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THE ADMINISTRATION OF JUSTICE

CRIMINAL JUSTICE SYSTEM IN KENYA: An Audit

Understanding pre-trial detention in respect to case flow management and conditions of detention.

Legal Resources Foundation Trust

RODI Kenya
Resource Oriented Development Initiatives

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CRIMINAL JUSTICE SYSTEM IN KENYA:
An Audit

Understanding pre-trial detention in respect to case flow management and conditions of detention

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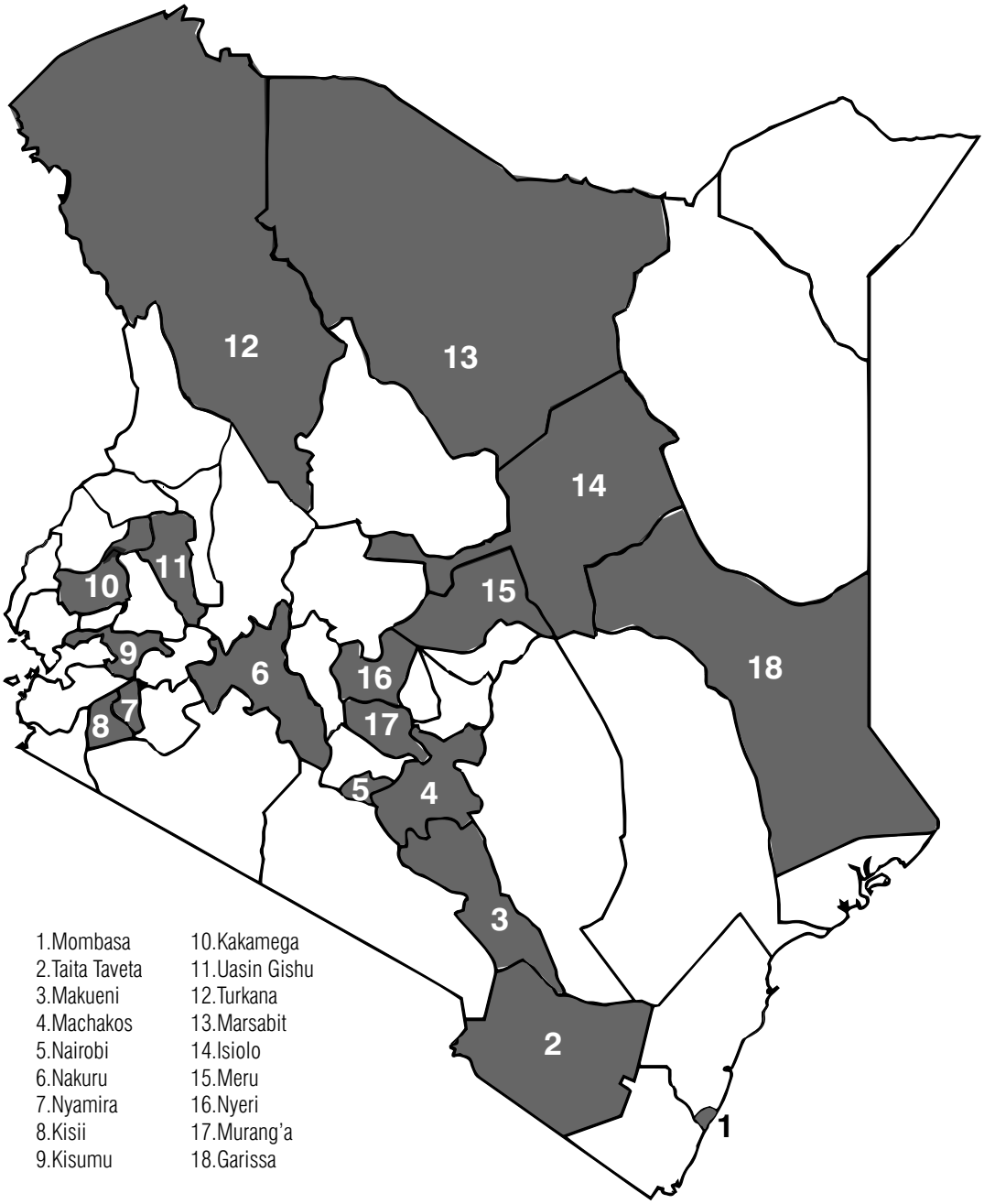

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8.Kisii
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Acronyms

ADR	Alternative Dispute Resolution
AU	African Union
CAT	The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	The Convention on the Elimination of All Forms of Discrimination against Women
CIPEV	Commission of Inquiry into Post-Election Violence
CJS	Criminal Justice System
CLE	Council of Legal Education
CMS	Case Management Systems
CPC	Criminal Procedure Code
CRH	Children Remand Homes
CRPD	The Convention on the Rights of Persons with Disabilities
CSO	Community Service Order
CSPRI	Civil Society Prison Reforms Initiative
CUC	Court Users Committee
DCT	Data Collection Tools
HRC	Human Rights Council
ICCPED	The International Convention for the Protection of All Persons from Enforced Disappearance
ICCPR	The International Covenant on Civil and Political Rights
ICPS	International Centre for Prison Studies
IDPs	Internally Displaced Persons
IPMAS	Integrated Performance and Accountability System

IPOA	Independent Police Oversight Authority
JTF	Judicial Transformation Framework
KNCHR	Kenya National Commission on Human Rights
LRF	Legal Resources Foundation
LSK	Law Society of Kenya
MHA	Mental Health Act
NCAJ	National Council on the Administration of Justice
NPS	National Police Service
NPSC	National Police Service Commission
OB	Occurrence Book
OCS	Officer Commanding Station
ODM	Orange Democratic Party
ODPP	Office of the Department of Public Prosecution
PA	Prisons Act
PNU	Party of National Unity
RCK	Refugee Consortium of Kenya
RODI	Resources Oriented Development Initiatives
TB	Tuberculosis
UNHCR	United Nations High Commission for Human Rights
UNSMR	United Nations Standard Minimum Rules (Mandela Rules)

Glossary

Cumulative The cumulative percent is the sum of all the percentage values in all previous categories plus that category.

Cognisable A cognisable offence is an offence for which a police officer may carry out an arrest without a warrant being issued by a court.

Dataset A dataset is a collection of data.

Duration Duration is the length of time for which something exists or lasts. For example, the duration of a case is the length of time the case lasts.

Frequency The frequency of a particular data value is the number of times the data value occurs. For example, if the data shows 400 detainees arrested for theft, then the offence of theft is said to have a frequency of 400.

Median The median is the middle value in a list of numbers. To find the median, the numbers must be listed in numerical order. The median separates the lower half of a data sample from the upper half. Another name for the median is the 50th percentile. Half or 50% of the data will be less than the median and half will be more than the median.

Observation Each entry collected in a given dataset is called an observation.

Offence An offence is a breach of a law or rule. The Penal Code says it means an act, attempt or omission punishable by law.

Outcome The outcome is the result of the case, and refers to any way in which the case may be brought to a conclusion. Outcomes may include convictions, acquittals, and withdrawals.

Percent A percentage is a number or ratio expressed as a fraction of 100. Percent means parts per hundred. The word comes from the Latin phrase per centum, which means per hundred.

Percentile A percentile (or a centile) is a measure used in statistics indicating the value below which a given percentage of observations in a group of observations fall. For example, the 25th percentile is the value below which 25% of the observations may be found. The 25th percentile is also known as the first quartile.

Population The population is the total membership or population or "universe" of a defined class of people, objects or events. For example, in most of the datasets in this report the reference population is all matters registered in those locations over the period 2013-2014.

Sample A data sample is a set of data collected or selected from a statistical population by a defined procedure.

Sampling Sampling is the process of selecting individual units (e.g. court cases, people) from a population of interest so that by studying the sample, results may be fairly generalized back to the population from which they were chosen.

Foreword

It is without a doubt that Criminal Justice System has undergone tremendous transformation in the recent past. The transformation process was further affirmed in the provisions of the 2010 Constitution. However, a few challenges persist that predispose the Criminal Justice System against the weak and indigent in our society. This is the first time in our history that our Criminal Justice System has been comprehensively audited, issues systematically documented and published.

The National Council on Administration of Justice (NCAJ) commissioned the Audit on 15th May, 2015 in fulfillment of its mandate to ensure a coordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system pursuant to section 34 of the Judicial Service Act (No. 1 of 2011). The Audit led by a multi sectorial steering committee of the NCAJ took a period of eighteen (18) months to be concluded. The subsequent findings contained in this Audit were validated by respective justice agencies and are therefore are a conformation of the status and recommendations that should be taken forward to address conditions of pre-trial detention and case-flow management.

This Audit sought to provide a comprehensive analysis of the Criminal Justice System towards providing recommendations to strengthen service delivery and policy reforms in Kenya. This Audit gives an independent and objective view of the material aspects of the Criminal Justice System. Subjecting the Criminal Justice System to this Audit was consistent with Kenya's development blueprint, Vision 2030, and the National Values and Principles of Governance set out in Article10 of the Constitution of Kenya. The Audit identifies institutions bearing a constitutional mandate to deliver justice to Kenyans/persons living in Kenya and areas that require further reforms within the Justice sector.

Key findings of the Audit confirm that Kenya's Criminal Justice System is largely skewed against the poor. It is an indictment of a system that is expected to guarantee justice to people from all walks of life, including all forms of vulnerabilities. The Audit found that more poor people are arrested, charged and sent to prison as compared to the well to do. It was an interesting finding that economic driven and social disturbance offences which are rated as petty; such as offences relating to lack of business licenses, being drunk and disorderly and creating disturbance form 70% of cases processed through the justice system. A major concern as per the findings was that, serious offences such as organized crimes, capital offences and sexual offences were found to have the highest rate of acquittal and withdrawals. This Audit therefore should stir deep reflections by the NCAJ to capitalize on the Audit recommendations for institutional reforms in our policing and prosecution systems.

Our new Constitutional order demands; transparency, accountability, participation and inclusiveness in governance. The Audit report will go a long way in supporting the implementation of this new order by providing a framework for policy direction for the NCAJ institutions in implementing their core mandates. Through this effort, Kenya therefore joins other Nations in establishing a baseline for improved service delivery within the Criminal Justice System.

I thank NCAJ, Legal Resources Foundation Trust (LRF) and RODI-Kenya for taking lead role in ensuring that we have credible data and literature that will inform practice, administrative, policy and legislative transformation within the realm of justice. I extend my appreciation to the National Steering Committee of the NCAJ and Justice Sector Institutions for opening their doors for scrutiny and also their tremendous efforts in conducting the Audit. This Audit should however not rest here. I therefore call for an agreed implementation framework under the NCAJ to take on the recommendations and policy reforms forward and periodic scrutiny which is a good health check for capacity commitment to service delivery

Many thanks to the Open Society Foundations (OSF) and the Government of Kenya for its support and funding that made the Audit a reality.

Hon. Justice David K. Maraga,

E.G.H., Chief Justice and President of the Supreme Court of Kenya and Chairman,
National Council on the Administration of Justice

Acknowledgement

Legal Resources Foundation Trust (LRF) and Resources Oriented Development Initiatives (RODI-Kenya) under the umbrella of National Council on Administration of Justice (NCAJ) partnered to conduct a comprehensive Audit of Kenya's Criminal Justice System with focus on pre-trial detention focusing on case-flow management and conditions of detention. LRF is an independent, non-profit Kenyan Civil Society Organization whose primary mandate is to promote access to Justice through Human Rights Education, Policy Advocacy and Research while RODI Kenya is a Kenyan development Organization with a primary focus on restorative prisoner rehabilitation, crime prevention and administration of Justice. The Executive Directors of LRF and RODI Kenya acknowledges with gratitude, the invaluable assistance and co-operation extended by NCAJ and all the individuals involved during the Audit.

Our gratitude to the NCAJ led by the Chairperson the immediate former Chief Justice Dr. Willy Mutunga for commissioning the Audit and taking a lead role in forming a National Steering Committee that provided technical and moral guidance during the eighteen (18) months Audit. We verily believe that the findings of this Audit and its subsequent implementation will go a long way in transforming Kenya's Criminal Justice System to be credible, accessible and humane to *"Wanjiku"* the general public. The policy and legal recommendations speak to the need for accelerated legal reforms to enable justice agencies deliver on their mandates.

We also acknowledge the support provided by the various institutions in the Criminal Justice System who formed the National Steering Committee on the Audit. (These institutions are listed in the Annexures). They all provided immense support and a conducive environment during the Audit period, where they seconded their most able and competent officers to provide technical and logistical support to the Audit process.

Sincere appreciation is extended to the Audit Team led by the Executive Directors of LRF and RODI Kenya namely Janet Munywoki and Eliud Ngunjiri respectively, who maintained a quality check from an administrative level; Lenson Njogu, who conceptualized the Audit project and provided lead in its implementation; Esther Bett and Dennis Kioo who provided overall monitoring of the Audit process; David Nyaga and Paul Kauku who were Co- Project Officers in-charge of due diligence and quality control; Duncan Okello- NCAJ Executive Director, Martha Mueni - NCAJ and Hon. Lyna Sarapai - Chief Justice Liaison Office for providing technical, administrative and logistical support during the entire process. Special mention goes to all Research Assistants who conducted the Audit with great passion and commitment despite the rough terrains that were a manifestation in various parts of the Counties.

We appreciate the lead consultants in the Audit: Jean Redpath and Lukas Muntingh of the University of Western Cape South Africa for their technical support. Gratitude to the Local

Consultants: Rtd. Lady Justice Mary Angawa and Beatrice Chelagat for providing the contextual analysis and conceptualizing the Kenya Criminal Justice System. Gratitude goes to the data entry clerks; Christine Kakuu and Gabriel Kerario who burnt the midnight oil in transforming the raw data to electronic form.

We express our profound gratitude to our partner the Open Society Foundations for providing technical and financial support without which this Audit would not have been possible. Your consistency and purpose in supporting effective Criminal Justice Reforms across the world is not in vain.

The invaluable support given to the Audit team by the current Chairperson of the National Council on the Administration of Justice Hon. Chief Justice David Maraga in ensuring that the Audit findings and recommendations see the light of day is highly appreciated. In deed, his presence at this stage sends a strong signal in respect to the leadership required towards the second phase of the Audit and the most crucial, which is implementation of the Audit recommendations.

To you our "*Wanjiku*" the general public, this Audit was heavily hinged on you and we sincerely trust that the findings of this Audit will benefit you as you engage and transverse through the Criminal Justice System.

Ms. Janet Munywoki
Executive Director: LRF

Mr. Eliud Ngunjiri
Executive Director: RODI - Kenya

Overview and Executive Summary

The 2010 Constitution ushered in a new era for governance in Kenya, with notable emphasis on rights codified in the Bill of Rights under Chapter Four of the Constitution. It is against this background that, under the auspices of the National Council on Administration of Justice (NCAJ), the Legal Resources Foundation Trust (LRF) and Resources Oriented Development Initiatives (RODI-Kenya) - with technical support from University of Western Cape South Africa and financial support from Open Society Foundations - partnered to conduct an audit study on Kenya's Criminal Justice System. The focus was on pretrial detention with specific emphasis on conditions of detention and case-flow management. The audit was commissioned by the NCAJ Council on the 15th May, 2015 and thereafter conducted under the supervision of an NCAJ National Steering Committee, comprising of members drawn from the various agencies of the Criminal Justice System.

Within the context of this study, case flow denotes a symbolic picture of the number, nature and speed of criminal matters flowing through the Criminal Justice System, particularly where these matters involve deprivation of liberty. On the other hand, conditions of detention refer to those attributes in a detention facility that are primarily of an infrastructural or physical nature and that have an impact on the human experience of incarceration. These attributes and their use refer to at least:

- The physical characteristics of the prison building, including sleeping, eating, working, training, visiting and recreation space;
- The provision of beds, bedding and other furnishings;
- The nature and conditions of the ablution facilities;
- The cleanliness of the living space and maintenance of buildings and infrastructure
- The level of occupation of the facility, individual cells and common areas regarding two and three-dimensional space measurements and ventilation

The main objective of the audit was to provide a comprehensive analysis of the Criminal Justice System and make policy, legislative and practice reforms that strengthen service delivery.

To achieve the intended objective, the audit targeted eighteen (18) Counties which were purposefully sampled. The study relied on respective institutions' official records, case studies, legal reviews, structured questionnaires and observations. In the Subordinate Courts a sample of 100 observations per official record used was weighted against the actual number over a two-year period; that is, 2013 and 2014. However, on data involving the High Court, a four year-period (2010 to 2014) was used.

A key finding from the audit study is that the flow of people deprived of their liberty, and cases through the Criminal Justice System, follows an inverted pyramid shape. At the police station, 68% of entries in police cells are cases related to drunk and disorderly behavior, property offenses; state regulated offenses, loitering, disturbance and nuisance, and cases involving children in need of care and protection. The audit further established that, 45% of police arrest and detention were effected during the weekends, with the highest rate of release from police cells equally being effected during the weekends.

A disturbing fact is that 64% of pretrial detainees in police cells had no reason for release recorded in the cell register, or the Occurrence Book, raising questions about their manner of release. The audit further finds that only 32% of police entries were converted to charges in court; of which 70% were petty offenses.

Notably, the category of "state regulated offenses" obtained a prominence and peculiarity that exceeds their standing in comparable studies of this nature in other African countries such as Malawi, Zambia, and Mozambique where this category was almost absent. These are offenses that do not typically require a complainant other than the state itself and involves regularization of both formal and informal activities and protection of the environment. They include offenses related to alcoholic drinks regulation, environmental laws, gambling and other forms of regulation like licensing and permit.

The study establishes that appeal matters at the High Court recorded high overturn rate with 45% of appeals lodged resulting in either liberty, reduced or increased sentence, retrial or change of conviction. In the prisons surveyed, it was established that 75% of pretrial detainees are below the age of 35 years and basically at the peak of their earning potential. This may suggest that Kenya's Criminal Justice System is a major driver of poverty.

Another issue which this study brings to the fore, and which should be of great concern, is the interface between children and the Criminal Justice System. The data shows that more children are admitted to prisons in remand than are admitted in Children's Remand Homes. Just over half of the cases where children are in conflict with the law are completed within the required ninety (90) days. The most common outcome, for around four (4) of the ten (10) cases, was for the child to be sentenced to a term of probation, most commonly for six months. Some three (3) out of ten (10) cases were withdrawn. Worryingly, the number of children remanded in prison stood at 452, which is unlawful[1].

On conditions of detention, it was an overall finding that, facilities holding persons deprived of their liberty are generally old, limited in space and dilapidated and majority of them were constructed

1 Article 53(f)(ii) Every child has the right not to be detained, except as a measure of last resort, and when detained, to be held separate from adults and in conditions that take into account of the child's sex and age.

during colonial time. It was further established that there are inconsistencies in policy and practice application in every aspect investigated by the audit.

It is therefore the overall conclusion of the audit that whereas Kenya as a state clearly has a legitimate interest in regulating various types of commercial and other activities, this should not be done in a manner that accentuates but rather eliminates poverty. It should be acknowledged that, in a country of low formal employment like Kenya, the state also has an interest in ensuring people are empowered to make their own way in an informal economy. It is unclear, for example, whether overly intrusive state regulation of clean home- made brew promotes any clear interest other than protect the market share of large manufacturers. Indeed, evidence suggests that alcohol manufacturing and consumption has increased in spite of heavy-duty alcohol control laws[2] in 2010. Accordingly, natural resources, which can also create enormous opportunities, should be managed in a creative and balanced way, other than criminalizing their use[3]. Indeed, the findings of this study should also alert the new County Governments which, in pursuit of increased revenue yields, may enact elaborate regulatory and legal regimes that end up being a snare for their citizens and thereby lowering the productivity and wealth generation of those Counties.

This seminal study on Kenya's Criminal Justice System is an invaluable contribution in the quest for reforms. No agency can read this Report and fail to be moved by its disturbing findings. It is an urgent call to action for all the justice sector actors of the inescapable need to align the Criminal Justice System with the promise contained in the Bill of Rights of the Constitution of Kenya.

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Duncan Okello

Executive Director:

National Council on the Administration of Justice

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Prof. Kimani Njogu

Chairperson, Board of Trustees,

Legal Resources Foundation Trust

2 *Alcoholic Drinks Control Act 2010*

3 *See Lockwood, M. (ed) "Managing Protected Areas: A Global Guide" Routledge 2012. At p 394 there is a discussion of Uganda's Kibale National Park, where agreement was reached with the surrounding 120000 community members, who extract more than 20 products from the park for their subsistence, commercial, cultural and medical needs, after an earlier policy of prohibition was found to be expensive and time consuming.*

Methodology

The audit targeted eighteen (18) Counties: *(Mombasa, Taita Taveta, Makueni, Machakos, Nairobi, Nakuru, Kisumu, Kakamega, Kisii, Nyamira, Turkana, Marsabit, Meru, Isiolo, Muranga, Nyeri, Garissa and Uasin Gishu)* which were purposefully sampled. The sample was informed by: population of pretrial detainees, reported prevalence levels of human rights violations, the question of marginalization and historical injustices, County vastness, the need to interrogate the emotive question of women and children, logistics and presence of justice agencies targeted i.e. Police Station, Court Station, Prison Stations, Children Remand Homes and Military Court Marshall.

From the onset, a scoping exercise was conducted in Nyeri Central Police Station, Nyeri Main and Women Prisons, Nyeri Law Courts and Nyeri Children Remand Home with a view of understanding how the Criminal Justice System works, how information is captured, the role of each Institution targeted, research methodology to be adopted and better understand the possible sources of data available to conduct the audit. The exercise was very instrumental in development of data tools; both qualitative and quantitative, which were vetted and approved by the National Steering Committee.

For the National Police Service, Cell Register, Charge Register and Petty Charge Register were relied on as the primary data sources with Occurrence Book and Movement Diary being used as reference sources. From each data source, a sample of (100) one hundred observations was drawn between the year 2013 and 2014. The observations were drawn randomly by first getting the total number of entries over the two-year period and the dividing that number with the target observations to arrive to a sampling interval.

For Kenya Prison Service, Remand Admission Register and Active Remand Warrants were used as the primary data sources with Court Disposal Register and TB Screening Register being used as reference sources. A Remand Warrant ideally gives a snapshot picture of the number of pretrial detainees in a given station, offence profile and the profile of the pretrial detainees. Remand Admission Register on the other hand provides a profile of remand admission within a given period. For the Remand Admission Register, a sample of (100) one hundred observations were drawn for the year 2013 and 2014. The observations were randomly sampled, by first getting the total of all admissions over the two-year period and then dividing the total sum by the target (100) one hundred observations to arrive to a sampling interval. In respect to the Active Remand Warrants, data was drawn from a maximum sample size of (100) one hundred warrants. In cases where active warrants were more than (200) two hundred; the same was divided by (100) one hundred to get a sampling interval. In cases where the warrants were less than (100) one hundred, all warrants were sampled and data therein entered in the data collection tools.

For the Court stations, Subordinate Court Register, High Court Register and Criminal Appeal Registers were used as the primary data sources. It was however observed that, the registers

were not well kept particularly in relation to recording of judgment and date of judgment, therefore necessitating use of physical case files. Since High Court matters take overly long, the sample drawn from the official records covered the period between 2010 and 2014. From the onset, a sample size of (100) one hundred observations was drawn from the Subordinate Court covering the period from 2013 to 2014. A sum of all entries for the two-year period was divided by the target sample size to arrive to a sampling interval which was rounded down. For the High Court, a sample size of (70) seventy entries was drawn from the Criminal Appeal Register and (35) thirty five from High Court Criminal Register. All entries were randomly sampled by first getting the total number of entries for the period between 2010 and 2014, then dividing the sum total with the target sample size to arrive to a sampling interval.

At the Children Remand Homes, Admission Register was used as the primary data source with Remand Warrants and Periodical Returns as reference sources. Data was randomly sampled with a sample size of (100) one hundred observations drawn from 2013 to 2014.

NB: All the entries coinciding with the sampling interval number were entered in the data collection tools as recorded.

With regards to conditions of detention, a structured questionnaire tool was developed primarily guided by (UNSMR) United Nations Standard Minimum Rules on Treatment of Prisoners (Mandela Rules), Persons Deprived of their Liberty Act 2014 and other international instruments[4] and domestic legislation.[5] Structured interviews were then conducted with officials and where necessary, random places of detention were chosen in order to make observations of the general state of the infrastructure and also take measurements.

At the analytical phase, all data collected was weighted to reflect the number of cases it represents (frequency weighting). So, for example, (100) one hundred observations drawn from a population of 1000 would each have twice the weight as an observation drawn from a population of (500) five hundred. The way in which the population size was determined or estimated is described in each sub-chapter. Mostly this was simply given by the total number of cases in the relevant registers.

4 Art. 5 of the Universal Declaration of Human Rights (UDHR);
Art. 7 of the International Covenant on Civil and Political Rights (ICCPR);
Arts. 2 and 10 of the UN Convention against Torture, Cruel Inhuman and Degrading Treatment or Punishment (UNCAT);
Arts. 2 and 3 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,
Rule 1, 6-10, 36-49, 54, 71 and 111-120 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
Principle 1 of the Basic Principles for the Treatment of Prisoners
Principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;
Rule 87(a) of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)
Principle 1 of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

5 National Police Service Act, Children's Act, Prisons Act

It was necessary to categorize offenses in larger groups for the purposes of analysis. In the police cell data-set, for example, there were (496) four hundred and ninety six differently described offenses in the data-set of (1370) one thousand three hundred and seventy observations. Categorization was guided by sufficiency in the numbers of observations to form a group, and grouping together a number of offenses of similar type, informed also by analysis carried out in other African countries. For example, all offenses involving property only were grouped together as "property offenses".[6] The category "violent offenses" however includes robbery and the various forms of robbery because of the element of violence in the definition of the offense. [7]

A category of some prominence in Kenya (as opposed to similar studies in Malawi, Zambia and Mozambique in which they were all but absent) was the category of "state regulated offenses", which arose out of analysis of the data. Grouped into this category are all offenses where the offense has been defined by the state in terms of legislation, mostly in legislation outside of the Penal Code.[8] These offenses typically do not have a complainant[9] other than the state itself and typically relate to the regulation of formal or informal economic activity, where a particular state interest is being protected, such as regulation of alcohol use and protection of the environment

The duration of detention and of cases was of particular interest in the study. The measures used to describe the duration throughout are the minimum and maximum, the median, and the 25th and 75th percentile. These measures provide a clear understanding of the ranges of duration.

The mean or average is not suitable for duration because it is susceptible to outliers, which are common when dealing with duration. For example, if 10 people are detained for 1 day and 1 person is detained for 100 days, the average duration is 10 days. This is misleading as none were detained for 10 days and in fact most were detained for only 1 day.

The minimum and maximum give the extremes of the entire range, while the median gives the middle value. Half of cases are the same or longer than the median and half the same or shorter in duration than the median – it is the middle value of values ranked from smallest to largest. The 25th percentile gives the value for the first 25 percent of a ranked list, and similarly the 75th percentile. In some cases, the 90th or 95th percentile is provided to illustrate duration for the last 10% of 5% of cases.

6 While the Penal Code provides a means of classification, this was not suitable for analytical purposes, because it contains too many categories. Further, some Penal Code categories group together offenses which are not necessarily logically related. Some Penal Code categories had too few observations to form a group.

7 Section 295, Penal Code: "Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

8 Gambling was included here although it is a Penal Code offense.

9 Except for illegal grazing, which is often illegal grazing in state parks; however, it may also be in relation to private property, in which case the complainant is the owner of the private property.

Chapter 1

Contextual Analysis

Historical Development of Criminal Justice System

Kenya's legal system is based on its statutory law, English common law, customary law, and Islamic law. It has evolved from the inheritance of its English Common Law tradition to modern day system adapting to the changing in social, economic and political trends. The Courts adhere to the principle of *stare decisis*, and like other common law countries, the legal system is adversarial in its procedure. Theoretically, a suspect is presumed innocent until proven guilty. In practice, however, the burden of proof is often placed on the prosecution.

Kenya initially had an informal, Customary Criminal Justice System. The system was carried out by local chiefs and council of elders in remote villages, where Police and formalized Courts are not readily accessible. After Britain declared Kenya a Crown Colony, the Colonial Parliament passed laws that in effect, formed the basis of the criminal laws in Kenya. When Kenya was annexed and declared a Crown Colony by Britain in 1921, the Kikuyu, the Kamba and the Maasai launched stiff resistance against British domination and rule. This fight against British colonization resulted in the Mau-Mau uprisings in the 1950s and led to Kenya's independence from Britain in 1963.

After independence in 1963, the government made various efforts to improve the management of the Criminal Justice System. These efforts have been carried out in the various ministries, departments and agencies that have a stake in the Administration of Justice. The Judiciary, being a major stakeholder, has undergone some changes to enhance its ability to administer justice fairly and efficiently. There have also been reform measures in the justice sector which have targeted corruption in the Judiciary,[1] the administration of justice,[2] the terms and conditions of service of the Judicial officers, the construction of additional Court facilities, the reconstitution of the Rules Committee, decongesting of prisons by establishing magistrates' Courts in prisons and remand homes, the launching of the Kenya law reports website as well as the adoption of strategic planning to guide the activities of the Judiciary. The clamor for change became more evident after the disputed presidential poll in 2007 in which, according to the Commission of Inquiry into the Post-Election Violence[3], an estimated 1 300 people were killed and 350 000 displaced. There were also gross human rights violations including physical and sexual molestation, rape and restrictions on the freedoms of movement during the two months of sporadic but violent inter-ethnic fighting pitting the Party of National Unity (PNU) and the Orange Democratic Movement (ODM) supporters against each other. The violence ended with the signing of the Agreement on the Principles of Partnership of the Coalition Government by H.E Mr. Mwai Kibaki and Mr. Rail Odinga on 28th February 2008. This led to the establishment of a coalition government whereby Mr.

1 *The Integrity and Anti-Corruption Committee (The Ringera Committee) set up in 2003*

2 *The Committee on the Administration of Justice (The Kwach Committee) see Kenya, in US Department of State, Country. Reports on Human Rights Practices 1999,*

3 *Report of the Commission of Inquiry into Post Election Violence (CIPEV). Government Printer, 2008*

Odinga of the ODM became prime minister as H.E Mr. Kibaki of the PNU retained the presidency. The Agreement comprised of the following four agenda items:

i. Stop the violence and restore fundamental rights and liberties.
ii. Address the humanitarian crisis occasioned by the massive displacement by resettling internally displaced people (IDPs) and promoting reconciliation and healing.
iii. Overcome the political crisis.
iv. Address and find solutions to the long-standing issues including constitutional, legal and institutional reform, land reform, poverty, inequity and regional imbalances, unemployment, particularly among the youth; consolidating national cohesion and bringing about transparency, accountability and acting against impunity.

The implementation of point 4, were critical to the realization of the rule of law in Kenya[4]

Legal framework of the Criminal Justice System

The promulgation of the Constitution of Kenya 2010, brought far much needed reforms in the Criminal Justice sector. Some of the highlights include Article 2(5) which provide that general rules of international law shall form part of law of Kenya and Article (6) any treaty or convention ratified by Kenya shall form part of law of Kenya. The other key provisions touching on Criminal Justice System include, Articles 48 to 50 of the Constitution which provide for the right of Access to Justice, the presumption of innocence and the right to a fair hearing. Article 48 provides that the state shall ensure Access to Justice for all persons and if any fee is required, it shall be reasonable and shall not impede access to Justice. Article 49, provides for the rights of arrested persons, and can be summarised as

- Requiring that an arrested person:[5] be informed of the reasons of their arrest,
- Their right to remain silent and the consequences of not remaining silent;
- Be allowed to communicate with a legal representative or any person whose assistance is required by the arrested person;
- Be held separately from persons who are serving a prison sentence;
- Be brought to Court as soon as reasonable possible and not later than 24 hours after their arrest or the next Court day if arrested outside the ordinary Court days;
- Be informed by the Court of first appearance of the reasons for continued detention or be released; and,
- Be released on bond or bail with reasonable conditions pending trial unless compelling reasons are given for continued detention. Article 49 further provides that a person should

4 *Ibid no 3*

5 *The Constitution of Kenya 2010, Article 49(1),*

not be remanded in custody for offences punishable by a fine only or by imprisonment of less than six months.[6]

The Constitution stipulates the amount of time that an arrested person can be held in custody by indicating that an arrested person is required to be arraigned in Court within 24 hours regardless of the nature of the offence. Article49 (1) (h) of the Constitution also made all offences bailable, with the result that categorisation of offences as bailable and non-bailable no longer applies. Other reforms within the Criminal Justice System are highlighted in the following processes:-

Criminal Procedure Code

The Criminal Procedure Code provides for the procedure to be followed in prosecuting criminal matters.[7] The Criminal Justice process commences with the arrest of an accused person either with or without a warrant of arrest.[8] The Courts have persistently through case law, reinforced the constitutional requirement that an arrested person be presented to Court for trial within the required time, that is 24 hours for non-capital offences and fourteen (14) days for capital offences, and had acquitted arrested persons due to the nullity of their prosecution despite there being sufficient evidence of their commission of an offence.

The CPC also gives powers not only to the Police, but also to private persons[9] and Magistrates to arrest suspects. Other people with powers of arrest include officers of the Ethics and Anti-corruption Commission[10] as well as officers of the National Assembly.[11] Under the CPC, the Police have wide discretion in executing arrests without a warrant of arrest and they can make such arrests in the following circumstances:[12]

- when the Police officer reasonably suspects that a person has committed a cognizable offence;
- when a person commits a breach of the peace in the presence of the Police officer;
- when a person obstructs a Police officer in the execution of his duties or when a person escapes or attempts to escape from lawful custody;

6 The Constitution, of Kenya , 2010. Article 49(2)

7 The Criminal Procedure Code, Cap 75 Laws of Kenya, revised edition 2009, available at http://www.kenyalaw.org/Downloads/Acts/Criminal%20Procedure%20Code.pdf (accessed on 12th February, 2016).

8 See Criminal Procedure Code, Part III titled "Arrest, Escape and Retaking".

9 Criminal Procedure Code, sections 34 & 35.

10 Ethics and Anti-Corruption Act, No. 22 of 2011, section 11(4),

11 The National Assembly (Powers and Privileges) Act (Cap. 6), section 30, available at http://www.parliament.go.ke/plone/statutory-documents/national-assembly-powers-and-privileges-act-chapter-6-revised-edition-2012

12 Criminal Procedure Code, section 29. See also The Kenyan National Police Service Act, No. 11 A of 2011, revised edition 2012,

- when a person is in possession of property that is reasonably suspected to be stolen;
- when a person is found on a highway, yard or other place during the night and the person is reasonably suspected of having or being in the process of committing a felony;
- When a person is found in the street or public place at night and is reasonably suspected of being there for an illegal or disorderly purpose or is unable to satisfactorily account for themselves. The arresting authority of the Police as contained in the CPC is further legitimised in the Kenyan National Police Service Act, 2011 which provides in section 24(h) that one of the functions of the Police is the apprehension of offenders.[13]

Safeguards against the abuse of Police arresting powers

This wide discretion has been abused by the Police to harass Kenyans, especially the poor, vulnerable and marginalised individuals without sufficient legal knowledge to defend themselves or sufficient resources to either bribe the Police officer to be released or to hire a lawyer to represent them in Court.[14] The CPC has in-built safeguards against this abuse of power by the police. It envisages Judicial and accountability safeguards in the use of the power of arrest without a warrant by requiring the arresting officer to take the arrested person before a Magistrate or before an Officer Commanding Station (OCS) respectively.[15] To enhance the accountability safeguards, it further gives powers to the Officer Commanding Station to release a person arrested without a warrant if a Police inquiry reveals insufficient evidence to proceed with a charge.[16] A further safeguard in the use of the Police arresting powers are contained in the National Police Service Act which provides that the Police must execute all their functions, including the arresting duties, in accordance with Article 244 of the Constitution as well as the Bill of Rights.[17] Article 244 of the Constitution requires the Police service to:

- Strive for the highest standards of professionalism and discipline among its members;
- Prevent corruption and promote and practice transparency and accountability;
- Comply with constitutional standards of human rights and fundamental freedoms;
- Train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and
- Foster and promote relationships with the broader society.

13 The Kenyan National Police Service Act, No. 11 A of 2011, revised edition 2012, available ://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/NationalPoliceServiceAct_No._11Aof2011_.pdf .

14 J Oloka-Onyango 'Police powers, human rights and the State in Kenya and Uganda: A comparative analysis' (1990) 1 Third World Legal Studies 1-36.

15 Criminal Procedure Code, section 33.

16 Criminal Procedure Code, section 36.

17 The Kenyan National Police Act, section 49.

More safeguards against the abuse of arresting powers by the Police as well as the pre-trial treatment of arrested persons are further entrenched in the 5th schedule of the National Police Service Act which is titled "Arrest and detention rules". These arrest and detention rules require the Police officers to conduct their functions in accordance with the Constitution, especially Articles 49-51, the National Police Service Act or any other relevant law.[18] The schedule requires that arrested persons be held only in designated Police lock-up facilities that are open to inspection by relevant authorities and nowhere else.[19] The schedule mandates that each Police station must have these lock-up facilities for detaining arrested persons and that the facilities must meet the following specifications:[20]

- Hygienic conditions conducive for human habitation;
- Adequate light, toilet and washing facilities and outdoor area;
- Men and women will be kept separately;
- Juveniles and children will be kept separately from adults; and
- Police detainees will be kept separately from convicted prisoners.

The fifth schedule provides further safeguards to pre-trial detainees by providing that detained persons are entitled to enjoy all the rights that do not relate to the restriction of their liberty, which includes communicating with and having visits from family members, access to doctors and general medical assistance as well as the right to lodge a complaint against mistreatment and ask for compensation.[21] These safeguards have been put in place to enhance the respect and protection of human rights and fundamental freedoms of accused persons who come in contact with the Criminal Justice System through the Police.

In addition to the above, the other safeguards exist in the nature of the exercise of Police powers are envisaged in the Constitution and in the Independent Policing Oversight Authority Act, 2011.[22] The Constitution provides for the establishment of the National Security Council, consisting of the President, Deputy President, the Attorney General, the Director-General of the National Intelligence Services, the Inspector-General of the National Police Service and the relevant Cabinet Secretaries, which is mandated to exercise supervisory jurisdiction over national security organs, the national Police services included.[23]

18 *The Kenya National Police Service Act, Schedule 5, Paras. 1-2.*

19 *Ibid 5, Paras. 10-12.*

20 *The Kenya National Police Service Act, Schedule 5, Paras. 4-5.*

21 *The Kenya National Police Service Act, Schedule 5, Paras.7 & 9.*

22 *Independent Policing Oversight Authority Act, No. 35 Of 2011, Revised Edition 2012,*

23 *The 2010 Kenyan Constitution, Article 240.*

The Constitution further established the National Police Service Commission which is mandated, among other things, to exercise due process as well as disciplinary control over the National Police Service Staff.[24] An Independent Police Oversight Authority has been established by the Police Oversight Authority Act with the aim of providing a civilian oversight over the work of the National Police Service.[25] The main objectives of the Oversight Authority are provided in section 5 of the Act as follows:

- Hold the Police accountable to the public in the performance of their functions;
- Give effect to the provision of Article 244 of the Constitution that the Police shall strive for professionalism and discipline and shall promote and practice transparency and accountability;
- To ensure independent oversight of the handling of complaints by the Service.

To ensure that it achieves these objectives, the Oversight Authority is empowered to perform the following functions:

- Investigation of any complaints related to disciplinary or criminal offences committed by members of the service and make recommendations for prosecution, compensation or any other appropriate relief;
- Monitoring and investigation of all policing operations affecting members of the public;
- conducting the inspection of Police premises, including detention facilities;
- Reviewing the patterns of Police misconduct and the functioning of the internal disciplinary process.[26]

This is the first time that a civilian Police oversight authority has been established in the history of Kenya, and it is hoped that the authority will use its powers effectively for the betterment of the Police service, to an extension, the protection of the rights of the Kenyan people.

Remand of Pre - Trial detainees in prison

With the enactment of the National Police Service Act, 2011, which requires that all pre-trial detainees be held in Police lock up facilities (fifth schedule, Para. 10 of the Act) and that a register be kept of the date and time of their first appearance in Court (fifth schedule, Para. 8(a) (iv)), doubts are raised as to whether pre-trial detainees will be remanded in prisons or Police lock-up facilities pending the commencement of their trials. The holding of pre-trial detainees in remand in

24 *The 2010 Kenyan Constitution, article 246.*

25 *Independent Policing Oversight Authority Act, section 3.*

26 *Independent Policing Oversight Authority Act, sections 6-7.*

prisons has been the practice in Kenya, and it is provided for by the Prisons Act[27] which in section 32 titled "Custody of persons under arrest" provides as follows;-

> "Every person arrested in pursuance of any warrant or order of any Court, if such Court is not sitting, may be delivered to an officer in charge for custody and such officer in charge shall cause such person to be brought before the Court at its next sitting."

However, despite the provisions of the **fifth schedule** requiring pre-trial detainees to be held in Police lock-up facilities, not all Police stations in the country have those facilities, and pre-trial detainees are still detained in prisons as per Section 32 of the Prisons Act. The danger with the application of this provision of the Prisons Act is that, it has no custody time limit for the detention of pre-trial detainees, meaning that these detainees will stay in prison until such a time that they are either released by the Courts on bail or until after their trial and either acquittal or conviction.

The circumstances of the pre-trial detainees held in custody is worsened by the delay that is often experienced in the trial of cases due to the heavy case back-log .This is a major drawback in the administration of justice in Kenya as well as the incapacity of the Police to complete investigations and identify witnesses in a timely manner, with the results accused persons are detained for months of years before trial.[28] The only available safeguard for the pre-trial detainees at the moment is the requirement that they be produced in the magistrate's Courts at least once in 14 days for mention so that the Court can look into their condition of detention and to ensure that they are provided with the necessary material support when in remand.

Bond and Bail processes

Article 49(1) (h) of the Constitution of Kenya gives an arrested person the right "to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released." Further, Article 49(2) of the Constitution 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."

At the same time, the Criminal Procedure Code (CPC) empowers an officer in charge of a police station or a Court to admit a person accused of an offence – other than murder, treason, robbery with violence, attempted robbery with violence and any related offence – to bail or release on executing a bond with sureties for his or her appearance.[29] Alternatively, such a police officer or Court may, instead of taking bail from the accused person, release him or her upon executing

27 *The Prison Act, Chapter 90 Laws of Kenya, Revised Edition 2009 (1977),*

28 *Article 51 Initiative (Freedom from Torture) 'Draft – Kenya Baseline Study Report, 18 May 2012' (2013)*

29 *Criminal Procedure Code, Chapter 75, Laws of Kenya, section 123(1).*

a bond without sureties. Further, the CPC provides that "The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive."[30] It also gives the High Court the power to "direct that an accused person be admitted to bail or that bail required by a subordinate Court or police officer be reduced.[31] Finally, it provides that "Before a person is released on bail or on his own recognizance, a bond for such sum as the Court or police officer thinks sufficient shall be executed by that person and by one or more sufficient sureties[32]

A number of other laws also contain provisions that deal with bail. These laws are the Children Act, the Prevention of Terrorism Act and the National Police Service Act. The Children Act empowers Courts to grant bail to child offenders pending their appearance before a Children's Court.[33] The Prevention of Terrorism Act 2012 provides that the rights of an arrested person specified under Article 49(1) (f) of the Constitution may be limited in order to ensure the protection of the suspect or any witness, to ensure that suspect avails himself for examination or trial or does not interfere with the investigations, to prevent the commission of an offence under this Act, or to ensure the preservation of national security.[34] The National Police Service Act gives a police officer investigating an alleged offence, save for an offence against discipline, broad discretionary power to "require any person to execute a bond in such sum and in such form as may be required," on condition that the person shall duly attend Court if and when required to do so.[35] However, this power is to be "exercised in strict accordance with the Criminal Procedure Code."[36] A person who refuses or fails to comply with the bond requirements commits an offence.[37]

These foregoing provisions of the Constitution and statutory laws seek to regulate administration of the right to bail and pretrial detention that is the confinement of accused persons in facilities such as police cells or prisons, pending the investigation, hearing, determination or appeal of their cases. Administering these laws entails balancing the rights of suspects and accused persons to liberty and to be presumed innocent with the public interest.

Attaining this much-needed balance has proved elusive for much of Kenya's history, and complaints are many concerning disparities in the administration of bail and bond. For example,

30 *Ibid section 123(2)*

31 *Ibid section 123(3)*

32 *Ibid section 124*

33 *Children Act, section 185(4).*

34 *Prevention of Terrorism Act 2012, section 35.*

35 *National Police Service Act, section 51(3).*

36 *Ibid, section 53(3).*

37 *Ibid, section 53(2).*

research shows that "there has been little consistency and standards in the application of bail by concerned agencies."[38] As a result, "there is great public concern that bail granted across the country lack clear criteria, are exorbitant, unjustifiable and unaffordable by the majority of accused persons who are vulnerable and poor."[39]

Conversely, in the face of increasing and deadly terror attacks and new crimes such as drug trafficking and piracy, the Government and the public have expressed concern that persons accused of committing such serious crimes are absconding after being granted bail, thereby undermining the administration of Criminal Justice. Additionally, for the first time in Kenya's history, the Constitution now recognizes and seeks to protect the rights of victims of crime. Parliament enacted this legislation as stipulated under Article 50(9), of the Constitution in the form of the Victim Protection Act, 2014. This Act seeks to recognize and give effect to the rights of victims of crime.[40] Second, this Act seeks to protect the dignity of victims of crime through, among other things; third, it seeks to promote cooperation among government departments, organizations and agencies involved in working with victims of crime.[41] In particular, this Act implicates bail decision making in two significant respects:

- It imposes a duty on the Courts to "ensure that every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken"[42]
- It gives victims of crime the right "to have their safety and that of their family considered in determining the conditions of bail and release of the offender."[43]

It is in this context that the Chief Justice appointed the Task Force on Bail and Bond to formulate Bail and Bond Policy Guidelines. The Taskforce, under the direct supervision of the Deputy Chief Justice, was placed under the umbrella of the National Council on the Administration of Justice (NCAJ).[44] The Judicial Service Act establishes the NCAJ, and gives it the primary function of "Ensuring a coordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system."[45] In particular, this law requires the NCAJ to "formulate policies relating to the administration of justice, These Bail and Bond Policy Guidelines are to

38 *Republic of Kenya, Office of the Vice President and Ministry of Home Affairs, Draft National Bail Information and Supervision Policy, Task Force Drafting the Victims of Offences Bill and the Bail Information and Supervision Bill 2011 at 19.*

39 *Ibid.*

40 *Victim Protection Act 2014, section 3(a).*

41 *Ibid, section 3(c).*

42 *Ibid, section 4.*

43 *Ibid, section 10(1)(b).*

44 *Judicial Service Act, No. 1 of 2011, section 34.*

45 *Ibid, section 35(1).*

guide police and judicial officers in the application of laws that provide for bail and bond were launched in March 2015.

Therefore, all arrested persons are now entitled to seek their release on bond or bail, pending charge or trial. In effect, all offences are therefore bailable.

Legal representation

Legal representation is an important aspect of the right to a fair trial.[46] Article 50 (2) (g) of the constitutional provides that every accused person has the right to a fair trial which includes the right to choose and be represented by an Advocate and to be informed of this right promptly further sub clause (h) provides to have an Advocate assigned to the accused person by the state and at the state's expense, if substantial injustice would otherwise result and to be informed of this right promptly.

Logically a right to a legal representation of one's choice may only arise where an accused person has the means to engage a counsel of his own choice. Where, however, an accused is given free legal aid he has no choice of the counsel who is to represent him. He has, however, a right of election-he can decide to accept the counsel assigned to him or to reject him and defend himself in person.

The provisions for legal representation in the Kenya have been enhanced by the Constitution of Kenya, 2010 which provides, in Article 50(2) (h), that as part of the fair trial rights, an accused person has a right 'to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly'. This, therefore, means that the right to a Legal Counsel at the State's is a constitutional requirement, and that the guiding principle as to whether or not a person is entitled to this right is the prevention of substantial injustices.

Prosecution under special legislation – Terrorism.

The Prevention of Terrorism Act, 2012 is the legislation that deals with the detection and prevention of terrorist activities and it gives Police officers the authority to arrest persons who are reasonably suspected to have committed or are committing offences under the Act.[47] Arrested persons under the Act are not to be held for more than 24 hours unless a Court so orders or unless the 24 hours falls outside the normal Court days, at which instance, the person is to be arraigned in Court

46 *See the International Covenant on Civil and Political Rights, article 14(3).*

47 *The Prevention of Terrorism Act, section 31.*

on the next normal Court day.[48] The Act authorises a Police officer to release a person arrested under the Act at any time before the expiry of 24 hours on condition that the person appears before a specified Court or other specified place by requiring the person to execute a bond of a reasonable sum on their own recognisance.[49] To prevent the Police from abusing their powers of arrest and release with regard to the time within which a suspect is to be arraigned in Court, the Act proscribes the re-arresting of a suspect released under section 32(2) above for the same offence unless a warrant of arrest is obtained or further evidence have come to light that justify the re-arrest.[50].

If it appears to an arresting officer under the Terrorism Act that it is necessary to detain the arrested person beyond the 24 hours that is provided for in the Act, the officer must produce the person in Court and make a written application for the Court to extend the time.[51] The written application must contain the offence which the arrested person is to be charged, a general overview of the evidence against them, and the reasons necessitating the continued holding of the suspect.[52] After taking into account any objections by the accused person, the Court can either release the person unconditionally; or upon conditions to ensure that the person avails him/herself for the purposes of facilitating the conducting of investigations and for trial proceedings, does not commit any offences during release, does not interfere with witnesses; or make an order for the remand of the person in custody taking into account the conditions enumerated in section 33(5) of the Act and only for a period not exceeding 30 days.[53] If the Court decides to release the accused person either conditionally or unconditionally, the Court may require the accused person to execute a bond and provide securities for the bond so as to secure the attendance of the accused person for trial proceedings.[54]

The Terrorism Act envisages the limitation of fundamental rights of persons accused of offences under the Act for the purposes of the investigation of terrorist acts, the detection and prevention of terrorist acts or to ensure that the enjoyment of the fundamental rights of the accused person does not prejudice the rights and fundamental freedoms of others.[55] Some of the rights that can be limited under this Act are the right to privacy, the right to be brought to brought to Court within 24 hours as per article 49(1) (f) of the 2010 Constitution, as well as the right not to be compelled

48 *Ibid , section 32(1).*

49 *Ibid section 32(2).*

50 *Ibid section 32(3).*

51 *Ibid, section 33(1).*

52 *Ibid section 33(2).*

53 *The Prevention of Terrorism Act, section 33(4) & (7).*

54 *Ibid section 33(6).*

55 *Ibid , section 35(1)-(2).*

to make any confession or admission that can be used against the accused person as per Article 49(1) (d) of the 2010 Constitution.[56] This Act makes inroads into the fair trial rights of accused persons, and its debilitating effects on the fundamental rights of the persons accused of offences under the Act are exacerbated by the lack of any type of oversight mechanism entrenched in the Act itself to prevent the abuse of its provisions.

Vulnerable groups in the Criminal Justice System

Child offenders

Special protection is accorded to vulnerable groups, such as children, when they come into contact with the Criminal Justice System. The Constitution provides, in Article 53(1)(f) that every child has a right 'not to be detained, except as a measure of last resort, and when detained, to be held - (i) for the shortest appropriate period of time; and(ii) separate from adults and in conditions that take account of the child's sex and age'. Article 53(2) further entrenches the need for the protection of children by emphasizing that the best interest of the child is the paramount principle in dealing with any matter concerning children. The principle of the best interest of the child is also entrenched in the Children's Act.[57] Section 18 of the Children's Act further provides as follows:

- No child shall be subjected to torture, or cruel treatment or punishment, unlawful arrest or deprivation of liberty.
- Notwithstanding the provisions of any other law, no child shall be subjected to capital punishment or to life imprisonment.
- A child offender shall be separated from adults in custody.
- A child who is arrested and detained shall be accorded legal and other assistance by the Government as well as contact with his family. Section 77 of the Children's Act also provides that where a Child is taken to Court, the Court may order, where the child is unrepresented, that the child be granted legal representation and that any legal expenses with regard to the legal representation is to be defrayed by monies provided by Parliament.

The Children's Act established the Children's Courts, which are special Courts to hear cases against child offenders other than charges of murder or cases where a child is charged together with adults.[58] Further safeguards in relation to child offenders are provided for in Part XIII of the Children's Act. Section 186 provides as follows:

56 *Ibid , section 35(3).*

57 *The Children's Act, Chapter 141 Laws of Kenya, Revised Edition 2010 (2007) sections 4 & 187,*

58 *Children's Act, sections 73(b) & 184-185.*

Every child accused of having infringed any law shall-

- Be informed promptly and directly of the charges against him
- If he is unable to obtain legal assistance is provided by the Government with assistance in the preparation and presentation of his defense
- Have the matter determined without delay
- Not be compelled to give testimony or to confess guilt;
- Have free assistance of an interpreter if the child cannot understand or speak the language used;
- If found guilty, have the decisions and any measures imposed in consequence thereof reviewed by a higher Court;
- Have his privacy fully respected at all the proceedings;
- If he is disabled, be given special care and be treated with the same dignity as a child with no disability.

The Act further provides that no child should be sentenced to death, be ordered to imprisonment or be placed in a detention camp, or be sent to a rehabilitation school (if below ten years).[59] Proceedings in relation to child offenders are conducted in accordance with the "Child Offender Rules" contained in Schedule Five of the Children's Act. The rules require that a child offender be taken to Court as soon as is practicable and not to be held in custody for a period exceeding 24 hours without the leave of Court.[60]

The rules, however, recommend the use of alternatives to remand custody where possible, such as 'close supervision or placement with a Counselor or a fit person determined by the Court on the recommendation of a Probation Officer or Children's Officer.[61] The rules further require the expeditious hearing of cases of child offenders, providing that should a case in a Children's Court not be completed within three months after the taking of plea, the case shall be dismissed and the child not be liable to any further proceedings for the same offence.[62] If, due to the seriousness of the case, it is heard by a Court superior to the Children's Court, the rules require that the child offender can only be remanded for six months, after which they are entitled to bail, and that should the case not be completed in the superior Court within 12 months after the taking of plea, the case shall be dismissed, the child discharged and not be liable for any further proceedings on the same offence.[63].

59 *Children's Act, section 190.*

60 *Children's Act, Fifth Schedule, Rule 4(1).*

61 *Children's Act, Fifth Schedule, Rule 10(6).*

62 *Children's Act, Fifth Schedule, Rule 12(2).*

63 *Children's Act, Fifth Schedule, Rule 12(3)-(4).*

In addition, the new principles relating granting of bail as stipulated under the Article 49(1) (h) of the Constitution of Kenya gives an arrested person the right "to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released." Further, Article 49(2) of the Constitution 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.

The stringent provisions in the Constitution and in the Children's Act relating to the treatment of children in conflict with the law indicates the societal concerns for enhancing the protection of children due to their vulnerability and developmental challenges. It entrenches the prevailing principle in international law that in proceedings dealing with children, the best interest of the child should be the prevailing principle.

Mentally ill offenders

Mentally ill offenders are another special group of offenders who need special protection in the Criminal Justice System. The Criminal Procedure Code provides that if the Court has reason to believe that an accused person is suffering from mental illness and is unable to stand trial, the accused person's case shall be postponed and the person shall be released on bail unless compelling reasons militate against the granting of bail.[64] If bail is not granted, the Code requires that the accused person is detained in safe custody in a place to be determined by the Court until an order is made by the President that the person be detained in a mental health facility.[65] Should the person with mental illness be determined to be able to stand trial, a medical officer is required to forward a certificate to that effect to the Attorney-General who shall then decide whether or not to continue with the proceedings against the person.[66]

The Mental Health Act provides little direct protection of persons with mental illness in the Criminal Justice System, only providing that in instances where a person with mental illness is before a Court, the Court should strive to protect the dignity of the person by sitting in camera.[67]Protection of the fundamental rights of mentally ill offenders are further sought to be entrenched in the draft Mental Health Care Bill, 2012.[68] In section 33 of the Bill titled "Mentally ill offenders" it provides that a mentally accused person should be held in a mental health facility where they can access the requisite medical attention during the currency of their detention at the State's expense. However, in instances where they are held in Police cells, the Bill requires that they be held separately from

64 *Criminal Procedure Code, section 162 (1)-(3).*

65 *Criminal Procedure Code, section 162(4)-(5).*

66 *Criminal Procedure Code, section 163.*

67 *Mental Health Act, Chapter 248 Laws of Kenya, Revised Edition 2012 (1991), section 38,*

68 *Mental Health Care Bill, 2012,*

other detainees in special cells.[69]The Bill further requires that where mentally ill offenders have the capacity to stand trial, their criminal cases should be expedited and be given priority over other cases.[70].

Immigrants

Under the *2011 Kenya Citizenship and Immigration Act*, a migrant who unlawfully enters or is unlawfully present in the country commits a criminal offence. If convicted, the penalty may involve a fine (of up to USD 5,500) or imprisonment (of up to 3 years), or both. Importantly, this rule does not apply to newly arrived asylum-seekers. Under the Act, irregular migrants may also be detained in police custody, prison or immigration holding facilities pending their deportation. In recent years, it has been estimated that, apart from the massive arrests during 2012 and 2014 security operations, hundreds of irregular migrants have been arrested and detained in Kenya. Every month, the media reports on incidents of arrests, raids and detention (and deportation) of groups of migrants. In 2011, the Nairobi-based NGO Legal Resources Foundation conducted a study which identified 726 foreigners in the prison system in Kenya. In 2012, the Refugee Consortium of Kenya (RCK) provided legal representation to 727 asylum seekers and refugees held in various detention centres across the country.

Despite scattered information on such incidents, comprehensive data on the number of migrants in detention in Kenya, as in other countries, is not collated. There are no ready statistics of migrants in Kenyan prisons, as there is no categorization of foreigners in the Kenyan judicial system and no database with numbers publicly released.[71] Data is especially limited for crucial areas of the country, such as the North Eastern Province, where it is likely that many irregular migrants are detected while, or shortly after, crossing the Somali-Kenya border.

More recently, in 2014, there have been multiple incidents in which (mainly) Ethiopian migrants were arrested and detained in Kenya, implying a potential increase in the number of Ethiopians traveling south through Kenya on their way to South Africa. It could also point to the increased efforts by Kenyan authorities to curb irregular migration through its territories. In May 2014, for example: police inn kitengela arrested 25 Ethiopian nationals on their way to Tanzania for being in the country without valid documents. The men, in their early 20s, were found hidden in a house, while waiting to be ferried to South Africa through Tanzania. They were arraigned at Mavoko Law Court where they where they were charged for being in the country without valid travel documents

69 *Mental Health Care Bill 2012, section 33(7).*

70 *Mental Health Care Bill 2012, section 33(4).*

71 *RMMS, 2013b, p. 7;*

According to RCK, one of the challenges in mixed migration and refugee protection in Kenya is the failure by law enforcement officers to distinguish between criminals, irregular migrants and asylum seekers.177 some reasons for the arrest and detention of refugees by Kenyan police stems from ignorance of the correct procedures and ineffective application of refugee law. In a 2012 report, RCK explained that the *2006 Refugee Act* states that asylum seekers have a period of 30 days once they have crossed the border to get to a registration point. Because those seeking protection usually cross the border without documentation, it is not easy for the police to know how long they have been in the country. Many of the police have insufficient training on refugee matters and are not familiar with refugee law.[72] They are often not able to conduct proper interviews (which are compounded by language barriers) with migrants to assess whether they entered the country as an economic migrant or asylum seeker. This can lead to asylum-seekers being categorized as economic migrants.[73] If migrants are arrested they are brought to Court, which usually happens fast. However, there is also a lack of adequately trained interpreters in the Courts. As a result, migrants often do not understand the charges, 180 and they might accept the charges without properly understanding them, or, misconstrue the judicial officer's questions. Irregular immigration either attracts a fine or a custodial sentence. Fines can be high, with some irregular migrants fined 100,000 or 200,000 Kenya Shillings [between USD 1,125 and 2,250]. In the previous *Immigration Act*, the prison sentence was around 6 months, but in the new *2011 Citizenship and Immigration Act* it can be up to 3 years. The context of the government of Kenya's crackdown on irregular migration in 2014 could possibly influence the judges' sentences.

Another issue is that migrants in Kenya often face is multiple detention in several ways. For example, they are arrested several times during their journey because they do not have proper documentation or they are released from prison only to end up again in a police cell because there are no deportation / repatriation systems in place. Migrants also face the risk of multiple detentions between countries. Often migrants are deported to the nearest point of entry where, after crossing the border, they are arrested again. When migrants are arrested, the usual process in Kenya is for them to spend one or two nights in a police cell before they are charged and sentenced to prison (for example, for two months). In some cases this cycle repeats itself before their eventual repatriation. Usually migrants are handed over to an immigration officer after they serve their sentence. The immigration officer has to keep the migrants until repatriation is arranged. However, migrants often end up in police cells, where they usually have to wait for a long time before repatriation. This has to do with the lack of financial resources for quick and efficient repatriation. For example, immigration officers will not arrange transport to repatriate just two Ethiopian migrants and will wait until there is a substantial number eligible for repatriation. This basically extends the prison sentence. While waiting for repatriation, migrants may be held in small police cells with 70 or 80 people. Conditions are often poor with a lack of space and resources for food.

72 *RCK, 2012, p. 36-37.*

73 *RMMS, 2013b, p. 31.*

Migrants in Kenya are upon arrest and subsequent production in court held in various prisons, and police stations all over the Republic as they proceed with their cases. This depends on where they are apprehended and brought to Court. Prison conditions exposes asylum seekers and refugees to a myriad of problems which include but not limited to lack of legal representation , counselling services etc.

In addition to routine arrests and detention of irregular migrants in Kenya, the authorities on several occasions in recent years have carried out mass arrests and detention of migrants and refugees as part of its security operations. For instance at the end of March 2014, the Interior Ministry launched yet another security operation dubbed '*Usalama Watch*', again aimed at addressing rising terror attacks in Kenya. The operation was implemented following an attack in Mombasa on 23 March 2014 and explosions in Eastleigh on 31 March 2014, which killed at least ten people and injured scores of others.[74] On 26 March 2014, Kenya's Cabinet Secretary for the Ministry of Interior and Coordination of National Government, Joseph Ole Lenku, issued a press statement ordering all refugees to the camps citing security challenges as the reason. This order was made despite the High Court ruling overturning an identical directive in July 2013. On 4 April, security forces put up road blocks and began sweeps in Eastleigh, indiscriminately rounding up and arresting thousands of people. During the operation more than 4,000 individuals were arrested and detained, the majority of them Somali refugees and asylum seekers. An estimated 2,200 refugees were sent to Dadaab and Kakuma refugee camps, while 359 Somalis were deported to Mogadishu, Somalia by April 2014.

Several agencies expressed their concern over Operation '*Usalama Watch*'. UNHCR cautioned over harassment and other abuses, overcrowding and inadequate sanitation in holding facilities, including the Kasarani Stadium where hundreds or even thousands of migrants were held. The conditions of detention were reportedly poor. Migrants/refugees were held in unsanitary and overcrowded cells in which men, women and children were held together. Witnesses interviewed by Amnesty International said the stench in Kasarani Police Station was unbearable. People defecated on the floor and, due to lack of room, would later trample on the human waste. During hours of detention, detainees were not given any food. At least two people reportedly died during the operation.

Finally, Independent Policing Oversight Authority (IPOA), mandated to hold the police accountable to the public in the performance of its functions, released a monitoring report on operation '*Usalama Watch*' in July 2014. The IPOA confirmed that the detention facilities were in very deplorable conditions, they were also overcrowded and children and adults were confined in the same cells. The IPOA also concluded that the constitutional limit of 24 hours, within which arraignment in

74 Amnesty International,(2014)pg 4-5

Court should be done for persons under arrest, had been grossly violated during the operation.[75] The IPOA further concluded that there was a lack of proper coordination/supervision of the operation, there was unethical conduct by some police officers, and individuals caught in the operation's dragnet were subject to violations of their human rights, which are guaranteed in Kenya's Constitution.

Women

Female offenders in Kenya make up to 18% of the prison population annually with the cumulative annual turn-over increasing from 10,857 in 2004 to 18,112 in 2012.They also account for up to 4% of all violent crimes in Kenya (Kenya police crime statistics,2011)More women are getting increasingly involved in crimes that hitherto were male dominated. Most female offenders are from poor backgrounds with low social status. The majority of them are illiterate, mainly from broken families. In certain cases, an abusive past and residence in urban centers also predispose some females to commit crimes. Female crimes in Kenya are diametrically opposed to those of their male counterparts. Whereas males have a tendency to be involved in violent crimes and other serious acts of subversion, female offences are less severe. It has been established that that the majority of female commit offences including assault, loitering, littering, hawking, and illicit alcohol brewing and sale. Presently, a number of female have been arrested for crimes such as prostitution, child neglect, child trafficking, drug trafficking, economic fraud and homicide. The offences notwithstanding, those arrested find themselves assigned to one of the eighteen (18) women's prison in the country with Langata and Shimon La Tewa maximum security women's prisons housing inmate populations of between 2000 and 3500 offenders.

In line with international standards, female offenders in Kenya are separated in female only institutions. The department with various partnerships has provided facilities and materials for women's specific hygiene needs including sanitary towels and regular supply of water and electricity. There are separate wards for those inmates who are old, lactating .pregnant or suffering from mental illness. Offenders are issued with free toiletry and sanitary towels and adequate food rations. A number of children who accompany their mothers benefit from day care institutions, adequate water and electricity supplies and are accommodated in separate dormitories.[76].

Over the years, a local NGO Faraja foundation provided facilities for women for proper sanitation/ hygiene e.g. renovation of kitchens in Kamiti, Langata Women's and Nairobi Remand Prisons. They also constructed a modern day care center for children imprisoned with their mothers at the Langata Women's Prison,. Women can have their children in prison with them until they are four years old. The kids are kept in a nursery section during the day, where they are watched by a few

75 *IPOA, (2014), p. 5-7.*

76 *Onyango-Israel, O.L., Institutional treatment of female offenders in Kenya*

of the inmates and guards. Currently there are about 90 children living in Langata Prison.[77] They also constructed resource centers at the remand section of Langata Women's Prison and Nairobi West Prison

The foundation also established the first bakery in the women's prison was one of the first, but that's now run by the prison. Other projects they've started include formal education, computer training, counselling and arts and crafts projects, which are lumped together in the industry category. A typical day for the inmates begins around 6:30am when they wake up. The cell doors are opened at 7am, and roll call is at 8am. Then the inmates have their breakfast and go to their assigned tasks. They might be working in the kitchen, on the farm or on various projects.[78]

Lang'ata Prison is a sprawling complex, with a remand centre and the women's prison, which is a maximum security facility. There are roughly 700 women incarcerated at Langata Women's Prison and more than 45 children under the age of four who live there with their mothers. The amount of time women spend in remand varies considerably. Some of them go straight to prison while others spend years, because different cases take different amounts of time. Typically a person charged with loitering or shoplifting will be processed quicker than the violent crimes, but, of course, it also depends on how complicated the case is.

The remand prison in Lang'ata is comprises of a large structure, with the cells organized around a Courtyard. The cells themselves are small rooms, although not miniscule, with a bathroom and a bunk in each – every prisoner has a bed. The remandees also have quite a bit of freedom in terms of how they spend their days, unless they are scheduled for Court. Otherwise, they can stay in their cells, participate in some of the prison's rehabilitation projects or prepare themselves for Court, including washing their 'outside' clothes for their day in front of the judge. In remand, there are two different types of uniforms – the standard stripes for the lesser crimes and a plain blue for capital offenses.

Once convicted the women are sentenced. Time in remand can be taken off, but the judge can also decide to add it on top. Then they are transferred to the prison, processed and officially become inmates.

On 7th October, 2015, there were reports that women, children and men were sharing holding cells in Courts across the Country after funds were slashed to the County level.[79] The National Police Service and the Kenya Prison Service have a duty to ensure that the gender-specific health and other needs of female detainees are met. Only female officers should attend to female detainees.

77 http://www.farajafoundation.or.ke/index.php/governance/deputy-governor/infrastructure-sanitation.html

78 https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjbqYuw5vfLAhVCOpoKHYsYBOEQFggdMAA&url=http%3A%2F%2Fwww.eadestination.com%2Finvestigative-journalism%2F43-behind-bars-a-look-at-life-in-one-of-kenya-s-most-notorious-prisons&usg=AFQjCNGxjwkfPV8NaQQ89WyLMEj84k7Imw

79 Sunday Nation ,7th October,2015

Although male officers may be assigned to detention premises set aside for women, a female officer should always accompany them. But where this is not feasible, the NPS and the KPS will ensure a minimum of female personnel and develop clear procedures that minimize the probability that female detainees will be abused or ill-treated in any way.[80]

Pre Trial Detention

Presently, there are roughly 10.1 million people formally imprisoned worldwide, according to the latest estimates by the International Centre for Prison Studies' World Prison Brief.[81] Pretrial detainees are disproportionately likely to be poor, unable to afford the services of a lawyer, and without the resources to deposit financial bail to facilitate their release should this option be available to them. When poor defendants are more likely to be detained, it can no longer be said that the Criminal Justice System is fair and equitable.

Pretrial detention can provide a window into the effectiveness and efficiency of a particular state's Criminal Justice System, as well as its commitment to the rule of law. In the developed world, the lower percentage of all prisoners who are on pretrial and the shorter average duration of pretrial detention indicate a relatively efficient Criminal Justice System: people move through the system quickly and are generally released pending trial. In developing countries, however, the great majority of all detainees are pretrial and they can languish in that situation for years. This indicates, at best, an inefficient and overwhelmed Criminal Justice System, and at worst a lack of commitment to the rule of law.[82]

Pre-trial detention is one way in which the right to liberty can be legitimately curtailed. It can defined as 'detaining of an accused person in a criminal case before the trial has taken place, either because of a failure to post bail or due to denial of release under a pre-trial detention statute'.[83] Globally, almost every third incarcerated person was in pretrial detention. But this proportion varies considerably by region.[84]

A multi country study found that "most prison systems in practice frequently deny to the remand population access to many of the facilities, rights and privileges granted to convicted inmate...

80 Judiciary (2015)Bail and bond policy guidelines, page 32

81 International Centre for Prison Studies (ICPS), Http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poptotal

82 Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk Overview of pre trial detention, Open Society Foundations,2011,page 22

83 Webster's New World Law Dictionary, available at http://law.yourdictionary.com/pre-trial-detention (accessed on 11th February, 2016).

