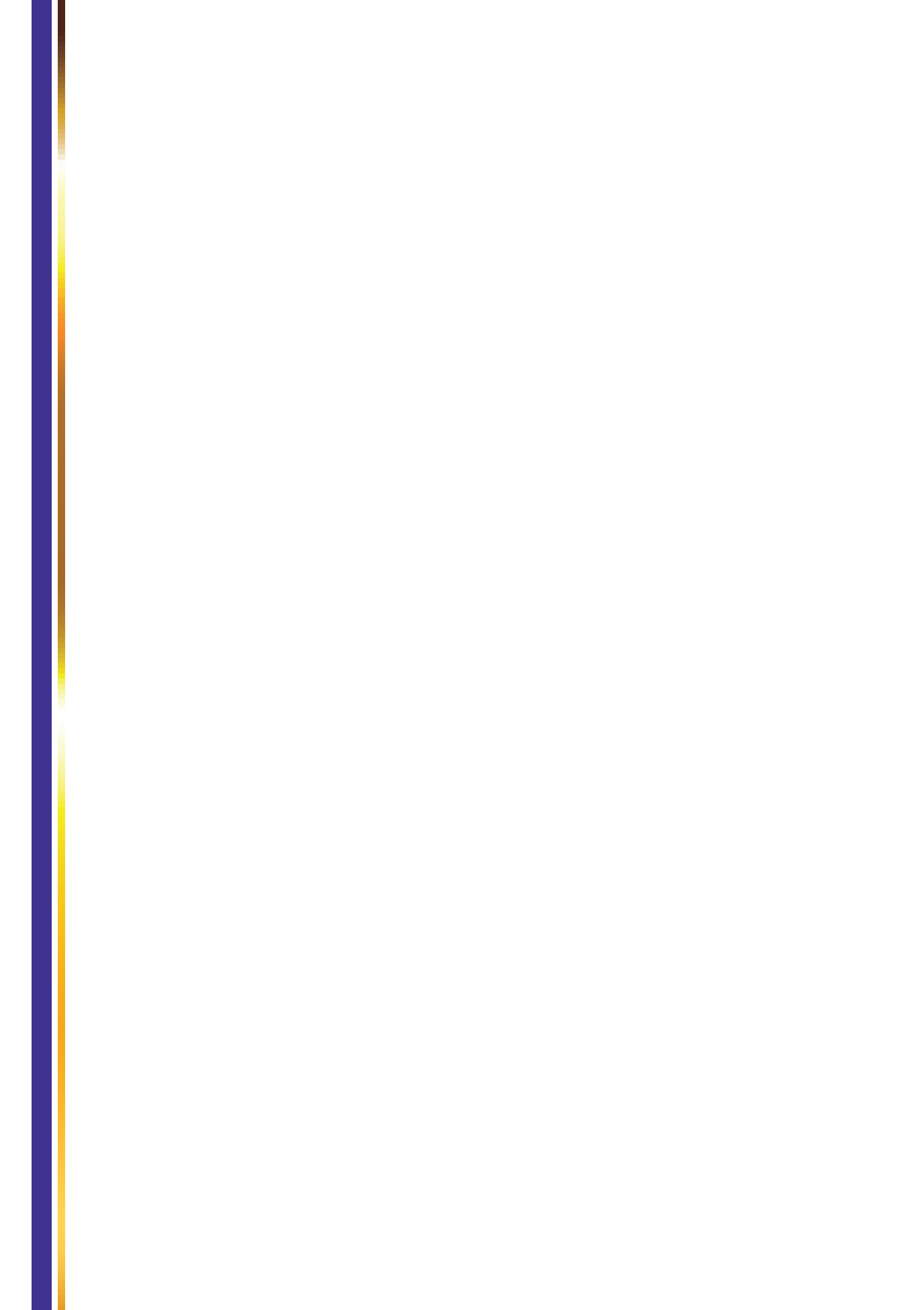




REPORT ON THE STATUS OF PERSONS WITH MENTAL ILLNESS IN THE CRIMINAL JUSTICE SYSTEM IN KENYA

THE NATIONAL COUNCIL ON
THE ADMINISTRATION OF JUSTICE



**REPORT ON THE STATUS OF PERSONS WITH MENTAL ILLNESS IN
THE CRIMINAL JUSTICE SYSTEM IN KENYA**

© National Council on the Administration of Justice

5th Floor Mayfair Center

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



In Kenya, mental health has increasingly become a concern over the past few years. In the criminal justice system, issues concerning mental health and handling of persons with mental illness are some of the most challenging and misunderstood, mainly owing to lack of awareness. The unawareness negatively impacts the implementation of laws around the issue and makes it more difficult for victims, witnesses and offenders to access justice. The laws governing how persons with mental illness interact with the criminal justice system generally do not adequately embody their rights and protections as envisaged in the Constitution of Kenya (2010). In addition, the criminal justice system does not effectively rehabilitate offenders with mental illness and facilitate their successful re-entry back into the community upon release. Therefore, persons with mental illness are highly stigmatized and vulnerable within the criminal justice system.

To serve them well, criminal justice sector institutions must work collaboratively to ensure respect for human dignity for persons with mental illness and protect against violations of their fundamental rights.

I laud the National Committee of Criminal Justice Reforms under the able leadership of Hon. Lady Justice Grace Ngenye, for preparing this report to raise awareness that mental health issues are worth consideration while dispensing justice and should be accorded adequate attention. The report contains a comprehensive review of the laws and policies that govern persons with mental illness within the criminal justice system. Further, the report highlights the gaps, and challenges in practice, an assessment of the conditions of detention of persons with mental illness, and a raft of associated recommendations. Implementation of the recommendations by NCAJ and member agencies will contribute toward the realisation of the shared vision of a criminal justice system that serves all people equally and efficiently.

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

ACKNOWLEDGEMENTS



The NCAJ through its National Committee on Criminal Justice Reforms (NCCJR) developed this report in line with its mandate of identifying legal, institutional, administrative, and financial barriers that impede the efficient functioning of the criminal justice system. The recommendations in the report will go a long way in enhancing access to justice for persons with mental illness.

First, I wish to sincerely thank the Correction and Aftercare Services Subcommittee members for steering the development of this report. Second, the commitment of the entire NCCJR that enriched this report is highly appreciated.

Third, I also acknowledge the invaluable input of members of the public, users, actors, and stakeholders in various institutions of the criminal justice system, who participated in developing this report by sharing their experiences, views, and recommendations.

Gratitude goes to Dr. Boniface Chitayi, the President of the Kenya Psychiatric Association, and Ms. Susan Ouko, the Head of Department – Criminal Justice Sector Reforms at NCAJ, for conducting research that guided the preparation of this report. The report's development also benefited greatly from the review, editing, guidance, and support of Dr. Moses Marang'a, the Executive Director of NCAJ, and Ms. Irene Omari, Head of Department - Council Coordination at NCAJ.

We appreciate the technical and financial support received from the International Development Law Organization (IDLO-Kenya) under the leadership of Ms. Teresa Mugadza towards the development and publication of this report.

