

Examining the Need for Sentencing Guidelines in the Criminal Justice System of Somalia



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Abstract

Sentencing is defined as the final pronouncement of a court after both parties present their cases before it. On the other hand, Sentencing Guidelines are a standard procedure followed when passing a sentence to a convict after considering both the mitigating and aggravating factors of a particular offence. This paper examines the need for Sentencing Guidelines in the dispensation of criminal justice in Somalia. The methodology of this paper will be purely doctrinal legal research.

This study concludes that issuing the Sentencing Guidelines in the country will greatly improve the proper dispensation of criminal justice by providing starting and end points for sentences. It recommends that the Sentencing Guidelines must not be issued as a mere discretionary sentencing policy but must be compulsory for judicial officers to rely on in the sentencing process. This will, in turn, promote consistency and uniformity as well as enhance public trust in the judiciary.

Keywords: Sentencing, courts of judicature, criminal justice, Somalia.

1. INTRODUCTION

Under the criminal law justice system, sentencing is a vital element, and as such, it protects the public from harm. It is trite law that in criminal cases, when an accused person is tried before a criminal court, such a court is under a duty to decide whether the accused person is guilty or innocent of the said charges. When the accused person is found guilty of the offence by the criminal court, the court should then go ahead and pass an appropriate sentence within the law after considering factors that either aggravate or mitigate the sentence. When the prosecution fails to prove their case, the court will then proceed to acquit the accused person and set him or her free.

Sentencing is an important element in the criminal justice system in every country. It contributes to protecting the public from harm by punishing criminal offenders.

In Somalia, particularly, the law requires that when an accused person is tried before a competent court and is found guilty and convicted of the said offence, a sentence must then be passed by the court after carefully analyzing both the mitigating and aggravating factors brought forward by the prosecution and the defense lawyer for that particular offence.

It should be noted that the sentence passed by a competent court must be very clear and precise. The judge or magistrate has the discretion to pass any sentence he or she deems fit; however, such discretion must be exercised judiciously. The sentences passed by the judges or magistrates include, but are not limited to, death and long-term custodial sentences.

Before a trial judge or magistrate passes a sentence, he or she must listen to both parties' arguments, evaluate the evidence on record and come up with an appropriate sentence within the law.

In 1962, Somalia promulgated its Penal Code, which outlined various offenses and penalties. This Penal Code also details aggravating and mitigating factors for offenses. Specifically, Article 39 enumerates the aggravating factors, which are as follows:

- a. Where the offender acted in ill or bad motive, such as killing an innocent person;
- b. Where the offender commits an offence so that he or she can conceal another offence, for instance killing the victim in order to conceal the previous crime;
- c. Where the offender through negligence commits a crime well-knowing that his or her negligent act would result in the commission of the crime, for example, a police officer who is chasing a thief fires live bullets in a crowded place, thereby leading to the death or injury of innocent people;
- d. Where the offender acted inhumanely or cruelly while committing the crime, such as dismembering the victim's body;
- e. Where the offender takes advantage in circumstances such as time, place or person in order to hinder public or private defense, such as stealing from the mosque in the middle of the night;
- f. Where the offender commits a crime in order to evade an arrest warrant or imprisonment order, for instance, a rape suspect against whom an arrest warrant had been issued commits an assault occasioning actual bodily harm against the police officers who were deployed to arrest him or her in order to escape arrest;
- g. For crimes against property, where the offender causes serious damage to the injured person's property, such as when the accused person causes significant damage to the victim's house during a theft;
- h. Where the offender aggravates or attempts to aggravate the consequences of the crime, for example, in a defilement case, where the suspect marries or tries to marry the victim;

- i. Where the offender commits the crime against public officers, diplomats, consular agents, or any other person entrusted with public duties as a result of executing their functions, for instance, an accused person assaulting a magistrate or judge during a trial;
- j. Where the offender commits the crime as a result of abuse of power or in a domestic relationship, such as, a public officer receiving a bribe; and
- k. Any other aggravating factors that the magistrate or the judge deems fit in increasing the punishment to the convict.

In addition, mitigating factors are provided for under Article 40 of the Somali Penal Code of 1962, and they include;

- a. Where the offender acts in a motive that has social or moral value, for example, where the offender commits grievous bodily harm on a person who was beating his mother;
- b. Where the offender commits a crime as a result of provocation by another person, for instance, where the suspect kills another person whom he found committing adultery with his wife;
- c. Where the offender commits a crime under the influence of a mob, provided the offender is not a habitual or notorious criminal, such as a student participating in the destruction of school property during a demonstration over increased school fees;
- d. For crimes against property, the offender acts negligently for the commission of the crime;
- e. In addition to the act caused by the offender, the victim with criminal intent caused an event that led to the commission of the crime;
- f. Where the offender before the trial begins had fully paid the compensation to the victim for the damage caused, for example, an offender taking back the goods he or she had stolen from the victim before the trial begins; and

- g. Any other mitigating factors that the magistrate or judge considers appropriate for lessening the punishment to the convict.