84 Roy Walmsley, World Prison Population List, 6th edition (London, International Centre for Prison Studies [ICPS], 2007); World Prison Brief Online (ICPS)

In some cases, such deprivations amount to an inducement to plead guilty in order to obtain better conditions of confinement."[85]

Excessive pre-trial detention also has a broader socio-economic impact: Pre-trial detainees may lose their jobs, be forced to abandon their education and be evicted from their homes. They are exposed to disease and suffer physical and psychological damage that lasts long after their detention ends. Their families also suffer from lost income and forfeited education opportunities, including a multi-generational effect in which the children of detainees suffer reduced educational attainment and lower lifetime income. The ripple effect does not stop there: communities and States marked by the over-use of pre-trial detention must absorb its socioeconomic impact[86]

Legal framework on pre-trial detention

There are several international instruments that sets out human rights standards on pre-trial detention and include: the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of Persons with Disabilities (CRPD), and the International Convention for the Protection of All Persons from Enforced Disappearance(ICCPED).

In addition, there are some additional standards developed in non-binding instruments, principally being the following: Standard Minimum Rules for the Treatment of Prisoners; the Code of Conduct for Law Enforcement Officials; the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions; the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; the Guidelines on the Role of Prosecutors; the Basic Principles on the Role of Lawyers; the Basic Principles for the Treatment of Prisoners; and the United Nations Standard Minimum Rules for Non-Custodial Measures, also known as the Tokyo Rules.

Although not legally binding, the Minimum Standards provide guidelines for international and domestic law for citizens held in prisons and other forms of custody. The basic principle described in the standards is that "There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other

85 Dünkel and Vagg, Waiting for Trial (Max Planck Institute, 1994), XIV.

86 Burton P. Pelser E and Gondwe L. (2005) Understanding Offending, Prisoners and Rehabilitation in Malawi, Crime & Justice Statistical Division National Statistical Office p. 37

status ".It should be noted that although the Standard Minimum Rules are not a treaty, they constitute an authoritative guide to binding treaty standards.

Other documents relevant to an evaluation of prison conditions include the Body of Principles for the Protection of All Persons under any form of detention or imprisonment,[87] and, with regard to juvenile prisoners, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as the "Beijing Rules")[88]. Like the Standard Minimum Rules, these instruments are binding on governments to the extent that the norms set out in them explicate the broader standards contained in human rights treaties. Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1982[89], Code of Conduct for Law Enforcement Officials, 1979, Declaration on the Protection of All Persons from Enforced, Disappearance, 1992 and Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, 1989[90]

The Regional level

The African Charter (also known as the Banjul Charter)[91] is the basic document from the African Unity (AU) that enumerates the rights and duties as well as the principles of people's rights. It also established safeguard mechanisms, such as the African Commission on Human and people's Rights. The Commission has made use of the United Nations Standard Minimum Rules for the Treatment of Prisoners, the International Covenant on Civil and Political Rights, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the African Charter on the Rights and Welfare of the Child, and the Protocol on the Rights of Women. Furthermore, in 1995 the Commission adopted the Resolution on Prisons in Africa, which extended the rights and protections set forth in the African Charter on Human and Peoples'Rights to prisoners and detainees. The Commission strives to emphasize individual state accountability to care for prisoners and guarantee the minimal standard of prisoners' rights. However, the Commission has not yet established coherent standards by way of guidelines as to degrees or

87 UN Commission on Human Rights, Body of principles for the protection of all persons under any form of detention or imprisonment, 7 March 1978, E/CN.4/RES/19(XXXIV), available at: http://www.refworld.org/docid/3b00f0846c.html [accessed 11 February 2016]

88 UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") : resolution / adopted by the General Assembly., 29 November 1985, A/RES/40/33, available at: http://www.refworld.org/docid/3b00f2203c.html [accessed 11 February 2016]

89 UN General Assembly, Principles of Medical Ethics, 16 December 1983, A/RES/38/118, available at: http://www.refworld.org/docid/3b00f01464.html [accessed 11 February 2016]

90 UN Commission on Human Rights, Human Rights Resolution 2005/26: Human Rights and Forensic Science, 19 April 2005, E/CN.4/RES/2005/26, available at: http://www.refworld.org/docid/45377c43c.html [accessed 11 February 2016]

91 African Union. 1981. African Charter on Human and Peoples' Rights. Banjul: African Union.

even elements of violations of prisoners' rights. The Commission usually hears a complainant's evidence and evaluates a government's response. In the absence of a governmental response, the Commission finds in favor of the complainant.

The Commission has also adopted several resolutions on the standards of prisons in Africa, including the Resolution on the Adoption of the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa. The Ouagadougou Declaration, adopted by the African Commission on Human and People's Rights (ACHPR) in 2003 – pays particular attention to un-sentenced prisoners and recommends:

- Better co-operation between the police, the prison services and the Courts to ensure trials are speedily processed and to reduce delays in remand detention through regular meetings of caseload management committees, including all Criminal Justice agents at the district, regional and national levels;
- Making costs orders against lawyers for unnecessary adjournments; and, targeting cases of vulnerable groups.
- Ensuring that people awaiting trial are only detained as a last resort and for the shortest possible time through increased use of cautioning, greater access to bail by expanding police bail powers and involving community representatives in the bail process, restricting time in police custody to 48 hours, and setting time limits for people on remand in prison.
- Good management of case files and regular reviews of the status of remand prisoners and, greater use of paralegals in the criminal process to provide legal literacy, assistance and advice at the earliest possible stage.

The Commission has also adopted declarations to find common solutions with the problems facing prisons in Africa and these include the Kampala Declaration on Prison Conditions in Africa, adopted in Kampala, Uganda, in 1996, the Arusha Declaration on Good Prison Practice adopted in Arusha, Tanzania, in 1999 and the Kadoma Declaration on Community Service in Zimbabwe in 1997.

All of these instruments contain recommendations on reducing overcrowding, promoting rehabilitation and reintegration programs, making prison administrations more accountable for their actions and more self-sufficient, encouraging best practices, promoting the African Charter and supporting the development of a Charter on the Basic Rights of Prisoners from the United Nations. In addition, the Commission also adopted the Robben Island to monitor state implementation of these provisions.

However, despite the aims of the Ouagadougou Declaration and the efforts of numerous stakeholders, progress towards prison reform has been limited across the continent and in most countries; prison conditions do not meet minimum standards of humane detention. Conditions in poor nations, conditions generally fall well below accepted international standards and frequently

amount to ill treatment. Overcrowded facilities, inadequate nutrition, poor health and hygiene standards, exposure to communicable diseases, inter-prisoner violence and victimization, and limited supervision contributes to detention conditions that are an affront to human dignity.

Right to liberty and security of the person

An individual is entitled to have respect for all his or her human rights when held in pre-trial detention, with the exception of the one right that cannot be exercised there, being the right to liberty, if limited for a legitimate reason.[92]The presentation of the relevant human rights follows as closely as possible a time-line from the moment an individual is deprived of liberty until the moment a Judicial authority orders release or convicts the individual in question.

Both international and regional human rights instruments guarantee the right to personal liberty and security. A state party to these instruments has the obligation to ensure that this right is respected throughout its territory[93] With regard to the security aspect of this right, the Human Rights Committee ('HRC'), which supervises compliance with the ICCPR, has stated that Article 9(1) of the ICCPR 'protects the right to security of person also outside the context of formal deprivation of liberty', and that an interpretation of Article 9 'which would allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction would render totally ineffective the guarantees of the Covenant'.[94] In the view of the HRC, 'it cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained. The right to liberty also entails the right to freedom from arbitrary arrest and/or detention. The HRC has stated that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law'

The United Nations Trainer's Guide on Human Rights for the Police, which is a non-legally binding guideline, highlights a number of human rights which have to be respected by the police during the exercise of their function.[95].These principles are applicable to the procedures with which the police can arrest and detain an individual. Also, as mentioned above, any deprivation of liberty, and thus arrest and detention, must be devoid of arbitrariness and be legal, reasonable and necessary in any circumstances. To summarize, restrictions on personal liberty may only be permitted under the following specific conditions:

92 Nigel R. and Matt P, The Treatment of Prisoners under International Law (Oxford: Oxford University Press, 2009).

93 See ICCPR art 9(1); African Charter art 6. See also UDHR art 3 and 9.

94 Communication No 195/1985, W Delgado Páez v Colombia (Views adopted on 12 July 1990), UN Doc CCPR/C/39/D/195/1985, Para 5.5.

95 United Nations, Human Rights and Law Enforcement, a Trainer's Guide on Human Rights for the Police (New York and Geneva: United Nations, (2002) ('Trainer's Guide') 38.

- Clear stipulation in the law of the reasons, conditions and procedures for the arrest and the requirement of reasonableness and necessity in all the circumstances.[96] This means that the relevant law must be 'sufficiently precise to allow the citizen … to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.
- Reasonable suspicion that the person concerned has committed the alleged offence, such as 'facts or information which would satisfy an objective observer that the person concerned may have committed the offence';[97]
- Sufficient evidence that the person concerned is likely to abscond, interfere with evidence or commit further offences, or that he presents a 'clear and serious threat to society which cannot be contained in any other manner'.

Furthermore, to ensure effective Judicial supervision and the prevention of disappearances, any arrest must be accurately recorded and contain the following information:[98]

- The reasons for the arrest;
- The time (and date) of the arrest;
- The time (and date) the arrested person was taken into a place of custody;
- The time (and date) the arrested person's first appeared before a Judicial or other competent, impartial and independent authority;
- The identity of the law enforcement officials concerned; and
- The place of custody.[99]

These records must be communicated to the arrested person or his/her counsel.[100]

Notification

At the time of arrest, the individual arrested must be informed of the reasons why they are being arrested and taken into custody. The Principles on Detention extends the notification requirement to the rights of the arrested person. It requires the authority responsible for arrest or detention to provide, at the time of arrest and at the commencement of detention, arrested persons with information regarding their rights and how to avail themselves of such rights in a language which

96 According to the principle of legality, any deprivation of liberty must be done in accordance with the law. See ICCPR art 9(1); African Charter art 6 and UDHR art 9. Communication No 702/1996 Clifford McLawrence v Jamaica (views adapted on 18 July 1997) UN Doc CCPR/C/60/D/702/1996 (1997), para 5.5.

97 See for example Fox, Campbell and Hartley v UK (1991) 13 EHRR 157, para 32.

98 Human Rights Handbook, Para 44.

99 Principles on Detention, principle 12(1).

100 Principles on Detention ,principle 12(2).

they understand. Arrested persons should in particular be made aware of their right to legal counsel. Any arrested person has also the right to have a family member notified of the arrest and the place of detention. Moreover, this right further entails the right to communicate with, and be visited by, relatives and others.

After the arrest, the person arrested must also be informed of any charges against them. The decision by the police whether to charge an arrested person should be made within a short period of time. Any charge made must be notified to the arrested person, as soon as the charge is first made; or when in the course of an investigation a Court or the prosecution decides to take procedural steps against the suspect. The arrested individual must also be informed of the nature and cause of the charge in detail in a language which they understand. The HRC has explained that 'one of the most important reasons for the requirement of "prompt" information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent Judicial authority'. It concluded that Article 9(2) of the ICCPR had been violated in a case where the complainant had not been informed upon arrest of the charges against him and was only informed seven days after he had been detained.[101]

Appearance before a Judicial or other Authority

As mentioned above, arrest and detention must be devoid of arbitrariness and therefore be legal, reasonable and necessary in any circumstances. According to the Body of Principles, the arrest may be ordered by a Judicial or other authority before the arrest stage ('ordered by'). In all other cases, the Judicial or other authority shall at least be involved immediately upon arrest ('under the effective control of ').As any arrest has to be subject to Judicial control or supervision to ensure its lawfulness, anyone arrested has the right to be brought before a Judicial or other authority after the arrest.

The Trainer's Guide has developed a specific rule under which a detainee should be brought before a Court as soon as reasonably possible but no later than 48 hours after arrest in order to be charged and be considered for bail or release: this is called the '48-hour rule'. An exception to this rule may only apply if the Court is not open on the day the 48 hour period expires and, in such cases, the individual shall be brought before a Court on the first possible day following the 48-hour period. The Guide even states that if the 48 hour rule is not observed, the individual in question should be released. This strict rule ensures the early involvement of a judicial body in the assessment of the lawfulness of the arrest and the supervision of a possible extended detention. Limiting the time period under which an individual may be detained in custody without being charged or considered for bail ensures the protection of the rule of law and human rights. If the Judicial or other authority deems the arrest and detention unnecessary and thus unlawful, the

101 Communication No 248/1987, G Campbell v Jamaica (Views adopted on 30 March 1992), 246, Para 6.3.

individual has to be released. No individual should be kept in custody after his release has been ordered.[102]

Conditions of Pre Trial Detention in Kenya

Pre-trial detainees may fall at greater risk of being mistreated, according to the Open Society Foundations because they are often under the sole control of the detaining authorities, who may "perceive torture and other forms of ill-treatment as the easiest and fastest way to obtain information or extract a confession."[103]

The prison conditions in Kenya fall short of internationally acceptable standards. Prison conditions expose asylum seekers and refugees to assault, sexual abuse, torture, ill-health, lack of counseling support, limited legal assistance and a poor diet.[104] In 2009, the Kenya National Commission on Human Rights (KNCHR) carried out a prison assessment and concluded that torture, degrading and inhuman treatment, unsanitary conditions, and extreme overcrowding were endemic in Kenyan prisons.

Moreover, KNHCR reported that prison staff routinely beat and assaulted prisoners. There were also media reports that prison officials rape female inmates. After the assessment, the Department of Prisons began implementing reforms to curb abuse. However, detention conditions, both in prisons and police cells are still considered harsh and life threatening. The NGO Legal Resources Foundation (LRF) attributes poor prison conditions to a lack of funding, overcrowding, inadequate staff training, and poor management.[105]

Kenyan and international law also prohibit arbitrary detention. Police officers can only arrest and detain a person if they have reasonable grounds for suspecting them of having committed an offense. Further, as described in under Article 2 (6) of the Constitution, under international law anyone who is arrested must be informed, at the time of arrest, of the reasons for their arrest and is to be promptly informed of any charges against them. They must also be brought before a judge. Moreover, under international law all people are entitled to protection from torture, cruel, inhuman or degrading treatment or punishment. Amnesty International concluded that Kenyan security forces were acting in violation of these rights.[106]

102 See Communication No 8/1977 Ana Maria Garcia Lanza de Netto, Beatriz Weismann and Alcides Lanz Perdamo v Uruguay on 3 April 1980) in Selected Decisions of the Human Rights Committee (Vol 1, 2nd to 16th sessions, United Nations, New York 1985) 45, 14 and 16.

103 Open Society Foundation, "Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk," June 2011,

104 RMMS (2015)Behind bars-the detention of migrants in and from the East and horn of Africa,page 55

105 US Department of State, 2014, Country Report Kenya, p.8.

106 Amnesty International, 2014,pg 7-9

Kenya's Independent Policing Oversight Authority (IPOA), mandated to hold the police accountable to the public in the performance of its functions, released a monitoring report on operation '*Usalama Watch*' in July 2014. The IPOA confirmed that the detention facilities were in very deplorable conditions, they were also overcrowded and children and adults were confined in the same cells.[107] The IPOA also concluded that the constitutional limit of 24 hours, within which arraignment in Court should be done for persons under arrest, had been grossly violated during the operation. The IPOA further concluded that there was a lack of proper coordination/ supervision of the operation, there was unethical conduct by some police officers, and individuals caught in the operation's dragnet were subject to violations of their human rights, which are guaranteed in Kenya's Constitution.[108]

In Kenya, Lengthy pretrial detention continued to be a serious problem and contributed to overcrowding in prisons. Some defendants served more than the statutory term for their alleged offense in pretrial detention. There is a functioning bail system, and all suspects, including those accused of capital offenses, are eligible for bail. However, many suspects remained in jail for months pending trial because of their inability to post bail. Below are excerpts of what some inmates have been going through.

When migrants are arrested, the usual process in Kenya is for them to spend one or two nights in a police cell before they are charged and sentenced to prison (for example, for two months). In some cases this cycle repeats itself before their eventual repatriation. Usually migrants are handed over to an immigration officer after they serve their sentence. The immigration officer has to keep the migrants until repatriation is arranged. However, migrants often end up in police cells, where they usually have to wait for a long time before repatriation. This has to do with the lack of financial resources for quick and efficient repatriation. This basically extends the prison sentence. While waiting for repatriation, migrants maybe held in small police cells with 70 or 80 people. Conditions are often poor with a lack of space and resources for food. According to Refugee Consortium of Kenya, (RCK) irregular migrants who have not yet been convicted of unlawful presence, or those awaiting deportation, are often detained with criminals.

107 IPOA, 2014, p. 5-7.

108 IPOA, 2014, p. 18-19.

Standards of Conditions of Detention

The treatment of pre-trial detainees must be guided by the following principles:

- The presumption of innocence;[109]
- The respect for dignity and humanity;[110]
- The absence of torture and ill-treatment.[111]

Detainees should be placed in an officially recognized place of detention administered by and under the supervision of an authority separate from the police. Pre-trial detention and all measures affecting the human rights of a detainee must be ordered by a judicial authority.[112] A person may only be kept under detention pending investigation or trial upon a written order of a judicial authority. A detainee and his counsel should receive prompt and full communication of any order of the detention, together with the reasons for the detention.

Formalities – Registration, Record Keeping and Communication

Record keeping is important for effective judicial control of detention. Rule 7(2) of the Standard Minimum Rules provides that the detention authority should keep a record (either in physical form like a registration book or in electronic form with a secured computer system) in every place of detention and enter details of the following:

- The identity of each detainee;
- The reasons for his commitment;
- The authority for his commitment (i.e., a valid commitment order or equivalent)
- The day and hour of his admission and release.

Access to Counsel and Legal Assistance

Pre-trial detainees have the right to be assisted by legal counsel in order to prepare their defense, properly and without undue hindrance. According to the Body of Principles, detained or imprisoned persons are entitled to 'communicate and consult' with their legal counsel, 'without delay or censorship and in full confidentially'. The term 'without delay' has been defined as no more than a matter of days, and therefore a detainee may not be denied access to counsel for a week or more The HRC concluded, in a case where a pre-trial detainee had not had access to

109 ICCPR arts 10(2)(a) and 14(2); Standard Minimum Rules r 84(2).

110 ICCPR art 10(1)

111 ICCPR art 7

112 Declaration on Disappearance Art 10(1)

legal representation for a four month period, that there was a violation of Article 9(4) of the ICCPR 'since he was not in due time afforded the opportunity to obtain, on his own initiative, a decision by a Court on the lawfulness of his detention'.[113] Thus a detained person has the right to not be denied access to counsel for a week or more.

Conditions of detention

A corollary to the prohibition of all kinds of ill treatment is that detainees must be treated with dignity and humanity .This principle is 'a basic standard of universal application which cannot depend entirely on material resources'. Thus a lack of resources shall not excuse substandard conditions of detention. The conditions of detention must be different than the ones applicable to convicted prisoners, as pre-trial detainees must benefit from a 'special regime'. This is derived from the presumption of innocence, considered above.

Special regime

International standards require pre-trial detainees to be held separately from convicted prisoners. While pre-trial detainees and convicted prisoners may be kept in the same building, they must be kept in separate quarters. If pretrial detainees and convicted prisoners are kept in the same building, then contacts (if any) between pre-trial detainees and convicted prisoners must be kept 'strictly to a minimum' (for example if convicted prisoners work in the pre-trial detainees' quarter as food servers or cleaner). The separation between male and female, and between adult and young detainees, shall apply in the same way as it shall apply for convicted detainees kept in separate places or separate parts of an institution according to their criminal record, the legal reason for their detention and the necessities of their treatment.

Accommodation

The place of detention and sleeping accommodation for pre-trial detainees should meet all the requirements of health, with particular attention paid to: climatic conditions; cubic content of air; minimum floor space, lighting (natural), heating and ventilation. It is preferable if detainees have some control over lighting and ventilation so light switches should be found inside the cell and the detainee shall be able to open and close the windows and shutters.

Food and Water

Food should be supplied to pre-trial detainees at regular intervals throughout the day. Drinking water should be available to every pre-trial detainee whenever they need it. The food should be

113 Communication No. 248/1987, G Campbell v Jamaica (Views adopted on 30 March 1992), in UN Doc GAOR, A/47/40, 246, Para 6.4.

well prepared and well served, as well as nutritional, wholesome and adequate for the detainee's dietary needs. These include those with medical conditions, as well as nursing or pregnant women. The detainees' specific diets for religious or cultural reasons shall also be respected. Where a pre-trial detainee wishes to have at their own expense food of their choice rather than the food provided by the place of detention, they should be able to do so.[114]

Medical Care

All detainees have the right to physical and mental health and thus to free access to the health services available in the country, in the same way as if they were not in detention, or to the doctor of their choice. Decisions about their health should be taken only on medical grounds by medically qualified people and these people have a duty to provide them with the same care as would be provided to a non-detainee. The medical staff shall be independent from the authorities supervising the detention. In addition, when a detainee is sick or is complaining of illness, the medical officer shall attend to this detainee on a daily basis. In the event that the medical staff deems that the detention has affected or will injuriously affect the physical or mental health of the detainee, the director of the detention centre needs to be informed.[115]

Hygiene

Pre-trial detainees should be provided with water and toiletries to keep themselves healthy and clean. Bathroom facilities, including shower and bathing installations using water at a temperature that is suitable to the climate, shall be clean and decent. Care should be taken that the requirements of hygiene are not used as a cloak for imposing discipline. The bedding provided to detainees should be clean and changed regularly to ensure its cleanliness.[116]

Clothing

A pre-trial detainee should be allowed to wear their own clothes unless such clothes are not clean or fit for use. If it is not allowed, a clean outfit which is suitable for the climate and adequate to keep the detainee in good health should be provided. Such outfit should not be degrading or humiliating and should be different from the outfit supplied to convicted detainees. All clothing should be kept in proper condition and underwear should be changed and washed regularly to maintain hygiene. A pre-trial detainee being removed outside the place of detention should always be allowed to wear their own clothes or other inconspicuous dress.[117]

114 Standard Minimum Rules r 87.

115 Standard Minimum Rules r 25.

116 Standard Minimum Rules r 19.

117 Standard Minimum Rules r 17(3).

Property

All belongings of a pre-trial detainee, including any money or effects received for them from outside, should be placed in safe custody and kept in good condition if they are not allowed to keep them. An inventory of the detainee's belongings should be made and signed by the detainee. On their release, all such belongings, except money spent, any property sent out of the place of detention or any article of clothing destroyed on hygienic grounds, should be returned to the detainee.[118]

Women in detention

The Body of Principles is applicable in its entirety without discrimination, which means that measures applied in accordance with the law and designed to protect the rights and special status of women, especially pregnant women and nursing mothers, shall not be deemed to be discriminatory'.[119] The last resort principle must be particularly closely considered when assessing women, as they may be less likely to present a risk for society and should, therefore, only be detained in exceptional circumstances. Whether the woman in question has dependents must be taken into account when deciding on pre-trial detention. Also, it is important that women who have been raped, who are escaping marriage or who have had extra-marital intercourse (in those states where it is an offence) are not automatically placed in pre-trial detention. If detention is deemed mandatory for a woman who has been arrested, the Standard Minimum Rules apply and state that detainees of different gender shall be kept in separate institutions or parts of institutions; in an institution which holds both men and women in detention, the whole of the premises allocated to women shall be entirely separate. Facilities for female detainees shall respond to the same standards as the ones for male detainees.

The Standard Minimum Rules also include special requirements to respond to instances of pregnancy, childbirth and childcare.[120] Thus there shall be special accommodation for all necessary pre-natal and post-natal care treatment and arrangements shall be made wherever practicable for babies to be delivered in a hospital outside the place of detention. If a child is born in a detention centre, it shall not be mentioned in the birth certificate. Where nursing infants can remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers. Moreover, female detainees should be supervised exclusively by female staff and should never be in a situation where there is a risk of abuse or harassment by male members of staff.[121] This

118 *Standard Minimum Rules r 43(2) and 43(3).*

119 *Women in detention by Julie Ashdown and Mel James*

120 *Standard Minimum Rules r 23.*

121

is an important factor as all international standards provide for this requirement, which shows that many women held in detention have been victims of physical or sexual abuse by men or have committed an offence in response to male aggression or exploitation. As, in general, men dominate detention centers, particular care should be taken in order to ensure that the human rights of women are protected. Their needs shall also be met and for example, they should also be able to make gender adequate choices in relation to their programme of activities (including for education and work possibilities). Whether the woman in question has dependents must be taken into account when deciding on pre-trial detention. Also, it is important that women who have been raped, who are escaping marriage or who have had extra-marital intercourse (in those states where it is an offence) are not automatically placed in pre-trial detention.

Vulnerable persons in detention

In its handbook on Prisoners with Special Needs, the United Nations Office on Drugs and Crime has identified different groups of prisoners who, given their vulnerable status in detention, require additional consideration, including:

- Persons with mental health care needs;
- Persons with disabilities;
- Ethnic and racial minorities and indigenous peoples;
- Foreign nationals;
- Lesbian, gay, bisexual, and transgender (LGBT) persons;
- Older persons

Case Flow Management

Case flow management is a set of principles and techniques that enhance greater processing efficiency, thereby reducing delays and case backlogs and encouraging generally better service from Courts. Cash flow management promotes early Court control of cases and active Court management of the progression of cases from initial filing to disposition, covering all phases, including those that follow the initial disposition, such as appeals and enforcement. The link between case flow management during trials and the detention of pre trial detainees cannot be ignored.

It includes all pre-trial phases, trials and increasingly, events that follow disposition to ensure integrity of Court orders and timely completion of post-disposition case activity. In an ever changing world, law and the machinery of justice must adapt to changing circumstances if they are to fulfill their role in society.' The role of each stakeholder in the Criminal Justice System will therefore be analyzed.

The Judiciary

Article 159 of the Constitution of Kenya 2010, stipulates interalia that in exercising Judicial authority, the Courts and tribunals shall be guided by among other principles that justice shall be not be delayed. The blueprint for this change is codified in the Judiciary Transformation Framework (JTF) 2012-2016. The Framework is anchored on four (4) pillars, namely: (i) People focused delivery of justice; (ii) Transformative leadership, organizational culture, and professional and motivated staff; (iii) Adequate financial resources and physical infrastructure and (iv) harnessing technology as an enabler for justice.

The Judicial Transformation Framework recognized that Judiciary has had very limited adoption and utilization of information and communication technologies. One of the key challenges is the failure to properly harness and deploy ICT, including developing the required ICT infrastructure and computerizing the key Judicial applications (especially a suitable case management system) leading to poor delivery of services. The result has been inefficiency and ineffectiveness in the administration of justice. One of the strategies to be adopted to expedite the delivery of justice was to develop and deploy an electronic Case Management System; an integrated document management system; embrace ICT and apply appropriate technology to enhance Court efficiency and effectiveness including audio-visual recording and transcription of Court proceedings and ensure appropriate staffing levels to deal with caseload.

The Judiciary launched the Judicial Service Week on 14th to 18th October, 2012 .The event comprised of a multi-agency collaboration that players in the justice chain work together under the National Council on the Administration of Justice. The Judicial service week was meant to fast track hearing of criminal appeals. The Judges opted to forgo their annual colloquium in a bid to reduce backlog in criminal matters at the High Court and enhance access to Criminal Justice. A prison study undertaken by the Judiciary early 2013 revealed that out of 3,008 prisoners who complained of case delays, nearly a third, or 900, did not know or have their appeal file numbers.

On August 15, 2013, the chairman of the Community Service Order sent a report to the Chief Justice showing that prisons were congested by over 94 per cent. There were also many complaints and hunger strikes in prisons at Kamiti, as well as in Nakuru over delayed cases. Of the 33,194 inmates in prison, 12,704 of them are first-time light offenders who qualify for release under the Community Service Orders programme. Community Service Orders allow offenders to perform unpaid work for the benefit of the community as an alternative to imprisonment. This allows offenders to maintain family ties while serving their punishment under the supervision of probation and administration authorities. The Chief Justice indicated that they would be streamlining registry processes to create clear accountability lines to reduce such incidents [122]

122 Chief Justice speech at the launch of the Judiciary Service Week http://kenyalaw.org/kenyalawblog/judiciary-service-week-at-the-kamiti-maximum-security-prison/#sthash.KunVptxJ.dpuf

Moreover, prison records showed that out of 33,194 convicted prisoners, 12,704 were eligible for Community Service Orders allowing them to complete their sentence out of custody. During the Judiciary Service Week, the Judges set aside October 18, 2013 to review cases of prisoners deserving release under the Community Service Orders. The target for the number of cases to be reviewed was 3,500. A total of 4,054 cases were reviewed and 3,830 offenders released to serve Community Service Orders. The tax payer has been saved an estimated total of Sh241, 290,000 that would have been the minimum amount spent on food for the prisoners for a year at a cost of Sh175 daily. The Judges were mindful of the fact that not all cases qualified for Community Service Orders, hence the 1,106 cases found to be unsuitable. Some 624 cases are still being reviewed.

Additionally, a liaison with prisons was established to ease the transmission of communication relating to prisoners such as availability, production notices, and memoranda from the prisoners to the Director of Public Prosecutions. The liaison would also double up as a communication office linking the Court with pro bono advocates. It was decided that a meeting be held with the Director of Public Prosecutions to agree on how to avoid any adjournments. It was also agreed that periodic meetings would be held with inmates to impress upon them the need to clear their cases. Documentation of process and the creation of checklists was agreed on to minimize cases of incomplete records and thus avoid the interruption of hearings. Executive summaries of cases would be provided to judges to enable them to distill the issues raised.

Availability of accurate and timely data is essential to informing policy and strategic management decisions. The envisaged development and rollout of the Judiciary performance management system will be premised on sound data. Some Court stations are already implementing Case Management Systems (CMS) with varied levels of success. It is recommended that these experiences be documented in readiness for rollout to all Court stations. Likewise, procurement of the complementary Integrated Performance Management and Accountability System (IPMAS) is to be fast tracked.[123]

The operationalisation of the case management system to capture daily returns from Malindi, Nyeri, Kisumu and Nairobi was also considered a priority. These findings confirmed the findings of earlier visits in the year 2012 / 2013, when 10 prisons were visited - Kamiti, Langata Women, Naivasha Maximum, Kisumu Main, Kibos, Shimo-la-Tewa, Manyani, Nyeri (King'ong'o), Main Meru and Embu. The visits sought to establish the number of prisoners who had been in the justice system for more than five years, and to identify the cause of the delays in completing their cases. A team led by a Deputy Registrar from the criminal division visited the prisons and prepared a findings report. During the visit, 3,008 prisoners complained of delays in the hearing of their cases for a variety of reasons. Most complaints arose from administrative failures such as lack of case file numbers for appeals filed in the High Court. The High Court elected to work

123 Judiciary (2014) Judiciary Case Audit and Institutional Capacity Survey, 2014, Nairobi: Vol 1 Judiciary

closely with other stakeholders, such as prisons, to ensure proper coordination and minimize the recurrence of such incidents.

The Registrar of the High Court established a section to nationally monitor the hearing of the appeals with a view to eliminating delays. A bring-up system was introduced in all High Court stations to monitor all pending requests from High Court and the Court of Appeal. All Deputy Registrars of the High Court are now required to periodically visit prisons in their jurisdictions. Over 10,289 Criminal Appeals are pending hearing according to an audit carried out by Judiciary last year," the High Court cleared 3,944 appeals, leaving 10,289 others pending. This includes 3,325 appeals filed during the year. It is estimated that out of a total 33,194 convicted prisoners, 12,704 prisoners qualify for Community Service.

Another initiative undertaken by the Judiciary was the development of the Judiciary Case Audit and Institutional Capacity Survey in 2014.The survey covered 156 Court stations comprising of one (1) Supreme Court; six (6) Court of Appeal stations; twenty (20) High Courts including the Industrial, Environmental and Land Courts, Land and Environment Courts, one hundred and twelve (112) magistrate's Courts and seventeen (17) Kadhi Courts. The survey revealed that the burden of case backlog in the Judiciary is progressively reducing but still remains high across all the Courts. It was evident that the case management filing system had not been rolled out to Court stations, thus limiting the expeditious and efficient management of case files. The manual filing system was characterized by challenges in, storage and retrieval of case files which leads to either misplacement or loss of files and delays in retrieval of files. On average file retrieval takes six (6) minutes across Court stations in the country. The survey made the following recommendations in respect of case management**:-**

- To roll out a Case Management System for all Courts to improve management of case files.
- Equip judicial officers with computer skills to enable them type and process their own judgments.
- Recruit stenographers to capture Court proceedings.

Another initiative was undertaken on 6th October, 2013, when the Chief Justice launched the High Court Registry operational Manual [124] to provide the first ever documented tool to guide the processes and procedures in Court registries, and affords an opportunity to offer standardized and harmonized customer experience across the board. The manual is anchored in the Civil Procedure Act and Rules, the Criminal Procedure Code, the Law of Succession, the Children's Act, Industrial Court Act and other enabling legislation.

Another initiate was undertaken through the Judicial Training Institute which developed guidelines for active case management of criminal cases in the Magistrate Courts and High Courts of Kenya.

124 Judiciary (2013) High Court Registry Operation Manual, 2013: Judiciary.

The guidelines were launched on 1st December, 2015 and were produced to guide the conduct of Criminal Cases in Kenya subject to any specific procedural rules issued for specific crimes. The main objective of these guidelines is to give effect to Article 159 of the Constitution; particularly in reducing delay, case backlog and ensuring that justice is done irrespective of status. The guidelines were deemed to encompass 'best practice' in the governance of criminal trials and appeals.

Further, on 15th February, 2016, the Chief Justice Willy Mutunga launched the Magistrates and Kadhis Courts Registry Manual at Limuru Law Courts in Kiambu County. The Manual is expected to guide Court Registry staff, in the performance of their official duties. The objectives of the Manual is to; simplify and standardize registry procedures, increase efficiency in the registries, guide litigants and staff on registry processes, promote accountability among registry staff and act as an orientation tool for new Registry staff.

The Manual simplifies Court procedures to facilitate effective and efficient services to all Court users. This is in line with the Constitution of Kenya that requires the Judiciary to take effective steps to reduce the obstacles that hinder public access to Judicial reforms recommended that efforts should be made for even distribution of the workload among the judges and to review from time to time the pendency of the cases in each Court and to take necessary steps to ensure a manageable caseload. This has led to administrative measures being undertaken in the way of recruitment of more Judicial officers

In most jurisdictions, the Judiciary has a statutory right to visit places of detention (i.e. prisons and police stations) in some they have a positive duty so to do. Independent inspections ensure: prisoners are properly treated, granted bail when appropriate; appear in Court as scheduled are legally incarcerated will have their trial heard speedily; hear prisoners' complaint.

Office of the Director of Public Prosecution

The mandate of Office of the Director of Public Prosecution (ODPP) is derived from Article 157 of the Constitution which states that the office is:-

- To institute and to undertake prosecution of criminal matters and all other related incidents.
- Instituting and undertaking criminal proceedings against any person before any Court of law except the Court martial;
- Taking over and continuing with any criminal proceedings commenced in any Court by any person or authority with the permission of the person or authority and discontinuing at any stage before Judgment is delivered of any criminal proceedings with the permission of the Court.
- Directing the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct.

The Mandate is executed through four departments namely: Offences against the Person; Economic, International & Emerging Crimes; County Affairs & Regulatory Prosecutions and Central Facilitation Services. The ODPP are members of the National Council on the Administration of Justice and submit yearly reports through the Administration of Justice and State of the Judiciary, report 2012-2013.

Cases handled by ODPP July 2013 - June 2014 were 97,880[125] in the State of Judiciary report 2013-2014, the ODPP handled 111,566 matters, which comprised criminal trials in the High Court and Subordinate Courts, appeals, revisions, applications and Extradition requests, advice files and complaints. The overall conviction rate stood at 82% in the 2013-2014 reporting period.

In order to enhance quality prosecutions, the Office created specialized thematic units focusing on the criminal sector. A key highlight was the increase of staff complement from 357 to 671. Staff have been deployed to the County levels where they continue to execute and support the prosecution mandate. The ODPP initiated development of the automated and integrated case management system which entails business process audit and gap analysis. The second phase relates to business process optimization and the design/automation of the case management system. The Office fully operationalized the ICT and communication departments.[126]

Legal representation

Early intervention by lawyers and paralegals can have a positive impact on pretrial justice and pretrial detention in particular. Lawyers and paralegals have a central role to play in advising, assisting, and representing individuals at the pretrial stage of the Criminal Justice process. Ensuring legal assistance is available at the earliest possible time allows for the most effective use of resources, as cases are dealt with at the front end of the Criminal Justice System. Helping to ensure that appropriate decisions regarding pretrial detention and release are made early on can reduce the use of pretrial detention. During the Judicial service week, Advocates offered *pro bono* services to the unrepresented accused persons with criminal appeals in High Court within their regions.

Under practice directions Gazette notice No 370, the Chief Justice gazetted rules meant to guide pauper briefs and pro bono legal services. Some of the directions include Pro bono services to be offered in the Supreme Court, Court of Appeal, High Court and the Magistrate Courts and Pro bono services in capital cases and cases of children in conflict with the law in the Magistrate Court. The rules further provide of an all inclusive payment of the sum of Ksh. 30,000.

125 *ODPP Second Progress Report 2013-2014*

126 *ODPP Second Progress Report 2013-2014*

Paralegals also play a great role in offering a much needed assistance offering prisoners legal education and appropriate advice and assistance in prison, police stations and Courts. When properly trained and supervised, they can be better placed than lawyers to perform a range of functions as they are often closer to the communities they serve, more flexible, and have skills necessary for innovative service.

The Judiciary Transformation Secretariat partnered in a pilot project with Legal Resources Foundation (LRF) to train and provide paralegals with a forum in which they can usefully apply their skills to assist pro se Court users to navigate the Court process. The pilot programmes have been instituted in the Meru, Embu, Makadara and Kisii law Courts. Other Courts have also made steps towards increasing access to justice. For instance, Naivasha Law Courts works with advocates and community paralegal groups and periodically holds clinics at the Naivasha Medium and Maximum Security Prisons to sensitize accused persons on the trial process and their rights. They also equip them with the information they need to navigate the process.

During the prison visits, a number of urgent and serious challenges faced by prisoners were identified, and which need attention. As a result, a multi-sectoral 'Prison Legal Awareness Clinic' project was developed to enhance access to justice by bridging the procedural knowledge gap for remandees, especially those who are unrepresented. The objective of the Project is to enhance the knowledge of remandees on the Criminal Justice process and procedures and their relevant rights in that regard. The project partners will work with a select group of law students to set up an initiative that will enlighten prisoners on procedural aspects of the Criminal Justice System and their rights in this regard. The Judiciary will generate information materials for the remandees and provide logistical support for the implementation of the clinics at selected prisons. The Office of the Deputy Chief Justice is implementing the project with the Moi University School of Law, Riara Law School, Strathmore Law School, University of Nairobi School of Law, the Legal Resources Foundation and the Kenya Prisons Service. The project will run on a pilot basis in the following prisons: Nairobi Medium, Langata Women's, Kwale, Malindi, Nakuru Women's and Eldoret Women's.[127]

The National Police Service

Agenda IV of the National Accord and Reconciliation Agenda also prioritized 'constitutional, legal and institutional' reforms, one of which was law enforcement institutions, as a means to improve the rule of law. In response to these recommendations, the government set up the National Taskforce on Police Reforms in 2009 headed by Retired Judge Philip Ransley. The taskforce came up with over 200 recommendations. To fast track and coordinate the implementation of the recommendations the President established the Police Reform and Implementation Committee

127 *Judiciary (2014),State of the Judiciary report, page 17*

(PRIC). Officers investigate crimes and gather and protect evidence. Law enforcement officers may arrest offenders, give testimony during the Court process, and conduct follow-up investigations if needed. The role of police in case management is to ensure as stipulated under the National Police Service Act, that the Police execute all their functions, including the arresting duties, in accordance with Article 244 of the Constitution as well as the Bill of Rights.

The promulgation of the Constitution of Kenya introduced significant changes in the policy, legislation and institutional structures towards police reform and significantly enhance police accountability. Some of the key changes include the establishment of the National Police Service (NPS), that merged the Kenya Police and the Administration Police under one command which was the newly created office of the Inspector General; the National Police Service Commission (NPSC) tasked with developing training policies, advising on salaries and remuneration of the members of the Service, overseeing recruitment and disciplinary matters and the vetting of the members of the National Police Service (NPS) and the establishment of a specific body mandated to deal with complaints against the NPS.

Some of the key developments include the establishment of Internal Affairs Unit a unit of the Service which shall comprise of; an officer not below the rank of assistant Inspector-General who shall be the Director; a deputy director; and such other staff as the Unit may require. The functions of the Internal Affairs Unit shall be; to receive and investigate complaints against the police; to promote uniform standards of discipline and good order in the Service; and to keep a record of the facts of any complaint or investigation made to it.

The police are the gate keepers of the Criminal Justice System. They investigate cases reported to them, arrest, may caution an offender (as provided in their standing orders), accord diversion or prosecute as may be appropriate. It is worth noting that not all cases may be investigated as per the police's discretion and prosecution occurs where there is reasonable suspicion and evidence. Community policing is a new strategy that relies on public confidence, citizen empowerment and co-operation to prevent crime and make residents secure.

In the year 2012-2013, the National Police Service recorded the following results. A total of 221,478 crimes were reported of which 68,257 constituted serious crimes. A total of 71,924 crimes were investigated, 59,424 arrests were made and 54,368 cases prosecuted. Some 14,905 ended in convictions. However, a large number of cases (29,192) taken to Court by the police were pending. Dismissals account for 2,627 cases, acquittals 4,327 and other disposals 3,851.[128] In respect of the police, it was found that excessive arrests, lack of knowledge of the law, lack of prosecution skills, poor coordination and lack of supervision by the Office of the Directorate of Public Prosecutions (DPP) contribute to delays in case flow management.

128 *Judiciary (2013)State of the Judiciary Report, page 17*

The Police Service still faces a number of challenges some of which could be addressed through modernizing ICT infrastructure; increasing the police population ration to the international levels standards of 1:450; equipping police with motor vehicles/aircrafts for mobility; enhancing community policing; and enhanced peace initiatives in cattle rustling prone areas.

Kenya Prisons Service

Kenya Prisons Service is headed by the Commissioner General of Prisons. It derives its mandate from the Prisons Act, Borstal Act and Public Service Commission Act**.** Kenya Prisons Service functions are to contain and keep offenders in safe custody, rehabilitate and reform offenders, facilitate administration of justice and promote prisoners opportunities for social re-integration. To decongest the prisons, non-custodial sentences such as community service are used by Courts as alternative to jail terms.

Over the years, many changes and reviews have taken place in the service, resulting in the current Prisons Act (Cap 90) and Borstal Act (Cap 92), and more recently in 1999, the Extra Mural Penal Employment was abolished and replaced with Community Service Orders (CSO) under the Department of Probation and Aftercare Services.

Prisons had been known to hold up to 10 times the number of inmates they were originally designed for. The Community Service Orders have proved a useful tool in rehabilitating those charged with minor offences, thus reducing the number of people being jailed. New accommodation limits have been constructed for inmates in specific prisons to ease congestion and new prisons have been built in Yatta, Makueni and Kwale Prisons[129] Community-based penalties have given some respite by providing alternatives to imprisonment. Despite the fact that Courts still make considerably low use of the available supervised noncustodial sentences, it is worth noting that, in the reporting period, 628 Probation and After Care Services Officers who also double up as Community Service Orders officers recommended a total of 50,722 non custodial orders that were adopted by the Court.[130]

There are two categories of prisoners: those who are on remand pending hearing of their cases and those who have been convicted. According to the Kenya prison brief the total Prison population total (including pre-trial detainees / remand prisoners) is 54, 154 at April 2015, Pre-trial detainees / remand prisoners (percentage of prison population)make up 40.4%.

129 Nyauraj.E and Ngugi M.N (2014) a Critical Overview of the Kenyan Prisons System: Understanding the Challenges of Correctional Practice. International Journal of Innovation and Scientific Research ISSN 2351-8014 Vol. 12 No. 1 Nov. 2014, pp. 6-12

130 Judiciary (2013) State of the Judiciary Report, Page 85

Probation and Aftercare Services

Community rehabilitation and reintegration of offenders is offered by the Department of Probation and Aftercare Service. This is an area where the Department has a comparative advantage backed by existing legal mandates and supportive organizational structure as a distinct discipline within the Criminal Justice System. The main statutes from which the Department draws its operational mandates include: The Probation of Offenders Act (Cap 64) Laws of Kenya, The Community Service Order Act (No. 10 of 1998) Laws of Kenya among others such as the Criminal Procedure Code, Sexual Offences Act, Borstal Institutions Act, The Penal Code, Power of Mercy Act, Victim Protection Act, among others.

Probation and Aftercare Service strives to promote and enhance the Administration of Justice, community safety and public protection through provision of social inquiry reports, supervision and reintegration of non-custodial offenders, victim support and social crime prevention. Increasingly, the mandate of the department of Probation and Aftercare Service is expanding rapidly owing to the central role it plays in Criminal Justice delivery. Most of the functions relate to issues of bail, sentencing, and pre-release decision making within the Criminal Justice System.

At present, the department has the responsibility in enforcement of various non-custodial Court orders particular to each individual, offence and sentence; interventions in the lives of offenders placed on various statutory supervision orders with the aim of reducing re-offending and effecting behavior change; promotion of harmony and peaceful co-existence between the offender and the victim/community through reconciliation, victim protection and participation in crime prevention initiatives; reduction of penal overcrowding by supervising select ex-prisoners in the community and facilitating prison decongestion programmes; reintegration of ex-offenders and Psychiatric offenders into the community.

The Probation and Aftercare Services department issued some 50,722 non-custodial orders in the 2012-2013 periods. Although the figures of those who served under Community Service Orders are impressive, the Courts sentenced them to serve relatively few hours/days. This meant that the cases exited the system quickly and would not accumulate till the end of the year, with only a few carried forward the following year. Probation officers inquire into pre-trial cases, but not all the Courts make use of this facility for lack of clear policy or legislation. Courts still make considerably low use of the available supervised non-custodial sentence, preferring imprisonment and fines instead.

Probation officers also prepare victim impact statements as directed by the Courts but their work is hampered by limited and reduced funding. The department is also hampered by weak and outdated laws, such as the Probation of Offenders Act and CSO Act, which do not govern new areas of work such as bail information services and aftercare. There is also lack of an approved policy on aftercare and bail information. Decreasing funding increases the need for enhanced

resource mobilization and the ring-fencing of certain budget lines for probation. There are limited funds to carry out capacity building, especially in new areas like pre-bail information and management of sexual offences, low number of vehicles for Court inquiries. The Judiciary and the public have heavily relied on probation services in spite of limited resources. For example, in the 2013/2014 financial year, the department received Sh324, 790,992, down from Sh605, 036,347 in 2012/2013 and lower than the 2011/2012 allocation of Sh410, 931,979.[131]

The Department of Probation and Aftercare Services face several challenges still persist as enumerated below:

- Courts are creating more work for probation officers including engagement with Alternative Dispute Resolution (ADR) and Victims work yet no additional resources or operational guidelines have been developed.
- Escalation of serious crimes including terrorism placing high demands on the performance of the department including bail reports in spite of limited resources.
- Similarly, the society has very low tolerance for crime that in some instances it does not appreciate non-serious offenders to serve non-custodial measures in the community
- Generation of social advisory reports to Courts and other penal release organs is greatly hampered by reduced government funding in spite of increased workload related to Bail decision making and Alternative dispute resolution
- Inadequate transport/vehicles to carryout supervision. The department still operates 1978 Land Rovers which break down frequently and are uneconomical to run with the meager resources available
- Lack of Inadequate training for probation officers to build competencies to address emerging demands from criminal activities and to adapt modern evidence based supervision and rehabilitation programmes.
- The Probation Service offender records management system (ORMS) often experiences connectivity problems affecting generation of reports to Court. The inability to complete Local Area Network installation as a result of reduced funding compounds this problem.[132]
- The current number of probation officers is not adequate to meet the demands of all magistrates and High Court. A huge number of officers have left the service to join County governments and Constitutional Commissions while others have exited due to natural attrition. This has left the Department with a deficit, which poses a serious challenge in service delivery, as there is no immediate replacement.

In ensuring expedite delivery of justice, the Judiciary is tasked with developing and deploying an electronic Case Management System; an integrated document management system; embrace

131 *Judiciary (2014)State of the Judiciary Report,*

132 *Judiciary (2014) State of the Judiciary Report ,page 87*

ICT and apply appropriate technology to enhance Court efficiency and effectiveness – including audio-visual recording and transcription of Court proceedings; and ensure appropriate staffing levels to deal with caseloads.

Properly harnessed and deployed, ICT can facilitate speedier trials and enhance the efficiency and effectiveness of administrative processes through data management, data processing and secure archiving of information while guaranteeing more transparency and fairness in the adjudication of cases and facilitating internal and external communication.

The Automation of Courts also has the potential to enhance public confidence in the judicial process by minimizing the risk of misplacement or loss of Court files. Cash flow management also means that the Court develops the operational policies and tools to guide and adhere to new procedures, assesses and adjusts resource needs to effectively manage cases, monitors performance and outcomes to assure quality and justice, and effectively communicates processing standards and requirements internally and externally.

Children's services

The Children Act is the comprehensive law on how children who come into contact with the law are to be treated by the justice system. It provides for the actors and structures and defines their various roles. The Juvenile Justice System has not yet attained the cohesiveness, visibility and accessibility required to ensure access to justice to children when they come into contact with the justice system. The Children Magistrate has very wide powers under the Children Act to ensure just that.[133] All magistrates have also been gazetted to listen to children's cases. The Children Act empowers Courts to grant bail to child offenders pending their appearance before a Children's Court.[134]

Non-custodial orders should be imposed as a matter of course in the case of children in conflict with the law except in circumstances where, in light of the seriousness of the offence coupled with other factors, the Court is satisfied that a custodial order is the most appropriate and would be in the child's best interest. Custodial orders should only be meted out as a measure of last resort. If considering detention or a probation order, the Court is required to take into account background reports prepared by a probation officer and a children`s officer. The overriding consideration when imposing orders against a child in conflict with the law is the child's best interests.

In making a bail decision in the case of accused persons who are children and other persons with special needs (such as persons with special mental health care needs, persons with disabilities

133 *Judiciary (2014)State of the Judiciary Report ,2013-2014,page 100*

134 *Children Act, section 185(4).*

and transgender prisoners), the Court should consider alternatives to remand such as close supervision or placement with a fit person determined by the Court.[135]

Police officers should release suspects who are children or vulnerable persons on a recognizance being entered into by his or her parent or guardian or other responsible person, with or without sureties, for such amounts as will, in the opinion of the officer, secure the attendance of the child or vulnerable person.[136] In the case of suspects who are children, police officers shall consider the best interests of the child in making these decisions.

The Judiciary embarked on a five-day crash exercise to clear a backlog of over 4,000 children cases at Milimani Law Courts. The Children's Court Service Week targeted 4,435 children matters that accumulated between January 2002 and December 2010. Six magistrates were involved in the exercise. This was the first service week ever, held for the Children's court. During the week, the Children's Court heard cases where action had not been taken by the parties for more than a year. The parties were required to inform the court whether or not they intend to proceed with their cases. The court heard the active cases and delivered judgments and closed files where necessary. The exercise was intended to manage the court's caseload by ridding the system of dead cases to enhance efficient and smooth operation of the Children's Court. The Children's Court will embark on a similar exercise from April 11 to 15th 2016.The exercise is meant to clear outstanding Criminal Case.

135 Judiciary(2015) Bail and bond policy guidelines, page 27

136 Child Offender Rules,5th Schedule Children's Act No 8 of 2001

Chapter 2

Case Flow Management Findings

2.1 Kenya Police Findings

In this section the trends relating to arrests and detentions carried out by the Kenya Police, and charges brought to court by the Kenya Police, are analysed. There are 450 National Police Service stations across Kenya employing approximately 45 000 police officials[137].

Methodology

Three sources of data from 15 police stations were used to explore trends in the police:

- Serious offence Charge Register, which records serious charges
- Petty offence Charge Register (where this was separate from the serious offence Charge Register)
- Cell Register, which records all people entering the police cells.

The serious offence register and petty offence register contain the same columns and thus the same variables and were analysed together. The Cell Register is analysed separately from the Charge Registers. The sampling methodology is described below.

Cell Register Sampling

The Cell Register is numbered daily. Totals for a year are thus not easily ascertainable. In order to draw a sample targeting 100 observations in each police station, the total number of charges over two years was first estimated by counting the number of entries in a typical week in 2013 and 2014, to guide an appropriate sampling interval. A sample was then drawn with a fixed sampling interval, so that researchers selected every nth entry (where n= rough estimated number in two years / 100). The number of observations drawn from each police station appears in the table below. A total of 1379 observations were drawn from 15 police stations. A better estimate of the true number of entries over the two years was calculated using the sample number, sampling interval, and start and end dates of the sample ultimately collected. The data was then given a weight in line with the better estimate of actual entries for each police station.

Table 1: Observations in Cell Register dataset, by location

Name	Frequency	Percent	Cumulative
Garissa	100	7.25	7.25
Isiolo	94	6.82	14.07
Kakamega	100	7.25	21.32
Kilimani	100	7.25	28.57

137 *Supplied by National Police Service*

Kisii	68	4.93	33.50
Kondele	100	7.25	40.75
Lodwar	100	7.25	48.01
Makueni	100	7.25	55.26
Marsabit	100	7.25	62.51
Maua	95	6.89	69.40
Murang'a	100	7.25	76.65
Nakuru	68	4.93	81.58
Nyali	65	4.71	86.29
Nyeri	100	7.25	93.55
Voi	89	6.45	100.00
Total	**1,379**	**100.00**	

Charge Register Sampling

Samples were drawn from both the serious and petty offence registers in the each of the locations surveyed, targeting a 100 observations from each register. Because these registers are numbered yearly, it is not difficult to ascertain the total number of entries in a year. A sample was drawn with a fixed sampling interval, so that researchers selected every nth entry (where n= number in two years / 100).

Table 2: Total observations from both Charge Registers, by location

Name	Frequency	Percent	Cumulative
Garissa	170	6.00	6.00
Isiolo	183	6.46	12.45
Kakamega	200	7.05	19.51
Kilimani	200	7.05	26.56
Kisii	181	6.38	32.95
Kondele	200	7.05	40.00
Lodwar	200	7.05	47.05
Makueni	200	7.05	54.11
Marsabit	200	7.05	61.16
Maua	169	5.96	67.13
Murang'a	200	7.05	74.18
Nakuru	200	7.05	81.23
Nyali	200	7.05	88.29
Nyeri	132	4.66	92.95

Voi	200	7.05	100.00
Total	**2,835**	**100.00**	

The distribution of observations among the Petty Offence and Serious Offence Charge registers from different locations appears below. Observations were weighted according to the yearly totals in the register reflected by the last entry in each year. Where these were missing the yearly total was estimated from existing records.

Table 3: Observations from petty offence and serious offence registers 2013-2014, by location

Name	Petty Offence Register	Serious Offence Register	Total
Garissa	70	100	170
Isiolo	90	93	183
Kakamega	100	100	200
Kilimani	100	100	200
Kisii	81	100	181
Kondele	100	100	200
Lodwar	100	100	200
Makueni	100	100	200
Marsabit	100	100	200
Maua	69	100	169
Murang'a	100	100	200
Nakuru	100	100	200
Nyali	100	100	200
Nyeri	32	100	132
Voi	100	100	200
Total	**1,342**	**1,493**	**2,835**

1. Cell Register Findings

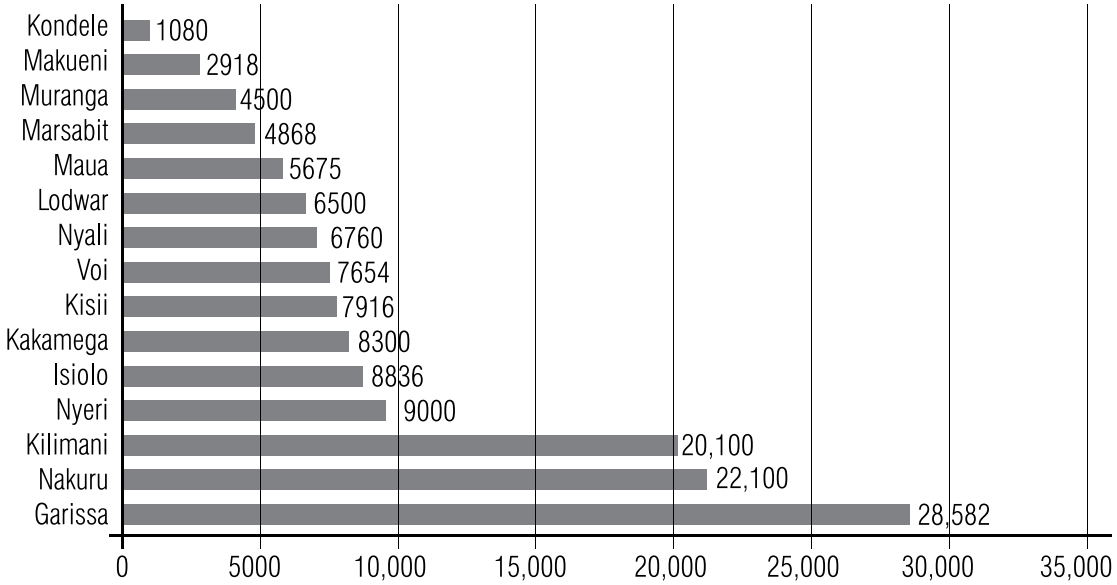
The analysis of the Cell Register sample gives an indication of how many people are detained by the Kenya Police in police cells.

Number of detentions in police cells

The total recorded entries into cells in police stations over the period 2013-2014, as estimated by the method described in the methodology, appears in the table below. The estimates indicate that over two years almost 145 000 (144 789) people were detained in police cells in these 15

police stations, or close to 10 000 (9653) per police station on average. The data also reveals vast variations by location, with Garissa, Nakuru and Kilimani together accounting for almost half of the total, and in excess of 20 000 people each over two years. The remainder of police stations detained between 1000 and 9000 each per year.

Figure 1: Number of entries into police cells, 2013-2014, by location



The data in the figure above is also presented in the table below.

Table 4: Total estimated recorded entries into police cells 2013-2014, by location

Name	Frequency	Percent	Cumulative
Garissa	28,582	19.74	19.74
Nakuru	22,100	15.26	35.00
Kilimani	20,100	13.88	48.88
Nyeri	9,000	6.22	55.10
Isiolo	8,836	6.10	61.20
Kakamega	8,300	5.73	66.93
Kisii	7,916	5.47	72.40
Voi	7,654	5.29	77.69
Nyali	6,760	4.67	82.36
Lodwar	6,500	4.49	86.85
Maua	5,675	3.92	90.77
Marsabit	4,868	3.36	94.13

Murang'a	4,500	3.11	97.24
Makueni	2,918	2.02	99.26
Kondele	1,080	0.75	100.01
Total	**144,789**	**100**	

According to the World Bank the population of Kenya in 2014 was 44.863 million with 24.720 million being aged 15-64.[138] This number detained in only 15 police stations represents 0.6% of the Kenyan adult population. Given that there are 450 police stations across Kenya, and applying the average of 9653 a potential number of 4.34 million is obtained, or as much as 18% of the Kenyan adult population every two years. This suggests that almost 1 in 5 Kenyan adults could spend time in a police cell every two years, if every entry were unique, or 1 in 10 per year. However each time a person is remanded to a police cell after going to court, or is pending before court, their name is re-entered. An analysis of the reason for entry into the cell showed that some 14% were either on remand, pending before court, or arrested on a warrant. Reducing the estimate by 14% still gives an estimate of over 3.7 million entries into police cells, or an average of 1.85 million per year, which is 7.5% of the Kenyan adult population each year.

Offence or reason for police detention

Almost all observations (99%) recorded the reason for detention in police cells. The data is presented in the figure below and also in the table below. Categories containing traditional common-law offences such as theft and assault form the minority of reasons for detention in police cells.

The offence is important because police are only allowed to arrest without a warrant in relation to cognisable offences. Cognisable offences are listed in Schedule 1 of the Criminal Procedure Code. Non-cognisable offences which require a warrant include common assault, which comprised almost 5% of offences (see below). Arrests without a warrant for common assault are unlawful.

Table 5: Reasons for detention in police cell, by reason, 2013-2014

Category	Frequency	Percent	Cumulative
Drunk and Disorderly, Affray	21,326	14.84	14.84
Remand or Pending	19,382	13.49	28.33
Property Offence	17,951	12.5	40.83
State Offence, Excluding Traffic	13,631	9.49	61.29
Traffic Offence	12,630	8.79	70.08
Immigration Offence	12,175	8.47	78.55

138 *http://data.worldbank.org/indicator/SP.POP.TOTL/countries/KE?display=graph*

Violent Offence, Excluding Common Assault	8,050	5.61	99.15
Common Assault	7,707	5.37	93.54
Loitering	5,584	3.89	38.62
Disturbance or Nuisance	5,428	3.78	3.78
Fraud and other Offences of Dishonesty	5,083	3.54	23.44
Child in Need of Care or Offence Relating to Children	3,180	2.22	34.15
Malicious Damage	2,079	1.45	40.07
Preparation to Commit a Felony	1,801	1.26	5.04
Obstruction of a Police Officer	1,723	1.2	42.85
Sexual Offence	1,599	1.11	41.18
Drug Offence	1,429	1	69.87
Warrant of Arrest	1,220	0.85	100
Offensive Language or Conduct	835	0.58	34.73
Other	672	0.47	41.65
Total	**143,485**	**100.00**	

Similarly offences contained in laws outside of the Criminal Procedure Code are not cognisable if they are punishable by a fine only or by less than three years' imprisonment. This is the case in relation to very many of the "state offences" discussed below. Such arrests would therefore be unlawful.

Nuisance offences

The most common reason for detention was for the offence of being drunk and disorderly (15%). Similar offences include loitering (4%) disturbance (2%), and nuisance (2%) and offensive language or conduct (1%). These are essentially anti-social behaviour offences. This brings into question what other interventions other than police action and criminal proceedings in court could be brought to bear controlling this behaviour, other than arresting and detaining people. Common nuisance is not a cognisable offence therefore such arrests without a warrant would be unlawful.

Traffic offences

Of particular interest is that almost 9% involved traffic offences, which in terms of the new law coming into effect from 2015 should no longer result in an arrest and detention but should simply result in the issue of a fine. If properly implemented this should reduce entries into police cells by 9%.

Immigration offence

This is a very large category, comprising 8% of all cell detentions. The data suggests more than 12 000 cell detentions in these 15 police stations alone in the 2013-2014. Some 73% of immigration cases had "pending repatriation" as the reason for the detention. Some 12% were" unlawfully present" in Kenya, 7% were "residing outside designated area" and 4% "failing to register as a Kenya".

State offences

Offences against the state requiring licencing, certificates or compliance with business rules (opening hours, forest produce, etc.) comprise an additional 9% of entries into police cells. In many countries such offences would not result in arrest and detention but would be dealt with through administrative fines.

• State offences: Alcohol regulation

More detail on the important category of "state offences" appears in the table below. As much as 49% relate to the regulation of Alcohol consumption and sales. Some 14% relates to the possession of amounts of Alcohol, a further 4% to possession on traditional Alcohol (*Chang'aa*) and 9% to unlicensed Alcohol sales. As much as 5% relates to arrests of persons for simply consuming Alcohol outside of legal hours. Many of these offences arise from the Alcohol laws introduced in 2010.[139] This legislation made all such offences cognisable, except those relating to the promotion of alcohol.[140]

Figure 3: Reason for detention in police cells, types of state offences, 2013-2014

State Offence	Frequency	Percent	Cumulative
Alc, Ch Sell	169	1.24	1.24
Alc, Deal	1,239	9.10	10.34
Alc, Hours Cons	741	5.44	15.79
Alc, Hours Open	10	0.07	15.86
Alc, Hours Sell	408	3.00	18.86
Alc, Lic	110	0.81	19.67
Alc, Man	272	2.00	21.67
Alc, No Lic	1,259	9.25	30.92
Alc, Poss	1,881	13.82	44.74

139 *Alcoholic Drinks and Control Act, 2010. "Mututho laws"*

140 *Section 63, Alcoholic Drinks and Control Act, 2010.*

Alc, Poss Ch	606	4.45	49.19
Boundaries, Int	65	0.48	49.67
Business, No Permit	149	1.09	50.76
Elec, Connection	354	2.60	53.36
Env, Fishing, Ill	48	0.35	53.71
Env, Forest	83	0.61	54.32
Env, Forest, Charcoal	249	1.83	56.15
Env, Govt Trophy	182	1.34	57.49
Env, Grazing	564	4.14	61.63
Env, Hunting	378	2.78	64.41
Env, Sand, No Permit	87	0.64	65.05
Env, Fishing, Ill	48	0.35	65.40
Env, Forest	920	6.76	72.16
Firearm	249	1.83	73.99
Food, Regulations	658	4.83	78.83
Gambling	1,804	13.25	92.08
Lottery, No Lic	94	0.69	92.77
Mungiki	45	0.33	93.10
No Med Certificate	114	0.84	93.94
Petrol, Dump	128	0.94	94.88
Poss, Copies Copyright	29	0.21	95.09
Reg, Pharm	163	1.20	96.29
Smoking, Public	45	0.33	96.62
Telecoms, Misuse	294	2.16	98.78
Video, No Lic	83	0.61	99.39
Water, Connection	83	0.61	100.00
Total	**13,611**	**100.00**	

• State offences: Environmental laws

Various offences aimed at protecting the environment, national parks or wildlife comprised almost 1 in 5 (19%) of the state offence category. The largest subcategory here was illegal grazing, which is an offence in terms of the Trespass Act and is a cognisable offence.[141] Such grazing can be

141 *Section 9, Trespass Act*

illegal because it is in a national park, or because it contravenes disease control measures, or because it is on private land. An impending drought was declared in January 2014 in Kenya.[142]

- ## State offences: Gambling

Gambling offences accounted for 13% of "state offence" entries into cells. Yet the majority of such offences are not cognisable. Keeping a gaming house, being found in a gaming house, permitting the keeping of a gaming house, carrying on a lottery, advertising a lottery, all require warrants for arrest.

- ## State offences: Other forms of regulation

The remainder of offences leading to detentions in police cells largely relate to the regulation of business and behaviour (see table above). Licensing and permits are required for a range of activities. Such regulation has economic impacts even without the economic impact occasioned by arrest. Furthermore the existence of such laws, and condonation of arrest for infringement, creates ample opportunities for bribe-seeking behaviours. An academic has commented on the extent of such laws in Kenya:

> "Regulatory systems and licensing practices in many countries have grown beyond quality control or even measurement. Kenya is a case in point, where in 2006 a study of licenses identified around 300 licensing requirements. Yet the true scope of licensing regulation was far larger, because a subsequent comprehensive inventory found well over 1300 business licenses and associated fees imposed by more than 60 government agencies and 175 local governments. Furthermore, regulators were continually producing new licenses." [143]

Offences involving violence

Only some 11% of offences held an element of personal violence. Half (50%) of these were for common assault, and 13% were for simple robbery. Common assault is not a cognisable offence and arrest without a warrant for common assault is therefore unlawful.

142 Relief Web, see <http://reliefweb.int/disaster/dr-2014-000131-ken>

143 Investment Climate Advisory Services of the World Bank Group "Policy Framework Paper on Business Licensing Reform and Simplification" 2010 The World Bank Group, available at <https://www.wbginvestmentclimate.org/uploads/PolicyFrameworkPaperWEB.pdf>

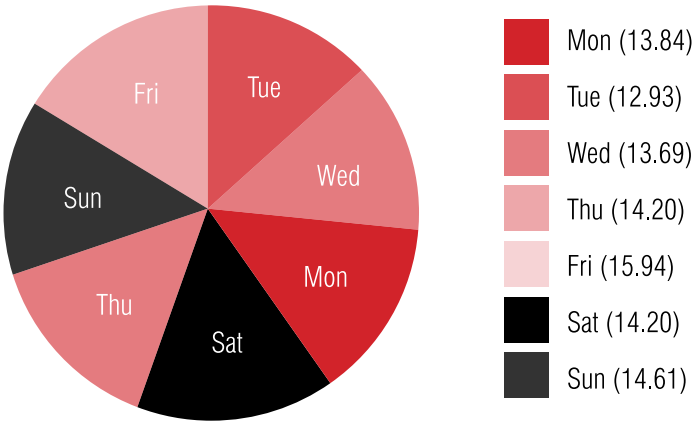
Property offences

This category comprised theft, stealing, housebreaking and burglary. "Stealing or theft by servant" comprised some 8%, and stock theft comprised 5%. Almost all property offences are cognisable, except for failing to account for stolen property.

Day of arrest

As expected, a greater proportion of all arrests and detentions in police cells occurred on Fridays than on any other days, and the least on Tuesdays (see Figure below).

Table 6: Percent of arrests on days of week



Type of offence and day of arrest

In terms of offences, possibly unexpectedly, similar proportions were arrested on weekend days (Friday and Saturday) compared to other days for drunk and disorderly. However, a higher proportion of offences involving violence were evident on weekends (13%) compared to other days (10%). (The category of violent offences includes robberies and assaults).

Reason for release

In only 576 of the 1379 observations (42%) the reason for release was recorded. In most cases in which the reason was recorded (79%) the detained person was released in order to go to court. The table below shows the percentage distribution for the observations where reasons were recorded.

Table 7: Reason for release from police cells, by reason, amongst those with recorded reasons

Reason	Frequency	Percent	Cumulative
Bond	372	0.71	0.71
Cash Bail	2,879	5.49	6.20
Child	311	0.59	6.80
Court	41,162	78.56	85.36
Free Bond	443	0.85	86.21
Hospital	65	0.12	86.33
NFPA	195	0.37	86.70
P22	850	1.62	88.32
Prison or Police Transfer	4,554	8.69	97.02
Released at Court	320	0.61	97.63
Repatriation	620	1.18	98.81
Withdrawal	383	0.73	99.54
Warning	240	0.46	100.00
Total	**52,394**	**100.00**	

It could be assumed that where no reason is given that the person is simply released on warning. This could suggest appropriate police practice for petty offences. On the other hand, it could suggest corrupt practices. There is no obvious reason if the outcome is release on warning or NFPA (no further police action), why this would not be recorded in the Cell Register consistently. The table below includes those where no reasons where given for release, showing the preponderance of "not recorded". Almost two-thirds have no reason for release. No clear trends by offence were observed in this regard i.e. no offence seemed more or less likely to have no reason.

