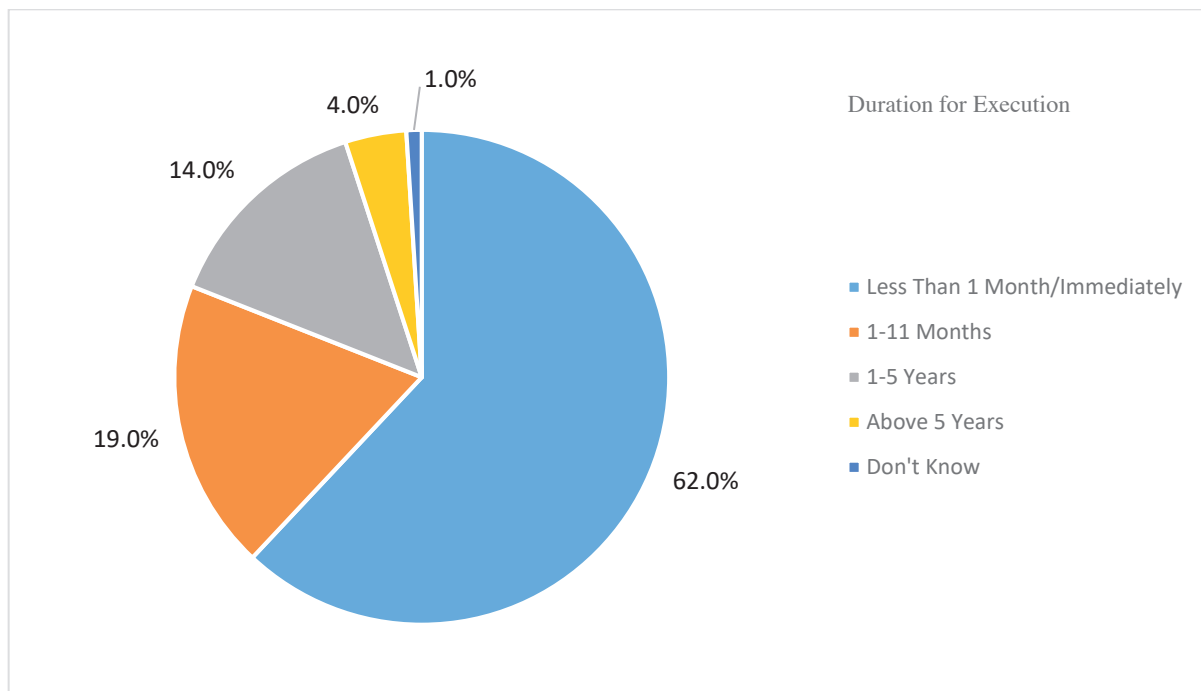
### **3.11 Proposed Duration it Should Take to Execute an Offender who has Exhausted all Appeals**

The study sought opinions from respondents on the duration it should take to execute an offender who is sentenced to death after exhausting all appeals in the matter. The results are as follows:

#### **3.11.1 Responses From Members of the Public**

From the results, 62.0% of members of the public were of the view that such offenders be executed either immediately or within a period not exceeding one month; while 19.0% of the respondents indicated that such offenders should be executed within a period of 1-11 months. Also, 14.0% of the respondents wanted such executions be conducted within a period of 1-5 years; 4.0% of the respondents suggested that such offenders should be executed at anytime after 5 years. However, 1.0% of the respondents indicated they did not know/have opinion on the duration within which an offender who has exhausted appeal should be executed. In general, the majority of the respondents as indicated in Figure 20 preferred that executions be conducted immediately an offender has exhausted all appeals.





**Figure 20: Proposed Duration it Should Take to Execute an Offender who has Exhausted all Appeals by Members of Public**

### 3.11.2 Public Officials' Responses

Public officials gave the following as the duration it should take to execute an offender who has executed all appeals: 70.2% said immediately; 14.0% responded it should be between 1-11 months; 13.2% indicated offenders should be executed within 1-5 years and 2.6% were for execution of offenders after 5 years, as shown in Table 3.15.

**Table 3.15: Proposed Duration it Should take to Execute an Offender who has Exhausted all Appeals by Public Officials**

Duration	Frequency	Valid Percent
Less than 1 Month/Immediately)	80	70.2
I to 11 Months	16	14.0
1-5 Years	15	13.2
Above 5 Years	3	2.6

### **3.12 Reason for Supporting Abolition of Death Sentence and Alternative Sentence**

The study aimed at establishing from the general public the reasons for supporting abolition of death sentence and appropriate alternative sentences for capital offences currently punishable by death.

#### **3.12.1 Support of Abolition of Death Sentence**

The study further sought reasons for supporting abolition of death penalty from the respondents. In their responses, 59.7% of members of public and 55.7% of public officials indicated that capital punishment deprives people of the opportunity to reform; 45.4% of members of public and 51.3% public officials respondents said capital punishment imposes hardship and trauma for the convict's family who may have had no role in the crime, whereas 44.4 % of members of public and 57.4% of public officials respondents said that death sentence is cruel and dehumanizing.

Additionally, 38.2% of members of public and 50.4% of public official emphasized that there was no conclusive proof that capital punishment acts as a deterrent for future crimes; 34.2% of members of public and 48.7% of public officials respondents said that the imposition of capital punishment is not free from risk as there is a chance of innocent people being sentenced to death; 24.7% members of public and 29.6% public officials were of the view that capital punishment confuses the idea of retribution with justice and society must move away from the conception "an eye for an eye".

Another 18.1% and 20.0% members of public and public officials respectively said that economically and socially backward groups will always have a greater chance of being subjected to capital punishment than the rich. These findings are shown in Table 3.16 below.

**Table 3.16: Reasons for Supporting Abolition of Death Sentence**

Reasons for supporting Abolition of Death Sentence	Members of Public		Public Officials	
	N	Percent of Cases	N	Percent of Cases
There is no conclusive proof that capital punishment acts as deterrent for future crimes	1018	38.2%	58	50.4%
Capital Punishment (CP) imposes hardship and trauma for convicts family	1212	45.4%	59	51.3%
It confuses the idea of retribution with justice and society must move away from conception of "an eye for an eye"	658	24.7%	34	29.6%
Capital punishment deprives people of the opportunity to reform	1593	59.7%	64	55.7%
Most Countries have abolished capital punishment	207	7.8%	19	16.5%
It is no risk free as there is a chance of innocent people being sentenced to death	912	34.2%	56	48.7%
The application of CP is too judge centric & depends on a judges personal belief against or in favour of death sentence	385	14.4%	21	18.3%
Economically and Socially backward groups will always have a greater chance of being subjected to CP than the rich	484	18.1%	23	20.0%
Death Sentence is cruel and dehumanizing	1184	44.4%	66	57.4%
According to the Bible and Quran no one has a right to take another's life/life is sacred	405	15.2%	18	15.7%
Every individual has a right to life according to the UN declaration on Human rights and the Kenyan Constitution	50	1.9%	1	0.9%
Can perpetuate revenge/enmity	7	0.3%	1	0.9%
It causes trauma to the hangman	4	0.1%		
Loss of Resourceful persons with useful skills	35	1.3%	1	0.9%

In other jurisdictions, numerous death penalty surveys have been conducted in Western countries, especially in the United States. From 1936 to the present, the Gallup polls have been recording the sentiments about the death penalty in the United States. A Gallup poll conducted on October 2007 found that 69.0% Americans favoured the death penalty (Oberwittler & Qi, 2008).