2. PURPOSE OF SENTENCING

It is a cardinal principle in criminal law that, the major purpose of sentencing is to punish the offender for the offence he or she committed and to deter other members in the community from doing the same. The process of sentencing in criminal trials is aimed at promoting the rule of law so that communities can live one another in harmony and prevent the occurrences of crime. The purpose of sentencing in criminal cases was clearly illustrated in the Ugandan High Court case of *“Uganda v Baiga (Criminal Case 67 of 2014)”*, where it was noted that:

“the court is mindful of the purposes for which punishment may be imposed, i.e.; to punish the offender to an extent and in a manner, which is just in all of the circumstances (just punishment); to denounce the type of conduct in which the offender engaged (denunciation); to deter the offender (specific deterrence) or others (general deterrence) from committing offences of the same or a similar character; to facilitate the offender’s rehabilitation; to protect the community from the offender (incapacitation); or a combination of one or more of those purposes.”¹

Furthermore, the objective of sentencing in a criminal trial was fortified in the Indian case of *Alister Anthony Pareira v. State of Maharashtra*, where the supreme court of India held that the primary objective of sentencing a convict in criminal justice system is to punish the offender and deter others from doing the same. The court went ahead and stated that appropriate sentencing must be proportionate to the nature and gravity of the offence.

3. TYPES OF SENTENCES

In Somalia, courts only have powers to pass sentences within the law. The Penal Code of Somalia 1962 provides for two types of punishments that is principal punishments (which is provided under Article 90) and accessory punishments (which is provided for under Article 92)

Under Article 90 of the Penal Code of 1962, the principal punishments prescribed for criminal offences include;

- a. Death sentence (as per Article 94 of the P.C)
- b. Life imprisonment (as per Article 95 of the P.C)
- c. Imprisonment (as per Article 96 of the P.C)
- d. Fine (as per Article 97 of the P.C)

Furthermore, accessory punishments are provided for under Article 92 of the Penal Code of 1962, and are as follows;

- a. Interdiction from public offices
- b. Interdiction from a trade or profession
- c. Legal interdiction

Let's now look briefly at each of the above criminal law punishments;

3.1 Death Sentence

Death sentence is one of the capital punishment under criminal law and it's the severest form of punishment a person ever receives. Under this type of punishment, the convict's life is taken away as a form of punishment for the crime he or she committed.

Death penalty is the highest form of punishment given under the Somali Penal Code. It only occurs in the rarest of the rare cases. This was fortified in

the case of Uganda vs. Obong Tom (criminal case No. 124 of 2019) UGHCCRD 202, where it was held that court only passes the sentence of death in exceptional circumstances, and that is, rarest of rare cases whereby the sentence of life imprisonment or custodial sentence is not enough and that death penalty is the only punishment that can be meted to the convict.

The same principle was stated in the famous Indian case of Bachan Singh vs. State of Punjab (1980), whereby the Supreme Court of India held that the punishment of death sentence can only be given in special circumstances and that is rarest of rare cases.

Under the Somali Penal Code of 1962, the death penalty is given for the following offences;

1. Treason against the state as per Article 184 of the Penal Code
2. Holding intelligence with the enemy and the enemy attains its objectives as per Article 190 of the P.C
3. Destruction or sabotage of military works that seriously affect the country's military operations as per Article 196 (2) of the P.C
4. Destruction or falsification of documents concerning the security of the state that seriously affect the military operations of the country as per Article 198 (2) of the P.C
5. Procuring secret information regarding the security of the state that seriously affects the security situations in the country as per Article 199 (2) of the P.C
6. Political or military espionage that has affected the security of the country as per Article 200 (2) of the P.C
7. Espionage concerning information the disclosure of which had been prohibited that seriously affected the military operations of the country as per Article 201 (3) of the P.C

8. Armed insurgency against the powers of the state provided the armed insurrection succeeds as per Article 221 of the P.C
9. Causing the happening of a civil war as per Article 223 of the P.C
10. Carnage (endangering public safety by force) that leads to the death of any person as per Article 329 of the P.C
11. Pollution of water and food that results into the death of any person as per Article 335 of the P.C
12. Murder as per Article 434 of the P.C

3.2 Life Imprisonment

Under criminal law, the sentence of life imprisonment means that the convict will spend the rest of his or her natural life in prison until pardoned, paroled or otherwise converted to a fixed term.