Table 8: Reason for release from police cells, all cases, by reason

Reason	Frequency	Percent	Cumulative
Bond	372	0.26	0.26
Cash Bail	2,879	1.99	2.24
Child	311	0.21	2.46
To Court	41,162	28.39	30.85
Free Bond	443	0.31	31.16
Hospital	65	0.04	31.20
NFPA	195	0.13	31.34
P22	850	0.59	31.92
Prison or Police Transfer	4,554	3.14	35.06
Released at Court	320	0.22	35.28

Repatriation	620	0.43	35.71
Withdrawal	383	0.26	35.98
Warning	240	0.17	36.14
Not Recorded	92,573	63.86	100.00
Total	**144,967**	**100.00**	

Insufficient observations regarding cash bail amounts were recorded to be able to report on bail amounts. However this suggests that this may not be consistently recorded in the Cell Register, and possibly only in cash receipt records, which were not sampled.

Duration of detention in police cells

Constitutional provisions

The Constitution of Kenya 2010 provides that persons arrested and detained in police cells must be brought before court as soon as possible, but not later than 24 hours after arrest, or if the 24 hour period ends on a day or time outside ordinary court hours, then before the end of the next court day.[144] This means that public holidays excluded, persons detained in court cells should be released either on the same day or one day after their arrest, unless they are arrested on a Friday or Saturday. If arrested on a Saturday, then they should be released on Monday, which is two days after arrest. If arrested on a Friday, they should at either be released on the same day during court hours or also at the latest on Monday, which is three days after arrest. Indeed the courts have awarded damages in the amount of KES 10 000 on more than one occasion for detention beyond the constitutional 24 hours. [145] The Constitution also provides that an arrested person is entitled to be released on bail or bond unless there are compelling reasons not to release, [146] and in relation to less serious offences the police are empowered to release arrested persons on bail, bond or warning.

Record-keeping

The Kenyan Police diligently record the date of entry into police cells and the date of exit. From this can be calculated how long people spend in police cells. Although the registers are diligently kept, some entries were missing and some resulted in negative durations. Excluding missing

144 Article 49, Constitution of Kenya 2010

145 Purity Kanana Kinoti v Republic [2011] eKLR ; Hussein AbdIllahi Ndei Nyambu Vs. Inspector General of Police and Another; Petition 387 of 2013 (High of Kenya at Milimani) KLR.

146 Article 49, Constitution of Kenya 2010

and negative values, the duration of detention was available in 929 of the 1379 observations (67%). It is possible that the missing or inaccurate observations may be more likely to contain those records reflecting people held beyond the constitutional time limits, but there is no way of determining this. The analysis below uses only the available observations.

Overall trends

Using only the available observations, the results show that more than a third is released on the same day while more than three quarters are released within one day (see table below). (The median is thus 1 day). An additional 10% are released within 2 days. However some 12% (1 in 8) endure more than the statutory two days, and 5% spend more than 5 days in police cells. Of some concern is the small percentage of observations showing extremely long periods in police cells. The reasons for these very long time periods in police cells are not clear. The table below shows the summary statistics. The 75th percentile is one day, which means that 75% are released within one day or less. The 90th percentile is 3 days, whih means 90% are released within 3 days but 10% are released after 3 days or more.

Table 9: Number of days in police cells, summary trends, 2013-2014

Duration	Minimum	25th percentile	Median	75th percentile	90th percentile	Maximum
Days	0	1	1	1	3	366

The full distribution of time spent in police cells appears in the table below.

Table 10: Number of days in police cells, 2013-2014

Days in police cells	Frequency	Percent	Cumulative
0	33,920	37.88	37.88
1	35,389	39.52	77.39
2	8,804	9.83	87.22
3	4,067	4.54	91.76
4	1,409	1.57	93.34
5	1,304	1.46	94.79
6	310	0.35	95.14
7	304	0.34	95.48
8	214	0.24	95.72
9	402	0.45	96.17
10	448	0.50	96.67
11	827	0.92	97.59
13	114	0.13	97.72

14	10	0.01	97.73
15	10	0.01	97.74
18	94	0.10	97.84
20	325	0.36	98.21
30	159	0.18	98.38
31	153	0.17	98.56
33	83	0.09	98.65
59	59	0.07	98.71
68	325	0.36	99.08
93	325	0.36	99.44
95	83	0.09	99.53
153	94	0.10	99.64
366	325	0.36	100.00
Total	**89,557**	**100.00**	

Trends by location

The data shows a great deal of variation by location. The table below shows the trends by location, sorted by smallest percentage of admissions who spend more than two days in detention (Garissa) to largest percentage spending more than two days in detention (Lodwar). In Garissa all the available observations indicated that persons were released on the same day that they were detained. By contrast, in Kondele only 16% were released on the same day, while in Lodwar more than a quarter (27%) spent more than two days in detention.

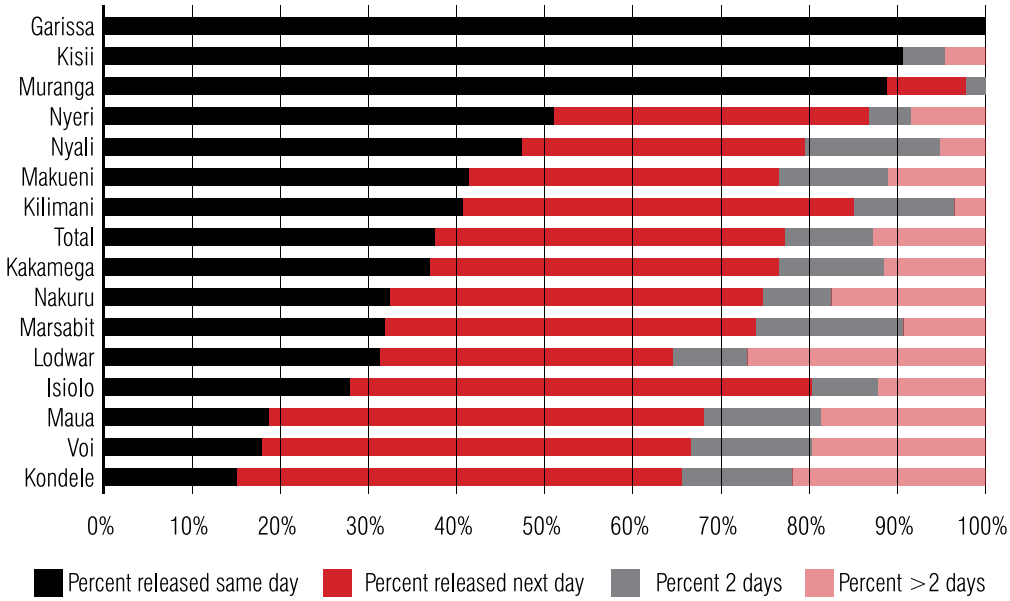
Table 11: Durations of detention of 0, 1, 2 or more than 2 days, by location

Name	Percent released same day	Percent released next day	Percent same or next day	Percent released after 2 days	Percent > 2 days
Garissa	100	0.00	100.00	0.00	0.00
Murang'a	89.13	8.7	97.83	2.17	0.00
Kilimani	40.91	44.32	85.23	11.36	3.41
Kisii	90.91	0.00	90.91	4.55	4.55
Nyali	47.46	32.2	79.66	15.25	5.08
Nyeri	47.78	33.33	81.11	4.44	7.88
Marsabit	32.15	41.92	74.07	16.59	9.33
Makueni	41.57	35.1	76.67	12.17	11.15
Isiolo	25.84	48.31	74.15	6.74	11.24
Kakamega	37.21	39.53	76.74	11.63	11.63
Nakuru	32.69	42.31	75.00	7.69	17.31

Maua	19.15	48.88	68.03	13.16	18.8
Voi	18.18	48.86	67.04	13.64	19.32
Kondele	15.63	50	65.63	12.5	21.87
Lodwar	31.71	32.93	64.64	8.54	26.83
Total	**37.88**	**39.52**	***77.4***	**9.83**	**12.88**

The durations in the table above are also illustrated in the figure below.

Figure 5: Durations of detention by location, 2013-20



Trends by day of week

Recall that the day of the week may be an important factor in determining the duration of detention in police cells. Recall that the Constitution requires an arrested person to go to court within 24 hours, unless the 24 hours expires outside of ordinary court hours (Monday to Friday, 8am to 5pm). Thus it might be expected that those arrested on Friday or Saturday may be held for longer durations than those arrested on other days, as they may legitimately be held until Monday to appear in court (if compelling reasons exist not to release on bail or bond). The data does support this notion to some extent, with Fridays, then Saturdays as days of admission, showing the highest proportion (34% and 28% respectively) spending more than 1 day in detention (see the table below).

Table 12: Percent of releases within a day and after a day, by day of week

Day of week	Percent same day	Percent 1 day	Percent same or 1 day	Percent more than 1 day
Monday	34.68	43.44	78.12	21.88
Tuesday	40.69	37.13	77.82	22.18
Wednesday	36.56	46.73	83.29	16.71
Thursday	32.31	43.60	75.91	24.09
Friday	34.03	32.31	66.34	33.66
Saturday	50.15	21.82	71.97	28.03
Sunday	37.19	52.04	89.23	10.77
All days	**37.88**	**39.52**	**77.4**	**22.6**
All days except Friday and Saturday	36.31	44.37	80.68	19.32

Compliance with 24-hour rule and state liability

Compliance with the 24-hour rule is difficult to determine given the exception for weekends. However if Friday and Saturday are excluded from the analysis, application of the 24-hour rule requires that 100% should be released on the same day or within 1 day (for those arrested Sunday to Thursday). The data however shows that only 81% are released on the same day or within one day (see table above) in relation to those arrested Sunday to Thursday.

Estimating liability for deprivation of liberty

Applying the 19% non-compliance to all 144 789 entries into police cells over two years, and applying the KES 10 000 nominal damages used by the courts in at least two cases, suggests a potential liability of the Kenyan state for deprivation of liberty of KES 275 million for nominal damages in relation to these 15 police stations over two years. This amount is equivalent to 77% of the entire budget of the Kenyan Human Rights Commission for 2016 (KES 356.5 million).[147]

Duration, reason for release and day of arrest

Somewhat surprisingly, Saturday showed the highest proportion (50%) being released on the same day (see table above), suggesting that Saturday arrests may be more likely to result in release on warning, or police bond or bail, rather than being taken to court on Monday. However the data does not clearly support this idea of police bond or bail driving the trend, because Saturday releases having a significantly higher percentage (77%) of no reasons given for release, compared to 62% on other days. Only around 2% were released on bond or cash bail with no

147 *Kenya Recurrent Budget 2015-2016*

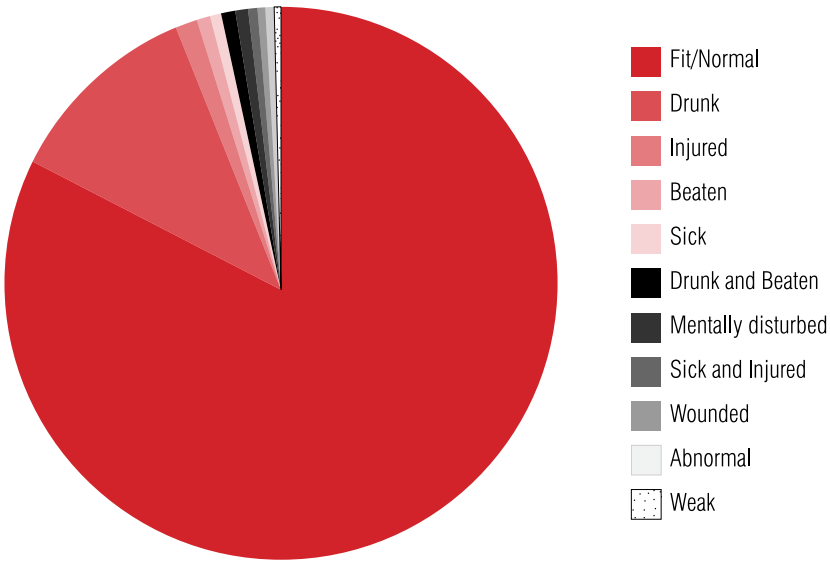
clear difference between Saturdays and other days. However only 16% of those arrested on Saturdays were eventually released to court, compared to 30% on other days. The high proportion of no reasons given for release is cause for concern given allegations of corruption and allegations of abuse of the arrest process.

Condition of person on detention and on release

Condition on detention

The Kenya Police also diligently record the condition of the person entering police cells. In the vast majority of case this was recorded as "fit" or "normal". Given the high proportion of reasons for detention being the offence "drunk and disorderly", it is unsurprising that a third is recorded as being or appearing to be drunk (16%). Beaten, sick, injured, wounded, mentally disturbed together comprise only 2%.

Figure 6: Physical condition of persons entering police cells



The data for the figure above appears in the table below.

Table 13: Physical condition of persons entering police cells, by description

Physical Condition	Frequency	Percent	Cumulative
Fit / Normal	116,919	82.27	82.27
Drunk	22,457	15.8	98.07

Injured	1,048	0.74	98.81
Beaten	634	0.45	99.26
Sick	336	0.24	99.5
Drunk and Beaten	253	0.18	99.68
Mentally Disturbed	230	0.16	99.84
Sick and Injured	83	0.06	99.9
Wounded	65	0.05	99.95
Abnormal	48	0.03	99.98
Weak	48	0.03	100.01
Total	**142,121**	**100.00**	

Condition on release

On release, almost all were listed as fit with less than 1% sick and less than 1% still drunk (no table shown). Although beaten, sick and injured comprise only 2%, given the high volumes entering police cells across Kenya this suggests the average police station would need to deal with approximately 100 persons in need of medical care each year. In terms of the Persons Deprived of Liberty Act such persons are entitled to medical care by the state on recommendation by a medical officer. [148] The Constitution of Kenya also provides that no person may be deprived of emergency medical care. [149]

2. Charge Register Findings

The Charge Registers record only those arrests resulting in a charge in court. The number of these is thus expected to be lower than the number entering the cells each year, as not all arrests are pursued through charges in court. The charges are drawn from both the Serious Offence Charge Register and Petty Offence Charge Registers.

Number of charges to court

The total number of charges in each location appears below. [150] A total of 46 826 charges in these 15 police stations were referred to court, suggesting an average of 3121 charges per police station. Applying this average to 130 police stations suggests the police bring 405 730 charges to court in Kenya every two years, or just over 200 000 each year.

148 *Section 15, Persons Deprived of Liberty Act*

149 *Article 43(2) Constitution of Kenya 2010*

150 *Because frequency weights use integers only, these numbers may differ slightly from those recorded due to rounding.*

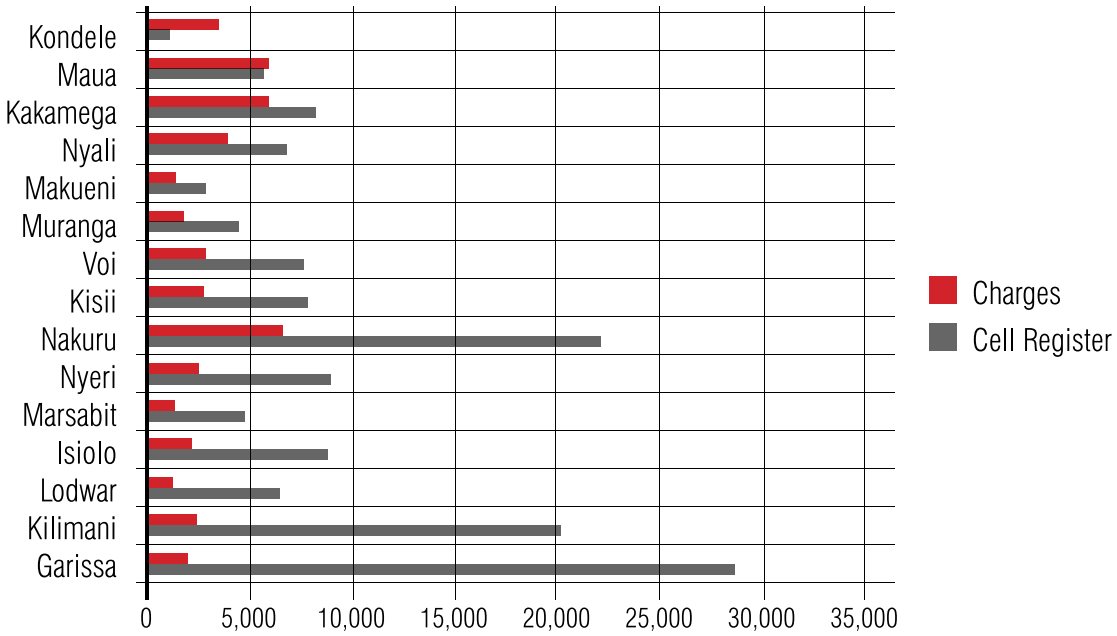
Table 14: Charges referred from police stations 2013-2014, by location

Name	Frequency	Percent	Cumulative
Garissa	2,050	4.38	4.38
Isiolo	2,178	4.65	9.03
Kakamega	5,900	12.60	21.63
Kilimani	2,500	5.34	26.97
Kisii	2,825	6.03	33.00
Kondele	3,500	7.47	40.48
Lodwar	1,300	2.78	43.25
Makueni	1,400	2.99	46.24
Marsabit	1,400	2.99	49.23
Maua	5,905	12.61	61.84
Murang'a	1,800	3.84	65.69
Nakuru	6,600	14.09	79.78
Nyali	4,000	8.54	88.32
Nyeri	2,568	5.48	93.81
Voi	2,900	6.19	100.00
Total	**46,826**	**100.00**	

Conversion rate of arrests to charges in court, by location

Recall that there were an estimated 144 789 Cell Register admission entries. By comparison, the two Charge Registers recorded 46 826 charges to court over the same time period. This suggests around 32% of arrests and detentions are converted into charges in court. This implies that 68% of arrests do not result in charges in court, and are dealt with through the exercise of discretion by the Kenya Police. The data is illustrated in the figure below, and the conversion rate is presented in the table below.

Figure 7: Number of charges compared to number of cell register admissions, 2013-2014, by location



Extraordinary variations are observed, suggesting very different practices by area. The more than 100% conversion of cell admissions to charges at Kondele and Maua suggests transfers from other police stations to the court at those locations, without time being spent in police cells. The low rate of conversion at Garissa and Kilimani suggests a high degree of discretion being exercised by police in arresting and releasing without charging in court, in some instances through withdrawal of complaints by victims.

Table 15: Number of cell Register and Charge Register entries 2013-2014, and conversion rate

Name	Cell Register	Charges	Conversion rate
Garissa	28,582	2,050	7%
Kilimani	20,100	2,500	12%
Lodwar	6,500	1,300	20%
Isiolo	8,836	2,178	25%
Marsabit	4,868	1,400	29%
Nyeri	9,000	2,568	29%
Nakuru	22,100	6,600	30%
Kisii	7,916	2,825	36%
Voi	7,654	2,900	38%
Murang'a	4,500	1,800	40%

Makueni	2,918	1,400	48%
Nyali	6,760	4,000	59%
Kakamega	8,300	5,900	71%
Maua	5,675	5,905	104%
Kondele	1,080	3,500	324%
Total	**144,789**	**46,826**	**32%**

Ratio of petty offence to serious offence charges

The ratio of petty to serious offence charges is also informative. Those locations with a lower ratio have a higher proportion of more serious charges. The findings show a high ratio of petty offences in Isiolo – almost 3 petty offences for every 1 serious offence charge – compared to less than 1 petty offence for every serious charge in Lodwar. The average for all regions is just over 3 petty offences for every 2 serious charges (a ratio of 1.6).

Table 16: Number and ratio of petty and serious charges, 2013-2014

Name	Petty charges	Serious charges	Ratio
Isiolo	1,620	558	2.90
Kisii	2,025	800	2.53
Kondele	2,500	1,000	2.50
Marsabit	1,000	400	2.50
Nakuru	4,600	2,000	2.30
Voi	2,000	900	2.22
Nyali	2,700	1,300	2.08
Nyeri	1,568	1,000	1.57
Kilimani	1,400	1,100	1.27
Kakamega	3,100	2,800	1.11
Maua	3,105	2,800	1.11
Garissa	1,050	1,000	1.05
Makueni	700	700	1.00
Murang'a	900	900	1.00
Lodwar	500	800	0.63
Total	**28,768**	**18,058**	**1.59**

Types of offences in charges to court

Most observations (99%) in the Charge Registers recorded the type of offence. These have been categorised into broad categories. The largest category of charges to court was that involving offences against the state i.e. non-compliance with statutory legislation around Alcohol, business licencing and the like. This comprised more than one fifth of charges to court. In many countries such regulatory offences would be dealt with administratively (see discussion below).

The next largest category was that relating to "drunk and disorderly" which also comprised more than one fifth of charges to court. If one adds to the drunk and disorderly category "disturbance" and "nuisance" this category ends up comprising 30% of all charges to court. Again, as these are essentially anti-social behaviour charges, this brings into questions what other interventions other than criminal proceedings in court could be brought to bear in reducing or controlling this behaviour.

Figure 8: Offence categories in the Charge Register, 2013-2014

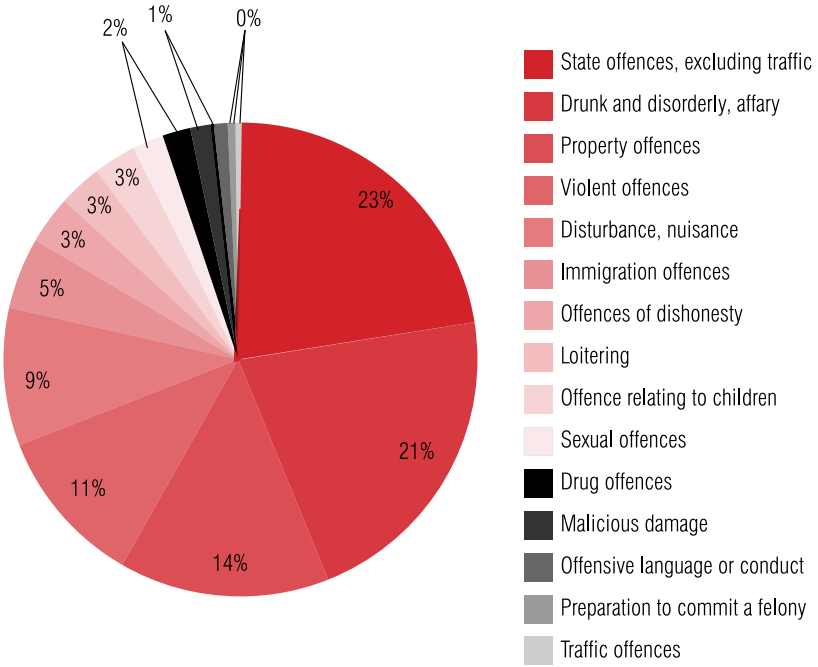


Table 17: Offence categories in Charge Register, 2013-2014

Category	Frequency	Percent	Cumulative
State Offences, Excluding Traffic	10,205	22.51	22.51
Drunk and Disorderly, Affray	9,685	21.36	43.87
Property Offences[1]	6,481	14.29	58.16

Violent Offences[2]	4,970	10.96	69.12
Disturbance, Nuisance	4,245	9.36	78.48
Immigration Offences	2,256	4.98	83.46
Fraud and Other Offences of Dishonesty	1,493	3.29	86.75
Loitering	1,350	2.98	89.73
Child in Need of Care or Offence Relating to Children	1,320	2.91	92.64
Sexual Offences	987	2.18	94.82
Drug Offences	867	1.91	96.73
Malicious Damage	659	1.45	98.18
Offensive Language or Conduct	275	0.61	98.79
Preparation to Commit a Felony	176	0.39	99.18
Traffic Offences	125	0.28	99.46
Death, Driving	110	0.24	99.7
Contempt etc.	104	0.23	99.93
Other	33	0.07	100
Total	**45,341**	**100.00**	

1 Excludes robbery
2 Includes robbery

Conversion rate of arrest to charges, by offence type

Recall that a very high proportion of Cell Register observations and Charge Register observations recorded the offence type. This makes some comparison of the estimated number of offences in respect of the Cell Register and the estimated number of offences in respect of the Charge Register possible. Such comparison gives an idea of the extent to which detentions in police cells are converted into charges in court, by offence type. It might be expected that less serious offences would have a lower conversion rate but in fact this is not the case. The highest conversion rate applied to state offences.

Table 18: Offence frequencies in cells and Charge Registers, and ratio[151]

Cell Register Category	Freq.	Charge Category	Freq.	Ratio
Child in Need of Care or Offence Relating to Children	3,180	Child or Child Offence	1,320	0.42
.	.	Contempt etc.	104	
.	.	Death, Driving	110	
Disturbance or Nuisance	5,428	Disturbance or Nuisance	4,245	0.78
Drug Offence	1,437	Drug Offence	867	0.60
Drunk and Disorderly, Affray	21,326	Drunk and Disorderly, Affray	9,685	0.45
Fraud and Other Offences of Dishonesty	5,083	Fraud and Other Offences of Dishonesty	1,493	0.29
Immigration Offences	11,893	Immigration Offences	2,256	0.19
Loitering	5,584	Loitering	1,350	0.24
Malicious Damage	2,079	Malicious Damage	659	0.32
Obstruction af a Police Officer	1,599	.	.	
Offensive Language or Conduct	835	Offensive Language or Conduct	275	0.33
Other	672	Other	33	0.05
Preparation to Commit a Felony	1,723	Preparation to Commit a Felony	176	0.10
Property Offence	17,951	Property Offence	6,481	0.36
Sexual Offence	1,429	Sexual Offence	987	0.69
State Offence, Excluding Traffic	14,565	State Offence, Excluding Traffic	10,205	0.70
Traffic Offence	12,342	Traffic Offence	125	0.01
Violent Offence	15,757	Violent Offence	4,970	0.32
Warrant of Arrest	1,220	.	.	
Total	**124,103**	**Total**	**45,341**	**0.37**

Indeed except for sexual offences, all the offences which demonstrate a higher than average conversion to charges in court (i.e. more than 37% of cell registrations have associated charges)[152] are so-called victimless offences. Drunk and disorderly, disturbance and nuisance, offences against the state requiring licencing, certificates or compliance with business rules (opening hours, forest produce, etc.) are highly likely to result in charges in court, as are sexual offences. Reasons for this are not clear but may relate to the availability of evidence in such case (testimony

151 *This table excludes those observations where no offence information was available.*

152 *Among observations which have the offence recorded, the ratio is 37%. For all observations the ratio is 32%.*

of law enforcement officers rather than members of the public) or the withdrawal of complaints by victims in other cases.

Duration of charges

Duration from offence to court

In 1669 of 2835 observations (59%) both the date of offence and the date on which the accused went to court was available and recorded. Among those records where the data is available, the duration from offence to court is under 3 days in 77% of cases. However, it is more than 30 days in 7% of cases, and the maximum is 1088 days (see Annexures).

Duration	Minimum	25th percentile	Median	75th percentile	90th percentile	Maximum
Days	0	1	1	3	16	1,088

Duration from offence to result

In 1059 of 2835 observations (37%) both the date of offence and date of the outcome of the case were recorded. It is unclear whether this implies that 63% were not resolved (did not yet have an outcome) at the date of data collection. Among those records where the date of offence and date of outcome is available, the duration from offence to result could be calculated. The summary results appear in the table below. The duration was 2 days or less in 34% of cases.

Duration	Minimum	25th percentile	Median	75th percentile	90th percentile	Maximum
Days	0	1	15	116	326	3,321

Conclusion

Large numbers of people are arrested and detained in police cells in Kenya, with this dataset suggesting around 5,000 people per police station per year on average. This number does not include people accosted or harassed by the police but not ultimately detained in police cells. As Kenya is a demographically young country these numbers are likely to represent a large proportion of the adult population being arrested and detained in cells each year.

While it may be argued that this is appropriate in a relatively high-crime country, analysis reveals that a large proportion of these arrests and detentions are not in relation to common law crimes which concern the public, such as theft.

The largest categories are offences defined by the state relating to the regulation of commercial activity, whether it is sales of alcohol or other contraband, and the protection of state forests or wildlife, and the like. Such offences do not have "complainants" or victims, other than the state itself. The high volumes of these offences are suggestive of a high degree of policing, as they only come to detention through the exercise of police action.

Furthermore, many detentions in police cells are in relation to offences which are not cognisable. Assaults (5%), nuisance (2%), and all statutory offences punishable by a fine only or less than three years' imprisonment, require a warrant for arrest.

Of further concern here is that it is low-level offences nuisance and state victimless offences which are more likely to go to court, suggesting that state resources in criminal justice are more likely to be used in these offences than others.

Widely varying rates of conversion of arrests into charges (by both location and offence type) also suggests a high degree of discretion being exercise by police officers, in both the initial arrest and release, suggesting that Kenyans cannot expect the same treatment wherever they are in Kenya. This apparent discretion and lack of record-keeping relating to reasons for release is suggestive of corruption.

While durations in custody in police cells are not excessively long in most cases, the data suggests 1 in 5 will be held beyond the constitutional time limit, potentially opening the state to a high degree of liability for deprivation of liberty claims.

Recommendations

Legislative framework

Regulatory offences

The Kenyan state clearly has a legitimate interest in regulating various types of commercial and other activity. However a national conversation needs to be begun around the appropriateness of using the criminal law, and in particular, the deprivation of liberty, in order to do so. This has already occurred in the arena of traffic offences. In many countries such "regulatory" offences would not be dealt with through the criminal courts but would be dealt with administratively and

result in administrative fines, which may only go to court on failure of the person to pay the administrative fine, either through a civil or criminal process.[153]

Similarly the state's need to protect state forests and wildlife, not least for tourism purposes, is also clear. Nevertheless arrests of, for example, persons for grazing their stock in national forests during times of drought seem particularly difficult to accept. Natural resources can be managed in creative and balanced ways, though time and space-sharing initiatives, sustainable grazing and other management plans which acknowledge that the people of Kenya should also be able to make use of these natural resources in times of need. [154] Indeed a significant proportion of arrests in this dataset seem to relate to attempts by individuals to make a living or to survive. Had the state not passed laws their attempts would not be seen by the community as "crimes".

Thus in this national conversation it needs to be acknowledged that in a country of low formal employment, the state also has an interest in ensuring people are empowered to make their own living in the informal economy. It is unclear whether, for example, state regulation of home-brewed alcohol does anything more (such as reduce alcohol harm) than protect the market share of large manufacturers of alcohol. Indeed there is some evidence to suggest alcohol consumption has increased in spite of alcohol control laws introduced in 2010.[155]

The county governments have also opened the door to a whole new layer of regulation, raising the spectre of even more draconian policing of economic activity. Such county by-laws should also be dealt with in an administrative fashion.

These of course are not easy issues to resolve. The intention here is simply to open the conversation around different or better ways of managing these issues. Not only do current methods have a cost to persons and families deprived of their liberty, but also to the state in having to process these matters using expensive criminal justice machinery. Using criminal justice machinery may

153 For example, In South Africa, a contravention of a local by-law (regulation) results in the following sets of actions against the offender: Notice- giving notice of the infringement; Notice results in the issue of a fine; Failure to pay the fine would result in summons being served; Failure to respond to summons requesting the offender to appear before court would result in the issues of a warrant of arrest by the Magistrates Court. In Canada, the Uniform Regulatory Offences Procedure Act (1992) provides that there is no general power of arrest in respect of the commission of a regulatory offence, except in specified circumstances, such as where the arrest is necessary to preserve evidence or identify the defendant. Where such an exceptional arrest occurs, the arresting officer must soon as is practicable, release the person from custody after serving the person with a summons or offence notice, except in specified circumstances. In Australia, Those accused of breaches of environmental regulations or corporate laws or charged with minor drug offences, taxation evasion and social welfare fraud, receive a summons from an agency (to whom regulatory responsibility has been delegated) and face civil proceedings or an administrative tribunal rather than face a criminal court.

154 See Lockwood, M. (ed) "Managing Protected Areas: A Global Guide" Routledge 2012. At p 394 there is discussion of Uganda's Kibale National Park, where agreement was reached with the surrounding 120 000 community members, who extract more than 20 products from the Park for their subsistence, commercial, cultural and medicinal needs, after an earlier policy of prohibition was found to be expensive and time-consuming.

155 See Daily Nation "Kenyans drinking more alcohol" 7 October 2014, available at "http://www.nation.co.ke/news/Alcohol-Kenyans-World-Health-Organisation-Report/-/1056/2478514/-/a10fblz/-/index.html

at the same time may "crowd out" dealing with "real" crime, which is real concern given the security threats with which Kenya is faced. The cost is also felt in the families of those deprived of liberty being less able to survive, and there may well be a real impact on GDP through reduction in economic activity, particularly if it is indeed the case that almost 10% of the adult population is deprived of liberty each year.

Alcohol seems also to be a problem beyond the economic activity of sales, which appears in the drunk and disorderly charges and nuisance offences. Interventions which attempt to reduce the occurrence of drunk and disorderly behaviour need to be considered. These may indeed be counter-intuitive. A fresh look needs to be taken at alcohol interventions in this regard, and these may lie in public education, taxation and cultural change rather than Criminal Justice System enforcement.

In relation to offences attracting fines – fines should be given grace period for payments, and it should also be possible to pay by instalments.

Policy and Practice

Halting unlawful arrests

Very many of the detentions in police cells appear to be in relation to non-cognisable offences, which require a warrant to effect arrest. Both police officials and the general public need to be educated regarding which offences permit a police official to arrest without a warrant. Officials who persist in carrying out or threatening unlawful arrests must be disciplined. Persons deprived of their liberty for unlawful arrests would have a claim against the state for such deprivations of liberty.

Ensuring compliance with the 24-hour rule

While the police should be commended for their compliance with the 24-hour rule in most cases, there remains the 1 in 5 held too long. Simply reducing the numbers arrested may help with managing the time periods for which they are detained. Indeed simply sensitising the police to the seriousness of deprivation of liberty may go a long way to improving matters. There also appears to be a need to harmonise policy and practice across Kenya in relation to the exercise of discretion.

Improving prosecution

There appears to be a low rate of prosecution of more serious offences. This could be due to arrests occurring without sufficient cause, or because of withdrawals of complaints, or because of unwillingness to prosecute difficult cases. In the chapter on the Magistrate's courts, a relatively low rate of convictions for serious offences is observed. There is need for the police and the Office of the Director of Public Prosecutions (ODPP) to work in harmony so as to ensure proper prosecution of cases. The ODPP and the Police should find a strategy of weaning out the police prosecutors without compromising the quality of prosecution, which happens when inexperienced prosecuting State Counsels handle prosecution. Prosecution should also collaborate with KSL to provide specialised training on prosecution so as to address the capacity gaps within the department. ODPP could also establish its own Institute for providing capacity building in the area of prosecuting.

Subordinate Courts findings

Subordinate Courts – Magistrates' Courts

Chapter 2.2

In this section the trends in relation to cases registered in the Magistrates' Courts, which are the main courts in Kenya dealing with the majority of criminal cases, are analysed. There are 116 court stations manned by at least 455 magistrates in Kenya.[156] A Magistrate's Court has the authority to hear all criminal cases except murder, treason and crimes under international criminal law.[157] In addition to Magistrates' Courts, the Constitution provides for additional Magistrates' courts in the form of Khadi's Courts and Courts Martial.

Methodology

The court registers of 14 Magistrates' Courts were used to explore trends. Case files were also consulted where necessary and possible. The sites chosen and sampling methodology are described below.

Court Register Sampling

The court registers are numbered yearly and thus the total intake for a year is easy to ascertain. A sample was drawn with a fixed sampling interval, so that researchers selected every nth entry (where n= number in two years / 100). A sample of 100 observations was drawn in this way from 14 Magistrates' court locations. The dataset analysed thus comprises 1400 observations

156 *The Judiciary of Kenya website, available at <http://www.judiciary.go.ke/portal/page/courts>*

157 *Ibid.*

representing cases enrolled in 14 Magistrates' courts of Kenya (excluding data from Children's Courts) during 2013 and 2014. Observations are weighted in accordance with the number of cases enrolled in their respective courts.

Table 1: Number of observations, by court location

Name	Frequency	Percent	Cumulative
Garissa	100	7.14	7.14
Isiolo	100	7.14	14.29
Kakamega	100	7.14	21.43
Kisii	100	7.14	28.57
Kisumu	100	7.14	35.71
Lodwar	100	7.14	42.86
Makadara	100	7.14	50.00
Makueni	100	7.14	57.14
Marsabit	100	7.14	64.29
Meru	100	7.14	71.43
Murang'a	100	7.14	78.57
Nakuru	100	7.14	85.71
Nyeri	100	7.14	92.86
Voi	100	7.14	100.00
Total	**1,400**	**100.00**	

Findings

Number of enrolments in Magistrates' courts

The 1400 observations represent 55 000 cases enrolled in these courts over the period 2013-2014. The relative numbers in the courts are listed in the table below. Makadara has the largest enrolment at 12 200 cases while the smallest enrolment is 900 at Makueni.

Table 2: Number of Magistrates' court cases enrolled, by court location, 2013-2014

Name	Frequency	Percent	Cumulative
Garissa	3,700	6.73	6.73
Isiolo	1,500	2.73	9.45
Kakamega	6,800	12.36	21.82
Kisii	6,100	11.09	32.91
Kisumu	1,400	2.55	35.45

Lodwar	1,800	3.27	38.73
Makadara	12,200	22.18	60.91
Makueni	900	1.64	62.55
Marsabit	1,700	3.09	65.64
Meru	4,600	8.36	74.00
Murang'a	2,300	4.18	78.18
Nakuru	7,900	14.36	92.55
Nyeri	2,100	3.82	96.36
Voi	2,000	3.64	100.00
Total	**55,000**	**100.00**	

Comparing these figures to the data collected in the Police Charge Register is not straight forward as there may not be a one-on-one matching of police stations to courts. In Garissa, Kakamega, Kisii, Lodwar, Marsabit, Murang'a and Nakuru, there were more cases registered in the courts than there were referred by the single relevant police station. This suggests that there may be additional police stations referring cases to these courts. Given that there are 450 police stations and 116 magistrates' courts in Kenya, on average there should be almost four police stations referring to each court. In Isiolo, Makueni, Meru, Nyeri and Voi courts, there were fewer cases registered in the courts of than were referred by the relevant police station, suggesting in these instances referral to other courts or some other cause of drop-off in cases being registered.

Table 3: Police Charge Register Numbers compared to Court Register Numbers, 2013-2014

Name	Number in Police Charge Register	Name	Number in Court Register
Garissa	2,050	Garissa	3,700
Isiolo	2,178	Isiolo	1,500
Kakamega	5,900	Kakamega	6,800
Kilimani	2,500	-	
Kisii	2,825	Kisii	6,100
-		Kisumu	1,400
Kondele	3,500	-	
Lodwar	1,300	Lodwar	1,800
-		Makadara	12,200
Makueni	1,400	Makueni	900
Marsabit	1,400	Marsabit	1,700
Meru	5,905	Meru	4,600
Murang'a	1,800	Murang'a	2,300

Nakuru	6,600	Nakuru	7,900
Nyali	4,000	-	
Nyeri	2,568	Nyeri	2,100
Voi	2,900	Voi	2,000
Total	**46,826**	**Total**	**55, 000**

Number of accused

It is possible for more than one person to be accused in each case. In 90% of the observations it was recorded how many accused were involved in each case. Confining the analysis to those observations, the number of accused ranged from 1 to 37. Most cases (81%) involved only one accused, while 11% involved 2 accused, 4% involved three, 2% four, and 3% five or more. This suggests that 55 000 cases could involve more than 75 000 accused persons. According to the World Bank the population of Kenya in 2014 was 44.863 million with 24.720 million being aged 15-64.[158] Thus 75 000 cases corresponds to 0.3% of the adult population appearing before these 14 Magistrates' courts in two years. Extrapolating these numbers to 40 Magistrates' courts suggests almost 1 in every 100 adults appearing before the Magistrates' courts in two years.

Repeat accused

The high number of accused persons suggests the possibility of repeat offenders. The name of the principal accused was recorded in all the observations. Names which were the same or very similar were recorded in 0.62% of cases. While it is possible that the same person may have used a different name, or not have been recorded as the principal accused, this suggests that repeat appearances in the Magistrates' court within a two-year period by accused persons are not obviously common. The most common offences among the less than 1% with repeat appearances were unlicensed alcohol sales (35%) and theft (50%).

Offences

In 97% of observations the offence with which the accused was charged was recorded. A very wide range of different offence types were recorded. For ease of analysis, these were broadly categorised. The categories are contained in the table below. The offences contained within the broad categories are explained below.

158 *http://data.worldbank.org/indicator/SP.POP.TOTL/countries/KE?display=graph*

Categories of offences

The largest category in the Magistrates' courts was that relating to property offences (26%), which included offences such as theft, burglary, breaking and entering, trespass, and possession of stolen goods. By comparison, property offences comprised 12% of detentions in police cells (see section on the Police) and 14% of charges referred to court. This suggests that between charging by police and registration in court, such charges are more likely to be registered, or alternatively come to court through methods other than arrest, or this may relate to the fact that courts and police stations do not map onto each other one-on-one, and widely varying arrest trends by location have been observed. This applies to all the comparisons below.

The next largest category is nuisance offences (19%), which contain offences such as disturbance of the peace and drunk and disorderly charges. The same percentage was recorded in police cells (19%), yet they comprised almost 30% of police charges to court. The category state regulation comprised 18% of cases registered. This category covers statutory offences in relation to the regulation by the state of food and alcohol production and sale, as well as offences relating to the protection of natural resources and the regulation of the sale of products such as pharmaceuticals. By comparison with police data, such offences comprised 23% in the charge register and 10% in the cell register.

Serious assault charges include assault causing bodily harm and assault causing grievous harm. This comprised 9% of charges. Charges involving drugs (possession, sale, trafficking) comprised 4%, as did white collar offences such as fraud and forgery. Immigration charges comprised almost 4%. Robbery with violence (including attempts) comprised 3% as did ordinary assault. Sexual offence charges (defilement, indecent assault, rape) comprised almost 3% of cases in the courts.

Table 4: Magistrates' court cases, by category of offences, 2013-2014

Offence Category	Frequency	Percent	Cumulative
Property Offences	13,954	25.82	25.82
Nuisance Offences	10,416	19.27	45.09
State Regulation Offences	9,554	17.68	62.77
Serious Assault	4,883	9.03	71.80
Drug Offences	2,369	4.38	76.18
"White Collar" Offences	2,285	4.23	80.41
Immigration Offences	2,028	3.75	84.16
Robbery with Violence	1,703	3.15	87.31
Assault	1,469	2.72	90.03
Sexual Offences	1,404	2.6	92.63
Other Felony Offences	1,193	2.21	94.84

Malicious Damage	1,117	2.07	96.91
Possession of Contraband[1]	426	0.79	97.70
Robbery	368	0.68	98.38
Offences Against Children	248	0.46	98.84
Manslaughter and Suicide	230	0.43	99.27
Criminal Justice System Offences	200	0.37	99.64
Firearm Offences	114	0.21	99.85
Animal Cruelty Offences	53	0.1	99.95
Organised Crime	37	0.07	100.00
Total	**54,051**	**100**	

1 This category includes possession of counterfeit notes, possession of counterfeit copies of copyright material, possession of government trophies, possession of public stores, and unauthorised possession of examination papers

The largest three categories comprise 63% of all charges in the Magistrates' courts. These three categories are described in more detail below.

• Property offences

Recall that 26% of all charges were in this category. Almost two thirds of property offence charges (64%) were theft charges. Breaking and entering comprised a further 14%. Burglary, motor vehicle theft and stock theft each comprised 5%. Property offences were more common in Makadara (43%) and Nyeri (27%), which had a larger percentage of property charges than the average of 26%.

• Nuisance offences

Recall that 19% of all offences were in this category. "Being drunk and disorderly" comprised 96% of these charges, while offensive conduct comprised almost 4%. The remainder included breaching the peace, creating a disturbance, committing a general nuisance, loitering, and using abusive language. These offences were relatively more common in Makueni (where they comprised 49% of all charges), Murang'a (40%), Marsabit (38%), Kakamega (30%) and Isiolo (28%). The very high percentages in these areas bring into question whether the criminal courts are the best method of dealing with these social issues.

• State regulation offences

This category comprises all those offences through which the state regulates the economic activity of citizens towards various goals, such as the promotion of health and safety and the protection of

natural resources. Recall that almost 1 in 5 (18%) of all cases fell into this category. This category was particularly prominent in Kisii (43%), Meru (34%), Voi (29%), and Kakamega (26%). Many of the offences constitute the failure to have a licence for the activity concerned (to sell alcohol, to collect or transport forest produce, to graze animals, to convey milk, to sell pharmaceuticals) and so on) while other offences refer to the failure to observe certain standards, such as those relating to sanitary conditions around food. By far the largest category (65%) was around licencing for the manufacture and sale of alcohol, chang'aa or busaa. Offences around forest produce, karanga (ground nuts) and the like comprised 14%. Offences related to the preparation of food comprised 5% of this category.

- **Simplification of categories**

The categories in the courts were further simplified as follows:

Table 5: Simplified offence categories, Magistrates' Courts, 2013-2014

Offence	Frequency	Percent	Cumulative
Drug Offences	2,369	4.38	4.38
Immigration Offences	2,028	3.75	8.13
Fraud, Dishonesty Offences	2,711	5.02	13.15
Nuisance Offences	10,416	19.27	32.42
Property Offences	13,954	25.82	58.24
State Regulation Offences	9,554	17.68	75.91
Sexual Offences	1,404	2.60	78.51
Violent Offences	9,540	17.65	96.16
Other	2,075	3.84	100.00
Total	**54,051**	**100.00**	

Bail

In some 4409 cases it was established that bail was granted by the courts before the end of the trial. However in a number of instances the relevant records were not available (reference to the case file was often necessary to establish this) – whether the information was missing was not consistently recorded. Considering only those cases where it could positively be established that bail was granted, suggests that bail occurred in at least 8% of cases in the Magistrates' courts.

Bail by offence type

Violent offences comprised 32% of those receiving bail and property offences 34%. Some 15% of violent offences and 11% of property offences were granted bail. This suggests these relatively

more serious offences were more likely to result in bail. This may be due to a lack of recording of other forms of pre-trial release.

Outcomes

Some 80% of cases had an outcome recorded. The most common outcome was a guilty verdict, which applied in 53% of cases, while 10% had an acquittal. Some 37% resulted in a withdrawal or discharge. Thus a verdict was applicable in only 63% of cases. Amongst cases with a verdict, 85% were guilty verdicts. This suggests that cases which the prosecution does not withdraw, are highly likely to result in a guilty verdict.

Table 6: Outcomes in the Magistrates' courts, by type of outcome, 2014-2015

Outcome	Frequency	Percent	Cumulative
Guilty	22,962	53.34	53.34
Acquitted	4,194	9.74	63.08
Withdrawn	15,893	36.92	100.00
Total	**43,049**	**100.00**	

The total number of guilty verdicts in these courts are equivalent to approximately 9% of the arrests explored in the previous chapter (recall however that the police stations do not map directly onto the courts here.) Nevertheless this provides an indication of the extent to which arrests are converted into guilty verdicts.

Outcomes by bail

In some 24% of cases where it was known bail was granted, the outcome was also known. Amongst these cases, the outcome was more likely to be an acquittal (21%) or withdrawal (44%) than in other cases, where acquittals were only 9% and withdrawals only 37%. This suggests that those who get bail are less likely to be convicted.

Outcomes by offence and offence category

A correlation was observed between guilty verdicts and the type of offence. The table below shows the outcome findings for all offence categories with more than 30 observations. Guilty verdicts were highly likely with the largest offence categories such as nuisance offences (83%), state regulation (80%) and immigration offences (65%). By contrast only 5% of sexual offences resulted in a guilty verdict, largely due to the high withdrawal rate for sexual offences (65%) - but also an acquittal rate of 30%. Robbery with violence showed a high withdrawal rate of 74%. The

findings suggest that more serious cases are more likely to be withdrawn than any other outcome, while less serious offences are highly likely to result in a guilty verdict.

Table 7: Magistrates' court outcomes, by offence category,159 (in order of decreasing guilty percent), 2013-2014

Offence Category	Guilty (Percent)	Acquitted (Percent)	Withdrawn (Percent)
Nuisance Offences	82.94	1.68	15.38
State Regulation	80.80	3.58	15.62
Immigration	65.14	0.72	34.14
Drug Offences	54.93	3.19	41.88
Other Felony Offences	33.78	21.75	44.47
Property Offences	31.42	17.47	51.11
White Collar Offences	29.60	3.70	66.70
Serious Assault	18.51	13.45	68.05
Robbery With Violence	12.99	12.99	74.03
Sexual Offences	5.11	30.03	64.86
Total	**53.34**	**9.74**	**36.92**

The table below collates all the offences into even broader categories to explore trends using all available observations.

Table 8: Magistrates' court outcomes, by simplified offence category, (in order of decreasing guilty percent), 2013-2104

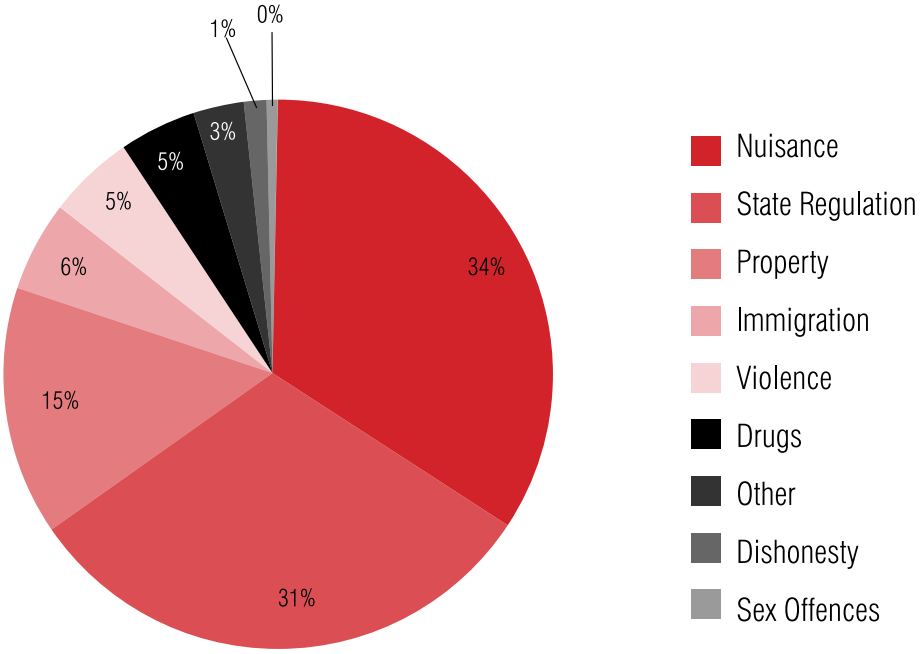
Simplified Category	Guilty (Percent)	Acquitted (Percent)	Withdrawn (Percent)
Nuisance Offences	82.94	1.68	15.38
State Regulation	80.80	3.58	15.62
Immigration	65.14	0.72	34.14
Drug Offences	54.93	3.19	41.88
Other	41.94	12.91	45.14
Property Offences	31.42	17.47	51.11
Fraud, Dishonesty	24.90	5.60	69.49
Violent Offences	18.39	19.74	61.87
Sexual Offences	5.11	30.03	64.86
Total	**53.34**	**9.74**	**36.92**

Indeed, looked at from the perspective of the composition of guilty verdicts, the nuisance and state regulation offences together comprise almost two-thirds of guilty verdicts. The pie-chart

159 *Categories with fewer than 30 observations in the dataset are excluded from this analysis*

below shows the composition of guilty verdicts by offence category. Offences involving violence comprise only 5% of all guilty verdicts.

Figure 1: Guilty verdicts by offence category, Magistrates' Courts, 2013-2014



Human Experience 1: Guilty pleas to expedite cases in alcohol cases (from paralegal files)

> "Pre-trial detainees from Meru women Prison, Maua Police Station and Meru court had offences relating to possession, manufacturing, selling or dealing with alcoholic drinks without license in contravention of Alcoholic Drinks Control Act Number 4 of 2010. All the detainees pleaded guilty and were awaiting judgment and eventual sentencing. On being queried why they pleaded guilty, eight of them said they were advised by their peers in the police station to plead as such as the charges in question attracts non-custodial sentences. Two of the pre-trial detainees pleaded guilty to avoid spending extended periods in remand custody."

Outcomes by location

Outcomes varied widely by location. Guilty verdicts were most likely in Makueni (77%), Kakamega (73%), Voi (71%), Kisii (71%), and Marsabit (69%). Guilty verdicts were least likely in Kisumu (15%). These findings appear to be influenced by the offence profile in these courts.

Table 9: Magistrates' court outcomes, by location name (in order of decreasing guilty verdict percent), 2013-2014

Name	Guilty (Percent)	Acquitted (Percent)	Withdrawn (Percent)
Makueni	77.01	3.45	19.54
Kakamega	72.73	3.41	23.86
Voi	70.97	10.75	18.28
Kisii	70.65	2.17	27.17
Marsabit	69.32	4.55	26.14
Meru	67.19	7.81	25.00
Murang'a	65.43	1.23	33.33
Lodwar	60.87	8.70	30.43
Isiolo	57.83	2.41	39.76
Nakuru	52.56	12.82	34.62
Garissa	50.00	1.32	48.68
Nyeri	46.25	23.75	30.00
Makadara	17.14	21.43	61.43
Kisumu	15.25	15.25	69.49
Total	**53.34**	**9.74**	**36.92**

Sentences

The types of sentences handed down by the Magistrates' courts included community service orders (CSO's), fines, fines and/or community service, imprisonment, imprisonment and/or fines, probation, committal to a school, suspended sentences, repatriation, and the death sentence. A (CSO) is an order made by the court requiring a person who has been found guilty of a criminal offence to perform unpaid public work which is of benefit to the community.[160] In probation, the offender is placed under the supervision of a probation officer for a set duration. [161] A breach of a probation order will result in the offender being produced in court and the court may substitute probation with any other sentence.

Recall that guilty verdicts were imposed in 53% of cases. The guilty verdict observations also recorded the sentence handed down in 74% of these guilty verdict observations. Confining the analysis to those observations where the sentence was recorded, the most common category of sentence was a fine and/or imprisonment, which was applied in 49% of cases. Imprisonment

160 Community Service Orders Act No. 10 of 1998; Probation of Offenders Act CAP 64; Penal Code CAP 63 of the Laws of Kenya.

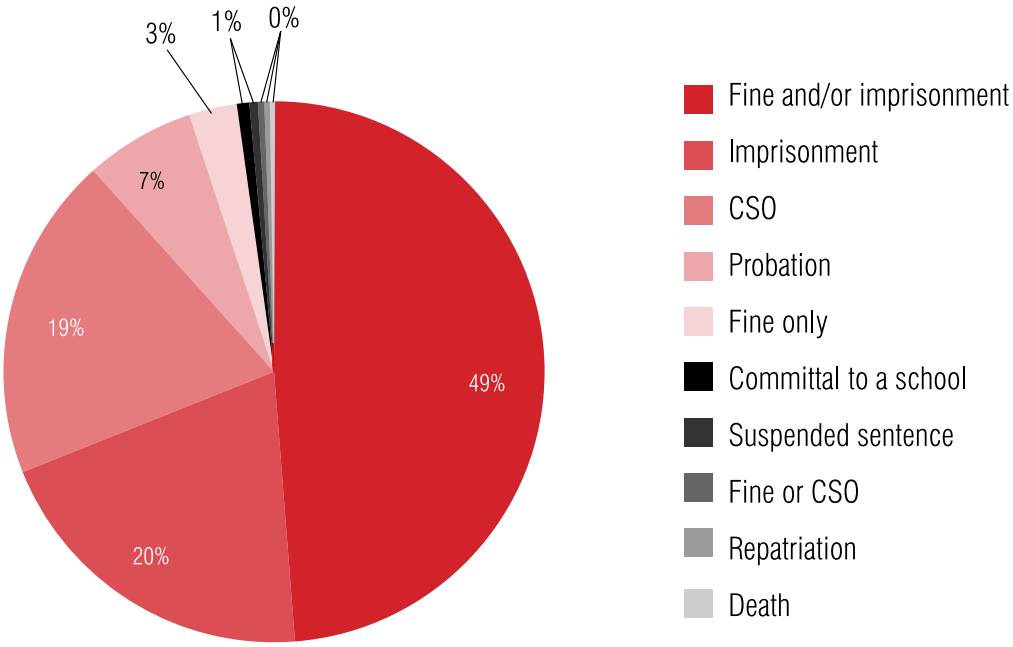
161 Cap 64 of the Laws of Kenya.

was imposed in 20% of cases, CSO's in 19% of cases, and probation in 7%. The figures are represented in the table below and the table is represented in the pie-chart below.

Table 10: Sentences in the Magistrates' courts, by type of sentence, 2013-2014

Sentence	Frequency	Percent	Cumulative
CSO	3,059	19.19	19.19
Death	18	0.11	19.31
Fine Only	444	2.79	22.09
Fine Or CSO	27	0.17	22.26
Fine and/or Imprisonment	7,786	48.85	71.11
Imprisonment	3,222	20.22	91.33
Probation	1,072	6.73	98.05
Repatriation	20	0.13	98.18
Committal to a School	201	1.26	99.44
Suspended Sentence	89	0.56	100.00
Total	**15,938**	**100.00**	

Figure 2: Sentence types in the Magistrates' Courts, 2013-2014



Categories of sentencing

The findings suggest that Magistrates' courts are making use of alternatives to imprisonment. The categories of sentencing above are further simplified into categories of comparable seriousness in the table below.

Table 11: Sentences in the Magistrates' court, combined categories

Sentence	Frequency	Percent	Cumulative
Fine and Imprisonment; Fine or Imprisonment	7,786	48.85	48.85
CSO; Fine only; Fine or CSO	3,530	22.15	71.00
Imprisonment, Suspended Sentence or Committal to School, Death	3,550	22.27	93.27
Probation	1,072	6.73	100.00
Total	**15,938**	**100.00**	

Sentences by offence type

Sentence type varies widely by offence type. The most onerous sentences were more likely in relation to sexual offences, immigration offences, drug offences, and property offences. They were less likely in relation to state regulation offences and nuisance offences. Recall however that the latter were more likely to result in guilty verdicts.

Table 12: Sentences in the Magistrates' court, by offences, 2013-2014

Sentence	CSO Only; Fine Only; Fine or CSO	Probation	Fine and Imprisonment; Fine or Imprisonment	Imprisonment Only; Suspended Sentence or Committal to School; Death
Offence				
Drug Offences	24.50	11.40	18.60	45.50
Immigration	0.00	0.00	42.28	57.72
Fraud, Dishonesty	6.60	66.34	5.94	21.12
Nuisance Offences	26.52	1.46	58.66	13.36
Property Offences	20.10	10.94	26.91	42.05
State Regulation	26.32	1.92	64.28	7.48
Sexual Offences	0.00	0.00	0.00	100.00
Violent Offences	25.03	18.60	32.38	24.00
Total	**22.15**	**6.73**	**48.85**	**22.27**

Duration of cases

In 63% of observations both the date of plea and the date the case was resolved was available (i.e. the case was complete and both dates were recorded). This permits the calculation of the number of days from plea to the case being resolved. However in 3% of observations the recorded date for the case being complete was a date before the date of plea, resulting in a negative duration. This suggests a recording error. No assumptions were made regarding the nature of the error and observations with negative durations were excluded from the analysis.

Durations for all completed cases

The durations from plea to outcome recorded in completed cases (recall that 63% of cases were complete) ranged from 0 days to 881 days (2.4 years). One third (34%) of cases were resolved on the same day that plea was taken. The median was 19 days for all completed cases, while the 25th percentile was 0 days and the 75th percentile was 146 days. In relation to the maximum, recall that the data was collected during late 2015 and early 2016 and the cases were enrolled from January 2013, with the most recent date of data collection being 26 January 2016. Hence the longest possible duration in the dataset is 1121 days. In other words had the sampling selected from earlier years, longer durations may have been recorded.

Duration of completed cases by offence category

Some 64% of nuisance cases were resolved on the same day, and some 56% of state regulation cases were resolved on the same day, compared to only 9% of property cases and 11% of sexual offence cases. The medians for property and sexual offence cases were 110 days and 234 days respectively.

Table 13: Median duration of completed cases, by offence category, Magistrates' Courts, 2013-2014

Category of Offences	Median (days)
Nuisance Offences	0
State Regulation Offences	0
Immigration Offences	1
Criminal Justice System Offences	4
Offences Against Children	6
Manslaughter and Suicide	24
Animal Cruelty Offences	26
Drug Offences	46
Organised Crime	62

Other Felony Offences	98
Serious Assault	99
Malicious Damage	103
Property Offences	110
Assault	128
Robbery With Violence	143
Possession of Contraband	146
"White Collar" Offences	157
Robbery	196
Firearm Offences	211
Sexual Offences	234
All	**19**

The trends by location show that the medians by offence type vary widely by location. This suggests that different causes, dependent on local circumstances by location, are influencing the duration trends.

Table 14: Duration of completed cases by location and selected offences, 2013-2014

Name	All Cases, Median (days)	Property Offences, Median (days)	Nuisance Offences, Median (days)	Serious Assaults, Median (days)
Kakamega	0	46	0	19
Kisii	0	35	0	95
Marsabit	1	57	0	19
Makueni	1	15	0	39
Garissa	3	2	28	67
Voi	5	23	0	161
Murang'a	5	79	0	233
Meru	8	41	33	117
Lodwar	17	36	3	21
Nyeri	42	91	0	126
Nakuru	59	88	15	296
Kisumu	82	105	37	61
Isiolo	83	10	83	-
Makadara	159	194	26	176
All	**19**	**110**	**0**	**99**

Durations for incomplete cases

Some 28% of cases were not yet complete at the time of data collection. The durations for these cases from registration to the date of data collection ranged from 308 days to 1060 days (2.9 years), median 597 days, 25th percentile 460 days, 75th percentile 784 days.

Completion rates

The overall one-year completion rate for all cases was 62%. The percentage however varied widely by location. The table below presents the completion rates from highest percentage completed in one year (Kakamega, 87%) to lowest completed in one year (Isiolo, 3%). It is possible that allocation of resources does not match demand in the relevant courts, resulting in delays. For example, Makadara and Kakamega have almost the same number of magistrates assigned (9 and 8 respectively), yet Makadara has almost twice the number of cases (12 200 and 6 800 respectively). This suggests resourcing may to some extent account for the difference in the completion rates observed.

Table 15: Percent cases complete within one year of plea, by location, 2013-2014

Name	Percent
Kakamega	87.00
Makueni	80.00
Garissa	78.79
Voi	78.00
Kisii	77.00
Murang'a	67.68
Nakuru	66.00
Nyeri	63.92
Marsabit	57.00
Lodwar	55.56
Meru	49.00
Kisumu	48.98
Makadara	43.00
Isiolo	3.03
All	62.00

The Kenya Criminal Procedure code provides that cases punishable by no more than 6 months' imprisonment must be heard within one year of when the complaint arose. [162] The only Criminal Procedure Code offences falling into that category are "rogue and vagabond" and "idle and disorderly". There were none of these cases in the dataset.

The table below presents the completion rates by offence category, from highest percentage (immigration cases) to lowest percentage (sexual offences). Note that offence types with higher completion rates also tend to be those with higher percentages of guilty verdicts. This suggests guilty pleas may play a role in the trends.

Table 16: Percent cases complete within one year, by simplified offence category, 2013-2014

Category	Percent
Immigration	88.66
State Regulation	82.53
Nuisance Offences	78.24
Other	54.43
Property Offences	54.04
Violent Offences	53.51
Drug Offences	47.70
Non-Violent, Non-Property	35.72
Sexual Offences	29.99
All	**62.00**

Conclusion

The Magistrates' Courts in Kenya are not primarily in the business of prosecuting classic Penal Code offences such as theft, robbery and assault. Nuisance offences, state regulation offences, drug offences and immigration offences comprise more than half of cases before the Magistrates' courts. Furthermore, the trends in relation to the Penal Code offences show that they take longer to resolve, and are less likely to result in a guilty verdict. It may be that to some extent the other offences are consuming resources and crowding-out the more serious offences.

The evidence here suggests that lesser offences are more likely to attract guilty verdicts as compared to more serious offences. Possible reasons could be that guilty pleas account for the trend, perhaps due to police advising arrested persons to plead guilty and be fined, the

162 Section 219, Criminal Procedure Code: "Except where a longer time is specially allowed by law, no offence the maximum punishment for which does not exceed imprisonment for six months, or a fine of one thousand shillings, or both, shall be triable by a subordinate court, unless the charge or complaint relating to it is laid within twelve months from the time when the matter of the charge or complaint arose."

perception that the criminal trial process could take very long, and fear associated with remand custody. There is a need to interrogate why robbery with violence matters have a higher tendency to be withdrawn before completion – this could be suggestive of initial arrests based on insufficient evidence, or of corrupt practices. Lesser offences also tend to be resolved more quickly.

There is a great deal of variation amongst the Magistrates' courts surveyed here, in terms of all trends interrogated, implying that Kenyans can expect to face very different justice depending on where they are located. There is evidence to suggest that while almost two-thirds of cases are resolved relatively quickly, very long durations between plea and judgement may apply to a third of cases, with more serious cases generally taking longer to resolve. The reasons for stark variations between regions should be investigated. It is possible that the current allocation of resources does not match demand in the relevant courts. This requires further investigation to establish whether this is the case or whether other reasons underpin these trends.

The data suggests courts in Kenya are making use of alternatives to imprisonment, such as community service orders and probation.

Recommendations

Legislative framework

Introducing administrative procedure for regulatory offences

State offences comprise the largest category of cases in these courts, and are comparatively highly likely to result in guilty verdicts. As suggested in the previous chapter, a national conversation needs to be undertaken to fully understand the implications of using criminal justice processes to further the very real public health and other interests of the state. This conversation must acknowledge that using the machinery of the police and courts to deal with these interests threatens livelihoods and may bring the Criminal Justice System into disrepute amongst a public over-policed in entrepreneurial activity and under-policed in terms of serious crime.

In particular, the vexed question of alcohol control emerges again in this dataset, as a subset of the category of state-control, as well as in the large number of offences apparently emerging from the consumption of alcohol. Periodic deaths as a result of deadly brews lead the Kenyan state to further "clamp-down" on informal alcohol production and sales recently. Yet 4 million Kenyans are said to consume such products, usually without serious incident and providing an entrepreneurial income stream for many. The Criminal Justice System is unlikely to be able to succeed in controlling this sector, yet at the same time where it does attempt to do so it may threaten livelihoods.

As one author has put it:

> "While the risks and harms associated with liquor retailing may be a pressing object of public health concern, selling alcohol still represents an aspirational and entrepreneurial opportunity to many. The tendency to underplay alcohol's economic value to small-scale retailers without an associated consideration of how to generate alternative income sources through integrated development interventions may drive policy unsustainability. As Michael Marmot' s work should remind us, without integrating efforts to mitigate the "causes of the causes" of demand for drink into alcohol control policies, the allure of alcohol as a micro-enterprise and its attendant alcohol related-harms will likely remain … Reconciling livelihoods with alcohol harm reduction agendas in the Global South will require new conversations about the nature and importance of demand. In turn, these must dissect the ambiguous complexities that emerge when selling alcohol in the Global South may be a responsible choice from a livelihoods perspective, even if its consumption (irresponsible or otherwise) remains an entrenched public health challenge."[163]

Similarly, a conversation needs to develop around the protection of natural resources via policing and criminal law, especially where attempts by the very poor at survival fall foul of environmental law. Greater attention needs to be focused on ways to integrate and mainstream protected areas into sustainable development, ways which take into account the real needs of communities in and around protected areas.

All of these conversations could lead to legislative reform.

Reducing the duration of cases

The one third of cases showing very long durations need to be further explored. The "Guidelines relating to active case management of criminal cases in Magistrate's Courts and the High Court of Kenya" of February 2016 seem now to place responsibility for managing the flow of cases squarely on the judiciary.[164] However the Guidelines top short of putting in place actual time limits. This study provides a basis for indicating what a reasonable time limit in Kenya might be for the resolution of cases in the lower courts. However such limits may need to distinguish among cases of different offence type. Very few offences currently fall into the category governed by a 1-year time limit. Expansion of this category would provide a clear measure to which the courts could be held to account.

163 Herrick, C. Critical Public Health (2013) "Alcohol control and urban livelihoods in developing countries: can public health aspirations and development goals be reconciled?" accessed at <http://www.academia.edu/4795894/Alcohol_control_and_urban_livelihoods_in_developing_countries_can_public_health_aspirations_and_development_goals_be_reconciled >

164 Gazette Notice No. 1340, 2016

Policy and practice

Rationalising the allocation of resources

The widely differing trends suggest allocation of resources, in terms of magistrates and other infrastructure, does not match demand in the relevant courts. This requires further investigation to establish whether this is the case or whether other reasons underpin these trends. If resources are not the problem, magistrates should be held to account for poor time-keeping in their courts.

Improving quality of justice for serious offences

Finally, the true business of the courts in appropriately addressing crime requires attention. The recommendations relating to the prosecution in the section on police are relevant here. The very low conviction rates for sexual and violent offences are cause for concern. The data suggest the true crime concerns of communities in Kenya may be receiving less attention than is ideal and that court time is taken up with state regulation. Whether this is an appropriate use of state resources allocated to criminal justice needs carefully to be considered.

Children's Courts findings

Children's Courts

Chapter 2.3

This section provides insight into cases heard in the Children's Courts of Kenya. The Children Act provides for Children's Courts in Kenya, which are empowered to hear:

- Any civil proceedings provided for in the same Act, such as Care and Protection matters
- A charge against any person accused of an offence against children under the same Act;
- Any charge against a child, other than a charge of murder, or a charge in which the child is charged together with a person or persons of or above the age of eighteen years. [165]

Children's Courts are required to sit separately from the ordinary subordinate courts and to conduct their proceedings in various ways which operate to protect children.[166]

Methodology

The court registers for 2013 and 2014 of two Children's Courts were used to explore trends in the subordinate courts. Case files were also consulted where necessary and possible. The sampling methodology is described below.

165 Section 73 Children Act as amended. In addition, they may exercise any other jurisdiction conferred by this or any other written law.

166 See Part VI, Children Act as amended

Children's Court Register Sampling

The Children's Court data was drawn from the registers of two Children's Courts, Milimani and Tononoka. Some 100 observations were drawn from each of these courts. The court registers are numbered yearly. A sample was drawn with a fixed sampling interval, so that researchers selected every nth entry (where n= number in two years / 100). The dataset analysed comprises 200 observations from the court registers. Where this was necessary and possible, additional information was drawn from court files. Observations were weighted in accordance with the total number of cases enrolled in their respective courts. It is unclear the extent to which the two courts selected are representative of Children's Courts in Kenya. The findings are probably only representative of the two courts concerned.