Popular support for the death penalty was found in other retentionists countries. A survey conducted in 2004 by Japanese government showed that 81.4 % of respondents supported the death penalty (The Japan Times 2008, April 23).

An Ipsos-public affairs poll released by the Associated Press, conducted from February 9 to April 5, 2007, in South Korea and eight other countries, found out that 72.0% of the Korean respondents supported the death penalty for people convicted of murder. Similarly, popular support for the death penalty could also be found in abolitionist countries. Even in abolitionist countries, it is not rare to find majorities supporting the death penalty. The Ipsos-public affairs poll in another study found out that in Britain, 50.0% of people were in favour of the death penalty. In Poland, between 60.0% and 80.0% of the surveyed population support the reintroduction of the death penalty, this is the highest support level for the death penalty in the European countries (Oberwittler & Qi, 2008).

However, research has shown that the abolition of the death penalty often happened at a time when the majority of the population still favour the same sanction, and that support levels gradually declined after the abolition (Hood. & Hoyle, 2008). In the same way, Germany is a good example of this effect. A report released by Allensbacher Institute (2002) showed that when the West German state abolished the death penalty in 1949, a majority (55.0%) of the population supported the death penalty. In 2000, only 23.0% West Germans were still in support of the death penalty, while 53.0% opposed the death penalty, and 24.0% did not have an opinion.

### **3.12.2 Alternatives to the Death Sentence**

Majority of the respondents hold the view that there should be alternative sentences to the death sentence. From the findings, 68.4% members of the public and 70.0% of public officials proposed life imprisonment as a suitable alternative to the death sentence. Similarly, 9.0% members of the public and 14.0% of public officials respondents suggested long term imprisonment of between 20-50 years as the alternative sentence; 8.3% of members of the public and 7.5% of public officials recommended rehabilitation and re-integration back into the community as alternative to death sentence; 6.0% members of the public and 7.5% of public officials advocated short term imprisonment of between 10-15 years as alternative to death sentence. It was a considered opinion of 5.2% members of public and 2.8% public officials that

imprisonment with hard labor which is beneficial to the state be an alternative to the death penalty. These responses are shown in Table 3.17 below.

**Table 3.17: Alternatives to the Death Sentence**

Alternatives to Death Sentence	Members of Public		Public Officials	
	N	Percent of Cases	N	Percent of Cases
Life imprisonment/sentence	1804	68.4%	77	70.0%
Imprisonment with hard labor which is beneficial to the state	139	5.2%	3	2.8%
Short Term Imprisonment 10-15 years	160	6.0%	6	7.5%
Long term Imprisonment 20 -50 years	239	9.0%	15	14.0%
Corporal Punishment	29	1.1%	1	0.9%
They should be rehabilitated and when ready reintegrated back to the community	220	8.3%	8	7.5%
Use of Traditional community based sentences such as in the case of the Turkana Community	27	1.0%	-	-
Fines	18	0.7%	-	-

An Ex-convict key informant from Nyandarua County had this to say on alternative to the death penalty:

*“Alternative sentence e.g. Probation and community service orders to be applied as a rehabilitative correctional approach. Empower and enhance community service orders”*

Similarly a judicial officer at Nyahururu Law Courts contented that:

*“Life sentence is a better alternative but has social and economic consequences for the exchequer.... prisoners on life sentence should be made to generate value for their existence like other countries such as China.”.*

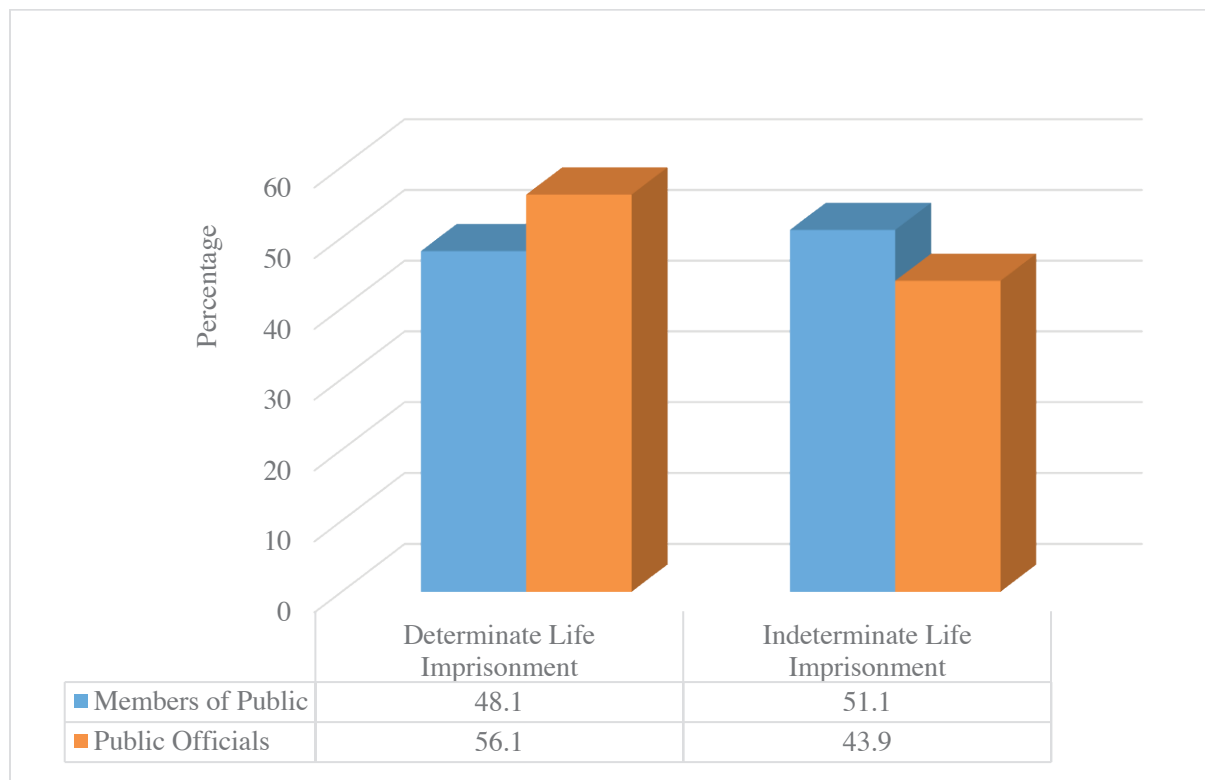
It is clear from the findings on alternative to death penalty that the majority of respondents viewed life sentence as the most suitable alternative to death penalty for capital offences in Kenya.

