



GUIDELINES ON LAW AND PRACTICE FOR THE MANAGEMENT OF PETTY OFFENDERS

THE NATIONAL COUNCIL ON
THE ADMINISTRATION OF JUSTICE (NCAJ)



GUIDELINES ON LAW AND PRACTICE FOR THE MANAGEMENT OF PETTY OFFENDERS

© National Council on the Administration of Justice (NCAJ)
5th Floor Mayfair Center, Ralph Bunche Road
P.O. Box 30041-00100, Nairobi.
Email: ncaj@court.go.ke

This publication may be reproduced in whole or in part and in any form for educational or non-profit purposes without special permission from the copyright holder, provided acknowledgement of the source is made.

FOREWORD



The National Council on the Administration of Justice Audit Report on the Criminal Justice System in Kenya revealed that petty offenders constitute seventy percent of cases processed through the justice system. In addition, the findings revealed that one out of every five Kenyan adults is likely to be arrested and held in a police cell every two years. It is the poor and most vulnerable groups of people who are the most adversely affected. Many petty offenders cannot afford legal representation or bail and will likely be held in remand for the duration of the trial. Indeed, data confirms that most people in prisons are pretrial detainees and convicts for petty and non-violent offences.

The purpose of these Law and Practice Guidelines for the Management of Petty Offenders is to provide a framework and standard against which petty offences should be managed. This is mainly on the measures necessary to ensure that such laws do not violate a person's right to liberty and security; freedom from arbitrary arrest and detention; equality and non-discrimination; dignity and freedom from torture, cruel, inhuman or degrading punishment. As such, they are intended for use by law enforcement agency officers, prosecutors, and courts for training and sensitization concerning the management of petty offenders.

I laud the National Committee of Criminal Justice Reforms under the able leadership of Hon. Lady Justice Grace Ngenye, for dedication and diligence in spearheading the development of these guidelines. These Guidelines represent a significant advancement toward ensuring that the justice system manages these cases expeditiously and safeguards the rights of petty offenders, particularly poor and vulnerable persons.

The guidelines will significantly benefit all those who handle petty offenders, particularly law enforcement agencies, prosecutors, and members of the Judiciary. I urge the actors in the criminal justice sector institutions to implement these Guidelines and their staff on effective management of petty offenders.

Hon. Justice Martha K. Koome, EGH
Chief Justice and President of the Supreme Court of Kenya &
Chairperson, National Council on the Administration of Justice (NCAJ)

ACKNOWLEDGEMENTS



These Guidelines are the collective and resourceful outcome of the efforts of many stakeholders in the criminal justice system who generously shared their wealth of experiences, expertise, and resources.

I wish to recognize and acknowledge the valuable participation and contributions of the entire NCCJR membership as experts and representatives from crucial State and non-State criminal justice sector institutions in Kenya. Special appreciation goes to the research team, which comprised of Ms. Susan Ouko (Head of Criminal Justice Reforms Department at NCAJ), Ms. Julie Wayua

Matheka (NCCJR Member and representative from ICJ-Kenya), Ms. Joanne Mutonga, Mr. Vincent Kimathi and Ms. Peris Wanjohi for conducting comprehensive research on petty offences, compiling and developing the Guidelines.

The development of the Guidelines also benefited greatly from the review, editing, guidance, and support of the NCAJ secretariat led by Dr. Moses Marang'a, the Executive Director, and comprising Ms. Irene Omari, Ms. Sylvia Yiantet, Ms. Roselyne Kabata.

We appreciate the technical and financial support received from the Kenyan Section of the International Commission of Jurists (ICJ-Kenya) vide a grant from the Open Society Initiative for Eastern Africa (OSIEA); and the International Development Law Organization (IDLO). Special appreciation goes to Mr. Protas Saende (Chairperson, ICJ-Kenya), Ms. Elsy Sainna (Executive Director, ICJ-Kenya), and Ms. Teresa Mugadza (Country Director, IDLO-Kenya).

Hon. Lady Justice Grace Ngenye
Judge, Court of Appeal
Chairperson, National Committee on Criminal Justice Reforms (NCCJR)

TABLE OF CONTENTS

FOREWORD	iv
ACKNOWLEDGEMENTS	v
TABLE OF CONTENTS	vi
OPERATIONAL DEFINITION OF TERMS	viii
ACRONYMS	x
EXECUTIVE SUMMARY	xi
CHAPTER 1: INTRODUCTION	1
1.1. Background	2
1.2. Legislative Framework	4
1.3. The Scope and Purpose of the Guidelines	7
1.4. Principles Underpinning Petty Offences	7
1.4.1. The Principle of Legality	8
1.4.2. The Principle of Proportionality	8
1.4.3. The Principle of Equality and Non-Discrimination	9
CHAPTER 2: ARRESTS	10
2.1. Situation Analysis on Arrests	11
2.2. Law and Practice Guidelines	13
2.2.1. Grounds of Arrest	13
2.2.2. Rights of an Arrested Person	14
2.2.3. Searches	16
2.2.4. Use of force	17
CHAPTER 3: PRETRIAL DETENTION	18
3.1. Situation Analysis on Pre-trial Detention	19
3.2. Law and Practice Guidelines	20
3.2.1. Alternatives to Detention	20
3.2.2. Bail and Bond for Petty Offenders	22
CHAPTER 4: TRIAL	24
4.1. Situation Analysis on the Trial Process	25
4.2. Law and Practice Guidelines	26
4.2.1. Decision to Charge	26
4.2.2. Summary of a Petty Offender's Rights during Trial	27
4.2.3. Right to a Fair and Public Hearing	28
4.2.4. Right to Presumption of Innocence	29
4.2.5. Right to be informed of the Charge with Sufficient Detail to answer it ...	30
4.2.6. Right of an Accused Person to Defend Themselves	31
4.2.7. Right to Legal Representation	31
CHAPTER 5: SENTENCING	32
5.1. Situation Analysis on Sentencing	33
5.2. Law and Practice Guidelines	35

CHAPTER 6: MANAGEMENT OF VULNERABLE PERSONS AS PETTY OFFENDERS	37
6.1. Situation Analysis on Vulnerable Persons.....	38
6.2. Law and Practice Guidelines	39
6.2.1. Children in Conflict with the Law/Children as Petty Offenders.....	39
6.2.2. Persons Living with Disabilities	41
6.2.3. Sex Workers.....	41
6.2.4. Hawkers/Street Vendors	42
6.2.5. Persons suffering from a substance disorder	42
6.2.6. Intersex Persons.....	43
CHAPTER 7: THE MANAGEMENT OF PETTY OFFENDERS IN UNIQUE CIRCUMSTANCES.....	44
7.1. Situation Analysis on the Management Of Petty Offenders During in Unique Circumstances.....	45
7.2. Law and Practice Guidelines.....	46
7.2.1. Accountability Mechanisms in Unique Circumstances	46
7.2.2. Arresting Petty Offenders.....	46
7.2.3. Pretrial Detention.....	47
7.2.4. Trial	47
7.2.5. Decongestion of Prisons and Places of Detention.....	47
REFERENCES	49

OPERATIONAL DEFINITION OF TERMS

Arrest: The act of apprehending a person for the alleged commission of a criminal offence. The action of a competent authority to arrest and detain a person as otherwise authorised by law.

Bail: An agreement between an accused person or his/her sureties and the court that the accused person will attend court when required, and that should the accused person abscond, in addition to the court issuing warrants of arrest, a sum of money or property directed by the court to be deposited, will be forfeited to the court.

Bond: An undertaking, with or without sureties or security, entered into by an accused person in custody under which he or she binds him or herself to comply with the conditions of the undertaking and if in default of such compliance to pay the amount of bail or other sum fixed in the bond.

Decriminalisation: The process of removing an act that was criminal, and its associated penalties, from the penal law.

Ill-treatment: Acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture, as defined in Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Key populations: People who inject drugs, men who have sex with men, transgender persons, sex workers, and prisoners.

Law enforcement agencies: All institutions or authorities mandated to respond to, detect, and prevent crime. They include inter alia the National Police Service, the Kenya Wildlife Service, the Kenya Forest Service, National Youth Service, and County Enforcement Agencies.

Performance of life-sustaining activities: The means to move, sleep, eat and exchange food, trade, tout, hawk, and engage in hygiene-related activities in public places.

Pretrial detention: The period of detention ordered by a judicial authority pending trial.

Petty offence: Any offence punishable by a fine only or by imprisonment for not more than 6 months.

Reasonable accommodation: The modification or adjustment to the procedure, process or physical conditions of detention to consider the needs of persons with physical, mental, intellectual or sensory disabilities, and to ensure that such persons can access, on an equal basis with other persons, the physical environment, information and communications, and other services and facilities provided by the detaining authority. Equal access should be provided regardless of the type of impairment, legal status, social condition, gender and age of the detainee.

Torture: Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Vulnerable persons: Women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities. These Guidelines have focussed on petty offenders who are disadvantaged in the criminal justice system because of their status including, but is not limited to, the economically or socially marginalised, persons living in poverty, children in contact or in conflict with the law, persons living with disabilities, sex workers and intersex persons.

ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
CPC	Criminal Procedure Code
NCAJ	National Council on the Administration of Justice
NCCJR	National Committee on Criminal Justice Reforms

EXECUTIVE SUMMARY

Petty offences are minor offences for which the punishment is prescribed by law as a warning, community service, a low value fine, or short-term imprisonment, often for failing to pay the fine. The closest definition of petty offences under Kenyan legislation is provided for by implication under Article 49 (2) of the Constitution of Kenya, which provides that “a person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.” Petty offences are contained in several statutes in Kenya, including the Penal Code, County by-laws, the Public Health Act, the Forest Conservation and Management Act, and the Wildlife Conservation and Management Act.

The challenges which necessitated the development of these guidelines were identified in the Audit Report on the Criminal Justice System in Kenya (2017), whose findings revealed that petty offences comprised 70 percent of the cases that are processed through the criminal justice system. The heavy enforcement of petty offences is counter-productive owing to the high expense incurred by the State in their prosecution, overreliance on custodial measures, and overcrowding in detention facilities. In addition, owing to the vague manner in which they are defined in law, petty offences have resulted in the criminalization of life-sustaining economic activities that are essentially not criminal but the result of a myriad of socio-economic issues within the society. The probability that a poor, vulnerable or marginalized petty offender shall lose their liberty at any point in the criminal justice process is extremely high owing to inadequate access to legal aid services or the inability to pay bail or the fine imposed by the court. The criminalization of petty offences also results in human rights violations owing to the vague manner in which they are defined in law and enforced. Further, because such cases are often heard *en masse*, most accused persons plead guilty even where the charges are unfair or unfounded.

