

Colonial legacies in criminal law: A comparative study of the Kenyan and Tanzanian jurisprudence

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Abstract: *Criminal justice systems in many African countries still reflect colonial era practices by punishing actions now widely considered matters of morality rather than criminal offences. This remains the case in Kenya and Tanzania despite progressive post-colonial constitutions. Laws continue to criminalise matters such as marriage, family obligations, and suicide – an enduring legacy that undermines human rights and social justice. Efforts to address this issue have been undertaken by various actors, with judiciaries contributing through what is known as transformative adjudication. Using the Third*

World Approach to International Law (TWAIL) as a theoretical framework, this chapter situates the analysis within the broader discourse on decolonisation and legal reform. Through a desktop study of both primary and secondary sources, this research examines judicial responses to colonial legal legacies in Kenya and Tanzania. Specifically, the chapter explores how courts in these countries have interpreted and challenged colonial-era legal frameworks, focusing on contemporary rulings that address human rights and social justice concerns. The chapter concludes with a recommendation, drawing on insights from other former colonies that have successfully phased out similar colonial remnants as part of their own decolonisation and legal reform processes.

1 Introduction

Criminal justice systems in most African countries retain colonial era practices by punishing actions or omissions now widely considered matters of morality rather than criminal offences, even by the countries that originally implemented these laws. In Kenya and Tanzania, this remains true. Despite post-colonial constitutions that include progressive clauses, criminal laws continue to penalise behaviours related to vagrancy, morality, marriage and domestic obligations, and suicide, among others, as outlined in the Penal Codes of these countries. This colonial legal legacy inevitably continues to undermine fundamental human rights and social justice.

Efforts to address this issue have been undertaken by various actors, with judiciaries contributing through what is known as transformative adjudication. As noted by Justice Pius Langa, former Chief Justice of the Republic of South Africa, transformative adjudication has no single accepted definition.¹ It was popularised in the South African context during the transition from apartheid to constitutional democracy.² Justice

1 P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351, <https://vula.uct.ac.za/access/content/group/43c49dc1-22c9-4c39-9f21-0f588f5182e3/Reading%20Material/Introduction%20to%20Constitutional%20Law/Prescribed%20reading/Pius%20Langa%20-%20Transformative%20Constitutionalism.pdf> (accessed 14 November 2025).

2 E Kibet & C Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *African Human Rights Law Journal* 340-366.

Langa interprets it, while referencing South Africa's interim Constitution as such, 'the core of transformative constitutionalism lies in interpreting the Constitution as a vehicle for change – one that heals the wounds of the past and guides society toward a better future, ensuring that all decisions can be substantively justified in light of the rights and values it enshrines.'³ He elaborates on this in relation to the transformation of the legal culture, the limb that this research is most concerned with, noting that the true shift from the deep problems of the past requires that 'all decisions be capable of being substantively defended in terms of the rights and values that it [the Constitution] enshrines.'⁴

On the other hand, Kibet and Fombad define transformative adjudication by distinguishing it from classical liberalism, noting that its focus is on substantive equality and substantive justice rather than assumed formal equality which is the focus of the former.⁵ From a legal perspective, they note that this would mean that transformative adjudication entails 'methods of legal reasoning that transcend formalism or positivism to ensure that rights are indeed enjoyed.'⁶ Thus, the premise of their work is that transformative constitutionalism offers hope for increased protection of fundamental rights and freedoms, a position that aligns with this chapter's hypothesis, that is, that courts are best placed to address these colonial vestiges by interpreting constitutional provisions through the lens of transformative adjudication. This position was echoed by the Supreme Court of Kenya when it observed, among others:

[A] constitution ... is a transformative charter. Unlike the conventional liberal Constitutions of the earlier decades which essentially sought the control and legitimisation of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy.⁷

It is in this context that this research relies on TWAIL as a theoretical framework, in order to situate the analysis within the broader discourse on decolonisation and legal reform. Through a desktop study of both primary and secondary sources, this research examines judicial responses

3 Langa (n 1) 352.

4 As above.

5 Kibet & Fombad (n 2) 353.

6 As above.

7 (2013) KESC 7 (KLR) (my emphasis).

to colonial legal legacies in Kenya and Tanzania. Specifically, the chapter explores how courts in these countries have interpreted and challenged colonial era legal frameworks, focusing on contemporary rulings that address human rights and social justice concerns. The chapter concludes with a recommendation, drawing on insights from other former colonies that have successfully phased out similar colonial remnants as part of their own decolonisation and legal reform processes.

The chapter is thus informed by the fact that the question of how current regimes can address colonial crimes has long been grappled with, given the intertemporality rule. The chapter contributes to these discussions by highlighting how courts have interpreted these laws in Kenya and Tanzania.

2 Overview of colonial legacies in East African criminal law and their ongoing impact

In an effort to control native populations and maximise their ability to exploit and profit from native resources, colonial powers transplanted their own laws into their colonial possessions,⁸ backed by international law, as argued by a TWAAIL proponent, Anghie.⁹ He observes that early conceptions of international law created and reinforced this hierarchy between colonising sovereigns and colonised peoples. It thus follows that, in what has been termed a form of historical inertia, post-colonial states remained defined by the legal structures of their colonial masters. Kenya and Tanzania are no exception to this. The connection being emphasised here is that, before the East Africa Protectorate was proclaimed in 1895, the Indian penal and criminal procedure codes had been in effect in the East African region for nearly 30 years, having first been introduced in Zanzibar.¹⁰

The impact of the Great Britain's influence on Kenyan laws still exists to date, more than 50 years post-independence; the Penal Code being one of the laws that have predominantly retained these colonial legacies.

8 M Kanna 'Furthering decolonisation: Judicial review of colonial criminal laws' (2020) 70 *Duke Law Journal* 411.

9 A Anghie *Imperialism, sovereignty, and the making of international law* (2004).

10 P Swanepoel 'Codifying criminal law in East Africa during the interwar period' (2019) 19 *Vienna Journal of African Studies* 93.

Specifically, offences that have largely been deemed as petty offences continue to be penalised.

On the other hand, Tanzania had a more nuanced colonial history, having been colonised by the Germans from 1886 to 1919 and by the British between 1918 and 1961, through the Tanganyika Order in Council of 1920. Section 17 of that Order essentially brought Tanganyika under the operation of the Indian Penal Code. Thus, the main source of Tanzania's criminal laws was a Penal Code that was imported from India, and similar to the situation in Kenya, these influences remain to date.¹¹

3 Colonial vestiges in criminal law

The Kenyan and Tanzanian Penal Codes still retain colonial era laws and, as noted by Kanna, some of these are identical or nearly identical to the colonial laws on which they were based.¹² To this end, this part has a two-fold purpose: namely, to identify and analyse specific offences retained from the colonial era in the Kenyan and Tanzanian Penal Codes, and to assess how these colonial influences continue to impact Kenyan and Tanzanian criminal laws.