**Hon. Lady Justice Grace Ngenye
Judge of the Court of Appeal &
Chairperson, NCAJ Committee on Criminal Justice Reforms (NCCJR)**

TABLE OF CONTENTS

FOREWORD	iv
ACKNOWLEDGEMENTS	v
ACRONYMS	vii
EXECUTIVE SUMMARY	viii
1.0 INTRODUCTION	1
2.0 THE LEGAL FRAMEWORK	3
2.1 The Penal Code	3
2.2 The Criminal Procedure Code (CPC)	3
2.3 The Mental Health Act (Cap. 248)	7
2.4 The Prisons Act (Cap 90)	9
3.0 ISSUES REGARDING MENTAL HEALTH IN THE CRIMINAL JUSTICE SYSTEM	10
3.1 Lack of awareness	10
3.2 Criminalization of symptoms of mental illness	10
3.2.1 Attempted Suicide	10
3.2.2 Substance Abuse Disorder	11
3.3 Gaps in training, practice and inadequate access to mental health services across the Criminal Justice System	13
3.4 General Conditions of detention for mentally ill offenders at the Mathari National Teaching and Referral Hospital	14
3.5 Coordination amongst Actors in the Criminal Justice System	15
4.0 RECOMMENDATIONS FOR THE CRIMINAL JUSTICE SYSTEM	17
REFERENCES	22
ANNEX 1: Psychiatric Ward Conditions of Detention: Mathari National Treatment and Referral Hospital (MSU) January, 2021.	25

ACRONYMS

CPC	Criminal Procedure Code
KPS	Kenya Prison Service
MOH	Ministry of Health
MSU	Maximum Security Unit
NCAJ	National Council on the Administration of Justice
NCCJR	National Committee on Criminal Justice Reforms
POMAC	The Power of Mercy Advisory Committee

EXECUTIVE SUMMARY

Persons with mental illness are highly stigmatized and marginalized within the criminal justice system, mainly due to inadequate awareness of mental health issues. The low awareness levels cut across justice sector institutions, including the police, prosecution, court, and correctional services. A large number of the people arrested, tried, convicted, and imprisoned for committing petty offences such as causing a breach of the peace or for indecent acts penalized under Section 182 of the Penal Code and “nuisance offences” captured under County Legislation are mentally ill.

There is a need for the criminal justice system to deter, rehabilitate, or facilitate access to appropriate treatment for persons with mental illness. Although the number of suicide and attempted suicide cases is on the rise, the automatic attachment of criminal liability and penalization of symptoms of mental illness has little impact on deterrence persons.

Given their vulnerable status in detention, mentally ill offenders also require additional consideration and protection. Persons exhibiting suicidal tendencies require mental health treatment such as psychological counseling, psychotherapy, and participation in suicide prevention programs. There are a limited number of mental health care providers within prison institutions in Kenya. For instance, practice, however, appears to be inconsistent in dealing with inmates presenting with mental health issues in prisons across the country. Further, Mathari National Teaching and Referral Hospital is the only public institution offering specialized psychiatric services, forensic services, drug rehabilitation services, and training in psychiatry for doctors and other health workers. The Maximum-Security Unit at Mathari only caters to persons over eighteen years hence adversely affecting service to children. Therefore, a clear gap exists in the criminal justice system concerning handling child offenders with severe mental health issues. A gap also exists concerning limited psycho-social support for the various actors within the criminal justice system who handle high-risk and stressful assignments.

The report contains numerous recommendations that once implemented, will advance the rights of persons with mental illness in the criminal justice system, as envisaged by the Constitution of Kenya (2010) under Articles 25(a), 27(4), 28, 29, 48, 49, 50 and 54. There is a need to develop strategies to facilitate institutional cooperation and collaboration in managing offenders presenting with mental illness to ensure access to mental assessment and appropriate treatment. Towards enhancing access to effective and efficient provision of forensic mental health services within the criminal justice system, there is a need to increase access to in-patient and out-patient services at the Mathari National Treatment and Referral Hospital and within correctional institutions in Kenya. There is a need to increase

access to court liaison services, enhance access to mental health services in the community, and increase the number of mental health training/capacity-building activities for all actors within the criminal justice system.

There is a need for NCAJ member agencies to come together and develop comprehensive guidelines which ensure that the unique circumstances of persons with mental illness are recognized, respected, and accommodated within the criminal justice system. In particular, the guidelines should address how institutions of the criminal justice system can work collaboratively in the management of victims, witnesses, and offenders presenting with mental illness to ensure reduction of delays in court processes, quick assessment, and access to the appropriate treatment.

1.0 INTRODUCTION

Mental health is a critical component of overall health, yet, there is limited awareness about mental health in general and poor recognition of mental disorders owing to stigma.¹ Inadequate awareness and limited understanding have contributed to poor health outcomes, premature deaths, human rights violations, and economic loss globally.² Additionally, low awareness on mental health has adversely affected efficient administration of criminal justice.

In Kenya, the Ministry of Health's Mental Health Policy (2015-2030) indicates that the number of people who present with mental disorders has risen exponentially. However, many of these people do not have access to adequate mental health care services.³ The Ministry of Health (MoH) Taskforce on Mental Health Report (2020) has similar findings and indicates that one out of every five Kenyans is likely to suffer from a mental illness within their lifetime.⁴ From the report, majority of Kenyans do not have sufficient information to enable them to identify the signs and symptoms of mental illness, and how it may affect or alter the behavior of an individual. The lack of awareness cut across sectors, including the justice sector and, more specifically, the criminal justice system.

Persons with mental illness are highly stigmatised and vulnerable in the criminal justice system. Those particularly vulnerable include women, children, and other disadvantaged persons. Inadequacies within the system have resulted in the victimization of mentally ill offenders and the further deterioration of their mental health. The inadequacies also yield violations of the rights of persons with mental illness as guaranteed by the Constitution of Kenya (2010).⁵

Inadequate access to appropriate health services and support may cause some people with mental illness to commit crimes or behave in ways considered a nuisance by society. Lack of access to healthcare compounded by poverty, trauma, and substance use problems may further increase the likelihood that a person with mental illness will behave in a manner that triggers a criminal justice response.⁶

¹KNCHR (2011) "Silenced Minds: the Systemic Neglect of the Mental Health System in Kenya." Available at http://www.knchr.org/Portals/0/EcosocReports/THE_%20MENTAL_HEALTH_REPORT.pdf

²The World Health Organization, (2019) "The WHO Special Initiative for Mental Health (2019-2023): Universal Health Coverage for Mental Health," Available at <file:///C:/Users/User/Desktop/NCCJR/RESEARCH%20NCCJR/Mental%20Health/WHO-MSD-19.1-eng.pdf>

³Ministry of Health (2015) "Kenya Mental Health Policy 2015–2030" p.5. Available at <http://publications.universalhealth2030.org/uploads/Kenya-Mental-Health-Policy.pdf>

⁴MoH Taskforce on Mental Health in Kenya. (2020) "Mental health and Well-being: Towards Happiness & National Prosperity." P. 11.

⁵Articles 25(a), 27(4), 28, 29, 48, 49, 50 and 54.

⁶Torrey E.F., A.D. Kennard, D. Eslinger, R. Lamb, and J. Pavle. (2010). *More Mentally Ill Persons are in Jails and Prisons than Hospitals: A Survey of the States.* VA: National Sheriffs Association and Treatment Advocacy Center. Available at https://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf

Despite the challenges, Kenya has made significant strides towards raising awareness of mental health issues and mobilizing efforts in support of mental health.⁷ Equally important is the need for mentally ill offenders to have access to the same range of services as the wider community. To address the plight of persons with mental illness, the National Council on the Administration of Justice (NCAJ) Committee on Criminal Justice Reforms (NCCJR) undertook an analysis and review of the laws and policies that govern persons with mental illness within the criminal justice system, assessed the conditions of detention of persons with mental illness, and engaged stakeholders to develop strategic recommendations on the efficient administration of justice for persons with mental illness.

⁷On Nov. 21 and 22, 2019, Kenya held its first Mental Health Conference, steered by its Ministry of Health. His Excellency, President Uhuru Kenyatta ordered the formation of the MoH Taskforce on Mental Health in Kenya in 2019, which was mandated to study mental health status in the country and recommend solutions to reform mental health systems. The Taskforce presented its final Report to the Health Cabinet Secretary (CS), Mutahi Kagwe, on 7th July, 2020. See Note 3.

2.0 THE LEGAL FRAMEWORK

2.1 The Penal Code

Persons with mental illness comprise a disproportionate number of the people who are arrested, tried, convicted, and imprisoned for petty offences. Common offences include causing a breach of the peace or committing indecent acts penalized under Section 182 of Penal Code and County Legislation. Section 226 of the Penal Code further criminalizes symptoms of mental illness that manifest as attempted suicide. The section further states that anyone who attempts to kill himself is guilty of a misdemeanour. Section 36 of the Penal Code provides for general punishment of misdemeanors as imprisonment for a term not exceeding two years or with a fine.