The sentence of life imprisonment was clearly defined in the Indian case of Bhagirath and others vs. Delhi Administration (1985), the Supreme Court of India defined life imprisonment to mean the confinement of the convict to prison for the remainder of his or her natural life.

Furthermore, the effect of life imprisonment was discussed in the Ugandan case of Tigo Stephen v Uganda; Criminal Appeal No 08 of 2009, where the Supreme Court stated that the death penalty and life imprisonment are the harshest form of capital punishment under criminal law, and as such, the sentence of death penalty can be mitigated to life imprisonment where the circumstances necessitate it, hence, the convict will spend the remainder of his life in incarceration.

The Somali Penal Code of 1962 provides life imprisonment for the following offences;

1. Espionage concerning information the disclosure of which had been prohibited of which the act is committed in the interest of a state at war with the Somali state as per Article 201 (2) of the P.C
2. Armed insurrection (uprising) against the powers of the state provided it does not succeed as per Article 221 of the P.C
3. Provokes the act of civil war as per Article 223 of the P.C
4. Carnage (endangering public safety by force) that leads to the physical injury of any person as per Article 329 of the P.C

3.3 Imprisonment

Imprisonment sentence is a sentence whereby an offender is committed to prison for a specified period of time. This is provided for Article 96 of the Penal Code of Somalia.

3.4 Fines

On some occasions, fines may be imposed on offender for the crimes he or she committed provided that those crimes are less serious in nature and the sentence of fines serve the purpose.

The courts usually prefer to give out fines to an offender where the offence carries the option of fine or imprisonment. The main reason for this is to decongest the prison service.

4. FACTORS THAT AFFECT THE SENTENCING PROCESS

When determining an appropriate sentence for a convicted person, various factors must be put into consideration before sentencing an offender. Some of the important factors include but not limited to;

4.1 First Time Offender

First time offender is a person or individual who had never been convicted of any offence before. In the Eastern African cases of *Arissol v R* [1957] EA 447 and *Mavuta v R* [1973] EA 89, it was held that, it's a common practice in the courts of law that first time offenders receive lesser sentence unless otherwise. Courts are normally lenient when sentencing first time offenders.

4.2 Ignorance of the Law

According to Article 5 of the Somali Penal Code 1962 provides that ignorance of the penal law is not a defense or an excuse for a defense. This clearly means that an offender cannot plead ignorance of the law as a defense whatever the circumstances it may be. However, it's a fact that not every person in the country is aware of all the laws and regulations made forth by the parliament and as such, courts may be merciful to an accused person who pleads ignorance of the law as a defense provided that he or she did not know that it was an offence at the time of committing the act. This is supported by the majority opinion of the U.S Supreme Court justices in the U.S case of *Lambert vs. California* (1957), where it was held that ignorance of the law can be a defense under certain circumstances.

4.3 Plea of Guilty

This typically means that when the accused person admits to the commission of the crime. In other words, it is when the accused person unequivocally accepts that he or she committed the offence. When the accused person confesses, courts are more lenient when giving out a sentence. This is because the admission of guilty by the accused person indicates that that he or she takes the blame entirely and is ready to reform.

5. DISCREPANCIES IN THE SENTENCING PROCESS

Sentencing is the final pronouncement of a competent court.

It is a trite law that when sentencing a convict, the degree of punishment should be proportionate to the harm caused and the degree of participation of the offender. This means that when a criminal offender is convicted of a very serious crime, then his or her punishment should be severe whereas criminals who commit less serious crimes, their punishment should be less severe. When a judge is passing a sentence, care should be given to the aggravating and mitigating factors as provided for by the Somali Penal Code of 1962.

When two or more persons are convicted of the same offence and in the same trial, the court is under duty to impose similar sentences unless the previous antecedent of one of the convict prevents it. This was clearly manifested in the Eastern African case of “*Marando v R*, ([1980] KLR 114)”:

The appellant and co-accused were convicted of manslaughter. The appellant, who was a first offender, was sentenced to four (4) years imprisonment and his co-accused to one day imprisonment. The trial Judge gave no reasons for the disparity in the sentences. On appeal, the sentence of four (4) years imprisonment was reduced to three (3) months imprisonment. The court took into account the fact that the appellant had been in pre-trial custody for 14 months. The court also observed the appellant would suffer justifiable feeling that he has been a victim of injustice.²

Therefore, to avoid discrepancies in the sentencing process, courts should pass the same sentences for offences that are similar in nature and committed under similar situations, provided that all other factors are constant.