For the sake of brevity, this part focuses on select types of offences, that is, offences that are considered petty, offences against public order and offences against morality. This part maps out legal principles in the criminal laws of Kenya and Tanzania that essentially create an enabling legal environment for the *status quo* that is the focus of this research. Since such an exercise can hardly be substantiated in the context of this chapter, this assessment is limited to selected aspects of criminal law principles. It should be noted that the legal principles discussed in this chapter are illustrated through the selected offences and their corresponding sentences, with particular reference to the death penalty.

Before delving into the specific offences, it is prudent to briefly discuss what constitutes the selected offences and sentences. Petty offences take various forms. Vagrancy laws, for instance, penalise persons for failing to provide a 'good account of themselves', and for not having a fixed residence or for not having proof of a means of income. Traditionally

11 N Filbert & J Shadrack *Tanzanian criminal law* African Criminal Law Series vol 1 (2024), <https://edoc.hu-berlin.de/server/api/core/bitstreams/b349b38c-cb43-4e4f-993f-b1387383653a/content> (accessed 14 November 2025).

12 See, generally, Kanna (n 8).

vague wordings, such as being ‘rogue’, ‘vagabond’, ‘disorderly’ or ‘idle’ are used.¹³ Other such offences, termed by the United Nations (UN) Human Rights Council (UNHRC) as activity-based criminalisation, criminalise specific conduct such as sleeping, eating, washing or bathing, causing a noise disturbance or blocking an entrance to a public or private building.¹⁴ Others target public health aspects and focus on littering, unauthorised disposal of waste or garbage, cooking in a public space, urinating in public, and washing clothes or bedding in public.¹⁵ The criminalisation of begging, that is, requests for money or any other valuable goods, and informal labour criminalisation, that is, individuals who work within the informal labour market, including hawking, trading, car guarding and washing in a public space, is also included.¹⁶

Categorised as offences against morality, same-sex sexual activity is criminalised by a majority of African countries, including in the Penal Codes of Kenya and Tanzania. Specifically, these laws criminalise acts of ‘carnal knowledge against the order of nature’ and ‘gross indecency.’ This legacy flows directly from the Indian Penal Code that was introduced by the British Empire, which criminalised this conduct under its section 377 and provided that ‘unnatural offences – whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment ... for a term which may extend to 10 years and shall be liable to a fine.’¹⁷

With respect to offences against public order, criminal law in this area was and continues to be used to preserve the established order, and the offences mostly targeted the expression of opinions that would undermine

13 UNHRC ‘Breaking the cycle: Ending the criminalisation of homelessness and poverty, Report of the Special Rapporteur on extreme poverty and human rights’, <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session56/advance-versions/a-hrc-56-61-add-3.pdf> (accessed 14 November 2025).

14 As above.

15 As above.

16 T Bannister, A Satkunanathan & T Affonso ‘Decriminalising public space governance: The role of the police’ (2025) *Journal of Community Safety and Well-Being* 74.

17 A Gupta ‘This alien legacy: The origins of “sodomy” laws in British colonialism’ Human Rights Watch (2008), <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism> (accessed 14 November 2025).

that order.¹⁸ Some of the common offences under this category include seditious and blasphemous libel and subversive activities.

Lastly, the death penalty (capital punishment), given its connection to offences against public order and morality, is discussed. As has been the trend thus far, both Kenya and Tanzania have engaged with the discourse on the constitutionality of the death penalty, although this engagement has evolved quite differently in their respective jurisprudence, as will be seen in the next part. However, before delving into this analysis, it is important to provide some insights into the death penalty as a tool for colonial domination.

A significant number of African countries retain capital punishment, and three main reasons are advanced to justify this *status quo*.¹⁹ As aptly summarised by the African Commission on Human and Peoples' Rights (African Commission), these reasons are that the continent is in the 'throes of political, economic, social and ethnic instability'; there is strong public belief in retributive justice; and the continent is afflicted by deep religious, cultural and legal diversity denying it a sense and feeling of common shared values.²⁰

As intimated in the foregoing, these offences flowed from English laws that were introduced during the colonial era. As can be expected, England and Wales have already undertaken significant reforms and done away with these outdated laws in terms of decriminalising same-sex sexual activities, repealing their vagrancy laws and abolishing the death penalty.²¹

However, aside from the fact that they are colonial relics, what really is the problem with these offences? The first problem arises from the fact that for some of these offences, their definitions are so vague and broad,

18 D Feldman & A Burrows 'Offences against the state, public order, public morality, and decency' in D Feldman & B Andrew (eds) *English public law* (2009) Oxford, 2009; Online Edition, *Oxford academic*, 31 October 2023, <https://doi.org/10.1093/oso/9780199227938.003.0027> (accessed 14 November 2025).

19 See, generally, D van Zyl Smit 'The death penalty in Africa' (2004) 4 *African Human Rights Law Journal* 1.

20 African Commission Launch of the document on the study on the death penalty in Africa, <https://achpr.au.int/en/news/updates/2012-04-19/launch-document-study-death-penalty-africa> (accessed 17 March 2026).

21 UNHRC (n 13); https://www.parliament.uk/about/living-heritage/transformingsociety/private_lives/relationships/overview/sexuality20thcentury/ (accessed 14 November 2025).

leaving room for wide interpretation.²² This contradicts the principle of legality, one of the hallmarks of criminal law. Based on this principle, an offence must clearly be defined in the law. Thus, criminal law must not be extensively interpreted to an accused's detriment, for instance, by analogy.²³ Enshrined in article 50(2) of the Constitution of Kenya, for instance, that provides for, among others, the well-established principle of legal certainty, which requires that criminal laws must be definite, clear and sufficiently precise to allow a person to foresee, to a reasonable degree in the circumstances, the consequences of which a given action may entail.²⁴ Kapiyo observes, for example, that offences such as 'idly sit other than in recreational places' may appear as legitimate provisions to regulate public order. However, the practical result is that 'their enforcement is subjective and the threshold for determining whether an offence has been committed or not, will largely be subjective and, therefore, depend on the specific law enforcer, without an objective criterion.'²⁵ This assessment reflects the general climate in the African region in relation to such offences.