The Penal Code uses demeaning language such as “idiot and imbecile” to refer to persons with mental illness.⁸ This further advances the stigmatization even where the law strives to protect them. Section 146 of the Penal Code reads as follows:

“146. Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years.”

2.2. The Criminal Procedure Code

The Criminal Procedure Code (CPC) outlines the procedures to be followed when handling cases of persons who present with serious mental illness. Section 162 (1)-(3) provides that where the court has reason to believe that an accused person has a mental illness and is unable to stand trial, the court shall postpone the matter, and the accused shall be released on bail unless there are compelling reasons against granting of bail. Section 162(4)&(5) provide that where bail is denied, the accused person shall be detained in safe custody in a place to be determined by the court until the President orders the person to be detained in a mental health facility.

Section 163 outlines the procedure where a person of unsound mind is subsequently found capable of making a defence and is, therefore, able to stand trial. In this case, a medical officer shall forward a certificate to the Attorney-General, who shall decide whether to continue the proceedings against the person.

⁸ The Section reads as follows: “146. Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years.”

Section 166 provides for persons found “guilty and insane,” pegged on the power given to the President to exercise a power of mercy. The Section reads as follows:

- “(1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.
- (2) When a special finding is so made, the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.
- (3) The President may order the person to be detained in a mental hospital, prison or other suitable place of safe custody.
- (4) The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the President under subsection (3) shall make a report in writing to the Minister for the consideration of the President in respect of the condition, history and circumstances of the person so detained, at the expiration of a period of three years from the date of the President’s order and thereafter at the expiration of each period of two years from the date of the last report.
- (5) On consideration of the report, the President may order that the person so detained be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.
- (6) Notwithstanding the subsections (4) and (5), a person or persons thereunto empowered by the President may, at any time after a person has been detained by order of the President under subsection (3), make a special report to the Minister for transmission to the President, on the condition, history and circumstances of the person so detained, and the President, on consideration of the report, may order that the person be discharged or otherwise dealt with, subject to such

conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.

- (7) The President may at any time order that a person detained by order of the President under subsection (3) be transferred from a mental hospital to a prison or from a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital.”

Under sub-section (5), the President is empowered not to pass sentence over the person against whom the Court has entered a special finding under sub-section (1), but a power of mercy. The former is a judicial function, and the latter is an executive responsibility.⁹ That executive power has constitutional underpinning under Article 133 of the Constitution, which stipulates thus:

“133(1) On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by-

- (a) granting a free or conditional pardon to a person convicted of an offence;
- (b) Postponing the carrying out of a punishment, either for a specified or indefinite period;
- (c) Substituting a less severe form of punishment; or
- (d) Remitting all or part of a punishment.”

The Advisory Committee is established under Article 133(2) of the Constitution, and its membership includes the Attorney General as Chair and the Cabinet Secretary responsible for correctional purposes. The power of mercy governs all matters relating to a petition under the Constitution for the exercise of the power of mercy by the President according to Article 133 of the Constitution.¹⁰ Section 2 of the Act provides the meaning of a “convicted criminal prisoner” to be any criminal prisoner under sentence of a court or a court martial and includes a person detained in prison under sections 162 to 167 of the CPC.

Section 167 provides the procedure for when the accused does not understand proceedings. The Section reads as follows:

⁹ Section 166 was declared unconstitutional by Criminal Case No. 6 of 2011, *Republic v S O M* [2018] eKLR. Available at <http://kenyalaw.org/caselaw/cases/view/152606/>

In this case, the Court held that the provisions of section 166 of the CPC are unconstitutional to the extent that they take away the judicial function to determine the nature of the sentence or consequence of the special finding contrary to Article 160 of the Constitution by vesting the discretionary power in the executive. It also violates the right to a fair trial protected under Article 25 of the Constitution.

¹⁰ *The Power of Mercy Act (Act No. 21 of 2011) Section 3*

“(1) If the accused, though not insane, cannot be made to understand the proceedings.

- (a) In cases tried by a subordinate court, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the President’s pleasure; but every such order shall be subject to confirmation by the High Court;
 - (b) In cases tried by the High Court, the Court shall try the case and at the close thereof shall either acquit the accused person or, if satisfied that the evidence would justify a conviction, shall order that the accused person be detained during the President’s pleasure.”
- (2) A person ordered to be detained during the President’s pleasure shall be liable to be detained in such place and under such conditions as the President may from time to time by order direct, and whilst so detained shall be deemed to be in lawful custody.
- (3) The President may at any time of his own motion, or after receiving a report from any person or persons thereunto empowered by him, order that a person detained as provided in subsection (2) be discharged or otherwise dealt with, subject to such conditions as to the person remaining under supervision in any place or by any person, and such other conditions for ensuring the welfare of the detained person and the public, as the President thinks fit.
- (4) When a person has been ordered to be detained during the Presidents pleasure under paragraph (a) or paragraph (b) of subsection (1), the confirming or presiding judge shall forward to the Minister a copy of the notes of evidence taken at the trial, with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make.”

The Courts have interrogated and addressed the provisions of the CPC highlighted above. Section 167(1) was declared unconstitutional in the case of *Hassan Hussein Yusuf v Republic*¹¹ as it directs that a person with mental illness and who is unable to understand proceedings to be detained at the pleasure of the President. The Court held that the Section violates Articles 25 and 29 of the Constitution, prohibiting cruel, inhuman, and degrading treatment.

¹¹ *Hassan Hussein Yusuf v Republic Meru High Court Criminal Appeal No. 59 of 2014 [2016]eKLR. The learned Judge reiterated this position in B K J v Republic, MERU HC Criminal Appeal No. 16 of 2015 [2016]eKLR.*

In *Joseph Melikino Katuta v Republic*, the Court further emphasized that keeping a mentally ill person in prison for an indeterminate period is cruel, inhuman, and degrading treatment contrary to Articles 25 and 29 of the Constitution.¹² A person with mental illness should be treated on an equal basis as any other offender with regards to their rights and protections. As such, they should not be subject to more extended periods of incarceration than any other person based solely on mental illness.

2.3. The Mental Health Act (Cap. 248)

The Mental Health Act provides little direct protection for persons with mental illness in the criminal justice system. Section 38 provides for the protection of dignity for persons with mental illness by having court sessions in camera.¹³ The Act under Section 16 (1) (b) also authorizes a police officer to take into custody a person who is suffering from a mental disability and take them to a treatment facility.

The Mental Health (Amendment) Bill, 2018,¹⁴ proposes to make amendments to the Mental Health Act targeted at promoting the mental health and well-being of all persons; reducing incidences of mental illness, and enhancing access to mental health care, treatment, and rehabilitation services for all persons with mental illness.

The Bill further seeks to eradicate the stigmatisation of individuals and promote the recovery of patients by enhancing their rehabilitation and integration back into the community, all while ensuring that the rights of a person with mental illness are protected and safeguarded.

Noteworthy highlights of the Bill include the addition of guiding principles, such as the promotion and fulfillment of the right to the highest attainable standard of health as enshrined under Article 43 of the Constitution, preservation of the freedom and dignity of every human being, the fair and equitable treatment of persons with mental illness; and protection of persons with mental illness from discrimination.

The Bill also includes the obligations of national and county governments concerning allocating resources (human and monetary) and developing rehabilitation programmes and strategies for sensitization, research, and data collection. The proposed Bill also captures the rights of persons with mental illness. They include the right to mental health services, the right to consent to treatment and participate in treatment planning, the right to access mental

¹² *Joseph Melikino Katuta v Republic*, Voi HC Criminal Appeal No. 12 of 2016 [2016]eKLR

¹³ *The Mental Health Act, Chapter 248 Laws of Kenya, Revised Edition 2012 (1991)*

¹⁴ *Mental Health (Amendment) Bill, 2018*. Available at <http://www.parliament.go.ke/sites/default/files/2018-12/Mental%20Health%20%28Amendment%29%20Bill%2C%202018.pdf>

health insurance, the right not to be subjected to forced labour, whether within or outside a mental health facility; right to receive remuneration for any work done, similar to that payable to a person without mental illness; right to access information; right to confidentiality; and right to representation.