6. THE NEED FOR SENTENCING GUIDELINES IN SOMALIA

Sentencing Guidelines is a document that guides the judges or magistrates when sentencing criminal offenders. The Sentencing Guidelines will have a starting point and end point for each and every offence under criminal law. The Sentencing Guidelines can be seen as a criteria's that had been put in place in order to establish uniformity and consistency in the sentencing process. This principle was elaborated more in the Ugandan case of; *Western Highland Creameries & Anorv Stanbic Bank Uganda Ltd* (Taxation appeal/ reference no 10 of20 13) [2013] UGCOMM 151 (30 august 2013) in this case, the court observed that Sentencing Guidelines is a document that had been put in place in order to provide guidance for the magistrates and judges to be based on while sentencing an accused person.

In accordance to the Sentencing Council for England and Wales;³

“Sentencing guidelines are documents which set out a way for judges and magistrates to consider the seriousness of particular offences, and so decide on the appropriate sentence for each case...”⁴

The sentencing Guidelines will be designed in a way that will enable the courts of law to achieve the purpose of sentencing such as punishing the offender, deterring others from doing the same and providing room for rehabilitating the offenders.

At the conclusion of criminal trials, the court hears both the aggravating and mitigating factors of the offence and comes up with appropriate sentence under the law.

It is important to note that Somalia does not have Sentencing Guidelines in place that would have enabled to create uniform system of sentencing

in the country, rather, the magistrates or the judges have the discretion when sentencing the convict after taking into account the aggravating and extenuating circumstances of the offence provided for under the Somali Penal Code of 1962.

Therefore, such an absolute discretion in the hands of the magistrates or judges often leads to abuse of judicial powers since there are no guidelines in place for them to follow when sentencing the offender and as such often leads to miscarriage of justice. This had made the general public to shun the judiciary and opt for other means of getting justice. Therefore, there is need for Sentencing Guidelines to be issued in the country so that magistrates and judges can follow when sentencing a convict in order to remedy such injustices.

The following are the reasons for the need of the Sentencing Guidelines in the country;

6.1 Minimizing Uncertainty (Disparity in Sentencing)

Since the Somali Penal Code of 1962 provides for the penalties of each criminal offence and further provides for the aggravating and extenuating factors for such offences, still, uncertainty in the sentencing process is bound to occur particularly where two judges by two different courts are handling the same offence for different offenders. One judge may give maximum sentence whereas the other judge may give out minimum sentence, all within the range of the statutory limits.

In order to avoid such uncertainty in the sentencing process, the country needs a Sentencing Guidelines that will provide for starting and end point for each offence. This will help the magistrates or judges to strictly follow the said Guidelines when passing a sentence and as such avoiding uncertainty in the process.

6.2 Providing for Uniformity and Predictability

Usually, in the absence of a Sentencing Guidelines, magistrates or judges enjoy absolute discretion when awarding a sentence. In the course of exercising their discretion, the magistrates or judges may award lenient or harsh sentence to the convict, hence, varying their decisions widely. The criminal law jurisprudence provides for the principle of proportionality which requires that punishments given to the offender must be appropriate to the harm caused. This principle was explained in the English case of; *Hoare v The Queen* (1989) 167 CLR 348) where court noted that the proportionality principle in the law of sentencing, is that the sentence imposed to the convict shall be appropriate to the gravity of the offence and the circumstances under which the offence was committed.

For purposes of uniformity in criminal trials, offenders who commit similar crimes under similar conditions should receive similar sentence. This will help create uniformity in the sentencing process. Furthermore, the strict follow of the said Sentencing Guidelines will make criminal sentencing in the country more impartial and predictable. This will result the judiciary regain its public confidence.

As the former chief justice of Uganda, Benjamin J. Odoki in his speech⁵ noted that the Sentencing Guidelines in general promote uniformity in sentencing offenders who commit similar offences under similar circumstances.

6.3 Ensuring Consistency in the Sentencing Process

Currently, under the criminal law jurisprudence in Somalia, the magistrates or judges have unfettered discretion when it comes to sentencing criminal offenders. Clear examples of unfettered discretion of the magistrates or judges can be seen in the East African cases of: *Hon.*

Akbar Hussein Godi vs Uganda Criminal appeal no. 3/2013 and Tonku vs Uganda HCT-00-CR-SC-0426/2010.

Both of these cases, the accused was indicted and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act of Uganda. In the first case, the accused was sent to imprisonment of 25 years while the latter, death sentence yet both cases involve loss of life.

It should be noted that, not always similar offences receive similar punishments; there are certain aggravating or mitigating factors that affect it. This principle was illustrated in the case of “Marando vs R (1980) KLR 114”.