Second, the enforcement of these offences subjects ordinary civilians, many of whom are unaware of their rights, to unparalleled human rights abuses. These include arbitrary arrests and detention; assault and mistreatment during arrest and detention; false arrests; unfair bail terms; irregular sentencing practices; and discrimination. A report by the Independent Policing Oversight Authority (IPOA) in Kenya, for example, revealed that only 40 per cent of respondents were familiar with their rights upon arrest, and that 53 per cent had experienced incidences of malpractices by police such as assault, falsification of evidence, bribery and threats of imprisonment.²⁶

22 V Kapiyo 'Addressing petty offences in Kenya: Which way forward?' Decrim Poverty Status (web blog), 22 May 2017, <https://decrimpoverystatus.org/addressing-petty-offences-in-kenya-which-way-forward/> (accessed 14 November 2025).

23 D Grädinaru 'The principle of legality' 20 November 2018) RAIS Conference Proceedings – The 11th International RAIS Conference on Social Sciences, SSRN: <https://ssrn.com/abstract=3303525>.

24 (2024) KEHC 2890 (KLR) para 44.

25 Kapiyo (n 22).

26 IPOA *Baseline survey on policing standards and gaps in Kenya*, <http://ijm-deutschland.de/wp-content/uploads/2015/08/Baseline-Survey-on-Policing-Standards-and-Gaps-in-Kenya.pdf> (accessed 14 November 2025).

3.1 Identification and analysis of specific legal principles in the Kenyan Penal Code

Petty offences are provided for under section 182 of the Penal Code, which provides for the crime of idle and disorderly persons.²⁷ This section provides:

Every common prostitute behaving in a disorderly or indecent manner in any public place; every person causing, procuring or encouraging any person to beg or gather alms; every person who publicly conducts himself in a manner likely to cause a breach of the peace; every person who without lawful excuse publicly does any indecent act; every person who in any public place solicits for immoral purposes; shall be deemed idle and disorderly persons, and are guilty of a misdemeanour and are liable for the first offence to imprisonment for one month or to a fine not exceeding one hundred shillings, or to both and for every subsequent offence to imprisonment for one year.

In terms of offences against public order, or tranquillity, as the Kenyan Penal Code categorises it, section 77 provides for the offence of subversive activities as such:

Any person who does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a subversive intention, or utters any words with a subversive intention, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

In so far as offences against morality are concerned, and relevant to this discussion, the criminalisation of same-sex sexual activity, section 162 on unnatural offences provides, among others, that '[a]ny person who has carnal knowledge of any person against the order of nature; or permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years', while section 165 provides:

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.

27 Penal Code, Cap 63, Laws of Kenya.

With regard to the death penalty, this is provided for under section 25 of the Penal Code, as the prescribed punishment for the offences of treason under section 40(3), murder under section 204, and robbery with violence under section 296(2).

3.2 Identification and analysis of specific legal principles in the Tanzanian Penal Code

Section 176 of Tanzania's Penal Code criminalises idle and disorderly conduct by identifying forms of behaviour such as begging and prescribing punishment, including imprisonment, for such conduct.

Same-sex sexual activity is similarly prohibited by section 154 of the Penal Code of Tanzania. Section 154 provides, among others, that

[a]ny person who has carnal knowledge of any person against the order of nature ... or permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony, and is liable to imprisonment for fourteen years.

Under section 155 attempts to commit unnatural offences is punishable by a sentence of imprisonment for a term of not less than 20 years, while section 157 criminalises indecent practices between males.

Offences such as sedition and seditious libel are still criminalised by the Tanzanian Penal Code. This is stipulated under section 55 of the Penal Code of Tanzania, which provides for the offence by defining a 'seditious intention' to include an intention to 'bring into hatred or contempt or to excite disaffection against' the government.

Tanzania also still retains the death penalty under its section 26 as punishment for the offence of treason under section 39 and murder under section 197.

4 Jurisprudential responses

4.1 Examination of how courts in Kenya have responded to colonial era legal frameworks

The promulgation of the Constitution of Kenya 2010 had a ripple effect on the criminal justice sector. Specifically, several articles of this Constitution created an enabling environment for the much needed reforms in this sector. As a starting point, article 2(5) provides that general rules of international law shall form part of the laws of Kenya,

while article 2(6) provides that any treaty or convention ratified by Kenya shall form part of the laws of Kenya.²⁸ These provisions bring Kenya directly under the international human rights standards, which strongly affirm the desirability of upholding human rights standards within the criminal justice sector, including, but not limited to, the UN Declaration on Human Rights (UDHR);²⁹ the International Covenant on Civil and Political Rights (ICCPR);³⁰ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);³¹ and the African Charter on Human and Peoples' Rights (African Charter).³²

Other constitutional provisions that form part of this enabling environment flow from articles 48 to 50 of the Constitution, whereby article 48 makes provision for access to justice, article 49 provides for the rights of arrested persons, while article 50 enunciates extensively on the conditions necessary for the right to a fair trial.

Furthermore, and outside of these 'criminal justice sector-focused' articles, the Kenyan Constitution also contains express provisions known as 'developmental clauses' that require courts to develop the law if the law does not give effect to a right or fundamental freedom.³³ Article 20(3) of the Constitution of Kenya 2010 provides that 'in applying a provision of the Bill of Rights, a court shall (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.' Thus, judges have a constitutional mandate to ensure that no law remains incongruent with the constitutional scheme.

Kenyan courts have responded to colonial era legal frameworks in various cases in what appears to be some sort of a mixed approach to colonial vestiges as reflected in contemporary rulings. To this end, and for the sake of brevity, this chapter discusses four landmark decisions: *Godfrey Ngotho Mutiso v Republic*, *Katiba Institute & 8 Others v Director of Public Prosecutions & 2 Others*, *EG v Attorney General*, and *Francis*

28 Constitution of Kenya, 2010.

29 Acceded to on 10 December 1948.

30 Acceded to on 23 March 1976.

31 Acceded to on 23 March 1997.

32 Acceded to on 23 January 1992.

33 JM Nyawa 'Colonialism, criminal law, and the dustbin of history: On Kenya's subversion judgment' *Verfassungsblog* (web blog) 25 April 2024, <https://verfassungsblog.de/colonialism-criminal-law-and-the-dustbin-of-history/> (accessed 14 November 2025).

Karioko Muruatetu & Another v Republic. These decisions fittingly demonstrate how Kenyan courts have responded to colonial relics.³⁴

While elaborating on the role of the judiciary in the implementation of this so-called transformative constitution, former Chief Justice Mutunga observed that article 159(2) mandates the judiciary to carry out reforms tailored to Kenya's needs with the aim of doing away with colonial and neo-colonial inefficiencies and injustices through transformative adjudication.³⁵ It is therefore not surprising that the aforementioned decisions came to be.³⁶

In *Godfrey Ngoto Mutiso v Republic*, the Court of Appeal (CoA) of Kenya issued a landmark decision that declared the mandatory death penalty for murder inconsistent with the spirit and letter of the Constitution of Kenya 2010. Specifically, the three-judge bench observed that the mandatory nature of the death sentence in murder cases is 'antithetical to the constitutional provisions on the protection against inhuman or degrading punishment or treatment and fair trial', as it does not provide individuals concerned with an opportunity to mitigate their death sentences.³⁷ The aspect of mitigation that was being highlighted here by the CoA was the failure to appreciate that sometimes there may be unequal participation in a crime, which would lead to different charges and sentences being imposed on the accused persons.