### 3.13 Public Opinion on Life Sentence

This study further aimed at finding out public opinion on the period of life imprisonment with or without limit and the appropriate duration for incarceration for convicts sentenced to life imprisonment.

#### 3.13.1 Opinion on Life Imprisonment

A comparative analysis in this study was done to obtain views from the respondents who did not favour life imprisonment without limit as indicated on Figure 21. This may possibly inform discourses on whether life imprisonment would serve a purpose as prescribed in law. In Kenyan statutes, some offences have determinate life sentence while others allow the magistrate or judge to apply discretionary powers. On this subject area of the study, 51.1% members of public and 43.9% public official favoured life imprisonment without limit, while 48.1% and 56.1% of members of public and public officials respectively supported life sentences with limits.



**Figure 21: Opinion on Determinate or Indeterminate Life Imprisonment**





**Figure 22: The President of Kenya Signing Death Commutation Kenya Gazette Notice**  
 (Source: POMAC 2016 October, 24)

### **3.13.2 Recommended Alternative Duration to Life Imprisonment**

The study respondents recommended the following as alternatives to life imprisonment: 33.2% of members of the public favoured a sentence of 21-30 years as a suitable alternative to life imprisonment. On the other hand, 26.4% of public officials recommended life imprisonment with option of condition of parole after 10 to 25 years as shown in Table 3.18.



**Table 3.18: Recommended Alternative Duration to Life Imprisonment**

<b>Recommended Alternative Duration to Life Imprisonment</b>	<b>Members of public</b>		<b>Public Officials</b>	
	<b>N</b>	<b>Percent of Cases</b>	<b>N</b>	<b>Percent of Cases</b>
Less than 21 years	564	24.6%	14	9.7%
21-30 years	760	33.2%	35	24.3%
31-40 years	270	11.8%	13	9.0%
41-50 years	165	7.2%	12	8.3%
51-70 years	144	6.3%	13	9.0%
71-100yrs	123	5.4%	3	2.1%
Life with option of condition of parole after 10 to 25 years	198	8.6%	38	26.4%
Duration should depend on the age of the offender at time of sentencing	67	2.9%	18	12.5%

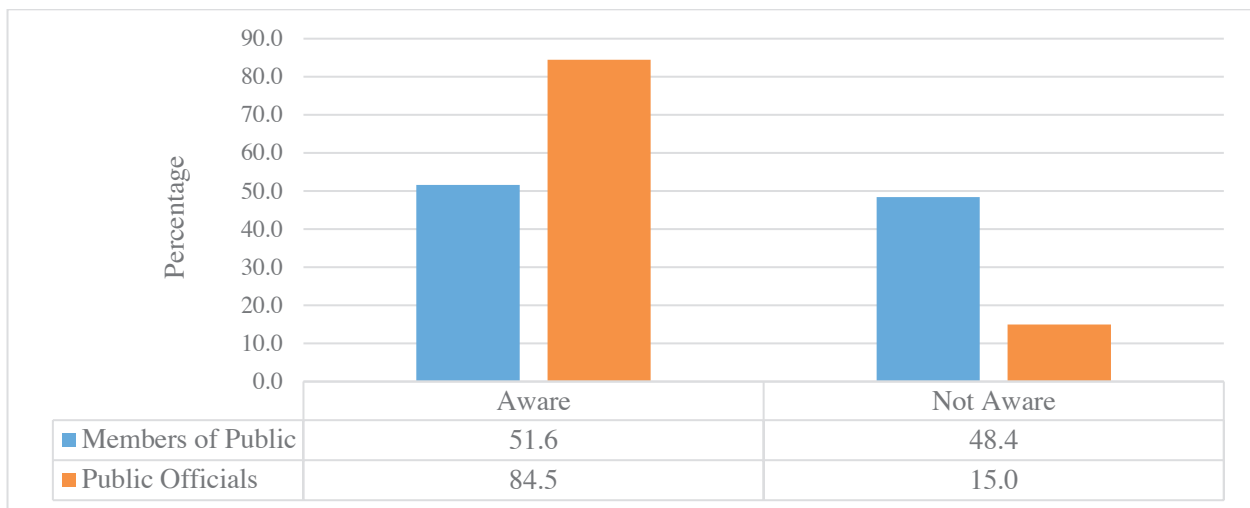
It is evident that those who opposed life imprisonment without limit largely preferred a life sentence of between 21-30 years. Equally, members of public respondents (26.4%) were in favour of life sentence of below 21 years without parole; unlike public officials who supported 10 to 25 years with option of condition of parole after 10 to 25 years.

### **3.14 Awareness on Victim Support Services and Recommended Alternatives**

The study sought to gauge the level of awareness from respondents in regards to legal provisions available to victims of crime including protection of victims, provision of better information and services, provision of reparation and compensation to victims and special protection to vulnerable victims.

#### **3.14.1 Awareness of Legal Provisions on Victim Support Services by Members of Public and Public Officials**

The findings on the level of awareness on the legal provisions for victim services established that 51.6% of members of public respondents were aware about victim support services while 84.5% public officials were also aware. In contrast, 48.4% members of public and 15.0% of public officials respectively were not aware as indicated in Figure 23.

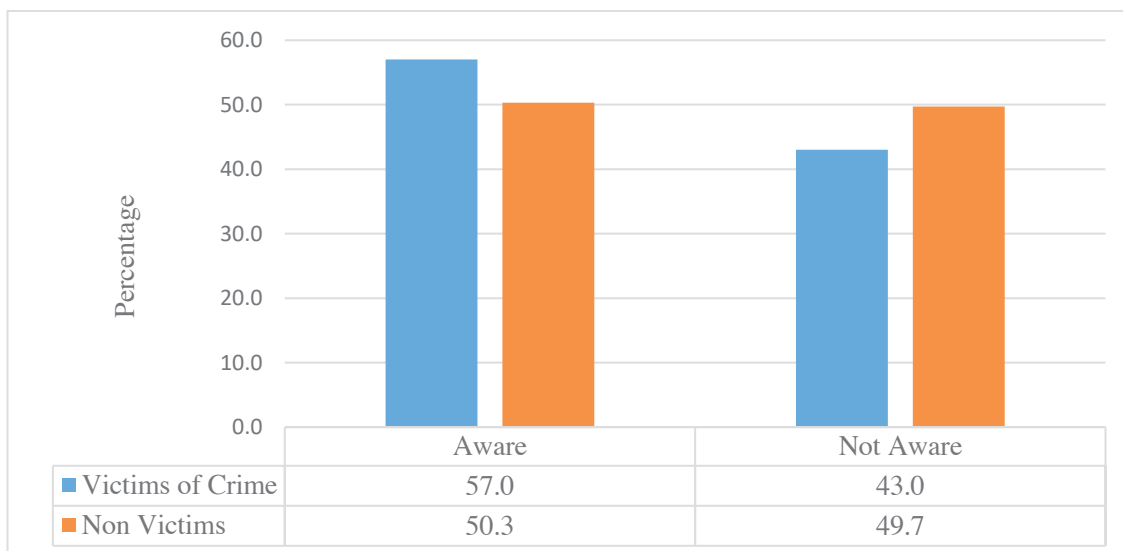


**Figure 23: Level of Awareness of the Legal Provisions for Victim Services**

This finding could be attributed in part to sensitization activities to the public following the establishment of Witness Protection Agency (WPA) in the criminal justice system. The findings were later cross-tabulated by County and demographic for members of public as follows.