Table 1: Number of observations in Children's Court Dataset

Name	Frequency	Percent	Cumulative
Milimani	100	50.00	50.00
Tononoka	100	50.00	100.00
Total	200	100.00	

At Milimani, the research fieldworker collected observations for both Child Care and Protection matters and crimes involving children, while at Tononoka observations were drawn only from those cases which were not Child Care and Protection matters. The 100 Milimani observations thus represent all 1200 cases of all types over those two years heard in Milimani, and the 100 Tononoka observations represent only the 200 non-Care and Protection cases heard there over two years.

Table 2: Number of cases enrolled at Children's Courts, 2013-2014

Name	Frequency	Percent	Cumulative
Milimani (All Matters)	1,200	85.71	85.71
Tononoka (All Matters Excluding Child Care and Protection Cases)	200	14.29	100.00
Total	**1,400**	**100.00**	

Consequently it is appropriate to analyse the Care and Protection matters separately from the other matters, and to separate matters relating to crimes committed against children from crimes in which children are facing charges themselves. The number of observations for each of the three categories is represented below.

Table 3: Number of observations in the Children's Courts dataset, by category of cases

Categories In The Children's Courts	Frequency	Percent	Cumulative
Charges against Children	93	46.50	46.50
Care and Protection Cases	85	42.50	89.00
Crimes against Children	22	11.00	11.00
Total	**200**	**100.00**	

The dataset represents just over 300 crimes by children and over one thousand Care and Protection matters. The number of cases represented by the observations of each type appears in the table below.

Table 4: Number of cases represented by Children's Court dataset, by category of case

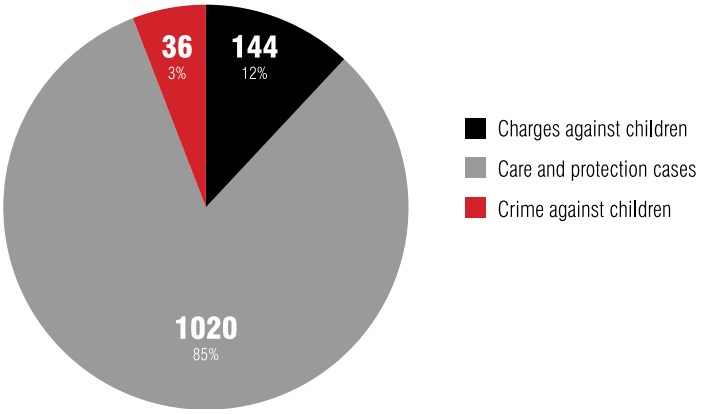
Categories In The Children's Courts	Frequency	Percent	Cumulative
Charges against Children	306	21.86	21.86
Care and Protection Cases	1,020	72.86	94.72
Crimes against Children	74	5.29	100.00
Total	**1,400**	**100.00**	

Findings

Distribution of cases in Children's Courts

The relative distribution of the cases in the Children's Courts can be suggested by confining the analysis to Milimani only, from which a sample in relation to all cases was drawn. It is clear from the Milimani sample that this court dealt overwhelmingly with Care and Protection matters, with charges against children and crimes against children comprising a minority of cases. The data in the table above is represented in the figure below.

Figure 1: Distribution of cases in Milimani, by Children's Court categories, 2013-2014



This brings into the question the appropriateness of the same court handling cases very different in nature. The question is echoed in the analysis for Remand Homes, which house child perpetrators, child victims, as well as children in need of care, in the same facility and even in the same rooms. It also suggests that Care and Protection matters are not often associated with charges against adult who are responsible for their care and protection.

A. Care and Protection cases

As indicated above, Care and Protection Cases comprised 85% of Milimani matters. Some findings are briefly described here.

Outcomes

In 75% of Care and Protection observations an outcome was recorded. More than half (51%) were released through Children's Homes or through their parents.

Some 34% resulted in repatriation. In the case of children, it is not clear that repatriation is in the best interests of the child, particularly where such children are refugees.

Some 14% of Care and Protection resulted in a committal to a Children's Home and 2% resulted in probation, suggesting some sort of wrongdoing on the part of the child.

Duration

Only 16% of cases recorded the entry date and judgment date, even though in 75% of cases an outcome was recorded. Among these, all were resolved within a month. Some 70% were resolved on the same day, 10% in 14 days, 10% in 16 days and 10% in 28 days.

B. Charges relating to offences against children

In this category are cases involving persons charged with perpetrating defined crimes against children, such as child torture. As indicated above, these comprised only 3% of cases at Milimani. Unfortunately there are insufficient observations (22) to draw firm conclusions. Some results are nevertheless presented, with the 22 observations recorded notionally "representing" 74 cases.

The most common charges were child neglect and child torture, and the most common outcome acquittal. As indicated above the high volumes of Care and Protection cases do not seem to be matched by associated charges relating to offences against children.

Table 9: Offences against children in the Children's Court, by type of offence

Charges	Frequency	Percent	Cumulative
Child, Abuse	2	2.70	2.70
Child, Fail Protect Neglect	2	2.70	5.41
Child, Fail Protect Physical Abuse	4	5.41	10.81
Child, Fail Protect Sexual Abuse	4	5.41	16.22
Child, Indecent Act	2	2.70	18.92
Child, Neglect	30	40.54	59.46
Child, Neglect, Parental Responsibility	2	2.70	62.16
Child, Rt to Ed	2	2.70	64.86
Child, Rt to Parent	6	8.11	72.97
Child, Torture	20	27.03	100.00
Total	**74**	**100.00**	

In 19 observations outcomes were available. They "represent" 48 cases. Because of the small number of observations, trends should not be concluded from this data. However 21% were withdrawn, 29% acquitted and 8% discharged, the remainder were found guilty.

Table 10: Outcomes in offences against children cases in the Children's Court, by outcome

Outcome	Frequency	Percent	Cumulative
Acquitted	14	29.17	29.17
Discharge	2	4.17	33.33
Discharge, Cond	2	4.17	37.50
Guilty, Fine	10	20.83	58.33
Guilty, Imprisonment	2	4.17	62.50
Guilty, Probation	8	16.67	79.17
Withdrawn	10	20.83	100.00
Total	**48**	**100.00**	

C. Charges against children

In this section the analysis is based on data collected from both Milimani and Tononoko. There were 93 observations representing 306 cases.

Offences

All observations relating to charges against children, recorded the charge faced by the child. The most common charges faced by children in these Children's Courts are theft charges and sexual offence charges. These are described in more detail below.

Theft charges

The charges faced by children were most likely to be various kinds of property offences such as theft or breaking charges. These amounted to more than one-third (35%) of the cases. Of some concern is the 4% of "theft by servant" charges (12% of all theft charges), suggesting that such children are in employment. There are restrictions on the employment of children in terms of the Employment Act 2007[167], while the Children Act of 2001, in section 10, provides that every child shall be protected from economic exploitation. Theft by servant carries a higher penalty than ordinary theft. It is unclear the extent to which the court interrogates issues of economic exploitation when children face "theft by servant" charges.

Table 6: Crimes by children heard in the Children's Courts,

Category	Charges	Frequency	Percent
Property Offences	Theft	88	28.76
34.64%	Theft, MV	2	0.65
	Theft, Servant	12	3.92
	Breaking	4	1.31
Sexual Offences	Sex, Defile	88	28.76
30.06%	Sex, Defile, Att	2	0.65
	Sex, Defile, Gang	2	0.65
Other	Escape, Aiding	2	0.65
18.95%	Escape, Custody	14	4.58
	Immigration, Presence	8	2.61
	MDP	2	0.65
	Pornography, Possession	12	3.92
	Counterfeit, Possession	4	1.31
	Disturbance	16	5.23

167 *Employment Act 2007*

Violence 9.15%	Arson	4	1.31
	Assault, BH	10	3.27
	Assault, GH	2	0.65
	Robbery	6	1.96
	Robbery, Viol	4	1.31
	Suicide, Att	2	0.65
Drug Offences 7.19%	Drugs, Poss Alc	2	0.65
	Drugs, Possession	16	5.23
	Drugs, Trafficking	4	1.31
Total	**Total**	**306**	**100.00**

Defilement charges

Furthermore, sexual offences, predominantly defilement, amounted to 30% of charges faced by children in these two courts. The Kenya High Court in 2013 upheld the criminalisation of adolescent consensual sex in terms of the offence of defilement.[168] (The case involved the prosecution of a boy for consensual sexual intercourse between a 16-year-old girl and the 16-year-old boy). Although the court has ruled the relevant provisions are not inconsistent with children's rights in the Kenyan Constitution, this does not prevent the legislature from considering changing the law in the light of changing social mores.

Drugs and alcohol charges

Various kinds of drugs and alcohol charges amounted to 7% of charges. Almost one quarter of these related to possession charges.

Violence charges

Offences involving violence amounted to 9% and included serious assault 4%, robbery 2%, arson 2% and robbery with violence 1%. Almost 1% involved attempted suicide.

Number of accused

In 94% of observations the number of accused was recorded. Confining the analysis to these, in most cases (91%) only one accused was involved in the case. The frequency of multiple accused appears in the table below. The number of accused is 18% larger than the number of cases. This

168 *CKW v. Attorney General & Director of Public Prosecution, Petition No. 6 of 2013 (High Court of Kenya) KLR*

is a lower percentage than was observed in the ordinary subordinate courts, suggesting that children may be less likely to be arrested for group crimes than adults.

Table 7: Accused in the Children's Courts, by number of accused

Number of accused	Frequency	Percent	Cumulative	Total number of accused
1	212	90.60	90.60	212
2	16	6.84	97.44	32
3	2	0.85	98.29	12
4	2	0.85	99.15	8
6	2	0.85	100.00	12
Total	**234**	**100.00**		**276**

Bail

Very few observations recorded whether or not bail was granted. Bail was however recorded to be granted in 9% of cases. This is the same percentage which was recorded in the subordinate courts.

Bail amounts

Bail amounts ranged from Ksh1,000 to Ksh100,000. The median amount was KSh15,000 (US$150). The lowest monthly minimum wage in cities in Kenya is around KSh11,000, suggesting the median amount of bail for a charge against a child is more than a month's minimum wage.

Bail offences

Bail was granted in relation to grievous harm, possession of counterfeit goods, robbery and defilement charges. These are relatively serious charges. It is unclear the extent to which other accused may have been released without any cash bail pending trial.

Duration

The Children Act provides that children have the right to have the matter against them determined without delay. Children may however be remanded awaiting trial. Certain time limits apply to that remand. The provisions relating to remand of children and the relevant time limits are described below.

Legislation

Where a child is not released on bail, the court may make an order remanding the child in custody.[169] The court must order detention for a defined remand period to a children's remand home. [170] If there is no children's remand home within a reasonable distance of the Court, the Court must make an appropriate order as to the child's safe custody as it deems fit,[171] but "safe custody" must not be a remand home or prison in which adults are detained or remanded.[172]

A remand to a children's remand home may be revoked and a child over age 15 ordered to be remanded in a borstal institution, if the child "proves to be so unruly a character that he cannot safely be remanded in a children's remand home or if the child has proved to be of so depraved a character that he is not fit to be so remanded". [173]

Remand in custody must not exceed six months (180 days) in the case of an offence punishable by death; or three months (90 days) in the case of any other offence.[174] These limits around the period of remand presumably mandate release on bail or other conditions once these time limits have been exceeded.

The Children's Act, Schedule 5 in Rule 12 also provides further specificity around limits on the time from plea to judgment, whether or not the accused is in custody, but with specific interim provisions where the accused is in custody:

> "12. (1) every case involving a child shall be handled expeditiously and without unnecessary delay.
>
> (2) Where the case of a child appearing before a Children's Court is not completed within 3 months after his plea has been taken he case shall be dismissed and the child shall not be liable to any further proceedings for the same offence.
>
> (3) Where, owing to its seriousness, a case is heard by a court superior to the Children's Court the maximum period of remand for a child shall be six months, after which the child shall be released on bail.

169 *Rule 10(1), Schedule 5, Child Offenders Rules, Children Act*

170 *Rule 10(1), Schedule 5, Child Offenders Rules, Children Act*

171 *Rule 10(2), Schedule 5, Child Offenders Rules, Children Act*

172 *Rule 10(2), Schedule 5, Child Offenders Rules, Children Act*

173 *Rule 10(3), Schedule 5, Child Offenders Rules, Children Act*

174 *Rule 10(4), Schedule 5, Child Offenders Rules, Children Act*

(4) Where a case to which paragraph (3) of this rule applies is not completed within twelve months after the plea has been taken the case shall be dismissed and the child shall be discharged and shall not be liable to any further proceedings for the same offence."[175]

Thus the general rule for ordinary Children's Court matters heard in the Children's Court, is that cases must be completed within three months (90 days) from the date of plea and that the period of remand may not exceed 90 days (with extensions for more serious matters).

Duration of completed cases

Some 45% of cases against children in the Children's Court had been completed and also had the date of summons and the date of judgement recorded, to permit calculation of the time taken from summons to judgement. Amongst these, only 54% were complete in less than the required 90 days, if we assume plea was taken at the outset of the case.

Bail was only recorded in 9% of cases, suggesting many of these may have been on remand. The range was from a minimum of zero (in 14% of cases) to a maximum 687 days. The median was 70 days, 25th percentile was 25 days and 75th percentile was 245 days.

Duration of incomplete cases

Despite the fact that the Act provides that matters against children should be heard without delay, in 36% of cases an outcome of the matter could not be determined. This suggests that 36% of cases had not been resolved at the time of data collection. The duration to date of these cases ranged from 362 to 1076 days, median 672 days, and 25th percentile 584 days, 75th percentile 831 days. Some 38% of these cases were theft cases, which is a higher proportion than found for all such cases, suggesting these are more likely to experience long delays. In terms of the current provisions alluded to above, all such cases should have resulted in discharge of the child with no further proceedings, and the child should not have continued to be held on remand. It is unclear whether or not this was the case as it was not recorded as such and therefore could not be established from the data collected.

Outcomes and sentences

An array of alternative outcomes is available in the Children's Court which is not available in the ordinary subordinate courts, including probation orders, an order of care, an order to attend a rehabilitation school, and an order to pay a fine or compensation, or an order to attend a vocational

175 *Rule 12, Schedule 5, Child Offenders Rules, Children Act*

training or a borstal institution.[176] Children's Courts may not make an order for imprisonment or death.[177] Even if a court is satisfied of guilt, a child may be discharged in terms of section 35(1) of the Penal Code. [178]

Human Experience 1: Impact on sentencing of Children Act provisions (from paralegal files)

> "W was arraigned in Marimanti PM's Court for the offence of defilement of a child aged 15 years in January, 2016. He pleaded guilty to the offence with no mitigation submission and was therefore imprisoned for a 15-year jail term. He was later admitted in Meru main Prison on the same day. The case was brought up to the attention of the paralegal by the welfare officer. His request was for an appeal to be drawn on the client's behest on grounds that, he committed the offence while he was still a minor. It emerged that, the client was born on 2nd January, 1998 and that the offence was committed on 31st December 2015 while the client was still 17. The victim is a neighbour and she had been a friend for a long time and both set of parents were aware of the friendship. Upon being arrested the fact that the client was still a minor during commissioning of the offence was not brought up and the same crucial detail was still left out in court. A petition was drawn seeking orders to have the subordinate court's proceedings reviewed by the High Court. On second hearing the Judge ordered the initial sentence meted out by Marimanti Magistrate Court be set aside and in its place be substituted by a two-year probation sentence under the supervision of Marimanti Probation Officer."

176 Children Act, s191: Methods of dealing with offenders (1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—
(a) By discharging the offender under section 35(1) of the Penal Code (Cap. 63);
(b) by discharging the offender on his entering into a recognisance, with or without sureties;
(c) by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap. 64);
(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;
(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;
(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;
(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;
(h) by placing the offender under the care of a qualified counsellor;
(i) by ordering him to be placed in an educational institution or a vocational training programme;
(j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (Cap. 64);
(k) by making a community service order; or
(l) in any other lawful manner.

177 Children's Act, s90. Restriction on punishment (1) No child shall be ordered to imprisonment or to be placed in a detention camp. (2) No child shall be sentenced to death. (3) No child under the age of ten years shall be ordered by a Children's Court to be sent to a rehabilitation school.

178 Section 191(1)(a), Children Act

Some 37% of cases did not have an outcome recorded at the time of data collection. The outcomes of the remaining 63% which did have outcomes are recorded in the table below. The most common outcome was probation (42%), for periods ranging from three months to three years. The next most common outcome was a discharge or withdrawal (27%). Committal to a Borstal or Children's Home applied in 12% of cases, usually for a period of three years.

Table 8: Outcomes in decided Children's Court cases with charges against children, by outcome

Outcome Category	Percent	Outcome	Duration (Months)	Frequency	Percent
Acquitted	3.13	Acquitted	.	6	3.13
All Borstal and Children's Home	11.46	Borstal 3yr	36	18	9.38
		Children's Home 3yr	36	4	2.08
Fine/Imprisonment	1.04	Fine 5000 / Imp 2	2	2	1.04
All Probation	42.69	Probation	3	2	1.04
		Probation	6	28	14.58
		Probation	9	2	1.04
		Probation	10	4	2.08
		Probation	12	14	7.29
		Probation	18	4	2.08
		Probation	20	2	1.04
		Probation	24	14	7.29
		Probation	36	12	6.25
All Rehabilitation	4.17	Rehab	.	2	1.04
		Rehab 3yr	36	6	3.13
All Released	7.29	Released	.	12	6.25
		Released, Parents	.	2	1.04
Repatration	2.08	Repatriation	.	4	2.08
Warrant Issued	1.04	Warrant	.	2	1.04
All Discharged and Withdrawn	27.08	Discharged 351	.	4	2.08
		Withdrawn 204	.	22	11.46
		Withdrawn 87A	.	26	13.54

Conclusions

The child justice system in Kenya appears to be in operation. However significant delays are experienced in relation to child offenders, at least in these two courts. It is unclear how representative these two courts are.

Outcomes generally reflect the provisions contained in the Children Act, which seeks to protect children. The findings show that teens arrested on defilement charges form a significant proportion of cases, suggesting that law reform around sexual offences and employment of children may help to further extract children from the Criminal Justice System. Drug law reform, especially relating to children, may also extract children from criminal justice processes.

The high proportion of repatriations of children in Care and Protection cases is cause for concern.

Recommendations

Legislative framework

Legal approaches to teen sexual conduct

In echoing the words of Justice Fred A. Ochieng[179] in the case which found it was not unconstitutional to criminalise sexual acts amongst teens: "Although he (the plaintiff) was unsuccessful (in challenging the law), I find that he has brought to the fore, the need to consider whether or not there are other measures which were more appropriate and desirable, for dealing with children, without having to resort to criminal proceedings."

"To this end, I send out a challenge to professionals in matters of children psychology and in the overall wellness of children to conduct appropriate studies in Kenya, with a view to ascertaining if there were mechanisms and procedures which could be put in place, to offer protection to children whilst simultaneously being proportionate to both the circumstances of the child and the offence"

The Honourable Justice' comments clearly point the legislature toward considering alternative approaches by the state, and calls for further research in determine how the "best interests" of children may be served most appropriately in the arena of sexual conduct by older children.

In particular, it is recommended that there be a review of the age of consent in Kenya. The majority of countries in Africa have set the age of consent for heterosexual sex at age 16 or younger, with a minority retaining the age of 18. Many countries which share a similar legal roots to that of Kenya such as Botswana, Namibia, South Africa, Zambia, Zimbabwe, Australia, Canada, and the United Kingdom, have set the age of sexual consent at 16 years of age. The "best interests of the child" principle should guide the review of the law relating to consensual sex between adolescents.

Through the various controversial pronouncements by the judiciary, the courts have been talking to the public about the issues and the challenges of interpretation of the Sexual Offences Act.

179 *In Petition number 6 of 2013: CKW vs Attorney General and DPP*

Perhaps it is time for a serious conversation on the challenges with the Act (Case Law). A task force on sexual offences should be established by the National Council on the Administration of Justice (NCAJ).

Policy and Practice

Compliance with timelines relating to remand of children

The law provides for two types of time limits (1) the maximum period for which a child may be held on remand (90 days for all except death penalty offences, in which case 180 days) and (2) the maximum duration from plea to outcome is generally 90 days (save for serious cases) after which the child should be discharged and may not be prosecuted again. Stakeholders' discussions and administrative guideline development are needed to ensure compliance with time limits relating to children. Issues such as re cording the date of plea-taking and tracking the duration of remand of children are issues which need to be addressed to ensure compliance with the law.

Programmes

Sex education needs to be talked about openly, and further research needs to be done on the best approaches to adolescent sexuality.

Boy children are more at risk of being in conflict with the law than girl children. While a range of programmes are available for vulnerable girls, there is an absence of programmes for boy children. Interventions which seek to reduce the vulnerability of boy children to being in conflict with the law should be investigated.

Children Remand Homes findings

Children's Remand Homes

Chapter 2.4

In Kenya there exist Probation Hostels, Rehabilitation Schools, Borstal Institutions and Children's Remand Homes, which house children in conflict with the law. The Children's Remand Homes are the institutions which house children before a court has made a determination as to what should happen to a child, and are under the administration of the Children's Department. Children are not supposed to be held in prison facilities. This section provides insight into admissions into Remand Homes in Kenya.

Methodology

This survey made used of registration records held by Children's Remand Homes, which reflects the flow of children through the homes over the period 2013-2014. In addition the number housed in the remand home at the time of data collection was recorded. The number flowing through Children's Homes far exceeds the number housed at any particular time.

Children Remand Home Register Sampling

The dataset comprises 35 observations from each Children's Remand Home register, using a structured random sample and drawn from the2013 and 2014 registers maintained at the homes, selecting only from entries relating to children on remand. Researchers selected every nth entry (where n= number of remand entries in two years / 35. The dataset thus represents the flow of children on remand through Children's Homes. The number of observations at each of the homes

surveyed is represented in the table below. These observations were weighted to reflect the actual flow through each of the Children's Homes.

Table 1: Observations from Children's Remand home registers drawn from 2013-2014

Name	Frequency	Percent	Cumulative
Eldoret	35	11.11	11.11
Kakamega	35	11.11	22.22
Kisumu	35	11.11	33.33
Likoni	35	11.11	44.44
Manga	35	11.11	55.56
Murang'a	35	11.11	66.67
Nairobi	35	11.11	77.78
Nakuru	35	11.11	88.89
Nyeri	35	11.11	100.00
Total	**315**	**100.00**	

Findings

Composition of Remand Homes

As indicated above, in addition to the sampling of the remand entries in the register, the number held on remand at the time of data collection was recorded (this date differed for each Remand Home). At the time of data collection this was the composition of the nine Children's Homes surveyed:

Table 2: Number of children on remand and in care and protection at the time of data collection

Name	Remand	Care and Protection	Total	Percentage Remand
Eldoret	81	18	99	82%
Kakamega	38	13	51	75%
Kisumu	80	45	125	64%
Likoni	34	43	77	44%
Manga	43	24	67	64%
Murang'a	24	24	48	50%
Nairobi	6	67	73	8%
Nakuru	27	14	41	66%
Nyeri	15	11	26	58%
Total	**348**	**259**	**607**	**57%**

At any one time in the nine children's homes approximately 350 children on remand are likely to be held, an average of almost 40 per home. Extrapolated to Kenya as a whole, which has 11 remand homes, there are likely to be around 425 on remand at any time.

With the exception of Nairobi, the number of remand children held at the time exceeded the number of children held in relation to Care and Protection cases. The holding of children on remand together with children in need of Care and Protection is not without some cause for concern, although it is the case that children in conflict with the law are often also in need of care and protection.

Turnover of children on remand in Children's Homes

The 315 observations represent 2940 admissions of children to the nine homes recorded over the period 2013-2014. The dataset thus represents the flow of children on remand through children's homes. While only 350 may be on remand in the homes at any time, almost 3000 children on remand moved through these nine children's homes over the period 2013-2014, or an average of around 330 each over two years. Extrapolating to 11 homes gives a figure of around 3600 for two years, or 1800 per year.

Given the size of the Kenyan population these numbers are relatively small, suggesting that some unknown proportion of children in conflict with the law are either dealt with informally, or not at all, or simply arrested and released, or as emerges from the prison data, are admitted to prisons. Contrary to reports, the number of children on remand currently entering Remand Homes alone does not appear to be overwhelming. Recall that in the Children's Court data, a single court, Milimani, processed 144 children in criminal cases over this time, while Tononoko processed 162. This suggests that each remand home may be receiving children on remand from at least two or more Children's Courts. The prisons data suggests that adding children admitted to prisons would double the number being admitted to remand homes.

Table 3: Children entering children's homes on remand, 2013-2014

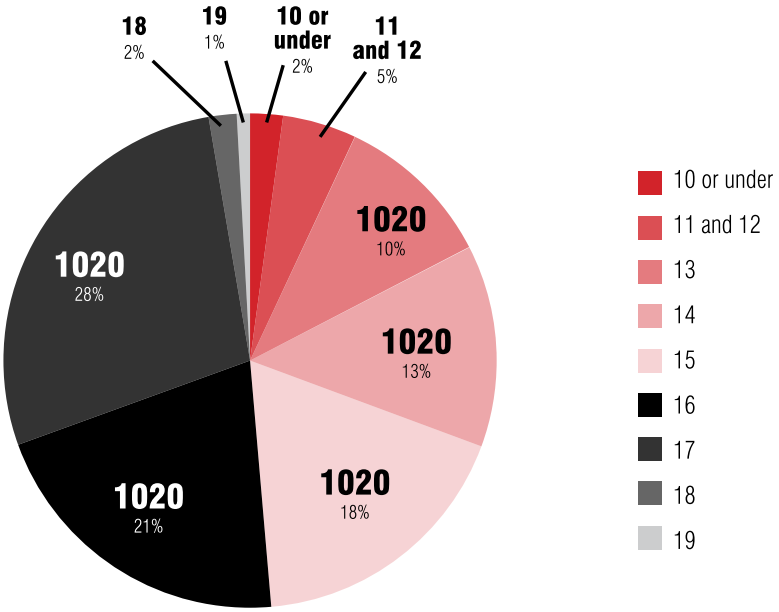
Name	Freq.	Percent	Cum.
Eldoret	560	19.05	19.05
Kakamega	665	22.62	41.67
Kisumu	315	10.71	52.38
Likoni	315	10.71	63.10
Manga	280	9.52	72.62
Murang'a	245	8.33	80.95
Nairobi	140	4.76	85.71

Nakuru	280	9.52	95.24
Nyeri	140	4.76	100.00
Total	**2,940**	**100.00**	

Ages

Most observations (99%) recorded the age of the child. Age assessments are employed to determine the age of children, where there is doubt of the age claimed. The median age is 16, with the range being from 7 to 19. No criminal responsibility is possible in Kenya under 8 years old, while for 8 or older and under age 12 children there is a rebuttable presumption of no responsibility. Only 4% are under the age of 12. Almost two-thirds are between the ages of 12 and 16. Some 30% are older than age 16. The issue of the crime of defilement between consenting adolescents of similar ages certainly plays a role in the prevalence of children age 16 and 17. This will be further discussed in the section considering the offences.

Figure 1: Ages of children entering Remand Homes

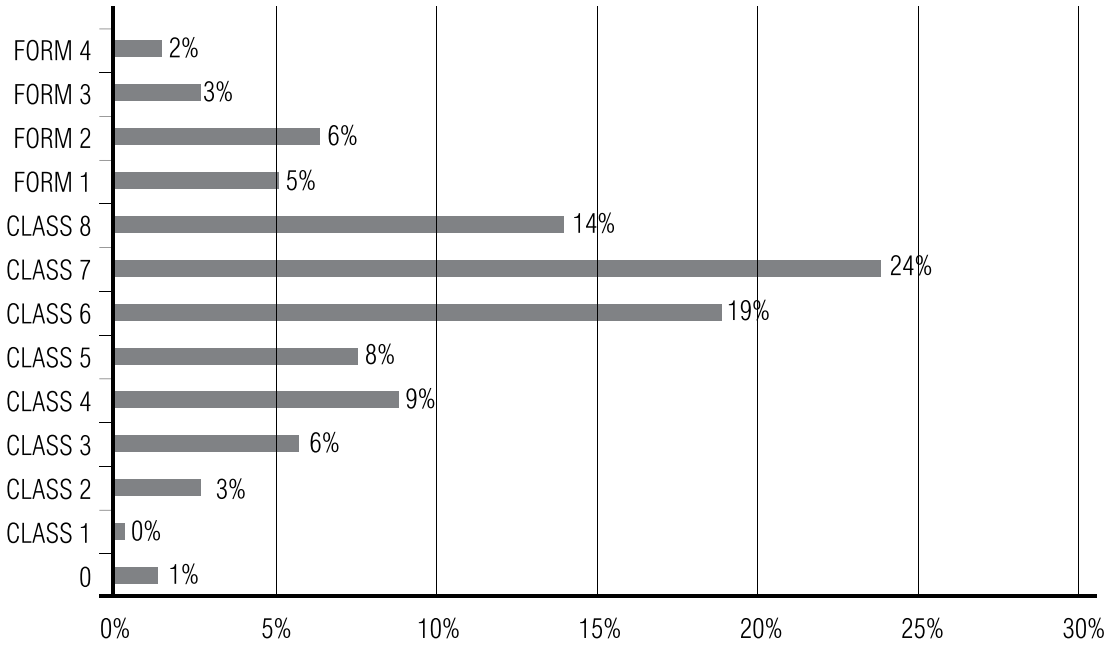


Education

Most observations (97%) recorded the level of education of the child. The data shows a wide variety of educational levels among children on remand, with the most common educational level being class 7, which is almost the end of primary school. However, almost 30% had more than this level of education. The wide variety of education level poses challenges for the educational offerings at the Homes while children are held on remand. The most common educational level

(29%) of 16-year-olds was Class 7, while a further 28% had less than this level of education. This suggests children entering Remand Homes may be educationally behind their peers.

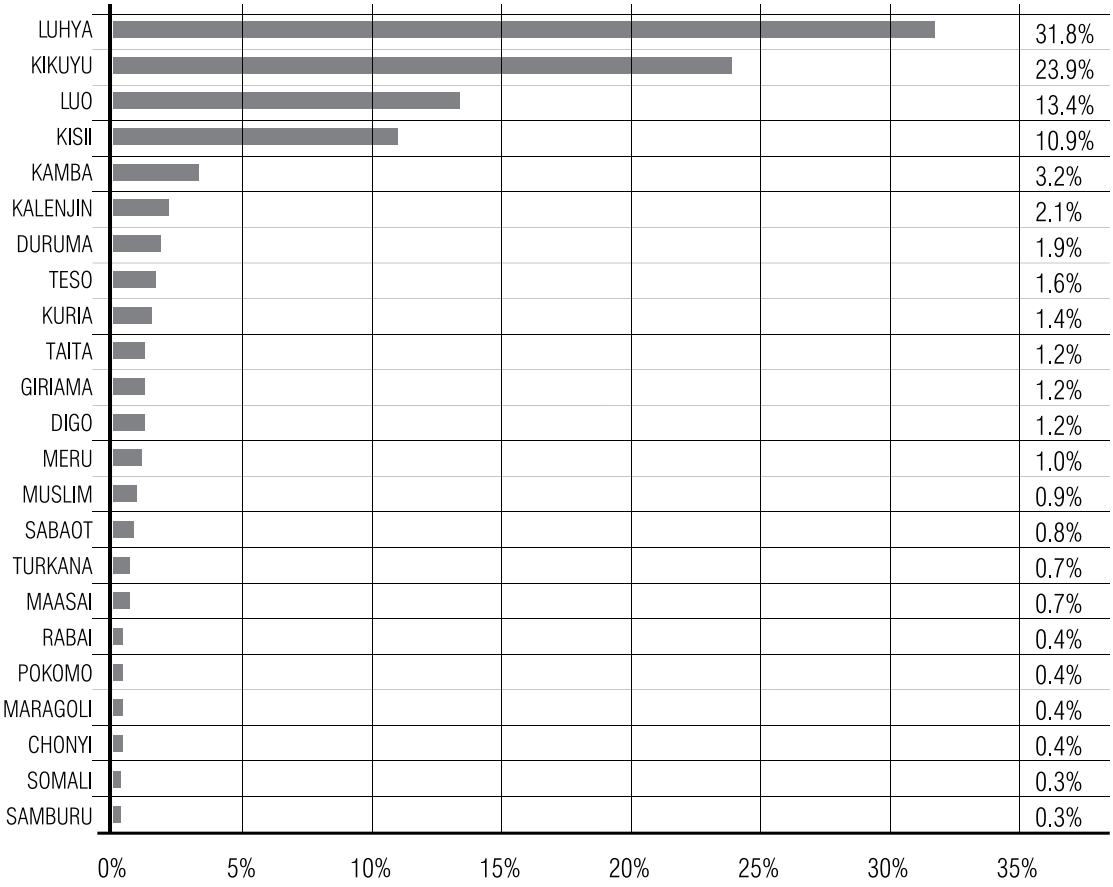
Figure 2: Education levels of children entering Remand Homes, 2013-2014



Tribe or cultural affiliation

Tribe or cultural affiliation was recorded for 87% of observations. The tribe or cultural affiliation of those recorded is illustrated below. It is unclear whether the distribution is in line with the population trends in the regions served by the Remand Homes, or whether any group is over or underrepresented. Luhya, Kikuyu, Luo and Kisii appear to be dominant among admissions to these nine Children's Remand Homes, accounting for over 80% of admissions together.

Figure 3: Tribe or cultural affiliation of children entering Remand Homes

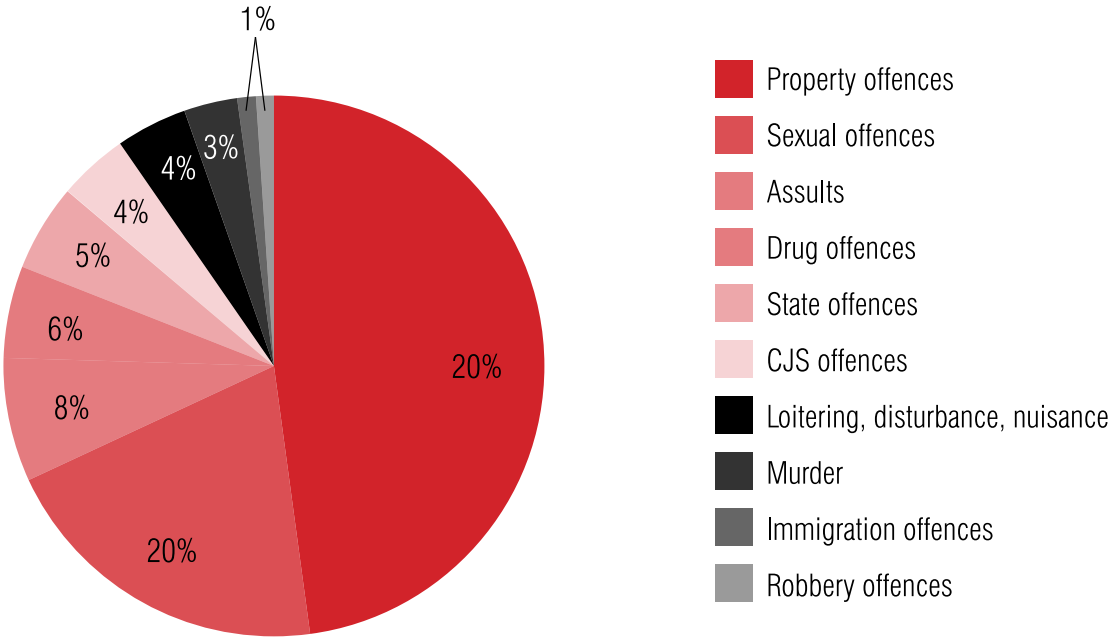


Offences

The offence was recorded for all observations. Property offences are common amongst children entering Remand Homes. Burglary and breaking comprise 29% while theft and stealing of various kinds comprise 18% (total of 47%). Recall that in the two Children's Courts surveyed such offences comprised 35%. Sexual offences comprise 18% and state-defined offences 5%. Recall that the Kenya High Court in 2013 upheld the criminalisation of adolescent consensual sex in terms of the offence of defilement.[180] Defilement and attempted defilement comprise 15% of admissions to Remand Homes. Some 38% of those children entering in relation to a defilement charge were 17 years of age, which was also the most common age for theft (24%).

180 CKW v. Attorney General & Director of Public Prosecution, Petition No. 6 of 2013 (High Court of Kenya) KLR

Figure 4: Categories of offences among admissions to Children Remand Homes, 2013-2014



The categories of offense appear in the figure above, with more detail on offence types in the table below.

Table 4: Offences among admissions to Children Remand Homes, 2013-2014

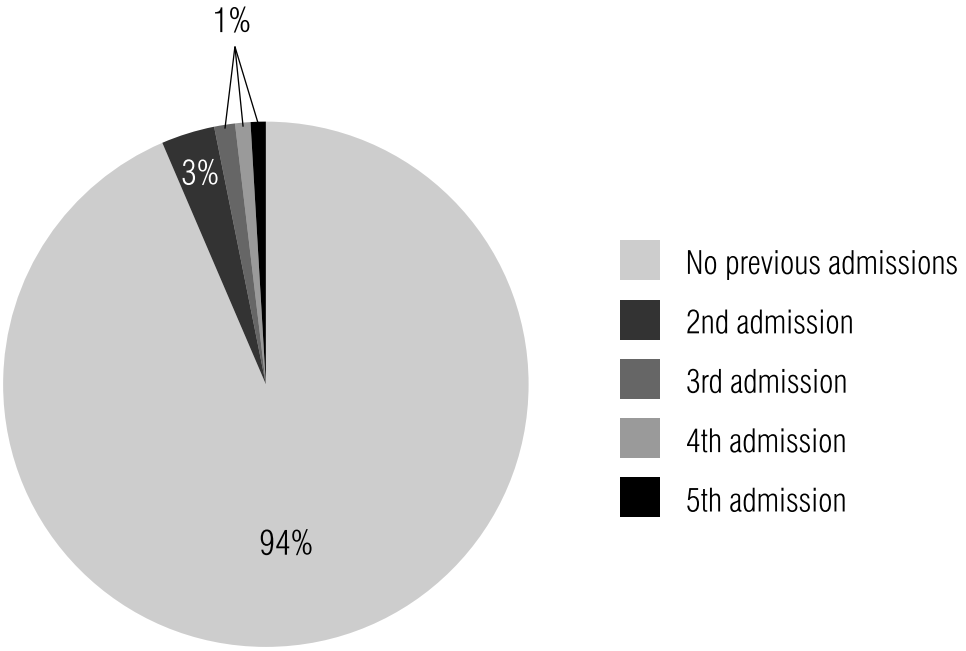
Offence	Frequency	Percent	Cumulative
Abortion, Procuring	35	1.21	1.21
Arson	44	1.52	2.73
Arson, Attempted	15	0.52	3.25
Assault	122	4.21	7.46
Assault, Bodily Harm	58	2.00	9.46
Assault, Grievous Harm	21	0.73	10.19
Bond, Peace	12	0.41	10.60
CJS (Criminal Justice System Offences)	8	0.28	10.88
CJS, Attend Cout, Failure to	7	0.24	11.12
CJS, Conflict Law	4	0.14	11.26
CJS, Defeat Just	19	0.66	11.92
CJS, Escape	26	0.90	12.82
CJS, Hostile Witness	27	0.93	13.75
CJS, Witness	9	0.31	14.06
Loitering	29	1.00	15.06
Disturbance	8	0.28	15.34

Drugs	4	0.14	15.47
Drugs, Possession	110	3.80	19.27
Drugs, Trafficking	9	0.31	19.59
Drunk & Disorderly	19	0.66	20.24
Fraud, Personation	4	0.14	20.38
Immigration	8	0.28	20.66
Immigration, Repatriation	33	1.14	21.80
Kidnapping	16	0.55	22.35
Manslaughter	22	0.76	23.11
Malicious Damage	24	0.83	23.94
Murder	76	2.63	26.56
Nuisance	63	2.18	28.74
Preparing to Commit Felony	63	2.18	30.92
Property, Breaking	520	17.96	48.88
Property, Theft	789	27.25	76.13
Robbery	8	0.28	76.41
Robbery, Violence	24	0.83	77.24
Sex Offence, Defilement, Gang	8	0.28	77.51
Sex Offence, Defilement	381	13.16	90.67
Sex Offence, Defilement, Attempted	46	1.59	92.26
Sex Offence, Incest	17	0.59	92.85
Sex Offence, Indecent Assault	9	0.31	93.16
Sex Offence, Rape	16	0.55	93.71
Sex Offence, Rape, Gang	19	0.66	94.37
Sex Offence, Sexual Assault	4	0.14	94.51
Sex Offence, Unnatural Offence	26	0.90	95.41
State Offence, Alcohol	60	2.07	97.48
State Offence, Charcoal	8	0.28	97.75
State Offence, Forest Produce	8	0.28	98.03
State Offence, Gambling	9	0.31	98.34
State Offence, Petrol Products	7	0.24	98.58
State Offence, Timber	19	0.66	99.24
State Offence, Unlicensed Motorcycle	14	0.48	99.72
State Offence, Unlawful Procession, Taking Part	8	0.28	100.00
Total	**2,895**	**100.00**	

Recidivism

It was possible in relation to only 74 of the 348 observations to determine whether or not the child had previously been admitted to this Remand Home on other charges. Amongst these, some 96% were first admissions with no prior offending on record at that Remand Home. However 3% had been previously admitted once, and 1% were third, fourth or fifth offenders. If this small sub-sample is representative it suggests while the majority of children come in on a first offence, some 4% are repeat offenders. This is similar to the subordinate court data.

Figure 5: Prior admissions amongst those with available data, Children Remand Homes 2013-2014



Recidivism, age, offences

The data also suggests that there is a relationship between age and being a repeat offender. Contrary to expectation, the repeat offenders were more likely to be of age 10 and 11 than any other age. This suggests a failure of previous interventions as at this very young age it is necessary to establish criminal responsibility, and it is questionable whether criminal justice processes are appropriate. The offences in relation to those with previous entries were murder, defilement and property offences such as theft.

Duration in Remand

Recall that for offences which are not capital offences, that Kenyan law provides that the maximum period on remand for children is 90 days.

Duration from entry to first remand date

In this section the time from first entry, to first subsequent remand date in court, is determined. The date of entry into the Remand Home and the date of first remand were available in 194 of the 315 observations collected (62%). This permitted the calculation of the time from first entering the Remand Home to first remand date at court. In almost half of these, this was the same date as the date of admission to the home, with the median being three days. This high number of 0 days duration may have been due to data collection inconsistencies: it is unclear whether 0 days means the children were taken to court after entering the remand home on the same day, or came to the remand home on the same day after going to court, and data collectors recorded this as the "first remand date".

Excluding 0 days from the analysis, reveals a median of 12 days. The trends show that around 12% have an initial remand date which was more than 14 days after admission. The reasons for this are not clear, as in cases involving children it is preferable to deal with matters as quickly as possible, and usually a remand date no more than two weeks later is set. Some 25% of releases are within 6 days or less, 50% at 12 days or less, 75% at 14 days or less. The maximum was 424 days – recall this is only to the first remand. It is unclear why such a long remand date was in place.

Table 5: Duration from entry into Remand Home and first remand date in court

Duration	Minimum	25th percentile	Median	75th percentile	Maximum
Days	1	6	12	14	424

Duration from entry to release

In only 108 of the 315 observations both a date of entry and date of leaving the Remand Home was available (34%). This may be because records are not updated if children go to court and do not return. For these observations for which total duration in the Remand Home could be calculated, the duration was from 0 days to 419 days, with a median of 21 days, 25th percentile 8 days and 75th percentile 56 days.

Only 83% of these children had remand duration under the statutory 90 days. Some 6% of cases took more than the 180 days maximum which applies to capital offences. These are significant periods of time for children to spend in a Remand Home, and may severely interrupt their

education. Offences relating to incest, assault and murder were more prominent in these longer durations of remand.

Table 6: Duration from admission to Remand home until release

Duration	Minimum	25th percentile	Median	75th percentile	Maximum
Days	0	8	21	56	419

Maximum durations of children still in custody

The methodology employed above, which makes use of admissions and release dates, can only provide durations of remand for children entering from 1 January 2013 who have actually been released. Some may have entered but are not yet released, or have entered prior to 2013. In the conditions survey, the researchers were asked to identify the child at each of the homes who had endured the longest time period in custody. This methodology captures the minority who will have spent very long time periods in the Children's Homes. Given that the conditions survey was mostly conducted in December 2015, the durations in excess of 1080 days at Kakamega, Likoni, and Nakuru would have entered the Remand Homes before January 2013.

Table 6: Number of remand and longest on remand, Children's Remand Homes, conditions survey

Name	On Remand (Conditions Survey)	On Remand (Case Flow Data Collection)	Longest On Remand (Months)	Longest On Remand (Days)
Eldoret	83	81	35	1050
Kakamega	38	38	49	1470
Kisumu	71	80	24	720
Likoni	77	34	41	1230
Manga	43	43	12	360
Murang'a	24	24	18	540
Nairobi	4	6	12	360
Nakuru	28	27	40	1200
Nyeri	2	15	12	360

Just as in the prisons, where the profile of remand warrants show much longer durations than the admissions profile, this "longest on remand figure" is likely to show much longer durations than the maximum duration amongst those admitted 2013 and 2014 and released to date.

Conclusions on Remand Homes

Remand homes were not during 2013-2014 receiving a flood of children on remand. This raises the question of in what manner children in conflict with the law are being managed, as anecdotal reports of many arrests by police of children continue to be heard. Recall that two Children's Courts between them dealt with just over 300 criminal cases against children or an average 150 each over two years. It is unclear how many courts are served by each Remand Home.

Over 2013-2014 the Remand Homes received around 300 children on remand each every year, as well as receiving Care and Protection children. Given that the average duration is 76 days, approximately 5 children admitted consecutively taken up one bed. If the 300 children per year are distributed evenly over time, each Remand Home needs on average a capacity of 60 beds for remand children alone. If the current number of children being admitted into prisons is taken into account,

The practice of keeping Care and Protection children with Remand Children, often in the same room, remains of concern.

The duration data in this dataset confirms that there is non-compliance with timelines applicable to the duration of remand in relation to children.

Recommendations

Policy and Practice

Compliance with timelines relating to remand of children

The recommendations from Children's Court chapter are also relevant to this section. These included compliance with time limits for remand of children. Children services need to ensure they have mechanisms in place to help in monitoring the time spent on remand by children in their care, and to have mechanisms in place to move the court in such instances. Perhaps it is appropriate to consider statutory obligations on institutions housing children on remand, to bring to the attention of the court instances where the time period has elapsed.

There is need to deal with the delays in transition from court to remand home Institutions in order to defeat cases of children being remanded in police stations for extended period of time (disqualifying orders from court in that regard). Perhaps proper guidelines should be made to guide the process.

NCAJ should take up the issues about the matters that take longer than the statutory period to conclude.

Infrastructure

Planning appropriate remand capacity for children

Remand of children should be avoided wherever possible and appropriate. However the state must make adequate provision for those instances where remand is necessary; the data here suggests that existing Remand Homes should ensure they have 60 beds for children on remand.

There needs to be established at least one Remand Home in each County to prevent children being remanded in Police Stations and Prisons – in the section on Prisons, some 3% were under the age of 18. Where there are no remand homes, children must be placed in child-friendly institutions where their rights are upheld. In particular, the "best interest of the child principal" dictates that a child's education ought not to be disrupted by the fact that a child has been subjected to the Criminal Justice System. To that end, its incumbent upon stakeholders to develop adequate infrastructure that ensures a child's education continues without disruption. This report recommends collaboration between the Department of Children Services and the Teacher Service Commission in placement of teachers into the Remand Homes.

Each county needs to have a remand home, with a rehab centre as an annex to deal with issues affecting children within the Juvenile Justice System. This will address the issue of children being remanded at police stations.

The children should be segregated against category (CICWL & CP) and also according to their ages. Care and Protection cases should not be sent into remand homes for children as they are not in conflict with the law. YCTCs and Borstals should be put under the Department of Children Services.

Ensure linkages in place

Although data was not presented on these issues, there is a need to employ a multi-sectoral approach in exploring avenues of ensuring children in conflict with the law have accessed sufficient legal representation. There is also a need to bridge the gap between discharge from Remand Homes and other placement centres, and a need to clearly define the role of probation department in relation to children on remand.

Legislative Framework

Recidivism

There is need for advocacy targeting legislation on the Rehabilitation and Aftercare Bill to address cases of recidivism.

To further address the issue of recidivism, the Probation department should address the issue of the environment of the child after undergoing rehabilitation. This is because it beats the logic of rehabilitation if the child is taken back to the same environment which led her or him to be in conflict with the law.

Criminal Appeal findings

Criminal Appeals

Chapter 2.5

Cases from the subordinate courts in Kenya may be subject to a first appeal before the High Court and a second appeal to the Court of Appeal. In this section the trends in relation to cases registered for appeal in the High Court are analysed.

Methodology

The court registers relating to Criminal Appeals in the High Court were used to explore these trends. Case files were also consulted where necessary and possible. The sampling methodology adopted in relation to the entries selected from the register is discussed below.

Criminal Appeal Register Sampling

Observations were drawn from each of 10 High Court Criminal Appeal locations in Kenya. The data was drawn from official registers in respect of appeals lodged over 5 years, over the period 2010-2014. A sample of 70 was targeted using structured random sampling, with every *nth* entry selected where n = (number over 5 years) / 70. The number of observations actually recorded is represented in the table below. Each observation was weighted according to the number of cases actually lodged in the court concerned over the time period 2010-2014.

Table 1: Observations in the Criminal Appeal dataset

Name	Frequency	Percent	Cumulative
Garissa	60	9.05	9.05
Kakamega	70	10.56	19.61
Kisii	43	6.49	26.09
Kisumu	70	10.56	36.65
Machakos	70	10.56	47.21
Meru	70	10.56	57.77
Mombasa	70	10.56	68.33
Murang'a	70	10.56	78.88
Nakuru	70	10.56	89.44
Nyeri	70	10.56	100.00
Total	**663**	**100.00**	

Findings

Number of lodgements

The 663 observations recorded represent 10,295 cases lodged for appeal over the period 2010-2014. The courts in the dataset with the most appeal lodgements were Nakuru, Machakos and Mombasa, which together accounted for 56% of appeals lodged amongst these 10 courts over five years. Kakamega and Kisii also had large loads. It is unclear whether the state resources allocated to these four courts reflect their manifestly much larger burden than in their brother courts.

Table 2: Number of lodgements in Criminal Appeals, 2010-2014

Name	Frequency	Percent	Cumulative
Nakuru	1,610	15.64	15.64
Machakos	1,400	13.6	29.24
Mombasa	1,400	13.6	42.84
Kakamega	1,330	12.92	55.76
Kisii	1,075	10.44	66.2
Nyeri	980	9.52	75.72
Kisumu	840	8.16	83.88
Meru	840	8.16	92.04
Murang'a	700	6.8	98.84
Garissa	120	1.17	100.01
Total	**10,295**	**100.00**	

Offence

The offence in relation to which the appeal was lodged was unfortunately not recorded in 64% of cases. Assuming this omission is random, the analysis can be confined to those observations for which the offence was recorded. This reveals that the most common offence types were defilement (22%), robbery with violence (17%), and murder (14%).

All types of sexual offences together amounted to 28%. In the Magistrates' Courts, sexual offences comprise only 3% and robbery with violence 3%, suggesting these offences are highly likely to be appealed. Stealing, stock theft, stolen goods possession, and theft of motor vehicle together amount to 13% of appeals lodged. In the first instance courts these property offences have a higher representation of around 26%.

This suggests that sexual offences, robbery with violence and murder convictions and sentences are most likely to be challenged on appeal. Murder, treason and robbery with violence are capital crimes. Defilement of a child under the age of twelve carries a penalty of life imprisonment. Thus it may be the severity of the penalty which prompts the appeal.

Table 3: Categories of offences in criminal appeals, 2010-2014

Offence Category	Frequency	Percent	Cumulative
Capital Offences	1,138	30.82	30.82
Other Offences	848	22.97	53.79
Property Offences	658	17.82	71.61
Sexual Offences	1,048	28.39	100.00
Total	**3,692**	**100.00**	

Outcome

The outcome of the appeal lodged was not recorded in 14% of cases and the outcome was still pending in a further 30% of cases. A further 4% were transferred to another court. Restricting the analysis to the 52% of cases which were complete and for which the outcome was recorded, reveals that while 31% of such appeals are dismissed or rejected by the court, as much as 25% succeed in obtaining their liberty while 13% succeed in having their sentence reduced. In a further 5% a retrial is ordered. Some 24% of cases are abandoned or withdrawn by the accused. Less than 1% results in an increase in sentence, and a similar amount result in a different conviction.

Table 4: Outcomes, criminal appeals lodged and completed (known outcomes)

Outcome	Frequency	Percent	Cumulative
Abandoned or Withdrawn	1,301	23.95	23.95
Conviction Type and Sentence Change	33	0.61	24.55
Dismissed Or Rejected	1,698	31.25	55.81

Increased Sentence	48	0.88	56.69
Liberty	1,369	25.20	81.89
Reduced Sentence	721	13.27	95.16
Retrial	263	4.84	100.00
Total	**5,433**	**100.00**	

If one considers only those cases on which the court made a decision (in other words excluding those withdrawn, abandoned and transferred) then it is clear that the majority of appeal cases are decided in favour of the accused (and initially convicted in the subordinate court) person by the High Court.

Table 5: Outcomes, decided criminal appeals (excluding withdrawals)

Outcome	Freq.	Percent	Cum.
Conviction Type and Sentence Change	33	0.80	0.80
Dismissed or Rejected	1,698	41.09	41.89
Increased Sentence	48	1.16	43.05
Liberty	1,369	33.13	76.19
Reduced Sentence	721	17.45	93.64
Retrial	263	6.36	100.00
Total	**4,132**	**100.00**	

Outcomes in offence categories

There was a statistically significant relationship between the outcome of appeals and the category of offence.

- ## Capital offence cases more likely to be successful on appeal

Considering only cases for which the outcome is known, only 7% of completed capital offence cases were abandoned or withdrawn (compared to 24% for all cases) and only 27% were dismissed or rejected (compared to 31% for all cases). As much as 41% resulted in the liberty of the accused (compared to 25% for all cases) while a further 22% resulted in a reduction of sentence (compared to 13% for all cases). Thus capital offence cases are significantly more likely to be successful on appeal than other cases. This trend is driven primarily by robbery with violence cases, which are more numerous in the dataset.

Table 6: Capital appeals outcomes, completed appeals, known

Outcome	Freq.	Percent	Cum.
Abandoned Or Withdrawn	42	6.97	6.97

Dismissed Or Rejected	163	27.03	34.00
Liberty	247	40.96	74.96
Reduced Sentence	131	21.72	96.68
Retrial	20	3.32	100.00
Total	**603**	**100.00**	

Given that not all observations had the required information, this data suggests at least 247 people previously convicted for capital cases were set a liberty by the High Court, or approximately 49 per year. In the subordinate courts there were 221 convictions or 111 per year in the 14 courts. This suggests the number of overturned cases in the 10 High Courts is at least equivalent to around 44% of convictions in the 14 subordinate courts per year. Note that these are capital offence cases where persons face the penalty of death.

• Sexual offence cases more likely to be dismissed or sent for retrial

Considered together, all sexual offence cases are slightly more likely than other cases to result in the case being dismissed or rejected (35%, compared to 31% for all cases) and more likely to be retried (11%, compared to 5% for all cases). They are less likely to be abandoned or withdrawn (16%, compared to 24% for other cases).

Table 7: Sexual offence appeals outcomes, completed appeals, known

Outcome	Frequency	Percent	Cum.
Abandon	102	15.96	15.96
CS Change	14	2.19	18.15
Dismissed	222	34.74	52.90
Liberty	174	27.23	80.13
Reduce	59	9.23	89.36
Retrial	68	10.64	100.00
Total	**639**	**100.00**	

Even though liberty is not as common as dismissal or retrial, over five years in these 10 courts, at least 174 people who had previously been convicted for sexual offence cases were set a liberty by the High Court, or approximately 35 per year. Yet in the 14 subordinate courts, although there were 1404 sexual offence cases registered over two years, a mere 70 cases resulted in a guilty verdict, or 35 per year. This suggests the number of convictions for sexual offences cases in the 14 subordinate courts a least *equals* the number of convictions overturned in the 10 High Courts each year. Yet as can be seen from the remand admission data, more than 4000 men are admitted on remand for sexual offences each year. This strongly suggests that in relation to sexual offences, the process is the punishment.

- ## Property offence cases more likely to result in reduction in sentence

Considered together, property offence cases are more likely to result in a reduction of sentence (29%, compared to 13% for all cases).

Table 8: Property offence appeals outcomes, completed appeals

Outcome	Frequency	Percent	Cumulative
Abandon	134	27.13	27.13
Cs Change	19	3.85	30.97
Dismissed	112	22.67	53.64
Increased	23	4.66	58.30
Liberty	42	8.50	66.80
Reduce	141	28.54	95.34
Retrial	23	4.66	100.00
Total	**494**	**100.00**	

Duration of criminal appeals

- ## Duration of all completed cases

Both the date of first lodging and the date of completion of a case were available in just over half of all cases (52%), which was also 99% of cases known to be completed. The range in duration was from 0 days to 2017 days. The median was 516 days (1 year 5 months), 25th percentile 274 days and 75th percentile 846 days.

Table 9: Duration of completed Appeal Cases, 2010-2014

Duration	Minimum	25th percentile	Median	75th percentile	Maximum
Days	0	274	516	846	2017

Recall that the maximum duration in this dataset is limited by the fact that this dataset only selected cases from 2010 onwards. The oldest case in the dataset was lodged in January 2010, while the latest date of data collection was 2 February 2016, making the largest possible value in the dataset 2220 days. The fact that the actual maximum (2017) in the dataset is close to this value suggests that some cases are very likely to exceed this duration, if cases lodged before 2010 were to be selected. Some lodged after 2010 may only be completed far in the future. Indeed the median duration to date of incomplete cases (see next section) is almost double the median duration of completed cases. In the table below the summary data for durations by outcomes and by offence category are presented.

Table 10: Durations of completed appeal cases, by outcomes and offence categories

Duration	Minimum	25th	Median	75th	Maximum
By Outcomes					
Cases Resulting in Liberty	0	251	462	735	1842
Cases Resulting in Reduced Sentence	0	384	570	1044	1779
Dismissed or Rejected Cases	0	286	605	932	2017
Abandoned or Withdrawn Cases	0	328	651	931	1785
By Offence Category					
Property Offence Cases	23	231	414	588	1095
Sexual Offence Cases	7	392	531	703	1441
Capital Cases	219	535	725	906	1677
All Completed Cases	**0**	**274**	**516**	**846**	**2017**

• Duration of completed cases by outcomes

By outcomes, the longest medians applied to abandoned or withdrawn cases, or dismissed or rejected cases. The median duration for appeal cases resulting in liberty for the accused was 462 days (1 year and 3 months) while for a reduction in sentence the median wait was 570 days (1 year and 7 months).

• Duration of completed cases by offence category

By offence category, capital offence cases had the longest durations, with the minimum duration being 219 days, and the median being 725 days.

• Duration of incomplete cases

Some 33% of cases in the dataset were not yet completed, while for a further 14% it was unclear whether or not the case was complete. Restricting the analysis to those cases in which it was known the case was incomplete, the durations to the date of data collection of incomplete cases can be calculated. These range from 338 days to 1177 days, with a median of 1018 days – compared to a median of 516 days among complete cases. Note that these are durations to the date of data collection and do not reflect the full duration of these cases.

Table 11: Incomplete appeal cases, durations to date

Duration	Minimum	25th	Median	75th	Maximum
All incomplete cases	338	763	1018	1587	1177

• One-year completion rates

The duration of appeal cases can also be considered in terms of one-year completion rates. This is the percentage of cases completed within a year of their lodgement date. Only 22% of appeals were completed within one year of their being lodged.

These rates varied widely by location. Machakos and Nyeri have very low rates of less than 3% being completed within one year, while Garissa, Kisii and Kisumu have a high one-year completion rate of over 50%. In the case of Garissa, however, this result may strongly influenced by the fact that only 65% of cases have a known status (known as being complete or not complete, rather than the information being missing). The widely varying rates suggest that some courts are more overwhelmed by demand than others.

Table 12: One-year completion rates by court

Name	Percent Completed in One Year (Number of Cases Complete in One Year / Number of Cases of Known Status)	Total Cases of Known Status	*Total Cases*	*Percent (Known/Total)*
Machakos	1.69	1180	1400	84.29
Nyeri	2.90	966	980	98.57
Mombasa	9.38	1280	1400	91.43
Murang'a	13.64	660	700	94.29
Meru	13.73	612	840	72.86
Kakamega	18.75	1216	1330	91.43
Nakuru	35.59	1357	1610	84.29
Garissa	51.28	78	120	65.00
Kisii	55.88	850	1075	79.07
Kisumu	58.00	600	840	71.43
Total	**21.78**	**8799**	***10295***	***85.46***

Human Experience 1: Delays in the appeals process (from paralegal files)

> "M is currently serving her 10 year jail term at Shimo la Tewa women prison for the offence of trafficking in narcotic drugs (*bhang*). She lodged her appeal against the sentence in 2010 and was allocated an appeal number. Since then, she has been sending prison officers and friends to the Mombasa High Court to check on the progress/status of her appeal but there has been no progress. She continues to languish in jail without a hearing date for her appeal 5 years down the line and her worry is that she may complete her term without a hearing. When she requested the paralegal to follow up on her case her words were "Paralegal, the Court has not been able to give me a hearing date till this day yet they were very fast to sentence me". It is important to note that the original case was heard and

determined by the Mombasa law court. The High Court says that it is still waiting for the Lower Court file before any further action is done on the Appeal file. Incidentally, the Lower Court and the High Court are within the same premises but the procedure for having a Lower Court File in the High Court is that the High Court must request for the file in writing after which the Lower Court will retrieve the file from the archives. If the file is delayed, the High Court can only do a reminder to the Lower Court and this is what has occasioned this delay to date. In the meantime, the detainee continues to languish in prison as she waits for her file to be transferred."

Conclusion

The very high rate of success on appeal for completed cases suggests that the appeal process is providing a necessary and robust safeguard in the Criminal Justice System in Kenya. However it does cast into question the quality of the original convictions, particularly on capital offences and sexual offences, where it is known the accused persons face a severe penalty and in all likelihood were held in custody throughout the trial and appeal process. The results call into question the trends relating to the decisions to pursue prosecutions in capital cases where evidence is apparently not, according to the High Court, sufficient for a conviction to be upheld. Such accused spend a great deal of time in custody awaiting trial and awaiting appeal. The safeguard provided by the High Court is somewhat muted given these exceptionally long durations of appeal. The fact that cases resulting in liberty of the person are resolved somewhat more quickly than other cases may suggest the involvement of legal counsel or other means of expediting appeals in these matters.

Recommendations

Policy and practice

Further research into high overturn rate

There is a need to interrogate the reasons for the high overturn rate in relation in particular to sexual offence cases. Does this point to inadequate justice in the lower courts? Are deserving cases not adequately supported by evidence? Or is there a tendency to prosecute cases which do not have merit? Depending on the outcome of such further research, interventions may be designed to ameliorate the situation. Possible interventions include review of the police curriculum and better training of police investigators to raise the quality of evidence before the courts.

Ensuring legal representation

The high rate of overturned cases suggests robust structures need to be put into place to ensure legal representation at the state expense is guaranteed to those persons who cannot afford it in the lower courts, thus raising the quality of justice, so that persons who should not have been found guilty do not need to wait until an appeal process is complete in order to receive a just outcome. Such legal counsel may need to be available at the police station.

Reducing delays

Further research into delay is required. One of the known causes of delay in the appeals process is the need for the production of copies of the proceedings in the lower courts. Currently such records are being typed manually. Expanding stenography skills may assist in the production of court records. Sometimes records are also missing. Standardised filing management system could help in ensuring security of the files.

Legislative framework

Legislative review of penalties

The severity of the punishment applicable to certain offences should be reviewed by the legislature, as the severity of the punishment seems to influence presumptions of guilt, denials of bail, and ultimately, the tendency to appeal against both conviction and sentence, placing strain on Criminal Justice System institutions and processes.

Expand oversight and review

The higher courts should be empowered to exercise its power of review more regularly so as to correct the mistakes of the lower court judgments. The higher courts should strengthen correspondence with and oversight of the lower courts in general to raise the quality of justice in the lower courts.

Infrastructure

Review allocation of resources

The widely varying demand, and widely varying completion rates, suggests allocation of resources needs to take into account variation in demand. Infrastructure and human resources should be reviewed in order to ensure trends are more similar across Kenya.

Kenya Remand Imprisonment: Active Remand Warrants findings

Kenya Remand Imprisonment:KenyaPrison Service

Chapter 2.6

There are 105 prison institutions of the Kenya Prison Service for adults across Kenya, of which 87 prisons are for men. Prisons do not only hold person convicted and sentenced to imprisonment, but also persons held on remand awaiting trial or sentence. On remand are accused persons who have not been granted bail or another form of pre-trial release. While most prisons in Kenya hold both convicts and those on remand, some are for remand prisoners only.

In this section two sources of data are used to understand trends in relation to imprisonment on remand in Kenya.

- Remand register, and associated registers
- Active remand warrants

This data provides two different views of remand imprisonment. The remand register provides a profile of the remand prisoners who flow through the system. The active remand warrants, by contrast, provide a profile of the composition of the remand population at the date of data collection.

Active remand warrants

In this section the active Remand Warrant data will be analysed, providing a picture of who was held on remand as at the time of data collection (late 2015 and early 2016).

Methodology

As indicated above in this section a sample was drawn from remand warrants at the prison. The sampling methodology is described below.

Active remand warrant sampling

For every person held on remand in a prison, there must be an active remand warrant authorising the head of prison to detain the prisoner on remand. These warrants are typically kept in piles.

These were sampled, targeting 100 observations using a structured random sampling method, of choosing every nth warrant in the pile, where n=total number on remand at the prison / 100. Where capital remand warrants were held separately, these were sampled separately targeting 35 observations using the same method.

At women's prisons which typically had a fewer than 100 women on remand, all the warrants were selected where there fewer than 35, otherwise 35 observations were targeted using the same method. Some observations relating to women also emerged from prisons which are not women's prisons. Each observation was weighted according to the total number of people held on remand in the prison concerned (or in the case of capital remands, according to the number of capital remand prisoners).

The dataset of active remand warrants comprises 2022 observations drawn from both capital and remand warrants including both male and female prisons and prisoners, representing 840 women 9724 men held on remand in 14 prisons.

- ## Dataset relating to men

The dataset relating to men comprised 1538 observations representing 9724 men held on remand at the time of data collection.

Table 1: Observations relating to male remand detainees

Name	Frequency	Percent	Cumulative
Garissa Main	91	5.92	5.92
Isiolo	83	5.40	11.31
Kakamega Main	100	6.50	17.82
Kakamega Main Capital	35	2.28	20.09
Kisii	26	1.69	21.78
Kisii Capital	74	4.81	26.59
Kisumu Main	100	6.50	33.09

Lodwar	96	6.24	39.34
Makueni Remand	98	6.37	45.71
Marsabit	21	1.37	47.07
Meru Main	99	6.44	53.51
Murang'a Main	100	6.50	60.01
Murang'a Main Capital	35	2.28	62.29
Nairobi R Mur	34	2.21	64.50
Nairobi R RV	35	2.28	66.78
Nairobi RA	100	6.50	73.28
Nakuru Main	100	6.50	79.78
Nyeri Main	101	6.57	86.35
Nyeri Main Capital	35	2.28	88.62
Shimo La Tewa Main	100	6.50	95.12
Voi	75	4.88	100.00
Total	**1538**	**100**	

- ## Dataset relating to women

The dataset relating to women comprised 484 observations representing 840 women held on remand at the time of data collection, which was late 2015 and early 2016.

Table 2: Observations relating to female remand detainees

Name	Frequency	Percent	Cumulative
Garissa Main	2	0.41	0.41
Isiolo	3	0.62	1.03
Kakamega Women	36	7.44	8.47
Kisii Women	58	11.98	20.45
Kisumu Women	42	8.68	29.13
Langata	99	20.45	49.59
Lodwar	4	0.83	50.41
Makueni Women	5	1.03	51.45
Meru Women	35	7.23	58.68
Murang'a Women	21	4.34	63.02
Murang'a Women (Capital Remands)	9	1.86	64.88
Nakuru Women	91	18.80	83.68
Nyeri Women	16	3.31	86.98

Nyeri Women (Capital Remands)	15	3.10	90.08
Shimo La Tewa Women	44	9.09	99.17
Wundanyi	4	0.83	100.00
Total	**484**	**100.00**	

Findings: Women on Remand

Number of women on remand

Of the prisons surveyed, those housing the largest number of female remand detainees are housed in Langata, Meru Women, and Nakuru Women, which together house around 35% of female remand detainees in the prisons represented by this sample. These figures can be extrapolated to suggest approximately 1460 women on remand held in the 18 female prisons in Kenya at the time of data collection.

Table 3: Total female remand detainees in the prisons surveyed, by location

Name	Frequency	Percent	Cumulative
Garissa Main	6	0.71	0.71
Isiolo	3	0.36	1.07
Kakamega Women	72	8.57	9.64
Kisii Women	58	6.90	16.55
Kisumu Women	42	5.00	21.55
Langata	297	35.36	56.90
Lodwar	8	0.95	57.86
Makueni Women	5	0.60	58.45
Meru Women	105	12.50	70.95
Murang'a Women	21	2.50	73.45
Murang'a Women Cap	9	1.07	74.52
Nakuru Women	91	10.83	85.36
Nyeri Women	16	1.90	87.26
Nyeri Women Cap	15	1.79	89.05
Shimo La Tewa Women	88	10.48	99.52
Wundanyi	4	0.48	100.00
Total	**840**	**100.00**	

Age

Women on remand ranged in age from 16 to 75, with the median age being 29. It is a finding consistent across many Southern and Eastern African contexts that the median age of persons detained on remand is around 29.

Some 3% of women were under the age of 18. It is unclear why the remand women under the age of 18 were not being held in Remand Homes. This is further discussed below in the section dealing with male children on remand. Some 1% of women were older than 60 years of age.