This decision is important because it ultimately formed the basis of the decision of the Supreme Court of Kenya (SCoK) in *Francis Karioko Muruatetu & Another v Republic*, in which the SCoK posited at the outset of its judgment that the appeal raised a fundamental legal issue, and noted that it is a legal issue that has engaged many global jurisdictions in unending controversy.³⁸ The facts of this landmark case were that the petitioners were charged with the offence of murder contrary to section 203 read with section 204 of the Penal Code and were convicted and sentenced to death in line with section 204 of the Penal Code. They appealed both the conviction and sentence on the grounds, among

34 (2013) KESC 31 (KLR).

35 W Mutunga 'The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions' (2015) 1 *Speculum Juris* 6, <https://www.saflii.org/za/journals/SPECJU/2015/6.html> (accessed 14 November 2025).

36 (2021) KESC 31 (KLR).

37 (2010) KECA 487 (KLR) para 36.

38 (2021) KESC 31 (KLR) para 1.

others, that the mandatory death sentence imposed upon them was unconstitutional.

The petitioners articulated their arguments on two limbs: first, that the mandatory nature of the death penalty under section 204 of the Penal Code fettered the judicial discretion compelling it to hand down pre-determined sentences as imposed by the legislature, thus impeding the doctrine of separation of powers; and, second, that the mandatory nature of the death sentence was a violation of the right to a fair hearing under article 50(2)(q) of the Constitution.³⁹

Thus, the petitioners were inviting the Court to determine whether or not the mandatory death penalty is unconstitutional. The Court agreed with the petitioners' claim and declared the mandatory nature of the death sentence as provided for under section 204 of the Penal Code unconstitutional.⁴⁰

In addition to making references to several provisions of the Constitution,⁴¹ the SCoK also made reference to ICCPR to which Kenya is a signatory. Its article 6(1), which establishes that capital punishment is an exception to the right to life as long as it is not arbitrarily imposed, and article 14 on equality of persons before courts and tribunals were pertinent.

Agreeing with the CoA in *Mutiso*, the SCoK observed:

To our minds, what section 204 of the Penal Code is essentially saying to a convict is that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the Court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decisions. Try as we might, we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.⁴²

The SCoK further observed that 'the dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without

39 (2021) KESC 31 (KLR) para 6.

40 (2021) KESC 31 (KLR) para 112; for the avoidance of doubt and as clarified by the SCoK, their order did not disturb the validity of the death sentence as contemplated under art 26(3) of the CoK.

41 The SCoK referenced art 19(3)(a), arts 20(1) & (2), art 25, art 28, art 48, art 50 of the Constitution of Kenya 2010.

42 (2021) KESC 31 (KLR) para 45.

the individual having any chance to mitigate.⁴³ The reference to the importance of acknowledging differential culpability in the commission of murder and the fact that the same can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence is a nod to the school of thought that considers that the death penalty, as a colonial vestige in the Kenyan criminal justice system, tends to be discriminatory in nature. This view is best supported with the fact that the death penalty has traditionally been imposed upon the poorest, most powerless, most marginalised people in society.⁴⁴

Given the fact that the mandatory death penalty is a colonial legacy, that is, under the common law of England, death was the only sentence that could be pronounced by a judge once a conviction of murder was issued and this is regardless of the nature of the offence or the particular circumstances of the offender,⁴⁵ these decisions signal a clear departure by Kenya's highest Court from these vestiges.

In the case of *Katiba Institute & Others v The Director of Public Prosecutions & Others*,⁴⁶ the Kenyan Court was asked to determine the constitutionality of section 77(1)(a) of the Penal Code that provides for the offence of subversive activities. The brief facts of the case were that Joshua Ayika, the interested party, posted on X (formerly Twitter) the following message:

I am not a prophet, neither am I a soothsayer but get it from me, in between Wednesday – Friday next week, we might have the army taking over from this 'Biblical Regime.' Prepare for an army to take over government for the next 90 days then we shall have elections.

He was arraigned and charged at the Chief Magistrate's Court at Makadara, Criminal Case E4457 of 2023. He was also charged on the second count with 'publication of false information' contrary to section 23 of the Computer Misuse and Cyber Crimes Act, 2018. The

43 (2021) KESC 31 (KLR) para 51.

44 SB Bright 'Imposition of the death penalty upon the poor, racial minorities, the intellectually disabled and the mentally ill' in OHCHR 'Moving away from the death penalty: Arguments, trends and perspectives', <https://www.ohchr.org/sites/default/files/Lists/MeetingsNY/Attachments/52/Moving-Away-from-the-Death-Penalty.pdf> (accessed 14 November 2025).

45 J Harrington 'The challenge to the mandatory death penalty in the Commonwealth Caribbean' (2004) 98 *American Journal of International Law* 126, <https://www.legal-tools.org/doc/f4e59f/pdf/> (accessed 14 November 2025).

46 (2024) KEHC 2890 (KLR).

government's case was that 'the words were prejudicial to the public order and security of Kenya and which information was calculated to cause panic and chaos among citizens of the Republic of Kenya.'⁴⁷

The petitioners thus questioned the constitutional validity of section 77 of the Penal Code, Cap 63 arguing that it limited freedom of expression, noting aptly that it has no 'place, in a modern democratic state like Kenya.'⁴⁸ While striking down this provision, the learned judge noted:

It is not far from our lips and eyes that independent Kenya inherited from the colonial state a repressive system ... It therefore goes without say that, Section 77(1) and (3) of the Penal Code is a colonial legacy which limits freedom of expression through the vaguely worded offence of subversion.⁴⁹

Speaking within the context of transformative constitutionalism, Nyawa emphasises that it is important to understand this decision within the ambit of what he terms 'memorial constitutionalism',⁵⁰ which, he argues, 'requires that judges not only consider the literal text of the law but also take into account the broader context, including the nation's history.'⁵¹ To reiterate this position, the Supreme Court of Kenya made the pronouncement on holistic interpretation in the *Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No 1 of 2012* as such:

But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is a contextual analysis of a constitutional provision, reading it alongside and against other provisions so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.⁵²

On the other hand, in *EG v Attorney General*, the central issue was whether sections 162(a) and (c) and 165 of the Penal Code were unconstitutional on grounds of 'vagueness and uncertainty', and whether they violated the constitutionally protected rights to equality;

⁴⁷ (2023) KESC 47 (KLR).