The Guidelines comprise a raft of laws and best practices on managing petty offenders from the point of arrest through to trial and sentencing. Special consideration is given to vulnerable groups such as street children, persons with disabilities, street vendors/traders, sex workers, and persons who abuse drugs. Best practice requires the law governing petty offences to state their objectives and purpose clearly. Further, the law must be precise, accessible, and consistent with international standards. The ingredients of petty offences should be clearly defined to ensure that the enforcement boundaries are ascertainable. Legislative scrutiny of petty offences has determined that such offences fall short of their intended objectives of maintaining law and order; and promoting public health and safety. Therefore, decriminalization or reclassification of petty offences is recommended.

The following measures have been recommended. First, the over-prosecution of petty offenders should be mitigated, and where appropriate, effective alternatives such as cautions, citations, and warnings should be utilized. Group plea-taking for petty offenders; and group trials should not be conducted as they infringe on the right to a fair trial. Due to the nature of petty offences, offenders should not be subjected to pretrial detention; or be handed custodial sentences unless aggravating circumstances make the sentence unsuitable. Imprisonment of petty offenders is not recommended because the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody.

CHAPTER

1

INTRODUCTION

1.1. Background

Regionally, the Principles on the Decriminalization of Petty Offences¹ by the African Commission on Human and People's Rights (ACHPR) define petty offences as “*minor offences for which the punishment is prescribed by law as a warning, community service, a low value fine or short-term imprisonment often for the failure to pay the fine.*” The Principles expand the definition to include examples of petty 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 not expressly defined under Kenyan legislation. The Penal Code under Section 4 defines a misdemeanour as “*any offence which is not a felony.*” In contrast, a felony is “*an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more.*” The closest definition is provided for under Article 49 (2) of the Constitution of Kenya which categorizes petty offences by implication and provides that “*a person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.*”

Petty offences are contained in several statutes in Kenya including the Penal Code,² County by-laws,³ the Public Health Act,⁴ the Forest Conservation and Management Act⁵ and the

1 Principles on the Decriminalisation of Petty Offences, 2018, adopted at the 61st Ordinary Session of the African Commission on Human and Peoples' Rights.

2 Sections 94, Offensive conduct conducive to breaches of the peace; Sections 9(1) threatening breach of peace; Sections 175 Common nuisance; Section 182 Idle and disorderly persons

3 Several offences Under the Legislation in Kisumu, Mombasa and Nairobi Counties' By-Laws relating to loitering in public places for immoral purposes; nuisance by public urination; hawking and vending; common nuisance; indecency; spitting on a footpath; using a public toilet without paying; trespass to land and disturbing the peace.

4 Section 164.

5 Offences provided for under Section 64(1) include felling, cutting, taking, burning or removing any forest produce; being or remaining in the forest between the hours of 7 p.m. and 6 a.m. unless using a recognised road or footpath; de-pasturing or allowing any livestock to be in the forest; clearing, cultivating or break up land for cultivation or for any other purpose.

Wildlife Conservation and Management Act.⁶ According to the Audit Report on the Criminal Justice System in Kenya (2017),⁷ petty offences such as offences relating to lack of business licenses, being drunk and disorderly and creating a disturbance comprise of 70 percent of the crimes that are processed through the entire criminal justice system. In the pretrial stage, a total of 68 percent of arrests and detention are for petty offences, and a majority of said offenders are underprivileged.⁸

The criminalization of petty offences is an issue that has attracted both national and international concern because enforcement in most instances tends to be counter-productive.⁹ Heavy enforcement and overuse of custodial measures have resulted in an overstretch of State resources during the prosecution process and subsequent overcrowding in detention facilities.¹⁰ Further, because petty offences are often couched in vague terms and are highly discretionary, they increase the likelihood of abuse, harassment, and extortion of underprivileged persons by private individuals and by law enforcement.¹¹ A study by the Kenyan Section of the International Commission of Jurists (ICJ Kenya) shows that bribery and extortion surrounding the punishment of petty offences has evolved into a political economy where petty offences are punished so harshly that the offenders find giving bribes a reprieve as opposed to being processed¹² through the criminal justice system.

In most instances, the criminalization of petty offences leads to the violation of rights

6 Offences relating to subsistence hunting under Section 97; and entry into a national park with any livestock for any purpose without authorization under Section 102(2).

7 The National Council on the Administration of Justice (2017) “Criminal Justice System in Kenya: An Audit Understanding pretrial detention in respect to case flow management and conditions of detention,” p. xxiv. Available at <https://ncaj.go.ke/wp-content/uploads/2019/10/Criminal-Justice-System-in-Kenya-An-Audit.pdf>

8 Ibid, p ccclxii

9 UN High Commissioner for Human Rights Report on Non-Discrimination and Protection of Persons with Increased Vulnerability in the Administration of Justice, in particular situations of deprivation of liberty and regarding the causes and effects of over-incarceration and overcrowding (August 2017)

10 Ibid. p. 293; also see UNODC, Handbook on Strategies to Reduce Overcrowding in Prison, New York, 2013. Available at https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf

11 The UN Special Rapporteur Report on Extreme Poverty and Human Rights, A/67/278

12 The Kenyan Section of the International Commission of Jurists (ICJ Kenya) “Law and Policy Research on the Petty Offences and Practices Affecting Populations at the National Level and in Kisumu, Mombasa and Nairobi Counties.” (2017) Available at <https://icj-kenya.org/jdownloads/Publications/Final%20Policy%20Brief%20on%20Petty%20Offences%2029.03.2017%20003.pdf>

guaranteed by the Constitution of Kenya (2010) and the regional and international instruments to which Kenya is a state party. Several petty offences are defined in a manner that potentially criminalizes conduct that is essentially not criminal but results from a myriad of socio-economic issues within the society. The persons most likely to be disproportionately disadvantaged as a result are the poor, vulnerable and marginalized.¹³ In Kenya, the probability that a petty offender of humble means will lose their liberty at any point in the criminal justice system is extremely high. Poverty is, at all stages in the criminal justice system, a contributing factor to incarceration.¹⁴ At the pretrial stage, the petty offender is likely to be remanded for inability to comply with the bail or bond terms, and is more likely to plead guilty even where the charges are unfair or unfounded.¹⁵ Where the matter proceeds in Court and a fine is imposed upon sentencing, the petty offender is likely to remain in detention owing to the inability to pay the fine.

1.2. Legislative Framework

Internationally, the Universal Declaration of Human Rights (UDHR) guarantees a person's right to life, liberty, and security. It prohibits arbitrary arrest and detention and guarantees a person's right to be presumed innocent until proven guilty. The International Covenant on Civil and Political Rights (ICCPR) guarantees all persons the equal enjoyment of civil and political rights contained in the Covenant,¹⁶ the right to liberty and security of person,¹⁷ and the right not to be subjected to arbitrary arrest or detention. Depriving a person of their freedom must be done per procedures established by law, and all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person.¹⁸ The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) Committee, in its concluding remarks found that women are

13 KNCHR: Decriminalization and Reclassification of Petty Offences in Kenya. Available at <https://www.knchr.org/Portals/0/PETTY%20OFFENCES%20-%20FINAL%20FINAL.pdf>

14 See Note 7. The Audit Report on the Criminal Justice System in Kenya. (2017) Findings revealed that the number of poor people who are arrested, charged and sent to prison is inversely proportional to the well do. In addition, majority of the poor are arrested for relatively minor offence such as being drunk and disorderly, creating disturbance and lacking business licenses.

15 Impact of overcrowding on persons incarcerated with increased vulnerabilities A/67/278, para 36

16 Article 3, UN General Assembly, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999,

17 Article 9

18 Article 10

more likely than men to be incarcerated for non-violent offences and that criminalization of petty offences has a discriminatory effect on women.¹⁹

The United Nations Sustainable Development Goals adopted by the United Nations General Assembly in September 2015 oblige governments to end poverty in all its forms by 2030, particularly by ensuring that all men and women, especially the poor and vulnerable, have equal access to economic resources. Governments must implement programs and policies to end poverty in all dimensions and create policy frameworks based on pro-poor and gender-sensitive development strategies to support accelerated investment in poverty eradication programs. They are also responsible for making cities and human settlements inclusive and safe, promoting the well-being of all, promoting peaceful societies for sustainable development, providing access to justice for all, and building effective, accountable, and inclusive institutions at all levels.

Regionally, all persons are entitled to the enjoyment of the rights and freedoms contained in the African Charter on Human and Peoples Rights (ACHPR) without distinction of any kind, including race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.²⁰ Concerning criminal justice, the ACHPR, through the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reforms, emphasized the importance of a criminal justice policy that controls the growth of the prison population, and one which encourages the use of alternatives to imprisonment. In so doing, a key recommendation made through the Ouagadougou Declaration was the decriminalization of petty offences.²¹ The Commission has observed that the laws that create petty offences are often inconsistent with the principles of equality before the law and non-discrimination on the basis that they either target or have a disproportionate impact on, the poor, vulnerable persons and key populations in their enforcement.

19 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13. Available at: <https://www.un.org/womenwatch/daw/cedaw/> para 54

20 Art. 2, Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("African Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

21 See "The Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reforms," Para 7. Available at <https://www.achpr.org/legalinstruments/detail?id=42>

In addressing the challenge mentioned above, the Commission enacted the Principles on the Decriminalisation of Petty Offences, whose purpose is to guide States on the decriminalisation of petty offences in Africa per its obligations under Articles 2, 3, 5, and 6 of the African Charter. These Principles establish the standards against which the laws which govern petty offences should be assessed and the measures that State Parties can take to ensure that such laws do not discriminate against persons based on their social origin or social status by criminalising life-sustaining activities. The Principles reiterate the obligation by all States to ensure that all laws, including laws that create petty offences, respect, protect and promote the rights of all persons to equality before the law and non-discrimination.

The ACHPR has further adopted the Luanda Guidelines on the Conditions of Arrest, Police Custody, and Pretrial Detention in Africa (the Luanda Guidelines)²² which guidelines provide that a person charged with a criminal offence that does not carry a custodial sentence should not be subject to a pretrial detention order.²³ In addition, the Guidelines require that if a person is suspected of a criminal offence, an assessment should be made as to whether in the circumstances of the case of the individual, detention pending trial is necessary and proportionate. In making the assessment, factors such as the responsibilities of the accused person in society, such as those of being primary caregivers, should be taken into account.²⁴ The ACHPR Principles and Guidelines on Fair Trial and Legal Assistance in Africa, (the Fair Trial Principles) provide that States should not detain a person before trial unless there is sufficient evidence to support the detention.²⁵

In Kenya, the Constitution (2010) under Article 29 guarantees all persons the right to freedom and security of person, including the right not to be deprived of liberty arbitrarily or without just cause; the right not to be detained without trial, except during a state of emergency; right not to be subjected to any form of violence from either public or private sources; right not to be subjected to torture in any manner, whether physical or psychological; right not to be subjected to corporal punishment; or to be treated or

22 African Commission on Human and Peoples' Rights, "Guidelines on the Conditions of Arrest, Police Custody and Pretrial Detention in Africa," (Luanda Guidelines) 28 July 2016. Available at: <https://www.refworld.org/docid/5799fac04.html>

23 Ibid. Article 10 (c)

24 Ibid., Article 12 (b) (iii)

25 African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article m (1) (e)

punished in a cruel, inhuman or degrading manner. Article 49(2) of the Constitution states that a person shall not be remanded in custody for an offence if the offence is punishable by a fine or imprisonment for not more than six months.