**a. Levels of Awareness on Victims Services for Respondents who Have Been Victims of Crime and the Non-victims**

A comparative analysis on the level of awareness of legal provisions for victims support services was conducted amongst members of public who had been victims of crime as indicated below.



**Figure 24: Level of Awareness of the Legal Provisions for Victim Services by Victimization**

The results showed that 57.0% of victims were aware and 43.0% were not aware, while 50.3% of non-victims were aware and 49.7% of non-victims were not aware as indicated in Figure 24.

#### **b. County Analysis on Levels of Awareness on Victims Services**

A cross tabulation on the level of awareness by County revealed the following: The level of awareness was high in Uasin Gishu (80.0%), Nandi (79.5%), Mandera (79.2%), Kisii (72.3%) and Nyamira (70.3%) counties. In contrast, the level of awareness was low in Kakamega (19.5%) and Vihiga (19.8%) among other counties. Other findings on level of awareness as shown in Table 3.19 was that; Kitui had 56.3% Samburu (55.8%), Machakos (55.1%), Meru (54.7%), Kirinyaga (54.7%), Kwale (54.0%) and Nairobi 54.0%. Generally, the findings bring to fore the need for sensitization at County level by the agencies concerned since about 36 counties showed awareness level at below 60.0%.

**Table 3.19: Awareness of Victim Support Services by County**

County of Residence	Awareness of the Legal Provisions for Victims Support Services	
	Yes	No
Uasin Gishu	80.0%	20.0%
Nandi	79.5%	20.5%
Mandera	79.2%	20.8%
Kisii	72.3%	27.7%
Nyamira	70.3%	29.7%
Baringo	68.2%	31.8%
West Pokot	67.4%	32.6%
Elgeyo Marakwet	67.0%	33.0%
Trans Nzoia	66.3%	33.7%
Isiolo	65.9%	34.1%
Migori	65.0%	35.0%
Kilifi	63.0%	37.0%
Embu	59.8%	40.2%
Marsabit	59.3%	40.7%
Siaya	59.0%	41.0%
Turkana	58.6%	41.4%
Lamu	56.4%	43.6%
Homabay	56.3%	43.7%
Kitui	56.3%	43.8%

County of Residence	Awareness of the Legal Provisions for Victims Support Services	
	Yes	No
Samburu	55.8%	44.2%
Machakos	55.1%	44.9%
Meru	54.7%	45.3%
Kirinyaga	54.7%	45.3%
Kwale	54.0%	46.0%
Nairobi	54.0%	46.0%
Taita Taveta	53.5%	46.5%
Nyeri	52.1%	47.9%
Narok	52.0%	48.0%
Mombasa	51.5%	48.5%
Kisumu	50.9%	49.1%
Garissa	50.5%	49.5%
Kericho	50.5%	49.5%
Makueni	49.5%	50.5%
Tharaka Nithi	49.4%	50.6%
Nyandarua	48.5%	51.5%
Bomet	48.0%	52.0%
Kiambu	45.9%	54.1%
Nakuru	45.0%	55.0%
Tana River	44.4%	55.6%
Laikipia	43.5%	56.5%
Murang'a	40.0%	60.0%
Kajiado	39.2%	60.8%
Bungoma	31.0%	69.0%
Wajir	23.7%	76.3%
Busia	21.1%	78.9%
Vihiga	19.8%	80.2%
Kakamega	19.5%	80.5%

### c. Demographic Analysis on Levels of Awareness on Victims Support Services

Further cross tabulation on the level of awareness on victims support services was done against the demographic characteristics of respondents. Generally, the results showed that 56.4% of male respondents and 49.1% of females were aware.

Awareness on the basis of level of education showed that majority of respondents with no formal education (64.3%) were unaware about victim support services, while those with university level education (61.1%) and middle level college education (63.0%) were aware. Also, most of the respondents who profess Hindu (66.7%) faith were aware of the legal provisions for the victim

support services. On the same note, 54.4% Christians were also aware of the legal provisions for the victim support services as indicated in Table 3.20.

**Table 3.20: Awareness of Victim Support Services by Members of the Public**

Demographic Characteristics		Awareness of the legal provisions for victims Support services	
		Yes	No
Gender	Male	56.4%	43.6%
	Female	49.1%	50.9%
Age of Respondent in Years	18-25	51.9%	48.1%
	26-33	53.7%	46.3%
	34-41	54.7%	45.3%
	42-49	53.1%	46.9%
	50-57	57.8%	42.2%
	58-65	48.6%	51.4%
	66+	49.1%	50.9%
Marital Status	Single	54.5%	45.5%
	Married	54.0%	46.0%
	Separated	47.7%	52.3%
	Divorced	57.5%	42.5%
	Widowed	35.2%	64.8%
Level of Education	None	35.7%	64.3%
	Pre-Primary	51.1%	48.9%
	Primary	42.3%	57.7%
	Secondary 1-4	54.8%	45.2%
	Secondary 5-6	60.2%	39.8%
	Middle Level College	63.0%	37.0%
	University	61.1%	38.9%
	Adult Literacy	64.3%	35.7%
	Other	50.0%	50.0%
Religion	Traditional	49.1%	50.9%
	Christian	54.4%	45.6%
	Islam	49.1%	50.9%
	Hindu	66.7%	33.3%
	Other	29.4%	70.6%

Demographic Characteristics		Awareness of the legal provisions for victims Support services	
		Yes	No
Main Occupation	Permanent Employment -Private Sector	60.1%	39.9%
	Permanent Employment -Public Sector	63.6%	36.4%
	Casual/temporary employment	52.1%	47.9%
	Business Person	49.2%	50.8%
	Subsistence Farming	42.4%	57.6%
	Other Specify	53.9%	46.1%
Ever been victim of Crime	Yes	57.0%	43.0%
	No	50.3%	49.7%

In the findings, 53.7% of the respondents between ages 26-33 years were aware of the legal provisions on victim support services. Most of the respondents of between ages 50-57 years were more aware of the victim support services than the younger age groups. This means that more sensitization is needed for the youths.