The Bill includes a seclusion and restraint section, which provides that a person with mental illness shall not be physically restrained or secluded except where authorized by a mental health practitioner as being the only means available to prevent immediate or imminent harm to the person with mental illness or other people. Seclusion or restraint shall be under humane conditions and should not extend beyond the period which is strictly necessary to administer treatment.¹⁵

The Bill does not specifically address the issues concerning patients connected to the criminal justice system. Provisions addressing forensic mental health services are crucial to facilitate enhanced diagnostic, treatment, and rehabilitation for forensic mental health services clients. Services must appropriately provide for the unique needs of both adults and juveniles.

It is essential to acknowledge that there are inherent difficulties in providing mental health services within a correctional facility, given the major focus of correctional facilities is to secure containment. In contrast, the focus of mental health institutions is the diagnosis, treatment, and rehabilitation. In the same vein, there is a difference between the provision of forensic mental health care and general mental health care services in a hospital because of the forensic patient's involvement in the criminal justice system. Therefore, the provision of mental health care services should ensure equality of service delivery regardless of an individual's age, gender, culture, socio-economic status, religious beliefs, previous conditions, forensic status, and physical or other disability.

¹⁵ *Ibid.*, Section 9E

2.4. The Prisons Act (Cap 90)

Section 38 of the Act addresses the removal of prisoners of unsound mind and provides as follows:

- “(1) Whenever a medical officer is of the opinion that any prisoner is of unsound mind, he may, by order under his hand in the form prescribed, direct that such prisoner be removed to any mental hospital in Kenya and be there detained, and such order shall be authority for the reception of the prisoner and for his detention in such mental hospital until removed or discharged as hereinafter provided.
- (2) Where any prisoner removed to a mental hospital under subsection (1) of this section is, in the opinion of the person in charge of such mental hospital, no longer of unsound mind, the person in charge as aforesaid shall notify the officer in charge of the prison from which the prisoner was removed, and the prisoner shall then be delivered into the custody of the officer in charge of that prison if still liable to be confined in prison, and if not so liable, shall be released.
- (3) Upon the expiration of the term of imprisonment to which he has been sentenced, the provisions of section 30 of the Mental Treatment Act¹⁶ shall apply to any prisoner detained in a mental hospital under this section as if he were detained in accordance with a reception order made under Part VI of that Act.¹⁷
- (4) The period, during which the prisoner has been detained in a mental hospital under this section shall be reckoned as part of his term of imprisonment.”

¹⁶ *Mental Treatment Act [Cap. 248 (1970)] has since been repealed and there is need to amend the Prisons Act to reflect the same.*

¹⁷ *The Mental Health Act (Cap 248) Part VI addresses admission of Involuntary Patients to mental health facilities. Section 14 touches on temporary treatment without certificate of certain persons.*

3.0 ISSUES ON MENTAL HEALTH IN THE CRIMINAL JUSTICE SYSTEM

3.1 Lack of Awareness

Lack of awareness leads to stigmatizing persons suffering from mental health disorders in the community and the criminal justice system. The lack of awareness cuts across all criminal justice sector institutions. Law enforcement, in particular, is the first point of contact with the criminal justice system that a person with mental illness may encounter owing to arrest for a petty offence, detention for their protection, or the safety of others. Owing to inadequate training and sensitization on mental health, law enforcement officers may not be in a position to discern whether distractive behaviour, often labeled the same as resistance instead, results from a mental health disorder.

3.2 Criminalization of symptoms of mental illness

3.2.1. Attempted Suicide

Suicide is caused by a self-directed injurious act with the intent to die. Although it is extreme, it is not an uncommon outcome for people with untreated mental disorders.¹⁸ The World Health Organization Report (2018) indicates that for every adult who has died from suicide globally, there have been at least twenty others attempting suicide.¹⁹ In Kenya, the MoH Taskforce on Mental Health Report places the national suicide mortality rate at 4.26 per 100, 000 of a population.²⁰

Several African countries such as Ghana, Nigeria, Rwanda, Tanzania, Uganda, and Kenya inherited legislation that penalized attempted suicide from their colonial administrators and has continued to maintain said laws in statutes.²¹ The rationale behind criminalizing attempted suicide was to deter said behavior. Unfortunately, criminalization has not effectively reduced the incidence of attempted suicide.²² Section 266 of the Kenyan Penal Code defines attempted suicide as a misdemeanor, which is punishable through imprisonment for two years, a fine, or both.

Some countries have, however, made significant strides to decriminalize suicide, including Sweden (1864), the UK (1961), Canada (1972), Ireland (1993), and India (2017.) The World Health Organization in 2014 reported that rates of suicide tended to decline in countries which have decriminalized it.

¹⁸ See Note 4. *The Report by MoH Taskforce on Mental Health in Kenya (2020)* p. 20

¹⁹ World Health Organization (2018). *Global Health Estimates 2016: Deaths by cause, age, sex, by country and by region, 2000-2016*. World Health Organization, Geneva.

²⁰ See Note 4. "Mental health and Well-being: Towards Happiness & National Prosperity." p. 22

²¹ Mensab Adinkerab, "Anti-Suicide Laws in Nine African Countries: Criminalization, Prosecution and Penalization," (2016) *African Journal of Criminology and Justice Studies: AJCJS*, Vol.9, Issue 1.

²² Lydia Matata, "Kenya's Criminalizing of Suicide Makes Things Worse for Mentally Ill, Critics Say," (2017) *Global Press Journal*. Available at <https://globalpressjournal.com/africa/kenya/kenyas-criminalizing-suicide-makes-things-worse-mentally-ill-critics-say/>

In the year 2016, the number of attempted suicide cases recorded by the Kenya National Police Service was 356; in 2017, the number of cases was 387; and in 2018, the number of cases recorded stood at 379.²³ It is important to note that the National Police Service only records reported incidences attempted suicides; therefore data concerning the actual number of attempts and deaths as a result of suicide in Kenya remains scarce.²⁴

We can also find the rationale for outlawing attempted suicide in religion (Christian, Islam, Judaism, and Hinduism) and in social norms, which argue that suicide contradicts the natural disposition of human beings to preserve and perpetuate life. Regarding the justification of its criminalization, it is often argued that temporary incarceration is necessary to prevent additional attempts. In addition, while incarcerated, the individual will also have the time to reflect on their misdeed and refrain from ever engaging in another suicidal act.²⁵

Instead, persons exhibiting suicidal tendencies require mental health treatment such as psychological counseling, psychotherapy, and participation in suicide prevention programs. The justification for the decriminalization of suicide includes arguments that suicidal behavior is triggered by mental disorders; mental disorders are treatable using medication, psychotherapy, and social support; punishing a survivor of suicide is discriminatory and goes against the spirit of article 43; the task force on mental health recommended that suicide attempt be decriminalized; the MoH is in the process of developing a suicide prevention strategy.

In light of the foregoing, there is a need to review Section 266 of the Penal Code, which criminalizes attempted suicide, and instead develop legislation to ensure that the appropriate health institution accords such persons access to adequate treatment and rehabilitation.

3.2.2. Substance Abuse Disorder

According to the Audit Report on the Criminal Justice System in Kenya (2017),²⁶ “nuisance offences,” such as disturbance of the peace and being drunk and disorderly, comprises nineteen (19) percent of offences recorded in Police Cell Registers. Yet, they comprised almost thirty (30) percent of the police charges

²³ The Office of the Attorney General, “National Police Service Annual Crime Report,” (2018) Available at <http://www.nationalpolice.go.ke/crime-statistics.html>

²⁴ Most of Kenya’s data on suicides comes from “lay reporting” and there is little coded data. The inaccurate coding of cause of death data has the implication that most cases of suicide are not captured. See Alphonse Shiundu, “Poor data on suicide leaves Kenya groping in the dark for answers,” (2019) *Africa Check*. Available at <https://africacheck.org/2019/03/29/analysis-poor-data-on-suicide-leaves-kenya-groping-in-the-dark-for-answers/>

²⁵ See Note 19. “Anti-Suicide Laws in Nine African Countries: Criminalization, Prosecution and Penalization,” p. 287

²⁶ The National Council on the Administration of Justice (2017) “Criminal Justice System in Kenya: An Audit Understanding pre-trial 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>

taken to court.²⁷ Law enforcement agencies utilize a significant amount of time and resources to prosecute what are essentially “anti-social behavior” charges. There is an urgent need to establish interventions that would be more suitable to curb such behavior other than criminal proceedings.