1.3. The Scope and Purpose of the Guidelines

The purpose of these guidelines is to provide a framework and standard against which petty offences, within the meaning of Article 49 (2) of the Constitution of Kenya, should be managed and the measures necessary to ensure that such laws do not violate a person's right to liberty and security of the person, freedom from arbitrary arrest and detention, equality and non-discrimination, dignity and freedom from torture, cruel, inhuman or degrading punishment and treatment and the right to socio-economic rights. As such, they are intended for use by law enforcement agency officers, prosecutors, and courts for training and sensitization concerning the management of petty offenders.

Specifically, the guidelines seek to:

- (a) Guide policy and practice reform towards safeguarding the rights of petty offenders and in particular, vulnerable persons and key populations;
- (b) Guide criminal justice actors on the management of petty offenders;
- (c) Enhance coordination among the criminal justice actors in the management of petty offenders; and
- (d) Encourage and promote the use of non-custodial measures in relation to petty offences.

1.4. Principles Underpinning Petty Offences

The ACHPR, through the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reforms, recommended the decriminalization of petty offences and encouraged States to embrace the use of alternatives to imprisonment because the laws that create petty offences are often inconsistent with the principles of equality before the law and non-discrimination on the basis that they either target or have a disproportionate impact on, the poor, vulnerable persons and key populations in their enforcement. These Guidelines contextualize petty offences by focusing on compliance with the principle of legality, proportionality, and equality.

1.4.1. The Principle of Legality

The principle of legality is considered the cornerstone of criminal legislation. The principle states that the law should be clear, ascertainable, and non-retrospective.²⁶ It, therefore, seeks to protect individuals by defining forbidden actions and protects the individual from unchecked control by the legislator, law enforcement officers, and the court. The law must be accessible to all persons they govern and be easily understood to achieve this objective.

Certainty of law enhances the rule of law and the ability of the law to achieve its objective of regulating conduct²⁷ Users of legislation are likely to comply with the law if they are offered the tools to understand the legislation. Certainty of law is essential in enforcing petty offences because it ensures uniformity in the administration of justice so that law enforcement officers can understand the law correctly and apply it appropriately. There is a need for continuous and rigorous sensitization of the public and law enforcement officers on petty offences, rights of an arrested person, and court processes.

1.4.2. The Principle of Proportionality

A vital aspect of the principle of proportionality is whether a limitation on the enjoyment of a right is proportional to the objective sought. Article 24 (1) of the Constitution prohibits the limitation of fundamental rights and freedoms except by law, and then only to the extent that the restriction is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. The factors to be considered when limiting a right include analysing the nature of the right, purpose, nature and extent of the limitation, the prejudice to the rights and fundamental freedoms of others, and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the objective.

²⁶ Aids Law Project vs Attorney General & 3 Others Petition, No. 97 of 2010 [2015] eKLR; Council of County Governors vs Attorney General & Another, Petition No. 56 of 2017 [2017] eKLR; Also see Article 50 (2) (n) of the Constitution which provides for the right of a person not to be convicted for an act or omission which at the time it was committed or omitted was not an offence in Kenya.

²⁷ EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & Another, Petition No. 150 & 234 of 2016 (consolidated), accessed at <http://kenyalaw.org/caselaw/cases/view/173946/>

The principle of proportionality is an essential test for justifying the laws that limit rights and principles. When exercising discretion, the enforcing officers should maintain a proper balance between the adverse effects of the decision on the rights, liberties, or interests of persons and the purpose pursued.

1.4.3. The Principle of Equality and Non-Discrimination

The principle of equality and non-discrimination is one of the foundations of the rule of law and guarantees that those in similar circumstances are dealt with equally in law and practice. Article 27 of the Constitution of Kenya (2010) provides that every person has the right to equal protection and benefit of the law, including the full and equal enjoyment of all rights and fundamental freedoms. Further, all persons are guaranteed the rights and freedoms without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or another opinion, national and social origin, birth or other status.²⁸ To give full effect to the realization of the right to equality and freedom from discrimination, Article 27(6) mandates the State to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. The laws that create petty offences must comply with Article 27 of the Constitution.

²⁸ See also the African Charter on Human and Peoples' Rights, Articles 2 and 3; and the Universal Declaration of Human Rights, Article 2.

CHAPTER **2**

ARRESTS

2.1. Situation Analysis on Arrests

Law enforcement agencies,²⁹ private individuals and Magistrates may arrest anyone who commits a petty offence without a warrant. The county inspectorate officers have powers to arrest without a warrant a person who:

- (a) The inspectorate officer believes on reasonable grounds is contravening county laws;
- (b) Possesses anything for which a permit, license, certificate or pass is required and does not have the permit, license, certificate or pass;³⁰ or
- (c) Is committing an offence in their presence.³¹

The National Police Service Standing Orders reiterate the powers of police officers to arrest with and without a warrant³² with an additional safeguard through an oversight mechanism that allows the officer in charge of a station to release an arrested person if there is insufficient evidence to support a charge.³³ The National Police Service³⁴ have powers to arrest a person:

- (a) Against whom a warrant has been issued; and
- (b) To arrest without a warrant –
 - (i) A person who the officer believes on reasonable grounds that the person has committed a cognizable offence,
 - (ii) A person who commits a breach of the peace in the presence of the police officer;³⁵ and
 - (iii) Any person whom the police officer finds in a street or public place during the hours of darkness and whom he suspects upon reasonable grounds of being there for an illegal or disorderly purpose or who is unable to give a satisfactory account of himself.³⁶

The rationale behind the petty offences is to maintain public health, safety, and order and

29 The Criminal Procedure Code (Cap 75) Section 29 on Arrest without Warrant & the National Police Service Act (Cap 84) Section 58 on Power of Police to arrest without a warrant. An Authorized Officer under any legal provision may also arrest an offender without warrant. See Section 80, Narcotic Drugs and Psychotropic Substances (Control) Act (1994) and Section 110 of the Wildlife Conservation and Management Act (2013)

30 Ibid, Section 19

31 Ibid, Section 20

32 National Police Service Standing Orders, Chapter 15, S 1(1) and 1(3).

33 Ibid. Chapter 15, Section 3

34 Ibid. Chapter 15 S 1(1) and 1(3).

35 CPC Section 29; National Police Service Act, Section 59

36 CPC, Section 29 (g)

to enforce and ensure compliance with county legislation.³⁷ However, owing to the vague and ambiguous framing of petty offences in legislation, there are no subjective criteria applied by law enforcement officers when deciding to arrest which in many instances results in arbitrary and unfair arrests.³⁸

Offences such as loitering, being idle and disorderly, and engaging in immoral conduct have very uncertain evidentiary requirements. The provisions regulating noise under the County By-Laws do not prohibit making noise, they prohibit making such noise as “*to cause annoyance to occupants of premises or passers-by on the streets.*”³⁹ It is within the purview of the enforcers to define the kind of noise that would be sufficient to annoy the public. It is also a general nuisance to commit an act contrary to public decency;⁴⁰ however, the legislation does not define what constitutes public indecency. Loitering or importuning for the purposes of prostitution⁴¹ is also prohibited, and it is within the enforcer to determine the intent. For instance, women are arrested for loitering for immoral purposes based on the mere observation of how they walk, dress, talk,⁴² or for being at a specific location at certain times even where there is no reasonable suspicion for committing a crime.⁴³

Law enforcement officers also cite petty offences as grounds to arrest people suspected of engaging in or are planning to engage in criminal activities. This is the rationale used during ‘cleaning up exercises’ on national holidays and when dignitaries are visiting the

37 The County Law Compliance Bill and Enforcement Bill. Also see Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party) [2018] eKLR where the court held that the intention of the offence of being idle and disorderly under section 182 of the Penal Code is to criminalize disorderly conduct. For example, in Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party) [2018] eKLR, the court commented on the difficulty of assessing what conduct constitutes being idle under the offence of being Idle and Disorderly at Section 182 (2) (d) of the Penal Code.

38 See Note 7. The Audit Report on the Criminal Justice System in Kenya. (2017). p. 25. See also L. Muntingh & K. Petersen, Punished for Being Poor – ‘Evidence and Arguments for the Decriminalisation and Declassification of Petty Offences’ (2015), p. 4.

39 Sections 3, 4 and 5 of the City of Nairobi (General Nuisance) By-Laws, 2007. Also see sections 3 and 4 of the Mombasa County By-Laws.

40 Nairobi City Council By-Laws Section 19 (e)

41 Ibid, Section 19 (m)

42 Federation of Women Lawyers (2008) ‘Documenting Human Rights Violations of Sex Workers in Kenya: A Report based on the Findings of a Study conducted in Nairobi, Kisumu, Busia, Nanyuki, Mombasa and Malindi Towns in Kenya, p 40.

43 Lucy Nyambura & another v Town Clerk, Municipal Council of Mombasa & 2 others [2011] eKLR

country,⁴⁴ and when conducting security operations on Fridays and the weekend when crime rates are high.⁴⁵ In addition, these operations also target homeless children and persons with disabilities in order return them to their homes, or take them to rehabilitation centers or hospitals.⁴⁶

2.2. Law and Practice Guidelines

2.2.1 Grounds of Arrest

The ingredients of the offences must be precise so that the enforcement boundaries are ascertainable. Where it is necessary to use vague terms with the deliberate intention of leaving it to the interpreters and enforcers of the law to determine the parameters of an offence, the pertinent terms that inform the ingredients of the crime should be defined to enable the users of legislation to understand the scope of the prohibited conduct.

- (a) Laws must clearly state their objectives and purpose, be precise, accessible, and consistent with international standards and respect the rights of the individual.⁴⁷ They should provide the necessary and appropriate means of enforcement.
- (b) The State should undertake post-legislative scrutiny of petty offences to determine if they meet their intended objectives of protecting public safety and health and maintaining law and order.
- (c) Laws must be based on a sound policy that identifies the prevailing problem and addresses this problem using the most effective measures. The criminal process should not be used to address social problems such as homelessness, drug abuse/addiction and unemployment. The State should invest in education, employment, job training, community-based substance abuse treatment and economic support to respond to these problems.

44 Human Rights Watch *Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya* (1997) Human Rights Watch Children's Rights Project, available at <http://www.hrw.org/reports/1997/kenya/>

45 The Nakuru Circuit Visit Report by the NCCJR, interview of officers at the Bondeni Police Station and Nakuru Central Police Station.