In light of above, a survey conducted by Sims, Yost and Abbott (2005) in Pennsylvania (USA) found out that the users of victim service programs are characterized as female (65.0%), high school graduates (51.0%), not married (57.0%), and not working full time (42.0%). An analysis of historical statistics in the U.S. also found that female victims are more likely to receive assistance than their male counterparts since they are usually more actively seeking and welcoming help (Langton, 2011). The survey also shows that violent crime victims who have two or more dependent family members under 12 years old are more likely to receive victim services than those who have no dependents or only one. The results of previous empirical studies depict victim service users as vulnerable, disadvantaged, and reactive people who have little informal social support.

### 3.14.2 Recommended Victim Support Services by Public Officials and Members of the Public

From the findings, 41.0% of members of the public and public officials (75.6%) recommended economic empowerment initiatives such as financial compensation and employment for victims;

17.5% of members of the public and 55.6 % of public officials preferred guidance and counseling for victims; 8.8% of members of public and 18.8% of public officials recommended free medical attention for victims of capital crimes; 8.0% members of the public and 11.5% of public officials recommended justice/fair hearing for the victims; 7.8% members of public and 21.8% public officials recommended the need for security/witness protection for victims. These findings are displayed in Table 3.21 below.

**Table 3.21: Recommended Victim Support Services by Respondents**

Recommended Victim Support Services as reported by Respondents	Members of Public		Public Officials	
	N	Percent of Cases	N	Percent of Cases
Free Medical attention	662	8.8%	44	18.8%
Economic empowerment for victims e.g. employment, financial compensation.	1881	41.0%	177	75.6%
Guidance and counseling	1327	17.5%	130	55.6%
Legal assistance	413	5.0%	44	18.8%
Security/witness protection	594	7.8%	51	21.8%
Justice/fair hearing	568	8.0%	27	11.5%
Sensitization and create awareness on the plight of victims	113	1.5%	10	4.3%
Free education for victims	270	6.4%	10	4.3%
Community/religious support	105	1.4%	6	2.6%
Facilitate reconciliation between victims/offenders and their families.	168	2.0%	19	8.1%
Relocate offender to reduce cases of trauma and revenge against the victim	153	2.0%	16	6.8%
Rescue Centers/Homes for victims	72	1.0%	12	5.1%

Notably, a recent study by Huang (2018) in Taiwan on unmet needs and service satisfaction of victim support for the direct and indirect victims of serious violence, reported services up-take rate as high as 83.0%. Among the service users, higher rates of reporting receiving legal, psychological and financial help were reported. The findings confirm that legal, psychological, and financial assistance remains the three predominant services in current victim support in Taiwan (Yu & Lin, 2008). Similarly, this study came to same findings in regards to victims support services recommended by the respondents.



## **CHAPTER FOUR: SUMMARY, CONCLUSIONS AND RECOMMENDATIONS**

### **4.1 Introduction**

The study sought to examine the public perception on capital offences and punishment in Kenya. The specific objectives of the study were: to establish the rate of Victimization in Kenya; establish the level of awareness on capital offences and capital punishment in Kenya; find out factors that contribute to offenders committing capital offences in Kenya; establish public perception on retention or abolition of capital offences and punishment in Kenya and examine the victims support services in Kenya.

### **4.2 Summary of Major Findings**

#### **4.2.1 Rates of Crime Victimization in Kenya**

The study revealed that 52.4% of public officials or their family members have been victims of crime and 47.6% of them were non-victims. This would mean that the social status in the society contributes to crime victimization in Kenya. Types of crimes experienced were; theft/stealing given that 31.5% of the respondents or their family were victims of theft/stealing, 17.4% of the respondents were victims of burglary/stealing, 14.4% of the respondents or their family had been victims of robbery or mugging, 6.7% of the respondents had members of their family as victims of murder. Also, 6.1% of the respondents or their family had been victims of robbery with violence, 3.4% of the respondents or their family members were victims of rape with 0.6% of the respondents saying that they or their family had been victims of defilement. This could be an indication that very few cases of defilement are reported.

#### **4.2.2 Level of Awareness on Capital Offences and Capital Punishment in Kenya**

The study also established the level of awareness of capital offences punished by death in Kenya among members of the public and public officials; 99.1% of public officials were aware that murder is a capital offence punishable by death while 99.1% of members of public were also aware. Most public officials (98.1%) and 78.2% were aware that robbery with violence and murder (91.1%) were capital offences which attracted capital punishment respectively.

Moreover, 59.1% of the public respondents were aware that treason is an offence that attracts the death penalty and in counties analysis 57.7% of the respondents stated that they were aware of military offenses that do not result to death penalty of military offences that result into capital punishment. Additionally, 54.8% of members of the public sampled said that they were aware that attempted robbery with violence was an offence that attracted capital punishment and also 50.4% of the respondents of the same category indicated that they were aware that administering of oaths to commit capital offences was an offence punishable by death. Based on the fact that murder was cited the most, it can be concluded that killing of one another is unacceptable in society.

#### **4.2.3 Factors Contributing to Offenders Committing Capital Offences in Kenya**

Factors contributing to offenders committing capital offences were found to be: poverty and high cost of living (reported by 42.7% of public officials and 38.1% of public); drug abuse and alcoholism (reported by 28.6% of public officials and 27.5% of members of public); unemployment, greed and lust, mental illness and depression, political influence and incitement, religion, cults and radicalization, tribal animosity and tribalism were also mentioned as root causes of capital offences in Kenya.

#### **4.2.4 Public Perception on Retention or Abolition of Capital Offences and Punishment in Kenya**

This study sought to establish public perceptions on retention or abolition of capital offences. The findings established that 53.9% of public officials and 43.1% of members of the public were in support of retaining the death sentence. On the other hand, 56.9% of members of the public were in favour of abolishing death penalty while 46.1% of public officials favoured abolition of the death penalty. On this, 25.5% of the members of the public cited that capital punishment acts as a deterrence for future crimes, 20.0% of them said that death penalty ensures that convicts are never released back into society as they may pose a threat in future, 17.0% of members of the public indicated that it is the most effective means of achieving justice for the victims and provides closure to the victim, their families and society.

Public officials 82.6% who supported retention of the death sentence indicated that capital punishment acts as a deterrence, 53.8% of them argued that the severity of a crime should mandate an equally severe punishment and 16.7% said that capital offenders do not deserve an opportunity to reform. Other reasons included the assertion that death penalty reduces the chances of convicts escaping from prison.

The study also sought to know from the respondents who were in support for retention of death sentence if there are other crimes that should be punished by death. It was found out that, 59.0% of the respondents believed that there were other offences that should be punishable by death. On the other hand, 41.0% of the respondents opposed the idea of having other offences to be included in the death penalty sentencing. From the study findings, majority (54.6%) of the members of the public said that rape, defilement (41.0%), terrorism (8.9%) and economic crimes and corruption (8.6%) should be punishable by death.