People with substance abuse disorder are more likely to enter the criminal justice system for petty offences, possession of drugs charges,²⁸ or, theft.²⁹ Under Section 3(1) and (2) of the Narcotic Drugs & Psychotropic Substances Control Act, it is an offence to be found in possession of drugs, and if found guilty, a person may be liable to a jail term of up to twenty years.³⁰ Persons who are found in possession of drugs even for personal use, are liable to prosecution under this provision.

Data collected from stakeholder engagements during various NCCJR institutional visits to drug treatment facilities across the country³¹ revealed a strained relationship between offenders suffering from drug addiction and the criminal justice system. The interviews with persons undergoing treatment at Asumbi-Karen, for example, revealed that the majority had, at one point or another, interacting with the criminal justice system due to their drug habits. Interviewees complained of harassment, excessive use of force, and arbitrary arrest by law enforcement officers. Interestingly, while the majority were arrested under suspicion of having narcotic substances, being drunk and disorderly, or loitering, few had been formally charged and presented before the courts. Interviewees also revealed that police took a long time from the point of arrest to the time of their processing at the police station.

For those who had been convicted of offences owing to substance abuse, their overall perception of the criminal justice system was that it was oppressive and did little to deter or rehabilitate persons who suffer from substance abuse disorder. Successful reintegration into society is hindered by inadequate access to appropriate treatment services during incarceration. Further, due to their obtaining a permanent criminal record, the likelihood of relapse and recidivism upon release remained high because of stigmatization by society. Instead of imprisonment or imposition of fines, it was recommended that treatment be the priority and that such persons be diverted directly to rehabilitation facilities. Criminalization of possession of drugs for personal use is an ineffective way of utilizing the resources of the criminal justice system as it is more practical to

²⁷ *Ibid.* p. 114

²⁸ *Possession of drugs for personal use is criminalized under the Narcotic Drugs and Psychotropic Substances (Control) Act under section 3(1) and (2) and the Alcoholic Drinks (Control) Act under section 33(1).*

²⁹ See Note 4. *The Report by MoH Taskforce on Mental Health in Kenya (2020)* p. 10

³⁰ *The Narcotic Drugs & Psychotropic Substances Control Act No. 4 of 1994*

³¹ *NCCJR Visit to the Omari Project in Mombasa; Asumbi Drug Treatment Facility in Homa Bay, Nyanza; and Asumbi Drug Treatment Facility in Karen, Nairobi.*

invest in treatment and harm reduction services.³² The Global Commission on Drug Policy also recommends not criminalizing drug use and possession, instead, people whose only offence is drug use or possession should be compelled to seek appropriate treatment instead.³³

3.3 Inadequate Access to Mental Health Services in the Criminal Justice System

Given their vulnerable status in detention, mentally ill offenders require additional consideration and protection. There exist inconsistencies in how inmates with mental health are handled in criminal justice sector institutions. The Audit Report on the Criminal Justice System in Kenya (2016) revealed that practices concerning treating detainees and inmates suffering from mental health issues differed across prisons in Kenya. Due to inadequate infrastructure, the common practice is to house persons with physical and mental disabilities in a separate block of the prison or the hospital section, separated from the general population. Where inmates present with more severe cases of mental illness, the practice is to refer them to psychiatric hospitals,³⁴ however, resources also influence the speed with which appropriate treatment can be rendered. For example, in several prisons, once a diagnosis is made, the transfer to a psychiatric hospital is immediate.³⁵ However, in others, the transfer may take longer to effect due to a lack of transport. In areas such as Marsabit, the transfer can take two weeks.

Children Remand Homes do not have the capacity to hold children with mental illness.³⁶ The practice has been to release such children back home to their parents. There is a gap in the criminal justice system concerning handling children presenting severe mental health issues.

A gap also exists regarding the various actors within the criminal justice system who handle high-risk and stressful assignments. Limited psycho-social support for said actors may result in high levels of stress, depression, and substance dependency, which may, in turn, affect the quality of services rendered. For example, literature has revealed that the suicide rate among Kenyan police officers is higher than the adjusted suicide rate of the country's population, indicating that the guidance and counseling services given may not be entirely effective.³⁷

³² Drug Policy Alliance (2015) "Drug and Policy Alliance: Approaches To Decriminalizing Drug Use and Possession." Available at https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Approaches_to_Decriminalization_Feb2015_1.pdf

³³ Global Commission on Drug Policy: 'Taking Control: Pathways to Drug Policies That Work, 2014'

³⁴ See Note 20. Audit Report. p. 317.

³⁵ For example in Isiolo, Kisii, Meru and Murang'a prisons.

³⁶ NCCJR has visited the following facilities: Nakuru Children's Remand Home, Likoni Children's Remand Home, Kisumu Children's Remand Home and Kirigiti Reception and Rehabilitation Centre.

³⁷ See Nyiringi P., (2016) 'Kenya Police Service Members' Perception of the Effectiveness of Guidance and Counselling Services in Curbing Suicide Ideation and Stress Management,' *International Journal of Innovative Research in Information Security (IJIRIS)*, Issue 08, Vol 3.

Offences such as desertion³⁸ within the disciplined forces have also been linked to depression or post-traumatic stress disorder.

3.4 General Conditions of Detention for Mentally Ill Offenders at the Mathari National Teaching and Referral Hospital

Mathari National Teaching and Referral Hospital is the only public institution in the country offering specialized psychiatric services, forensic services, drug rehabilitation services, and training in psychiatry for doctors and other health workers in the region. It derives its mandate from the Mental Health Act, Prison Act, the Constitution of Kenya (2010), and the CPC. The hospital comprises two central units, namely the Civil Unit and the Maximum Security Unit (MSU), established in 1978 for criminal offenders with mental illnesses.

The MSU holds both male and female patients with mental illness who have committed offences. It is strictly an adult facility and does not admit persons below 18 years. There are three categories of in-patients in the MSU:

- i. Remand patients;
- ii. Special category criminals; and
- iii. The convicted.

The entire hospital has an official bed capacity of 700, with the MSU having a physical capacity of 194 beds.³⁹ In 2019, the average bed occupancy of the MSU on average stood at 140 percent, with mentally ill offenders coming from courts, police stations, and prisons. The MSU also has an outpatient service operating three times a week which attends to approximately 155 offenders monthly.⁴⁰

Findings from the NCCJR field visits to Mathari Hospital in December 2018⁴¹ and January 2021⁴² revealed that the MSU does not comply with international standards owing to the following:

- i. The dilapidated structure of the facility is incompatible with the United Nations Standard Minimum Rules for the Treatment of Prisoners with regards to conditions of detention.⁴³
- ii. The staff-to-patient ratio is high owing to overcrowding and staff shortage, thus negatively impacting the quality of services offered.⁴⁴

³⁸ Section 141(1) the Kenya Defence Forces Act of 2012; Section 2, the Kenya Prisons Act (Cap 90)

³⁹ The National Assembly Departmental Committee on Health Report on the Status of National Referral Hospitals (2019). Available at <http://www.parliament.go.ke/sites/default/files/2019-06/Report%20on%20The%20Status%20of%20National%20Referral%20Hospitals.pdf>

⁴⁰ *Ibid.*, p.14. The MSU scaled down outpatient services in March 2020 to operate only once a week owing to government regulations on curbing the spread of COVID 19.

⁴¹ The NCAJ Committee on Criminal Justice Reforms (NCCJR) 2018 “Correctional and Aftercare Subcommittee’s Institutional Visits Report.” A follow-up visit was conducted in January, 2021.

⁴² See Annex 1: Psychiatric Ward Conditions of Detention: Mathari National Treatment and Referral Hospital (MSU) January, 2021.