⁴⁸ (2023) KESC 47 (KLR) para 5.

⁴⁹ (2023) KESC 47 (KLR) para 105.

⁵⁰ Nyawa (n 33).

⁵¹ As above.

⁵² (2014) KESC 33 (KLR) para 26.

human dignity; freedom and security of the person; privacy; freedom of conscience, religion, belief and opinion; health; and the right to a fair hearing.⁵³ In a unanimous decision, the Kenyan High Court held that the provisions in the Penal Code that criminalise same-sex sexual conduct were constitutional and did not infringe the rights to equality, dignity, privacy, health, expression, freedom and security of the person, and the right to a fair hearing.⁵⁴

The holding was on the basis that there was insufficient evidence brought in the case to demonstrate an infringement of the rights.⁵⁵ Furthermore, the High Court held that decriminalising same-sex sexual conduct would lead to cohabitation of same-sex couples, which would infringe the constitutional provisions that protect the family as the ‘natural and fundamental unit of society’ and the important role of ‘culture as the foundation of the nation and as the cumulative civilisation of the Kenyan people and nation.’⁵⁶ The High Court hinged its interpretation on article 45(2) of the Constitution and stated that the country’s criminalisation of homosexual conduct did not violate the petitioners’ rights to human dignity and privacy, and it expressly declined to address whether the limitation was reasonable and justifiable under article 24 of the Constitution.⁵⁷

While disagreeing with this decision, Kanna observes that the Kenyan High Court would have been better served by using a non-sequential proportionality test such as South Africa’s to consider the validity of a colonial era law, that is, by focusing on the law’s colonial legacy as illuminative of its purpose.⁵⁸ Under this test, she notes that

a court could also consider whether the colonial legacy of the challenged law was inherently antithetical to the nature of the constitutional right in question, such as the rights to freedom of expression and association or the rights to privacy and equal treatment under the law.⁵⁹

53 (2019) KEHC 11288 (KLR) para 242.

54 (2019) KEHC 11288 (KLR) (n 53) para 406.

55 (2019) KEHC 11288 (KLR) (n 53) paras 308, 299, 311.

56 (2019) KEHC 11288 (KLR) (n 53) para 397.

57 (2019) KEHC 11288 (KLR) (n 53) para 32m.

58 Kanna (n 8) 420.

59 As above.

Interestingly, the Kenyan High Court seemed to have categorically referenced the 'spirit and tenor' of the Constitution as being the basis of their decision. The Court stated that the Kenyan Constitution was

a mirror reflecting the national soul, the identification of the ideals and aspirations of the nation ... the spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.⁶⁰

It would then appear from the assessment above that the assertion that Kenya has adopted varying approaches in dealing with its colonial heritage in its criminal justice system is justified.

4.2 Examination of how courts in Tanzania have responded to colonial era legal frameworks

While a comparative analysis between Kenya and Tanzania on similar themes is preferable, such an exercise is not possible for various reasons. Tanzania's courts have not had such extensive engagement with vestiges of colonial law, and this *status quo* flows largely from the fact that most reforms to the criminal justice system are still developing. Specifically, Tanzania is currently embarking on its criminal justice sector reform process, which remains at a nascent stage. The Chande Commission, tasked with this exercise, was only inaugurated in 2023.⁶¹ It therefore remains to be seen what substantive impact these reforms will have on colonial era laws.

In Tanzania, the death penalty is carried out by hanging and this dates back to colonial legislation which applied section 302 of the Indian Penal Code to the territory.⁶² This was consequently replaced in 1921 by section 2 of the Punishment for Murder Ordinance 28 of the Tanganyika territory.⁶³ Today, the death penalty is imposed by sections 197 of the Penal Code, which prescribes the punishment for murder, and sections 39 and 40 which deals with the crime of treason. The Penal Code thus mirrors the same provisions relating to capital punishment in many

60 (2019) KEHC 11288 (KLR) (n 53) para 379.

61 'Tanzania's criminal justice system: Analysis of President Samia's Commission key findings and recommendations' *Tanzania Digest*, <https://www.digest.tz/tanzanias-criminal-justice-system/> (accessed 14 November 2025).

62 https://www.ahrlj.up.ac.za/images/ahrlj/2009/ahrlj_vol9_no2_2009_gaitan_kuschnik.pdf (accessed 14 November 2025).

63 As above.

former British colonies, including Kenya. The Tanzanian Constitution incorporated a Bill of Rights that contains a right to life clause under article 14, which provides that ‘every person has the right to live and to the protection of his life by the society in accordance with the law’, thus indicating the presence of a constitutional impetus to abolish these colonial era laws.

Similarly, Tanzania has ratified a raft of international instruments including, but not limited to, the African Charter.⁶⁴ The Charter and its attendant Protocols underscore the need for protecting the right to life and, thus, the promotion of the abolishment of capital punishment in Africa agenda. It is therefore clear that there is a conducive legislative framework in place to enable the abolishment of capital punishment in Tanzania.

To this end, *Republic v Mbushuu*, considered a landmark decision by Tanzania’s Court of Appeal, is worth examining.⁶⁵ The Court considered in *Mbushuu* whether a prohibition under national law existed on the grounds that the death penalty may amount to torture under international law on the basis of the treaties that Tanzania has ratified and which have been incorporated into the domestic legal system.⁶⁶ Thus, the question was whether the death penalty may violate article 13 of the Constitution of Tanzania, resulting in section 197 of the Tanzanian Penal Code being unconstitutional.⁶⁷ Based on article 1(1) of the Convention Against Torture, the CoA held that the death penalty contained elements of torture.⁶⁸ This Court, however, proceeded to hold that the death penalty was not unconstitutional based on the fact that it can be legalised under the exception clause, as it held that:

the crucial question is whether or not the death penalty is reasonably necessary to protect the right to life. For this we say it is society which decides. The learned Trial Judge ... acknowledges that presently society deems the death penalty as reasonably necessary. So, we find that though the death penalty as provided by s 197 of the Penal Code offends art 13(6)(a) and (e), it is not arbitrary, hence

⁶⁴ Ratified in 1984.

⁶⁵ (1994) LRC 349.

⁶⁶ A Gaitan & B Kuschnik ‘Tanzania’s death penalty debate: An epilogue on *Republic v Mbushuu*’ (2009) 9 *African Human Rights Law Journal* 459.

⁶⁷ (1994) LRC 349.