However, 58.1% of public officials believed that defilement is the most serious offence that should be punished by death, followed by rape (31.4%) terrorism (12.8%) and economic crimes (8.1%). Other offences, mentioned minimally (3.0%) by the respondents to attract the death penalty included abortion, unnatural sex acts, drug trafficking, cattle rustling, kidnapping, incitement, possession of illegal firearms, child abuse and human trafficking.

In regard to the opinions of respondents on appropriate alternative sentences for offences currently punishable by death, 68.4% of members of the public and 70.0% of public officials were of the view that life imprisonment would be a suitable alternative. Also, 14.0% of public officials and 9.0% of members of the public favored long term imprisonment (20-50 years) as would be appropriate. Other alternatives indicated (at very low rates) as suitable included rehabilitation and when ready be re-integrated back to the community; short term prison sentence (10-15 years) which includes imprisonment with hard labour that is beneficial to the state would be the best alternative sentence; corporal punishment use of traditional community based sentences and use of fines.

On the period of life imprisonment, the respondents' opinions were sought on whether life sentence should be with or without limit. From the findings of the study, 51.1% of members of

the public were in favour of life imprisonment without limit while 48.1% recommended alternative duration for life sentences. On the same, 43.9% of public officials supported life sentence without limits, but 56.1% were in support of life sentence with limit. For life sentence with limit, majority of members of public (33.2%) were in favour of recommended duration of 21-30 years, while their public official counterparts (26.5%) favoured life with option of condition of parole after 10-25 years. Also, 24.6% of members of the public and 9.7% of public officials favoured a sentence of less than 21 years.

Other recommended durations for life imprisonment were a sentence of between 31-40 years supported by 11.8% of members of the public and 9.0% of public officials; 7.2% of members of the public and 8.3% of public officials were for a sentence of 41-50 years; a sentence of 51-70 years was supported by 6.3% of members of the public and 9.0% public officials; 5.4% of members of public and 2.1% public officials indicated a sentence of 71-100 years among others.

#### **4.2.5 Recommended Victims Support Service in Kenya**

From the findings, 41.0% of members of the public and 75.6% of public officials recommended economic empowerment such as financial compensation and employment for victims. Members of the public (17.5%) and public officials (55.6%) as well indicated need for guidance and counseling for victims.

Other views were that victims should be offered free medical attention (8.8% reported by members of the public and 18.8% reported by public officials); victims should be provided with security and witness protection (7.8% of members of the public and 21.8% of public officials); victims should be given justice and a fair hearing (8.0% of members of the public and 11.5% of public officials); provision of legal assistance (18.8% of public officials and 5.0% of members of the public); provision for free education; facilitation of reconciliation between victims, offenders and their families; relocation of offenders to reduce cases of trauma and revenge against the victim; more awareness and sensitization on the plight of victims; religious and community support for victims and establishment of rescue centres and homes for victims were more recommendations given though at lower percentage rating as provided in Table 3.21.

### **4.3 Conclusions**

Based on the findings of this study, the discourse on death penalty in Kenya is an on-going concern informed by legal, moral, class, religion, culture and other social cleavages. Whether to abolish or retain the death penalty in law is a debate that will always elicit divided opinion for a long time to come. There is utmost need to weigh both sides of the arguments from abolitionists and retentionists very carefully and make informed decisions on progressive actions that will serve the best purpose of the criminal law in Kenya.

### **4.4 Recommendations**

In view of the findings and conclusion of this study, the following policy recommendations and areas for further research are suggested.

#### **4.4.1 Key Policy Recommendations**

This study recommends:

- i. There is need to review the death penalty and life sentence in Kenya. This is in light of the fact that Kenyan courts continue to hand down death sentences that are not executed. For instance the last execution done in Kenya was 1987. A number of death row convicts have successfully challenged this in courts. A number of death sentences have also been commuted into life sentences. This has implications for Kenya's jurisprudential position on the sensitive legal matter of the death penalty. Majority of the respondents were in preference for a determinate life sentence instead of indeterminate life sentence.
- ii. There is need to adopt restorative justice as a policy for victims of capital crimes in Kenya. Although in law, the victims are supposed to be compensated, criminal cases are mainly between the state and the accused. Therefore, most victims or their families are unable to file suits to demand compensation. If a law is enacted and the court are allowed to hear the matter concurrently, it would be supportive to the victim. Many respondents in this study recommended that the victims or their families should be economically empowered from the damages and loss suffered.
- iii. There is the need for sensitization and awareness creation around victims of crime support services in Kenya. The study respondents recommended support to victims of crimes to enable them recover from loss of livelihoods and other negative consequences

of crime. Awareness will enable such victims to seek remedial redress from public and other institutions. Sensitization on the available programs, guidance and counselling, financial and legal assistance was also recommended.

- iv. Designing sustainable and long term economic programmes aimed at alleviating poverty and empowering Kenyans in terms of employment and other opportunities. The study found out that poverty and high cost of living were the major factors in commission of capital offences. Such programmes would provide livelihoods and disrupt potential offenders from committing capital offences in the country.
- v. There is need to rethink about the discourse on death sentence for capital offences in Kenya. This empirical study gives a divided outcome between the two sets of respondents. This is in line with majority of opinions expressed by members of the public and public officials.

The findings established that most of the public officials (53.9%) and 43.1% of members of the public were in support of retaining the death sentence. On the contrary, most of the members of the public (56.9%) and 46.1% of public officials were abolitionist. Retentionist respondents cited that capital punishment acts as a deterrence for future crimes and the death penalty ensures that convicts are never released back into society as they may pose a threat in future. On the other hand, the abolitionists indicated that the death penalty is a severe form of punishment and offenders should be given an opportunity to reform. Also, depending with the criminal justice system, death penalty may be abused by those in authority to suppress their critics.

#### **4.4.2 Recommendations for Further Research**

This study recommends a depending study be conducted to establish reasons why citizens commit capital offences and yet the level of awareness on such crimes is significant.

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## APPENDICES

### Appendix 1: Letter of Introduction to Sample respondents



#### CAPITAL PUNISHMENT AND CAPITAL OFFENCES

##### Questionnaire

Name of County \_\_\_\_\_

Name of Sub- County \_\_\_\_\_

Name of Division \_\_\_\_\_

Name of Location \_\_\_\_\_

Name of Sub- Location \_\_\_\_\_

Name of Specific Area/Village \_\_\_\_\_

Name of Interviewer \_\_\_\_\_

Date of Interview: \_\_\_\_\_ Time: \_\_\_\_\_

Hello, my name is \_\_\_\_\_

The Power of Mercy Advisory Committee (POMAC) in collaboration with the National Crime Research Centre (NCRC) is collecting the views of Kenyans in regard to capital punishment and the form of punishment offenders should be subjected to. This questionnaire provides you with a medium to have a say in the review of capital punishment and the form of punishment offenders should be subjected to. The survey opens a dialogue on what Kenyans want in regard to handling of capital offenders and management of capital offences besides bringing the stakeholders together in the debate on Death Penalty.