46 The Star 'Controversy rocks crackdown on street children in Nairobi'

47 Luanda Guidelines, Article 2(a)

- (d) The State should ensure adequate public participation by the vulnerable and marginalized groups when developing policy. It should align policies to meet the needs of the people they target and put in place measures to ensure that people can obey the laws. For instance, free toilets should be provided so that the laws preventing public urination and defecation do not unfairly impact homeless people.

2.2.2 Rights of an Arrested Person

Every petty offender has the right to liberty and security of the person, which includes the right not to be denied that liberty.⁴⁸ A person should not be arrested or detained arbitrarily or without just cause.⁴⁹ The right to liberty can only be limited for reasons and conditions previously laid down by law⁵⁰ and in such a way as to permit arrest only in the exercise of powers normally granted to law enforcement officials in a democratic society.⁵¹

- (a) Any arrest, detention or imprisonment should only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.⁵² **Article 49(2) of the constitution of Kenya (2010) states that person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.**
- (b) The rights of an arrested person as provided for under Article 49 of the Constitution (2010) apply to every petty offender who has been arrested. Therefore, every person arrested for a petty offence is entitled to the following guarantees:
 - (i) To be informed promptly, in language that the person understands, of the reason for the arrest, the right to remain silent; and the consequences of not remaining silent.
 - (ii) To remain silent;
- (c) To communicate with an advocate, and other persons whose assistance is necessary.
- (d) Not to be compelled to make any confession or admission that could be used in evidence against the person.
- (e) To be held separately from persons who are serving a sentence.

48 The Constitution of Kenya (2010), Article 29

49 African Charter on Human Rights, Article 6; The Constitution of Kenya (2010), Article 29; International Covenant on Civil and Political Rights Article 9 (1)

50 African Charter on Peoples and Human Rights, Article 5

51 Ibid, Article 6

52 United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 2

- (f) To be brought before a court as soon as reasonably possible, but not later than-
 - (i) Twenty-four hours after being arrested; or
 - (ii) if the twenty-four hours end outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.
- (g) At the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released.
- (h) To be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.
- (i) An arrested person should be treated in a humane manner and with respect for the inherent dignity of the human person.⁵³ The treatment should accord with the person's right to be presumed innocent.
- (j) Victims of arbitrary arrest and detention should be compensated and stiff penalties for the perpetrators provided to have a deterrent effect.⁵⁴ However, this safeguard is not contained in the County Legislation that vests powers of arrest in the County Inspectorate Officers.
- (k) All law enforcement officials responsible for apprehensions, arrests, detentions, custody, transfers and imprisonment, and other officials authorized by law to use force and firearms should be supervised and a clear chain of command established.⁵⁵ To comply –
 - (i) Establish an independent county inspectorate oversight mechanism, similar to IPOA for purposes of enhancing accountability of County Inspectorate Officers.
 - (ii) There should be oversight mechanisms that can review the decision of the inspectorate officer to arrest and charge before arraignment, similar to the powers exercised by the officer in charge of a police station.⁵⁶
- (l) When undertaking an arrest, the arresting officer must believe or suspect that the person has committed or is about to commit an offence; this belief or suspicion must be based on certain facts from which an inference or conclusion is drawn which any reasonable person in view of the same facts would draw.⁵⁷ In addition to the

53 United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 1

54 Fair Trial Principles, Guideline M (1) (g)

55 Fair Trial Principles, M (1) (d)

56 See Chapter 15 section 3 of the National Police Standing Orders

57 Luanda Guidelines, Article 3

suspicion being reasonable the arresting officer-

- (i) Must have an open mind with regard to factors pointing to both innocence and guilt;
- (ii) In the appropriate circumstances the suspect should have the opportunity to deal with allegations against him before being arrested; and
- (iii) For the suspicion to be reasonable, it must extend to all elements of the offence.

2.2.3 Searches

Petty offenders have the right to privacy which, includes the right not to have their person, home, or property searched or their possessions seized.⁵⁸ A search should not be arbitrary,⁵⁹ and the limitation to the right to privacy should conform to Article 24 of the Constitution.

- (a) Law enforcement officers are required to carry out searches according to the law and in a manner consistent with the person's inherent dignity and the right to privacy. Officials conducting a search shall-
 - (i) For all types of searches, including pat-down, strip, and internal body searches, be of the same gender as the suspect. An intersex person has the right to decide the sex of the person who should search them;
 - (ii) Inform suspects of the reason for the search before the conduct of the search;
 - (iii) Make a written record of the search, which is accessible by the person searched, their lawyer or other legal service provider, family members, and, if the person searched is in custody, any other authority or organisation with a mandate to visit places of detention or to provide oversight on the treatment of persons deprived of their liberty;
 - (iv) Provide a receipt for any items confiscated during the search;
 - (v) Ensure that strip searches and internal body searches are only conducted in private; and
 - (vi) Ensure that internal body searches are only conducted by a medical professional and only upon informed consent or by a court order.

58 The Constitution of Kenya (2010), Article 31 (b) and (b)

59 ICCPR; Article 7

2.2.4 Use of force

A petty offender should be treated humanely and with respect for the inherent dignity of the human person.⁶⁰ A person has the right not to be subjected to any force, either from public or private parties.⁶¹ Law enforcement officials shall as far as possible apply non-violent means and avoid using restraints when arresting petty offenders, and only consider using reasonable force when non-violent means remain ineffective or have no likelihood of succeeding.

- (a) Force should only be used as a measure of last resort and limited to circumstances in which it is strictly necessary to carry out an arrest. If the use of force is necessary in the circumstances the level of force must be proportionate, and always at the most minimal level necessary.
- (b) Use of firearms should be strictly limited to the arrest of a person presenting an imminent threat of death or severe injury, or to prevent the perpetration of a serious crime involving grave threat to life, and only when less extreme measures are insufficient to make the arrest.⁶²

60 United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 1

61 The Constitution of Kenya (2010), Article 29 (c)

62 Luanda Guidelines, Article 3(c)

CHAPTER

3

PRETRIAL
DETENTION

3.1. Situation Analysis on Pre-trial Detention

The Constitution of Kenya (2010)⁶³ stipulates the right of arrested persons, including persons arrested for petty offences. Offenders arrested and detained at the police station are guaranteed these rights, including the right to bail or bond on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released.⁶⁴ Article 49(2) of the Constitution stipulates that an arrested person shall not be remanded in custody for a petty offence – an offence punishable by a fine only or imprisonment of fewer than six months. The National Police Service Standing Orders require the officer in charge of a police station to release any person arrested on a minor charge on bail /bond with or without sureties or personal bond or recognizance unless the officer has good reason to believe in doing so, the arrested person will not attend court. By this, it is noted that petty offenders should only be detained as a measure of last resort: where the officer believes the offender will not attend court or to protect the petty offender.

In court, petty offenders are also guaranteed rights and freedoms as stipulated in the Constitution and other legislative instruments. This means that the court is obliged to ensure the promotion of these rights and to see that the same is adhered to by itself, its officers/agencies, and the parties involved in the matter. Further, the court should inform the offender of his rights and the reasons for the decisions made, for example, information on the right to be released on bail or bond and why bail has been denied.

Most of the prison population comprises pretrial detainees who often have to wait for lengthy periods for their cases to be concluded. The official capacity of the Kenyan prison system is 26,757.⁶⁵ Albeit the number of pretrial detainees fluctuates from day to day, findings from the Audit Report revealed that 66 percent of pretrial detainees are held in prisons that are occupied at 150% above capacity or higher.⁶⁶

Over-reliance on pretrial detention and the lengthy duration of the trial process continues to be a severe problem and further contributes to overcrowding in prisons. Yet, there is a functioning bail system, and all suspected offenders are eligible for bail. Unfortunately, the challenge is often that accused persons remain in jail due to their inability to post bail.

63 Article 49

64 Art. 49(1)(h) Constitution of Kenya (2010)

65 World Prison Brief – Kenya <http://www.prisonstudies.org/country/kenya>

66 See Note 7. The Audit Report on the Criminal Justice System in Kenya. (2017). P. 305.

Many petty offenders fall into this category partly because of gaps in practice at the point of arrest. For example, police officers seldom employ warning or diversion, especially for the indigent, youth, or vulnerable persons in society.⁶⁷ Pretrial detention has even more significant implications for petty offenders who, as a result of imprisonment, may lose their livelihood, including accommodation and source of income. At the same time, they endure prison conditions that are often poorer than those of their convicted counterparts. This is, however, not a phenomenon unique to Kenya. Globally, the majority of detainees in detention facilities are either in pretrial detention for petty crimes or are serving a short-term sentence of imprisonment.⁶⁸

3.2. Law and Practice Guidelines

3.2.1 Alternatives to Detention

Pretrial detention is a measure of last resort and should only be used where necessary and where no other alternatives are available.⁶⁹ When used, it should be administered humanely and with respect for the inherent dignity of human beings.⁷⁰

- (a) Persons charged with a criminal offence that does not carry a custodial penalty should not be subject to pretrial detention.⁷¹ Pretrial detention should be reserved for persons accused of committing serious offences and who pose a real danger to society.⁷² Petty offenders should, in principle, be exempt from pretrial detention as the liberty of the accused person is guaranteed in the Constitution. A person should not be detained before trial unless there is sufficient evidence to support the detention.⁷³

67 See Note 7. The Audit Report on the Criminal Justice System in Kenya. (2017). p.62.

68 Open Society Justice Initiative, “Justice Initiatives - Pretrial Detention,” (2008) p. 71. Available at https://www.justiceinitiative.org/uploads/2f65cc09-c4da-4a48-9929-c8bff4110f53/Justice_Initiat.pdf

69 See Note 22. “Luanda Guidelines,” Article 10 (b)

70 Tokyo Rules, p 3, para 6.2

71 See Note 22. “Luanda Guidelines,” Article 33(a)(iii)

72 UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: mission to Togo*, 6 January 2008, A/HRC/7/3/Add.5, para 69 <https://www.refworld.org> [accessed on 9/07/2020]
Committee against Torture, Concluding Observation on Costa Rica 2008, CAT/C/CRI/CO2 at para 6. Available at <https://tbinternet.ohchr.org/> (last accessed on 9/07/2020)

73 African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article m (1) (e)

- (b) Criminal justice sector institutions should take measures to mitigate the over-reliance on unjustified, excessive, and prolonged pretrial detention to ease overcrowding in detention facilities. They should divert petty offenders away from the criminal justice system where appropriate,⁷⁴ utilize effective alternatives such as cautions, citations, and warnings.⁷⁵
- (c) At the pretrial stage the law enforcement agencies should also be vested with the discretion anchored in law to decide not to proceed with a case when they consider that it will not be in the best interests of public safety, crime prevention and the rights and needs of victims, subject to having checks and balances to prevent possible abuse.
- (d) Where it is deemed necessary to detain petty offenders, officers should ensure to separate them from serious offenders.⁷⁶ They should also consider the sex, age, criminal record, the legal reason for their detention, and the necessities of their treatment.⁷⁷ The following criteria shall be complied with at all times-
- (i) Women, men and intersex persons should be held separately;
 - (ii) Accused persons shall be kept separate from those serving sentence;⁷⁸ and
 - (iii) In compliance with the principle that children should be detained as a last resort and to uphold their best interests,⁷⁹ children should not be detained for petty offences. Instead, alternatives to prosecution and incarceration should be utilised to prevent recidivism and promote the social rehabilitation of child offenders.⁸⁰ However, in unavoidable circumstances, where children are detained, they shall be held in a separate facility within the station away from the adults.