⁶⁸ As above.

a lawful law, and it is reasonably necessary and it is thus saved by art 30(2). Therefore, it is not unconstitutional.⁶⁹

While critiquing this decision, Gaitan and Kuschnik posit a very pertinent question that aptly summarises the analysis of this decision. They observed that:

it is unclear why the Court of Appeal on the one hand held that the death penalty would amount to torture or cruel and inhuman treatment, yet on the other hand held that it must be legalised on grounds of the exception clause. One may wonder how the conclusion of the Court of Appeal, whereby the death penalty was cruel and inhuman, yet not unconstitutional, may be compatible with article 9(f) of the Tanzanian Constitution, which calls for a recourse to the Universal Declaration when interpreting the Bill of Rights. Particularly, in article 5 of the Declaration it is held: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'⁷⁰

Given the precedential system in Tanzania, the harmful effects of the decision in *Mbushuu* continues to reverberate in this discourse as can be seen in the case of *Jebra Kambole v United Republic of Tanzania*.⁷¹ As recent as 2019, the High Court of Tanzania upheld the death penalty in *Jebra Kambole v Attorney General of the United Republic of Tanzania*, whereby the petitioner was challenging the constitutionality of section 197 of the Penal Code on the grounds that it violated articles 12(2), 13(1), (2), (6)(a), (d) and (e), 14 and 29(1) and (2) of the Constitution of the United Republic of Tanzania and should therefore be declared unconstitutional.⁷²

Even though the gist of the petitions were not the same *per se* based on the Court's assessment, that is, that the petition therein was 'only about the constitutionality of the mandatory imposition of the death penalty under section 197 of the Penal Code and not *per se* the constitutionality of the death penalty provided under section 197 of the Penal Code', it is yet another missed opportunity by the Tanzanian courts to, in Msomi's words, 'reflect the country's commitment and involvement in the ... human rights framework.'⁷³ Relying on the decision in *Mbushuu*,

69 (1994) LRC 349 para 117.

70 Gaitan & Kuschnik (n 66) 469.

71 Application 18 of 2018.

72 Misc Civil Cause 22 of 2018) [2019] TZHC 6 (18 July 2019).

73 T Msomi 'Tanzania's colonial relic: A thread of capital punishment' *Oxford Human Rights Hub Blog* (web blog) 4 April 2024, <https://ohrh.law.ox.ac.uk/>

the High Court held that having considered the prayer in relation to *Mbushuu*, it is fully bound by *Mbushuu* by virtue of the doctrine of *stare decisis* and, thus, *Kambole's* petition was *res judicata*.⁷⁴

With such a background and given the multiple international instruments that have been ratified by Tanzania, it is not surprising that this country has been on the receiving end of various decisions from the African Court concerning the death penalty.⁷⁵ However, more relevant to this discussion is the African Court's most recent judgment in 2024 in *Crosperry Gabriel & Another v United Republic of Tanzania*, which summarises this issue. Here, the applicants had been convicted of the offence of murder and sentenced to death by hanging by the High Court in Tanzania based on which decision they filed a memorandum to the African Court against Tanzania under the African Charter in 2016, complaining of violations of various fundamental rights, that is, the rights to non-discrimination (article 2), equality (article 3), life (article 4), human dignity (article 5), and to a fair trial (article 7).⁷⁶

Noting that 'capital punishment by hanging is undebatably a human rights offence and compromises the fundamental principles of human dignity, justice, and equality', the African Court ordered Tanzania to 'undertake all necessary measures to repeal from the Penal Code the provision for the mandatory imposition of the death sentence.'⁷⁷ This had been the African Court's decision even in its previous decisions against Tanzania in *Rajabu & Others* in 2015 and in *Lazaro* in 2016.⁷⁸ Seemingly, it is a colonial vestige that the Tanzanian courts, despite the presence of both constitutional, international instruments, and the global abolishment impetus, do not intend to do away with.

Tanzania also criminalises same-sex relations and related offences under sections 154, 155 and 157.⁷⁹ These laws are actively enforced. For instance, as recently as 2023, *Muharami Hassan Nayonga* (case unreported) was convicted under sections 154 and 157 of the Penal

tanzanias-colonial-relic-a-thread-of-capital-punishment/ (accessed 14 November 2025).

74 Misc Civil Cause 22 of 2018) [2019] TZHC 6 (18 July 2019) 17.

75 See, eg, *Ally Rajabu & Others v The United Republic of Tanzania* Application 007/2015, & *John Lazaro v United Republic of Tanzania*, Application 003/2016.

76 Application 050/2016.

77 As above.

78 As above.

79 The Penal Code, Laws of Tanzania, ch 16.

Code that criminalises unnatural offences and indecent practices between males, and was sentenced to serve 30 years' imprisonment by the Kilwa District Court.⁸⁰

Another colonial era law that warrants a discussion in the Tanzanian context is sedition. Using what Smith and others have termed the classical common law definition of seditious intention, section 55 of Tanzania's Penal Code defines seditious intention as 'an intention to bring into hatred or contempt or to excite disaffection against the lawful authority of the United Republic or the Government thereof.'

It is on the basis of this law that a case was brought against Tanzania before the East African Court of Justice (EACJ), *Media Council of Tanzania & 2 Others v The Attorney General of the United Republic of Tanzania*, on the grounds, among others, that sections of the Act in question that criminalised seditious statements restricted freedom of expression and the right to access information.⁸¹ The EACJ found that Tanzania's sedition offence 'fails the test of clarity and certainty required' and that it 'hinged on the possible and potential subjective reactions of audiences to whom the publication is made. This makes it all but impossible, for a journalist or other individual, to predict and thus plan their actions.'⁸² Thus, Tanzania was ordered to take the necessary measures to amend its laws to bring them into compliance. However, Tanzanian authorities continue to charge persons with the offence of sedition, with some journalists having been charged as such as recently as 2021.⁸³

With respect to the other offences categorised as petty offences herein, such as colonial era vagrancy laws that criminalise activities such as loitering, public indecency and begging, are still in place in Tanzania. In fact, the very same language that was introduced to British colonies through the English Vagrancy Act of 1824 is still in use today.⁸⁴

To conclude this part, considering the contextual realities, that is, both political and moral considerations that may be at play in Kenya

80 <https://www.humandignitytrust.org/country-profile/tanzania/> (accessed 14 November 2025).

81 Reference 2 of 2017 para 11.

82 Reference 2 of 2017 para 99.

83 *Mbowe & Others v The Republic* (2021) High Court of Tanzania, Criminal Appeal 76 of 2020 paras 53-59.