Table 4: Ages of women on remand, by age

Age	Frequency	Percent	Cumulative
16	7	0.85	0.85
17	16	1.94	2.79
18	19	2.30	5.09
19	22	2.67	7.76
20	27	3.27	11.03
21	25	3.03	14.06
22	36	4.36	18.42
23	32	3.88	22.30
24	44	5.33	27.64
25	46	5.58	33.21
26	47	5.70	38.91
27	35	4.24	43.15
28	38	4.61	47.76
29	34	4.12	51.88
30	43	5.21	57.09
31	28	3.39	60.48
32	37	4.48	64.97
33	8	0.97	65.94
34	17	2.06	68.00
35	55	6.67	74.67
36	8	0.97	75.64
37	19	2.30	77.94
38	18	2.18	80.12
39	19	2.30	82.42
40	23	2.79	85.21
41	10	1.21	86.42

42	12	1.45	87.88
43	6	0.73	88.61
44	1	0.12	88.73
45	8	0.97	89.70
46	1	0.12	89.82
47	3	0.36	90.18
48	4	0.48	90.67
49	5	0.61	91.27
50	15	1.82	93.09
51	8	0.97	94.06
52	6	0.73	94.79
53	6	0.73	95.52
54	8	0.97	96.48
55	3	0.36	96.85
56	2	0.24	97.09
57	6	0.73	97.82
60	8	0.97	98.79
63	4	0.48	99.27
68	1	0.12	99.39
70	1	0.12	99.52
71	1	0.12	99.64
75	3	0.36	100.00
Total	**825**	**100.00**	

Occupation

Some 24% of women did not have an occupation indicated. Some 55% of those with occupations listed, had their occupation listed on the warrant as "unemployed". The next most common was "farmer" at 15%. Some 30% of women farmers were held for state-related offences, such as manufacturing or selling alcoholic drinks or being in possession of a wildlife trophy.

Table 5: Occupation of women on remand

Occupation	Frequency	Percent	Cumulative
Accountant	2	0.31	0.31
Barmaid	4	0.63	0.94
Business	63	9.86	10.80
Casual	4	0.63	11.42

Chef	1	0.16	11.58
Conductor	3	0.47	12.05
Employed	11	1.72	13.77
Farmer	93	14.55	28.33
Hawker	3	0.47	28.79
Hotel Waiter	2	0.31	29.11
House Help	15	2.35	31.46
House Wife	2	0.31	31.77
Labourer	1	0.16	31.92
M-Pesa Agent	2	0.31	32.24
Salonist	11	1.72	33.96
Security	1	0.16	34.12
Self-Employed	55	8.61	42.72
Sports Lady	2	0.31	43.04
Student	3	0.47	43.51
Tailor	3	0.47	43.97
Teacher	3	0.47	44.44
Unemployed	352	55.09	99.53
Waiter	3	0.47	100.00
Total	**639**	**100.00**	

Kenya is a developing country and thus it is to be expected that in line with the population, a significant proportion are unemployed or working-class. Nevertheless it is remarkable that it is the least resourced who are being detained, and the power dynamics at play need to be recognised.

Education

Some 20% of women on remand are illiterate. This may seriously compromise their ability to defend themselves in a court of law. A further 51% are just literate. The remainder could report on the number of years of schooling they received.

Table 6: Education levels of women on remand

Years of Education	Frequency	Percent	Cumulative
Illiterate	130	21.07	21.07
Literate	314	50.89	71.96
1	0	0.00	71.96
2	3	0.49	72.45
3	9	1.46	73.91

4	14	2.27	76.18
5	9	1.46	77.63
6	7	1.13	78.77
7	41	6.65	85.41
8	46	7.46	92.87
9	1	0.16	93.03
10	14	2.27	95.30
11	9	1.46	96.76
12	17	2.76	99.51
15	3	0.49	100.00
Total	**617**	**100.00**	

Offences

Women are highly likely (49%) to be held in relation to violent offences, which include assaults, kidnapping, manslaughter, and robbery with violence, as well as infanticide and murder. Murder comprised 63% of the violent offences category for women. Property offences comprised 15%, and amongst property offences, theft by servant comprised 10% of offences.

Offences against the state (excluding drugs) comprised 12%, and of these, 64% related to the possession, manufacture, or sale of alcoholic drinks. Offences of fraud and dishonesty comprised 8%.Offences relating to drugs amounted to 8%, and 58% of these were for mere "possession" or "being in a place of narcotic drugs". Offences against children amounted to almost 3%.

Table 7: Offences women are held for on remand, by category

Offence Category	Frequency	Percent	Cumulative
Children	24	2.88	2.88
CJS	2	0.24	3.12
Drugs	65	7.79	10.91
Fraud, Dishonesty	69	8.27	19.18
Guns	2	0.24	19.42
Immigration	8	0.96	20.38
Malicious Damage	5	0.60	20.98
Nuisance[1]	15	1.80	22.78
Property	124	14.87	37.65
Sexual Offences	12	1.44	39.09
State Offence	97	11.63	50.72

Terror	4	0.48	51.20
Violent Offence	407	48.80	100.00
Total	**834**	**100.00**	

1 *Includes nuisance, disturbance, and drunk and disorderly.*

Duration

The warrants listed the first date of remand as well as the next date of remand. From these dates the duration from the date of first remand to the next date of remand could be calculated. This was available in 98% of the observations relating to women on remand.

Table 8: Duration of detention of women on remand

Percentile	Minimum	25th	Median	70th	75th	91st	Maximum
All offences	0	52	145	365	487	1,000	2,665

The time spent on remand by women on remand to their next remand date ranged from 0 to 2665 days (7 years and 4 months), with a median of 145 days (5 months). This means half of women on remand by their next remand date will have spent 5 months or more, and half will have spent less than 5 months. The 25th percentile was 52 days and the 75th percentile was 487 days. Some 30% will have spent more than one year on remand and some 9% will have more than 1000 days on remand by their next remand date. Most (69%) women held for more than a year were held on murder charges.

• Median duration by offence type

Offence Category	Median Duration (Days)
Drugs	100
Fraud, Dishonesty	63
Property Offences	103
State Offences	28
Violent Offence	383
All	**145**

Medians were also calculated for offence categories with sufficient observations (see table above). The longest durations were in relation to violent offences (383 days) and the shortest in relation to offences against the state (28 days).

Findings: Men on Remand

Number of men on remand

Of the prisons surveyed, those housing the largest number of male remand detainees are housed in Nairobi, Shimo La Tewa Main, and Nakuru which together house around 50% male remand detainees in the prisons represented by this sample. Because the prisons vary a great deal in size, an estimate for Kenya is not attempted, but it is noted that a number of 23 000 on remand is recorded for April 2016 by the World Prison Brief. [181] Note that the official capacity of the entire prison system for both remand and convicted prisoners is 26 757. [182]

Table 9: Total male detainees in the prisons surveyed, by location

Name	Frequency	Percent	Cumulative
Garissa Main	273	2.81	2.81
Isiolo	83	0.85	3.66
Kakamega Main	500	5.14	8.80
Kakamega Main Cap	210	2.16	10.96
Kisii	468	4.81	15.78
Kisii Cap	296	3.04	18.82
Kisimu Main	900	9.26	28.07
Lodwar	192	1.97	30.05
Makueni Remand	196	2.02	32.06
Marsabit	21	0.22	32.28
Meru Main	792	8.14	40.43
Murang'a Main	200	2.06	42.48
Murang'a Main Cap	210	2.16	44.64
Nairobi RA	2,600	26.74	71.38
Nakuru Main	1,000	10.28	81.66
Nyeri Main	303	3.12	84.78
Nyeri Main Cap	105	1.08	85.86
Shimo La Tewa Main	1,300	13.37	99.23
Voi	75	0.77	100.00
Total	**9,724**	**100**	

181 *World Prison Brief, http://www.prisonstudies.org/country/kenya*

182 *Ibid.*

Age

The ages of men on remand ranged from 13 to 74. The median age is 28. The 25th percentile is 23 and the 75th percentile is 35. This means 75% of men on remand are under the age of 35.

Table 10: Ages of men on remand

Age	Frequency	Percent	Cumulative
13	3	0.03	0.03
14	2	0.02	0.05
15	42	0.44	0.49
16	99	1.04	1.53
17	281	2.94	4.47
18	526	5.51	9.97
19	331	3.46	13.44
20	343	3.59	17.03
21	406	4.25	21.28
22	350	3.66	24.94
23	369	3.86	28.80
24	386	4.04	32.84
25	623	6.52	39.37
26	366	3.83	43.20
27	364	3.81	47.01
28	674	7.05	54.06
29	264	2.76	56.82
30	596	6.24	63.06
31	165	1.73	64.79
32	350	3.66	68.45
33	251	2.63	71.08
34	217	2.27	73.35
35	366	3.83	77.18
36	217	2.27	79.45
37	157	1.64	81.10
38	143	1.50	82.59
39	224	2.34	84.94
40	197	2.06	87.00
41	100	1.05	88.05
42	103	1.08	89.12

43	25	0.26	89.39
44	84	0.88	90.27
45	106	1.11	91.38
46	28	0.29	91.67
47	60	0.63	92.30
48	51	0.53	92.83
49	31	0.32	93.15
50	69	0.72	93.88
51	16	0.17	94.04
52	103	1.08	95.12
53	88	0.92	96.04
54	15	0.16	96.20
55	78	0.82	97.02
56	35	0.37	97.38
57	29	0.30	97.69
58	17	0.18	97.86
59	14	0.15	98.01
60	42	0.44	98.45
61	35	0.37	98.82
62	8	0.08	98.90
63	27	0.28	99.18
65	14	0.15	99.33
68	4	0.04	99.37
69	2	0.02	99.39
70	31	0.32	99.72
71	3	0.03	99.75
72	21	0.22	99.97
74	3	0.03	100.00
Total	**9,554**	**100.00**	

• Children on remand

Some 5% of men held on remand were under the age of 18, amounting to 427 children, which exceeds the approximately 350 being held in Remand Homes at around the same time. The most common offences amongst these boys were “preparation to commit a felony” (18%) and defilement (15%). Property offences together accounted for 38% and violent offences 24%.

During the research process, researchers were informed that such boys were held in prison because they are a danger to other children in Remand Homes. Nevertheless holding them in prison is contrary to the law. If such boys are indeed a danger to other children alternative arrangements must be made, as prisons do not have appropriate facilities for the care of children. Recall that these are remand prisoners.

Occupation

This was recorded on 76% of warrants for men. Amongst those where it was recorded, some 10% said they were unemployed. Labourers (18%), businessmen (10%) and farmer (6%) were the next largest categories.

Table 11: Occupation of men on remand

Occupation	Frequency	Percent	Cumulative
Acrobatic	13	0.20	0.20
Artist	9	0.14	0.34
Barber	26	0.41	0.75
Barman	15	0.23	0.99
Bodaboda	266	4.16	5.15
Builder	26	0.41	5.56
Business	634	9.92	15.48
Butcher	7	0.11	15.59
Car Wash	94	1.47	17.06
Caretaker	52	0.81	17.88
Carpenter	14	0.22	18.10
Cart Puller	91	1.42	19.52
Casual	10	0.16	19.68
Charcoal Burner	18	0.28	19.96
Chef	53	0.83	20.79
Civil Servant	6	0.09	20.88
Cleaner	13	0.20	21.09
Clerk	36	0.56	21.65
Community Health Worker	2	0.03	21.68
Conductor	175	2.74	24.42
Cook	13	0.20	24.62
Driver	278	4.35	28.98
Electrician	22	0.34	29.32
Employed	87	1.36	30.68

Farmer	370	5.79	36.47
Fisherman	45	0.70	37.18
Fitter	13	0.20	37.38
Garbage Collector	104	1.63	39.01
Gardener	26	0.41	39.42
Hawker	73	1.14	40.56
Herdsman	68	1.06	41.62
Hotelier	26	0.41	42.03
Information Technology	2	0.03	42.06
Investment Advisor	26	0.41	42.47
Jua Kali	185	2.90	45.37
Khat Seller	26	0.41	45.77
Labourer	1,150	18.00	63.78
Loader	39	0.61	64.39
Manager	3	0.05	64.43
Marson	9	0.14	64.57
Mason	184	2.88	67.45
Mechanic	197	3.08	70.54
Miner	1	0.02	70.55
Musician	26	0.41	70.96
Officer Messenger	2	0.03	70.99
Pastor	2	0.03	71.02
Police Officer	26	0.41	71.43
Printing	26	0.41	71.84
Project Cordinator Kangemi	26	0.41	72.24
Pupil	28	0.44	72.68
Quarry	22	0.34	73.03
Salesman	65	1.02	74.05
Sand Harvester	9	0.14	74.19
Security	219	3.43	77.61
Self-Employed	257	4.02	81.64
Shoe Maker	39	0.61	82.25
Stove Technician	2	0.03	82.28
Student	153	2.40	84.67
Tailor	52	0.81	85.49
Teacher	60	0.94	86.43

Tour Operator	26	0.41	86.83
Tout	40	0.63	87.46
Transport	13	0.20	87.66
Transporter	26	0.41	88.07
Unemployed	668	10.46	98.53
Waiter	64	1.00	99.53
Welder	30	0.47	100.00
Total	**6,388**	**100.00**	

Education

Men appeared to have somewhat more years of education than women on remand on average. Only 5% were illiterate and the median years of education is 8 years, which is also the most common. Some 5% had either completed schooling (12 years) or had done additional study after school.

Table 12: Education levels of men on remand

Years of education	Frequency	Percent	Cumulative
Illiterate	320	5.38	5.38
Literate	1,019	17.12	22.50
1	30	0.50	23.00
2	46	0.77	23.78
3	215	3.61	27.39
4	270	4.54	31.93
5	234	3.93	35.86
6	142	2.39	38.25
7	498	8.37	46.61
8	1,495	25.12	71.74
9	54	0.91	72.64
10	298	5.01	77.65
11	180	3.02	80.68
12	840	14.12	94.79
15	284	4.77	99.56
16	26	0.44	100.00
Total	**5,951**	**100.00**	

Offences

The largest category among men on remand is also violent offences, at 32%. Amongst violent offences, murder comprises 49%. Property offences comprise 27% and sexual offences 16%, while offences against the state (excluding drugs) comprise 6%.

Among offences against the state, alcohol offences were less common than among women on remand, with manufacture, sale and possession of alcohol offences making up 22% of the offences against the state category for men on remand. Other more numerous offences in this category include "providing telecommunication services without a licence" (9%); "touting" (9%); "cutting, ferrying and making charcoal" (5%); "entering a national park with livestock" (5%); "unlawful discharge of water without a permit (4%); "possession of bush meat" (3%); "removing forest produce" (3%); and "possession of wildlife trophies" (3%).

Table 13: Offences in relation to men on remand

Offence Category	Frequency	Percent	Cumulative
Children	48	0.49	0.49
CJS	5	0.05	0.55
Driving	145	1.49	2.04
Drugs	513	5.28	7.31
Fraud	417	4.29	11.60
Guns	63	0.65	12.25
Immigration	170	1.75	14.00
MDP	117	1.20	15.20
Nuisance	300	3.09	18.28
Property	2,619	26.93	45.22
Sexual	1,573	16.18	61.39
State	580	5.96	67.36
Terror	42	0.43	67.79
Violence	3,132	32.21	100.00
Total	**9,724**	**100.00**	

Drug offences comprise 5% of all offences of men on remand. Offences of fraud and dishonesty amount to 4%. As much as 3% are there in relation to nuisance, disturbance, and drunk and disorderly-type charges. Driving charges comprise just more than 1%, of which 53% are causing death by driving charges.

Duration

The warrants listed the first date of remand as well as the next date of remand. From these dates the duration from the date of first remand to the last date of remand could be calculated. This was available in 97% of the observations relating to men on remand.

The duration from first warrant date to last warrant date for men on remand ranged between 0 and 3487 days, with the median being 142 days. Some 23% have will have been held for more than a year, and some 6% by their next warrant date will have been held for more than 1000 days. All the measures, except the maximum, are somewhat lower than what was observed for women on remand.

Table 14: Duration of remand for men on remand

Percentile	Minimum	25th	Median	75th	77th	94th	Maximum
All offences	0	52	142	347	365	1000	3487

• Duration by offence type

Medians were also calculated for offence categories with sufficient observations. The longest durations were in relation to violent offences (284 days), and the shortest in relation to driving offences (27 days). Although offences against the state had a 35-day median, some 30% spent more will have spent more than 90 days on remand.

Table 15: Median duration of detention of men on remand, by offence category

Offence Category	Median Duration (Days)
Drive	27
Drugs	43
Fraud	82
Immigration	105
MDP	64
Nuisance	76
Property	120
Sex	203
State	35
Violence	284
All	142

Conclusion

The profile of remand detainees suggests a range of ordinary Kenyans who are at the prime of income-earning potential. The holding of so many possibly productive persons who may never be found guilty on remand is counter-developmental and costly for the Kenyan state. At the same time, educational levels suggest such persons will need legal representation in order adequately to defend themselves in court. Legal representation ought to be a priority in order to realise gains envisioned by Constitution of Kenya 2010 Article 50(2) (h) "Every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

The evidence here suggests that if the state were to confine itself to holding on remand only those accused of violent offences, the number of men on remand would reduce by two-thirds and the number of women by one-half.

It is clear that a significant number will endure exceptionally long time periods on remand. Evidence from the other sections on the courts suggests it is by no mean guaranteed that they will ever be convicted, with only 53% of accused in subordinate courts being found guilty. Indeed the most serious offences for which people are held the longest on remand have the lowest conviction rates – 5% for sexual offences and 13% for robbery with violence.

Furthermore, in relation to more serious offences, even if convicted many of these will eventually succeed on appeal.

Kenya Remand Imprisonment: Remand Admission Register findings

Remand Admission Register : Kenya Prison Service

Chapter 2.7

The active remand warrants analysed above provide a profile of the composition of the remand population at the date of data collection. In this section the remand register data will be analysed, which provides the picture of the flow of persons on remand through the remand system.

Methodology

There is a remand admission register at every prison. Data was sampled from the years 2013-2014 in these registers. The observations were then weighted according to the total volume of admissions in each prison over the two years. The sampling methodology adopted for selecting entries in the registers is described below. Additional registers such as the tuberculosis register were sometimes consulted for additional information.

Remand register sampling

The observations were selected using a structured random sampling technique from the registers for 2013 and 2014, targeting every nth entry, where n=total in 2013 and 2014 / 100. Where a separate capital remand register was kept, 35 observations were targeted using the same method. The resultant observations were then weighted to represent the total admissions recorded in these registers over two years. The dataset comprises 2500 observations from the prison registers reflected below.

Table 1: Observations drawn from prison remand registers

Name	Freq.	Percent	Cumulative
Garissa Main	100	4.00	4.00
Isiolo	103	4.12	8.12
Kakamega Main	100	4.00	12.12
Kakamega Women	100	4.00	16.12
Kisii Main	99	3.96	20.08
Kisii Women	100	4.00	24.08
Kisumu Main	100	4.00	28.08
Kisumu Women's	99	3.96	32.04
Langata Women	100	4.00	36.04
Lodwar	100	4.00	40.04
Makueni Remand	96	3.84	43.88
Makueni Women	100	4.00	47.88
Meru Main	100	4.00	51.88
Meru Women	98	3.92	55.80
Murang'a Main	99	3.96	59.76
Murang'a Women	100	4.00	63.76
Nairobi RA ALL	88	3.52	67.28
Nairobi RA ROB+M	34	1.36	68.64
Nakuru Main	100	4.00	72.64
Nakuru Women	100	4.00	76.64
Nyeri Main	100	4.00	80.64
Nyeri Women	100	4.00	84.64
Shimo La Tewa Main	100	4.00	88.64
Shimo La Tewa Women	100	4.00	92.64
Voi	98	3.92	96.56
Wundanyi	86	3.44	100.00
Total	**2,500**	**100.00**	

Findings: Remand Register

Total number of remand admissions

The total number of admissions to these institutions over two years amounts to 90 814. This number is approximately double the number of charges to court (45 000) recorded in the police data over 15 police stations, but some 62% of the number of arrests (1450 000) made at the 15

police stations surveyed. This may be because more than these 15 police stations feed into the prisons concerned. According to the World Bank the population of Kenya in 2014 was 44.863 million with 24.720 million being aged 15-64.[183] The number being admitted to remand in these prisons alone over 2 years thus is equivalent to almost 4 in every 1000 adults in Kenya.

Table 2: Total remand admissions 2013-2014, selected institutions

Name	Frequency	Percent	Cumulative
Garissa Main	2,200	2.42	2.42
Isiolo	1,339	1.47	3.90
Kakamega Main	5,600	6.17	10.06
Kakamega Women	1,000	1.10	11.16
Kisii Main	6,930	7.63	18.80
Kisii Women	1,200	1.32	20.12
Kisumu Main	6,800	7.49	27.60
Kisumu Women's	792	0.87	28.48
Langata Women	4,200	4.62	33.10
Lodwar	2,100	2.31	35.41
Makueni Remand	1,728	1.90	37.32
Makueni Women	200	0.22	37.54
Meru Main	5,500	6.06	43.59
Meru Women	2,156	2.37	45.97
Murang'a Main	3,465	3.82	49.78
Murang'a Women	400	0.44	50.22
Nairobi RA ALL	19,096	21.03	71.25
Nairobi RA ROB	2,652	2.92	74.17
Nakuru Main	8,300	9.14	83.31
Nakuru Women	100	0.11	83.42
Nyeri Main	3,200	3.52	86.94
Nyeri Women	300	0.33	87.28
Shimo La Tewa Main	8,700	9.58	96.86
Shimo La Tewa Women	1,300	1.43	98.29
Voi	1,470	1.62	99.91
Wundanyi	86	0.09	100.00
Total	**90,814**	**100.00**	

183 *http://data.worldbank.org/indicator/SP.POP.TOTL/countries/KE?display=graph*

Male admissions

The total number of admissions of men in the 15 prisons indicated is close to 80 000 over two years. This is equivalent to more than 6 in every 1000 adult males in Kenya, for these prisons only. There are 105 prison institutions of the Kenya Prison Service for adults across Kenya, of which 87 prisons are for men. Thus an estimate of 457 000 remand admissions of men over two years for Kenya as a whole can be made, or almost 4 out of every 100 adult men. However this is likely to be an over-estimate as the prisons not surveyed may be smaller than those included in this survey.

Table 3: Remand admissions of men, 2013-2014

Name	Freq.	Percent	Cum.
Garissa Main	2,200	2.79	2.79
Isiolo	1,287	1.63	4.43
Kakamega Main	5,600	7.11	11.54
Kisii Main	6,930	8.80	20.33
Kisumu Main	6,800	8.63	28.96
Lodwar	1,848	2.35	31.31
Makueni Remand	1,728	2.19	33.50
Meru Main	5,500	6.98	40.49
Murang'a Main	3,465	4.40	44.88
Nairobi RA ALL	19,096	24.24	69.13
Nairobi RA ROB	2,652	3.37	72.49
Nakuru Main	8,300	10.54	83.03
Nyeri Main	3,200	4.06	87.09
Shimo La Tewa Main	8,700	11.04	98.13
Voi	1,470	1.87	100.00
Total	**78,776**	**100.00**	

Female admissions

The total number of remand admissions of women over two years in these prisons is close to 12 000. This is equivalent to almost 1 in every 1000 adult females in Kenya. There are 18 prisons for women in Kenya. Taking only the figures for the 10 women's prisons, an estimate of almost 21 000 admissions on remand for women over two years for Kenya can be made. This number is closer to 2 in every 1000 adult women in Kenya.

Table 4: Remand admission of women

Name	Frequency	Percent	Cumulative
Isiolo	39	0.33	0.33
Kakamega Women	1,000	8.40	8.73
Kisii Women	1,200	10.08	18.82
Kisumu Women's	792	6.66	25.47
Langata Women	4,200	35.30	60.77
Lodwar	126	1.06	61.83
Makueni Women	200	1.68	63.51
Meru Women	2,156	18.12	81.63
Murang'a Women	400	3.36	84.99
Nakuru Women	100	0.84	85.83
Nyeri Women	300	2.52	88.35
Shimo La Tewa Women	1,300	10.93	99.28
Wundanyi	86	0.72	100.00
Total	**11,899**	**100.00**	

Offences

Compared to the warrant profiles, less serious offences assume more prominence in admissions. This means they are more numerous among admissions, but people held on remand for less serious offences probably spend less time on remand. While admission to police cells for a shorter period of time is expected for nuisance offences, such as drunk and disorderly and disturbance, their prominence at almost 8% of male admissions and 9% of female admissions to prisons is surprising. This means either that courts are choosing to remand those accused of these offences in custody pending trial, or that the conditions of bail are such that those accused of these offences are unable immediately to meet these conditions.

Table 5: Offences categories for male admissions

Offence Category	Frequency	Percent	Cum.
Child Offences	548	0.70	0.70
CJS	741	0.95	1.65
Drug Offences	4,055	5.20	6.85
Drunk and Disorderly, Nuisance, Disturbance	6,859	8.79	15.63
Driving Offences	1,361	1.74	17.38
Fraud, Dishonesty	3,051	3.91	21.29
Firearms	69	0.09	21.37

Immigration	2,874	3.68	25.06
Malicious Damage	1,685	2.16	27.22
Property	22,987	29.45	56.67
Preparing	2,328	2.98	59.65
State Offences (Excluding Alcohol)	7,546	9.67	69.32
State Offences (Alcohol Only)	2,643	3.39	72.70
Violent Offences	17,220	22.06	94.76
Sexual Offences	4,087	5.24	100.00
Total	**78,054**	**100.00**	

Also of concern is the prominence of offences against the state at 13% among men and 26% among women. Many of these offences are simply about people attempting to earn a living and involve state interests, which could perhaps be better served using mechanisms other than criminal law and deprivation of liberty. Incarceration in a prison is a serious deprivation of liberty and it is questioned whether the interest the state has in these offences is appropriately balanced against the social and economic impact of such deprivation of liberty. A recent study on the socio-economic impact of remand imprisonment in Kenya, Mozambique and Zambia, found serious social and economic impacts on families, especially in relation to women detained on remand. Together, drunk and disorderly, nuisance and state offences comprised 33% of admissions of women on remand.

Table 6: Offences categories for female admissions

Offence Category	Freq.	Percent	Cum.
Child Offences	393	3.33	3.33
CJS	109	0.92	4.25
Drugs	296	2.51	6.76
Drunk, Nuisance, Disturbance	940	7.96	14.72
Driving	25	0.21	14.93
Fraud, Dishonesty	899	7.61	22.54
Immigration	224	1.90	24.44
Malicious Damage	72	0.61	25.05
Property	2,826	23.93	48.98
Preparing	57	0.48	49.46
State Offences (Excluding Alcohol)	960	8.13	57.59
State Offences (Alcohol Only)	2,051	17.37	74.95
Violent Offences	2,951	24.99	99.94
Sexual Offences	7	0.06	100.00
Total	**11,810**	**100.00**	

"Preparing to commit a felony "is also of concern at 3% for men. Arrests and prosecutions on such an offence are subject to a high degree of discretion and their prominence in the flow of men into remand imprisonment at almost 3% should perhaps be further explored. This may be as a result of a tendency to arrest young people found in the streets at night where they either fail to explain themselves or fail to bribe their way out.

Offences involving violence (which includes robbery and robbery with violence, as well as assaults) comprise less than a quarter of both male and female admissions to remand.

Age

The ages of men admitted were recorded in 34% of observations relating to men admitted. The ages ranged from 16 to 75, with a median age of 28. This is similar to the age profile found in the active remand warrant profile, and in many other African states.

Table 7: Age profile among male admissions

Age	Frequency	Percent	Cumulative
16	123	0.41	0.41
17	430	1.44	1.85
18	324	1.08	2.93
19	441	1.47	4.40
20	1,198	4.00	8.40
21	1,355	4.52	12.92
22	1,744	5.82	18.74
23	1,662	5.55	24.29
24	1,784	5.96	30.25
25	1,378	4.60	34.85
26	1,987	6.63	41.48
27	1,679	5.61	47.09
28	2,117	7.07	54.15
29	1,554	5.19	59.34
30	1,597	5.33	64.67
31	915	3.05	67.73
32	1,219	4.07	71.80
33	994	3.32	75.12
34	596	1.99	77.11
35	652	2.18	79.28
36	626	2.09	81.37

37	632	2.11	83.48
38	434	1.45	84.93
39	583	1.95	86.88
40	661	2.21	89.08
41	363	1.21	90.30
42	545	1.82	92.11
43	298	0.99	93.11
44	238	0.79	93.90
45	344	1.15	95.05
46	124	0.41	95.47
47	102	0.34	95.81
48	175	0.58	96.39
49	85	0.28	96.68
50	89	0.30	96.97
51	30	0.10	97.07
52	151	0.50	97.58
54	68	0.23	97.80
56	70	0.23	98.04
57	32	0.11	98.14
58	47	0.16	98.30
59	32	0.11	98.41
60	70	0.23	98.64
61	137	0.46	99.10
62	50	0.17	99.27
63	30	0.10	99.37
64	35	0.12	99.48
66	68	0.23	99.71
75	87	0.29	100.00
Total	**29,955**	**100.00**	

The age was recorded in 69% of observations relating women. The ages of women admitted ranged from 15 to 95, with a median of 28 again. Just over 1% is over the age of 65, while almost 5% are under the age of 18.

Table 8: Age profile of women admitted to remand imprisonment

Age	Frequency	Percent	Cumulative
15	42	0.46	0.46
16	128	1.40	1.86
17	149	1.63	3.49
18	176	1.92	5.41
19	201	2.20	7.61
20	488	5.33	12.94
21	257	2.81	15.75
22	549	6.00	21.75
23	620	6.78	28.52
24	384	4.20	32.72
25	455	4.97	37.69
26	414	4.52	42.21
27	358	3.91	46.13
28	372	4.07	50.19
29	337	3.68	53.87
30	587	6.41	60.29
31	174	1.90	62.19
32	343	3.75	65.94
33	164	1.79	67.73
34	308	3.37	71.10
35	324	3.54	74.64
36	131	1.43	76.07
37	164	1.79	77.86
38	285	3.11	80.97
39	68	0.74	81.72
40	273	2.98	84.70
41	35	0.38	85.08
42	144	1.57	86.66
43	160	1.75	88.41
44	95	1.04	89.44
45	146	1.60	91.04
46	98	1.07	92.11
47	67	0.73	92.84
48	51	0.56	93.40
49	42	0.46	93.86

50	42	0.46	94.32
51	35	0.38	94.70
52	78	0.85	95.55
53	12	0.13	95.68
54	45	0.49	96.18
55	42	0.46	96.63
56	48	0.52	97.16
57	84	0.92	98.08
59	14	0.15	98.23
60	34	0.37	98.60
61	25	0.27	98.87
64	7	0.08	98.95
65	6	0.07	99.02
67	3	0.03	99.05
70	1	0.01	99.06
72	42	0.46	99.52
80	22	0.24	99.76
95	22	0.24	100.00
Total	**9,151**	**100.00**	

Children admitted on remand

Some 2% of remand admissions are of boys under 18 and 5% of admissions of women are of girls under 18. Together the number of children admitted over two years in these prisons is 720. This compares to the 3000 admitted to children's remand homes over the same time period. This suggests the accommodation of remand homes should be inflated by an additional 24% to accommodate these children.

Tribe or cultural affiliation

Only 34% of observations recorded the tribe or cultural affiliation. The distribution of tribes amongst admissions for which this was recorded appears below. It is unclear the extent to which this 34% is representative, and nor to what extent this differs from the profile of the regions served by the prisons under investigation. Kikuyu, the largest group in Kenya, comprises 34% of these recorded admissions, and Kisii, 29%. Somali are prominent at 7%.

Table 9: Tribe indicated among remand admissions (all)

Tribe	Frequency	Percent	Cumulative
Kikuyu	7,937	33.99	33.99
Kisii	6,767	28.98	62.97
Luo	2,372	10.16	73.13
Somali	1,727	7.4	80.53
Luhya	1,626	6.96	87.49
Kamba	678	2.9	90.39
Kalenjin	602	2.58	92.97
Meru	507	2.17	95.14
Masai	224	0.96	96.1
Giriama	104	0.45	96.55
Ethiopian	88	0.38	96.93
Embu	84	0.36	97.29
Malakote	44	0.19	97.48
Muyonyaya	44	0.19	97.67
Burundi	42	0.18	97.85
Chinese	42	0.18	98.03
Mganda	43	0.18	98.21
Russian	42	0.18	98.39
Thai	42	0.18	98.57
Turkana	42	0.18	98.75
Digo	39	0.17	98.92
Taita	35	0.15	99.07
Rabai	26	0.11	99.18
Kipsigis	22	0.09	99.27
Oromo	22	0.09	99.36
Pokomo	22	0.09	99.45
Asian	13	0.06	99.51
Chaka	13	0.06	99.57
Duruma	14	0.06	99.63
Jibana	13	0.06	99.69
Nubi	13	0.06	99.75
Ogaden	13	0.06	99.81
Samburu	13	0.06	99.87
Somali Kenya	13	0.06	99.93
Muslim	12	0.05	99.98

Tugen	4	0.02	100
Nandi	2	0.01	100
Pokot	1	0	100
Taveta	1	0	100
Total	**23,348**	**100**	

Durations of remand detention

The release date is recorded in relation to about one-third of admissions of men. This may be because those who are released after going to court, do not have a release date recorded, as they simply do not return from court. This idea is supported by the fact that the reasons for release recorded, in about three-quarters of releases, relate to conditional release awaiting trial i.e. cash bail, surety and the like, which are processed at the prison itself. Reasons such as "acquittal" and "released from court" were not present.

Durations for those with recorded releases

Some one third of admissions of men admitted had been released and had their date of release recorded at the time of data collection. The duration of detention for these ranged from 0 days to 904 days. The median duration of detention was only 10 days, 25th percentile 2 days, 75th percentile 30 days. This suggests a relatively fast turnaround for half of a third of all admissions (or one-sixth of all admissions).

Table 10: Durations of remand detention for remand admissions released from prison, days

Duration	Minimum	25th	Median	75th	Maximum
Women (days)	0	1	5	23	745
Men (days)	0	2	10	30	904

For women admitted, there were release dates were available in 49% of observations. The range for women was from 0 days to 745 days, with a median of 5 days, which suggests a half of half of women (one quarter) are released within 5 days of admission. The 25th percentile was 1 day, the 75th percentile 23 days.

Durations among those not released

The durations of those still detained is best indicated in the duration data for the active remand warrants in the section above. This data together with the register data for those not yet release shows that while at least 17% of male admissions are released within 10 days, and at least 25% of

women within 5 days, thereafter long delays are apparent for the remainder of detained persons. Property offences and offences against the state are more prominent among the early releases.

Reason for release

In 751 of the 987 observations (76%) for which a release and released date was recorded, the terms of release were also recorded. Amongst those for which a reason was recorded, some 29% were released on surety bond and less than 1% on own bond. The remainder were released on cash bail. This means that half (53%) of all releases recorded by the prison, related to cash bail releases.

Table 11: Terms of release among released admissions (men and women, missing excluded)

Cash Bail Amount (Kes) or Other Release Term	Frequency	Percent	Cumulative
Own Bond	230	0.76	0.76
Surety Bond	8,759	29.06	29.82
Cash Bail	21,154	70.18	100.00
Total	**30,143**	**100.00**	

Cash bail and duration

Those paying cash bail appeared to be able secure their release more speedily than the remainder, which were overwhelmingly surety bond releases. This may point to the difficult of obtaining sureties.

Table 12: Number of days to release, cash bail and other reasons compared

	Minimum	25th	Median	75th	Maximum
Cash Bail	1	1	6	25	904
Other Release	0	2	13	25	745

Cash bail release offence profile

The table below compares the offence profile of admissions, amongst those receiving cash bail to the profile amongst those not receiving cash bail. The results suggest those accused of violence, fraud and dishonesty, and property offences were more likely to pay cash bail.

Table 13: Offence profile of those paying cash bail or not

Offence	Percent Among Releases Receiving Cash Bail	Percent Among Releases Not Receiving Cash Bail
Abortion, Infanticide	0.01	0.08
Drug Offences	1.84	1.84

Offences against Children	0.21	1.38
Drunk and Disorderly, Nuisance	5.05	10.52
Fraud, Dishonesty	7.08	3.50
Immigration	0.35	4.47
Justice System	1.08	1.06
Mdp	2.69	1.58
Organised Crime	0.04	0.17
Property Offences	30.87	27.35
Preparing to Commit a Felony	3.96	1.99
State Offence	18.90	19.60
Violent Offences	24.58	21.29
Sexual Offences	3.35	5.17
Total	**100.00**	**100.00**

Cash bail amounts

The cash bail amounts ranged from KES 1 000 to KES 1 000 000, with a median amount of KES 15 000. These are significant amounts of money compared to the earnings of ordinary Kenyans. This is particularly relevant given the occupations of the remand admissions recorded.

Table 14: Cash bail amounts recorded amongst released admissions (all)

Amount (KES)	Frequency	Percent	Cumulative
1,000	496	2.38	2.38
2,000	979	4.70	7.09
3,000	931	4.47	11.56
4,000	387	1.86	13.42
5,000	2,824	13.57	26.99
6,000	3	0.01	27.01
7,000	134	0.64	27.65
8,000	183	0.88	28.53
10,000	4,064	19.53	48.06
15,000	969	4.66	52.72
18,000	1	0.00	52.72
20,000	2,013	9.67	62.39
25,000	84	0.40	62.80
30,000	2,221	10.67	73.47
35,000	85	0.41	73.88

40,000	223	1.07	74.95
41,493	12	0.06	75.01
45,000	42	0.20	75.21
50,000	1,448	6.96	82.17
70,000	1	0.00	82.17
76,000	1	0.00	82.18
80,000	393	1.89	84.07
100,000	1,710	8.22	92.28
133,896	12	0.06	92.34
150,000	40	0.19	92.53
200,000	581	2.79	95.32
230,000	1	0.00	95.33
250,000	1	0.00	95.33
300,000	273	1.31	96.65
400,000	167	0.80	97.45
500,000	299	1.44	98.89
600,000	42	0.20	99.09
700,000	32	0.15	99.24
1,000,000	158	0.76	100.00
Total	**20,810**	**100.00**	

Occupations

The occupation was only recorded in 10% of the observations. Nevertheless the types of occupations appeared similar to those recorded among the remand warrants, and do not suggest a great deal of wealth amongst those admitted on remand.

Table 15: Occupations recorded among remand admissions (all)

Occupation	Frequency	Percent	Cumulative
Agent	26	0.33	0.33
Barmaid	17	0.22	0.55
Business	350	4.46	5.01
Cashier	13	0.17	5.18
Clerk	13	0.17	5.34
Counsellor	35	0.45	5.79
Dress Making	13	0.17	5.95
Employed	172	2.19	8.15

Farmer	299	3.81	11.96
Fish Monger	13	0.17	12.13
Hawker	13	0.17	12.29
Hotelier	1	0.01	12.30
House Girl	13	0.17	12.47
House Help	26	0.33	12.80
House Wife	26	0.33	13.13
Labour	220	2.81	15.94
M-Pesa Agent	13	0.17	16.10
Recruitment Officer	13	0.17	16.27
Salonist	39	0.50	16.77
Security	13	0.17	16.93
Self-Employed	691	8.81	25.74
Shopkeeper	4	0.05	25.79
Student	36	0.46	26.25
Supplies	42	0.54	26.79
Teacher	26	0.33	27.12
Unemployed	5,716	72.88	100.00
Total	**7,843**	**100.00**	

Conclusion

The dataset on remand admission provides some insight as to who is admitted to remand detention and the trends relating to release. The high number of less serious offences admitted is cause for concern. Almost 1 in 10 being admitted to prisons is admitted for nuisance offences. That release from prison before trial is clearly occurring is positive but the high cash bail amounts are cause for concern and out of reach for the ordinary Kenyan.

Recommendations

Legislative Framework

Lesser offences not to result in remand

Lesser offences are well-represented among admissions, as they were in arrests and before court. The underlying issues need to be addressed. The reasons for the trend need to be better understood. A national conversation is necessary to consider the desirability of using Criminal

Justice System processes and the deprivation of liberty in these matters, especially as these may crowd out better handling of more serious offences. In many countries such offences would not result in remand imprisonment but would be dealt with administratively with summons and fines.

Policy and Practice

Facilitating release on bail or bond

There is little the Kenya Prison Service can do to control the admissions of persons on remand to its institutions. However it can continue to facilitate the release of those admitted by ensuring such persons have access to paralegals that help to trace sureties and arrange cash bail for those for whom this is available or possible. During 2013 and 2014 around a third of admissions were released in this way, with 75% so being released within 25 days. This may have improved with the further expansion of paralegal services in 2015 and 2016. The Prison Service can also sensitise the magistracy to the burden on the prison service of processing the very high number of admissions on remand, and the problem of overcrowding within prisons, by inviting magistrates to observe the conditions.

Operationalise legal aid

There is a need to operationalise the Legal Aid Act No.6 of 2016 which provides for the establishment of National Legal Aid Services whose mandate includes but is not limited to "take appropriate measures to promote legal literacy and legal awareness among the public and in particular, educate vulnerable sections of the society on their rights and duties under the Constitution and other laws".

Practices around children

The Kenya Prison Service must engage with the Children Services and other stakeholders to ensure practices are in place to ensure children are not held in prisons and that there are alternative means of accommodating children who are not suitable for Children Remand Homes. The current practice of prisons receiving such children falls outside of the law, although the reasons are recognised. The data in this section suggests that additional accommodation at least equal to the current number of Children Remand Homes would need to be put in place to ensure such children are adequately accommodated elsewhere.

Lawyers and paralegals to investigate women held for murder

Many women on remand are typically held in relation to murder charges and these women are held for exceptionally long time periods, as emerges from the remand warrants which showed medians of more than a year for such women. Experience in other countries suggest such women often have valid defences to such charges, such as self-defence in the context of domestic abuse, and would secure release if their case were to come to trial. Presumptions of guilt often result in complacency in these cases. Means of expediting such cases should be explored by paralegals.

Infrastructure

Prison capacity

Legislative and practice reform could work to reduce the number admitted to prisons to encompass only those accused of traditional common-law offences. If this were done then the data here suggests that the remand population would reduce by approximately one-quarter. The official capacity of prison system in Kenya is 26,757 yet the current pre-trial population is approximately 22,000. This current Pre-trial population tranlates to 85% of the official capacity. Reducing remand numbers by one quarter would release almost 6 000 prison spaces. The data in the court and appeals section also suggests many held on common-law offences will never be convicted and many of those convicted will succeed on appeal. Further reductions can therefore be obtained if remand is viewed more as the exception than the rule. Even so, the conditions of detention section of this report makes clear the obligation on the state to improve conditions, which may well require additional prison capacity. If the state wishes to imprison even half those it currently does, additional capacity is required in order to hold people with dignity.

Remand home capacity

At no point should a child be detained, except as a measure of last resort, and when detained, they are to be held for the shortest appropriate period of time and separate from adults and in conditions that take account of the child's sex and age. On that note, stakeholders need to adopt workable, practical policies of ensuring no child is detained in an adult facility whatever the offence. The data here suggests children are being detained in prison facilities and that the capacity of the remand home system must be doubled. Separation of older children from younger children, of older boys from girls, and of children with a problematic history should form part of the planning of additional capacity.

Additional Surbodinate Courts findings

Additional Subordinate Courts

Chapter 2.8

In addition to the Magistrates' courts considered previously, the Constitution of Kenya explicitly provides for two additional types of subordinate courts, and provides that the national Parliament may through an Act of Parliament establish any other local court or tribunal. [184] The additional courts provided for by the Constitution are the Kadhi's Courts, and the Courts Martial. In this section these additional subordinate courts are discussed.

Certain offences and disciplinary processes of a criminal nature within the Kenya National Police and Kenya Prison Service are also discussed, as these are arguably part of the Criminal Justice System.

Kadhi's Courts

The Kadhi's Courts do not deal with criminal matters. The jurisdiction of a Kadhis' court is limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.[185] In an interview with a Kadhi magistrate, he indicated that should evidence of criminal activity arise through the course of proceedings in his court, that these would be referred to the Magistrates' Courts.

184 *Section 169, Constitution of Kenya 2010*

185 *Section 170(5) Constitution of Kenya 2010*

Courts Martial

Courts Martial exercise limited criminal jurisdiction under military law in respect of persons who serve in the armed forces. The Kenya Army, Kenya Navy, and Kenya Air Force comprise the national Kenya Defence Forces (KDF).[186] The KDF is currently governed by the Kenya Defence Forces Act 25 of 2012. This Act excludes domestic violence offences under the Sexual Offences Act 2006 from the jurisdiction of Courts Martial. Offences heard in Courts Martial are predominantly those provided for in the Kenya Defence Force Act.

The Kenya Defence Forces Act excludes civilian persons subject to the Act accused of sexual offences and domestic violence offences under the Sexual Offences Act 2006 from the jurisdiction of Courts Martial, unless the offence is committed outside Kenya.[187] Offences heard in Courts Martial are predominantly those provided for in the Kenya Defence Force Act.

Part IX of the Kenya Defence Force Act provides for the Constitution of Courts Martial. Part IX provides that a Court Martial must consist of a Judge Advocate, who must be the presiding officer, plus five others appointed by the Defence Court Martial Administrator in the case of an officer, otherwise three others. Commanding officers of the accused, as well as the convenor of the Court Martial are disqualified[188].

The Judge Advocate must be a magistrate or an advocate of not less than ten years standing, appointed by the Chief Justice.[189] Rulings and directions on questions of law, procedure or practice must be given by the Judge Advocate.[190] Every question to be determined on a trial by a court-martial must be determined by a majority of the votes of the members of the court – the Judge Advocate may not vote.[191] Where the death penalty is to be imposed all members of the court must agree [192] and the President must confirm. [193]

The Court Martial must sit in open court unless it is necessary or expedient in the administration of justice or open court would lead to disclosure of information which would endanger the public or witnesses. [194] The findings of the court must be made in open court, notwithstanding the

186 *Section 241, Constitution of Kenya 2010*

187 *Section 55(1) and 55(2) Kenya Defence Forces Act 2012*

188 *Section 164 Kenya Defence Forces Act 2012*

189 *Section 165 Kenya Defence Forces Act 2012*

190 *Section 175 Kenya Defence Forces Act 2012*

191 *Section 176 Kenya Defence Forces Act 2012*

192 *Section 176 Kenya Defence Forces Act 2012*

193 *Section 184 Kenya Defence Forces Act 2012*

194 *Section 169 Kenya Defence Forces Act 2012*

exceptions provided for above. [195] The rules on admissibility of evidence are the same as those in civil court. [196]

Limitation of Constitutional Rights

The Bill of Rights in the Constitution of Kenya 2010, like most constitutions, contains a limitations clause which provides for the circumstances under which there may be a limitation of constitutional rights. In a similar fashion to other such clauses, this clause provides that constitutional rights must not be limited except by law, and then only to the extent that the legislated limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.[197]

The relevant factors include the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice 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 purpose. [198]

Further, a provision in legislation limiting a right or fundamental freedom in the case of a provision enacted or amended on or after the effective date of the Constitution, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation; must not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and must not limit the right or fundamental freedom so far as to derogate from its core or essential content.[199] The State or a person seeking to justify a particular limitation must demonstrate to the court, tribunal or other authority that the requirements of the limitations clause have been satisfied.[200]

The Kenya limitation clause is however unusual in that it further limitation of rights in relation to persons serving in the National Police Service and Kenya Defence Force is mandated. [201] This further limitation provision provides for the further legislative limitation of rights:

195 *Section 170 Kenya Defence Forces Act 2012*

196 *Section 170 Kenya Defence Forces Act 2010*

197 *Section 24(1)(Constitution of Kenya 2010*

198 *Section 24(1)(a)-(e) Constitution of Kenya 2010*

199 *Section 24(2) Constitution of Kenya 2010*

200 *Section 24 (3) Constitution of Kenya 2010*

201 *Section 24(5) Constitution of Kenya 2010*

"(5) Despite clauses (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

(a) Article 31—Privacy;

(b) Article 36—Freedom of association;

(c) Article 37—Assembly, demonstration, picketing and petition;

(d) Article 41—Labour relations;

(e) Article 43—Economic and social rights; and

(f) Article 49—Rights of arrested persons."

The Constitution then goes on to provide:

"Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to a fair trial; and

(d) the right to an order of habeas corpus."[202]

Thus these constitutional provisions provide that the legislation in relation to persons serving in the Kenya Defence Force or the National Police Service may contain further limitations beyond the general limitations clause of, for example, the rights of arrested persons[203], but may not limit

202 Section 25, Constitution of Kenya 2010

203 Constitution of Kenya s49 Rights of arrested persons
(1) An arrested person has the right—
(a) to be informed promptly, in language that the person understands, of—
(i) the reason for the arrest;
(ii) the right to remain silent; and
(iii) the consequences of not remaining silent;
(b) 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;
(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 ends 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; and

the right to freedom from torture, freedom from slavery or servitude; the right to a fair trial; and the right to an order of habeas corpus.

The Kenya Defence Force Act 2012 as well as the National Police Service Act 2011 both explicitly provide for limitation of rights in terms of this further limitation clause, some of which limitations are directly relevant to Courts Martial and to criminal proceedings.[204] In particular, section 54 permits the rights of arrested persons who serve in the KDF to be limited by further provisions in the KDF Act which permit holding them together with persons serving a sentence; holding them without bail; and holding them in custody notwithstanding that the offence is punishable only by a fine or imprisonment of less than 6 months. [205] All of these constitute limitations of the rights of arrested persons in terms of section 49 of the Kenya Constitution.

Note that the Constitution does not permit any limitation of fair trial rights.

Offences in the Kenya Defence Force Act

The KDF Act provides for specific offences in respect of persons serving in the KDF. Offences for which the death penalty may be applied (or a lesser punishment) include aiding the enemy; communicating with the enemy; spying; offences while in action (such as failing to obey orders; improperly withdrawing, failing to pursue or consolidate, failing to relieve, or forsaking station); offences by a person in command; and misconduct in action, and mutiny.[206] Other offences include cowardice; neglect of duty; offences against morale; advocating governmental change by force; being captured through disobedience or neglect; sentry offences; looting and pillaging; offences against civilian population outside Kenya; mutiny; failure to suppress mutiny; desertion; and absence without leave; assisting desertion or absence without leave.

Court Martial Procedure

Persons alleged to have committed any offence under the Kenya Defence Force Act may be arrested by the Military Police.[207] The Act further provides that proceedings must be instituted *without unreasonable delay*, and a special report must be made of the necessity for further delay to the Service Commander wherever someone is held in custody for eight days and for every eight

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(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.
(2) 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."

204 See Part V Kenya Defence Forces Act 2012

205 Section 54, Kenya Defence Forces Act 2012

206 See Sections 56 – 136 Kenya Defence Forces Act of 2012

207 Section 137 Kenya Defence Forces Act of 2012

days thereafter unless the accused is in active service. [208] An absolute limit of 42 days to custody applies whether or not the accused is in active service; [209] after this time the accused must be held on open arrest. [210]

Procedure for desertion in the Kenya Defence Force

Slightly different procedural provisions apply to KDF deserters and those who are absent without leave. A police officer may arrest any person whom the police officer has reasonable cause to suspect of being an officer or KDF service member who has deserted or is absent without leave.[211] Any person who is arrested in this way must *as soon as is reasonably practicable* be brought before a Magistrates' Court. [212] This could be a limitation of the 24-hour rule contained in the "rights of arrested persons" provision of the Constitution[213] but such limitation is not explicitly provided for in the relevant section of the KDF Act. [214]

The KDF Act provides that a person who has been arrested and brought before a Magistrate, or a deserter who surrenders[215], is not entitled to bail. This is a limitation of the "rights of arrested persons" provision, which provides that "an arrested person has a right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released". This limitation is expressly provided for in the KDF Act. [216] KDF alleged deserters are therefore not entitled to bail. Such persons must be detained in civilian prisons until they are delivered into service custody.[217] However a limit of 42 days in closed custody applies, as indicated above.

Desertion is defined as a criminal offence and its punishment is specified in section 74 of the KDF Act[218]. Essentially, being absent without leave for more than 90 days amounts to desertion,

208 Section 140 Kenya Defence Forces Act of 2012

209 Section 140(4) Kenya Defence Forces Act of 2012

210 Section 140(5) Kenya Defence Forces Act of 2012

211 Section 141(1) Kenya Defence Forces Act of 2012

212 Section 141(4) Kenya Defence Forces Act of 2012

213 Section 49 Constitution of Kenya 2010

214 Section 54 Kenya Defence Forces Act of 2012

215 In terms of section 143 Kenya Defence Forces Act of 2012

216 Section 54(2)(b) Kenya Defence Force Act 2012

217 Section 145 and 146 Kenya Defence Forces Act of 2012

218 Section 74 (1) A person who is subject to this Act commits an offence if that person—
(a) deserts; or
(b) persuades or procures any person subject to this Act to desert.
(2) A person deserts if that person—

in terms of this Act, as well as a number of acts such as re-enlisting without resigning or not re-enlisting when obliged to do so, as well as avoiding serving abroad or before an enemy. If on "active service" life imprisonment is mandated for desertion; if not, then a maximum term of two years' imprisonment applies. The presumption of desertion after 90 days is relatively controversial, as the desertion offence usually requires evidence of the intention to desert; without evidence of such intention the offence is then simply absence without leave. [219]

Desertion trends in the Kenya Defence Force

In May 2014 it was reported that the Kenya Defence Force (KDF) had lost 800 people to desertion since October 2011.[220] Presumably these were mostly absent without leave for more than 90 days. This is approximately 330 per year. As indicated above, deserters arrested by police officers must be brought to the Magistrate's' Courts. If all 330 cases had been pursued and came to the 14 Magistrates' Courts surveyed, which heard 55 000 cases in two years, 17 observations which related to desertion should have emerged in the Magistrates' Courts sample of 1400 which was collected in this study.

In the event no observations were observed from the KDF in the dataset of 1400. Three observations related to "desertion" emerged, but these were from the Kenya Police (two observations) and from the Kenya Prison Service (one observation). That there are no observations from the KDF suggests that fewer than 40 cases came to these 14 Magistrates' Courts in 2013 and 2014. This could mean that the cases did not go via the Magistrates Courts or that the KDF did not pursue these cases or that the alleged deserters have not been apprehended.

(a) with the intention, either at the time or formed later, of remaining permanently absent from duty—
(i) leaves the Defence Forces; or
(ii) fails to join or re-join the Defence Forces when it is the person's duty to join or re-join them;
(b) being an officer, enlists in or enters the Defence Forces without having resigned the person's commission;
(c) being a service member, enlists in or enters the Defence Forces without having been discharged from any previous enlistment;
(d) is absent without leave, with intent to avoid serving in any place outside Kenya, or to avoid service or any particular service when before an enemy; or
(e) is absent without leave for a continuous period of more than ninety days.
(3) A person who commits an offence under subsection (1), shall be liable, upon conviction by a court-martial—
(a) to imprisonment for life or any lesser punishment provided for by this
Act if—
(i) the offence was committed under subsection (1)(a), the person was on active service or under orders for active service at the time when it was committed; or
(ii) the offence was committed under subsection (1)(b) the person in relation to whom it was committed was on active service or under orders for active service at that time; or
(b) to imprisonment for not more than two years, in any other case.
(4) In addition to, or without any other punishment, a court-martial that convicts an officer of or service member of desertion, other than a reservist called out on permanent service, may direct that the whole or any part of any service preceding the period of desertion shall be forfeited.

219 See inter alia Winthrop Military Law and Precedents Beard Books 2000

220 http://www.standardmedia.co.ke/article/2000121041/800-soldiers-have-deserted-kenya-defence-forces-since-2011

That there were two observations from the Police Service suggests an actual 80 cases in 2013 and 2014 together in these 14 courts. That there was one observation from the Prison Service suggests an actual 40 cases in 2013 and 2014 together in these 14 courts. Nationally the figure would be higher for both institutions. The offence in the Police and in the Prison Service will be discussed below.

While the calculations above suggest a small number of cases, compared to the reference populations the numbers form a significant percentage of those populations. For example, the Kenya Defence Force comprises approximately 24 000 people.[221] If 330 cases occurred per year, this would be just more than 1 in 100 deserting (1%) every year.

Case Studies of Courts Martial in the Kenya Defence Force

Access to Court Martial records was not obtained for this study. Consequently an attempt was made to source case studies of persons convicted through the Court Martial Process. These persons were interviewed by members of the research team.

The evidence obtained and presented here thus comes from the interview process conducted with persons accused and convicted by Court Martial. It was not possible to cross-verify any of the information from official records as permission could not be obtained by the researchers to access the relevant records. In terms of fair trial rights, accused persons have the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.[222] It is unclear whether the accused persons themselves were denied access to these records.

Three of the case studies related to desertion, while one related to stealing ammunition and a further case related to attempted murder.

Of particular concern, is that 3 of the 5 cases demonstrate exceptionally long periods to conclusion of the case by Court Martial. Time periods in custody provided for in the KDF Act were exceeded. It is also arguable that their fair trial right "to have the trial begin and conclude without unreasonable delay" was unjustifiably limited.

221 Information supplied.

222 Section 50(5)(b)

The 5 case studies identified and their details are summarised below:

Table 1: Case Studies on Court Martial

No.	1	2	3	4	5
Age	32	31	36	-	-
Rank	Corporal	Senior Private	SPT (Senior Private)	Private	Private
Service Years	8	8	8	3	2
Offence	Desertion for 9 months	Stealing ammunition	Desertion	Desertion	Attempted Murder c/s 133 KDF Act ARW 220 of Penal Code
Sentence	3 years	6 years	8 years	Life	Life
Prison	Nakuru Main Prison	Naivasha Maximum Prison	Naivasha Maximum Prison	Kamiti Maximum Prison	Kamiti Maximum Prison
Arrest Date	-	-	2014/11/03	2014/06/20	2014/10/18
Conviction Date	-	-	2015/09/15	2015/09/22	2016/01/28
Days to Conviction	-	-	316	459	467

General observations applicable to all cases

Relatives are seemingly never allowed to be present during trial and may only appear during judgement, which takes place at night. This poses a danger to their lives since they are not accommodated in the barracks. Furthermore the right to a "public hearing" is infringed if members of the public are barred from attending. Such closed proceedings must be clearly justified and there was no suggestion of the reasons for closing the hearings in these cases.

During trial personal lawyers tend to be intimidated and seem not to be allowed space to represent their clients adequately. This may be contrary to the right "to have adequate time and facilities to prepare a defence". There is no option of cash bond/bail during trial, and convictions are generally without an option of a fine.

Case Study 1: Corporal A

Corporal A is an inmate in Nakuru prison who was convicted with three (3) others for deserting the force. Two of the others have since been transferred to Kericho and Rumuruti Prisons and one is

out on bond pending appeal. Corporal J deserted out of free will for 6 months from 18 September 2012 by working at Eluak Camp near Mandera.

Corporal A alleges that he wrote three letters within the months that he was away to the Army Commander requesting to be excused from duties since he was feeling that KDF (Kenya Defence Forces) work was not his calling. No replies were given to his letters and hence he decided to go back to work. On 2nd March 2013, he resumed his duties without pay. However, he was getting all his basic needs met since his bosses had instructions from "above" to provide the same to him.

The trend lasted until April 2014 when he was approached by the Military Police (Investigating Unit) to record a statement in respect of his act of desertion. Corporal A was officially charged in Lanet Court Martial on 21st October 2014 with the observance of a Senior Resident Magistrate, Nakuru Law Courts. The Magistrate was assisted by six senior military officers, who according to Corporal A, were the ones pressing the case.

The case took a period of two months and a hearing date was set every two weeks. The witnesses on this matter were the senior officers. Corporal A had hired an independent senior advocate who was denied access to the military court during the sessions. Corporal A was then offered a Military lawyer who was of a junior rank compared to the prosecutor and was therefore unable to represent him adequately without being seen as breaking the chain of command. This seems to be a clear infringement of the fair trial right "to choose, and be represented by, an advocate, and to be informed of this right promptly"[223].

Corporal A was found to have a case to answer and put onto defence just as in the normal courts. Corporal A opted to conduct his own defence. He called for the letters that he had written to his Army Commander requesting to be relieved off his duties to be brought forward. However, the commander denied having received such a letter from him and since he had no copies, he was left with no option but to accept the verdict of guilty as charged.

The senior officers were the ones who pronounced the verdict and the Magistrate read out the sentence.

Corporal A was convicted for 18 months under the KDF Act which provides for a maximum sentence of two years for the offence in question without an option of fine. He had no bail/bond during trial. He was committed in Nakuru main Prison to serve his sentence. He is due for release in July 2016. Corporal A was given a chance to submit mitigation grounds before sentence, though he felt, that was just a formality since the verdict had already been given.

223 *Section 50(2)(g) Constitution of Kenya 2010*

Case Study 2: Senior Private B

Senior Private B was accused of stealing ten thousand rounds of ammunition from the barrack's armoury. He did not have any links with any officer working in the armoury nor was he ever posted in the armoury section. During the annual audit at the barracks (in January 2015), it was discovered that 10,000 rounds of ammunition were missing and since someone had to the fall, Senior Private B alleges he was "fixed". This happened while he was out on leave, which had previously been denied to him on several occasions. He alleges a plan was hatched to teach him a lesson for insisting on taking a leave of absence.

Five days into his leave, three officers, two Majors and a Sergeant visited his home and informed him he was being recalled for questioning in respect to loss of 10,000 rounds of ammunition and that everyone was being questioned and after the questioning he would be allowed to go back home. He accompanied the six officers to the barracks. On arrival, he was immediately detained in the barrack's cells as a suspect.

He was put in detention for five (5) months and during that time, no information pertaining to the case was ever given, neither was he questioned. Senior Private B was later issued with a file and found therein the charge and all the witness statements and was later on taken to a Court Martial for trial. The file was issued on a Friday but he was arraigned in court on the Tuesday of the following week. If true, this seems to be clear infringement of the fair trial rights "to be informed of the charge, with sufficient detail to answer it"[224] and "to have adequate time and facilities to prepare a defence"[225].

The trial process consisted of five military senior officers and one Magistrate who was brought in to "merely to guide due process of the law" whatever outcome the senior officers arrived at. Senior Private B alleges fellow soldiers were bribed or paid to give false information. He got to know of the bribes through his friends at the barracks and when the issue was raised during trial. The Magistrate did nothing insisting, his role being to adopt the decision of the Senior Officers.

During the whole trial process, no other evidence was produced in court to show that Senior Private B committed the offence. Those culpable for the loss of the ammunitions were the senior officers and the deputy officer in charge of the barracks and so they needed a cover up and since he was on leave, Senior Private B alleges, he became the easiest of targets.

Senior Private B alleges coercion, undue influence and both physical and mental torture were used. If torture was indeed used this is contrary to the right "not to be subjected to torture in any manner, whether physical or psychological".[226]

224 Section 50(2)(b) Constitution of Kenya 2010

225 Section 50 (2)(c) Constitution of Kenya 2010

226 Section 29(d) Constitution of Kenya 2010

The trial took two months before it was brought to its conclusion in addition to the five months spent in detention.

Case Study 3: Senior Private C

Senior Private C alleges that after his company left Mt. Elgon in 2008 during Operation "Okoa Maisha" ("save lives") Military campaign, they went back to barracks in Nanyuki and he was sent to Soi, Isiolo where he was posted to the school of infantry.

After a month in Isiolo, he had a problem needing personal attention at home and he went without permission for 1425 days. In October 2012 October, he went back to Nanyuki barracks to return his work Identification Card so that he could be given back his national Identification Card. He was asked to report to his station at the Regimental Police, after which he was later sent to a senior officer for purposes of clearance. He was later asked to go home and wait for a call to pick up his National Identification. He was eventually called in 2014 – some 275 days later.

Upon his return, he was informed that he had been away for 2,150 days. He was escorted to the military police where he recorded a statement, and later placed in a military cell. On 3 November 2014, he was placed in close arrest (detention) until 2015. He had been in detention for a total of eight months, when the commanding officer recommended he be prosecuted. He went for the first hearing on 20 August 2015 and from the charges, was told he had deserted duties for 2,230 days, a charge that he pleaded not guilty to, as he was only away for 1,425 days.

He requested legal representation and was told that would not be useful as he would still get two years imprisonment, a mandatory conviction for deserting for over 90 working days. This seems to be a clear infringement of the fair trial right "to choose, and be represented by, an advocate, and to be informed of this right promptly"[227] and the right "to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly".[228]

He was sentenced to two years imprisonment and dismissed. He reminded the Court of the ten months in detention and requested for the same to be factored, but the request fell on deaf years. Recall that the KDF Act provides for 42 days in closed detention only.

Case Study 4: Private D

Private D was convicted for the offence of desertion contrary to Section 74(1) (a) of the Kenya Defence Forces Act. He was arrested on 20 June 2014 while in Nyahururu. Private D deserted

227 *Section 50(2)(g) Constitution of Kenya 2010*

228 *Section 50(2)(h) Constitution of Kenya 2010*

duty for a total of 674 days. Immediately prior to his desertion he was serving in the Kenya mission in Somalia. When his company was allowed to get back to the country he deserted duty. His unit was Nanyuki 1 KR. His trial was conducted at Kahawa barracks.

Private D claims to have requested leave many time while in Somalia which was denied while others got days off. He alleges that whenever he asked for leave he would be told that passes and leave have been disallowed.

On his arrest he was taken to Miharati Police Station where he spent one night and was handed over to Military Police. He was transferred to Kenyatta Military barracks in Gilgil where he spent 11 days. He was transferred to Nanyuki 1 KR where he stayed in custody until December 2014. He was then transferred to Kahawa Barracks but could not be accommodated as the guard room was full at the time. He was moved to DOD headquarters for one day then to Lang'ata Barracks for another 3 days. He was finally transferred to Kahawa Barracks when he stayed in closed custody until the end of trial and conviction. He says that the military cells can be said to be equivalent to the present cells at Kamiti Main Prison. Recall that the Act provides for a maximum of 42 days in closed detention.

During trial, Private D was provided with a defending officer (a Major). The defending officer's role is to ensure the accused gets copies of proceedings, copies of statements and all relevant provisions of the KDF Act. He was also told he was entitled to legal representation by a civilian counsel. Interpretation was provided from English to Kiswahili. The trial was presided over by a civilian officer, a magistrate from the judiciary. He was in a panel of five persons which included 2nd Lieutenant, Captain, Major and Lieutenant Colonel. The decision was made by majority vote, and the magistrate pronounces the verdict.

The prosecutor in Private D's case was the rank of Lieutenant Colonel. Private D spent a total of 15 months in closed custody before the trial was concluded, instead of the maximum of 42 days. The case experienced inordinate delays arising from the absence of the magistrate. The magistrate was changed and he was not given opportunity to start the trial afresh. The presiding magistrate role is diminished in the presence of the senior military officer.

Private D alleges that the trial was unfair as the witnesses did not voluntarily give their evidence. Private D believes he is entitled to half-pay during trial but his pay was stopped on 29th August 2012 after he absented from duty for a continuous 7 days without official leave. Private D avers that while the Act provides that one be declared a deserter after absence without leave for 90 days he was declared a deserter after seven (7) days.

Case Study 5: Private E

Private E was convicted for the offence of attempted murder contrary to section 133 of KDF Act as read with 220 of the Penal Code and sentenced to life imprisonment. Private E was at the time of arrest serving in Mandera Base where he was accused of accidental discharge.

The trial was conducted at Kahawa barracks. He was then transferred to Kahawa Barracks but could not be accommodated as the guard room was full at the time. He was moved together with Gakure to DOD headquarters for one day then to Lang'ata for another 3 days. He was finally transferred to Kahawa Barracks when he stayed in closed custody until the end of trial and conviction

Before being charged an accused person is given an abstract of evidence (equivalent to statements) at least more than 24 hours before charges are read. Private E's case was investigated by a Captain in the Military Police. During trial Private E was provided with a defending officer (Major) the defending officer's role is to ensure the accused gets copies of proceedings, copies of statements and all relevant provisions of the KDF Act. He was represented by a civilian counsel. Interpretation was provided English to Kiswahili.

The trial was presided over by a civilian officer known as advocate magistrate. He was in a panel of 5 persons who included 2nd Lieutenant, Captain, Major and Lieutenant Colonel. The decision was made by majority vote where the judge/advocate pronounces the verdict. The prosecutor in Private E's case was the rank of Lieutenant Colonel. Private E spent a total of 14 months in closed custody before the trial was concluded, instead of the maximum of 42 days. The case experienced inordinate delays arising mainly from absence of magistrate. The delays could constitute an unjustifiable limitation of the right "to have the trial begin and conclude without unreasonable delay".[229]

Private E also alleges that the trial was unfair as the witnesses did not voluntarily give their evidence. The defending officer would always indicate that he even as he discharged his duty; he had to protect his own job.

Private E's pay was stopped upon arrest. The trial court clerks were the rank of Sergeant and Corporal. The court allows civilians as shorthand writers. They record the proceedings and make the same available to parties. Private E alleges that the prosecutor was closely involved in the content of the proceedings and the final determination. This may be contrary to the right "to a fair and public hearing before a court".[230]

229 *Section 50(2)(e) Constitution of Kenya 2010*

230 *Section 50(1) Constitution of Kenya 2010.*

Conclusion: Courts Martial

Those convicted of desertion in these cases seem not to have realised the gravity of the consequences of their absence without leave. This suggests that recruits are not adequately informed of the terms of their enlistment and the permissible pathways of discharge before and during their term of enlistment.

A number of fair trial infringements are apparent in the case studies above, including failure to hold the trial in open court, denial of legal representation and inadequate time given to prepare. The long durations to trial and during trial, contrary to the fair trial right "to have the trial begin and conclude without unreasonable delay" seems to be related to the onerous composition of the Court Martial, which in the case of officers requires five officers and a Judge Advocate.

The role of the Judge Advocate in providing rulings only on matters of law leaves accused with the impression that this has not been an impartial and independent decision, as the ultimate decision on guilt is taken by army officers. The structure of the Act which leaves the Judge Advocate only deciding matters of law could be constitutionally contested on the grounds that the Court Martial is not a wholly independent or impartial court, as required in terms of fair trial rights. Currently officers both prosecute and decide on matters of fact, including the guilt or innocence of the accused.

Recommendations: Courts Martial

Recruits to the Kenya Defence Forces should be made aware of the gravity of being absent without leave for more than 90 days and of the terms of their enlistment, including the circumstances under which they may be discharged. The high rate of desertion reported suggests a lack of understanding of the terms of military service. The KDF Act and associated regulations should be available to all officers, which is not currently the case.

The reasons for desertion should be investigated, and if appropriate provision of psycho-social support should be considered. Whether Kenya is at war in Somalia or in peace keeping should be made clear, and what current situations constitute "active service", as desertion during "active service" implies a much harsher penalty. Recruits must be made aware of the implications.