In this case, the appellants and the co-accused were convicted for the offence of manslaughter. The appellant who was a first offender was given a sentence of four (4) years imprisonment and his co-accused one day imprisonment sentence. The trial judge gave no reason for the disparity in the sentences. The case was appealed and the four (4) years sentence was reduced into three months imprisonment. The fact that the appellant had been in custody for 14 months before the trial was considered by the appellate court.⁶

Having Sentencing Guidelines that is very strict to be based on when passing out a sentence will create consistency and uniformity in the sentencing process in the country. This means that, the trial magistrate or judge will have no choice but to follow the strict Sentencing Guidelines for guidance.

6.4 Transparency in the Sentencing Process

Since the Sentencing Guidelines provide for starting and end point for each and every criminal offence under criminal law, the trial judge is under duty to follow them and award punishments to the convict while

referring to the Guidelines. As a result, this process is expected to bring transparency in the criminal sentencing.

6.5 For the Purpose of Deterrence

The word deterrence means preventing would-be criminals from committing crimes for the fear of the consequences that may arise. Deterrence is divided into specific and general deterrence. Specific deterrence means punishing the individual offender to prevent him or her from committing a crime again whereas general deterrence is related to punishing the offender as an example so that the general public does not commit a crime for fear of punishment. Therefore, since the Sentencing Guidelines will contain sentencing ranges for each and every offence under criminal law, it will be aimed at deterring a person from the commission of the offence and generally protecting the public from harm.

The point of a deterrence purpose is clearly explained in the Ugandan case of; *Kizito Seukula V Uganda* Criminal appeal no. 24 of 2001. In this case, the accused person was charged with the offence of defilement. The Court of Appeal had this to say:

“On Appeal the court noted that despite the fact that he is a first offender who has started his journey in criminality in a high gear. What he did to this girl was to say the least treacherous. He introduced her to sex at such a young age of 11 year. In spite of the message of castration to be meted out to such men, accused appears to be unconcerned about it. He has not, in the least, looked repentant for what he did. He has a large family of 7 children, but the heinous offence he committed weighs down such a mitigating factor. He spoils other parents' children and wants his to be highly regarded. It is important that a deterrent sentence be imposed in this case considering the circumstances under which it was

committed. The sentence should fit both the crime and the offender.”⁷

6.6 It Leads to Public Confidence

The major purpose of sentencing under criminal trials is to punish the offender and deter others from committing the crimes and in the process protect the public from harm. Most times, the public take the law into their own hands by a process known as mob justice. This is as a result of the public losing trust in the judiciary, because on some occasions the magistrates or judges abuse their judicial discretion. A strict and fixed Sentencing Guidelines to be based on when passing a sentence in the country’s justice system can bring public confidence back.

7. Conclusion and Recommendations

This study noted that the sentencing process is one of the most challenging aspects of the criminal justice system. In a fragile country recovering from civil war, like Somalia, where the judiciary is weak and public confidence in the justice system is low, coupled with frequent crimes, there is an absolute need to formulate strict and fixed Sentencing Guidelines that must be followed when sentencing a convict. Appropriate Sentencing Guidelines should aim to punish the offender, protect the public from harm, and reform the convict. The primary purpose of these Sentencing Guidelines is to bring consistency, uniformity, and transparency to the sentencing process by providing sentencing ranges for every criminal offense.

This study concludes that issuing Sentencing Guidelines in the country will greatly improve the proper dispensation of criminal justice by providing minimum and maximum sentences for each criminal offense.

This study recommends that Sentencing Guidelines should not be issued as mere discretionary sentencing policies but should be compulsory for judicial officers to rely on during sentencing. This will promote consistency and uniformity and enhance public trust in the judiciary. Additionally, this study recommends that judicial officers be trained to apply the Sentencing Guidelines for the proper dispensation of justice in the country. Furthermore, the Sentencing Guidelines should also be applied to the Court Martial (Somali Military Court).

Notes

¹ *Uganda v Baiga (Criminal Case 67 of 2014)*

² *Marando v R, ([1980] KLR 114)*

³ Available at <http://sentencingcouncil.judiciary.gov.uk/sentencing/what-are-guidelines.htm> accessed on 18th March, 2023

⁴ Ibid

⁵ Speech by the Hon the Chief Justice his Lordship Benjamin J Odoki at the launch of the constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions legal notice no. 8 of 2013 at Kabira country club, Kampala on 10th June 2013

⁶ *Marando vs R (1980) KLR 114*

⁷ *Kizito Seukula V Uganda Criminal appeal no. 24/2001*

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