⁴³ *Ibid.* Psychiatric Ward Conditions of Detention: Mathari National Treatment and Referral Hospital (MSU) 2021.

⁴⁴ *Ibid.* NCCJR Institutional Visits Report (2018) revealed that in December 2018, the MSU had a population of 126 men and 19

The quality of treatment is also inadequate due to limited access to modern drugs.

iii. There is a disconnect between the Court, the Office of Attorney General, and other criminal justice agencies, causing delays in releasing or discharging patients from the MSU. The pace at which the power of mercy is being administered is slow. Many offenders remain in the MSU long after letters recommending release on the power of mercy are written.⁴⁵

This puts a more significant strain on the resources of the facility as it is also forced to deal with illnesses resulting from old age due to the long duration of stay by patients.⁴⁶

iv. Most mentally ill offenders who are released experience stigma and rejection from the community. Therefore, the likelihood that their families and society will reject them upon release is high. The State does not currently have transitional houses to accommodate those released from the MSU and rejected by the community.

v. Legal aid is not easily accessible to psychiatric offenders who have no legal representation.

vi. There are no dedicated health facilities in Kenya with a specific mandate to handle children's mental health issues when they are found to conflict with the law.

3.5 Coordination amongst Actors in the Criminal Justice System

The police may refer a person with mental illness who has been arrested but not charged with an offence to the Civil Unit of Mathari Hospital. The Investigating Officer ensures adequate follow-up on patients referred from the police station. However, delays may occur if said officer is reassigned to other assignments or transferred to another station. Challenges also exist concerning persons committed for mental assessment. Persons assessed as fit to take a plea are often not promptly taken to court to conclude their cases. The inadequacy in coordination among the criminal justice actors may cause delays in determining the cases of persons with mental illness.

women in custody. In January 2021, the population stood at 201 men and 16 women in custody. On average, one (1) to three (3) nurses are in each section. Given the high number of male patients, the nurse-to-patient ratio in the male section of the MSU is disproportional.

⁴⁵ *During the follow-up visit, interviews with the facility's psychiatrist, nurses, and administrators revealed that several patients have been awaiting feedback from the POMAC for over a year regarding their recommendation for release.*

⁴⁶ *The feedback from the facility was that the MSU should be regarded purely as a treatment facility such that persons who have completed treatment are released back to the relevant detention facilities or back into the community. Persons with severe mental disabilities and who, therefore, will never be able to stand trial should not be detained at the MSU.*

The MSU in Mathari Hospital is mandated to receive persons strictly based on a court order. Procedural shortcomings exist at the police station level. Several stakeholders within the criminal justice system are involved in the operations of the MSU. The doctors and nurses facilitate the treatment of the patients from Mathari National Teaching and Referral Hospital under the Ministry of Health. The Kenya Prison Service (KPS) provides escort for offenders to and from court and security at the MSU. Probation Officers assess an offender's family and the community's attitude and preparedness towards releasing a special category criminal offender and submit need/risk assessment reports to the Power of Mercy Advisory Committee (POMAC.) The Department of Probation is also involved in the release, sensitization, and supervision of special category criminal offenders in the community.

Patients' committal/admission instruments to the MSU Special Category are not well defined in the CPC. When a person is found guilty and insane under Section 166 of the CPC, they are housed in prison as Special Psychiatric Offenders and later moved to a mental hospital. Their subsequent release from prison or a mental hospital requires a presidential pardon. For prisoners to receive a presidential pardon, a petition to POMAC must show specific requirements have been fulfilled, including having a community and family that will accept them upon their return. Therefore, this presents a challenge because the community often perceives such persons as burdens and may hinder the process of their reintegration back into society.

4.0 RECOMMENDATIONS FOR THE CRIMINAL JUSTICE SYSTEM

- i. Amend the legal framework dealing with persons with mental illness in the criminal justice system to enhance protection and protect against violation of rights. The table below comprises the legislative amendments proposed:

The Penal Code	
Section 11. Presumption of Sanity	There ought to be clear legislation on the issue of mental assessment before standing trial for murder. There is a need to clearly define and suggest the types of cases that ought to be subjected to mental assessment going forward.
Section 146	Amend section to remedy the use of derogatory terms (“idiots” and “imbeciles”) describing persons with mental illness.
Section 266	Repeal Section 266 of the Penal Code, which criminalizes attempted suicide. Create a provision that ensures that the appropriate health institution accords such a person access to adequate treatment and rehabilitation.
The Criminal Procedure Code	
Sections 162-166	Review Sections 162-167 of the CPC to better address the handling of persons with mental illness in the criminal justice system.
Section 167(1)	Was declared unconstitutional in the case of <i>Hassan Hussein Yusuf v Republic</i> ⁴⁷ as it directs that a person with a mental disability and is unable to understand proceedings to be detained at the pleasure of the President. The Court held that the Section violates Articles 25 and 29 of the Constitution, which prohibit cruel, inhuman, and degrading treatment. In <i>Joseph Melikino Katuta v Republic</i> , the Court further emphasized that keeping a mentally ill person in prison for an indeterminate period is cruel, inhuman, and degrading treatment contrary to Articles 25 and 29 of the Constitution. ⁴⁸
The Prisons Act	
Section 38	Amend Section 38 to align it with the Mental Health Act. Section 38(3) refers to the Mental Treatment Act, which was repealed. Amend Section to read “Mental Health Act.”

⁴⁷ *Hassan Hussein Yusuf v Republic* Meru High Court Criminal Appeal No. 59 of 2014 [2016]eKLR. The learned Judge reiterated this position in *B K J v Republic*, MERU HC Criminal Appeal No. 16 of 2015 [2016]eKLR.

⁴⁸ *Joseph Melikino Katuta v Republic*, Voi HC Criminal Appeal No. 12 of 2016 [2016]eKLR

The Narcotics and Psychotropic Substances (Control) Act

Review Section 3(2) -
Possession of narcotic
drugs for personal use

- (a) Less punitive policies towards drug possession do not result in a significant increase in drug use, drug-related harm, or crime;
- (b) Addiction treatment and rehabilitation are less expensive than incarceration;
- (c) Individuals with substance abuse problems are much more likely to find recovery in rehabilitation than in jail;
- (d) People who have undergone treatment are more likely to become productive members of society as compared to convicted persons who hold a criminal record; and
- (e) Decriminalization removes criminal sanctions and may not be as effective as reclassification. Reclassification will put in place appropriate structures to deal with the problem.
- (f) The Global Commission on Drug Policy recommends the removal of penal sanctions for drug use and possession and instead advocates for mechanisms to compel such persons to seek appropriate treatment instead.

- ii. There is a need for NCAJ to develop comprehensive guidelines which ensure that the unique circumstances of persons with mental illness are recognized, respected, and accommodated within the criminal justice system. In particular, the guidelines should address:
 - (a) How institutions of the criminal justice system can work collaboratively in the management of victims, witnesses, and offenders presenting with mental illness to ensure reduction of delays in court processes, speedy assessment, and access to the appropriate treatment;
 - (b) How petty offenders who have mental illness are to be handled and diverted to the appropriate community-based mental health treatment programmes as an alternative to imprisonment;
 - (c) The standard procedure for identification, management, and referral of prisoners with mental illness across all correctional/detention facilities to appropriate treatment facilities/programmes, and their return to the prisons/remand facilities after treatment to stand trial or continue serving their sentences; and
 - (d) How to conduct mental health literacy training, sensitization, and capacity building for all actors within the criminal justice system.
- iii. To enhance access to effective and efficient access to mental health services within the criminal justice system:
 - (a) Mathari Hospital MSU should increase access to inpatient and out-patient services;
 - (b) All correctional institutions should ensure access to mental health services in the hospital section;
 - (c) The Judiciary should enhance access to court liaison services in all court stations;
 - (d) The Ministry of Health should improve access to mental health services in the community; and
 - (e) NCAJ should spearhead the development of a mental health literacy curriculum for use by all justice sector agencies.
- iv. Institutions of the criminal justice sector should establish an integrated database where persons with mental illness are identified (in the same way persons with physical disabilities are identified.)