74 See Note 22. “Luanda Guidelines,” Article 33(a)(iii)

75 Ouagadougou Plan of Action Adopted on Accelerating Prisons and Penal Reforms in Africa, para 1

76 United Nations Standard Minimum Rules for the Treatment of Prisoners (the “Nelson Mandela Rules”) (2015) Available at <https://cdn.penalreform.org/wp-content/uploads/1957/06/ENG.pdf>, Rule 11

77 Ibid. Rule 11

78 The Constitution of Kenya (2010) Article 49 (1) (e)

79 Ibid. Article 53 (1) (f); The Children’s Act (2003) section 28 (1) (g) and (2) The United Conventions on the Rights of the Child (UNCRC), Article 37;

80 The UN Guidelines for Action on Children in the Criminal Justice System (the Vienna Guidelines; ECOSOC 1997/30), para 15.

3.2.2. Bail and Bond for Petty Offenders

Pretrial detention should be reserved for cases in which the courts find concrete and compelling reasons to deny bail in the interest of justice or safety.

- (a) As a rule, petty offenders should be released at the police station on the security of cash bail unless the officer has reasonable grounds for believing that the petty offender will abscond.⁸¹ The police officer should hand over the bail received to the court during the arrested person's first court appearance and obtain a receipt.⁸²
- (b) To secure the rights of petty offenders to bail pending trial under Article 49 (2) of the Constitution –
 - (i) The duty of all the agencies with powers to arrest to issue bail should be stipulated in the legislation that donates to them the powers to arrest.
 - (ii) To prevent abuse of discretion, enforcement officers need to develop guidelines on the issuance of bail. The guidelines should set out the maximum amount of bail payable concerning petty offenses and require that a receipt be issued after payment.
- (c) Petty offenders should be given reasonable bail terms, only attaching conditions necessary to prevent the suspect from failing to surrender to custody, committing an offence while on bail, interfering with witnesses, or otherwise obstructing the course of justice.⁸³
- (d) Petty offenders who do not present a flight risk should be released on free bond, on their own recognizance, or with a surety.⁸⁴ Children, expectant mothers, and mothers with infants should not be detained unless there are exceptional, compelling reasons.

81 National Police Service Standing Orders, Order 9(i).

82 Ibid, Order 9 (ii)

83 NCAJ, "Bail and Bond Policy Guidelines," (2015) p.13 Available at <https://ncaj.go.ke/wp-content/uploads/2019/10/Bail-and-Bond-Policy-Guidelines.pdf>

84 Ibid, p 14

- (e) For detention to be legitimate, a petty offender should only be detained⁸⁵ in accordance with the law when it is determined to be necessary, reasonable and proportionate in all the circumstances, in pursuit of a legitimate purpose, and based on individual assessment of the case.

85 UNHCR, “Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention,” (2012.) Available at <https://www.refworld.org/pdfid/503489533b8.pdf>

4

CHAPTER

TRIAL

4.1 Situation Analysis on the Trial Process

Kenya's legislative framework extensively addresses the trial process concerning the rights and responsibilities of the accused person, the complainant, and actors in the criminal justice system. The Constitution of Kenya (2010) guarantees explicitly an accused person the right not to be detained without trial,⁸⁶ the right to be released on bail or bond on reasonable conditions pending trial unless there are compelling reasons not to,⁸⁷ and the right to a fair trial.⁸⁸ The Criminal Procedure Code (CPC) also addresses itself to the trial process by indicating that the prosecution of offences under the Penal Code (Cap. 63) as well as offences under any other law, are to be dealt with in accordance to the Code.⁸⁹

Concerning the responsibilities of the various parties, the Bail and Bond Policy Guidelines outline the accused person's obligation to attend trial as well as the duty of the State to ensure public safety and security between the time of arrest and hearing.⁹⁰ The Policy Guidelines also address the roles to be carried out by the various justice sector agencies to ensure the efficient delivery of justice during the entire trial process.

The application of these laws and policies has seen several challenges regarding interagency collaboration, practice, and implementation. The Audit Report on the Criminal Justice System in Kenya revealed that only 32% of police entries are converted to charges in court; of which 70% are petty offences.⁹¹ The Audit revealed that serious offences such as organized crimes, capital offences, and sexual offences had the highest rate of acquittal and withdrawals.⁹² Petty offences are often heard *en masse* and most accused persons plead guilty.⁹³ For those who contest the charges, the likelihood that they shall be remanded in custody is high owing to an inability to pay bail because the majority of arrested persons

86 Article 29(b)

87 Ibid Article 49(1)(h)

88 Ibid Article 25(c) and Article 50(2)

89 CPC, Section 3

90 Bail and Bond Policy Guidelines – General Principles (c) and (e)

91 See Note 7. The Audit Report on the Criminal Justice System in Kenya. (2017). p. xxix. The offences rated as petty are primarily economically driven and social disturbance offences such as those relating to lack of business licenses, being drunk and disorderly, and creating a disturbance.

92 Ibid. p. xxiv.

93 Victor Kapiyo, "Addressing Petty Offences in Kenya: Which Way Forward?" (n.d.)

Available at https://pettyoffences.org/addressing-petty-offences-in-kenya-which-way-forward/#_ftn5

accused of having committed petty offences are indigent. There is a need to give further direction to actors and users of the criminal justice system, especially in understanding the law and aligning the same with practice.

4.2 Law and Practice Guidelines

4.2.1. Decision to Charge

The decision to prosecute for a petty offence should only be made when the prosecutor is satisfied that prosecution is the most appropriate step to be undertaken and the matter cannot be disposed of using alternative mechanisms.

- (a) The prosecutors should exercise their prosecutorial discretion with due regard to the circumstances of the case, considering each case on its merits based on the aggravating and mitigating circumstances.⁹⁴ Prosecutors should also consider the aggravating and mitigating circumstances like the nature of the offence, the way it was committed the loss or harm caused, whether the offender is a repeat offender, and the likelihood of reoffending.⁹⁵
- (b) The prosecutor should consider the public interest connected to the decision to charge, such as the costs to the criminal justice system and the delays likely to result from the prosecution.
- (c) Prosecutors should use non-prosecutorial disposals such as cautions, warnings, and citations as much as possible for petty offences. They should employ diversion in deserving cases, especially those involving drug use.⁹⁶
- (d) Prosecutors should uphold their duty to ensure justice is served rather than obtain a conviction at all costs.

94 United Nations “Guidelines on the Role of Prosecutors.” Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx#:~:text=Prosecutors%20shall%2C%20in%20accordance%20with,of%20the%20criminal%20justice%20system>

95 International standards prescribe that the principle of assisting with prisoner social reintegration to prevent reoffending should be at the heart of prison management strategies and policies- see ICCPR, Article 10

96 ACHPR /Res.64 (XXXIV) 03: Resolution on the adoption of the ‘Ouagadougou Declaration and plan of action on accelerating prison and penal reform in Africa’ (2003)

4.2.2. Summary of a Petty Offender's Rights during Trial

Every petty offender who is charged with an offence has the following guarantees regarding the trial process:

- (a) The right to have any dispute that the application of law can resolve decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.⁹⁷ Concerning children, the courts shall hear all cases in camera in a children's court.
- (b) The right to a fair trial which entails the right to-
 - (i) be presumed innocent until the contrary is proved;
 - (ii) be informed of the charge, with sufficient detail to answer it;
 - (iii) have adequate time and facilities to prepare a defence;
 - (iv) a public trial before a court established under the Constitution;
 - (v) have the trial begin and conclude without unreasonable delay;
 - (vi) be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
 - (vii) choose, and be represented by an advocate and to be informed of this right promptly;
 - (viii) have an advocate assigned to the accused person by the State and at State's expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (ix) remain silent and not to testify during the proceedings;
 - (x) be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
 - (xi) adduce and challenge evidence;
 - (xii) refuse to give self-incriminating evidence;

97 Constitution of Kenya (2010), Article 50 (1) and 50 (2) (d)

- (xiii) have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;
- (xiv) not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime under international law;
- (xv) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
- (xvi) the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;
- (xvii) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law;
- (xviii) be given the information he or she is entitled to in a language that the person understands; and
- (xix) if charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request and within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.

These guidelines have placed greater emphasis on the right to a fair and public hearing, the presumption of innocence, to be informed of the charge with sufficient detail to answer it, to mount a defence, and to have legal representation owing to the challenges highlighted in the Situation Analysis.

4.2.3. Right to a Fair and Public Hearing

Petty offenders are entitled to a hearing where their individual culpability is determined. To this end-

- (a) Group plea-taking of offenders should not be conducted as it infringes on the right to a fair trial.

- (b) Group trials of offenders should not be held as they infringe on the right of an accused person to defend him or herself adequately.
- (c) Petty offenders may only be joined in one count or charge and charged together if:⁹⁸
 - (i) Accused of the same offence committed in the course of the same transaction;
 - (ii) Accused of an offence and persons accused of abetment or of an attempt to commit the offence;
 - (iii) Accused of more offences than one of the same kind (that is to say, offences punishable with the same amount of punishment under the same section of the penal code or any other act or law) committed by them jointly within twelve months; or
 - (iv) Accused of different offences committed during the same transaction.
- (d) Where children who have committed a petty offence are charged jointly with adults, the court shall hear their matters in camera.

4.2.4. Right to Presumption of Innocence

To safeguard the right of an accused person to be presumed innocent-

- (a) Pretrial detention should be used sparingly to protect innocent persons from pleading guilty in order to secure their release;
- (b) The criminal justice process should be fast tracked to prevent inordinate periods of pretrial detention for petty offenders;⁹⁹ and
- (c) Petty offenders should be detained under humane and reasonable conditions that comply with their right to dignity and be held separately from convicted persons and serious offenders.