The debate is expected to advise government on a public driven stance in the global debate on the penalty.

You are therefore, expected to participate in the exercise by providing your free opinion on the subject. All the information you provide will be treated in utmost confidentiality.

The interview is scheduled to take an average of 20 minutes and if you have any questions about the study, please do ask.

### **Respondents Background Information**

1. Gender

1. Male

2. Female

2. Age of Respondent in years.

1. 18-25

5. 50-57

2. 26-33

6. 58-65

3. 34-41

7. 66+

4. 42-49

3. Marital Status:

1. Single/Never Married

4. Divorced

2. Married

5. Widowed

3. Separated

4. Level of Education:

1. None

2. Pre-primary

3. Primary

4. Secondary 1-4

5. Secondary 5-6

6. Middle level College (Specify)\_\_\_\_\_

7. University

8. Adult Literacy

9. Other (Specify)\_\_\_\_\_



5. Religion:

- |                |                          |
|----------------|--------------------------|
| 1. Traditional | 4. Hindu                 |
| 2. Christian   | 5. Other (Specify) _____ |
| 3. Islam       |                          |

6. Nationality

1. Kenyan
2. Non-Kenyan (Specify) \_\_\_\_\_

7. Main Occupation

1. Permanent employment – Private Sector
2. Permanent employment – Public Sector
3. Casual/temporary employment(Specify whether in public or private) \_\_\_\_\_
4. Business person
5. Subsistence Farming
6. Other (specify-e.g pupil/student/housewife) \_\_\_\_\_
7. None of the above (specify) \_\_\_\_\_

8. Length of stay in the locality (study site)

1. Below 1 year
2. 1-3 Years
3. 4-6 Years
4. 7-9 Years
5. 10-12 Years
6. 13+ Years

### Specific Information on Capital Punishment and Capital Offences

9. (a) Have you or any of your family members ever been a victim of a crime?

☐ YES ☐ NO

(b) If YES, which crime (s) was it \_\_\_\_\_

10. What do you think is the purpose of sentencing offenders? *Please rank the options in order of precedence where 1 is the most important*

☐ Punish an offender

☐ Restrict an offender's opportunities to re-offend

☐ Change behaviour/attitudes of an offender to prevent them re-offending  
(rehabilitation)

☐ Deter others from committing the same crime (general deterrence)

☐ Make amends to the victims for harm done

☐ Express society's disapproval

☐ Scare the offender so that he/she won't do it again (individual deterrence)

☐ Don't know

☐ Others (specify) \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

11. (a) Are you aware that in the Kenyan Law, the following are the Capital Offences punishable by death? *tick on the box for each offence as appropriate*

i. Treason (Penal Code 40 (3) P.C.) ☐ YES ☐ NO

ii. Administering an oath to commit a capital offence (S.60 P.C.) ☐ YES ☐ NO

iii. Murder (Sec. 204 P.C.) ☐ YES ☐ NO

iv. Robbery with Violence (Sec. 296(2) P.C.) ☐ YES ☐ NO

v. Attempted Robbery with Violence (S. 297(2) P.C.) ☐ YES ☐ NO

- vi. Military Offenses Not Resulting in Death (treachery, spying, aiding the enemy, assisting the enemy with intelligence information, misconduct in action by others, mutiny, and unlawfully advocating for a change of government) - Kenya Defense Forces Act {Sec. 58 (3)(a), 59 (1) (a), 60 (1), 61 (2) (a), 62 (2)(a), 63 (a), 67, 72(3)(a)} ☐YES ☐NO

b) And that for the following categories of offenders death penalty cannot be applied because of their special circumstances:

- i. Juveniles ☐YES ☐NO  
ii. Mentally ill ☐YES ☐NO  
iii. Pregnant Women ☐YES ☐NO

12. In your opinion what factors contribute to offenders committing offences that attract the death penalty?

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13. Are you in favour of Death Sentence for capital offences (Murder, Robbery with Violence, Attempted Robbery with Violence, Treason, oathing, specified military offences) in Kenya? ☐YES, am in favour ☐NO, am not in favour

**Note: If you are in favour of Death Sentence for capital offences, go to Q14 and if not in favour of Death Sentence go to Q15.**

14.(a) If you are in favour of Death Sentence, please indicate the three (3) main reasons which make you support Death Sentence (*TickBox*)

- i. ☐Capital punishment acts as deterrence for future crimes.  
ii. ☐Retribution through death penalty is the most effective means of achieving justice for the victim and provides closure to the victim/victim's family and society.  
iii. ☐Capital Punishment ensures that the convicts are never released back into society as they may pose a threat in future

- iv. ☐ Capital punishment reduces the chances of convicts escaping from prison
- v. ☐ Those accused of capital crimes do not deserve an opportunity for reformation
- vi. ☐ The severity of a crime should mandate an equally severe punishment.
- vii. ☐ Capital Punishment ensures jails are not overpopulated / Overcrowded
- viii. ☐ Prison infrastructure is adequate to accommodate such prisoners
- ix. ☐ Capital Punishment may impose less financial burden on the State

**Any other reasons.** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(b) In your opinion, in the light of the capital offences under the Kenyan Law, should all these offences attract death sentence? *please explain briefly where the response is NO.*

i. Treason (Penal Code 40 (3) P.C.) ☐ YES ☐ NO

Why? \_\_\_\_\_

\_\_\_\_\_

ii. Administering an oath to commit a capital offence ( S. 60 P.C.) ☐ YES ☐ NO

Why? \_\_\_\_\_

\_\_\_\_\_

iii. Murder (Sec. 204 P.C.) ☐ YES ☐ NO

Why? \_\_\_\_\_

\_\_\_\_\_

iv. Robbery With Violence (Sec. 296(2 P.C.) ☐ YES ☐ NO

Why? \_\_\_\_\_

\_\_\_\_\_

- v. Attempted Robbery with Violence (S. 297(2) P.C.) ☐ YES ☐ NO

Why? \_\_\_\_\_

\_\_\_\_\_

- vi. Military Offenses Not Resulting in Death (treachery, spying, aiding the enemy, assisting the enemy with intelligence information, misconduct in action by others, mutiny, and unlawfully advocating for a change of government) - Kenya Defense Forces Act (Sec. 58 (3)(a), 59 (1) (a), 60 (1), 61 (2) (a), 62 (2)(a), 63 (a), 67, 72(3)(a))
- ☐ YES ☐ NO

Why? \_\_\_\_\_

\_\_\_\_\_

- (c) In your view, are there other crimes you feel should be punishable by death?

☐ YES ☐ NO

If YES, list them \_\_\_\_\_

\_\_\_\_\_

- (d) In your opinion, how long should it take to execute an offender sentenced to death who has exhausted all appeals in the matter?