84 See sec 176 Penal Code of Tanzania.

and Tanzania, it would be prudent for courts to consider applying the non-sequential test when dealing with cases founded on oppressive laws inherited from the colonial past. The use of the non-sequential test has been enunciated by Kanna, who appreciates its flexible nature and has aptly highlighted its benefits when she observes:

A court employing it could theoretically decide to consider a law's colonial legacy as an independent factor and thus invalidate a law based on the implications of its colonial legacy alone. Because the non-sequential test is not exhaustive, it allows courts to cater their analysis to the particular facts of each case ... a court would decide the nature of the right implicated is so important that any limitation not formulated and implemented by an elected, independent, native government is invalid. Regardless of the factor used to consider colonial legacy, the element of control – the moral and physical control inherent in many colonial-era criminal laws – would be the relevant takeaway.⁸⁵

5 Lessons from regional bodies and other countries from the African region

5.1 Responses from regional bodies

Before attempting to provide any recommendation(s), it is important to provide a justification for the need for any reforms. To this end, looking at the prevailing circumstances in the larger African region seems apt. Accordingly, this part considers what the approaches to colonial legacies in criminal law have been both in terms of policy considerations as well as jurisprudentially.

A good starting point would therefore be to consider the work of the African Union (AU), given its central role in influencing policy and legislative transformation in the African region. At the intergovernmental level, the regional response to this issue flows directly from the AU and its organs. To this end, the African Commission notes that despite the extensive focus that has been directed towards transforming criminal justice systems and outcomes in Africa, 'poor and other categories of marginalised persons remain vulnerable to violations of their fundamental human rights upon entering the criminal justice system, an

85 Kanna (n 8).

effect which is compounded and multiplied across different factions of the criminal justice chain.’⁸⁶

Thus, in 2017, the African Commission adopted the Principles on the Decriminalisation of Petty Offences in Africa in an effort to articulate standards for acceptable human rights practices, specifically concerning matters of access to justice in the African region.⁸⁷ This effort aligns the region with international best practices, a crucial step towards creating an enabling legal environment.⁸⁸ It is also important to commend these efforts to articulate standards, given the requirement of clarity in criminal law in line with the principal of legality. Specifically, the African Commission defines petty offences, thus providing clarity in terms of definitions. This is important in that, even though individual countries may choose to frame these offences differently, the African Commission’s definition is sufficiently broad to cater for any criminalisation of conduct that is akin to minor offences and inevitably results in the violations of acceptable human rights practices.

Given the vital effect that could be had on potential reforms, it is worth providing this definition herein. The African Commission has defined petty offences as follows:

Minor offences for which the punishment is prescribed by law to carry a warning, community service, a low-value fine or short term of imprisonment, often for failure to pay the fine. Examples include, but are not limited to, offences such as being a rogue and vagabond, being an idle or disorderly person, loitering, begging, being a vagrant, failure to pay debts, being a common nuisance and disobedience to parents; offences created through by-laws aimed at controlling public nuisances on public roads and in public places such as urinating in public and washing clothes in public; and laws criminalising informal commercial activities, such as hawking and vending. Petty offences are entrenched in national legislation and, in most countries, fall within the broader category of minor offences, misdemeanours, summary offences or regulatory offences.⁸⁹

Furthermore, in 2020 the African Court delivered a landmark advisory opinion in a petition filed by the Pan-African Lawyers Union (PALU), which sought to declare that vagrancy laws criminalise the status of an

86 African Commission Principles on the Decriminalisation of Petty Offences in Africa, 25 October 2018.

87 As above.

88 See, generally, UNHRC (n 13).

89 African Commission (n 86).

individual rather than a specific criminal act, while giving police agencies sweeping powers of detention.⁹⁰ The African Court found that vagrancy laws were incompatible with the enforcement of various human rights instruments, and recommended that countries repeal their vagrancy laws and, thus, decriminalise these offences.⁹¹

Another regional intergovernmental organisation, the Economic Community of West African States (ECOWAS) Court of Justice, also issued a similar decision in a case filed by Amnesty International, the Consortium for Street Children and the Southern Africa Litigation Centre. The applicants submitted arguments on how colonial era vagrancy laws that criminalise poverty violate the fundamental principles of legality and dignity while enabling intersectional discrimination as they perpetuate inequality across Africa.⁹² The basis of the applicants case was that Sierra Leone's loitering laws, which criminalise anyone found 'loitering' in public spaces and 'not giving a good account of himself', are vaguely-worded statutes and that they give the police *carte blanche* to arbitrarily detain the poor and other marginalised groups, based on what the applicants termed 'little more than subjective assessments of "suspiciousness"'.⁹³ The ECOWAS Court of Justice struck down these laws on the basis that they 'violate the fundamental principles of legality and dignity while enabling intersectional discrimination'.⁹⁴ Specifically, the ECOWAS Court of Justice found that Sierra Leone's loitering laws violated the African Charter's rights to equality, non-discrimination and freedom of movement, together with recognising that these laws' 'vague and imprecise language enables arbitrary application falling far short of international human rights standards'.⁹⁵

90 Advisory Opinion 001/2018.

91 <https://www.ibanet.org/african-vagrancy-laws> (accessed 14 November 2025).

92 <https://courtecawas.org/wp-content/uploads/2024/11/ADVOCAID-LTD-v-REP-OF-SIERRA-LEONE-ECW-CCJ-APP-18-22-JUDGMENT-ENG.pdf> (accessed 17 March 2026).

93 I Byrne 'ECOWAS Court strikes down colonial vagrancy laws: A victory against poverty criminalisation' University of Essex Human Rights Centre Blog (web blog), 28 November 2024, <https://hrcessex.wordpress.com/2024/11/28/ecowas-court-strikes-down-colonial-vagrancy-laws-a-victory-against-poverty-criminalisation/> (accessed 14 November 2025).

94 <https://decrimpovertystatus.org/wp-content/uploads/2024/10/Practitioners-Guide-on-Human-Rights-Based-Approach-to-Criminal-Law-Oct-2024-compressed.pdf> (accessed 14 November 2025).

95 Byrne (n 93).

Another colonial vestige that has received much attention at the regional level is the issue of the death penalty. Sub-Saharan Africa is reported to have made the most progress towards the abolition of the death penalty over the last two decades, given that countries in this region have been abolishing the death penalty at a greater rate than any other region over the last ten years.⁹⁶ In terms of a statistical representation of this progress, 21 countries in sub-Saharan Africa have abolished the death penalty,⁹⁷ while another 21 are categorised as *de facto* abolitionist, given that no executions have been carried out in over ten years. It is under this category that both Kenya and Tanzania fall,⁹⁸ and only four countries, that is, Botswana, Equatorial Guinea, Nigeria and South Sudan, retain the death penalty in law and practice.⁹⁹

In terms of the criminalisation of same-sex sexual activity, more than 30 countries in Africa criminalise same-sex sexual activity, with countries such as Uganda and Nigeria actually having legislations that target these offences, namely, the Anti-Homosexuality Act in 2014 and the Same-Sex Marriage Prohibition Act of 2014, respectively.¹⁰⁰ However, some African countries, such as Angola, Botswana, Gabon, Mozambique and South Africa, have decriminalised these activities in recent years.¹⁰¹ Noting that the basis of this criminalisation is British colonialism, Mofokeng observes that reparatory justice necessitates comprehensive legal reform to safeguard individuals from all forms of discrimination

96 S Babcock 'Sub-Saharan Africa: The new vanguard of death penalty abolition' Cornell Centre on the Death Penalty Worldwide, <https://dpw.lawschool.cornell.edu/wp-content/uploads/2021/11/Sub-Saharan-Africa-The-New-Vanguard-of-Death-Penalty-Abolition-1.pdf>; A Novak 'An overview of the death penalty in sub-Saharan Africa' in A Novak (ed) *The African challenge to global death penalty abolition: International human rights norms in local perspective* (2016) 3.