98 CPC, Section 136

99 Communication 301/05 Haregewoin Gebre-Sellasia &

4.2.5. Right to be informed of the Charge with Sufficient Detail to answer it

The charge sheet or information should contain the specific offence or offences that the person has been charged with, together with such particulars as may be necessary to give reasonable information on the nature of the offence charged.¹⁰⁰

- (a) A charge should contain the statement describing the offence and its particulars.¹⁰¹ The statement and particulars of the offence should be set out in ordinary language, avoiding as far as possible the use of technical terms.¹⁰² The statement should describe the offence briefly the essential elements of the offence and contain a reference to the section of the law creating the offence.¹⁰³
- (b) The place, time, thing, matter, act or omission should be described in ordinary language.¹⁰⁴
- (c) An accused person or other person referred to in the charge should be described in sufficient detail to identify the person without necessarily stating that person's correct name, abode, style, degree or occupation. If it is impracticable to describe the person owing to the name of the person for any reason, that person shall be described, or designation given as is reasonably possible or the person may be described as "a person unknown".¹⁰⁵

The court must ensure that the accused understands the substance of the charge and be allowed to respond to the facts of the charge. The aim is to ensure that the plea of guilty is unequivocal and that the plea as recorded cannot be interpreted in any way other than as an admission of guilt. Where the accused is unrepresented, the court's duty to ensure that a plea of guilty is unequivocal is heightened as emphasised. The court should pay particular attention to accused persons who are not represented and ensure that the charge and all the elements of the offence are thoroughly explained to unrepresented persons.

100 CPC, Section 134

101 Ibid, Section 136 (a) (i) and (iii)

102 Ibid, section 136 (a) (ii) and (iii)

103 Ibid.

104 Ibid, Section 136 (f)

105 Ibid, Section 136 (d)

4.2.6. Right of an Accused Person to Defend Themselves

An accused person has the right to adduce and challenge evidence and should be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. They should be given adequate time and facilities to prepare their defence. Mindful that most petty offenders are indigent, the State should provide accused persons with copies of the charge sheet, witness statements, and other evidence it intends to rely on at a nominal fee considering the circumstances of petty offenders. Article 48 of the Constitution of Kenya (2010) provides the right to access justice and mandates the State to ensure that all persons have access to justice. If any fee is prescribed, it shall be reasonable and not impede access to justice.

4.2.7. Right to Legal Representation

Considering the abuses that petty offenders suffer during the enforcement of petty offences and notwithstanding that the offences carry lesser criminal penalties, they should be accorded legal aid at all stages in the criminal justice process to safeguard their rights. Such legal representation follows where substantial injustice is likely to occur. In particular, indigent petty offenders should have access to legal aid at the initial point of coming into contact with the criminal justice system. All the actors in the criminal justice system should inform the offender of the right to legal representation and facilitate the offender's access to legal representation.¹⁰⁶

106 See section 42 (1) of the Legal Aid Act which obligates persons in charge of detention facilities to inform the detainee of the availability of Legal Aid and to inform NLAS that a person in their custody has applied for legal aid.

CHAPTER

5

SENTENCING

5.1. Situation Analysis on Sentencing

Petty offences generally ought to attract less severe punishment than serious offenses. However, this has not been the case in Kenya, as many petty offenders have been and continue to be incarcerated. The Audit Report on the Criminal Justice System in Kenya revealed that seventy percent of the cases processed through the criminal justice system are petty offenses, the majority of whom hail from disadvantaged backgrounds. Incarceration, for this category of petty offender, is likely to have a permanent punitive effect owing to loss of employment, housing, and possible future employment opportunities. A petty offender who is incarcerated will likely remain in cyclic poverty and condemn their dependants to the same fate.

Sentencing has been a problematic area in administering and enhancing access to justice. It is an issue that has constantly given the justice sector, and more so the courts' backlash from the public mainly due to the variance, disproportion, and inconsistency in the sentences pronounced, including those for petty offences. This has resulted in a lack of public confidence in a system entrusted to promote and protect their rights.

The process and procedure of sentencing are guided by the Constitution, legislation, and other policies such as the Sentencing Guidelines (2015). Section 24 of the Penal Code provides a range of penal sanctions that a court may inflict, including death, imprisonment, or, where the court so determines under the Community Service Orders Act, 1998, community service under a community service order, detention under the Detention Camps Act, fine, forfeiture, payment of compensation, finding security to keep the peace and be of good behaviour. It further recognizes other penal sanctions that may be provided for by other statutes.

The CPC under Section 169 provides that judgment shall be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon, and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

When sentencing, courts are further guided by and obligated to observe the following principles:¹⁰⁷

107 The Judiciary, "Sentencing Policy Guidelines." Available at <http://kenyalaw.org/kl/>

- (a) Proportionality: The sentence meted out must be proportionate to the offending behaviour. The punishment must not be more or less than is merited given the gravity of the offence. Proportionality of the sentence to the offending behaviour is weighted given the actual, foreseeable, and intended impact of the offence as well as the responsibility of the offender.
- (b) Equality/Uniformity/Parity/Consistency/Impartiality: Same sentences should be imposed for the same offences committed by offenders in similar circumstances.
- (c) Accountability/Transparency: The reasons and considerations leading to the sentence should be set per the law.
- (d) Inclusiveness: The offender and the victim should participate in and inform the sentencing process.
- (e) The principle of proportionality is grounded within the concept of just deserts and is embraced by common law. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) recognise the principle of proportionality but emphasise that with respect to juveniles, the response should not only take into account the gravity of the offence but also the personal circumstance of the juvenile. Article 50 (1) of the Constitution of Kenya 2010 upholds the right to determine a matter fairly. Fairness demands that the sentence imposed should neither be excessive nor less than is merited.
- (f) Constitution of Kenya 2010, a.27; a.73 (1) (a) (iii); a.73 (2) (b). 7 Constitution of Kenya 2010, a. 50; a.73 (2) (d)). 8 Article 10 (2) (b) of the Constitution of Kenya identifies inclusiveness as one of the national values and principles of governance.
- (g) Respect for Human Rights and Fundamental Freedoms: The sentences imposed must promote and not undermine human rights and fundamental freedoms. In particular, the sentencing process must uphold the dignity of both the offender and the victim. The factors to be considered when considering a custodial sentence include the gravity of the offence, the offender's criminal history, the offender's character, and the offender's responsibility to third parties.

5.2. Law and Practice Guidelines

The pronouncement of a sentence for a petty offender should be done without unreasonable delay, and judgment must point out the reasons for the sentence imposed. The proviso to section 333 (2) of the CPC obligates the court to consider the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed.

- (a) A petty offender should not be in custody for an excessive amount of time. Imprisonment of petty offenders should be avoided altogether as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. Short sentences are disruptive and contribute to re-offending.¹⁰⁸
- (b) A petty offender who has been in custody throughout the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be discharged absolutely under section 35 (1) of the Penal Code.
- (c) Due to the nature of petty offences, offenders should be given non-custodial sentences unless there are aggravating circumstances that make the sentence unsuitable.¹⁰⁹ Section 23.8 of the Sentencing Guidelines underline the mitigating circumstances that warrant a more lenient penalty than would be ordinarily imposed in their absence to include:
 - (i) A great degree of provocation;
 - (ii) Commitment to repairing the harm caused by the offender's conduct as evidenced by actions such as compensation, reconciliation, and restitution before conviction;
 - (iii) Negligible harm or damage caused;
 - (iv) Mental illness or impaired functioning of the mind;

108 Ibid. p.21

109 Ibid. Section 23.7 indicate the aggravating circumstances that warrant a stiffer penalty to include: Use of a weapon to frighten or injure a victim; Multiple victims; Grave impact on national security; Serious physical or psychological effect on the victim; Continued assault or repeated assaults on the same victim; Commission of the offence in a gang or group; Targeting of vulnerable groups such as children, elderly persons and persons with disability amongst others.

- (v) Age, where it affects the responsibility of the individual offender;
 - (vi) Playing of a minor role in the offence;
 - (vii) Being a first offender;
 - (viii) Remorsefulness;
 - (ix) Commission of a crime in response to gender-based violence; and
 - (x) Pleading guilty at the earliest opportunity and cooperation with the prosecution and the police.
- (d) The sentencing process should consider criminogenic needs in determining the sentence. Criminogenic needs are characteristics, traits, problems, or issues of an individual that directly relate to the individual's likelihood to re-offend and commit another crime. Generally, these are structural elements of a person's life that led them to commit the crime, for example, gender roles, poverty, education/employment, substance abuse, peer relationships, emotional stability/mental health, criminal orientation and thinking, and residential stability.
- (e) The primary objective of non-custodial sentences is the rehabilitation of offenders. By serving these sentences, offenders take responsibility for their actions and, at the same time, remain in the community, which provides an environment conducive to rehabilitation.

CHAPTER

6

**MANAGEMENT OF
VULNERABLE PERSONS
AS PETTY OFFENDERS**

6.1. Situation Analysis on Vulnerable Persons

A disproportionate number of vulnerable persons, particularly key populations, are arrested for petty offences. The offence of being idle and disorderly contrary to Section 182(d) of the Penal Code covers a wide array of activities, including loitering, public indecency, and soliciting for an immoral purpose. The CPC under Section 29 also allows police to arrest without a warrant any person with no apparent means of subsistence and who cannot give a good account of him or herself.¹¹⁰ The enforcement of petty offences is characterised by unlawful, arbitrary, and discriminatory arrests primarily targeting the poor, vulnerable, marginalized and key populations.

Street Children: They are more often than not arrested and detained for loitering and vagrancy-related offences.¹¹¹

Persons with disabilities: It is common for persons with disabilities in Kenya to come into conflict with the law, particularly for petty offences owing to social stigma surrounding mental illness as well as lack of access to care and medical treatment.¹¹² This is especially true for persons with intellectual and psychosocial disabilities who often experience difficulties in communicating. It is difficult to adequately accommodate a petty offender with such a disability in the criminal justice process, especially where actors within the criminal justice system (law enforcement officers, prosecutors, judicial officers, and correctional officers) are not adequately sensitized and trained to identify an accused person who is suffering from mental illness or has an intellectual disability.

110 The CPC, 1930 (revised 2015) Section 29(g) A police officer may, without an order from a magistrate and without a warrant, arrest: any person whom he finds in a street or public place during the hours of darkness and whom he suspects upon reasonable grounds of being there for an illegal or disorderly purpose, or who is unable to give a satisfactory account of himself.

111 See Sorber R, Winston S, Koech J, Ayuku D, Hu L, Hogan J, et al. Social and economic characteristics of street youth by gender and level of street involvement in Eldoret, Kenya; Human Rights Watch. JUVENILE INJUSTICE: Police abuse and detention of street children in Kenya. Nairobi, Kenya; 1997; and Suda C. Street children in Nairobi and the African cultural ideology of kin-based support system: Change and challenge. *Child Abus. Rev*; 1997;6:199–217. Available at: <http://search.ebscohost.com/login.aspx?direct=true&db=psyh&AN=1999-00066-003&site=ehost-live>.

112 Lydia Matata, (n.d) “Kenyans living with mental illness get lost in the criminal justice system,” Available at <https://pettyoffences.org/kenyans-living-with-mental-illness-get-lost-in-the-criminal-justice-system/>

Street vendors/traders: They account for many people working in Kenya’s informal sector. However, the existence of restrictive by-laws such as the General Nuisance by-laws, which criminalise annoyance, obstruction, or inconvenience to the public in the exercise of common rights, posits street vendors as a target group in the enforcement of petty offences.