\_\_\_\_\_

- 15.(a) If you are in favour of abolition of death penalty, please indicate the three (3) main reasons, in your view, why death penalty should be abolished (*TickBoxand/or fill the space provided*)

- i. ☐ There is no conclusive proof that capital punishment acts as a deterrent for future crimes

- ii. ☐ Capital punishment imposes hardship and trauma for the convict's family who may have had no role in the crime
- iii. ☐ Capital punishment confuses the idea of retribution with justice and society must move away from the conception of "an eye for an eye"
- iv. ☐ Capital Punishment deprives people of the opportunity to reform
- v. ☐ Most countries have abolished capital punishment
- vi. ☐ The imposition of capital punishment is not free from risk as there is a chance of innocent people being sentenced to death
- vii. ☐ The application of capital punishment is too judge centric and depends on a judge's personal belief against or in favour of death sentence
- viii. ☐ Economically and socially backward groups will always have greater chance of being subjected to capital punishment than the rich
- ix. ☐ Death Sentence is cruel and dehumanising

Any **other reasons**.

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(b). In your opinion, what would you consider appropriate alternative sentences for offences currently punishable by death?

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16. Life sentence in Kenya is a sentence prescribed for a wide range of serious offences.

Currently, Life sentence means being in prison for the entire life of the convicted offender.

(a) In your opinion do you favour Life imprisonment without limit? ☐ YES ☐ NO

(b) If NO, what duration would you recommend for life sentence?

☐ 21 - 30 Years

☐ 31 - 40 Years

☐ 41 - 50 Years

☐ 51 - 70 Years

☐ 71 - 100 Years

☐ Life with option of conditional parole after 25 Years

☐ Others (Specify) \_\_\_\_\_

(17) (a) Are you aware that there are legal provisions for victims services that provide amongst others for protection of victims of crime, provide them with better information and support services, provide for reparation and compensation to victims and provide special protection for vulnerable victims? ☐ YES ☐ NO

(b) In your opinion what victim services would you recommend as part of restorative justice for victims of capital crimes in Kenya. (*Please list*)

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**THANK YOU**



## Appendix 2: Letter of Introduction to Key Informant



### CAPITAL PUNISHMENT AND CAPITAL OFFENCES KEY INFORMANT GUIDE

**Date of Interview:** \_\_\_\_\_ **Time:** \_\_\_\_\_

#### INTRODUCTION:

Hello, my name is \_\_\_\_\_

The Power of Mercy Advisory Committee (POMAC) in collaboration with the National Crime Research Centre (NCRC) is collecting the views of Kenyans in regard to capital punishment and the form of punishment offenders should be subjected to. As an important stakeholder, this interview provides you with a medium to have a say in the review of capital punishment and the form of punishment offenders should be subjected to. The survey opens a dialogue on what Kenyans want in regard to handling of capital offenders and management of capital offences besides bringing the stakeholders together in the debate on Death Penalty.

The debate is expected to advise government on a public driven stance in the global debate on the penalty.

You are therefore, expected to participate in the exercise by providing your free opinion on the subject. All the information you provide will be treated in utmost confidentiality.

The interview is scheduled to take an average of 20 minutes and if you have any questions about the study, please do ask.

**THANK YOU**

### Specific Information on Capital Punishment and Capital Offences

1. (a) Have you or any of your family members ever been a victim of a crime?  
  
(b) If YES, which crime (s) was it \_\_\_\_\_
2. What do you think is the purpose of sentencing offenders? *Please rank the options in order of precedence where 1 is the most important*
3. (a) Are you aware that in the Kenyan Law, the following are the Capital Offences punishable by death?
  - vii. Treason (Penal Code 40 (3) P.C.)
  - viii. Administering an oath to commit a capital offence (S.60 P.C.)
  - ix. Murder (Sec. 204 P.C.)
  - x. Robbery with Violence (Sec. 296(2) P.C.)
  - xi. Attempted Robbery with Violence (S. 297(2) P.C.)
  - xii. Military Offenses Not Resulting in Death (treachery, spying, aiding the enemy, assisting the enemy with intelligence information, misconduct in action by others, mutiny, and unlawfully advocating for a change of government) - Kenya Defense Forces Act {Sec. 58 (3)(a), 59 (1) (a), 60 (1), 61 (2) (a), 62 (2)(a), 63 (a), 67, 72(3)(a)}
- b) Are you aware that for the following categories of offenders death penalty cannot be applied because of their special circumstances:
  - iv. Juveniles
  - v. Mentally ill
  - vi. Pregnant Women
4. In your opinion what factors contribute to offenders committing offences that attract the death penalty?

5. Are you in favour of Death Sentence for capital offences (Murder, Robbery with Violence, Attempted Robbery with Violence, Treason, oathing, specified military offences) in Kenya? ☐ YES, am in favour ☐ NO, am not in favour

**Note: If you are in favour of Death Sentence for capital offences, go to Q14 and if not in favour of Death Sentence go to Q15.**

6. (a) If you are in favour of Death Sentence, please indicate the three (3) main reasons which make you support Death Sentence

(d) In your opinion, in the light of the capital offences under the Kenyan Law, should all these offences attract death sentence?.

vii. Treason (Penal Code 40 (3) P.C.)

Why

viii. Administering an oath to commit a capital offence ( S. 60 P.C.) Why?

ix. Murder (Sec. 204 P.C.)Why?

Robbery With Violence (Sec. 296(2 P.C.) Why?

x. Attempted Robbery with Violence (S. 297(2) P.C.)Why?

xi. Military Offences Not Resulting in Death (treachery, spying, aiding the enemy, assisting the enemy with intelligence information, misconduct in action by others, mutiny, and unlawfully advocating for a change of government) - Kenya Defense Forces Act (Sec. 58 (3)(a), 59 (1) (a), 60 (1), 61 (2) (a), 62 (2)(a), 63 (a), 67, 72(3)(a))Why?

(e) In your view, are there other crimes you feel should be punishable by death?

If YES, list them

(d) In your opinion, how long should it take to execute an offender sentenced to death who has exhausted all appeals in the matter?

7. (a) If you are in favour of abolition of death penalty, please indicate the three (3) main reasons, in your view, why death penalty should be

(b).In your opinion, what would you consider appropriate alternative sentences for offences currently punishable by death?

8. Life sentence in Kenya is a sentence prescribed for a wide range of serious offences.

Currently, Life sentence means being in prison for the entire life of the convicted offender.

(c) In your opinion do you favour Life imprisonment without limit?

(d) If NO, what duration would you recommend for life sentence?

☐ 21 -30 Years

☐ 31 - 40 Years

☐ 41 - 50 Years

☐ 51 - 70 Years

☐ 71 - 100 Years

☐ Life with option of conditional parole after 25 Years

☐ Others (Specify) \_\_\_\_\_

9. (a) Are you aware that there are legal provisions for victims services that provide amongst others for protection of victims of crime, provide them with better information and support services, provide for reparation and compensation to victims and provide special protection for vulnerable victims?

(b) In your opinion what victim services would you recommend as part of restorative justice for victims of capital crimes in Kenya.