97 These countries are Angola, Benin, Burundi, Burkina Faso, Cap Verde, Côte d'Ivoire, Gabon, Guinea, Guinea-Bissau, Madagascar, Mauritius, Mozambique, Namibia, Republic of the Congo, Rwanda, São Tomé and Príncipe, Senegal, Seychelles, Togo, South Africa.

98 These countries are Cameroon, Central African Republic, Comoros, Democratic Republic of the Congo, Eritrea, Ethiopia, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mauritania, Mali, Eswatini (formerly Swaziland), Niger, Sierra Leone, Tanzania, Uganda, Zambia and Zimbabwe.

99 Babcock (n 96).

100 OHCHR 'Ongoing impact of colonial laws on LGBT human rights: A global perspective with a focus on the African context', <https://www.ohchr.org/sites/default/files/documents/cfi-subm/2308/subm-colonialism-sexual-orientation-oth-mofokeng.pdf> (accessed 17 March 2026).

101 A Mambondiyani 'The colonial legacy of anti-LGBTQ+ laws in Africa', <https://news.trust.org/item/20231110155614-gmz8p> (accessed 17 March 2025).

and violence, including on the grounds of gender, gender identity and sexual orientation.¹⁰² In Mofokeng's assessment, this reparatory justice should thus entail a repealing of laws that perpetuate this discrimination and violence. It is important to highlight that a wave of conservatism has been reported across the region, with both Kenya and Tanzania also considering further penalisation of same-sex sexual activities.¹⁰³

5.2 Responses from other countries in the African region

In tandem, there is evidence of significant efforts at the national level to address this issue. But how has this abolitionist trend looked jurisprudentially in these countries? The analysis discloses a different pattern of response. On the issue of petty offences, for instance, the Ugandan Constitutional Court in *Francis Tumwesige Ateenyi v Attorney General* examined section 168 of their Penal Code which dealt with offences related to being 'rogues and vagabonds', punishable with imprisonment of up to six months, or up to one year for subsequent offences, and had been established in Ugandan law under British colonial rule.¹⁰⁴ The Court held sections 168(1)(c) and (d) to be unconstitutional and should therefore be repealed, on the basis that 'elements for the impugned provisions are ambiguous, vague and too broad to amount to a precise definition of an offence which is what is required under article 28(12) of the Constitution or what is otherwise referred to as the principle of legality.'¹⁰⁵

In the Malawian case of *Mayeso Gwanda v The State*, the Malawian High Court struck down the definition of vagrancy on, among other grounds, that it violated the constitutional right to equality, because authorities are more likely to apply and enforce it against the poor than against the rich.¹⁰⁶

On the issue of the death penalty, in *Kigula & Others v Attorney General*, the Constitutional Court of Uganda issued a ground-breaking decision that limited the application of the death penalty in the country

102 OHCHR (n 100).

103 Mambondiyani (n 101).

104 *Tumwesige Francis v Attorney General* Constitutional Petition 36 of 2018) [2022] UGCC 5 (2 December 2022).

105 *Tumwesige Francis* (n 104) para 40.

106 (High Court) Constitutional Cause 5 of 2015.

despite its *de facto* status whereby it held that the mandatory nature of the death penalty was unconstitutional on the grounds that it violated fundamental human rights.¹⁰⁷ It is important to note that this decision was affirmed by the Supreme Court of Uganda in 2009.¹⁰⁸ The decision by the Zimbabwe Constitutional Court of 2016 in *Obediah Makoni v Commissioner of Prisoners & Others*, which held that life imprisonment without the possibility of parole violated the rights to be free from torture and inhumane treatment under Zimbabwe's Constitution, is also of note.¹⁰⁹ This decision is important to this discourse since, typically, the death penalty is served as a life imprisonment sentence in *de facto* abolitionist states.¹¹⁰

Closely connected to this was the High Court of Malawi's holding in the case of *Republic v Chiliko Senti*, where the Court observed that even if they are *de facto* death sentences, the harsh prison conditions in which prisoners have to languish as part of the life sentences, which are sometimes life-threatening, should be taken into account.¹¹¹ In this case, the High Court ordered the release of a former death row prisoner on the justification that the harsh prison conditions to which they were subjected amounted to, what the Court termed as 'a punishment on their own.'¹¹²

6 Conclusion

In conclusion, it is clear that the imprint of colonial rule remains visible in both Kenyan and Tanzanian criminal law, with statutes and offences transplanted during the colonial period still shaping present-day frameworks. These colonial remnants continue to influence not only the substance of criminal law, but also its enforcement, disproportionately affecting marginalised groups and raising concerns about fairness and equality.

107 Constitutional Appeal 3 of 2006 [2009] UGSC 6 (21 January 2009) (Uganda).

108 *Attorney-General v Susan Kigula & 417 Others* Constitutional Appeal 3 of 2006 (Judgment of 21 January 2009, unreported) Supreme Court of Uganda, <http://www.saflii.org> (accessed 27 September 2025).

109 CCZ 8/16 (Const Application CCZ 48/15) [2016] ZWCC 8 (13 July 2016).

110 Babcock (n 96).

111 Sentence Rehearing Cause 25 of 2015 (unreported) (Malawi) (2015).

112 Babcock (n 96).

As seen from the analysis of the judicial interpretations, it is clear that judicial responses have been uneven, with Kenya showing greater willingness to reinterpret or limit colonial era provisions, while Tanzania remains more tightly bound by historical precedent. Regional and international human rights instruments and courts provide clear normative pressure for reform, pointing towards the gradual but necessary process of decolonisation.

Based on the foregoing, this research makes a single recommendation: The operative criminal laws should be reformed in light of the progressive clauses contained in both countries' post-colonial constitutions. These constitutional provisions, particularly within the Bill of Rights, provide a strong legal foundation for pursuing such reforms.

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