- v. There is a need for NCAJ to develop guidelines on how to go about the process of issuing Certificates of Good Conduct to prisoners who are released to allow for enhanced access to employment opportunities. There is a need to develop laws and policies concerning the process of inputting and expunging fingerprints from the criminal database.
- vi. The National Police Service should establish mechanisms to ensure accountability of police during the arrest of persons (fitting body cameras, facilitating drug testing at the point of arrest, e.g., conducting field sobriety tests.)
- vii. The Ministry of Health should enhance community activism by facilitating referral to drug treatment centres/ counselling services/ mandatory attendance of support group meetings.
- viii. The Kenya Prison Service should establish mental health units in all prison facilities that shall assess detainees at the point of entry to ensure comprehensive health screening. Further, detainees already in the system and in need of help shall also be identified and referred to the appropriate treatment facility/programmes; and returned to the prisons/remand facilities after treatment to stand trial or continue serving their sentences.
- ix. The Probation and Aftercare Service should establish transitional housing (half-way homes) within the criminal justice system for mentally ill offenders to facilitate smooth reintegration back into society.
- x. The MSU is the only forensic psychiatry inpatient unit in Kenya. There is a need for the KPS to incorporate the provision of comprehensive mental health services within the prison facilities. KPS should establish specialized mental health wings in all prisons across the country.
- xi. The MoH to rebuild Mathari Teaching and Referral Mental Hospital, including the MSU.
- xii. The MoH should increase the recruitment, training, and deployment of adequate multidisciplinary mental health service providers, especially at the MSU, to shift the gap in human resources per population ratio.
- xiii. The Kenya Medical Supplies Authority should ensure the provision of the requisite range of medications for psychiatric conditions that are modern and evidence-informed and to fulfill its mandate of adoption and procurement of products recommended in the Kenya essential drugs list.

- xiv. Judiciary should streamline proceedings to ensure cases are disposed of in an expeditious manner to decongest the system and reduce stresses due to slow judicial processes.
- xv. All institutions in the criminal justice system to ensure the availability of psychological services and regular staff debriefings on mental health at all workplaces.

REFERENCES

- Alphonse Shiundu (2019). “Poor Data on Suicide Leaves Kenya Groping in the Dark for Answers,” Africa Check. Available at <https://africacheck.org/2019/03/29/analysis-poor-data-on-suicide-leaves-kenya-groping-in-the-dark-for-answers/>
- Drug Policy Alliance (2015). “Drug and Policy Alliance: Approaches to Decriminalizing Drug Use and Possession.” Available at https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Approaches_to_Decriminalization_Feb2015_1.pdf
- Global Commission on Drug Policy (2014). “Taking Control: Pathways to Drug Policies that Work.” Available at <https://www.globalcommissionondrugs.org/reports/taking-control-pathways-to-drug-policies-that-work>
- Kenya National Commission on Human Rights (2011). “Silenced Minds: The Systemic Neglect of the Mental Health System in Kenya.” Available at http://www.knchr.org/Portals/0/EcosocReports/THE_%20MENTAL_HEALTH_REPORT.pdf
- Lydia Matata (2017). “Kenya’s Criminalizing of Suicide Makes Things Worse for Mentally Ill, Critics Say,” Global Press Journal. Available at <https://globalpressjournal.com/africa/kenya/kenyas-criminalizing-suicide-makes-things-worse-mentally-ill-critics-say/>
- Mensah Adinkrah (2016). “Anti-Suicide Laws in Nine African Countries: Criminalization, Prosecution and Penalization,” African Journal of Criminology and Justice Studies: AJCJS, Vol.9, Issue 1.
- Mental Health (Amendment) Bill, 2018. Available at <http://www.parliament.go.ke/sites/default/files/2018-12/Mental%20Health%20%28Amendment%29%20Bill%2C%202018.pdf>
- Ministry of Health (2015). “Kenya Mental Health Policy 2015–2030.” Available at <http://publications.universalhealth2030.org/uploads/Kenya-Mental-Health-Policy.pdf>
- MoH Taskforce on Mental Health in Kenya (2020). “Mental health and Well-being: Towards Happiness & National Prosperity.”
- NCAJ Committee on Criminal Justice Reforms (2018) “Correctional and Aftercare Subcommittee’s Intuitional Visits Report.”
- NCAJ Committee on Criminal Justice Reforms (2019) “Report from the First National Criminal Justice Reforms Conference.”

Phyllis Nyingi (2016). “Kenya Police Service Members’ Perception of the Effectiveness of Guidance and Counselling Services in Curbing Suicide Ideation and Stress Management,” *International Journal of Innovative Research in Information Security (IJIRIS)*., Issue 08, Vol 3

The National Assembly (2019). “Departmental Committee on Health Report on the Status of National Referral Hospitals.”

The National Council on the Administration of Justice (2017). “Criminal Justice System in Kenya: An Audit Understanding pre-trial 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>

The Office of the Attorney General (2018). “National Police Service Annual Crime Report,” Available at <http://www.nationalpolice.go.ke/crime-statistics.html>

The World Health Organization (2019) “The WHO Special Initiative for Mental Health (2019-2023): Universal Health Coverage for Mental Health.”

Fuller Torrey, Aaron Kennard, Don Eslinger, Richard Lamb, and James Pavie (2010). “More Mentally Ill Persons are in Jails and Prisons than Hospitals: A Survey of the States. VA: National Sheriffs Association and Treatment Advocacy Center. Available at https://www.treatmentadvocacycenter.org/storage/documents/fnal_jails_v_hospitals_study.pdf

World Health Organization (2016). *Global Health Estimates*. “Deaths by Cause, Age, Sex, by Country and By Region, 2000-2016.”

Laws of Kenya

The Constitution of Kenya (2010)

The Criminal Procedure Code (Cap 75)

The Kenya Defence Forces Act (2012)

The Kenya Prisons Act (Cap 90)

The Mental Health Act, Chapter 248 Laws of Kenya, Revised Edition 2012 (1991)

The Mental Health (Amendment) Bill, 2018

The Narcotic Drugs & Psychotropic Substances Control Act No. 4 of 1994

The Penal Code (Cap 63)

The Power of Mercy Act (Act No. 21 of 2011)

Case Law

B K J v Republic, MERU HC Criminal Appeal No. 16 of 2015 [2016]eKLR.

Hussan Hussein Yusuf v Republic Meru High Court Criminal Appeal No. 59 of 2014 [2016]eKLR

Joseph Melikino Katuta v Republic, Voi HC Criminal Appeal No. 12 of 2016 [2016]eKLR

Republic v S O M [2018] eKLR.