Persons serving in the Kenya Defence Forces are entitled to all fair trial rights contained in the Constitution. Trial by an independent and impartial tribunal is fundamental to fair trial rights. The current structure of the Court Martial provided for in the legislation does not adequately address impartiality concerns and legislative amendment should be considered to enhance the role of the Judge Advocate.

Fair trial rights mean private defence lawyers should be allowed time and space to represent their clients to the best of their abilities without being intimidated. The KDF should be sensitised to this.

As a fair trial right, holding open court should be the rule and not the exception. Relatives should be allowed to attend court sessions, as proceedings are meant to take place in open court unless reasons of security apply. Judgements should and must be conducted during the day to enable the relatives visiting to return early to their respective places in safety.

Fair trial rights also require access to court records. Whether or not evidence is admissible, should be guided by the law and the Judge Advocate, rather than being a preserve of senior military officials, as required by the KDF Act itself.

Some guidelines on sentencing should be available, as two years is the maximum for desertion when not in active service and need not be applied in all instances.

Kenya National Police and Kenya Prison Service

The Constitution of Kenya provides for a right to equality, in particular that "Every person is equal before the law and has the right to equal protection and equal benefit of the law".[231]

Kenya's Employment Act seeks to declare and define the fundamental rights of employees and to provide basic conditions of employment of employees. The Employment Act, while providing that it binds the government, excludes a large number of government employees from its provisions, including the armed forces, as well as the Kenya Police, the Kenya Prison Service and the Administration Police Force.[232]

This is *prima facie* a limitation of the right to equality, as members of these entities are excluded from the protection and benefit of the Employment Act. Whether it is a justifiable limitation depends on whether the limitation meets the requirements of the limitations clause i.e. whether the legislated limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".

In addition, employees of the Kenya Police and Kenya Prison Service, like those in the Kenya Defence Force, are criminalised through the offence of desertion if they fail to come to work for a defined period. Employees of other government entities do not face desertion charges if they fail to come to work and instead are dealt with through the provisions of the Employment Act.

231 *Section 27(1) Constitution of Kenya 2010*

232 *Section 3 Employment Act 2007 as amended 2012*

Most democratic countries accept that different employment provisions apply to those serving in the military due to the specific nature of military service. This is particularly the case during times of military operation, whether peace-keeping or war. Most countries also provide for the offence of desertion from the military (although most require intention to desert to be shown for the offence to be proved). While some authoritarian countries (including Singapore) retain the offence of desertion in relation to those serving in the police, most modern democracies do not (including South Africa). Criminalising prison service employees is rarer.

It is arguable that the Constitution of Kenya requires consideration of whether the exclusion of the Kenya Police and Kenya Prison Service from the provisions of the Employment Act, and the continued retention of the offence of desertion in relation to these entities, is indeed a justifiable limitation of the rights of those employed by these entities.

Further, it should be considered whether their employment disputes ("disciplinary processes) should be dealt with in terms of the Employment Act rather than internal disciplinary processes, which effectively mandate punishments such as fines and confinement to barracks. Such disciplinary processes are held in relation to "disputes that can be resolved by the application of law" and these must in terms of fair hearing rights, be determined through a "fair and public hearing before a court" or another independent and impartial tribunal or body.[233] These disciplinary hearings are seldom obviously independent or impartial.

Desertion in the Kenya National Police

Desertion is defined as follow: "A police officer who absents himself from duty without leave or just cause for a period exceeding twenty-one days shall, unless the contrary is proved, be considered to have deserted from the Service." [234] This places the onus the accused to prove that he or she has not deserted, once the absence is shown. No intention is required.

Arrest is mandated: "Upon reasonable suspicion that any police officer has deserted the Service, any police officer may arrest that officer without a warrant, and shall thereupon take him before a magistrate having jurisdiction in the area in which such person deserted or was arrested."

The penalty may include imprisonment or a fine: "Any police officer who deserts from the Service commits an offence and is liable on conviction to summary dismissal or imprisonment for a term not exceeding two years or to a fine not exceeding one hundred thousand shillings." In the two observations recorded in the subordinate court dataset, both were withdrawn, one after 31 days, and the other after an unrecorded length of time.

233 Section 50 Constitution of Kenya 2010

234 Section 94 National Police Service Act 2011

Thus the offence is not dealt with via Court Martial or internal disciplinary processes but appropriately via the Magistrates' Courts. In addition to the right equal treatment and benefit of the law, it could be argued that the definition of the offence affects rights in relation to fair labour relations, and freedom and security of the person are affected by the provisions relating to arrest.

Presumably it would be argued the offence serves the purpose of "national security" as the National Police Force is listed by the Constitution as among the "National Security Organs" of Kenya.[235] On the other hand, it is not clear in which way it serves national security to have former police officers who have failed to report for duty serving terms of imprisonment with offenders.

• Limitation of rights in the Kenya National Police

Recall that the Constitution mandates additional limitation of rights in relation to the police. However the rights affected are not among those for which additional limitation is provided for in the Police Act. The limitations expressly permitted by the Police Act are as follows:

"A limitation of a right or fundamental freedom under this section shall relate to—

(a) the right to privacy to the extent of allowing—

(i) a person, home or property to be searched;

(ii) possessions to be seized;

(iii) information relating to a person's family or private affairs to be required or revealed; or

(iv) the privacy of a person's communications to be investigated;

(b) the freedom of expression to the extent of limiting the freedom to impart information for officers of the Service;

(c) the freedom of the media;

(d) the right to access to information to the extent of protecting the Service from—

(i) demands to furnish persons with information; and

(ii) publicizing information affecting the nation;

(e) the freedom of association to the extent of limiting the right of officers of the Service from joining or participating in the activities of any kind of association other than those authorized under this Act;

(f) the right to assemble, demonstrate, picket and petition public authorities to the extent of ensuring discipline in the Service; and

(g) the right to fair labour relations to the extent of prohibiting officers of the Service from joining and participating in the activities of a trade union and going on strike.

235 *Section 239 Constitution of Kenya 2010*

(h) An officer shall not be barred from voting at any election if, under the laws governing the said election, he or she has a right to vote.

The Police Act itself requires any such further limitations in the Police Act to be—

"reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and only for purposes of ensuring—

(a) the protection of classified information;

(b) the maintenance and preservation of national security;

(c) the security and safety of officers of the Service;

(d) the independence and integrity of the Service; and

(e) the enjoyment of the rights and fundamental freedoms by any individual does not prejudice rights and fundamental freedoms of others." [236]

• Internal Disciplinary Processes of the National Police Service

The National Police Service Act provides for an Internal Affairs Unit, which investigates and recommends action in relation to disciplinary offences. [237] The Act provides in Part X for offences against discipline by police officers, and disciplinary offences are described in Schedule 8 of the Act. The Act provides that a police officer "who commits a criminal offence, as against law shall be liable to criminal proceedings in a court of law"[238], in other words, are not subject to internal disciplinary processes but to the ordinary courts. Desertion (section 94) and torture (section 95) are defined as criminal offences in the Police Act itself. Section 89 initially provided for the following punishments for internal disciplinary offences. These were initially:

(a) reprimand;

(b) suspension;

(c) an order of restitution;

(d) stoppage of salary increments for a specified period of time, but not exceeding one year;

(e) reduction in rank;

(f) dismissal from the Service; or

(g) any combination of the punishments provided under this section.

236 *Section 47(2) National Police Service Act 2011*

237 *Section 87 National Police Service Act 2011*

238 *Section 88 National Police Service Act 2011*

Note there was initially no provision for fines but rather only for cessation of salary increments (increases). The penalties were thus broadly in line in terms of severity with those available in terms of the Employment Act for breach of the employment contract. However the National Police Service Amendment Act of 2014, which commenced in July 2014, added the following punishments:

h) confinement to barracks or police residential quarters;

(i) reduction of salary by not more than one third of the basic salary for a period not exceeding for three months; and

(j) a fine not exceeding a third of basic salary.

These additional punishments go beyond those in the Employment Act. Confinement to barracks is furthermore a deprivation of liberty which would ordinarily only be mandated in relation to a criminal offence. Fines and reductions of salary too are punishments outside of the normal contractual damages which apply in the employment relationship. Fair trial rights require such penalties to be adjudicated independently and impartially.

Thus the question remains whether the offence of desertion in relation to the police, and the provision for punishments such as these, infringe the right to equality before the law of those employed in the police.

Conclusion and recommendations: Police Discipline

The limitation of rights encompassed in the offence of desertion in relation to the Kenya Police may be unjustifiable. It should be reviewed whether it is in the interests of national security to retain this as a criminal offence or whether national interests would better be served by treating the issue as an internal disciplinary matter, with punishments such as dismissal, barring from further employment in the Public Service, and the like. Furthermore, the additional penalties for disciplinary infringements may also fall foul of the right to equality, to fair trial, and to freedom and security of the person.

It is recommended that the following be considered:

- Removal of the offence of desertion from the Police Act
- Inclusion of police in the Employment Act
- Deletion of the punishments of fines, salary cuts and confinement to barracks from the Police Act for internal disciplinary offences.

Desertion in the Kenya Prison Service

A deserter from the Kenya Prison Service is defined in the Prisons Act, 2009 as "a prison officer who absents himself from duty without reasonable cause for a period of twenty-one days or more".[239]

The legislation further provides that "any prison officer may, on reasonable suspicion that any person is a deserter from the Service, arrest such person without warrant and shall forthwith take him before a magistrate".[240]

Further, "any prison officer, who leaves the Service, withdraws himself from duty or is absent without leave or deserts shall be guilty of an offence and liable to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding six months, or to both such fine and such imprisonment".[241]

In the single observation of desertion from the Prison Service in the dataset, the case was withdrawn, but only after 24 days. If the single observation does represent 40 people over 2 years, in a prison service of approximately 20 000, this implies 1 in every 1000 facing a desertion charge each year from the prison service from these 14 locations alone.

This legislation pre-dates the Constitution. The Constitution does not provide for additional limitation of rights (by means of express limitation in law) of persons employed by the Kenya Prison Service, but only refers to the KDF and the National Police Service.[242] The Kenya Prison Service is also not defined to be among the National Security Organs of Kenya.[243]

Consequently it may be argued that the by creating the criminal offence of desertion in relation to the Kenya Prison Service and mandating arrest in relation to what is essentially a labour matter, the Kenya Prisons Act unjustifiably limits a number of the constitutional rights of prison officials, primarily their right to equal treatment and benefit of the law, but also the right to fair labour practices[244] to freedom and security of the person[245], and to fair administrative action[246].

These provisions could therefore be challenged constitutionally.

239 *Section 2, Kenya Prisons Act Cap 90, 2009*

240 *Section 10, Kenya Prisons Act Cap 90, 2009*

241 *Section 15(2) , Kenya Prisons Act Cap 90, 2009*

242 *See section 24(5) Constitution of Kenya 2010*

243 *See section 239 Constitution of Kenya 2010*

244 *Section 41, Constitution of Kenya 2010*

245 *Section 29, Constitution of Kenya 2010*

246 *Section 47, Constitution of Kenya 2010*

Internal Disciplinary Processes of the Kenya Prison Service

Internal offences and charge procedures are provided for by Prison Standing Orders and Prisons Act Chapter 90. (Note these are not Courts Martial). Example of internal offences include smuggling of contrabands, malingering, improper dressing, late reporting for duty, use of derogatory language, fighting, and reporting for duty while drunk.

Process

During the research process, the practice in relation to internal disciplinary matters was described as follows. Whenever a prison officer is alleged to have committed a disciplinary offence, the offence is recorded or entered in the journal book by the officer in charge of shift. The in-charge shift can be of any rank depending on the size of Prison Station. The Journal book is then forwarded to the Officer in Charge who may recommend investigations or dismiss the offence altogether. In the event investigations are recommended the Deputy Officer In charge takes over and once investigations are complete, charges may be preferred or not depending on the evidence gathered.

The adjudicating officer must be of the rank of an inspector or chief inspector. An accused officer is usually escorted in the proceeding room by officers of his/ her rank without his/her beret and belt. An officer of the rank of the Senior Sergeant is always present during the proceedings. Charges are read out in a language he/she understands by the prosecuting officer. A prosecuting officer is supposed to be of the rank of an inspector or chief inspector from another station, but that is not always the case. In many stations, the adjudicating officer doubles up as the prosecuting officer. Where this happens, this is clearly against fair trial rights, which require an independent and impartial tribunal.

An accused prison official will either plead guilty or not guilty or request for another adjudicating officer to preside over the case.

Once found guilty, depending on the charges, extra duties can be allocated, fines imposed resulting in deductions from the salary or warning is issued. In cases where interdiction is the verdict, the same must be approved at the regional and national level. If aggrieved by the decision, an accused officer can lodge an appeal through the officer in charge to the regional commander and if still not satisfied; he/she can lodge further appeal to the commissioner general.

Conclusion and recommendations: Prison Service Discipline

The criminal offence of desertion in relation to the Kenya Prison Service, which mandates arrest in relation to what is essentially a labour matter, unjustifiably limits a number of the constitutional rights of prison officials. Predominantly this is the right to equal protection and benefit of the law, but also, the right to fair hearing, fair labour practices[247] to freedom and security of the person[248], and to fair administrative action[249]. These provisions could therefore be challenged constitutionally. Furthermore, it is doubtful whether the levying of fines for internal disciplinary matters is a fair labour practice, or treats prison service employees equally to those in other employment, yet this is provide for in sections 17, 18 and 19 of the Act. Imposition of a fine is arguably a judicial function which should be carried out by a court of law or other independent and impartial tribunal. The Prisons Act and these practices should be reviewed in the light of constitutional rights.

In particular, it is recommended that the legislation be amended in the light of the Constitution. It is recommended that the following be considered:

- Removal of the offence of desertion from the Prisons Act
- Inclusion of the Prison Service in the Employment Act
- Deletion of fines as a result of internal disciplinary processes from the Prisons Act.

247 *Section 41, Constitution of Kenya 2010*

248 *Section 29, Constitution of Kenya 2010*

249 *Section 47, Constitution of Kenya 2010*

Chapter 3

Conditions of Detention Findings

3.1. Conditions of detention at selected Court Holding Cells findings

1. Introduction

The 2012/13 Annual Report of the Judiciary described court infrastructure as follows:

> Almost all the 111 court stations in the country were in a poor state of repair and in need of massive rehabilitation because of many years of underfunding and neglect. Some court buildings had been condemned as unfit for human occupation, while others had been constructed using poor quality materials and workmanship and not respond to the needs of court staff or its users.[250]

The demand for court infrastructure improvement is enormous. For example, in June 2011 there were 16 High Court buildings and the Constitution requires that there must be 47 High Court buildings, meaning that 31 new High Court building must be constructed.[251] There are currently 113 district courts, an increase of two from 2011. Supported by the World Bank, Kenya embarked on a major transformation of its judicial system in 2012 to improve key functions to promote better administration of justice and delivery of quality legal services to court users.[252] Part of this transformation includes the construction of new courts as well as the rehabilitation of existing ones.

Given this acknowledgment, it can be expected that court holding cells will in many regards not be able to ensure adequate accommodation, separation of categories (e.g. children and adults) and adequate access to ablution facilities, water and adequate ventilation. It is perhaps because detainees are held in court cells for a few hours at a time and never over night that shortcomings have been tolerated and not prioritised. The fact, however, remains that the international standards and Kenyan constitutional requirements do not make a distinction between court holding cells and other places of detention. In short, the right to dignity apply to all places of detention at all times. However, the fact that detainees spend a relatively short period at court holding cells do make a difference in what can reasonably be expected from such a facility. In view of this, a minimalist approach was followed looking at what are the essential requirements of such a facility.

Court holding cells are, as the name suggests, in court buildings and the Judiciary is responsible for its maintenance. The cells are, however, used and managed by the police and Prison Service for pre-trial detainees and sentenced persons facing further charges. Since detainees are under

250 The Judiciary (2013) Annual Report 2012/3 – The state of the judiciary and the administration of justice, p. 152.

251 The Judiciary (2013) Annual Report 2012/3 – The state of the judiciary and the administration of justice, p. 152.

252 'Kenya's Bold Move to Improve Performance in Delivery of Judicial Services' World Bank press release, 15 November 2012, http://www.worldbank.org/en/news/press-release/2012/11/15/kenya-bold-move-improve-performance-delivery-judicial-services

the control of the police it follows that the same (or higher) standards would apply to the court holding cells as to the police station cells. Persons held in court holding cells are covered by the People Deprived of the Liberty Act (2014), but it must be accepted that detention in a court holding cell is for matter of hours and that in some instances it will not be possible to meet all the requirements in the legislation, for example access to education. It would have assisted if the legislation made specific reference to court holding cells and spell out what the applicable standards are.

2. Methodology

The holding cells at 17 courts were inspected for the purposes of this survey as listed below in Table 1. Data was collected between 30 October 2015 and 17 February 2016.

Table 1

Court	Date of fieldwork
Garissa	23-Nov-15
Isiolo	11-Nov-15
Kakamega	04-Dec-15
Kisii	17-Nov-15
Kisumu	20-Jan-16
Lodwar	18-Nov-15
Makadara	10-Nov-15
Machakos	04-Dec-15
Marsabit	04-Dec-15
Meru	30-Oct-15
Milimani Children	09-Nov-15
Mombasa High Court	15-Dec-15
Murang'a	02-Nov-15
Nakuru	05-Nov-15
Nyeri	02-Feb-16
Tononoka Children	17-Feb-16
Voi	10-Nov-15

Structured interviews were conducted with officials based on a questionnaire-type interview schedule. Given that suspects are only intended to remain at the court cells to attend their trial on a specific day, the survey of court cells covered a limited number of key issues. The interview schedule covered the following themes:

- Segregation by age and gender
- Access to water and food
- Access to toilets
- Access to medical assistance
- Overall conditions

3. Profile of court cells

Table 2 presents the profile of persons being held in the surveyed court cells on the date that the fieldwork was conducted. As can be expected, the majority of persons held were adult males, some 80% with 12% adult females and the balance children and infants with their mothers.

Table 2

	Children and infants			Adults		
Court	**Male**	**Female**	**Infants**	**Male**	**Female**	**Total**
Garissa	1			24		25
Isiolo	1	1		24	3	29
Kakamega				7		7
Kisii	6		1	62	9	78
Kisumu				5		5
Lodwar						0
Makadara			3	33	5	41
Machakos				20	10	30
Marsabit				12		12
Meru						0
Milimani Children						0
Mombasa High Court	1		3	62	11	77
Murang'a				2		2
Nakuru			2	106	10	118
Nyeri				18	6	24
Tononoka Children						0
Voi		2		15	4	21

4. Segregation by age and gender

International instruments

Rule 11 UNSMR

Inadequate infrastructure at a number of the courts limit the extent to which adults and children can be held separately as well as men from women. The solution is often to keep children in the hallway leading to the cells (e.g. Isiolo and Lodwar). In the case of Lodwar the women are also kept in the hallway. Physical capacity to segregate appropriately by age and gender are problematic at the following courts: Garissa, Isiolo, Lodwar, Makadara, Makueni Machakos, Marsabit, Meru, Tononoka and Voi. At some courts the situation is dire, as is the case at Voi where there is only one cell.

5. Access to water and food

International instruments

Rule 22 UNSMR

Access to clean drinking water is problematic at most court holding cells. At Garissa and Kisii detainees do not have access to clean drinking water. From Mombasa it was reported that there is water, but it is not drinkable (brackish). Only four courts had taps in the cells, being Machakos, Meru, Murang'a and Nyeri. At the other courts the detainees are dependent on police officers to bring them water, either in a large container or in bottles, or to escort them to a public tap in the court compound.

At none of the courts, except Makadara, are detainees provided with food. At Makadara it appears that detainees in prison custody bring their meals with them when appearing in court. Reportedly detainees are dependent on relatives to bring food to them at the courts, or they will receive food at the prison or police station where they are detained. This is of course assuming that they will return to the police station or prison in time to receive a meal there. From Nakuru it was reported that the detainees can buy food from the police's food supplier.

From the above it is evident that there are notable problems with access to water and food at court holding cells. Even if detention is a matter of hours, access to clean drinking water is a basic necessity and should not be dependent on a police official to bring water or enable it to be brought into the cell.

6. Access to toilets

International instruments

Rule 15 UNSMR

From the data it is unclear whether toilets are located within cells at some of the courts. The overall arrangement appears to be that toilets are outside of the cells and detainees need to be escorted to use them. From Machakos and Voi it was report that there are toilets in the cells, but in the case of Voi that they are out of order. At Makadara there is only one toilet which is shared by men and women. However, the court-based police holding cells in Makadara Law Court has two toilets; one each at the disposal of women and men. The toilet may also be completely outside the secure area of the holding cell but still in the court compound, as is the case at Kakamega Court.

Inquiry was made into the functionality of the toilets and from four courts it was reported that the toilets do not function well, these being Isiolo, Makadara, Meru and Voi. In the case of Voi, the toilets do not work but there is a pit latrine. Isiolo reportedly suffer water shortages and at Meru vandalism was given as the reason for non-functioning toilets. All other courts reported that the toilets (or pit latrine in some instances) function well. Although the toilets may be functioning reportedly well, it does not mean that they are clean and free of odour. From only five courts was it reported that they are clean and free of odour, these being Meru, Murang'a, Nakuru, Nyeri and Tononoka. In two instances their cleaning is done by a contracted private company, being Meru and Nyeri. It is not clear why such a service exists at these two courts, but not at the others. Water shortages have an impact on the cleanliness of the toilets at Isiolo and Kakamega. From the other courts it was reported that the toilets were not clean and had a bad odour.

Access to a clean functional facility to relieve oneself is an absolute basic requirement and is essential for health and hygiene purposes. Water borne diseases can spread rapidly in prison populations and there is a real risk that pathogens may be transferred from unhygienic court cells to prisons.

7. Access to medical assistance

International instruments

Rules 24-35 UNSMR

From all the courts, except Meru, it was reported that if there is a medical emergency, the detainee will be able get medical assistance. In the case of Meru no explanation was provided. A number of responses indicate that the court must make an order for the detainee to be taken to hospital. In some instances an ambulance will be called whilst in other, reliance is placed on police or prisons department vehicles to transport the detainee.

8. Overall conditions

International instruments

Rule 13-14 UNSMR

The court holding cells were assessed for cleanliness and ventilation. Nine were assessed to be clean and well-ventilated and the other described as dirty and poorly ventilated resulting in a bad odour. From Machakos it was reported that the cells are clean but that the detainees are dirty. The Marsabit holding cells were described as 'dirty and muddy'. At Mombasa High Court the holding cells are in the basement creating ventilation problems.

Lighting is problematic at a number of court holding cells. From Garissa it was reported that there are no artificial light and that natural light is insufficient. As noted above, in the case of Mombasa the cells are in the basement and there are fluorescent lights installed and functioning. At Nakuru, three of the nine cells have artificial lighting and the others are in darkness as the cells are also, like Mombasa, in the basement. From the other courts it was reported that natural light was sufficient to read by.

The above indicates that there are a number of issues at various court cells that require attention. Ventilation, lighting and basic space requirements need to be addressed.

9. Conclusion

Every year thousands of people spend shorter or longer periods in court holding cells waiting for their cases. It is inevitable that this volume of people have an erosive effect on infrastructure. Court holding cells are not designed and fitted to detain people for long periods and the intention is that they will arrive and leave on the same day. However, it remains necessary to set clear standards in respect of court holding cells. Areas of focus include but are not limited to the following:

- feeding of detainees (food and water)
- provision of emergency medical services
- separation of men from women as well as other categories such as first time offenders versus repeat offenders
- separation of children from adults
- provision of clean sanitation facilities.

Despite these design and utilisation features it was found that infrastructure is lacking in a material manner and that detainees are held in some instances in place where they lack access to clean water, clean functional toilets, fresh air, and food. Court cells in particular do not cater for proper separation of categories and women and children are often held in hallways. The fact that

detainees do not stay for very long in the holding cells is, however, no excuse for conditions that amount to an affront to human dignity.

It is recognised that the Kenyan government has embarked on an infrastructure improvement programme, but this needs to be expedited. It is also the case that many people appear in court, after having spent time in custody, on charges that probably did not warrant an arrests, or at least not detention. They could have been granted bail or some other measure of conditional release following arrest or shortly thereafter.

There appears to be some uncertainty as to which institution is responsible for the management of courts cells with respect to detainee management and the relevant regulatory framework. It is used by both the police and KPS, but a regulatory framework in respect of minimum standards appear to be absent. Presumably the Persons Deprived of their Liberty Act applies but little evidence was found that this is being adhered to. A shortcoming in the Persons Deprived of their Liberty Act is that it does not identify who is responsible for particular categories of detained persons and consequently does not state that, for example, the local head of police is responsible for the well-being of court cell detainees. This needs to be addressed.

It is furthermore recommended that the Ministry of Health conducts regular inspection of court cells to ensure that they are hygienic and safe for human occupation.

As part of infrastructure improvement, efforts should be made to ensure that legal representatives are able to consult their clients in private.

Chapter 3.2

Conditions of detention at selected children remand homes findings

1. Introduction

Children's Remand Homes (CRH) are established in terms of section 50(1) of the Children's Act by the Director of Children's Services. A child is a person under the age of 18 years.[253] It is furthermore the task of the Director of Children's Services to:

- provide care, guidance and other assistance and treatment for children who have been arrested or remanded in police custody or in children's remand homes, and assist children through court proceedings and children's hearings;
- supervise all children's rehabilitation centres, children's homes and remand homes and safeguard and promote the welfare of any children admitted therein;
- provide quarterly reports on the management of children's rehabilitation centres, children's homes and remand homes.[254]

The Director is furthermore responsible for the supervision of all CRH (as well as rehabilitation schools) and to this end shall periodically visit them or cause them to be visited.[255] Children in

253 *S 260 Constitution of Kenya, Definitions, Children's Act.*

254 *S 38(2) Children's Act.*

255 *S 51 Children's Act.*

conflict with the law may be remanded to a CRH by virtue of paragraph 10 of Schedule 5 to the Children's Act – the Child Offenders' Rules.

The Constitution of Kenya also sets out fairly detailed and specific rights for children in article 53 with the overarching principle that 'A child's best interests are of paramount importance in every matter concerning the child.'[256] More specific to the subject matter of this report, the Constitution guarantees children:

- access to free and compulsory basic education
- access to basic nutrition, shelter and health care
- to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour
- not to be detained except as a measure of last resort, and when detained, to be held for the shortest possible period; separate from adults and in conditions that take account of the child's sex and age.[257]

In early 2016 the UN Committee on the Rights of the Child (CRC) released its Concluding Observations following the submission of a combined State report.[258] The CRC expressed concern about the following:

- limited progress has been achieved in establishing a functioning juvenile justice system;
- Children are still treated as adults and held together with adults in some places of detention
- Insufficient information on personnel with specialized training in juvenile justice, including lawyers, judges, prosecutors and public defenders, and correctional officers;
- Insufficient information was submitted on legal assistance provided to children in conflict with the law, diversion programmes, and alternatives to detention, such as community service, and probation.[259]

With regard to general capacity as well as detention, the CRC recommended the following:

- Systematically build capacity and enhance skills and specialization of Children Court Magistrates and prosecutors and all relevant actors in the juvenile justice system,

256 Article 53(2) Constitution of Kenya.

257 Article 53(1) Constitution of Kenya.

258 The Committee considered the 3rd, 4th and 5th periodic reports of Kenya (CRC/C/KEN/3-5) at its 2085th and 2087th meetings (see CRC/C/SR. 2085 and 2087), held on 21 January 2016, and adopted the following concluding observations at its 2104th meeting (see CRC/C/SR.2104), held on 21 January 2016.

259 CRC/C/KEN/CO/3-5 para 74 (a-d).

including law enforcement personnel and social workers, on national and international standards on juvenile justice;[260]

- In cases where detention is unavoidable, ensure that adequate facilities exist for children in conflict with the law, and that detention conditions are compliant with international standards, including with regard to access to education and health services.261

2. Profile of CRH

The sampled CRH are not new, as shown in Table 1 below. The oldest became operational in 1957 and the newest in 2008. Most of the CRH's were detention facilities during colonial times and the actual dates of construction are not accurately known. The years in the table below reflect when the institutions became operational.

Table 1

CRH	Year Became Operational
Nairobi	1957
Nakuru	1957
Kakamega	1965
Eldoret	1964
Manga/ Kisii	2008
Murang'a	
Nyeri	1960
Likoni	
Kisumu	1968

A total of nine CRH were surveyed as listed in Table 2 below. Interviews were conducted with an official using a structured questionnaire. All the data collected were collated and used as the basis for the description and analysis to follow.

Table 2

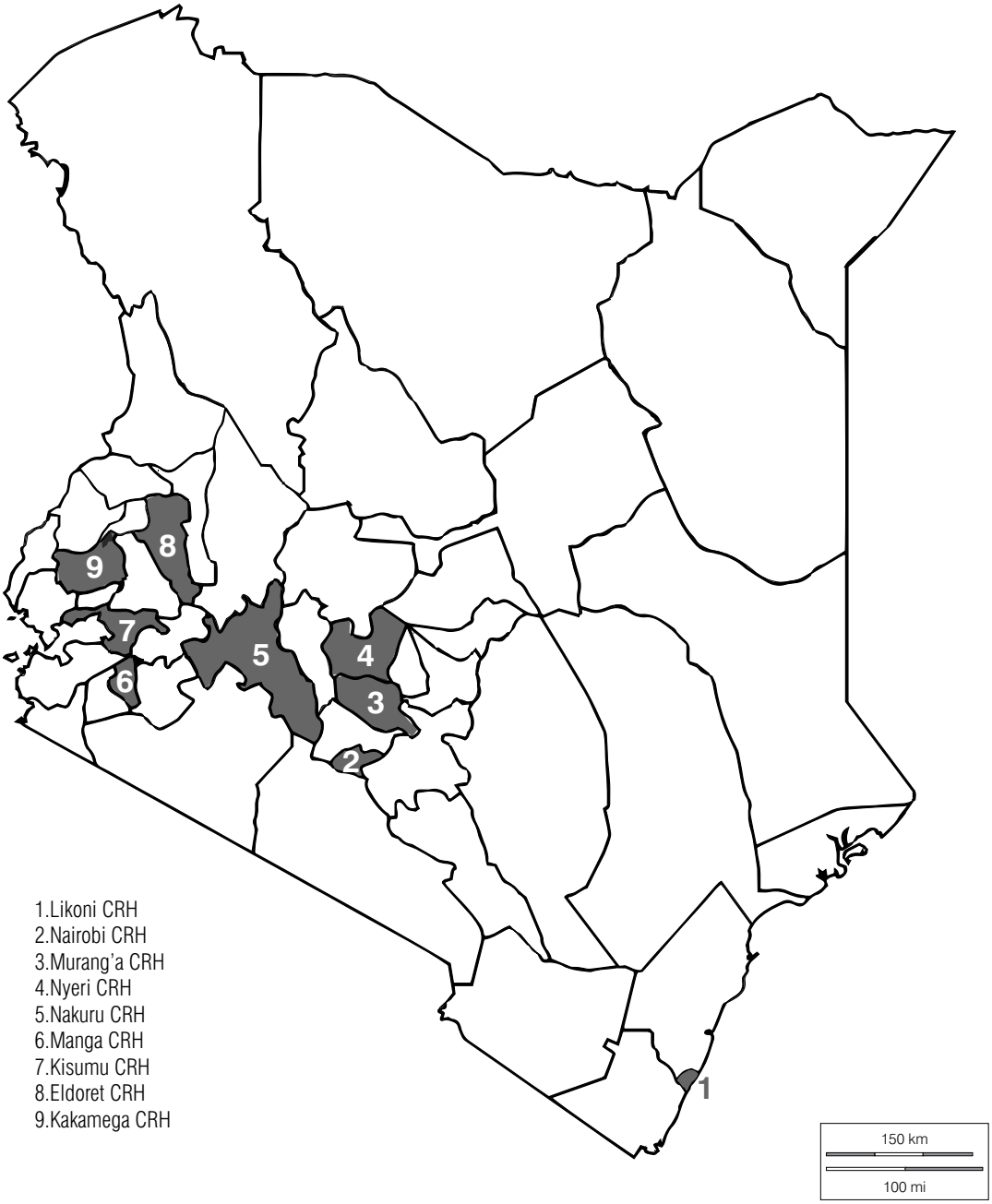
CRH	Town and County	Date of Fieldwork
Eldoret	Eldoret, Uasin Gishu	1/12/2015
Kakamega	Kakamega, Kakamega	25/11/2015
Kisumu	Kisumu, Kisumu	8/12/2015
Likoni	Likoni, Mombasa	16/2/2016
Manga	Manga, Nyamira	4/12/2015
Murang'a	Murang'a , Murang'a	1/12/2015

260 *CRC/C/KEN/CO/3-5 para 75 (c).*

261 *CRC/C/KEN/CO/3-5 para 75 (f).*

Nairobi	Nairobi, Nairobi	2/12/2015
Nakuru	Nakuru, Nakuru	3-4/12/2015
Nyeri	Nyeri, Nyeri	9/12/2015

CJS AUDIT 2015(CASE FLOW MANAGEMENT AND CONDITIONS OF DETENTION)
REMAND HOMES AUDIT SITES



The following themes were covered through the interviews:

- Right to physical and moral integrity
- Property belonging to a child
- Right to adequate standard of living
- Adequate food and drinking water
- Clothing and bedding
- Health care
- Safety and security
- Contact with the outside world
- Complaints and inspection procedure
- Female children in the CRH
- Support services for pre-trial children
- Staff skills and training
- Management

Table 3 presents basic data on each of the CRH. Eldoret had the highest number of pre-trial detainees at 83, followed by Likoni at 77. The overwhelming majority of children detained are boys. However, at Kisumu and Likoni more than a quarter of children detained were girls. This is reportedly a result of the fact that children in need of care as well as children in conflict with the law are detained there.

Of great concern is that some children had been held at the respective CRH for long periods and well in excess of legal prescripts. The longest was at Kakamega where a child had been there for 49 months, or four years and one month. Similar durations were also found at Likoni, Nakuru and Eldoret. These durations were found despite the fact that the Child Offenders' Rules are clear that custody may not exceed six months in the case of an offence 'punishable by death' and three months in the case of any other offence. The reference to the death penalty is confusing as the Children's Act itself prohibits the imposition of the death penalty on a child.[262] Nonetheless, the conclusion to be drawn from this is that even for the most serious offences the detention period in a CRH may not exceed six months. With the exception of Kisumu (no response) there was at least one child in each of the CRH that had exceeded the six month period by a significant margin. The Child Offenders' Rules set time limits for how long a case against a child can continue, requiring that:

262 S 190(2).

(2) Where the case of a child appearing before a Children's Court is not completed within 3 months after his plea has been taken, the case shall be dismissed and the child shall not be liable to any further proceedings for the same offence.

(3) Where, owing to its seriousness, a case is heard by a court superior to the Children's Court, the maximum period of remand for a child shall be six months, after which the child shall be released on bail.

(4) Where a case to which paragraph (3) of this rule applies is not completed within twelve months after the plea has been taken, the case shall be dismissed and the child shall be discharged and shall not be liable to any further proceedings for the same offence.[263]

From the data collected it is not known whether a plea had been entered, but it would be equally disturbing if a plea had not been entered after such a lengthy time lapse.

Table 3

CRH	Total Awaiting Trial	Male	Female	% Female	Longest on Remand in Months
Eldoret	83	77	6	7.2	35
Kakamega	38	36	2	5.3	49
Kisumu	71	47	24	33.8	24
Likoni	77	62	20	26.0	41
Manga	43	38	5	11.6	12
Murang'a	24	23	1	4.2	18
Nairobi	4	4	0	0.0	12
Nakuru	28	22	6	21.4	40
Nyeri	2	0	2	100.0	12

3. Right to physical and moral integrity

Key international instruments

- Art. 5 of the Universal Declaration of Human Rights (UDHR);
- Art. 7 of the International Covenant on Civil and Political Rights (ICCPR);
- Arts. 2 and 10 of the UN Convention against Torture, Cruel Inhuman and Degrading Treatment or Punishment (UNCAT);
- Arts. 2 and 3 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

263 *Para 12 Child Offenders' Rules.*

- Rule 1, 6-10, 36-49, 54, 71 and 111-120 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Principle 1 of the Basic Principles for the Treatment of Prisoners
- Principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Principle 1 of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- Rule 87(a) of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

3.1 Prohibition of torture

The Children's Act is silent on what the applicable standards of care are at CRH and as far as could be established, regulations to this effect have not been gazetted.[264] From all nine CRH it was reported that all staff had received training on the absolute prohibition of torture and at two of the CRH (Eldoret and Nairobi) it was reported that there has been refresher training to support the induction training.

Deaths at CRH are rare, but it was reported from all nine that if this were to happen that it must be reported to the police who will investigate.

3.2 Duration of custody

In section 2 above some basic data on the duration of custody has already been presented and the following builds on that. Section 36A(4)(c) of the Criminal Procedure Code (CAP 75) allows a court to remand a person to custody and section 36A(7) places a limit of 30 days on the period of remand. However, the Child Offenders' Rules do not place such a limitation for renewal of the warrant on the Court. The question therefore arises as to whether courts read section 36A(7), setting the 30-day limit, together with paragraph 10 (placing an overall limit). At none of the CRH it was found that any children were being detained on an expired warrant.

A child who has been charged with a capital offence and his /her matter is before a court superior to a children's court can only be remanded for a maximum period of six months and for matters before a children's court or non- capital offence, a child can only be remanded for three months. Immediately after taking plea, a capital case relating to a child should take six months, failure of which the child ought to be released unconditionally without being liable to further prosecution on

264 There is a proposed bill on prohibition of torture but it has only been deliberated upon at departmental level. Section 13 of the Children Act provides for protection of children from all forms of abuse i.e. physical, psychological, neglect all any form of exploitation. Section 18(1) of the Children Act provides that no child shall be subjected to torture, of cruel treatment or punishment, unlawful arrest or liberty, deprivation of liberty.

the same offence. For cases in a court superior to a children court, the period is 12 months and non- capital offences is three months.

3.3 Record-keeping and notification

The Persons Deprived of their Liberty Act (2014) require that the following records be kept:

- personal details of the person detained , including name, age and address;
- physical condition of the person detained , held in custody or imprisoned;
- reason for the imprisonment; steps taken to ensure that the person arrested or detained is subjected to due process of the law; and
- the medical history of the person detained, held in custody or imprisoned.[265]

At all the CRH it was confirmed that a register is kept recording the name of the child, reason for detention, date of admission, date of release or transfer, and contact details or parents or guardian (unless unknown).

There is some inconsistency in the responses as to whether the CRH has a responsibility to contact the child's parent or guardian. From Nakuru it was reported that it is the responsibility of the arresting officer who will liaise with probation services to notify the parent or guardian of the arrest and detention. A number of CRH also reported that some children do not disclose the contact the details of their parent or guardian, or it may be a case that they do not know if they had been living on the streets for a time. The Persons Deprived of their Liberty Act (2014) states the following in respect of notification:

> 21(1) Where a child is detained or deprived of liberty in execution of a lawful sentence, the competent authority shall within forty eight hours notify a parent or guardian of the child of such detention or deprivation of liberty.

A 'competent authority' is furthermore defined as 'any person, officer or body responsible for or dealing with matters relating to persons deprived of liberty'.[266] The implication thus being that all officials along the route of the criminal justice process are equally responsible to notify the child's parents, or at least to verify that such a notification has already happened.

265 *Section 3(3).*

266 *Definitions Persons Deprived of their Liberty Act (2014).*

3.4 Information provided

It was also reported from all the CRH that all children are oriented about their rights and responsibilities upon admission as well as how to lodge a complaint and to access services. The exact content of this orientation was, however, not reviewed and this may be an area for further investigation. In support of the orientation, the rules of the CRH are displayed either in the dormitories and/or in the dining hall, except at Likoni where they are not displayed. Six of the CRH reported that the children receive written information about their rights and responsibilities upon admission.

3.5 Supervision

While all the CRH reported that children are supervised at night it was not always clear who does the supervision. From some CRH it was reported that this is done by security staff only and at others security staff with care staff. It would be cause for concern if it was only security staff, especially if they had access to the dormitories. It is necessary to ensure that there is consistency in practice and that the safety of children is ensured at all times.

4. Property belonging to a child

Key international instruments

- Rule 67 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rule 35 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL)

It was confirmed that at all CRH the valuables and cash children arrived with are recorded in a property register or cash register, as the case may be, and that the children sign for this. This is compliant with the Persons Deprived of their Liberty Act (2014).[267] Upon release or transfer, the child will again sign for his or her property upon receipt. If a child arrives with medication, this is also kept securely and ensured that the prescription is followed. In some cases it may be necessary to verify the use of the medication with a medical practitioner.

5. Right to adequate standard of living

Key international instruments

- Art. 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Rule 12, 15, 18, 19, 22 and 23 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)

267 *Section 9(1).*

- Rules 31-34, and 37 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL)
- Art. 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

5.1 Adequate accommodation

The overall condition of buildings was reported to be acceptable. Specific enquiry was made whether there were any cracks in the walls where insects may hide or enter and if the roof was leaking. At Manga it was noted that there are cracks in the walls and that the roof is leaking and at Nyeri that the buildings are in an acceptable condition but are old and in need of renovation. Given the age of some of the buildings, infrastructure decline is probably prevalent.

Table 4 presents a sample from the majority of CRH regarding the dormitory size and occupation. Fieldworkers were requested to randomly select and take the necessary measurements as well as establish the number of children sleeping in that dormitory. Despite the requirement in the Persons Deprived of their Liberty Act (2014) that no detained persons shall be kept in 'crowded conditions'[268], it was only at Manga where it was found that floor space per child was sufficient at 7.2 m^2 per child. At the others it was well below what can accepted as reasonable and Murang'a is of particular concern at less than one square metre per child.

Table 4

CRH	Occupants	Length	Width	Square Metres	Square Metres Per Person
Eldoret	30	10	5	50	1.7
Kakamega	28	12.2	6.1	74.42	2.7
Kisumu	No response	5	3	15	
Likoni	20	12	6	72	3.6
Manga	10	9	8	72	7.2
Murang'a	24	5	3	15	0.6
Nairobi	20	12	5	60	3
Nakuru	28	7	5	35	1.3
Nyeri	26	12	5	60	2.3

From all except two of the CRH it was reported that the outside area where children play and engage in activities is clean, dry and free from obstacles that may cause injury. From Murang'a it was reported that the outside area becomes muddy when it rains and from Nyeri that the outside area is too small for the number of children detained there. Internal areas as well as regularly used external areas were also reported to be clean, free of rubbish and having no stagnant water.

268 Section 12(1).

5.2 Ventilation and light

Ventilation of dormitories was reported to be good at all the CRH and that windows are secured with either bars or mesh. All the dormitories are fitted with artificial light and during daylight hours natural light is also of an acceptable quality.

5.3 Vectors of disease

At all the CRH it was enquired if there were any signs of mosquitoes, lice, fleas, ticks, mites, flies, bed bugs, cockroaches and rodents as these animals are associated with a number of illnesses, afflictions and diseases. Apart from mosquitoes being a general problem, especially at night, none of the other vectors were reported. From five of the CRH (Eldoret, Kakamega, Likoni, Manga and Nakuru) it was reported that fumigation is done every two to four months, although this is at times subject to funding implying that it may be less regular. Mosquito nets are also available at Kakamega, Kisumu, Likoni, Manga and Nyeri. However, in the case of Kisumu it was reported that the nets are in short supply. From Murang'a it was reported that no steps against vectors are taken because there are none, not even mosquitoes. In the case of malaria, the prevalence of the diseases in Murang'a County is significant lower than the national figure lending support to the response – 1479/100 000 compared to national figure of 20 252/100 000 of the population.[269]

5.4 Ablution facilities

From all the CRHs it was reported that there are adequate toilets for the number of children detained, although in some instances the ratio of toilet per children is rather high. For example, at Kakamega it was one toilet to 25 children and at Kisumu there are two pit latrines for 47 boys. Where information was available, there are also toilets in the dormitories but greater reliance is placed on the external pit latrines. The toilets at Likoni CRH have been vandalised and not yet repaired due to lack of funds. At Nairobi CRH the toilets are also 'not in a good condition' and must be flushed manually.

Four of the CRH were observed not to have showers, being Kakamega (due to water rationing), Likoni (vandalised), Nairobi and Nyeri (no showers fitted). It appears in these instances that children use basins and buckets to wash. Soap is provided at all the CRHs.

All the CRHs reported that they are able to ensure that children's hair are properly maintained.

269 Department of Health (2015) Health at a glance – Murang'a County, http://www.healthpolicyproject.com/pubs/291/Murang'a%20County-FINAL.pdf

5.5 Adequate food and drinking water

The Persons Deprived of their Liberty Act (2014) states the following regarding diet in places of detention:

> (1) A person deprived of liberty shall be entitled to a nutritional diet approved by competent authorities.
>
> (2) A diet under subsection (l) shall take into account the nutritional requirements of children, pregnant women, lactating mothers and any other category of persons whose physical conditions require a prescribed diet.[270]

All CRH reported that they serve three meals per day. Variation in the diet is possible, but may be restricted by available funds. Seasonal fruits and vegetables are also available to vary the diet. None of the CRH reported any problems regarding the regularity of food supplies. From at least six CRH it was reported that food is prepared on an open fire or using a *jiko* (a portable charcoal burning stove). Children are supplied with plates, cups and spoons with which to eat their food. Breakfast typically consists of porridge (*uji, wimbi*) and tea or bred with tea. Lunch is typically *ugali* (stiff maize porridge) or rice with vegetables or *githeri* with beans (samp and beans) and vegetables. Meat and fish were not reported to feature prominently in the diet reported. Dinner is very similar to lunch.

Medially prescribed meals appear to be available at all facilities surveyed. Two other CRH noted that medically prescribed meals may be subject to available funding. Only three CRH reported that they are able to abide by religious dietary requirements, being Eldoret, Kakamega and Nyeri.

It was enquired whether children can receive or purchase any food, including smaller items such as biscuits, canned food, and fruit. Practice appear to be inconsistent, with Eldoret and Kisumu CRH prohibiting it and others not permitting cooked food, but smaller items such as biscuits are allowed.

None of the CRH, except Kakamega, reported any problems with the supply or quality of water. From Kakamega it was reported that the supply of water is dependent on rainfall and when there is a shortage, assistance is sought from the nearby prison. At five of the CRH it was observed that there are no taps inside dormitories and water is stored in containers (e.g. bucket) for use during the night.

270 Section 13.

5.6 Clothing and bedding

The Persons Deprived of their Liberty Act (2014) states the following regarding clothing and bedding in places of detention:

1. A person deprived of liberty shall be provided with beddings sufficient to meet the requirements of hygiene and climatic conditions.
2. A person deprived of liberty shall be provided with clothing sufficient to meet requirements of hygiene, climatic conditions and special needs on account of gender and religion.
3. The Competent Authority shall ensure that beddings and clothing referred to in subsections (1) and are maintained in good repair and hygienic conditions.[271]

All children admitted to a CRH are issued with two uniforms and they are not permitted to wear their own clothing except when they appear in court. From the majority of CRH it was reported that children have sufficient clothing for the prevailing climate as they are issued with sweaters for the colder months. The exception was Eldoret where children are required to wear their own clothing when the weather turns cold due to insufficient stock. Soap is provided to children to keep their clothing clean. All the CRH reported that the children are supplied with sufficient bedding.

5.7 Access to sport and religious services

Access to education appears to be restricted to Kisumu, where there are three hours of schooling three times per week. Some recreational activities are arranged, such as yoga classes at Nairobi CRH. From Eldoret it was reported that due to a lack of security personnel, the children cannot use the field outside the facilities grounds.

Access to religious services were reported to be adequate and the CRHs receive visits from religious workers once to twice per week.

6. Health care

Key international instruments

- Art. 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Rules 24-35 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Principle 9 of the Basic Principles for the Treatment of Prisoners
- Art. 6 Code of Conduct for Law Enforcement Officials

271 *Section 14.*

- Rules 49-55 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL)
- Principles 1-6 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

The Persons deprived of their Liberty Act (2014) sets the following basic requirement in respect of access to health care:

> A person detained, held in custody or imprisoned is, on the recommendation of a medical officer of health, entitled to medical examination, treatment and healthcare, including preventive healthcare.[272]

6.1 Screening and access to healthcare

None of the CRH reported that they do a health screening by a nurse or doctor of newly admitted children. The absence of a screening examination is due to the fact that none of the CRH have appointed nurses or doctors, nor do they have the equipment to render basic medical services. The approach appear to be more reactive in the sense that if the child complains of a health problem, then he or she will be taken to the nearest hospital for examination and treatment. The same seems to apply in respect of a screening for contagious diseases – the child is taken to hospital when there are observable symptoms. Screening for drug and substance abuse appears to be done inconsistently. From Murang'a it was reported that this is a legal requirement, but from Eldoret it was reported that screening is not done but drug and substance abusers are identified through observation. A similar response was recorded in respect of Kakamega where it was noted that such individuals are taken to the local hospital. It could not be confirmed whether staff administering admissions are in fact trained to screen for drug and substance abuse. Similar responses were recorded in respect of screening for behavioural problems, history of mental health problems and risk of self-harm, and it is apparent that no uniform protocol in this regard is applied. In the case of a history of mental health problems (and history of mental health treatment), it appears that at least in some instances (e.g. Eldoret) such information is not forwarded to the CRH if such a history indeed exists on record.

Access to health care of an acceptable quality appears to be available although it was reported from at least one CRH (Eldoret) that the required medication may not be always available at the state hospital and then it is sourced from another facility, such as a pharmacy etc. All the CRH except Manga reported that the children have access to specialist medical care (e.g. dentist) if this is needed. No additional information was recorded in the case of Manga as to the reasons for

272 Section 15.

lack of access to specialist medical care. In respect of access to psychiatric care, it was reported from all the CRH that such care is available except at Kisumu. However, it was later established that there is a psychiatric ward at in Kisumu County referral hospital also known as Jaramogi Oginga Odinga Teaching and Referral Hospital.

It was enquired what the most pressing medical problems are and the following were noted: malaria (Kakamega), headaches, chest problems, TB (Nyeri) and scabies (Nairobi and Nakuru). In the case of scabies it appears that reference was made to children who arrive at the CRH with scabies and it is not a problem within the facility itself. Such cases are treated accordingly at the local hospital.

6.2 Inspection by health care practitioner

It was enquired if the facility is regularly inspected by a health care practitioner to verify the suitability of food, standard of hygiene, cleanliness, sanitation, lighting, ventilation, clothing, bedding, and opportunities for exercise. Four CRH reported that this does not happen or that it is seldom and/or infrequent – these CRH being Eldoret, Kisumu, Murang'a and Nyeri. From Nakuru and Nairobi it was reported that such inspections happen fortnightly and quarterly at Manga. The regularity of inspections at other CRH was not determined. However, as shown in Table 5 below, the availability of health care personnel in Nyamira County, where Manga is situated, is notably lower than the rate for the country as a whole and this may contribute to the lack of inspections.[273]

Table 5

Profession	County 2012	County 2013	Kenya 2013
Nurses Per 100,000 People	40	38	55
Doctors Per 100,000 People	2	5	10
Clinical Officers Per 100,000 People	9	18	21

6.3 HIV/AIDS and TB

According to UNAIDS, the HIV prevalence rate in Kenya for people age 15 to 49 years is 5.3% and there are some 170 000 children under the age of 15 years who are HIV positive and some 650 000 orphans (aged 0-17 years) due to AIDS.[274] The nine CRH reported varied measures taken to prevent the spread of HIV and TB. The overall approach appear to emphasise reaction as opposed to prevention. Only from Murang'a, Nairobi and Nyeri were it reported that there is education initiatives by health care personnel (Murang'a and Nyeri) and peer sex education

273 Department of Health (2015) Health at a glance – Nyamira County http://www.healthpolicyproject.com/pubs/291/Nyamira%20County-FINAL.pdf

274 UNAIDS: Kenya (2014) http://www.unaids.org/en/regionscountries/countries/kenya

(Nairobi). All children qualifying for ARV treatment have such access. TB treatment appears to be accessible when such a diagnoses has been made. Two CRH (Kisumu and Likoni) reported that they are not able to provide a special diet to children on ARV treatment due to lack of funds. Given the importance of continuity of treatment when receiving ARV or TB treatment, it appears that at all the CRH the necessary steps are taken when children are transferred or released.

6.4 Children with disabilities

It is uncertain how many children with disabilities there are in Kenya. The 2009 Census reported that 3.5% of the Kenya population live with disabilities.[275] None of the CRH reported that they had any measures in place to deal with children with physical or psycho-social disabilities. It appears that such children are referred to other institutions, or they are committed elsewhere by the courts and are not referred to CRH (i.e. Nakuru). This is an issue requiring further investigation.

7. Safety and security

Key international instruments

Rules 28-29, 63-65 and 66-71 UN Rules for the Protection of Juveniles Deprived of their Liberty

7.1 Emergency evacuation procedure

Enquiry was made into whether the CRH have emergency evacuation procedures in place in, for example, the case of a fire. Five of the nine reported that there is no emergency evacuation procedure in place and the balance gave varied and rather unclear answers. It is reason for concern that emergency evacuation procedures do not appear to be in place. The following sets out basic requirements of such a plan:

- Conditions under which an evacuation would be necessary.
- Conditions under which it may be better to shelter-in-place.
- A clear chain of command and designation of the person in your business authorized to order an evacuation or shutdown.
- Specific evacuation procedures, including routes and exits.
- Procedures for assisting visitors and employees to evacuate, particularly those with disabilities or who do not speak English.
- Designation of what, if any, employees will remain after the evacuation alarm to shut down critical operations or perform other duties before evacuating.

275 *African Disability Rights Yearbook 'Kenya' http://www.adry.up.ac.za/index.php/2014-2-section-b-country-reports/kenya*

- A means of accounting for employees after an evacuation.
- Special equipment for employees.
- Appropriate respirators.[276]

7.2 Separation of sexes and age groups

All the CRH are able to detain boys and girls separately, as is required by the Persons Deprived of their Liberty Act (2014).[277] Two CRH reported that they are not able to separate boys according to age categories, being Likoni and Murang'a, due to a lack of space. At Likoni one of the dormitories burnt down and has not been replaced yet. Those that are able to separate the age groups, do so based on available space. At Kakamega those under 14 years of age sleep separate from those over 14 years. At Kisumu there are three groups: 10 to 13 years, 14-16 years and 17 – 18 years. The number of girls detained are very low in general and they are as a rule not separated according to age or offence. From Manga and Nyeri it was also reported that the boys are separated according to the alleged offence, but further information was not provided.

7.3 Security and use of force

Despite the fact that CRH are for children, it is accepted that contraband may be brought in by children. In this regard cigarettes, *bhang* (marijuana) and hard drugs were mentioned. Searches are conducted but it was noted that sometime contraband does get through. Security staff at the CRH are from the Department of Prisons and they do not carry weapons. An incident register or occurrence book is maintained (also called security log book) is maintained at all the CRH. Mechanical restraints are reportedly not used at any of the CRH. The separation of high risk detainees is restricted due to limited infrastructure and reliance is placed on staff exercising more active supervision.

From all facilities except Manga it was reported that all officials have received training on the minimum use of force and in some instances there have also been refresher training (e.g. Kakamega and Nyeri). The use of force is reportedly extremely rare, if it happens at all, and in such an event it must be reported to the head of the CRH and will be recorded accordingly. However, the overwhelming majority of CRH reported that the use of force does not happen or is extremely rare.

276 US Department of Labour, https://www.osha.gov/SLTC/etools/evacuation/evac.html

277 Section 12(3)(c).

7.4 Discipline

The UNSMR require that no prisoner may be used in a disciplinary capacity. Nearly all the CRH reported that they comply with this requirement, except Manga. In this case it was reported that some children are appointed as representatives of the children and that they be required to report on children who sneak away from the CRH.

In respect of a disciplinary code, there are varied practices and it appears that each of the CRH follow their own code and procedure. A disciplinary code does not exist in law, but whatever the CRH develops must be in line with the Children's Act (2006). Records of disciplinary infringements and sanctions are not maintained consistently at all CRH. At Kisumu, Likoni, Murang'a and Nairobi such records are not kept, for example in a dedicated register or occurrence book. Corporal punishment and solitary confinement are not permitted under Kenyan law. From Manga and Nakuru it was reported that a child may be isolated from other children for a few hours as punishment. The procedure to be followed if a child wants to appeal against a particular punishment is unclear and most CRH reported that they do not punish children and therefore have no appeal procedure.

8. Contact with the outside world

Key international instruments

- Rules 58-64, 68-70 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Principles 15-20 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Art. 37(c & d) of the Convention on the Rights of the Child
- Rules 59-62 UN rules for the Protection of Juveniles Deprived of their Liberty.

8.1 Notification of families and family contact

It was reported from all the CRH that the families or guardians of admitted children are informed of the child's detention. In some instances they can call their families or guardian, and in other the staff contact the families. It was furthermore reported that such calls are at state expense.

The Persons Deprived of their Liberty Act (2014) sets the minimum standard that all detained persons may receive a visitor at minimum once every seven days.[278] None of the CRH place a limit on the frequency or duration of family members visiting a child, except Eldoret where it was

278 *Section 24(1).*

explained: 'We do not have a limit, but not every day.' It is not clear how such a guideline will be applied. From Nyeri it was reported that a court may restrict visits if there is reason to believe that there may be tampering of evidence. Visits by family members may not be restricted as a disciplinary sanction. Facilities for visitors are reportedly adequate at all the CRH surveyed and they have access to a toilet and drinking water. In the event of an emergency, children can contact their families telephonically at state expense, although the staff sometimes use their own phones for this purpose.

8.2 Contact with legal representative and consulate

In most instances children are informed upon admission about their right to contact their legal representative. From Nyeri it was reported that the Legal Resources Foundation (LRF) provides advice in this regard. The extent to which children can communicate in private with their legal representatives is curtailed firstly by available infrastructure (e.g. Likoni) and secondly, the responsibility of the CRH staff to exercise some form of supervision. The impression is gained that such supervision is exercised within sight but not earshot at some CRH but not all. For example, from Kakamega it was reported that conversations are monitored and that the Officer on Duty is present during the consultation. None of the CRH, except Manga, reported that there is restriction on the length of a consultation with a legal representative. In the case of Manga it was reported that consultations are for 15 to 30 minutes. Access to legal representation is not restricted as a disciplinary measure at any of the CRH. If a child is a foreign national, he or she is permitted to communicate with his diplomatic representative. In general it appears to be a rare occurrence that children who are foreign nationals end up in a CRH. However, from Nakuru it was reported that following the post-election violence in Kenya there were 'many' such cases from Tanzania and Uganda and the CRH used print and social media to locate the parents.

8.3 Access to media and letter writing

All the CRH have television sets that children can watch, although the one in Eldoret is reportedly not in good working order. Newspapers are passed on from the staff to the children and radios are also available.

Although it is reportedly a rare event, children are permitted to write letters and these are posted at state expense. Illiterate children are assisted by the staff or other children to write letters. Censoring of correspondence was reported only from Likoni CRH.

9. Complaints and inspection procedure

Key international instruments

- Art. 8 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Art. 13 of the UN Convention against Torture, Cruel Inhuman and Degrading Treatment or Punishment (UNCAT)
- Rules 54 and 83-85 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rules 72-78 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL)

9.1 Complaints

All the CRH reported that children are allowed to lodge complaints and requests to the officer on duty or directly to the manager. It was furthermore enquired if the children 'are allowed to make requests or lodge complaints without censorship to the substance but on the prescribed form with the central authorities, judicial authorities, national human rights institutions or any other body concerned with their rights and well-being.' All the CRH responded that this is the case, except from Manga and Nyeri it was reported that this is not allowed, but no further information was provided. It was also asked if the family or the legal representative of a child can lodge a complaint and this was reported to be the case except at Manga where it was noted that only the child can lodge a complaint.

9.2 Inspections

No clear statutory requirement was identified in respect of how often a CRH must be inspected and by who. All the CRH except Kisumu reported that they are inspected by one or more agencies on a relatively regular basis. Agencies conducting inspections are Area Advisory Council members, magistrates, NGO's, Public Health Department, police administration, health inspectors and Children's Department. According to the information collected, children are free to speak to inspectors when and where such inspections take place.

10. Female children in the CRH

Key international instruments

- Principle 5(2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

- Rule 11(a), 28, 45(2) and 81 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Bangkok Rules.

It is a critical requirement that female children and male children are detained separately, especially with regard to sleeping arrangements. This was found to be the case at all the CRH. In respect of supervision of female detainees, the overall impression is that there are always male and female staff on duty and since the children are not segregated according to gender during the day, they are supervised by both male and female staff. From Likoni it was reported that this is not always done, but efforts are made to comply with this. It appears that there are no female staff at Likoni. At the other CRH the keys to the female dormitories are held by female staff. Female detainees requiring pre- and post-natal services access these from local hospitals or in the case of Nakuru, from NGOs in addition to state hospital services. The response from Eldoret did not clarify what the procedure is for dealing with such cases. All the CRH reported that female detainees are provided with sanitary towels free of charge.

11. Support services for pre-trial children

Key international instruments

- Art. 10(2) of the International Covenant on Civil and Political Rights (ICCPR)
- Art. 37 of the Convention on the Rights of the Child
- Rule 29, 45 and 60 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rules 17 and 18 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

All the CRH have social workers as staff although from Kakamega it was reported that such services are rendered by part-time social workers and volunteers who visit the institution. Access to legal representation is varied. From Likoni and Murang'a it was reported that they do not have access to legal representation. At Kakamega children are assisted to obtain legal representation if they request this and from Nakuru and Nairobi it was reported that this is conditional on the charge. Children charged with murder are given legal representation by the state.

The Persons Deprived of their Liberty Act (2014) sets the following requirement in respect of access to education for all detained persons:

Persons deprived of liberty shall be entitled-

1. 1(a) to access educational opportunities and reading material that is beneficial to their rehabilitation and personal development;
2. Subject to subsection (l), every Competent Authority under whose charge a person deprived of liberty is placed shall take all practical and reasonable measures possible to facilitate enjoyment of the right to education and access to information.
3. So far as is practically reasonable, the education of children detained in prison shall be integrated with the current system of education.[279]

It is cause for concern that there exists no formal education at any of the CRH, although there exists some informal programmes at some of the institutions. The fact that some children can stay at a CRH for extended periods makes it all the more imperative to give children access to education.

Religious, cultural and recreation activities appear to be better developed as set out below.[280] These are arranged by the staff of the institution as well as external stakeholders such as churches and NGOs. Sports equipment appear to be adequate.

Table 6

CRH	Activities
Eldoret	Various religious groups have special arrangements from within whereby we collaborate together; no cultural activities.
Kakamega	Songs, ball games and appropriate technology training (e.g. soap making, shampoo making and bleach making).
Kisumu	Bead making, soap making, farming activities, singing and dancing
Likoni	Sports, spiritual guidance
Manga	Participate in music, games and agriculture
Murang'a	Singing and drama
Nairobi	All religion catered for; yoga, football games
Nakuru	The children are allowed to play, access to counselling, religious sessions as well as general education section on hygiene, sanitation and so forth
Nyeri	Spiritual nourishment and sports

279 *Section 18.*

280 *Section 20 Persons Deprived of their Liberty Act (2014).*

12. Staff skills and training

Key international instruments

- Art. 5 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Art. 10 of the UN Convention against Torture, Cruel Inhuman and Degrading Treatment or Punishment (UNCAT
- Principles 18-20 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- Rules 81-87 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)
- Rule 74 UNSMR.

The data collected indicate that reportedly all staff working at a CRH have received the appropriate training to enable them to work with pre-trial detainees. However, the responses are not sufficiently detailed to provide a description of the scope and depth of such training. References were nonetheless made to refresher training rendered in-house as well as training by NGOs such as Natal and CEFA (European Community for Training and Agriculture). It was only from Nakuru that it was reported that 'refresher training hardly happens'.

13. Management

Information was collected on the allocated posts per CRH as well as vacancy rates as presented in Table 7 below. As can be seen, the vacancy rate at some CRH is high.

Table 7

CRH	Filled Post	Vacant Posts	Total	% Vacancy
Eldoret	14	50	64	78
Kakamega	7	15	22	68
Kisumu	9	3	12	25
Likoni	8	8	16	50
Manga	12	8	20	40
Murang'a	23	14	37	38
Nairobi	15	25	40	63
Nakuru	14	0	14	0
Nyeri	14	7	21	33

Deficiencies in service delivery are reportedly identified by the head of the CRH and communicated to management. At least one CRH reported that whilst this is done, results are limited although exact reasons or examples were not presented.

The disciplinary code of the Department is reportedly enforced at all the CRH surveyed.

Recommendations

Due process

1. It was observed that some children remain in CRH long in excess of what the law sets down as the maximum period remand of a child; the longest being 49 months at the time of the fieldwork. This is a situation requiring urgent attention from the judiciary as the remand detention of these children have now become unlawful and have been so for a considerable period of time without action being taken to address it. A far greater effort should be made to adhere to the requirements of Schedule 5 to the Children's Act.
2. Flowing from the preceding, other mechanisms to expedite children's cases should receive urgent attention. This may include, but is not limited to, diversion, victim-offender mediation, pro-bono legal assistance and plea bargaining. Attention should also be given to cases where children are charged with adults and how their cases can be expedited.
3. Legal representation of all children in pretrial detention ought to be enforced as matter of priority. The National Legal Aid and Awareness Programme (NALEAP) may be of assistance in this regard.

Law reform

4. The legislation needs to be amended to set clear minimum standards with regard to conditions of detention and the treatment of children in CRH. Linked to this is the fact that Kenya does not have distinct child justice legislation that would deal with their rights and responsibilities in a comprehensive manner.

Staff training

5. Although the data did not indicate clear shortcomings in staff training, it will be worthwhile to investigate this issue further. The fact that so many inconsistent practices were found do lend weight to a recommendation that the training curriculum and refresher training needs to be reviewed. There may indeed be a general need for staff training, including security staff to work with children on remand. This will assist in bring about consistency in practice on a range of issues.
6. All officials dealing with children deprived of their liberty need to understand that they all have a responsibility to notify the parents or guardians of a child of his or her detention within 48 hours, or at least to verify that the parents have been notified already.

7. Upon admission, all children should receive information regarding their rights and responsibilities as well as the rules of the CRH. This information should be explained in a language that the child understands and it should furthermore be displayed in the CRH where it can be consulted by the children.
8. Consistency need be brought in respect of the enforcement of and record-keeping relating to the disciplinary code applicable to children.
9. The complaints procedure appears to be functional in relation to external agencies, although restrictions in this regard were reported from Manga and Nyeri. There must be no restrictions on the lodging of complaints and the situation at these two CRH need to be rectified.
10. Staff vacancies need to be addressed to ensure that there is sufficient staff to provide adequate support and supervision.

Standards - Infrastructure

11. CRH are characterized by ageing infrastructure and it is probably the case that in many instances this places a serious limitation on the treatment of children as well as their overall experience of being in remand detention. There is thus a need to review the current infrastructure and determine needs.
12. In the majority of cases, the available floor space per child is well below what can be regarded as acceptable. In several instances the available floor space is similar to what has been observed in severely overcrowded prisons.
13. External areas where children play were in most instances reported to be clean and free from rubbish and stagnant water. Problems were, however, reported in the case of Nyeri and Murang'a which need to be addressed.

Standards – conditions of detentions

14. Mosquitoes are a general problem and more effective measures need to be taken to control it.
15. Access to ablution facilities appears to be at an acceptable level although some ratios of toilet to children were high. The toilets at Likoni CRH have been vandalised and not yet repaired due to lack of funds. At Nairobi CRH the toilets are also 'not in a good condition' and must be flushed manually. Four of the CRH were observed not to have showers, being Kakamega (due to water rationing), Likoni (vandalised), and Nairobi and Nyeri (no showers fitted). These shortcomings need to be addressed to ensure that children are detained under conditions of human dignity.
16. Dormitories should be fitted with taps to ensure that children have access to clan safe drinking water and avoid that water is stored in containers for use.281

281 S 43(1)(d) Kenya Constitution.

17. Serious consideration should be given to providing children in CRH with access to education. Given that some of them remain there for long periods, the denial of education violates their right to free basic education.282
18. Greater effort should be made to provide children with a variety of recreational and cultural activities.
19. All new admission should undergo a health status examination prior to being mixed with other children in the CRH. Given that the most pressing health problems are malaria (Kakamega), headaches, chest problems, TB (Nyeri) and scabies (Nairobi and Nakuru), greater emphasis should be placed on promotive and preventive health care services at CRH. It was also found that there are inconsistent practices in respect of HIV and TB prevention and this need to be corrected and aligned with national policy. Particular attention should be paid to ensure continuity of treatment with reference to TB and HIV/Aids.
20. None of the CRH reported that they had any measures in place to deal with children with physical or psycho-social disabilities. This needs to be addressed as a matter of urgency.
21. Five of the nine CRH reported that there is no emergency evacuation procedure in place and the balance gave varied and rather unclear answers. It is reason for concern that emergency evacuation procedures do not appear to be in place. Given the potential catastrophic consequences of a fire or similar disaster, the development and practicing emergency evacuations need to be implemented.
22. There was some inconsistency in report on how often families can visit their children. There needs to be a uniform standard across all CRH.
23. There is generally no restriction on the length of consultations between a child and his or her legal representative. However, from Manga the impression was gained that this is restricted to 15-30 minutes. If this is the case, it needs to be corrected.

282 S 53(1)(b) Kenya Constitution.

Chapter 3.3

Conditions of detention at selected Police Stations findings

1. Introduction

Conditions of detention are important in respect of a range of rights and the UN Working Group on Arbitrary Detention stated the following on the right to a fair trial: *"Where conditions of detention are so inadequate as to seriously weaken the pre-trial detainee and thereby impair equality, a fair trial is no longer ensured, even if procedural fair-trial guarantees are otherwise scrupulously observed."*[283]

Conditions of detention refer to those attributes in a detention facility that are primarily of an infrastructural and physical nature having an impact on the human experience of incarceration. Their establishment, utilisation and management should be aimed at contributing to the safe, secure and humane treatment of all detainees. These attributes and their use refer to at least:

- the physical characteristics of the prison building, including sleeping, eating, working, training, visiting and recreation space;
- the provision of beds, bedding and other furnishings;
- the nature and conditions of the ablution facilities;
- the cleanliness of the living space and maintenance of buildings and infrastructure

283 E/CN.4/2005/6, para 69.

- the level of occupation of the facility, individual cells and common areas with reference to two and three dimensional space measurements and ventilation .

Whilst an emphasis is placed on the physical attributes, it should be borne in mind that these are strongly influenced by other factors such as staff capacity and the willingness of management to resolve problems or at least ameliorate their negative effects.