Sex workers: Sex workers fear arrest and suffer stigmatization by society and harassment from the police and county law enforcement officers. They are more often than not targeted for the offences of loitering, importuning, or attempting to procure a male or female for prostitution purposes, which is an offence as provided for under the Nairobi City By-Laws under the section on “General Nuisance.” Owing to the ambiguous framing in legislation, there is no subjective criteria applied by law enforcement officers when deciding to arrest which in many instances results in arbitrary and unfair arrests.

Persons who abuse drugs: The criminalization of drug use has set the stage for arbitrary arrests, bribery, and harassment of people abusing drugs. The punitive approach and incarceration have not been effective. As a result, more drug users/addicts can be found in prisons instead of rehabilitation centres where they can be assisted to receive the required treatment.

6.2. Law and Practice Guidelines

6.2.1 Children in Conflict with the Law/Children as Petty Offenders

In any matter concerning the child, the child’s best interest is of paramount importance.¹¹³ The objective of the criminal justice actors when dealing with children in conflict with the law should be reformative, social integration, rehabilitation, and restorative justice.¹¹⁴

- (a) A child arrested on suspicion of an offence should be brought to court as soon as practicable but not later than twenty-four hours from the time of arrest unless with the permission of the court.¹¹⁵ Children should only be detained as a matter of last resort and for the shortest period possible and in conditions that consider the child’s age and sex.¹¹⁶

113 Constitution of Kenya (2010), Article 53 (2).

114 African Charter on the Rights and Welfare of the Child, A. 17 (3)

115 Constitution of Kenya (2010), Article 49 (1) (f); Child Offenders Rules, Schedule 5 of the Children Act (“Child Offenders Rules”), rule 4(1)

116 Constitution; Article 53 (1) (f) (i) and (ii)

- (b) Upon apprehending a child, the officer must inform the parents, or guardians of the child or the Director of Children’s Services as soon as is practicable.¹¹⁷ The child’s parent, guardian or advocate must be present at the time of any police interview with the child.¹¹⁸ Every child (whether in contact with the law or in conflict with the law) should have a Protection and Care (P&C) file opened.
- (c) Children’s matters on petty offences should be dealt with/resolved through alternative means of dispute resolution and diversion. Prosecution of Cases for petty offences for children should be as a matter of last resort, and should be dispensed within three months.¹¹⁹
- (d) A child arrested for a petty offence should be released on a recognizance being entered into by the child’s parent, guardian, or other responsible person, with or without sureties.¹²⁰ The child should only be detained for a petty offence if there is reason to believe that releasing the child will defeat justice.¹²¹ In exercising discretion, the officer arresting the child must act in the best interest of the child. Bail terms imposed must be reasonable, affordable, and for the purposes of securing the attendance of the child to court.¹²²
- (e) Children should be held separately from adults in a separate institution or a separate part of the police station.¹²³ This applies when they are being conveyed to court and when waiting to attend or leave the court. A female child shall, while detained, conveyed, or waiting, be under the care of a woman officer.¹²⁴ Every police station should have an operational Children Protection Unit (CPU), and the same should have standard operating procedures anchored in the National Police Service Act.
- (f) Agencies in the justice sector and their officers shall provide children in contact with the law and in conflict with the law with access to psychosocial support throughout the pretrial, trial, and post-trial process.

117 Child Offender Rules, Rule 4 (2) (a) and (b)
 118 Child Offender Rules, Rule 4 (3)
 119 Child Offender Rules, Rule 12 (1) and (2)
 120 Child Offender Rules, Rule 5
 121 Child Offender Rules, Rule 5 (d)
 122 Ibid.
 123 Child Offender Rules, Rule 2
 124 Child Offender Rules, Rules (1) and (3)

6.2.2 Persons Living with Disabilities

- (a) Every petty offender with a disability should be treated with dignity¹²⁵ and be detained under reasonable accommodation.¹²⁶ When dealing with persons with disabilities, the court should be conscious of the disability needs of the persons appearing before it.¹²⁷
- (b) Where the sentence imposed on a person with a disability is imprisonment, the physical conditions of detention should consider the specific needs of persons with disabilities and ensure that the detention does not amount to inhuman or degrading treatment.¹²⁸ Facilities should also be easily accessible and conducive to elderly persons.
- (c) Persons with disabilities should be permitted to keep in their possession any form of aid relevant to their disability. If a genuine security reason requires the removal of any form of aid, suitable alternatives shall be provided.
- (d) Persons with mental disabilities, while under mental distress, are likely to be placed under arrest and charged with committing offences such as disorderly conduct and loitering. In addition, drug possession offences sometimes target persons with substance abuse disorders who require treatment rather than prosecution.¹²⁹ As such, users and survivors of psychiatry should be exposed to treatment as opposed to the criminal trial process.

6.2.3 Sex Workers

Sex workers are entitled to the same human rights as everyone else. Sex workers have the right to bodily integrity, dignity, and freedom from violence. The ongoing criminalisation of sex work violates all of these human rights.

125 Constitution of Kenya (2010), Article 54 (1) (a).

126 UN Convention on the Rights of Persons with Disabilities, Article 14

127 The Judiciary Criminal Procedure Bench Book, para 11.

128 Sentencing Guidelines, para 20.24

129 The National Committee on Criminal Justice Reforms Report to Asumbi Treatment Centres- Homabay Karen

6.2.4 Hawkers/Street Vendors

Where a street vendor's goods or assets utilised for their street vending activities have been confiscated, the officer confiscating the goods shall handle the goods in a manner that does not cause damage and issue the street vendor with a receipt detailing the specific goods confiscated, and the location from which they may recover their goods.

6.2.5 Persons suffering from a substance disorder

- (a) Drug abuse should be considered a significant public health issue. Policy changes and justice system reform are an integral part of harm reduction.¹³⁰ Studies reveal that repressive laws, which include imprisonment and harassment, drive many drug users underground, away from health and social support services.¹³¹ Less punitive policies towards drug possession do not result in significant increase in drug use, drug-related harm or crime.
- (b) It is crucial to build the capacity of and sensitize all actors within the criminal justice sector on identification, techniques, and procedures for handling persons under the influence of drugs and persons suffering withdrawal symptoms.

Section 52 of the Kenya Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 provides for the establishment of rehabilitation centres for the care, treatment, and rehabilitation of persons addicted to narcotic drugs or psychotropic substances.” Section 53 allows the Cabinet Secretary to set up a special rehabilitation fund to be funded by the government and other sources. Despite these provisions in the law, in reality, there are very few State operated rehabilitation centres.

It is recommended that treatment be prioritized and alternative forms of punishment other than incarceration are considered. Consider diversion directly to a rehabilitation facility upon conviction for drug abuse-related charges. There is a need to enhance networking and collaboration amongst all criminal justice system stakeholders to facilitate drug use projects and generate strategies targeted at reform and rehabilitation. The government should channel more resources into developing drug treatment facilities and rehabilitation

130 Human Rights Watch, “Americas: Decriminalize Personal Use of Drugs; Reform Policies to Curb Violence, Abuse,” (2013)

131 United Nations Office on Drugs and Crime, “World Drug Report 2009,” (Vienna: United Nations Office on Drugs and Crime, 2009).

centres and ensure the treatment process is cost-effective and easily accessible. Further, the government should facilitate community discourse/discussions on drug addiction, treatment, and counselling.

To curb harassment and corruption, law enforcement officers should ensure that the least amount of time is taken between arrest and processing of this category of suspects at the police station.

6.2.6 Intersex Persons

Every intersex detainee has inherent dignity and the right to have that dignity respected and protected. Particulars to the realization of this right include, but are not necessarily restricted to the following:

- (a) Separation of categories: Male, female and intersex prisoners shall be kept separate from each other; **Section 12(3)(e)** provides that intersex persons deprived of liberty shall be held separate from other persons
- (b) Male, female and intersex children deprived of liberty shall be accommodated in appropriate and separate facilities but not in isolation;
- (c) Intersex (I) marker shall be included in all official documents/registers that require identification of sex;
- (d) Intersex detainees shall have the right to choose the sex of the officer to conduct the search;
- (e) Access to sanitation facilities that maximize privacy; and
- (f) Ensure intersex detainees are under the care of officers who have undergone intersex sensitization and awareness training and have a general overview of intersex conditions and a specific knowledge of intersex rights regarding their detention.

CHAPTER

7

**THE MANAGEMENT
OF PETTY OFFENDERS
IN UNIQUE
CIRCUMSTANCES**

7.1. Situation Analysis on the Management of Petty Offenders During in Unique Circumstances

In unique circumstances, limitations on the enjoyment of certain individual rights and freedoms may be deemed necessary to facilitate a return to normalcy in the country. Unique situations include health disasters, pandemics, natural disasters, criminal or terrorist violence, armed conflicts, foreign military intervention, political or civil unrest, or serious societal upheavals.

Article 58 (1) of the Constitution of Kenya (2010) provides that for dire crises of exceptional and imminent danger that threaten the life of the nation such as war, invasion, general insurrection, disorder, natural disaster or other public emergency warrant a state of emergency to be declared under Article 132 (4)(d). Even where a state of emergency is declared, the Constitution of Kenya (2010) under articles 57(2)(3)(4)& (5) and Article 58(6)(a)(ii) indicates the importance of setting in place effective remedies and adequate safeguards which must be made accessible during all crises so as to ensure that the limitations imposed do not diminish the substance of the rights inherent in the human person.¹³²

As such, the State, in adopting emergency measures in any crisis, must continue to uphold the rule of law, protect and respect international human rights standards and basic principles of legality, and the rights to access justice and due process. Limitations on human rights and fundamental freedoms should be proportionate, non-discriminatory, time-bound, strictly related to the containment of the contagion, and subject to review.

With specific regard to the criminal justice system and the management of petty offenders, legal safeguards and oversight mechanisms must be in place to ensure that any derogation or restrictions/limitations of rights do not continue indefinitely and that states protect and ensure human dignity and the rights of all people.

132 Constitution of Kenya (2010) Article 58(6)(a)(ii) Legislation enacted due to a pronouncement of a state of emergency must be consistent with the Republic's commitment under international law. Other safeguards include provisions under Article 57(2)(3) and (4): the President may pronounce a state of emergency for no longer than fourteen days, and it is only the National Assembly which shall offer an extension. Under Article 57(5) the Courts also play a critical role in decisions regarding the legality of a declaration of a state of emergency and in reviewing the legality of specific emergency measures.

The Judiciary continues to always operate as a check on executive actions and as an upholder of the rule of law. Judicial oversight of the implementation of emergency measures by law enforcement and other authorities is necessary to avoid the excessive use of powers and to protect vulnerable, marginalised, and stigmatized groups.