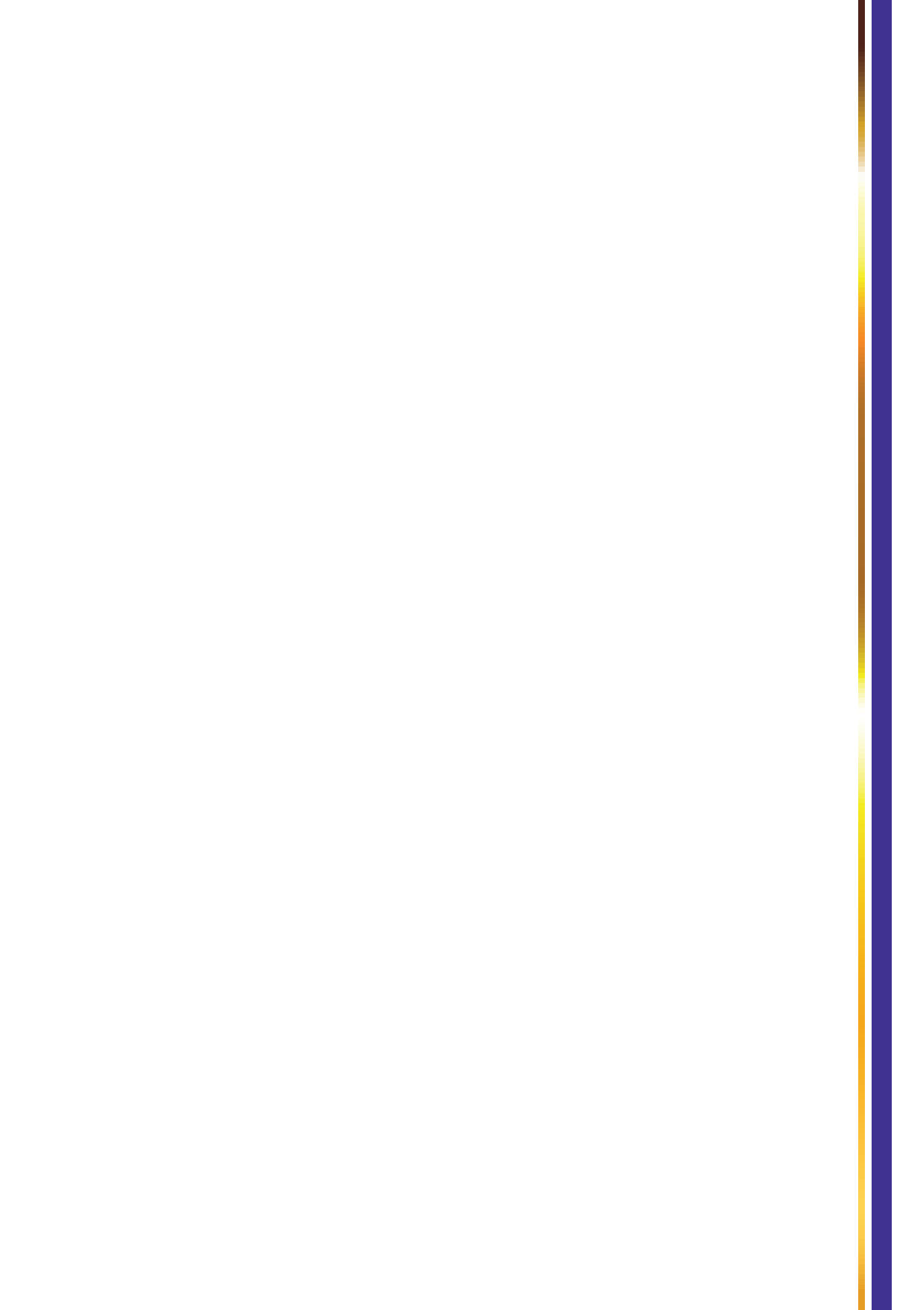
Annex 1:

Psychiatric Ward Conditions of Detention: Mathari National Treatment and Referral Hospital (MSU) January, 2021.

PSYCHIATRIC WARD CONDITIONS OF DETENTION MATHARI NATIONAL TREATMENT AND REFERRAL HOSPITAL (MSU)			
Date of visit: 28 th January, 2020			
ITEM		FINDING	
1.	No. of wards:	Three (3) Section A – Male Section B – Male Section C – Female	
2.	Ward particulars:	Each Cube has 8 beds Section A has a total of 10 Cubes (at the time of the visit, only 8 were in use) Section B has 9 Cubes (at the time of the visit, 8 were in use) Section C has a total of 10 Cubes, however, only six were occupied Section A&B have seclusion rooms which are used to hold violent patients. Section C seclusion rooms are completely closed off and out of use.	
3.	Current occupancy (TOTAL)	MALE	FEMALE
		201	16
4.	Category of patients:	MALE	FEMALE (Section C)
	Remand & Convicted	Section A – 93 Section B – 82	11
	Special category	Section A – 14 Section B – 12	5
5.	Longest duration of stay	17 years Duration of stay is still a challenge. Letters have been forwarded to POMAC requesting the release of some patients, however, these have not been responded to in over a year.	
6.	Layout/ design (shape of room, arrangement of beds, roof, wall color, windows etc):	The Cubes are octagon shaped and have 8 built-in beds. Due to overcrowding, some patients sleep on the floor (mattresses and beddings are provided). The cubes are run-down. Some windows are broken and covered with cardboard. Some of the cubes have leaky roofs and owing to the dilapidated state of the facility, the walls also let in water when it rains. The water pools on the floor where some patients sleep. There is no toilet in the cell. At night, buckets and water are provided for the patients.	

7.	Ambience (Conducive for therapy/treatment):	No.
8.	Ventilation:	Ventilation in Sections A&B is poor owing to overcrowding in the male cells.
9.	Lighting:	Natural light enters the Cubes via the roof window and the 8 (30cm by 10cm) windows. Artificial light is provided in the cubes during the night.
10.	Cleanliness:	The cells and toilets are kept clean by the patients.
11.	Separate accommodation for men and women:	Yes. The male Sections are however very overcrowded.
12.	Separate toilets for men and women:	Yes.
13.	No. of dedicated staff members: Staff to patient ratio:	Each Section has a psychiatrist attached. On average, there are 1 to 3 nurses attached to each section and student nurses assist on occasion. The nurse to patient ration in Section A&B is disproportional. For example in Section A there are 3 nurses for a total of 107 patients. The nurses are overwhelmed. For the out-patient facility, there are psychiatrists attached on a rotational basis. A maximum of 10 patients are seen in a day for purposes of mental assessment.
14.	Detainee access to the outside area:	The detainees have access to an outdoor area in each of the Sections. They do not intermingle, except during occupational therapy.

15.	Occupational therapies (art and craft, yoga and quizzes, ordinary simple indoor and outdoor activities, reading in the library, gardening, exercise etc.):	<p>There is an Occupational Therapy Department at the MSU, however it is also understaffed. The trainers are not adequately facilitated to ensure patient access to a wider range of activities.</p> <p>There is a recreation room which is used for group therapy sessions and church services. A television and radio were donated by the church a few years ago, they have since broken down and are in need of repair.</p> <p>Only one indoor game is available: darts (no chess, checkers, scrabble etc.)</p> <p>Only outdoor activity is available is volleyball.</p> <p>The MSU has rooms to offer the following vocational training activities:</p> <ol style="list-style-type: none"> 1. Tailoring (the tailor retired 2 years ago and has not been replaced) 2. Shoe making (the artisan is set to retire soon) 3. Carpentry/Welding workshop (is functioning below standards. The last artisan retired in 2005. A casual laborer was employed temporarily. The patients used to be able to do certificate exams, however, this has not happened in over 10 years as there hasn't been anyone to train them. A Prison Officer used to be seconded, however this has not happened.) 4. Home economics/cooking. The kitchen burners are old and need repairing. There are no food supplies for training purposes. 5. Art and crafts (there is no artist/teacher. There are no supplies – paints, paint brushes, drawing paper and canvass) 6. Farming/gardening. There is a big field which was once the garden area where patients were taught how to garden. Owing to lack of supplies (tools and seedlings) the garden is now overrun by weeds and grass. <p>Equipment to facilitate training in the abovementioned activities is outdated (last purchase was in 1970) and this makes it virtually impossible to impart an appropriate/relevant life skill which can be utilized by the patient upon reentry into society.</p> <p>The lack of options for occupational therapy causes a lot of monotony for the patients. They mostly idle about during the day.</p> <p>At the very least, it was recommended a portion of the former garden area be levelled and a small football field be established.</p>
16.	Provision of meals:	3 times a day. Breakfast, lunch and dinner.
17.	Particulars of diet:	Tea, porridge, ugali, rice, cabbage, beans and on occasion meat.
18.	Measures in place to ensure patient and staff safety (alarm processes, risk management, violence prevention and management etc.):	The facility is enclosed with high walls. There are KPS officers manning the perimeter and patrolling the compound. Each section has its own nursing team to ensure effective management.
19.	Can patients be visited by family/relatives:	Yes, under strict supervision. It was however revealed that very few visitors come to see the patients. Owing to COVID-19, visitation was halted in March, 2020.
20.	Access to psychological interventions and drugs:	There is still a shortage. Older generation drugs are generally available. Newer generation drugs may be prescribed from outside the facility, however patients cannot afford to pay for them.





The National Council on the Administration of Justice
5th Floor, Mayfair Center, Ralph Bunche Road
P.O. Box 30041 – 00100, Nairobi, Kenya

Email: ncaj@court.go.ke

Website: www.ncaj.go.ke