International norms and standards in respect of prison conditions are far better developed compared to standards for conditions in police detention cells. This is despite the fact that many detainees across the world and in Kenya spend extended periods in police detention cells. In this regard the assessment is guided by the international norms applicable to all people deprived of their liberty and supported by Kenyan legislation.

The Kenyan Constitution has a general requirement on the right to dignity[284] and states further in Article 51 that 'A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.' The Constitution further obliges Parliament to enact legislation that

(a) provides for the humane treatment of persons detained, held in custody or imprisoned; and

(b) takes into account the relevant international human rights instruments.[285]

It is assumed that the National Police Service Act is such legislation as required by Article 51(3) and the Fifth Schedule to the Act sets down more detail. [286] The Constitution further states that children must be detained separate from adults and 'under conditions that take account of the child's sex and age'.[287]

Former South African Chief Justice, Arthur Chaskalson, concluded that in a broad and general sense, respect for human dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner.[288] It is therefore with this purpose (to prevent that a person is devalued as a human being) that one needs to view conditions of detention.

284 S 28 Every person has inherent dignity and the right to have that dignity respected and protected.

285 Article 51(3) Constitution of Kenya.

286 National Police Service Act of 2011 Schedule 5.

287 S 53(1)(f)(ii).

288 Chaskalson, A. (2002) Human dignity as a Constitutional Value. In Kretzmer, D. and Klien, E. (Eds.). The Concept of Human Dignity in the Human Right Discourse, The Minerva Centre for Human Rights the Hebrew University of Jerusalem Tel Aviv University, p. 134.

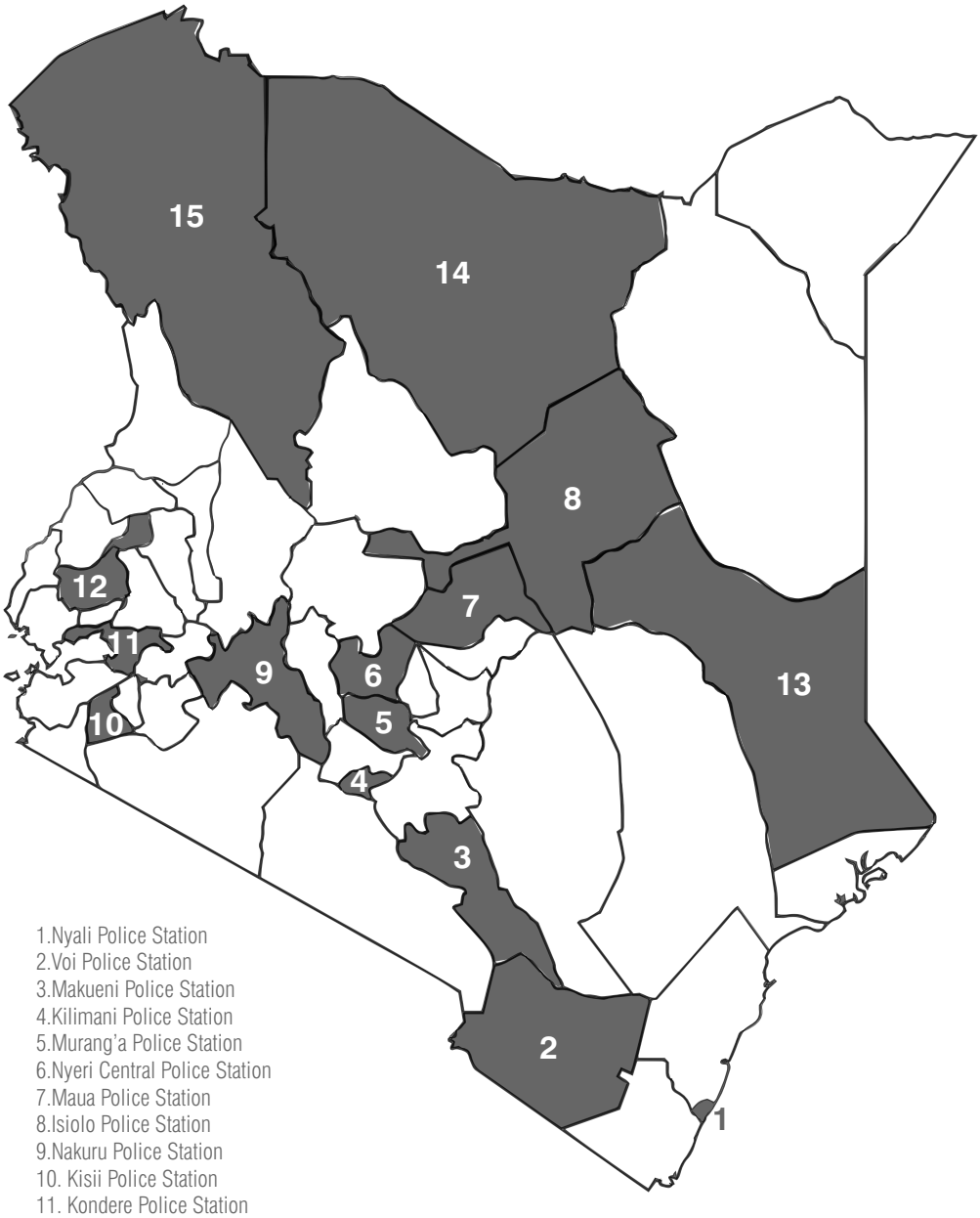
2. Methodology

A total of 14 police stations were surveyed as listed in Table 1 below. Given cost implications, more stations could not be surveyed. Data was collected between 14 September and 14 December 2015.

Table 1

Police Station	Town and County	Date of Fieldwork
Garissa	Garissa, Garissa	14/12/2015
Isiolo	Isiolo, Isiolo	9/11/2015
Kakamega	Kakamega, Kakamega	8/10/2015
Kilimani	Kilimani, Nairobi	9/10/2015
Kisii	Kisii, Kisii	23/9/2015
Kondele	Kisumu	30/9/2015
Lodwar	Lodwar, Turkana	16-17/11/2015
Makueni	Makueni, Makueni	1/10/2015
Marsabit	Marsabit, Marsabit	22/10/2015
Maua	Maua, Meru	17/9/2015
Murang'a	Murang'a, Murang'a	14/9/2015
Nakuru	Nakuru, Nakuru	21/9/2015
Nyali	Nyali, Mombasa	12/10/2015
Nyeri	Nyeri, Nyeri	24/9/2015
Voi	Voi, Taita Taveta	25/9/2015

CJS AUDIT 2015(CASE FLOW MANAGEMENT AND CONDITIONS OF DETENTION)
POLICE STATION AUDIT SITES



1.Nyali Police Station
2.Voi Police Station
3.Makueni Police Station
4.Kilimani Police Station
5.Murang'a Police Station
6.Nyeri Central Police Station
7.Maua Police Station
8.Isiolo Police Station
9.Nakuru Police Station
10. Kisii Police Station
11. Kondere Police Station
12. Kakamega Police Station
13. Garissa Police Station
14. Marsabit Police Station
15. Lodwar Police Station

150 km
100 mi

Structured interviews were conducted with officials based on a questionnaire-type interview schedule. The interview schedule covered the following themes:

- right to physical and moral integrity
- property belonging to a detainee
- right to adequate standard of living
- adequate food and drinking water
- clothing and bedding
- health care
- safety and security
- contact with the outside world
- complaints and inspection procedure
- women in detention
- children
- staff skills and training

The above-listed thematic issues are derived from a number of international instruments and speak to what can be regarded as core minimum rights of people deprived of their liberty with reference to police stations.

3. Profile of detainees in custody

Table 2 presents the basic profile of detainees as they were found on the dates that data was collected. It should be emphasized that this profile is not generalizable as custody numbers and profile of detainees can fluctuate significantly due to a range of factors.

Table 2

Police Station	Detainees in Custody	Children Accompanying Their Mothers	No. Of Women	No. of Children	Duration Longest in Custody (Days)
Garissa	87	0	22	12	14
Isiolo	32	0	5	0	2
Kakamega	6	0	1	0	2
Kilimani	10	0	1	0	2
Kisii	11	0	4	2	6
Kondela	5	0	1	0	1
Lodwar	37	1	7	15	14

Makueni	8	0	0	0	6
Marsabit	3	0	0	0	1
Maua	38	0	11	4	1.5
Murang'a	1	0	0	0	0
Nakuru	11	0	0	5	60
Nyali	9	0	0	1	1
Nyeri	6	0	1	3	21
Voi	8	0	4	1	3
Total	273	1	57	42	

As can be seen from the above, Garissa Station had the highest number of detainees at 87 as well as the highest number of women at 22. Women constituted 22% of all detainees. Children (in conflict with the law) constituted 16% of all detainees. Lodwar had the highest number of children at 15. The explanation provided was that there is no Children's Remand Home (CRH) in Lodwar and they thus await trial at the police station. The longest duration of custody was 60 days and the explanation provided was that these detainees are 'awaiting repatriation to a Borstal institution'. However, it remains cause for concern that some detainees had already been detained at the police stations for some weeks, such as at Garissa and Lodwar. Only one female detainee had a child with her in detention.

4. Right to physical and moral integrity

Key international instruments:

- Art. 5 of the Universal Declaration of Human Rights (UDHR);
- Art. 7 of the International Covenant on Civil and Political Rights (ICCPR);
- Arts. 2 and 10 of the UN Convention against Torture, Cruel Inhuman and Degrading Treatment or Punishment (UNCAT);
- Arts. 2 and 3 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,
- Rule 1, 6-10, 36-49, 54, 71 and 111-120 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Principle 1 of the Basic Principles for the Treatment of Prisoners
- Principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;
- Rule 87(a) of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

- Principle 1 of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

4.1 The prohibition of torture and other ill treatment

Section 29(d) of the Kenyan Constitution places an absolute prohibition on torture and other ill treatment. The National Police Service Act of 2011 defines torture[289] as well as other cruel inhuman and degrading treatment.[290] Section 95 of the National Police Service Act (2011) places an absolute prohibition on the use of torture and provides for a punishment of no more than 25 years upon conviction for torture and 15 years maximum upon conviction for cruel, inhuman and degrading treatment. The Fifth Schedule to the National Police Service Act in paragraph 7 also states that 'A detained person shall be entitled to enjoy all the rights that do not relate to the restriction of liberty'. The right to be free from torture and other ill treatment is such a right. Article 10 of UNCAT, to which Kenya is a party, places an obligation on States party to ensure that relevant officials are trained on the absolute probation of torture[291] and Article 16 extends this duty to 'the prevention of treatment acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture'. It was in view of these obligations that it was investigated whether or not and to what extent police officials at the surveyed police stations has been trained on the absolute prohibition of torture and if they had received any subsequent refresher training. Given that law enforcement contexts may change over time, refresher training is regarded as essential in equipping law enforcement officials to enforce the law in a manner that adheres to ever-evolving human rights standards.

The responses from the 15 police stations showed significant variation. Where additional information was available, it was apparent that reliance is placed on the training that police officials received during their recruitment-phase at a police college. A minority of stations reported that there are some additional lectures at station level that may cover the prohibition of torture. Such lectures may take place on weekly basis (Lodwar) or monthly (Voi). From Nyali it was reported that officers had not been informed of the absolute prohibition of torture. The overall impression is that

289 "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes of—
(i) obtaining information or a confession from the person or from a third person; (ii) punishing the person for an act which that person or a third person has committed or is suspected of having committed; (iii) intimidating or coercing the person or a third person; or (iv) 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. Provided that torture does not include any pain or suffering arising from, inherent in or incidental to lawful sanctions.

290 Definitions "cruel, inhuman and degrading treatment or punishment" means a deliberate and aggravated treatment or punishment not amounting to torture, inflicted by a person in authority or the agent of the person in authority against a person under his custody, causing suffering, gross humiliation or debasement to the person.

291 Article 10(1) Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

the prohibition of torture is a subject dealt with during initial college training and that little is being done to reinforce this training and keep officers abreast of developments in law and practice.

4.2 The use of mechanical restraints

Schedule 6(D)(2) to the National Police Service Act sets down the conditions for the use of mechanical restraints:

> An instrument of restraint may-
>
> (a) not be applied for longer than necessary to secure the purpose for which it is used;
>
> (b) not be used as a punishment; and
>
> (c) shall be removed immediately after the purpose for which it is used is achieved.

Mechanical restraints are reportedly used in three instances: detainees who are violent are placed in cuffs; detainees are cuffed while being searched prior to being placed in the cells; when transported to court of hospital to prevent escapes. From the data collected, there is nothing to indicate that mechanical restraints are being used improperly.

4.3 Investigating deaths in custody

Schedule 6A to the National Police Service Act of 2011 sets down fairly detailed procedure for reporting the use of force, including when such use of force was fatal:

> 5. Any use of force that leads to death, serious injury and other grave consequences shall be reported immediately by the officer in charge or another direct superior of the person who caused the death or injury, to the Independent Police Oversight Authority who shall investigate the case.
>
> 6. The Inspector-General shall not be precluded by virtue of paragraph (5) from conducting investigations into the matter.
>
> 7. A police officer who makes a report to the Independent Police Oversight Authority in accordance with paragraph (5) shall -
>
> (a) secure the scene of the act for purposes of investigations; and
>
> (b) notify the next of kin, their relative or friend of the death or injury as soon as reasonably practical.
>
> 8. It shall be a disciplinary offence for a police officer to fail to report in accordance with these regulations.
>
> 9. An officer shall not tamper or otherwise damage any evidence from the scene of the act.

Schedule 6B of the National Police Service Act in paragraphs 4 to 7 deal with the use of firearms and sets down a similar procedure as above. Schedule 6C(1)(3) sets out the duties of the Commanding Officer in respect of a death that is not necessarily attributable to the use of force or firearms:

> The station commander, or any other relevant direct superior, shall, immediately after the death or serious injury of a person who at the time of his death or injury, was in police custody or under the control of the Police or in any way the death or serious injury was the result of police action or inaction which includes anyone who may have been injured or killed being a bystander during a police operation-
>
> (a) take all steps to secure evidence which may be relevant to that death;
>
> (b) immediately report the case to the Independent Police Oversight Authority, using the means of communication that guarantee there will be the least delay, and confirm this in writing no later than within 24 hours after the incident;
>
> (c) supply the Independent Police Oversight Authority with evidence of and all other facts relevant to the matter, including, if available, the names and contact details of all persons who may be able to assist the Independent Police Oversight Authority should it decide to conduct an investigation; and
>
> (d) non-compliance with the above shall be an offence.

It is a basic requirement that there should be clear procedure in place for when a death in custody occurs and that this procedure should be known to police officials. The responses received indicate that there is variation in what police officers know and understand of the required procedure. Two responses were fairly detailed:

> [The] OCS must be informed. Then he/she informs the higher authorities, signal must be circulated to vigilance house [in] Nairobi and investigation starts from there and an officer is appointed.

> [It is] Booked in OB (Occurrence Book) and the OCS is informed about the death. An inquest file is opened and forwarded to the DPP (Director of Public Prosecutions) and IPOA (Independent Police Oversight Authority) for investigation. The inquest takes 3-4 days and the body is released to the family.

The remainder of the responses were not particularly detailed and essentially stated that it is the responsibility of the Commanding Officer and that an inquest may follow. Several stations also noted that a death has never occurred there, or at least not one that the respondent was aware of, and the respondent was therefore not knowledgeable on the procedure. It is cause for

some concern that there was such variation and in some cases lack of knowledge on what the procedure is to follow in case of a death in police custody.

Information from the IPOA indicates that in 2012/13 there were 14 complaints lodged with it concerning deaths implicating the police.[292] In the following year this figure shot up to 50.[293] The IPOA notes that these complaints originate primarily from Nairobi and surrounds, implying that this is not an accurate picture of what happens in Kenya overall. More comprehensive national figures on deaths due to police action or in police custody could not be obtained.

4.4 Record-keeping

It is essential for the protection of all arrested persons that there identification details are recorded in a designated register. Schedule 5 paragraph 8 to the National Police Service Act of 2011, sets down the record-keeping requirements for the police in respect of detainees. It requires the following to be recorded:

- name
- reasons for the arrest and detention
- date and time of the arrest and detention
- date and time of first appearance before a court
- identity of the arresting officer
- date and time for interrogations and identity of interrogators
- date and time of any transfer of the detainee to another place of detention.

The following are regarded as the essential record-keeping requirements and data was collected accordingly:

- name and identity
- reason for detention
- date and hour of admission
- date and hour of release or production in court.

The data indicates that such records are maintained and in most instances it was reported that the details were recorded in the Occurrence Book (OB)[294] and cell register, with two exceptions:

292 *Independent Police Oversight Authority (2013) Annual Report 2012/13, IPOA, p. 26.*

293 *Independent Police Oversight Authority (2014) Annual Report 2013/14, IPOA, p. 10.*

294 *The correct term is reported to be 'accountable documents', but was recorded as OB in the data.*

- at Kakamega the details are recorded only in the OB
- at Voi the release details are not recorded.

4.5 Detainees are informed of their rights and responsibilities

Articles 49 to 51 of the Kenya Constitution set down the rights of arrested and accused persons. Article 50 deals with the right to a fair trial and subsection 3 reads: 'If this Article requires information to be given to a person, the information shall be given in language that the person understands.' Schedule 5(2) to the National Police Service Act places an obligation on all police officers to 'accord an arrested or detained person all the rights set out under Articles 49, 50 and 51 of the Constitution.' There is thus a duty to inform arrested and detained persons of their rights.

Despite the deprivation of liberty, detained persons must be treated with dignity[295] and fairness.[296] In this regard it is an important preventive measure in respect of rights violations that detained persons are informed upon admission in writing of the rules of the institution, the disciplinary code and procedure and any other matters necessary for the detained person to understand his/her rights and responsibilities.[297] If the detained person is illiterate, this information must be conveyed to him verbally.[298]

From Garissa it was reported that detainees are not often informed of their rights and responsibilities. From four stations it was reported that detainees are upon arrest informed of their rights. From a similar number of stations it was reported that this is done or also done when admitted to custody. From the balance it was not clear who is responsible for this and if it is indeed done in a language that the detainee can understand.

From all 15 stations it was reported that detainees are informed that they may contact their families, legal representative or consular representative as the case may be. The means to do so

295 ICCPR, Art. 10(1).

296 ICCPR, Art. 14. The Basic Principles for the Treatment of Prisoners, in Principle 5, emphasise the residuum of other rights and fundamental freedoms despite the deprivation of liberty: "Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants."

297 UNSMR Rule 54 Upon admission, every prisoner shall be promptly provided with written information about:
(a) The prison law and applicable prison regulations; (b) His or her rights, including authorized methods of seeking information, access to legal advice, including through legal aid schemes, and procedures for making requests or complaints; (c) His or her obligations, including applicable disciplinary sanctions; and (d) All other matters necessary to enable the prisoner to adapt himself or herself to the life of the prison..

298 UNSMR Rule 54 (1) The information referred to in rule 54 shall be available in the most commonly used languages in accordance with the needs of the prison population. If a prisoner does not understand any of those languages, interpretation assistance should be provided. (2) If a prisoner is illiterate, the information shall be conveyed to him or her orally. Prisoners with sensory disabilities should be provided with information in a manner appropriate to their needs.

is, however, more problematic. Sometimes detainees are dependent of the police station phone or they can use their own phone if they have one. In other instances they have to rely on an officer's phone, as is the case at Nyali. At none of the police stations detainees are able to make a phone call at state expense to notify their families of their arrest.

4.6 Notification of children arrested

Schedule 5 to the Children's Act [CAP 141], cited as the Child Offender's Rules, and requires the following:

> 4 (1) Where a child is apprehended with or without a warrant on suspicion of having committed a criminal offence he shall be brought before the Court as soon as practicable: Provided that no child shall be held in custody for a period exceeding twenty-four hours from the time of his apprehension, without the leave of the Court.
>
> (2) Where a child is held in police custody the officer in charge of the police station shall as soon as practicable inform -
>
> (a) the parents or guardians of the child; or
>
> (b) the Directors299 of the arrest.
>
> (3) The police shall ensure that the parent or guardian of the child, or an advocate appointed to represent the child is present at the time of any police interview with the child.
>
> (4) Where a child's parent or guardian cannot immediately be contacted or cannot be contacted at all, a Children's Officer or an authorised officer shall be informed as soon as possible after the child's arrest so that he can attend the police interview.

Rule 4(2)(b) therefore places a clear obligation on the Officer Commanding Station (OCS – referred to as Officer in Charge in the legislation) to inform the Director of Children's Services that a child has been arrested.

It was asked if the detainee is a child, whether the police inform the parents/guardian, family, legal representative, or consular representative, as the case may be, about the fact that a child is detained. From Garissa it was reported that this is not done. The other stations reported that the Children's Department is informed. However, it was reported from a minority of stations that the parents or guardian is informed of the child's arrest and detention.

299 Director of Children's Services

4.7 Duration of custody

Section 49(f) of the Constitution of Kenya requires that an arrested person 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 ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day

In view of this requirement, with cognizance of section 49(f)(ii), it was enquired if there were any people in custody for longer than 48 hours. The responses were varied and a range of explanations were provided for exceeding the 24 hour requirement and also exceeding 48 hours:

- Garissa – 'There are only refugees who wait for repatriation to their camps after court appearances.'[300]
- Kakamega – 'Only one who is waiting for the parent to collect (a student) facing a charge of robbery with violence.'
- Kisii – 'Many times but the police goes to court to swear why they will exceed 48 hours.'
- Lodwar –'In the morning they were six; men, women and children.'
- Makueni – 'There were only five new detainees arrested the previous day. All of them were taken to court. Only capital offenders can be held beyond 24 hours.'
- Maua – 'For those who have committed serious assaults and victims health is deteriorating and bordering weekends.'
- Nakuru – 'Sometimes there are; awaiting for more investigation. A court order is present to effect the detention'.

From the above it appears that there is at least some inconsistency in the application of the 24-hour rule. The response from Maua is confusing as the Constitution makes no reference to the seriousness of the offence as a reason for extended detention. The Bail and Policy Guidelines state that the police can request from a court that a suspect be remanded to their custody if they can demonstrate that there are 'reasonable grounds that necessitate continued detention'.[301] Such an extension may then be for a maximum period of 14 days. The Bail and Police Guidelines are, however, silent if such an extension may be repeated or whether it is limited to once. In the

300 The procedure is that once the order for repatriation is made, the refugees are handed back to police who the repatriate the refugee to the camp. If the order is repatriation back to the mother country, the police liaise with immigration department. Relevant law here is the refugee act of Kenya. A second scenario is where the police liaise with UNHCR office and the UNHCR SEND THEIR protection officers to collect the refugees destined for the camp. The third scenario is where an interpreter cannot be found in good time; as such the refugee may spend some 1-3 months in police custody or prison awaiting one.

301 Kenya Bail and Policy Guidelines (2015) para 4.37

case of terrorism offences, the remand period can be for up to 30 days but the police may apply for an extension. However, there is a total limit of 90 days.[302]

All but two of the stations (Marsabit and Murang'a) reported that they currently have, or do have from time to time, detainees that have been remanded by a court to await trial at the police station. It should be emphasised that police stations are generally not designed nor operated in a manner that would allow for humane detention beyond a day or two.

4.8 Vulnerable groups

From the outset it must be accepted that all detained persons are vulnerable to victimisation as they are all dependent for their well-being on the officials overseeing them. Despite this, males and females must at all times be held separately and so should children be held separately from adults. Transgender persons, intersex, the elderly and people with disabilities are also considered to be vulnerable to exploitation and other forms of victimisation.

From Garissa it was reported that all detainees are held in the same cell as there is only one cell and from Isiolo that there are only two cells, implying that segregation beyond the sexes is not possible. As similar situation was reported from Kondela, but it was noted that some detainees (presumably women and children) may be held in the charge office. Lodwar also reported that an office is used as an improvised cell for women and children. A number of stations reported that they are able to segregate women and children, but do not have sufficient cells to accommodate transgender persons and persons with disabilities (e.g. Kakamega and Kilimani). From Maua it was reported that there are five cells and it is therefore possible to effect the required segregations. Similar situations were reported from Murang'a, Nakuru and Voi.

Al the stations surveyed reported that detainees are always supervised at night.

5. Property belonging to detainee

Key international instruments:

- Rule 67 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rule 35 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

All the stations reported that they comply with the requirement that detainees' valuables, including cash, are recorded in a register and kept securely until they are released. Similarly that detainees

302 *Kenya Bail and Policy Guidelines (2015) para 4.38.*

sign when receiving their valuables when released or transferred. The register was referred to as the 'Prisoner's Property Receipt Book' and 'Prisoner Property Register'.

The procedure for handling detainees' medicine is less clear. From Garissa and Murang'a it was reported that there is no procedure. At most of the other stations it was reported that the medicine is handed over to the OCS and kept in a safe box.[303]

6. Right to adequate standard of living

Key international instruments:

- Art. 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Rule 12- 15, 18, 19, 21-23 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rules 31-34, and 37 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL)
- Art. 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

States are under the obligation to ensure that persons deprived of their liberty shall be treated with humanity and with due respect for the inherent dignity of the human person. This obligation is laid down in Art. 10 of the ICCPR, as well as in the regional human rights treaties[304] and the specific principles and rules on the deprivation of liberty.[305]

6.1 Adequate accommodation

Schedule 5 to the National Police Service Act does not set down a minimum space requirement per detainee, but it does require that cell accommodation must be 'conducive for human habitation'.[306] Cell overcrowding must therefore be regarded as not conducive to human habitation.

303 Confinement for purposes of administering treatment for infectious diseases has been outlawed through the Courts in Constitutional Petition no 329 OF 2014 dated 24th March 2016.

304 Art. 10 ICCPR: "1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status." See also Art. 5 ACHPR.

305 See e.g. Principle 1 of the Body of Principles and Rule 60 (1) UNSMR. This Rule reads as follows: "The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings." See also the CoE Guidelines, Art. XI (1).

306 Schedule 5 paragraph 5(a).

The available square meter per person at each of the station where information was available is presented in Table 3 below. Six stations (Garissa, Kondela, Kakamega, Murang'a, Nyali and Voi) did not have overcrowded cells at the time of the fieldwork. There is no universally accepted minimum space requirement per prisoner. For example, the European Committee for the Prevention of Torture sets the minimum at 6 m^2 in a single cell and 4 m^2 in a multi-occupancy cell, excluding sanitary installations.[307] In South Africa the minimum 3.34 m^2 per prisoner.[308] The available space per detainee was calculated by measuring the cells and calculating floor space, which was then divided by the number of occupants. If, for the purposes of this report, 3.5 m^2 is regarded as the absolute minimum space requirement per person, it is noted with concern that a number of stations were well below this in all or some of their cells. Stations noted for providing less than the minimum amount of floor space are: Isiolo, Lodwar, Makueni, Marsabit, Maua, Nakuru and Nyeri.

Table 3

Station	Cell 1	Cell 2	Cell 3	Cell 4
Garissa	2.5	7.27		
Isiolo	2.0	1.4		
Kakamega	6.7	12.0	12.0	12.0
Kilimani				
Kisii	3.0	24.0	8.0	
Kondela	5.0			
Lodwar	0.4	2.0		
Makueni	1.5			
Marsabit	1.3			
Maua	1.6	2.9	1.6	5.0
Murang'a		8.0		
Nakuru		1.7	2.3	4.0
Nyali	7	4	4	
Nyeri	1.5	1.2	1.2	
Voi	7.5			7.5

6.2 Time out of cells

The UNSMR requires a minimum of one hour of outside exercise per day per prisoner.[309] While prison architecture may more easily enable detainees to spend time outside of their cells, police station infrastructure present significant challenges in this regard. Schedule 5 to the National

307 *CPT/Inf (2015) 44.*

308 *B-Orders Department of Correctional Services, 2006.*

309 *Rule 23.*

Police Service Act does require a minimum amount of time per day out of the cells, but it does require that a lock-up facility must have an outdoor area, presumably for the use of detainees.[310]

Only three stations reported that they are able to allow detainees out of the cells each day, being Maua (30 minutes), Murang'a (2 hours) and Nakuru (1 hour). The responses from Nyali were unclear. At these stations the area where they can spend time out of the cells is of a reasonable condition, save perhaps for Nakuru where it is car park area at the police station filled with larger exhibits, such as car wrecks. From the other stations it was reported that this was not possible and detainees only leave the cells when they go to court. This situation is of deep concern as detainees may in some cases spend extended periods in police custody and are thus deprived of a fundamental human need in the interests of their physical and mental well-being.

6.3 Condition of buildings

Schedule 5 to the National Police Service Act does require the following in respect of overall conditions:

5. A lock-up facility shall have -

(a) hygienic conditions conducive for human habitation;

(b) adequate light, toilet and washing facilities and outdoor area;

(c) men and women will be kept separately;

(d) juveniles and children will be kept separately from adults; and

(e) police detainees will be kept separately from convicted prisoners.

Most police station buildings in Kenya are fairly old and was built during colonial times. It was reported from several stations that the areas where detainees sleep the walls showed cracks, some had leaking ceilings and two were reported to be in a state of poor maintenance (Marsabit and Nakuru).

In respect of ventilation, it was reported that generally cells have one window, but are well-ventilated with the exception of Isiolo, Kisii, Marsabit, Nyeri and Voi. In the case of Nyeri and Voi, there are not windows but ventilation holes (a grid-covered opening of roughly 30 cm by 30 cm).

Artificial lights in cells are not available in slightly more than half of stations surveyed and the following stations were reported not to have electric lights in the cells: Garissa, Isiolo, Kakamega, Kisii, Kondela, Lodwar, Marsabit and Murang'a. Keeping detainees in the dark, especially during the winter, is not consistent with human dignity. Natural light during day hours were also reported to be problematic at Kisii, Marsabit, Nyali, Nyeri and Voi.

310 Schedule 5 paragraph 5(b).

The poor conditions of police buildings appears to be a longstanding problem as reflected in a number of Parliamentary questions and debates in Hansard dating back to 1973. While the refurbishment or construction of police stations may be expensive, it has to be accepted that in some instances that the infrastructure is dilapidated and not able to meet human rights standards set out in the Constitution and subordinate law.

6.4 Vectors of disease

Mosquitoes were reported to be a general problem and other vectors reported were bedbugs (Kondela), lice (Lodwar, Maua, Nakuru), fleas (Lodwar, Nyeri), cockroaches (Lodwar) and rodents (Voi). Measures taken against vectors appear to be far and few between. Only from Kakamega was it reported that the local hospital staff spray the cells every two weeks, presumably for mosquitoes. From Nyali it was reported that the sewer system is frequently drained and fumigation is done regularly. From other stations it was reported that cells are regularly cleaned, but it is not clear if any specific and suitable disinfectants are used. Seven stations reported that no measures are taken against vectors.

6.5 Access to toilets and water

Access to toilets appears to be a problem at nearly all the police stations surveyed. Only from Maua was it reported that each cell had a toilet. The overall pattern is that toilets are located outside the cells and that during the day detainees are escorted to use the toilet. At night they have buckets in the cells. From Lodwar it was reported that there is only one pit latrine for all detainees and that it is nearly full. From Nyeri and Voi it was also reported that the number of toilets are not sufficient for the number of detainees. The cleaning and storage of buckets was reported to be a problem at least at one police station (Kisii).The cleanliness and functionality of toilets were reported to be problematic at the following stations: Garissa, Kondela, Lodwar, Makueni, Nyeri and Voi.

It appears that at none of the police stations there are water taps in the cells and the general practice is that a 20 litre container of water is placed in the cells from which detainees can drink water. The storing of water in containers is problematic, especially when cells are severely overcrowded and detainees lack the means to keep containers clean and there is open sewage in the cells. This places their health as well as the health of officials at great risk.

6.6 Access to food

All the stations surveyed except Nakuru reported that three meals are served every day. Nakuru noted that only two meals are served per day. From the stations where information was available, it appears that food is provided by the local police canteen or a contracted company. The content

of meals varied between stations. Breakfast typically consists of thin maize porridge with tea or bread with tea. Lunch generally consist of *ugali* (stiff maize porridge) with cabbage or beans or colewort (*sukuma*) or vegetables. Detainees are provided with basic eating utensils such as a plate and cup, but spoons are not supplied at all stations. Metal spoons reportedly create a security risk. It is assumed that detainees will therefore eat with their hands.

It appears that all detainees receive the same food and there is no attempt to meet religious dietary requirements. The UNSMR does not make specific reference to the observance of religion-based dietary requirements, but it does state that 'There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status. The religious beliefs and moral precepts of prisoners shall be respected.'

6.7 Access to clothing and bedding

Detainees are not supplied with a uniform and are permitted to wear their own clothing, as is the practice internationally. However, if the detainee's clothing is no longer suitable, or it has been taken in as evidence, the Police Service does not supply alternative clothing and such detainees will be dependent on their relatives to supply them with clothing. It was only at Kakamega, Lodwar and Maua that detainees are provided by the police with soap to wash themselves as well for washing their clothing.

At all except one of the stations it was found that no bedding or blankets are provided. From Kisii it was reported that bedding is provided to female detainees and from Makueni that well-wishers provide bedding to arrested children. At the other stations detainees sleep in their clothing and on the concrete floor. This situation is by all accounts degrading and unsanitary.

7. Access to health care

Key international instruments:

- Art. 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Rules 24-35 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Principle 9 of the Basic Principles for the Treatment of Prisoners
- Art. 6 Code of Conduct for Law Enforcement Officials
- Rules 41-55 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)
- Principles 1-6 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

The UNSMR, in Rule 24(1), states that:

1. The provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.
2. Health-care services should be organized in close relationship to the general public health administration and in a way that ensures continuity of treatment and care, including for HIV, tuberculosis and other infectious diseases, as well as for drug dependence.

It was enquired if all new admissions who show visible sign of injury or ill health, or complain thereof, are taken to a hospital or clinic without delay? All stations except Garissa reported that this is the case and that such detainees are taken to the nearest government hospital.

Deaths appear to be rare and only one death due to unnatural causes (murder) was reported for 2014 from Maua. The matter has reportedly been referred to the Director for Public Prosecutions.

The role of health sector personnel is of particular importance in places of detention and such staff must receive training to perform their duties in compliance with the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[311] The Special Rapporteur on Torture recommended as follows:

> Health sector personnel should be instructed on the Principles of Medical Ethics for protection of detainees and prisoners. Governments and professional medical associations should take strict measures against medical personnel that play a role, direct or indirect, in torture. Such prohibition should extend to such practices as examining a detainee to determine his "fitness for interrogation", procedures involving ill-treatment or torture, as well as providing medical treatment to ill-treated detainees so as to enable them to withstand further abuse.

8. Contact with the outside world

Key international instruments:

- Rules 58-64, 68-70 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)

311 E/CN.4/1995/34 12 January 1995 para. 926(i) See also CAT, Concluding Observations on Turkey, UN Doc. CAT/C/CR/30/5, 2003, para 7(k) "Intensify training of medical personnel with regard to the obligations set out in the Convention, in particular in the detection of signs of torture or ill-treatment and the preparation of forensic reports in accordance with the Istanbul Protocol"

- Principles 15-20 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Art. 37(c & d) of the Convention on the Rights of the Child

Principle 19 of the Body of Principles states that:

> A detained person shall have the right to be visited by and to correspond with, in particular, members of family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Principle 15 of the Body of Principles stresses this contact shall not be denied longer than a few days upon arrest. Rule 58 on the UNSMR requires that

> 1. Prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals:
>
> (a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and
>
> (b) By receiving visits.

8.1 Contact with family and legal representative

An important protective measure is that detainees must be able, without delay, to contact their relatives and/or legal representative to inform them of their arrest. All the stations reported that detainees are permitted to contact their families and/or legal representative. From some stations it was reported that officials would allow detainees to use their phones to contact their families. Five stations reported that they are without official telephones; these being Garissa, Kondela, Marsabit, Nyeri and Voi. Where official phones are available, it was reported that detainees will be able to use these in the case of an emergency. There appears to be little restriction on visiting hours and the duration of visits. Some stations reported that visits are permitted daily between 08:00 and 18:00.

Only six of the 14 stations reported that the visitors' area where detainees can receive visitors is adequate for the number of visitors. At these stations there is either no visitors' area or it can only accommodate too few people. In the case of Maua it can only take one person at a time. On the day of the fieldwork, Maua had 38 detainees which would imply lengthy delays in receiving a visitor.

Enquiry was also made whether arrested foreign nationals are permitted to contact their diplomatic or consular representative or other authorised body. All stations confirmed that this is permitted at

the detainee's expense and may be facilitated by the Commanding Officer. However, few stations have indeed had such a case. A similar enquiry was made in respect of stateless persons and none of the stations reported ever having to have dealt with such a case.

8.2 Reason for arrest and access to counsel

Every arrested person has the right to be informed of the reasons for his or her arrest[312] and also to be informed of their right to legal representation.[313] From all stations except Kilimani it was reported this requirement is complied with and that this information is conveyed to the detainee upon arrests and/or at the police station by officials there. It is not clear from the data collected why Kilimani does not comply with this requirement.

It appears as if none of the police stations surveyed has a dedicated office where detainees can consult their legal representatives in private and that in the majority of instances an office is temporarily made available for this purpose (e.g. at Garissa, Kakamega and Kisii). From Kilimani it was reported that the detainee has to consult his legal representative outside; presumably this is still in the secure area of the station. The extent to which consultations are indeed private is called into question. From Makueni it was reported that a police official must be 'close to hear the discussion but not contributing to their discussions'.

There appears to be no time limit on the duration of consultations between a detainee and his or her legal representative. However, a number of stations reported that visits are permitted only from 06:00 until 18:00 – these being Garissa, Kakamega and Nakuru. Such an arrangement would thus place an effective limit on access to legal representation and be a violation of the detainee's fair trial rights.

9. Complaints and inspection procedure

Key international instruments:

- Art. 8 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Art. 13 of the UN Convention against Torture, Cruel Inhuman and Degrading Treatment or Punishment (UNCAT)
- Rules 54 and 83-85 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)

312 S 49(1)(a)(i) Kenya Constitution.

313 Ss 49(1)(c) and 50(2)(g) Kenya Constitution.

- Rules 72-78 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

From years of monitoring places of detention, it is by now well-established and accepted that a lack of transparency and, consequently, accountability are the fundamental risks to detainees' rights, in particular the right to be free from torture and other ill treatment. The Special Rapporteur on Torture is clear on this issue:

> The most important method of preventing torture is to replace the paradigm of opacity by the paradigm of transparency by subjecting all places of detention to independent outside monitoring and scrutiny. A system of regular visits to places of detention by independent monitoring bodies constitutes the most innovative and effective means to prevent torture and to generate timely and adequate responses to allegations of abuse and ill-treatment by law enforcement officials.[314]

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, in Principle 29, recognises the importance of visits by independent parties and requires that: 'places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment'.[315] Moreover, detained persons shall, subject to reasonable conditions to ensure security and good order in places of detention, 'have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment'.[316] The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment in Principle 33(1) states that:

> A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

9.1 Complaints procedure

Schedule 5(8)(b) to the National Police Service Act requires the OCS to appoint an official who is responsible for the welfare of detainees. Presumably this official will be responsible for taking complaints. The same schedule at 9(d) confirms the right of a detainee to lodge a complaint of ill treatment to the IPOA.

314 *A/HRC/13/39/Add.5 para 157*

315 *Body of Principles, Principle 29(1).*

316 *Body of Principles, Principle 29(2).*

All the stations confirmed that detainees can lodge a complaint at any time. All the stations similarly reported that complaints are recorded in the Occurrence Book and that there is no separate register for complaints. However, if the complaint concerns violence perpetrated by the police, this is according to the report from Nakuru, recorded in a separate register. It was furthermore confirmed by all stations except Kondela, that family members of the detainee or his or her legal representative may also lodge a complaint.

9.2 Inspection procedure

Schedule 5 to the National Police Service Act state the following regarding inspections:

> 11. A lock-up facility shall be open for inspection, including unannounced visits by both the Independent Police Oversight Authority (IPOA) and the Cabinet Secretary or their representatives.
>
> (1) In the case of unannounced visits contemplated in paragraph 11 -
>
> (a) officers responsible for the facility shall cooperate fully with the persons making the visit;
>
> (b) recommendations may be made for improvement, which shall be binding upon the Police;
>
> (c) the detained person shall be entitled to communicate freely and confidentially with persons making the visit.
>
> (2) Any officer referred to in sub-paragraph (1) who fails to comply with the requirements set out therein commits an offence.

Three stations reported that they have never been inspected by an independent authority. A further five stations reported that they have been inspected by senior police inspectors, for example from head office. Six stations reported that they had been inspected by independent inspectors. For example three stations reported that they had been inspected by the Independent Police Oversight Authority (IPOA). From Kakamega it was reported that there had been inspections by the Ministry of Public Works, Department of Health and NGOs. The National Human Rights Commission had inspected the station at Kisii. Where independent inspections took place it was reported that the detainees were permitted to talk freely to the inspectors.

10. Women

Key international instruments:

- Principle 5(2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

- Rule 11(a), 28, 45(2) and 81 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Bangkok Rules.

Schedule 5 to the National Police Service Act requires that men and women be detained separately.[317] All the stations reported that females are always detained separately from male detainees. However, from Makueni it was reported that it is not possible to segregate them when travelling to court or hospital. From Nyali it was reported that children are kept with female detainees.

From three stations it was reported that female detainees are not always supervised by female officers; these were Maua, Nyeri and Voi. In the case of Voi it was explained that there is a shortage of female officers. As a result of an apparent lack of female staff at these stations it does occur that male officers enter female cells without being escorted by a female officer.

From two stations it was reported that female detainees are provided with sanitary towels free of charge, namely Kakamega and Murang'a. In the case of the latter it was noted that this is done dependent on the availability of stock. At other stations, detainees are dependent on their families for assistance.

11. Children

Key international instruments:

- Art. 10(2) of the International Covenant on Civil and Political Rights (ICCPR)
- Art. 37 of the Convention on the Rights of the Child
- Rule 29, 45 and 60 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rules 17 and 18 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNJDLs) set out detailed provision for the detention of children. In addition to the general provisions, the UNJDLs state the following in respect of pre-trial detainees:

> 17. Juveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made

317 *Schedule 5(5)(c).*

to apply alternative measures. When preventive detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention. Untried detainees should be separated from convicted juveniles.

18. The conditions under which an untried juvenile is detained should be consistent with the rules set out below, with additional specific provisions as are necessary and appropriate, given the requirements of the presumption of innocence, the duration of the detention and the legal status and circumstances of the juvenile. These provisions would include, but not necessarily be restricted to, the following: (a) Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications; (b) Juveniles should be provided, where possible, with opportunities to pursue work, with remuneration, and continue education or training, but should not be required to do so. Work, education or training should not cause the continuation of the detention; (c) Juveniles should receive and retain materials for their leisure and recreation as are compatible with the interests of the administration of justice.

Schedule 5 to the Children's Act lays down the basic requirements and procedure pertaining to an arrested child, the main features being that:

- the child be brought before a court within 24 hours
- the police OCS must inform, as soon as practicable, the parents or guardians of the child; or the Director (of Children's Services) of the arrest
- the police shall ensure that the parent or guardian of the child, or an advocate appointed to represent the child is present at the time of any police interview with the child
- If a child's parent or guardian cannot immediately be contacted or cannot be contacted at all, a Children's Officer or an authorised officer shall be informed as soon as possible after the child's arrest so that he can attend the police.[318]

From Isiolo and Kondela it was reported that children cannot be segregated due to inadequate facilities. Six stations reported that children are detained separately, but that they are mixed with adults during transportation. There is thus a need for clarification on the transportation of children to and from court or hospital, and possibilities should be explored whether the Children Services Department can provide assistance. From Lodwar it was reported that children are detained with women in the same cell due to a lack of facilities.

318 Schedule 5 para 4 Children's Act

Access to a social worker by children appears to be generally possible and is facilitated through the probation service or the Children's Department through a children's officer or Children and Gender Desk of the police. From Garissa and Nakuru it was reported that a social worker is not available for children. According to the data collected, the department responsible for children's affairs are notified when a child is arrested. It was furthermore noted by police management, when providing feed-back on the draft report, that there is an insufficient number of Child Protection Units (a civil society driven initiative) and that additional funds need to be provided to make the Child Protection Units more accessible;[319] a goal supported by the UN Committee on the Rights of the Child in its 2016 review of Kenya.[320] It appears that there is a broader need to discuss the role of the Probation Department and Children's Services in relation to children in conflict with the law.[321]

12. Staff skills

Key international instruments:

- Art. 5 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Art. 10 of the UN Convention against Torture, Cruel Inhuman and Degrading Treatment or Punishment (UNCAT
- Principles 18-20 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- Rules 81-87 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)
- Rule 74 UNSMR.

From all the stations it was reported that staff had received training on detainee management, but the overall impression is that this happened during their initial training at the police college as recruits. Seven stations did, however, report that there had been some refresher training, although this may not have been specifically on detainee management. Input from police management following the fieldwork[322] indicated that all OCS's are supposed to hold lectures every Saturday on detainee management and fire arms and on emerging issues every day during *Timam* parades at 5 pm. The extent to which this is complied with could, however, not be verified.

319 *Meeting to present draft findings of this report to police management, 19 June 2016, Vigilance House, Nairobi.*

320 *CRC/C/KEN/CO/3-5 para 34(g).*

321 *Meeting to present draft findings of this report to police management, 19 June 2016, Vigilance House, Nairobi.*

322 *Meeting to present draft findings of this report to police management, 19 June 2016, Vigilance House, Nairobi.*

13. Recommendations

As is the case across Africa, neglected infrastructure, limited training, weak oversight and non-compliance with internationally accepted human rights standards characterise police detention in Kenya. The Kenyan Police face numerous challenges and it will take a concerted effort to arrange challenges existing on multiple levels. Investing in human resources and infrastructure should be the foci of a transformation process seeking the ultimate objective of undoing the features of an inherited colonial police force.

Standards of detention

1. The overall impression is that whatever standards of detention there are, they are not complied with or compliance is poor. Clear measurable standards for police detention need to be laid down that addresses all aspects of detention as well as what type of infrastructure may be used for police detention (e.g. are shipping containers acceptable?).
2. At a few police stations it was observed that detainees have been held there for extended periods; the longest being 60 days at Nakuru. Police cells are not suitable for detention longer than a few hours and at maximum two days. All efforts should be made that detainees are not held in police cells for long periods.
3. Only three stations reported that they are able to allow detainees out of the cells each day, being Maua (30 minutes). Murang'a (2 hours) and Nakuru (1 hour). The UNSMR requires a minimum of one hour of outside exercise per day and this is even more an urgent requirement when detainees spend lengthy periods in police custody.
4. Record-keeping meets the requirements although two exception were noted at Kakamega and Voi and needs to be addressed.
5. There is inconsistency in the information provided to detainees upon admission and this needs to be addressed to establish a uniform practice.
6. Indigent detainees should be permitted to inform their families of their arrests at state expense and not have to rely on the goodwill of police officials. Where possible, detainees should be able to seek the assistance of a welfare officer to assist them as needed.
7. There is inconsistency regarding the notification of parents and relevant government department when children are arrested. The legal prescripts are clear and need to be complied with.
8. It is furthermore recommended that Child Protection Units be established elsewhere as is the case in Kisumu and Malindi.
9. A range of vectors of disease were reported. This holds significant risks for detainees, staff and the community. More effective measures need to be taken to address the problem in conjunction with the Department of Health.

10. Meals served appear to be basic and may be adequate for a day or two, but when in police custody for a long period, this may become problematic. This lends further support to the recommendation that police custody for long periods should as far as possible be prevented.
11. At all except one of the stations it was found that no bedding or blankets are provided. This situation is by all accounts degrading and unsanitary. As a matter of priority detainees should be provided with at least blankets.
12. It was found that some stations are without official telephones and some also have no visitors' area. Telephones are essential so that detainees can notify their families of their arrest and visitors' areas enable visits to be conducted in a dignified manner.
13. The feasibility of stationing lawyers and/or para-legals at police stations should be investigated as they may assist in expediting cases by providing proper advice and court preparation.
14. From three stations it was reported that female detainees are not always supervised by female officers; these were Maua, Nyeri and Voi. In the case of Voi it was explained that there is a shortage of female officers. As a result of an apparent lack of female staff at these stations it does occur that male officers enter female cells without being escorted by a female officer. Not having female officers at a police station place female detainees at significant risk and needs to be addressed as a matter of priority.
15. It was reported from a minority of stations that it is not always possible to separate children from adults at the cells or during transportation. Both issues need to be addressed through either active monitoring but preferably through putting the required infrastructure in place.

Training, policy and oversight

16. The data indicates that there is significant variation in the extent to which officials have been trained in the absolute prohibition of torture and reliance in placed on their induction training. It is essential that officials receive regular refresher training on the prohibition of torture and the minimum use of force. Moreover, police officers should receive continuous training to ensure that they are familiar with legal and other regulatory prescripts and are able to apply a progressive and rights-based approach to policing.
17. The overall impression is that little refresher training takes place which would explain the inconsistencies in various practices observed. It is thus recommended that broad-based training is undertaken to ensure that officials are familiar with standing orders and legal prescripts.
18. While the regulatory framework governing a death in police custody is fairly clear on the procedure to follow, there is reason to conclude that not all officials are adequately trained to follow the correct procedure, giving rise to inconsistent responses.

19. All police stations should be inspected by an independent authority on a regular basis through announced and unannounced visits.

Infrastructure

20. From some stations (e.g. Garissa and Isiolo) it was reported that due to the few cells available it is not possible to ensure the required separation of categories. The necessary infrastructure needs to be put in place to ensure separation of categories as is required.
21. If 3.5 m2 is regarded as the absolute minimum space per person, it is noted with concern that a number of stations were well below this in all or some of their cells. In this regard the following stations are noted: Isiolo, Lodwar, Makueni, Marsabit, Maua, Nakuru and Nyeri. The recommendation again relates to improving infrastructure that requires upgrading and improvement. Minimum standards need to be set down for police cells.
22. The poor conditions of police buildings appears to be a longstanding problem as reflected in a number of Parliamentary questions and debates in Hansard dating back to 1973. While the refurbishment or construction of police stations may be expensive, it has to be accepted that in some instances that the infrastructure is dilapidated and not able to meet human rights standards set out in the Constitution and subordinate law. In many other instances, due to the age of the buildings, their architecture is not able to meet human rights standards.

Chapter 3.4

Conditions of detention at selected Remand Prisons in Kenya findings

Introduction

Conditions of detention are important in respect of a range of rights and the UN Working Group on Arbitrary Detention stated the following on the right to a fair trial:

Where conditions of detention are so inadequate as to seriously weaken the pre-trial detainee and thereby impair equality, a fair trial is no longer ensured, even if procedural fair-trial guarantees are otherwise scrupulously observed.[323]

Conditions of detention refer to those attributes in a detention facility that are primarily of an infra-structural and physical nature having an impact on the human experience of incarceration. Their establishment, utilisation and management should be aimed at contributing to the safe, secure and humane treatment of all detainees. These attributes and their use refer to at least:

- the physical characteristics of the prison building, including sleeping, eating, working, training, visiting and recreation space;
- the provision of beds, bedding and other furnishings;
- the nature and conditions of the ablution facilities;
- the cleanliness of the living space and maintenance of buildings and infrastructure

323 *E/CN.4/2005/6, para 69.*

- the level of occupation of the facility, individual cells and common areas with reference to two and three dimensional space measurements and ventilation.

Whilst an emphasis is placed on the physical attributes, it should be borne in mind that these are strongly influenced by other factors such as staff capacity and the willingness of management to resolve problems or at least ameliorate their negative effects. Prison governance therefore forms an important dimension of understanding conditions of detention and this has been remarked upon as follows:

> Good prison governance is to a large extent determined by the existence of an enabling policy framework, necessary resources and the extent to which prison management has the ability to implement these policies on a day-to-day basis in a transparent, accountable and ethical manner. In the context of this research, however, the notion of governance is understood to encompass not only issues of administrative efficiency and probity, but also the extent to which the basic human/constitutional rights of offenders are recognised and respected.[324]

The following are important in this regard in assessing prison conditions:

- The prisons are overcrowded as there had not been an expansion of infrastructure to cope with the growing demand for prison space.
- The existing infrastructure is rapidly ageing and in many regards the existing architecture negates against compliance with domestic and international law standards pertaining to conditions of detention. The separation of different categories of prisoners cannot always be complied with.
- The combination of overcrowding, ageing buildings and lack of resources drive many of the problems that have been identified in other studies as well as the current one.
- Inadequate cells and furnishings, a monotonous diet, sickness and disease, a shortage of ablution facilities and prisoner idleness stand out as key problems.

Reference is made above to the ageing nature of the prison infrastructure. Table 1 below presents the date of construction (specific or estimated) of the prisons surveyed.[325]

Table 1

County/ Province	Prison	Date of Construction
Nairobi/ Nairobi	Nairobi Remand and Allocation Prison	1911
Garissa/ North Eastern	Garissa	1945
Isiolo/ Eastern	Isiolo	1947

324 *Tapscott C. (2005) A Study of Best Practice in Prison Governance. CSPRI Research Report Nr. 9, p. 3.*

325 *Data generated from Prison standing orders 1979 edition.*

Kakamega/ Western	Kakamega	1931
Kakamega/ Western	Kakamega Women	1951
Kisii/ Nyanza	Kisii	1961
Kisii/ Nyanza	Kisii Women	1961
Kisumu/ Nyanza	Kisumu	1961
Kisumu/ Nyanza	Kisumu Women	1961
Nairobi/ Nairobi	Langata Women	1954
Turkana/ Rift Valley	Lodwar	1952
Makueni/ Eastern	Makueni Remand	2003
Makueni/ Eastern	Makueni Remand Female	2012
Marsabit/ Eastern	Marsabit	1931
Meru/ Eastern	Meru	1961
Meru/ Eastern	Meru Women	1965
Murang'a/ Central	Murang'a	1961
Murang'a/ Central	Murang'a Women	1963 gazetted in 2003
Nakuru/ Rift Valley	Nakuru	1961
Nakuru/ Rift Valley	Nakuru Women	1961
Nyeri/ Central	Nyeri	1953
Nyeri/Central	Nyeri Women	1963
Mombasa/ Coast	Shimo La Tewa	1953
Mombasa/ Coast	Shimo La Tewa Women	1953
Taita taveta/ Coast	Voi	1955
Taita taveta/ Coast	Wundanyi	1952

Methodology

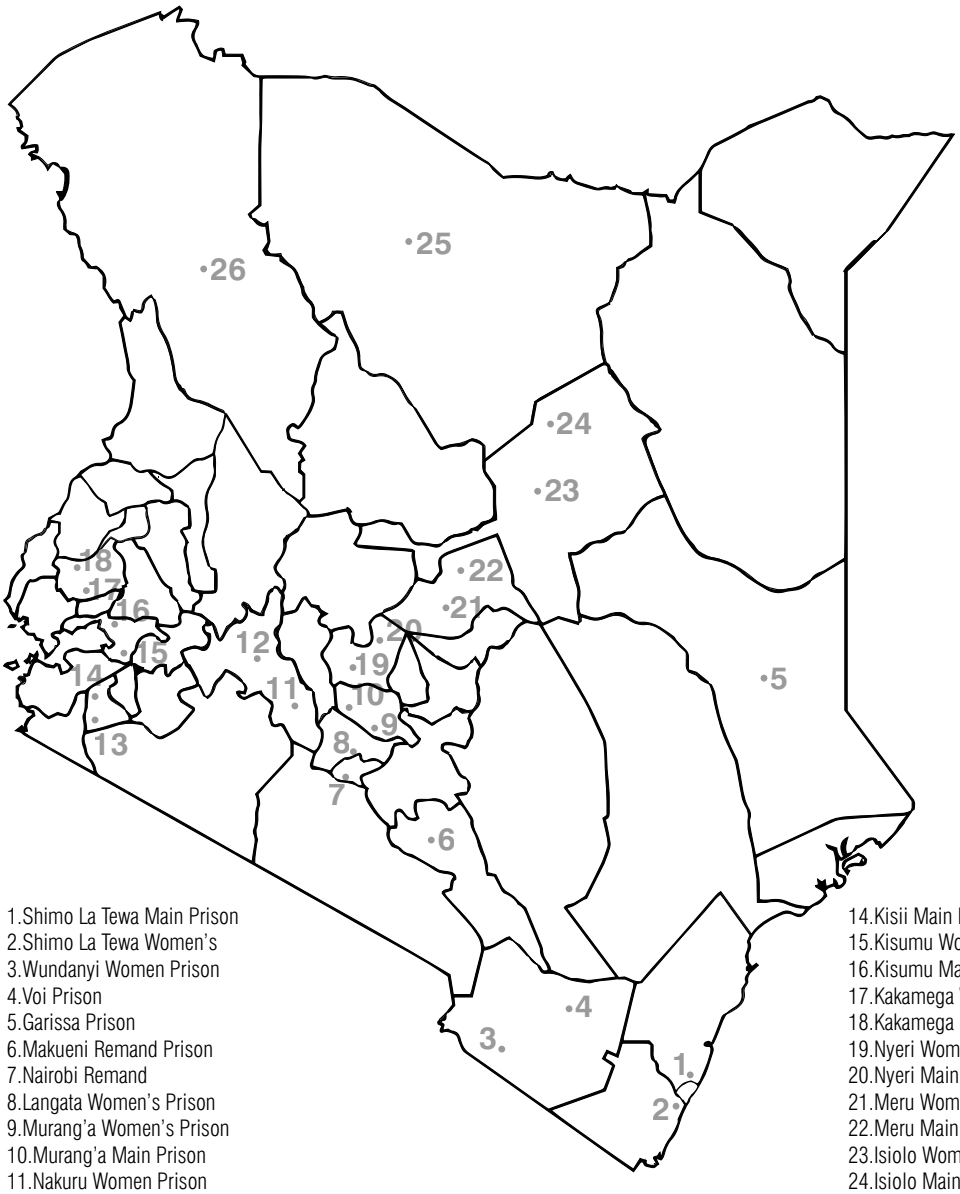
It was not part of the scope of this survey to interview prisoners regarding conditions of detention and treatment, but rather to assess the systems and basic infrastructure in place as they relate to conditions of detention. The dates on which fieldworkers collected data from the 26 prisons are presented in Table 2.

Table 2

Prison	Date of Visit
Garissa	07/10/2015
Isiolo	28/08/2015
Kakamega	13/08/2015
Kakamega Women	11/08/2015

Kisii	02/09/2015
Kisii Women	27/08/2015
Kisumu	11/09/2015
Kisumu Women	01/09/2015
Langata Women	25/08/2015
Lodwar	13/11/2015
Makueni Remand	28/08/2015
Makueni Remand Female	24/08/2015
Marsabit	19/10/2015
Meru	02/09/2015
Meru Women	11/08/2015
Murang'a	10/08/2015
Murang'a Women	10/08/2015
Nairobi Remand	31/08/2015
Nakuru	25/08/2015
Nakuru Women	10/08/2015
Nyeri Main	04/09/2015
Nyeri Women	10/9/2016
Shimo La Tewa	10/09/2015
Shimo La Tewa Women	27/08/2015
Voi	01/08/2015
Wundanyi	26/08/2015

CJS AUDIT 2015(CASE FLOW MANAGEMENT AND CONDITIONS OF DETENTION)
REMAND HOMES AUDIT SITES



1.Shimo La Tewa Main Prison
2.Shimo La Tewa Women's
3.Wundanyi Women Prison
4.Voi Prison
5.Garissa Prison
6.Makueni Remand Prison
7.Nairobi Remand
8.Langata Women's Prison
9.Murang'a Women's Prison
10.Murang'a Main Prison
11.Nakuru Women Prison
12.Nakuru Main Prison
13.Kisii Women's Prison
14.Kisii Main Prison
15.Kisumu Women's Prison
16.Kisumu Main Prison
17.Kakamega Women's Prison
18.Kakamega Main Prison
19.Nyeri Women's Prison
20.Nyeri Main Prison
21.Meru Women's Prison
22.Meru Main Prison
23.Isiolo Women's Prison
24.Isiolo Main Prison
25.Marsabit Prison
26.Lodwar Prison

The Prisons

Table 3 presents the basic profile of the respective prison populations with reference to sentence status, percentage on remand, infants accompanying their mothers, the number of female remandees, number of juvenile remandees, and the duration of custody for the longest period per prison.

Table 3

	Nr of Detainees	Nr of Convicted	% Remand	Children accom-panying their Mothers	Nr of Women	Juveniles	Longest Awaiting Trial, Months
Garissa	215	219	49.5	9	30	0	96
Isiolo	81	95	46.0	0	27	0	24
Kakamega	704	446	61.2	0	0	0	108
Kakamega Female	62	179	25.7	17	241	0	96
Kisii	783	402	66.1	0	0	0	84
Kisii Women	61	168	26.6	37	229	0	50
Kisumu	917	2279	28.7	0	0	20	120
Kisumu Women	0	198	0.0	13	198	0	96
Langata Women	343	312	52.4	51	312	2	72
Lodwar	241	218	52.5	6	23	6	
Makueni Remand	200	20	90.9	0	0	0	22
Makueni Remand Female	5	12	29.4	4	18	0	3
Marsabit	23	115	16.7	4	6	0	2
Meru	800	436	64.7	0	0	13	156
Meru Women	95	215	30.6	57	310	0	42
Murang'a	371	159	70.0	0	0		60
Murang'a Women	26	32	44.8	8	59	0	0.5

Nairobi Remand	2595	216	92.3			78	132
Nakuru	1029	1562	39.7			20	204
Nakuru Women	91	169	35.0	46	260	0	49
Nyeri Main	474	669	41.5	0	0	5	49
Nyeri Women	32	71	31.1	14	103	0	96
Shimo La Tewa	1256	1297	49.2	0	0	0	146
Shimo La Tewa Women	82	103	44.3	6	185	0	62
Voi	68	82	45.3	-	-	-	8
Wundanyi	4	43	8.5	7	47	-	4

The highest number of remandees is at Nairobi remand at nearly 2600, followed by Nakuru with 1029. The proportion of remandees at each prison varied greatly and some are indeed exclusively remand prisons, such as Nairobi Remand and Makueni Remand. These prisons usually hold a small number of sentenced prisoners to perform particular tasks in and around the prison that cannot be allocated to remandees. AT some of the women's prisons significant numbers of infants are in prison with their mothers, for example at Langata (51) and Meru (57). The number of juveniles in detention is relatively low and should be regarded as a positive trend. Of far greater concern is the fact that some detainees remain awaiting trial for excessively long periodS. The longest was recorded at Nakuru at 17 years or 204 months awaiting trial and second longest at Meru at 13 years or 156 months. To remain awaiting trial for such a period on the presumption of innocence is a gross violation of the accused's right to a fair trial; after such a long period a fair trial is no longer possible

Right to physical and moral integrity

Key international instruments:

- Art. 5 of the Universal Declaration of Human Rights (UDHR);
- Art. 7 of the International Covenant on Civil and Political Rights (ICCPR);
- Arts. 2 and 10 of the UN Convention against Torture, Cruel Inhuman and Degrading Treatment or Punishment (UNCAT);
- Arts. 2 and 3 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,
- Rule 31 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Principle 1 of the Basic Principles for the Treatment of Prisoners
- Principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;

- Rule 87(a) of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)
- Principle 1 of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Prohibition of torture and ill treatment

Kenya acceded to UNCAT in February 1997 and has since submitted two reports to the Committee against Torture (CAT). However, torture has only been criminalised in the National Police Service Act and the draft Prevention of Torture Bill (2011) has still not been enacted.[326] There is thus no legislation criminalising torture in respect of the prison system. However, the Persons Deprived of their Liberty Act (2014) criminalises 'cruel, inhuman or degrading treatment' but not torture. A contravention in this regard may attract a punishment of Ks 500 000 or two year's imprisonment or both.[327] It should be noted that the duty of the State to provide safe custody is not limited to ensuring that officials do not torture or ill-treat prisoners. The State is also responsible for preventing inter-prisoner violence and ill treatment. Moreover, the State's obligations extend beyond that of its own officials since it has a duty towards non-State actors – in this case, all prisoners.[328] The CAT has been clear in this regard:

> The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.[329]

326 CAT/C/KEN/CO/2 para 6.

327 Section 5.

328 Muntingh L and Satardien Z (2011) Sexual violence in prisons – Part 1: The duty to provide safe custody and the nature of prison sex, SA Journal of Criminal Justice.

329 Committee Against Torture, General Comment 2, CAT/C/GC/2/CRP.1/Rev. 4, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/402/62/PDF/G0840262.pdf?OpenElement, para 18.

Training

Article 10 of the UNCAT requires that officials working with people deprived of their liberty be informed and educated regarding the absolute prohibition of torture. In 2013 CAT recommended that Kenya 'redouble its efforts to train the police on human rights, especially the provisions of the Convention, and extend the training programme to all law enforcement and military personnel and carry out an effective evaluation of the impact of the training programme.'[330]

The responses received from the prisons surveyed indicate some variation in the extent to which prison officials are or have been trained in the absolute prohibition of torture. From 14 prisons it was reported that the prohibition of torture formS part of initial training at the college and that there have not been any refresher training, or it was long ago, or it involved a small segment of the staff. At the other 12 prisons there have been refresher training, or officials are reminded of the prohibition during *timam* parades. From the available evidence there is reason to conclude that a greater effort should be made to ensure that all officials are well versed in the absolute prohibition of torture.

Deaths

There was some variation in the responses describing how deaths in custody are investigated. A number of prisons reported that there has not been a death at their facilities, but did not describe what the procedure is to be followed in such a case. From Meru Women's Prison it was reported that the body is immediately taken to the hospital and that investigations are done by the police. The immediate removal of the body may have serious consequences for an investigation, especially If foul play is a possibility. The majority of prisons reported that the police conducts the investigation, but were by and large vague on what the responsibilities are of the KPS in securing the crime scene and supporting the police with their investigation.

Expiration of warrants

The detention of a person may only be carried out in strict accordance with the provisions of the law and by competent officials or persons authorised for that purpose.[331] Section 31 of the Prisons Act stipulates the requirements in respect of remand warrants. A person may only be detained on a valid and unexpired warrant, meaning that the person's detention must fall within the dates of detention as specified by the court. All prisons except three reported that all remand detainees at their facilities are being held on unexpired warrants. The three prisons where this was not the case were Kisumu, Makueni Remand and Shimo La Tewa Women's Prison.

330 *CAT/C/KEN/CO/2 para 24.*

331 *Body of Principles, Principle 2.*

Record keeping

The International Convention for the Protection of All Persons from Enforced Disappearance, which Kenya signed in February 2007, gives normative and operational force to the provisions of the Declaration on the Protection of all Persons from Enforced Disappearance and requires, amongst others, that State parties to the Convention:

> Guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty.[332]

Article 17 provides valuable practical guidelines for States on the prohibition of enforced disappearances, the required legal safeguards regarding the deprivation of liberty, and the administrative safeguards applicable to the deprivation of liberty. Many of the administrative safeguards in the International Convention, in the form of registers and records, are also found in Rules 6-10 of the UNSMR (2015) and must be accepted as a reasonable and achievable requirement.

The Persons Deprived of their Liberty Act (2014) provides further guidance stating that the following needs to be recorded:

- personal details of the person detained , including name, age and address;
- physical condition of the person detained , held in custody or imprisoned;
- reason for the imprisonment; steps taken to ensure that the person arrested or detained is subjected to due process of the law; and
- the medical history of the person detained, held in custody or imprisoned.[333]

From all the prisons it was reported that there is a register where the name and identity of the remand prisoner as well as the date and reason for admission is recorded. It appears to be generally the case that the date but not the time of admission and release is recorded. Whether there is indeed compliance with the Persons Deprived of their Liberty Act requirements needs further investigation.

332 *Art. 17 (2)(c).*

333 *Section 3(3).*

Information given

Despite the deprivation of liberty, detained people must be treated with dignity[334] and fairness.[335] It is an important preventive measure that detained people are informed in writing upon admission about the rules of the institution, the disciplinary code and procedures, and any other matters necessary for a detained person to understand his rights and responsibilities.[336] If the detained person is illiterate, this information must be conveyed to him verbally.[337]

A range of practices were reported. The general trend is that prisoners are informed of their rights and responsibilities upon admission. The overall impression is that there is not consistency in what information is provided, how it if provided and to whom it is provided. At some prisons, prisoner rights and responsibilities are displayed on a notice board but not at all. From Lodwar it was reported that the Kenya National Commission on Human Rights (KNCHR) had installed a notice board for the rules of the prison, as well as prisoner rights and responsibilities to be displayed. From Meru Women's Prison it was reported that it is rare that officials provide such information and that prisoners received it from para-legals working in the prison. From Murang'a it was reported that such information is only supplied upon request. At Nyeri there is a reportedly a small booklet provided to prisoners that contain all the necessary information. The inconsistency in practice reported is cause for concern. Moreover, it is not guaranteed that the same information is provided to all detainees upon admission.

Access to legal representation and consular services

It was reported from all prisons that detainees are upon admission informed of their right to legal representation. This seems to be generally done by the documentation officer who is in some instances supported by a para-legal (e.g. Nyeri Main, Nyeri Women and Wundanyi). Consulting one's legal representative in private appears to be problematic in the majority of instances for two reasons. The first is that at many prisons the infrastructure is inadequate and there is simply not a consultation room. In some instances it was reported that an office can be temporarily made available. Secondly, from a number of prisons it was reported that a KPS officer must be present

334 ICCPR, Art. 10(1).

335 ICCPR, Art. 14. The Basic Principles for the Treatment of Prisoners, in Principle 5, emphasise the residuum of other rights and fundamental freedoms despite the deprivation of liberty: "Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants."

336 UNSMR Rule 54.

337 UNSMR Rule 55(2)

during consultations. This is violation of the Persons Deprived of their Liberty Act (2014).[338] From some prisons this was qualified by explaining the officer must be within sight but not earshot. Contrary to this correct interpretation of the rules, it was reported from Makueni Remand that 'Everything must be heard. An officer must be closely present'. Similar reports were noted at Nakuru and Murang'a. From Voi it was reported that the officer must listen to the conversation but 'must keep secret of what they hear.' Similar practices were reported in respect of written correspondence (e.g. Makueni Remand, Meru Women, Meru and Kisii). As with regard to the time allowed for consultation with one's legal representative, inconsistency in practice was found. From Garissa it was reported that half an hour is given and from Meru Women's Prisons only ten minutes. This is in violation of the People Deprived of their Liberty Act (2014) which reads: 'Nothing in this section limits the number of days on which a person deprived of liberty may be visited by his or her legal counsel or other representative in exercise of his or her right of access to justice.'[339]

However, from Nairobi Remand it was reported that this can happen as often as necessary and for as long as required. It is essential that the same practice is applied across the KPS and that access nor privacy is compromised in any way. Apart from the time limits noted above, no other restrictions on accessing one's legal representative were reported (e.g. as a disciplinary measure).