7.2 Law and Practice Guidelines

7.2.1 Accountability Mechanisms in Unique Circumstances

- (a) Agencies within the criminal justice sector shall endeavour to support access to legal information and promote rights awareness. This includes undertaking advocacy and information campaigns related to the crisis situation. Information should be made easily accessible in the national languages and disseminated through traditional and social mediums to target populations at risk and in need of protection.
- (b) The Judiciary in collaboration with the Office of the Director of Public Prosecutions (ODPP) and the Law Society of Kenya (LSK) shall ensure that the principle of legality, the rule of law, and fundamental human rights are effectively guaranteed during all unique circumstances. Courts must remain independent and capable to evaluate, and if necessary, nullify, any unlawful imposition or unjustified extension of emergency measures.
- (c) National human rights institutions and civil society organizations shall monitor human rights violations. In addition, advocates and legal aid providers may take up cases where emergency powers are being enforced in a discriminatory manner or there is disproportionate or illegal use of force.

7.2.2 Arresting Petty Offenders

- (a) Petty offenders arrested during unique circumstances shall be accorded all the rights and fundamental freedoms.¹³³
- (b) During the arrest, law enforcement officers must use reasonable and appropriate force.

133 Constitution of Kenya (2010) Article 51, Constitution of Kenya.

- (c) The police and other security agencies in the administration of their mandate must refrain from using tools that can further aggravate the prevailing circumstances, such as tear gas canisters, during public health crises and pandemics.
- (d) The police shall adhere to the law, guidelines, and measures released by the government to manage arrests and the population in the police stations.

7.2.3 Pretrial Detention

- (a) Petty offenders shall not be held in police custody for petty or minor offences if the offence is punishable by a fine only or by imprisonment for a period not exceeding six months.¹³⁴
- (b) Petty offenders should not be held at the Police Stations for more than twenty-four hours and should be released on either police cash bail or personal bond.
- (c) All persons with underlying conditions should not be held at the police station longer than necessary. The police should take all necessary measures to protect the arrested persons' right to health.

7.2.4 Trial

- (a) Petty offenders, who are arrested must be presented in court within twenty-four hours.
- (b) The courts may use other means, including digital avenues to dispose of petty offences. Courts may embrace the use of non-custodial sentencing, including fines, Community Service Orders (CSO), probation, and warnings, among others.
- (c) Courts will encourage the use of Alternative Justice Systems (AJS), which may include diversion, ADR, and plea bargaining, among others.

7.2.5 Decongestion of Prisons and Places of Detention

- (a) All agencies of the criminal justice sector shall develop mechanisms to facilitate cooperation and collaboration to reduce the congestion of prisons and other places of detention. Mechanisms include increasing the use of alternatives to pretrial detention and imprisonment.

¹³⁴ Article 49 (2), Constitution of Kenya. Also stated as a commitment by the National Police Service in their Bail and Bond Charter.

- (b) Where separate holding facilities are deemed necessary due to the unique circumstance, for example, in the containment of disease during pandemics or public health crises, the same shall be identified and gazetted as holding facilities.
- (c) Detention facilities will endeavour to have linkages with other service providers to offer services to petty offenders, including medical, legal, psychosocial support, health and sanitation services, and childcare, among others.
- (d) While respecting the interest of justice and ensuring adequate protection of victims' rights, all efforts should be made to decongest detention facilities, including prisons, police stations, and immigration detention centres. Particular attention is needed for gender and child sensitivity in developing protocols and guidelines for women and children deprived of liberty during unique circumstances, including in cases where women are imprisoned with their children.

REFERENCES

Collette Suda (1997) 'Street children in Nairobi and the African Cultural Ideology of Kin-Based Support System: Change and Challenge.' Available at: <http://search.ebscohost.com/login.aspx?direct=true&db=psyh&AN=1999-00066-003&site=ehost-live>

Federation of Women Lawyers (2008) 'Documenting Human Rights Violations of Sex Workers in Kenya: A Report based on the Findings of a Study conducted in Nairobi, Kisumu, Busia, Nanyuki, Mombasa and Malindi Towns in Kenya.' Available at <https://kelinkkenya.org/wp-content/uploads/2010/10/Documenting-Human-Rights-Violations-of-Sex-Workers.pdf>

Human Rights Watch (1997) 'Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya.' Available at: <https://www.refworld.org/docid/3ae6a7e94.html>

Kenya National Commission on Human Rights (2018) 'Decriminalization and Reclassification of Petty Offences in Kenya.' Available at <https://www.knchr.org/Portals/0/PETTY%20OFFENCES%20-%20FINAL%20FINAL.pdf>

Lukas Muntingh & Kristen Petersen (2015) 'Punished for Being Poor: Evidence and Arguments for the Decriminalisation and Declassification of Petty Offences.' Available at <http://hdl.handle.net/10566/5126>

Lydia Matata (n.d) 'Kenyan living with mental illness get lost in the criminal justice system.' Available at <https://pettyoffences.org/kenyans-living-with-mental-illness-get-lost-in-the-criminal-justice-system/>

National Council on the Administration of Justice (2015) 'Bail and Bond Policy Guidelines.' Available at <https://ncaj.go.ke/wp-content/uploads/2019/10/Bail-and-Bond-Policy-Guidelines.pdf>

National Council on the Administration of Justice (2015) 'The Judiciary Sentencing Policy Guidelines,' Kenya Gazette Notice Number 2970. Available at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/SentencingGuidelines.pdf>

National Council on the Administration of Justice (2017) 'Criminal Justice System in Kenya: An Audit Understanding pretrial detention in respect to case flow management and conditions of detention.' Available at <https://ncaj.go.ke/wp-content/uploads/2019/10/Criminal-Justice-System-in-Kenya-An-Audit.pdf>

Open Society Justice Initiative (2008) 'Justice Initiatives: Pretrial Detention.' Available at https://www.justiceinitiative.org/uploads/2f65cc09-c4da-4a48-9929c8bff4110f53/Justice_Initiat.pdf

Rebecca Sorber, Susanna Winston, Julius Koech et al. (2014) ‘Social and Economic Characteristics of Street Youth by Gender and level of Street Involvement in Eldoret, Kenya,’ PLoS ONE 9(5): e97587. Available at <https://doi.org/10.1371/journal.pone.0097587>

The Judiciary Criminal Procedure Bench Book (2018). Available at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/JudiciaryCriminalProcedureBenchBook.pdf>

United Nations Office on Drugs and Crime (2009) ‘World Drug Report 2009,’ (Vienna: UNODC, 2009)

United Nations Office on Drugs and Crime. (2013). Handbook on Strategies to Reduce Overcrowding in Prison.’ New York. Available at https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf

Victor Kapiyo ‘Addressing Petty Offences in Kenya: Which Way Forward?’ (n.d.) Available at https://pettyoffences.org/addressing-petty-offences-in-kenya-which-way-forward/#_ftn5

World Prison Brief – Kenya <http://www.prisonstudies.org/country/kenya>

INTERNATIONAL AND REGIONAL INSTRUMENTS

African Commission on Human and Peoples’ Rights (2016) ‘Guidelines on the Conditions of Arrest, Police Custody and Pretrial Detention in Africa.’ (Luanda Guidelines). Available at: <https://www.refworld.org/docid/5799fac04.html>

Organization of African Unity (1981) ‘African Charter on Human and Peoples’ Rights.’ (“Banjul Charter”) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) Available at <https://www.achpr.org/legalinstruments/detail?id=49>

Principles on the Decriminalisation of Petty Offences (2018) adopted at the 61st Ordinary Session of the African Commission on Human and Peoples’ Rights

The African Commission on Human and Peoples’ Rights, ‘Ouagadougou Plan of Action Adopted on Accelerating Prisons and Penal Reforms in Africa.’ Available at <https://www.achpr.org/legalinstruments/detail?id=42>

The African Commission on Human and Peoples’ Rights ‘Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.’ Available at <https://www.achpr.org/legalinstruments/detail?id=38>

The UN Guidelines for Action on Children in the Criminal Justice System (the Vienna Guidelines; ECOSOC 1997/30)

The UN Special Rapporteur Report on Extreme Poverty and Human Rights, A/67/278

UN Committee against Torture, Concluding Observation on Costa Rica 2008, CAT/C/CRI/CO2. Available at https://tbinternet.ohchr.org/_

UN Convention on the Rights of Persons with Disabilities' (2008). Available at <https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>

UN Convention on the Rights of the Child (1989). Available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

UN General Assembly, International Covenant on Civil and Political Rights (ICCPR) 16 December 1966. Available at <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249. Available at: <https://www.un.org/womenwatch/daw/cedaw/>

UN Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak : mission to Togo, 6 January 2008, A/HRC/7/3/Add.5, para 69 <https://www.refworld.org>

United Nations High Commission for Refugees, "Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention," (2012.) Available at <https://www.refworld.org/pdfid/503489533b8.pdf>

United Nations "Guidelines on the Role of Prosecutors." Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx#:~:text=Prosecutors%20shall%2C%20in%20accordance%20with,of%20the%20criminal%20justice%20system.>

United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Adopted by General Assembly resolution 43/173 of 9 December 1988. Available at <https://www.ohchr.org/Documents/ProfessionalInterest/bodyprinciples.pdf>

United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948. Available at https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf

United Nations High Commissioner for Human Rights Report on Non-Discrimination and Protection of Persons with Increased Vulnerability in the Administration of Justice, in particular situations of deprivation of liberty and with regard to the causes and effects of over-incarceration and overcrowding (August 2017)

United Nations Standard Minimum Rules for the Treatment of Prisoners (the “Nelson Mandela Rules”) (2015) Available at <https://cdn.penalreform.org/wp-content/uploads/1957/06/ENG.pdf>

United Nations, General Assembly, Resolution 67/187, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Annex, paras. 15-19, 20 December 2012, A/RES/67/187

LAWS OF KENYA

The Children Act, 2001 (Cap. 141)

The Constitution of Kenya (2010)

The County Law Compliance Bill and Enforcement Bill.

The Criminal Procedure Code (Cap 75)

The Forest Conservation and Management Act (2016)

The Kisumu County By-Laws

The Mombasa County By-Laws

The Nairobi County By-Laws

The National Legal Aid Act (2016)

The National Police Service Act (2011)

The National Police Service Standing Orders (2017)

The Penal Code of Kenya (Cap. 62)

The Public Health Act (Cap. 242)

The Wildlife Conservation and Management Act (2013)

CASE LAW

Aids Law Project vs Attorney General & 3 Others Petition, No. 97 of 2010 [2015] eKLR

Council of County Governors vs Attorney General & Another [2017] eKLR

EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & Another, Petition No. 150 & 234 of 2016 (consolidated), accessed at <http://kenyalaw.org/caselaw/cases/view/173946/>

Lucy Nyambura & another v Town Clerk, Municipal Council of Mombasa & 2 others [2011] eKLR

Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party) [2018] eKLR



© National Council on the Administration of Justice (NCAJ)
5th Floor Mayfair Center, Ralph Bunche Road
P.O. Box 30041-00100, Nairobi.
Email: ncaj@court.go.ke



THE OPEN SOCIETY INITIATIVE 
FOR EASTERN AFRICA