In respect of access to consular services for foreign nationals detained or other support services in the case of stateless persons, no restrictions were reported.[340] There was, however some variation. Some prisons do not receive foreign national often and it appears that there was thus some uncertainty as to the procedure to follow. A number of prisons reported that the welfare officer is responsible for this and may be supported by a para-legal. From Kisii it was reported that the International Committee of the Red Cross as well as the UN High Commissioner for Refugees are contacted. From Langata Women's prison it was reported that as a matter of procedure, the KPS Head Office as well as the relevant embassy is notified of the person's detention.

Work performed and access to education

PTDs may only be required to perform work that is necessary to keep themselves and their environment clean. This was found to be the case at all the prisons surveyed. From three prisons (Kisumu Women's, Nyeri Main and Shimo La Tewa Women) it was reported that upon request detainees can engage in such work as mat-making, carpentry, metal work, tailoring and formal schooling. This should be regarded as a positive development as detainees acquire skills and

338 Section 7(j).

339 Section 24(3).

340 People Deprived of their Liberty Act (2014) section 11.

a perfectly understandable option when detainees remain in custody for long periods and need an alternative to break the monotony and idleness of prison life. However, this should not be regarded as an excuse or an amelioration of spending long periods awaiting trial. Nonetheless, it should be investigated how more detainees can have access to education and the role of the Ministry for Education and community structures are in providing assistance in this regard.

The People Deprived of their Liberty Act sets a progressive standard in respect of all prisoners and people detained otherwise: 'Persons deprived of liberty shall be entitled - to access educational opportunities and reading material that is beneficial to their rehabilitation and personal development'.[341] It furthermore needs to be established what the operational meaning of this goal is. As far as could be established, this standard is not being met in respect of awaiting trial prisoners.

Property belonging to a prisoner

Key international instruments:

- Rule 43 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rule 35 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

Upon admission, a prisoner's valuables and cash are handed over to officials and recorded in a cash register or in the Prisoner Property Book; there appears to be some variation between different prisons in this regard. The prisoner signs at this point and also when receiving his valuables and cash again upon release. Signature may be with a thumbprint.

Prisoners who are carrying medication when admitted will be screened by a medical officer, as was reported in most instances, to ascertain the appropriateness of the medication. If the medicine is further required and has run out, arrangement will be made for continuation.

Right to an adequate standard of living

Key international instruments:

- Art. 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Rule 9-16, 21 and 41 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)

341 Section 18(1)(a).

- Rules 31-34, 47 and 48 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

States are under the obligation to ensure that people deprived of their liberty shall be treated with humanity and with due respect for the inherent dignity of the human person.

Available cell capacity and occupation

The People Deprived of their Liberty Act (2014) states that 'A person deprived of liberty shall not be confined in crowed conditions' although the meaning of crowded is not defined and leaves it to the Cabinet Secretary to specify this by Regulation. [342] The official capacity of the Kenyan prison system is 26 757 and total occupation at April 2015 was 54 154, 202.4%.[343] The national occupancy rate masks what the situation is at some individual prisons, such as Meru where the occupancy rate is 401% and Kakamega at 375% (see Table 4 below). At both prisons, pre-trial detainees constituted more than 60% of the total population (see Table 2 above), indicating that the underlying reason is a slow moving criminal justice process and in all likelihood an under-utilisation of conditional release mechanism provide for in law. With reference to the prisons for which complete data is available, it was found that 66% of prisoners in this group are held in prisons that are occupied at 150% or higher. There is no doubt that this is an unacceptable situation and creates a range of risks associated with prison overcrowding.

Table 4

Prison	Capacity	Occupation	Occupancy Rate
Meru	200	802	401.0
Kakamega	200	750	375.0
Garissa	75	208	277.3
Lodwar	112	242	216.1
Makueni Remand	100	197	197.0
Kisumu	120	230	191.7
Nyeri Main	250	476	190.4
Isiolo	50	81	162.0
Murang'a Women	20	31	155.0
Marsabit	15	23	153.3
Kisii Women	150	229	152.7
Langata Women	250	343	137.2

342 *Section 12(1-2).*

343 *World Prison Brief – Kenya http://www.prisonstudies.org/country/kenya*

Nakuru	800	1037	129.6
Meru Women	65	82	126.2
Voi	60	71	118.3
Nakuru Women	100	100	100.0
Nyeri Women	32	32	100.0
Makueni Remand Women	10	5	50.0
Wundanyi	10	4	40.0
Kakamega Women	7	12	171.4
Kisii	300	780	260
Kisumu Women	100	44	44
Murang'a	80	152	190
Nairobi Remand & All.	1228	2549	207.5
Shimo La Tewa	500	1256	251.2
Shimo La Tewa Women	35	82	234.2

Fieldworkers were tasked to select one cell at random where pre-trial detainees are held and take measurements as well as note the number of occupants. The results are presented in Table 4 below. Nyeri Women's prison had the largest available space per person at nearly 41 m^2, followed by Nyeri Main at 11.05 m^2. The majority of cells assessed had less than 1.5 m^2 per person which is unacceptable.

Table 5

Prison	Width	Length	Size	Occupancy	Square Metre Per Person
Garissa	12.1	22.7	274.67	38	7.22
Nakuru Women	2	2.5	5	4	1.25
Nyeri Women	25.5	25.5	650.25	32	19.4
Nyeri Main	6.5	8.5	55.25	9	6.1
Makueni Remand Female	4	11	44	11	4.00
Shimo La Tewa Women	6.5	18.5	120.25	43	2.80
Marsabit	5	8	40	23	1.74
Murang'a Women	6	7	42	27	1.56
Isiolo	4.5	11	49.5	32	1.55
Nairobi Remand & All.	9	16	144	94	1.53
Kakamega Women	4	6	24	20	1.20
Kisumu	2	4	8	7	1.14

Langata Women	6.3	17	107.1	97	1.10
Meru Women	7	8.5	59.5	59	1.01
Makueni Remand	6.5	20	97	97	1.00
Kisii	6	18	108	111	0.97
Lodwar	7	10	70	72	0.97
Kisii Women	4	12	48	50	0.96
Shimo La Tewa	5	10	50	53	0.94
Nakuru	1.5	2.5	3.75	4	0.94
Murang'a	5	16	80	91	0.88
Kisumu Women	1	2	2	3	0.67
Kakamega	3	6.5	19.5	40	0.49
Meru	5.5	9.5	52.25	112	0.47
Voi	0.5	2	1	20	0.05
Wundanyi	0.5	2.5	1.25	30	0.04

Amount of time per day outside of cells per day

The UNSMR requires a minimum of one hour of outside exercise per day per prisoner.[344] All the prisons surveyed except two (Kisii Women and Murang'a Women), reported that detainees spent in excess on one hour per day out of their cells. In many instances this ranged from three to four hours, and even longer. This is regarded as a positive trend. With regard to the two exceptions, it was reported that the detainees spend between 15 and 30 minutes outside per day. At two prisons (Shimo La Tewa and Shimo La Tewa Women) there was some dispute if not inconsistency in practice. In both instances it was reported that the time outside depends on the officer in charge and this can vary substantially.

General cleanliness, hygiene and vectors for disease

From all the prisons, it was reported that the compound is clean and that there is no solid waste lying around or stagnant water. The areas used by detainees for outside exercise was reported in all but a few instances to be clean dry and free from objects that may cause injury. At Makueni Remand Women it was observed that the area used for outside exercise is a small concrete-covered area. From Kisii Women's prison it was reported that there is a fair amount of stagnant water to be seen and from Shimo La Tewa (Male) that there was stagnant water and leftover food at a particular area giving off a foul smell.

344 Rule 21(1)

Thirteen of the 26 reported the presence of vectors of disease, the most common being mosquitoes. The presence of lice, bed bugs and cockroaches were reported from Kakamega, Kakamega Women, Kisii, Langata Women, Makueni Remand, Meru, Meru Women, Shimo La Tewa and Shimo La Tewa Women. Measures to control vectors include spraying, fumigation and draining stagnant water as well as maintaining general hygiene and cleanliness. The availability of mosquito nets is limited and appears to be more prevalent at women's prisons.

Quality of infrastructure and building

From the majority of prisons it was reported that the overall condition of buildings are of an acceptable standard and that the cell roofs do not leak and that there are no cracks and crevices where insects may hide and proliferate. Problems in this regard were, however, reported from Kakamega, Kisii Women, Kisumu, Makueni Remand, Marsabit, Murang'a, Nakuru, Shimo La Tewa Women and Voi.

Lighting and ventilation

All the prisons except Makueni Remand reported that there is artificial lighting in the cells. However, in some instances the artificial light is outside of the cell and not in the cell. The effectiveness of this is questioned. From two prisons (Makueni Remand and Murang'a Women) it was reported that natural light during the day is insufficient to read by. Ventilation was reported to be good at all the cells inspected except at Kisii and Makueni Remand.

Access to ablution facilities

Given that the majority of prisons surveyed are overcrowded it follows that the ratio of toilets to prisoners is far from ideal in a number of instances. From Murang'a it was reported that there is one toilet for 80 prisoners, Nakuru it was one to 75 and Makueni Remand 97. The cleanliness of toilets was reported to be acceptable in nearly all instances; the exceptions being Garissa and Makueni Remand. At four prisons it was reported that there are no showers and other means are used, such as buckets, basin and bath for washing purposes. These prisons are Langata Women, Meru Women, Nakuru Women and Shimo La Tewa. The supply of soap by the government is not dependable and prisoners rely on donations as well as on their families to provide soap.

Access to recreation and religious services

Sport and recreational activities for pre-trial detainees appear to be fairly limited and are restricted to football and volleyball when they are outside of their cells. The available infrastructure also place severe limitations at some prisons on recreational and sport activities (e.g. Nakuru and

Shimo La Tewa). From Shimo La Tewa Women it was reported that there is at present no access to physical exercise. Organised cultural activities appear to be very limited and were reported only from Nairobi Remand.

Access to religious services appear to be well developed and no problems were reported in this regard.

Adequate food and drinking water

Key international instruments:

- Art. 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Rule 20 and 87 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rule 37 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

The right to adequate nutrition and water is fundamental to the right to life and the UNSMR, in Rule 20, requires that:

1. Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.
2. Drinking water shall be available to every prisoner whenever he needs it.

Diet

All the prisons except Kakamega reported that three meals are served per day. This is usually early morning, mid-day and late afternoon. In the case of Kakamega it was reported that no breakfast is served – lunch at 11:50 and supper at 16:00. This is a regrettable situation as it means that prisoners have a lapse of 20 hours between the last meal of the day and the first meal of the next day. It is not clear why Kakamega only serves two meals and follow-up investigations are required.

Although claims were made that a meal plan is followed, it appears that *ugali* and beans are the staples and may be accompanied with vegetables. Varying the diet with seasonal fruit and vegetables does not appear to be a standard practice and may be a function of the area in which the prison is located. However, from several prisons it was reported that fruit is never provided (e.g. Nakuru Women and Meru). Fruit can reportedly be purchased from the prison canteen at several of the prisons surveyed. Meat was not mentioned as a meal item; only at Nyeri Women. From Marsabit it was reported that prisoners are supplied with avocados and oranges when in season as well as different vegetables during the rainy seasons.

Although this research project did not consult prisoners regarding their views of the food they received, a 2011 study did and the results were not very encouraging, as shown Table 6 below.[345] Nearly 80% of prisoner interviewed was of the view that the food was in general *Very bad* or *Bad*.

Table 6

Variable	V. Bad	Bad	Average	Good	V.Good
General view of food in prison	39.8	35.1	20.2	3.6	1.3
Taste of food	36.4	47.0	10.3	4.7	1.6
Odour of food	29.7	44.4	17.6	6.2	2.1
Texture of food	32.0	44.4	15.0	6.5	2.1
Colour of food	25.1	46.5	17.6	8.8	2.1
Appearance of food	42.6	45.2	7.2	3.4	1.6
Nutritive value of food	37.2	45.2	10.9	5.2	1.6
Average	34.7	44.0	14.1	5.5	1.7

No reports were made that there are problems with the supply of the food to the prisons. However, from Makueni Remand and Makueni Women it was reported that the prisoners complain that they receive too little food. From Shimo La Tewa it was reported that the suppliers have not been paid for four years now and are owed KSh 480 million (US$ 4.7 million). Media reports indicate that the problem of non-payment of suppliers may be more widespread as it was reported in September 2015 that Nakuru prison owed suppliers of foodstuffs some KSh 100 million (US$ 988 000).[346]

The extent to which medically prescribed meals are complied with vary from prison to prison. The People Deprived of their Liberty Act (2014) states that 'A diet under subsection (l) shall take into account the nutritional requirements of children, pregnant women, lactating mothers and any other category of persons whose physical conditions require a prescribed diet.' A number of prisons appear to cater for a wider range of medical conditions such as prisoners under ARV treatment, diabetics and TB patients (e.g. Makueni Women, Marsabit, and Shimo La Tewa). From several prisons it was reported that a special meal is doubling the ration, especially for prisoners on ARV treatment, whereas others noted that meals can be supplemented with milk and fruit, or providing more regular meals for people with diabetes. From Kakamega Women's prison it was reported that they are dependent on donations for additional foodstuffs as the government can only provide the basics such as vegetables. It is reason for some concern that there is considerable variation in providing special meals based on medical grounds and this may require closer examination to ensure that there is uniformity and that all prisons have adequate access to the necessary resources to provide the required meals.

345 Korir, J. (2011) A diet of worms – the quality of catering in Kenyan prisons, Limuru: Zapf Chancery, p. 64.

346 'Nakuru prison owes suppliers Sh 100 m in unpaid debts' Business Daily, 24 September 2015, http://www.businessdailyafrica.com/Corporate-News/Nakuru-prison-owes-suppliers-Sh100m-in-unpaid-debts/-/539550/2884208/-/hf4i5s/-/index.html

Compliance with religious dietary requirements drew a varied range of responses. Some prisons reported that the meat given to prisoners is sourced from a Halaal butcher. A number of prisons reported that the same food is given to all prisoners and that no distinction is made, which seem to be the case in the majority of prisons surveyed. A few prisons noted that special arrangements are made for Muslim prisoners during Ramadan.

In general, prisoners may not receive food from outside for security and hygiene reasons. However, from Murang'a it was reported that prisoners can receive milk, bread and fruit. At all the prisons, prisoners can buy additional food from the prison canteen. What is sold varies from prison to prison and may include perishable as well as non-perishable items.

Preparation of food

At the overwhelming majority of prisons food is prepared on open fires using large pots. *Jikos* are also used at some prisons. In some prisons soot built-up is a problem (e.g. Makueni and Makueni Women). The kitchen at Kakamega was described as not being 'built to standard'.[347] Ventilation appears to be generally good except at Voi. The kitchen areas were reported to be clean and dry except at Makueni Remand. At Meru biogas is also used. In respect of the energy sources at the other prisons serious consideration should be given to alternatives such as biogas and solar energy.[348] The reliance on wood is not sustainable and contributes in all likelihood to deforestation.

Eating utensils

The provisioning of eating utensils is done in an inconsistent manner. Apart from plates (known as a mururu), spoons are provided at some prisons and not at others. Sealable containers for leftover containers are not provided.

Water

Access to clean drinking water was not reported to be a significant problem at any of the prisons surveyed. Only from Nakuru was it reported that the supply of water can at times be irregular. It is also apparent that not all cells have taps inside and prisoners then have to rely on containers to store water when they are locked up. This was found to be the case at eight prisons being:

347 Description by fieldworker.

348 A recent report by the Auditor General found that a project to install biogas at 14 prisons was mismanaged resulting in significant financial losses (Several Kenya prisons bio-gas systems incomplete, faulty despite use of millions of shillings, Standard Digital, 30 July 2015, http://www.standardmedia.co.ke/m/story.php?articleID=2000170915&story_title=Several-Kenya-prisons-bio-gas-systems-incomplete-faulty-despite-use-of-millions-of-shillings

Kakamega, Kisumu, Kisumu Women, Marsabit, Nyeri, Shimo La Tewa, Shimo La Tewa Women and Wundanyi. This may become problematic in hot weather.

Clothing and bedding

Key international instruments:

- Rules 17-19 and 88 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rule 38 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

Rule 17 of the UNSMR requires that:

> (1) Every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him in good health. Such clothing shall in no manner be degrading or humiliating. (2) All clothing shall be clean and kept in proper condition. Underclothing shall be changed and washed as often as necessary for the maintenance of hygiene. (3) In exceptional circumstances, whenever a prisoner is removed outside the institution for an authorized purpose, he shall be allowed to wear his own clothing or other inconspicuous clothing.

Clothing

The Persons Deprived of their Liberty Act (2014) sets the following standard in respect of clothing: 'A person deprived of liberty shall be provided with clothing sufficient to meet requirements of hygiene, climatic conditions and special needs on account of gender and religion.'[349] The data collected indicate that there are not enough uniforms for male pre-trial detainees charged with non-capital offences. The general pattern appears to be that women and capital detainees are issued with uniforms (grey uniform) but for the remainder they are allowed to wear their own clothing if uniforms are in short supply. Where uniforms are available (black and white stripes), detainees are permitted to wear their own clothes when they appear in court. If a detainee's own clothing is no longer suitable or has been taken as evidence, they have to rely on their families or donations for clothing. The overall impression gained is that the majority of non-capital detainees are dependent on their families for clothing and during winter will request from them warmer clothing. Even for capital remandees it appears that warmer clothing is also in short supply. At some prisons detainees are provided with soap to wash their clothing and bedding (e.g. Garissa, Kakamega Women, Lodwar and Marsabit). At the other prisons it appears that detainees depend on their families for soap or have to purchase it from the prison canteen.

349 *Section 14(2).*

Bedding

The Persons Deprived of their Liberty Act (2014) sets down a clear standard in respect of bedding: 'A person deprived of liberty shall be provided with beddings sufficient to meet the requirements of hygiene and climatic conditions.'[350] The provisioning of bedding appears to be highly problematic. No beds are provided at any of the prisons except at Langata Women where bunk beds and mattresses are provided. At some prisons detainees are provided only with one blanket (e.g. Meru Women) and no mattress. At Meru three to four detainees share a mattress and at Nakuru and Voi it is two people to a mattress. At Nakuru Women each detainee has a mattress and two blankets and extra blankets are provided to those with children. It is evident that practices vary significantly and the reasons for this are not clear. Nonetheless, a basic requirement is that detainees should at least have a mattress and sufficient bedding for the prevailing climate. At Kisumu Women every detainee has a bed, a mattress, two blankets and a bed cover.

Health Care

Key international instruments:

- Art. 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Rules 22-26 and 91 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR) medical services
- Principle 9 of the Basic Principles for the Treatment of Prisoners
- Art. 6 Code of Conduct for Law Enforcement Officials
- Rules 49-55 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)
- Principles 1-6 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

The UNSMR, in Rule 22, states that:

> (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality. (2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital

350 *Section 14(1).*

facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers. (3) The services of a qualified dental officer shall be available to every prisoner.

Screening

The medical screening of new admissions is of particular importance in any prison environment, and even more so when facilities are overcrowded. The aim is to ensure that medical conditions receive prompt treatment and that communicable diseases are detected and prevented from spreading into the general prison population.

All the prisons except Shimo La Tewa and Voi reported that medical screening is done either immediately upon admission or within 48 hours. In the case of Shimo Law Tewa no response was recorded and from Voi it was reported that there is no nurse at the prison and the nearest government medical facility refuse to do the screening. Even though Voi is not a large prison, it is 118% full and this brings a number of potential health risks. It is therefore essential that a solution to the reported absence of a nurse at the facility be found. Some prisons reported that the PF10 Form[351] is used to do the screening and it is not clear whether this form is used at all or only some prisons. At admission, the form is usually attached to the warrant. It is reportedly administered by a documentation officer who may not necessarily have a health care background.

Access to services

All the prisons reported that they are nearby to a government hospital; often less than a kilometre away. The furthest is six kilometres, being the two Nyeri prisons. From Meru it was reported that a prison doctor visits the prison on a daily basis; the hospital is two and half kilometres from the prison. Four prisons reported that their dispensaries are well-stocked and are thus able to provide sufficient care; these being Langata, Nakuru, Shimo La Tewa and Wundanyi. A number of prisons reported that they are poorly supplied with medicine and other equipment to provide basic services and therefore refer cases to the local hospital which may in fact could have been dealt with at the prison. These are Garissa, Kisii, Langata, Makueni, Marsabit, Meru, Nakuru and Voi. Despite the noted shortcoming it appears that detainees have access to medical care at a standard similar to the general population, whether that be rendered at the prison or a the local hospital. Accesses to emergency medical services appear to be reasonable even if there is no medical officer on duty on a 24 hour basis since the prisons are located near hospitals. In addition,

351 The form is green in colour and it is ideally used during admission to screen inmates on their health status. The details are used to assess HIV, TB, any chronic illness, whether an inmate is dependent on a particular drug. Such information helps health department to handle inmate from an informed perspective.

some prisons do have a nurse that is either on the premises or lives in the compound and can be contacted after hours. Nonetheless, some prisons did report problems with emergency medical assistance provided by the prisons service, these being Garissa, Marsabit and Voi.

Access to specialist medical service (e.g. dentist and psychiatrist) is more restricted in some cases. From Isiolo it was reported that while a dentist is nearby, a psychiatrist can be accessed in Meru (52 km) or Embu County (152 km). A similar situation prevails at Wundanyi where detainees are referred to Voi, some 60 km away. From Voi it was reported that most services are available, but for some cases hospitals in Mombasa need to be accessed which is 150 km away.

As with regard to treatment for serious mental illness, the data indicates varied practice. Several prisons reported that once a diagnosis is made, the transfer to a psychiatric hospital will happen immediately (e.g. Isiolo, Kisii, Meru and Murang'a). Contrary to this, it was reported from Garissa that the transfer may take long to affect due to a lack of transport. From Langata Women, Makueni and Marsabit it was reported that the necessary orders need to be issued and then the transfer can take place and that this can take as long as two week (i.e. Marsabit), although it should not take longer than seven days (Makueni Women). The overall impression is thus that there is some uncertainty and varied practice as to what the legal requirements are and that available resources also influence the speed with which transfers are done.

Enquiry was made whether detainees are able to consult their own private medical practitioner at their own cost. The responses were varied, noting that it is permitted (e.g. Kisii) or that it is permitted under supervision and after vetting (Isiolo and Meru), or that it is not permitted at all (Marsabit and Nakuru Women). The varied practices indicate that not all officials are familiar with the legal prescripts.

Most pressing medical problems

Three issues stood out in respect of the most pressing medical problems reported by nearly all the prisons, being TB, diarrhoea and scabies. TB was reported to be a serious problem at eight prisons, diarrhoea at seven prisons and scabies at twelve prisons. Not only was the prevalence of TB reported to be a problem, but also relapse as well as MDR-TB. MDR-TB is a direct consequence of incomplete treatment and can have dire consequences for people in densely populated environments. Diarrhoea in prison environments can in all likelihood be attributed to unhygienic food preparation and consumption practices, unsafe drinking water, unsanitary ablution facilities and poor personal hygiene. Scabies, caused by a skin mite, spreads easily in overcrowded prisons through human contact.[352] Upper Respiratory Tract Infections were reported

352 Human scabies is caused by an infestation of the skin by the human itch mite (Sarcoptes scabiei var. hominis). The microscopic scabies mite burrows into the upper layer of the skin where it lives and lays its eggs. The most common symptoms of scabies are intense itching and a pimple-like skin rash. The scabies mite usually is spread by direct, prolonged, skin-to-skin contact with a person who has scabies (CDC http://www.cdc.gov/parasites/scabies/)

to be a problem at Lodwar and Meru Women. Chicken pox was also reported to be a problem at Lodwar. The overall impression is that severely overcrowded facilities coupled with unsafe if not unhygienic practices and unsafe drinking water give rise to the majority of medical problems. It should furthermore be added that cost effective treatments for scabies are available.

Inspections

The majority of prisons are regularly inspected by public health care officials. These are frequently stationed at the prison or at a nearby hospital from where they operate. Only three prisons reported that they have not undergone inspections by health care officials in recent times; these being Garissa, Lodwar and Marsabit.

Deaths

None of the prisons reported any unnatural deaths (murders, accidents and suicides) in 2014. The number of natural deaths is reflected in Table 7 below. The highest being at Nairobi Remand which is in all likelihood a function of the large number of people detained there and that they may also stay there for extended periods. The relatively high number of deaths at Shimo La Tewa can also be attributed to similar reasons.

Table 7

Prison	Deaths
Nairobi Remand	22
Shimo La Tewa	17
Meru	6
Kakamega	3
Nyeri Main	3
Lodwar	2

HIV and TB

From all the prisons except Shimo La Tewa (no response) it was reported that some or all of the following measures are taken to limit the spread of HIV and TB: screening, segregation for TB cases for two weeks, counselling, voluntary counselling and testing, health education, and provision of condoms upon release if requested. It is perhaps some reason for concern that the responses were varied to a large extent, indicating that there is no uniform policy, or that officials are not familiar with the policy.

From all 26 prisons was it reported that qualifying detainees have access to ARV treatment and that prisoners diagnosed with TB have access to treatment.

Continuity of treatment is essential with regard to HIV and TB. Continuity of treatment when transferred from one prison to another appears to be well managed and no problems were reported in this regard. From some, but not all prisons, it was reported that if a prisoner who is on treatment is released he or she receives a referral letter which they must take to their nearest public health care facility. It is not clear if this is the practice at all prisons and from Meru Women's Prison it was reported that there is no follow-up mechanism. If this is indeed a more widespread problem, it requires urgent attention. A further problem identified is ensuring continuity if the detainee is released from court.

Disabled prisoners

The People Deprived of their Liberty Act (2014) states that:

> 23 (1) Where persons with disabilities are deprived of liberty under any legal process, they shall be treated on an equal basis with others and shall be entitled to such guarantees as are in accordance with the Constitution and the law relating to the protection of the rights of persons with disabilities.
>
> (2) Persons with disabilities deprived of liberty shall be accommodated in facilities that adequately meet their personal needs, taking into account the condition and nature of their disability.
>
> (3) The Competent Authorities shall take appropriate measures to facilitate humane treatment and respect for the privacy, legal capacity and inherent human dignity of persons with disabilities deprived of liberty.

People with physical disabilities present a problem to the prison administration and from a number of prisons it was reported that there exists no facilities for them, such as at Isiolo, Kakamega, Kakamega Women, Makueni Remand Women, Marsabit, Meru Women, Nakuru and Voi. A common practice appear to be to keep people with physical and mental disabilities separate from the general population which could be in a separate block of the prison or in the hospital section. People with serious mental disabilities or illness are also referred to psychiatric hospitals. This is an issue requiring further investigation as the current data raise more questions than providing answers. It needs to be established whether people with physical and mental disabilities are not in fact disadvantaged by keeping them in the hospital section of a prison, or if a separate block is indeed able to cater for their needs and whether officials have been adequately trained to deal with such prisoners.

Safety and security

Key international instruments:

- Art. 10(2)(a) of the International Covenant on Civil and Political Rights (ICCPR)
- Arts. 4-6 of the African Charter on Human and Peoples' Rights
- Principle 8 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Rules 27-34 and 85(1) of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Principle 7 of the Basic Principles for the Treatment of Prisoners
- Art. 3 Code of Conduct for Law Enforcement Officials
- Principles 1-11 and 15-17 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- Rules 63-71 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

Separation of categories

International law requires that men and women must be held separated and sentenced separate from unsentenced prisoners. In general the prisons surveyed complied with this requirement. Three deviations were noted and all three due to overcrowding when there is no choice but to mix sentenced and unsentenced prisoners. This occurred at Garissa, Meru and Wundanyi. No instances were reported that male and female prisoners mix or have contact. The People Deprived of their Liberty Act (2014) requires the following separations: men from women; children from adults; male children from female children; mothers with infants from other people; intersex persons from other persons; refugees, asylum seekers and refugee status applicants from other prisoners; and civil debt prisoners from other prisoners.[353] Moreover, older persons need to be detained in facilities appropriate to their age and special needs.

Detainees facing capital charges are detained separately from other detainees. Terrorism suspects are also held separately and are reportedly transferred to Kamiti Prison. Terrorism suspects are also held at Shimo La Tewa and Naivasha.

Prevention of contraband entering prison

From all the prisons surveyed it was reported that detainees are searched upon admission for contraband. Strip-down searches appear to be common as well as pat-down searches. A number

353 *Section 12(3).*

of prisons reported that body cavity searches are also done (e.g. Meru Women, Nakuru, Shimo La Tewa Women and Voi). In the case of Shimo La Tewa Women's prison, body cavity searches are only done if the metal detector indicates that there may be a concealed object. A metal scanner is reportedly in use at Nyeri Main and Meru prisons as well. Searches are reportedly done only by same-sex officers. The privacy of strip searches was mentioned more from prisons for women than at male prisons, although this does not necessarily imply that searches at male prisons are not done in private.

Use of mechanical restraints

The use of mechanical restraints is, as far as could be established, limited. It is most commonly used to prevent escapes especially when prisoners are taken outside of the prison, such as to court. It is furthermore used when a detainee exhibits violent behaviour. From the women's prisons it was reported that mechanical restraints will only be used in exceptional circumstances.

Enforcement of discipline and punishment

Rule 40 of the UNSMR states that:

> No prisoner shall be employed, in the service of the institution, in any disciplinary capacity.

Certain sanctions imposed on prisoners may amount to torture, cruel, inhuman or degrading treatment or punishment.[354] Therefore, the following are expressly prohibited under international law: corporal punishment[355]; lengthy solitary confinement[356]; collective punishment[357]; punishment

354 Art. 7 ICCPR

355 Rule 31 See also E/CN.4/1997/7/Add.2 (Special Rapporteur on Torture - Visit to Pakistan 1996). The CCPR in General Comment 20 (para. 5) notes in respect of Art. 7 of the ICCPR that "The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.

356 General Comment 20 on the ICCPR para. 6. The Istanbul statement on the use and effects of solitary confinement defines solitary confinement as the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day. In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic. [Adopted on 9 December 2007 at the International Psychological Trauma Symposium, Istanbul.]

357 The provisions of the UNSMR (Rule 30) clearly require an individualised response by the authorities meeting the requirements of due process. Group punishments inflicted because one or a few prisoners violated a rule cannot meet this requirement.

affecting diet (unless approved by a medical officer)[358]; long term shackling of prisoners[359] and forced labour.[360] Due to the fact that solitary confinement threatens not only the individual's mental and physical health, but also endangers his due process rights, special care must be taken to limit its use to only exceptional circumstances. The Special Rapporteur on Torture regards the use of prolonged solitary confinement as falling within the range of psychological methods of torture, leaving lasting emotional scars on victims:

> The establishment of psychological torture methods is a particular challenge. Mock executions, sleep deprivation, the abuse of specific personal phobias, prolonged solitary confinement, etc. for the purpose of extracting information, are equally destructive as physical torture methods. In most cases, victims of mental abuse are left dependant on counselling and other psychological or psychiatric support for long periods of time. Moreover, their suffering is very often aggravated by the lack of acknowledgement, due to the lack of scars, which leads to their accounts very often being brushed away as mere allegations.[361]

No evidence was found that prisoners are used in a disciplinary capacity overseeing other prisoners. Reference was made to 'trustees' and 'leaders', but it was emphasised that they are never used in a disciplinary capacity. It was reported from all prisons that a register of disciplinary actions taken against prisoners is maintained and kept with the OIC.

Disciplinary offences for prisoners are not described in the Prisons Act but provision is made that the Minister will prescribe such offences.[362]

The Prison Act sets out the punishments a that prisoner may receive and these include:

- confinement in a separate cell with reduction in diet as prescribed;
- forfeiture of remission

358 Rule 32(1). Despite the requirement in the UNSMR that a medical officer must approve the restriction of diet as a punishment, it is increasingly the trend in regional instruments and national legislation that the use of restricted diet as punishment is being prohibited. Rule 22(1) of the European Prison Rules (2006) allows only for a change in diet based on medical reasons. See also the Inter-American Commission on Human Rights (2002) Report on Terrorism and Human Rights, para. 161-162.

359 Rule 33

360 Art. 8 of the ICCPR. This should be read together with Rule 71(1) of the UNSMR that work performed by prisoners must not be of an "afflictive nature".

361 A/HRC/13/39/Add.5 para 55

362 Section 50 Prisons Act.

- reduction in stage, or forfeiture of privileges, or postponement of promotion in stage, or forfeiture of all or part of earnings, or removal from any earnings, or removal from any earnings scheme, or reduction in earnings grade
- corporal punishment with a cane not exceeding such amount as may be prescribed.[363]

Corporal punishment was abolished in 2003 by the Criminal Law (Amendment) Act, but the Prisons Act has not been amended to reflect this. However, from Kisumu it was reported that if a prisoner attempts to escape 'he will face corporal punishment'. None of the other prisons indicated that corporal punishment is still in use, but some confirmed that segregation and reduction in diet is still in use, whilst others stated that it is not used. Similar contradictory responses were recorded in respect of the use of solitary confinement (or segregation as it is referred to in the legislation). From some prisons (e.g. Kakamega) it was reported that the punishment (including segregation) of pre-trial detainees is prohibited by the Prisons Act. This is incorrect as the punishments provided for in the Prisons Act apply to both sentenced and unsentenced prisoners.[364] To some extent prisoners are protected from solitary confinement as a result of the limited infrastructure and overcrowding. However, a number of prisons reported that solitary confinement is used, but then provided different times limits on such confinement ranging from twelve hours up to 14 days. Solitary confinement is authorised by the OIC or his or her Deputy. It is assumed that such confinement may also be accompanied by a restriction in diet. From the prisons where it was reported that solitary confinement is used, it was reported that the OIC visits the prisoner at least once per day. Some prisons reported that this may be more frequent and that he or she may be accompanied by the medial officer and welfare officer.

All except two prisons reported that a prisoner subject to disciplinary sanction has the right to appeal against the sanction to a higher authority. From Meru and Meru Women's prisons it was reported that there exists no avenues for appeal. The information received on the process of appeal is, however, confusing and lack clarity. In several instances it was noted that the prisoner can appeal to the OIC, but this does not deal with the situation where the OIC imposed the sanction. Information received from Marsabit provided more clarity in that it was explained that the prisoner can appeal to the provincial or national headquarters. From the available data it is concluded that there is a lack of clarity on the appeal process.

Use of force

Section 9 of the Prisons Act deals with cases where prisons officers have the powers and privileges of a police officer and reads:

363 *Section 51 Prisons Act.*

364 *Definitions, Prisons Act.*

> While in charge of prisoners for the purpose of conveying any person to or from a prison, or for the purpose of apprehending any prisoner who may have escaped from a prison, or who may have escaped while being conveyed to or from a prison, or for the purpose of preventing the rescue of any persons in custody or an attack on a prison, every prison officer shall have all the powers, protection and privileges of a police officer.

Section 12 of the Prisons Act deals with the use of force by a prison official, but is scant on guiding the use of force. However, if at least in certain instances, such as an escape, a prison official has the same powers and privileges as a police official it also means that the prison official is bound by the same rules on the use of force which are set out in Schedule 6 of the Police Service Act. Schedule 6 of the Police Service Act provides a fair amount of detail on the use of force and more specifically on the use of firearms. For example, a firearm may only be used to prevent the escape of a person charged with a felony.[365] There is good reason to conclude that the guidance on the use of force provided by the Prisons Act need to be revised to bring it into line with the letter and intent of Schedule 6 of the National Police Services Act.

It should be noted that from all the prisons it was reported that the carrying of firearms is not permitted in the prison compound and is restricted to external guards.

The use of force may only be authorised by the duty officer and when so done, must be reported to the OIC. Incidents on the use of force are recorded in the occurrence book. The extent to which prison officials are trained on the minimum use of force appear to vary. From a number of prisons it was reported that apart from initial training at the training college, officials received regular reminders on the minimum use of force at parades (e.g. Makueni and Langata Women). A larger proportion of prisons reported that such training was only done during initial training. Structured refresher training on the minimum use of force appear to be the exception rather than a regular practice.

It was enquired whether detainees are subject to a medical examination following the use of force. All the prisons, save for three, reported that a medical examination is routine following the use of force. From Kisii it was reported that it is voluntary and from Makueni that it is only done if there were 'severe injuries'. From Marsabit it was reported that the officers on duty will do an assessment to determine if a medical examination is required. The problem with this approach is that life threatening injuries may not be visible (e.g. internal haemorrhage) and it is an essential safeguard that a proper examination is done by a qualified person.

365 *National Police Service Act, Schedule 6, Part B, Para 1(d).*

Incident register

All the prisons reported that an incident register is maintained and kept in the office of the OIC. It is referred to as the journal or occurrence book.

Emergency evacuation

The majority of prisons reported that they do not have an emergency evacuation procedure in place in the event of, for example, a fire. The architecture of most prisons appear to make this an impossibility as there is only one entrance and exit (e.g. Nairobi Remand) and that the external perimeter fence is not secure enough to prevent escapes (as was observed in Nyeri). Six prisons reported that they do have an emergency evacuation procedure in place, but little information was provided in this regard. Makueni Remand noted that there were two fire extinguishers for the whole prison and Makueni Women's prison reported that there were no fire extinguishers. The current situation presents significant risks to both prisoners and staff.

Supervision

All the prisons reported that prisoners are supervised at night and that officials are stationed at the various wards, towers and gates. However, as is described further on, staff ratios vary greatly and questions can be asked as to how effective supervision is during the day and night.

Contact with the outside world

Key international instruments:

- Rules 37-38, 90 and 92-93 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Principles 15-20 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Rules 59-62 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)
- Art. 37(c&d) of the Convention on the Rights of the Child

Principle 19 of the Body of Principles states that:

> A detained person shall have the right to be visited by and to correspond with, in particular, members of family and shall be given adequate opportunity to communicate with the

> outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Principle 15 of the Body of Principles stresses this contact shall not be denied longer than a few days upon arrest. Rule 115 on the UNSMR requires that:

> An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the *interests of the administration of justice and of the security and good order of the institution*.

Rules 58 of the UNSMR provide for family contact and Rule 62 provides for the right of foreign nationals to contact their consular or diplomatic representation. Rule 63 lays down the right to be kept informed of important news.

Notification of families

It was reported that prisoners are free to contact their relatives upon admission and this is done telephonically at their own cost. The People Deprived of their Liberty Act (2014) requires that the phone call to notify one's family must be at no cost to the prisoner.[366] However, from a number of prisons it was reported that if detainees do not have the funds to make a phone call, they will be assisted by a social welfare officer in which case, there is no cost associated with the phone call. This is reportedly a common occurrence. From Nyeri Women prison it was reported that there is a para-legal from the NGO RODI - Kenya who will also assist in contacting the family. The general pattern is also that it will be the social welfare officer who will contact the family in case of an emergency. At Wundanyi it was found that the officials make the call to inform the family of the person's detention. Contacting one's legal or consular representative seems to be more problematic. At some prisons this is permitted at state expense, whilst at others it is not, such as Meru, Nairobi Remand and Wundanyi.

Visits by families

Visits by families to detainees are subject to few restrictions with regard to the days of the week, times and duration. Visits may also not be restricted as a disciplinary measure, although it was reported from Meru Women that this will happen if the detainees has been placed in the isolation cells. At some prisons it was reported to be restricted to less than ten minutes (Kakamega) and five minutes at Meru Women. However, the main restriction appears to be the number of visitors

366 *Section 8(2).*

that can be accommodated at any one time and a visit may thus become a time consuming exercise for the family.

Given the levels of overcrowding and limited infrastructure at many prisons, it is not surprising that visitor areas at some prisons are inadequate from the number of visitors. At Kakamega Women it was found that the visitors' area is used as cell due to overcrowding. At Nakuru Women there is no visitors' area and visits are conducted at the entrance gate. The situation at Shimo La Tewa was described as follows: 'It is small but the prison has made arrangements whereby the prisoners appear in the visiting bay in turns. Communication is also not very easy because of the small holes in the glass portioning the visit area.' In addition to those noted above, the visitors' areas at the following prisons were described as inadequate: Kakamega, Kisii, Kisii Women, Marsabit, and Nyeri. At most prisons visitors have access to toilets and water, but not at the following prisons: Kisii Women, Makueni Remand, Makueni Women and Nakuru Women.

Information from outside

The general practice appears to be that all incoming and outgoing correspondence is screened and this may include listening to phone conversations (e.g. Lodwar). The majority of prisons had televisions that detainees could watch and radios seem to be broadly available. Newspapers are received through donations or detainees may purchase them at some prisons. From the following prisons it was reported that detainees are not permitted to purchase newspapers: Kisii Women, Marsabit, Murang'a Women, Nairobi Remand and Shimo La Tewa. From Nakuru it was reported that the prison library also holds the latest periodicals.

Some prisons reported that detainees are provided with the means to write letters post them free of charge, whereas others said this could not be done. The latter group included the following prisons: Garissa, Kisii, Kisumu (both), Makueni (both) and Nakuru Women. It was also remarked that since cell phones have become available that letter writing has become a rarity. Illiterate detainees are assisted by officials and fellow inmates.

Complaints and inspection procedure

Key international instruments:

- Art. 8 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Art. 13 of the UN Convention against Torture, Cruel Inhuman and Degrading Treatment or Punishment (UNCAT)
- Rules 35-36 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)

- Rules 72-78 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

After years of monitoring prison conditions and the rights of prisoners, it is well-established and accepted that a lack of transparency and accountability pose a fundamental risk to prisoners' rights, particularly the right to be free from torture and other ill treatment. The Special Rapporteur on Torture is clear on this issue:

> The most important method of preventing torture is to replace the paradigm of opacity by the paradigm of transparency by subjecting all places of detention to independent outside monitoring and scrutiny. A system of regular visits to places of detention by independent monitoring bodies constitutes the most innovative and effective means to prevent torture and to generate timely and adequate responses to allegations of abuse and ill-treatment by law enforcement officials.[367]

Complaints mechanism

From all the prisons it was reported that there is a complaints mechanism in place and that the common practice is that complaints are taken in the mornings when detainees are unlocked, thus complying with the basic requirement in the People Deprived of their Liberty Act.[368] It was also reported from several prisons that complaints can be lodged at any time of the day. From Shimo La Tewa Women it was report that there are two registers for this purpose – one a human rights complaint book and the other a register of requests. It is not clear why a different practice is followed at this prison, but it is nonetheless regarded as a positive practice. The People Deprived of their Liberty Act requires that there must be one register.[369]

In respect of lodging complaints with external agencies, practice appears to be varied and some do raise reason for concern. The People Deprived of their Liberty Act states if the complainant is unhappy with the decision of the Officer in Charge, he or she may lodge and appeal with the Cabinet Secretary.[370] It appears that generally detainees are provided with paper and writing materials to lodge a written complaint with external agencies, as is provided for in the People Deprived of their Liberty Act.[371] From Makueni Remand it was reported that written complaints to external agencies are 'thoroughly screened' before they are sent to the relevant authority. Similar

367 *A/HRC/13/39/Add.5 para 157*

368 *Section 27(1).*

369 *Section 27(5).*

370 *Section 27(7).*

371 *Section 27(8).*

practices were reported from Meru and Nyeri Women, noting that all correspondence must be censored. From Nairobi Remand it was reported that it is a requirement of the Prisons Act that correspondence must be censored. However, no requirement of this nature could be found in the Prisons Act.[372]

It was also reported from all the prisons that a family member or legal representative can also lodge a complaint on behalf of a detainee.

Inspections

As is the case with many other items surveyed, there is significant variation in practice. The prisons surveyed have all in recent time been inspected by either an internal or external agency. Only Kisimu prisons, Meru prisons and Murang'a prison reported that they had not been subject to an external inspection of any nature. External agencies that have inspected prisons include the following: county government and judiciary (Isiolo); NGO's (Kakamega and Shimo La Tewa); KNHRC (Kisii, Kakamega and Shimo La Tewa); and health practitioners (Lodwar, Makueni, Marsabit, Nyeri and Shimo La Tewa). While internal inspection are valuable to assess compliance with legal and policy prescripts, inspections from external role players promote a sense of transparency and accountability. Communication between inspectors (internal and external) is not restricted in any way at most of the prisons surveyed. From five prisons it was reported that there is no interaction between detainees and inspectors, but this seems to be more a function of the nature of the inspection and/or available time and not a case where such interaction is prohibited or purposefully restricted.

Women in prison

Key international instruments:

- Principle 5(2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Rule 8(a), 23 and 53 of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)

Segregation

No instances were reported where male and female prisoners are mixed or have contact. Women are always supervised by female officers, although male officers are used for perimeter security as well as escort duty to court or hospital for additional security. Male officers entering a female

372 Section 11 refers to the power search persons and vehicles as well as inspecting any item, but does not empower an official to censor correspondence.

prison or section are at all times accompanied by a female officer. At prisons or sections where women are detained the OIC was reported to be a woman in all cases.

Pre- and post-natal care

At all prisons, except at Shimo La Tewa, arrangements are made that pregnant female detainees give birth at a hospital outside the prison. In the case of Shimo La Tewa it was explained that there is a health facility within the prison compound and that there is a nurse on duty 24 hours a day. The extent to which pregnant detainees or those who had recently given birth can be accommodated separately is limited by the available infrastructure. This is, however, possible at Shimo La Tewa. At most prisons where women are detained, breastfeeding mothers are given dietary supplements or provided with extra rations. Three prisons reported that there are no extra rations or supplements being Kisii Women, Lodwar and Nakuru Women. In the case of the latter, it was explained that the children may get additional fruits and supplements, although this would refer to children of a slightly older age. From Kisumu it was reported that these women receive '*Uji* mix' in addition to the normal diet. The overall impression gained is that there is no consistency with regard to the diet for breastfeeding female detainees and this may hold adverse consequences for their babies. When it was enquired if infants received dietary supplements, the responses were equally varied. Reference was made to additional milk, fruit and biscuits. From Langata Women it was reported that their diet is according to the Ministry of Health Policy and supplements are 'mostly micronutrients'. It is unclear which policy was being referred to or how such micronutrients are administered. From other prisons it was unclear if any supplements were provided.

Sanitary towels

Sanitary towels for women are provided by the government as well as through donations, as required by the Persons Deprived of their Liberty Act (2014).[373]

Children in conflict with the law in prison

Key international instruments:

- Art. 10(2)(b) of the International Covenant on Civil and Political Rights (ICCPR)
- Rule 8(d) of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- Rules 17 and 18 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLR)

373 *Section 14(4).*

Children present a particularly vulnerable group in custodial settings. Therefore it is required that the authorities responsible for the welfare of children should be informed of their imprisonment as soon as children are taken into custody. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNJDLs) set out detailed provision for the detention of children, including segregation from adults. The Children's Act states that in the absence of nearby Children's Remand Home that the court can remand the child to another place of safe custody, provided that such a place shall not be a 'remand home or prison in which adults are detained or remanded.'[374] From the data collected it is apparent that if there is the suspicion that a detainee may be a child, that it is important to determine the age of the detainees and also to notify the welfare services concerned with children. However, as was reflected in Table 2 above, children are detained in prisons and some prisons hold significant numbers. For instance there were 78 children at Nairobi Remand on the day of the fieldwork.

Segregation

It is apparently a rare event that children are detained in a prison to await trial as they are normally referred to a children's remand home and may also await trial at a Borstal institution under certain circumstances. In the few instances where this has happened, they were kept separate from adults (e.g. Meru and Nakuru). The overall rare occurrence of children detained in prisons is regarded as a positive trend.

Management

Rule 47 of the UNSMR requires that:

1. The personnel shall possess an adequate standard of education and intelligence.
2. Before entering on duty, the personnel shall be given a course of training in their general and specific duties and be required to pass theoretical and practical tests. (3) After entering on duty and during their career, the personnel shall maintain and improve their knowledge and professional capacity by attending courses of in-service training to be organized at suitable intervals.

Staff training

The information collected reflects greatly varying responses to the question whether officials have been trained to work with pre-trial detainees. The overall impression gained is that officials have received some basic initial training on detainee management and human rights when at training college. Subsequent training specific to managing unsentenced prisoner appear not to have

374 *Para 10(2) Schedule 5, Children's Act.*

happened on any significant scale and have been isolated and erratic. It must be accepted that the needs of pre-trial detainees differ from those of sentenced prisoners since they have not yet been convicted. Furthermore that since they are presumed innocent that a less stringent prison regime applies to them than to sentenced prisoners. Especially when detainees spend long periods awaiting trial, it can be particularly traumatising and thus placing different demands on the prison staff.

Staff to prisoner ratio

Table 8 below reflects the number of staff posts and vacancies per prison ranked from lowest to highest prisoners per post filled assessed as a ratio against the number prisoners in custody.[375] This ranges from 1: 0.7 to 1: 6.7. Blank cells in the table indicate that the data was not available. There do not appear to be significant staff shortages although the situation on the ground may be very different.

Table 8

Prison	Prisoners in Custody	Filled Posts	Ratio 1 Official to Prisoners
Kisumu	3,196	480	6.7
Nakuru	2,591	443	5.8
Nairobi Remand	2,811	548	5.1
Meru	1,236	259	4.8
Kisii	1,185	290	4.1
Kakamega	1,150	327	3.5
Nyeri Main	1,143	352	3.2
Meru Women	310	97	3.2
Murang'a	530	168	3.2
Lodwar	459	148	3.1
Kisumu Women	198	67	3.0
Wundanyi Women	47	17	2.8
Kisii Women	229	95	2.4
Garissa	434	187	2.3
Kakamega Women	241	115	2.1
Makueni Remand	220	107	2.1
Marsabit	138	73	1.9
Nakuru Women	260	145	1.8

375 *Staff numbers and vacancies supplied by the KPS.*

Voi	150	100	1.5
Langata Women	655	450	1.5
Isiolo	176	142	1.2
Nyeri Women	103	87	1.2
Makueni Remand Female	17	15	1.1
Murang'a Women	58	89	0.7
Shimo La Tewa	2,553	321	
Shimo La Tewa Women	185	111	
TOTAL	**20,275**	**5,233**	**3.4**

Deficiencies

All the prisons, except two, reported that deficiencies in service delivery are regularly (weekly and monthly) reported to senior management. Two prisons (Marsabit and Murang'a) reported that this is not done regularly or as the need arises.

Staff discipline

It was reported from all the prisons that the staff disciplinary code is enforced. The average number of officials subject to disciplinary action per month ranged from nil to eight.

Recommendations

Legislative

1. There is a need to review the current prison legislation and subordinate law to ensure that it complies with the constitution and international law and is furthermore harmonised with other domestic legislation.

Standards – due process

2. It was observed from a number of prisoners that there are detainees who have been in custody for several years, the longest being 17 years. This is an unacceptable situation and makes a mockery of the right to a speedy trial. This requires urgent attention from the judiciary.
3. Three prisons reported that there were detainees being held on expired warrants, being Kisumu, Makueni Remand and Shimo La Tewa Women's Prison. This requires urgent attention to ensure that such cases are brought to the attention of the courts timeously.

4. Consistency needs to be improved in respect of the information provided to new admissions and also to ensure that the rules of the prisons are displayed where prisoners can study them.
5. Consultations between a detainees and his or her legal representative are under all circumstances private. Warders are permitted to observe for security reasons but should be outside earshot. There must be consistency across all prisons in this regard. There should furthermore be no limit on the duration of consultations or the number of visits permitted.
6. There should be consistency in how foreign nations and stateless persons be handled and accessing their consular representative or support organisation. There needs to be a clear procedure on how foreign nationals and stateless persons are handled and how the Head of Prison contacts the appropriate consular or other representative as well as where such persons can obtain additional information that may assist them.

Standards – investigations and inspections

7. With regard to deaths in custody, it needs to be ensured that there is consistent practice and how such cases are handled and investigated.
8. Inspections by health care practitioners need to be done on a regular basis at all prisons.
9. All prisons should be inspected by independent persons on a regular basis and follow-up visits should be undertaken to ensure that recommendations are acted upon.

Standards – conditions of detention

10. Overcrowding is a serious problem in most prisons and although there has been a reduction in total prisoner numbers over the past decade, it is still well above available capacity. All efforts should be made to reduce the use of imprisonment especially for pre-trial detainees and to use alternative options, such as bail and conditional release.
11. All prisoners are entitled to a minimum of one hour of outside exercise per day. While most prisons comply, if not exceed, this requirement, there are two prisons (Kisii Women and Murang'a Women) where this is not the case and need to be addressed.
12. In general the prisons were reported to be clean with a few exceptions. Of more concern is the presence of vectors of disease. All efforts should be made to eliminate these. The ageing buildings housing prisoners also aggravate the problem.
13. All prisoners should have access to sufficient and clean ablution facilities. This was found not to be the case in several prisons and require urgent attention through the installation of the needed infrastructure.
14. Greater effort should be made to provide for sport and recreational activities for detainees.

15. Prisoners require a more varied diet than what is currently the case. There is also reason to conclude that the quality of food should be improved. Significant variation was observed in the extent to which medically prescribed meals are provided and this needs to be addressed.
16. For the preparation of food, alternative sources of energy than charcoal should be invested in.
17. All cells should be fitted with water taps to prevent that water is stored in containers in cells.
18. Detainees should be provided with adequate clothing as uniforms.
19. Bedding appears to be a significant problem and all prisoners should be provided with at least a mattress and adequate blankets for the prevailing climate.
20. All new admissions should be subject to a health status examination immediately upon admission prior to mixing with the general population.
21. Practice appears to be inconsistent in dealing with detainees with mental health problems. A standard procedure should be developed and staff trained therein.
22. The overall impression is that severely overcrowded facilities coupled with unsafe if not unhygienic practices and unsafe drinking water give rise to the majority of medical problems. Efforts need to be increased to prevent these problems and where necessary the infrastructure upgraded and other measures taken to reduce overcrowding.
23. Efforts should be undertaken to ensure that there is continuity of treatment for detainees with TB and Aids when they are released from custody.
24. All prisoners who have been subject to the use of force must undergo a medical check-up. Furthermore, all officials should receive regular refresher training on the minimum use of force.
25. There needs to be consistency to ensure that babies and breastfeeding mothers receive nutritional supplements.

Staff training

26. In 2013 CAT recommended that Kenya 'redouble its efforts to train the police on human rights, especially the provisions of the Convention, and extend the training programme to all law enforcement and military personnel and carry out an effective evaluation of the impact of the training programme.'[376] The recommendation is supported to ensure that all officials are properly trained and understand their duties.
27. The KPS needs to develop a policy on people with disabilities and individual prisons supported to implement such a policy. Consequently staff should be trained accordingly.

376 *CAT/C/KEN/CO/2 para 24.*

28. A professional prison service ensures that its staffs receive proper induction training and that this is followed up with refresher training. Many inconsistent practices were observed and this is in all likelihood due to the lack of regular training.
29. There should be close cooperation with the KPS and develop modalities of implementing the UNSMR, since it has committed itself to compliance with the UNSMR.
30. There is a need to review the disciplinary procedure to ensure consistent practice. The reduction of diet should be abolished and solitary confinement restricted to only the most severe cases and then in line with then UNSMR.

Infrastructure

31. Overcrowding results in some instances that the separation of categories of prisoners cannot be maintained with reference to sentenced and unsentenced prisoners. There is thus an urgent need to address current infrastructural shortcomings to ensure that required separations are complied with. Earlier recommendations pertaining to overcrowding apply equally her.
32. All prisons should have an emergency evacuation procedure and also have at its disposal adequate firefighting equipment.
33. Where they are inadequate, visitor facilities need to be upgraded to allow for the volume of visitors and detainees as well as water and toilets for visitors.
34. Prisoners should be supported to write and post letters free of charge.

Chapter 4

Conclusions and Recommendations

Overall Conclusions on Case Flow Management

Large numbers of people are arrested and detained in police cells in Kenya, with this dataset suggesting around 5,000 people per police station per year on average. This number does not include people accosted or harassed by the police but not ultimately detained in police cells. As Kenya is a demographically young country these numbers are likely to represent a large proportion of the adult population being arrested and detained in cells each year.

While it may be argued that this is appropriate in a relatively high-crime country, analysis reveals that a large proportion of these arrests and detentions are not in relation to common law crimes which concern the public, such as theft.

The largest categories are offences defined by the state relating to the regulation of commercial activity, whether it is sales of alcohol or other contraband, and the protection of state forests or wildlife, and the like. Such offences do not have "complainants" or victims, other than the state itself. The high volumes of these offences are suggestive of a high degree of policing, as they only come to detention through the exercise of police action.

Furthermore, many detentions in police cells are in relation to offences which are not cognisable. Assaults (5%), nuisance (2%), and all statutory offences punishable by a fine only or less than three years' imprisonment, require a warrant for arrest.

Of further concern here is that it is low-level offences nuisance and state victimless offences which are more likely to go to court, suggesting that state resources in criminal justice are more likely to be used in these offences than others.

Widely varying rates of conversion of arrests into charges (by both location and offence type) also suggests a high degree of discretion being exercise by police officers, in both the initial arrest and release, suggesting that Kenyans cannot expect the same treatment wherever they are in Kenya. This apparent discretion and lack of record-keeping relating to reasons for release is suggestive of corruption.

While durations in custody in police cells are not excessively long in most cases, the data suggests 1 in 5 will be held beyond the constitutional time limit, potentially opening the state to a high degree of liability for deprivation of liberty claims.

The Magistrates' Courts in Kenya are not primarily in the business of prosecuting classic Penal Code offences such as theft, robbery and assault. Nuisance offences, state regulation offences, drug offences and immigration offences comprise more than half of cases before the Magistrates' courts. Furthermore, the trends in relation to the Penal Code offences show that they take longer to resolve, and are less likely to result in a guilty verdict. It may be that to some extent the other offences are consuming resources and crowding-out the more serious offences.

The evidence here suggests that lesser offences are more likely to attract guilty verdicts as compared to more serious offences. Possible reasons could be that guilty pleas account for the trend, perhaps due to police advising arrested persons to plead guilty and be fined, the perception that the criminal trial process could take very long, and fear associated with remand custody. There is a need to interrogate why robbery with violence matters have a higher tendency to be withdrawn before completion – this could be suggestive of initial arrests based on insufficient evidence, or of corrupt practices. Lesser offences also tend to be resolved more quickly.

There is a great deal of variation amongst the Magistrates' courts surveyed here, in terms of all trends interrogated, implying that Kenyans can expect to face very different justice depending on where they are located. There is evidence to suggest that while almost two-thirds of cases are resolved relatively quickly, very long durations between plea and judgement may apply to a third of cases, with more serious cases generally taking longer to resolve. The reasons for stark variations between regions should be investigated. It is possible that the current allocation of resources does not match demand in the relevant courts. This requires further investigation to establish whether this is the case or whether other reasons underpin these trends.

The data suggests courts in Kenya are making use of alternatives to imprisonment, such as community service orders and probation.

The very high rate of success on appeal for completed cases suggests that the appeal process is providing a necessary and robust safeguard in the Criminal Justice System in Kenya. However it does cast into question the quality of the original convictions, particularly on capital offences and sexual offences, where it is known the accused persons face a severe penalty and in all likelihood were held in custody throughout the trial and appeal process. The results call into question the trends relating to the decisions to pursue prosecutions in capital cases where evidence is apparently not, according to the High Court, sufficient for a conviction to be upheld. Such accused spend a great deal of time in custody awaiting trial and awaiting appeal. The safeguard provided by the High Court is somewhat muted given these exceptionally long durations of appeal. The fact that cases resulting in liberty of the person are resolved somewhat more quickly than other cases may suggest the involvement of legal counsel or other means of expediting appeals in these matters

The child justice system in Kenya appears to be in operation. However significant delays are experienced in relation to child offenders, at least in these two courts. It is unclear how representative these two courts are.

Outcomes generally reflect the provisions contained in the Children Act, which seeks to protect children. The findings show that teens arrested on defilement charges form a significant proportion of cases, suggesting that law reform around sexual offences and employment of children may

help to further extract children from the Criminal Justice System. Drug law reform, especially relating to children, may also extract children from criminal justice processes.

The high proportion of repatriations of children in Care and Protection cases is cause for concern.

Remand homes were not during 2013-2014 receiving a flood of children on remand. This raises the question of in what manner children in conflict with the law are being managed, as anecdotal reports of many arrests by police of children continue to be heard. Recall that two Children's Courts between them dealt with just over 300 criminal cases against children or an average 150 each over two years. It is unclear how many courts are served by each Remand Home.

Over 2013-2014 the Remand Homes received around 300 children on remand each every year, as well as receiving Care and Protection children. Given that the average duration is 76 days, approximately 5 children admitted consecutively taken up one bed. If the 300 children per year are distributed evenly over time, each Remand Home needs on average a capacity of 60 beds for remand children alone. If the current number of children being admitted into prisons is taken into account,

The practice of keeping Care and Protection children with Remand Children, often in the same room, remains of concern.

The duration data in this dataset confirms that there is non-compliance with timelines applicable to the duration of remand in relation to children.

The profile of remand detainees suggests a range of ordinary Kenyans who are at the prime of income-earning potential. The holding of so many possibly productive persons who may never be found guilty on remand is counter-developmental and costly for the Kenyan state. At the same time, educational levels suggest such persons will need legal representation in order adequately to defend themselves in court. Legal representation ought to be a priority in order to realise gains envisioned by Constitution of Kenya 2010 Article 50(2) (h) "Every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

The evidence here suggests that if the state were to confine itself to holding on remand only those accused of violent offences, the number of men on remand would reduce by two-thirds and the number of women by one-half.

It is clear that a significant number will endure exceptionally long time periods on remand. Evidence from the other sections on the courts suggests it is by no mean guaranteed that they will ever be convicted, with only 53% of accused in subordinate courts being found guilty. Indeed the most

serious offences for which people are held the longest on remand have the lowest conviction rates – 5% for sexual offences and 13% for robbery with violence.

Furthermore, in relation to more serious offences, even if convicted many of these will eventually succeed on appeal.

The dataset on remand admission provides some insight as to who is admitted to remand detention and the trends relating to release. The high number of less serious offences admitted is cause for concern. Almost 1 in 10 being admitted to prisons is admitted for nuisance offences. That release from prison before trial is clearly occurring is positive but the high cash bail amounts are cause for concern and out of reach for the ordinary Kenyan.

Those convicted of desertion in these cases seem not to have realised the gravity of the consequences of their absence without leave. This suggests that recruits are not adequately informed of the terms of their enlistment and the permissible pathways of discharge before and during their term of enlistment.

A number of fair trial infringements are apparent in the case studies above, including failure to hold the trial in open court, denial of legal representation and inadequate time given to prepare. The long durations to trial and during trial, contrary to the fair trial right "to have the trial begin and conclude without unreasonable delay" seems to be related to the onerous composition of the Court Martial, which in the case of officers requires five officers and a Judge Advocate.

The role of the Judge Advocate in providing rulings only on matters of law leaves accused with the impression that this has not been an impartial and independent decision, as the ultimate decision on guilt is taken by army officers. The structure of the Act which leaves the Judge Advocate only deciding matters of law could be constitutionally contested on the grounds that the Court Martial is not a wholly independent or impartial court, as required in terms of fair trial rights. Currently officers both prosecute and decide on matters of fact, including the guilt or innocence of the accused

The limitation of rights encompassed in the offence of desertion in relation to the Kenya Police may be unjustifiable. It should be reviewed whether it is in the interests of national security to retain this as a criminal offence or whether national interests would better be served by treating the issue as an internal disciplinary matter, with punishments such as dismissal, barring from further employment in the Public Service, and the like. Furthermore, the additional penalties for disciplinary infringements may also fall foul of the right to equality, to fair trial, and to freedom and security of the person.

It is recommended that the following be considered:

- Removal of the offence of desertion from the Police Act
- Inclusion of police in the Employment Act
- Deletion of the punishments of fines, salary cuts and confinement to barracks from the Police Act for internal disciplinary offences.

The criminal offence of desertion in relation to the Kenya Prison Service, which mandates arrest in relation to what is essentially a labour matter, unjustifiably limits a number of the constitutional rights of prison officials. Predominantly this is the right to equal protection and benefit of the law, but also, the right to fair hearing, fair labour practices[377] to freedom and security of the person[378], and to fair administrative action[379]. These provisions could therefore be challenged constitutionally. Furthermore, it is doubtful whether the levying of fines for internal disciplinary matters is a fair labour practice, or treats prison service employees equally to those in other employment, yet this is provide for in sections 17, 18 and 19 of the Act. Imposition of a fine is arguably a judicial function which should be carried out by a court of law or other independent and impartial tribunal. The Prisons Act and these practices should be reviewed in the light of constitutional rights.

In particular, it is recommended that the legislation be amended in the light of the Constitution. It is recommended that the following be considered:

- Removal of the offence of desertion from the Prisons Act
- Inclusion of the Prison Service in the Employment Act
- Deletion of fines as a result of internal disciplinary processes from the Prisons Act.

Overall Recommendations on Case Flow Management

The Kenyan state clearly has a legitimate interest in regulating various types of commercial and other activity. However a national conversation needs to be begun around the appropriateness of using the criminal law, and in particular, the deprivation of liberty, in order to do so. This has already occurred in the arena of traffic offences. In many countries such "regulatory" offences would not be dealt with through the criminal courts but would be dealt with administratively and result in administrative fines, which may only go to court on failure of the person to pay the

377 *Section 41, Constitution of Kenya 2010*

378 *Section 29, Constitution of Kenya 2010*

379 *Section 47, Constitution of Kenya 2010*

administrative fine, either through a civil or criminal process.[380] Not only do current methods have a cost to persons and families deprived of their liberty, but also to the state in having to process these matters using expensive criminal justice machinery. Using criminal justice machinery may at the same time "crowd out" dealing with "real" crime, which is real concern given the security threats with which Kenya is faced. The cost is also felt in the families of those deprived of liberty being less able to survive, and there may well be a real impact on GDP through reduction in economic activity, particularly if it is indeed the case that almost 10% of the adult population is deprived of liberty each year.

The one third of cases showing very long durations need to be further explored. The "Guidelines relating to active case management of criminal cases in Magistrate's Courts and the High Court of Kenya" of February 2016 seem now to place responsibility for managing the flow of cases squarely on the judiciary.[381] However the Guidelines top short of putting in place actual time limits. This study provides a basis for indicating what a reasonable time limit in Kenya might be for the resolution of cases in the lower courts. However such limits may need to distinguish among cases of different offence type. Very few offences currently fall into the category governed by a 1-year time limit. Legislative expansion of this category would provide a clear measure to which the courts could be held to account.

The severity of the punishment applicable to certain offences should be reviewed by the legislature, as the severity of the punishment seems to influence presumptions of guilt, denials of bail, and ultimately, the tendency to appeal against both conviction and sentence, placing strain on Criminal Justice System institutions and processes.

The higher courts should be empowered to exercise its power of review more regularly so as to correct the mistakes of the lower court judgments. The higher courts should strengthen correspondence with and oversight of the lower courts in general to raise the quality of justice in the lower courts.

In particular, it is recommended that there be a review of the age of consent in Kenya. The majority

380 For example, In South Africa, a contravention of a local by-law (regulation) results in the following sets of actions against the offender: Notice- giving notice of the infringement; Notice results in the issue of a fine; Failure to pay the fine would result in summons being served; Failure to respond to summons requesting the offender to appear before court would result in the issues of a warrant of arrest by the Magistrates Court. In Canada, the Uniform Regulatory Offences Procedure Act (1992) provides that there is no general power of arrest in respect of the commission of a regulatory offence, except in specified circumstances, such as where the arrest is necessary to preserve evidence or identify the defendant. Where such an exceptional arrest occurs, the arresting officer must soon as is practicable, release the person from custody after serving the person with a summons or offence notice, except in specified circumstances. In Australia, Those accused of breaches of environmental regulations or corporate laws or charged with minor drug offences, taxation evasion and social welfare fraud, receive a summons from an agency (to whom regulatory responsibility has been delegated) and face civil proceedings or an administrative tribunal rather than face a criminal court.

381 Gazette Notice No. 1340, 2016

of countries in Africa have set the age of consent for heterosexual sex at age 16 or younger, with a minority retaining the age of 18. Many countries which share a similar legal roots to that of Kenya such as Botswana, Namibia, South Africa, Zambia, Zimbabwe, Australia, Canada, and the United Kingdom, have set the age of sexual consent at 16 years of age. The "best interests of the child" principle should guide the review of the law relating to consensual sex between adolescents.

There is need for advocacy targeting legislation on the Rehabilitation and Aftercare Bill to address cases of recidivism. To further address the issue of recidivism, the Probation department should address the issue of the environment of the child after undergoing rehabilitation. This is because it beats the logic of rehabilitation if the child is taken back to the same environment which led her or him to be in conflict with the law.

Lesser offences are well-represented among admissions to prison, as they were in arrests and before court. The underlying issues need to be addressed. The reasons for the trend need to be better understood. A national conversation is necessary to consider the desirability of using Criminal Justice System processes and the deprivation of liberty in these matters, especially as these may crowd out better handling of more serious offences. In many countries such offences would not result in remand imprisonment but would be dealt with administratively with summons and fines.

It is recommended that the following be considered:

- Removal of the offence of desertion from the Prisons Act and Police Act
- Inclusion of the Prison Service and Police in the Employment Act
- Deletion of fines as a result of internal disciplinary processes for both prisons and police.

Very many of the detentions in police cells appear to be in relation to non-cognisable offences, which require a warrant to effect arrest. Both police officials and the general public need to be educated regarding which offences permit a police official to arrest without a warrant. Officials who persist in carrying out or threatening unlawful arrests must be disciplined. Persons deprived of their liberty for unlawful arrests would have a claim against the state for such deprivations of liberty.

While the police should be commended for their compliance with the 24-hour rule in most cases, there remains the 1 in 5 held too long. Simply reducing the numbers arrested may help with managing the time periods for which they are detained. Indeed simply sensitising the police to the seriousness of deprivation of liberty may go a long way to improving matters. There also appears to be a need to harmonise policy and practice across Kenya in relation to the exercise of discretion.

There appears to be a low rate of prosecution of more serious offences. This could be due to arrests occurring without sufficient cause, or because of withdrawals of complaints, or because of unwillingness to prosecute difficult cases. In the chapter on the Magistrate's courts, a relatively low rate of convictions for serious offences is observed. There is need for the police and the Office of the Director of Public Prosecutions (ODPP) to work in harmony so as to ensure proper prosecution of cases. The ODPP and the Police should find a strategy of weaning out the police prosecutors without compromising the quality of prosecution, which happens when inexperienced prosecuting State Counsels handle prosecution. Prosecution should also collaborate with KSL to provide specialised training on prosecution so as to address the capacity gaps within the department. ODPP could also establish its own Institute for providing capacity building in the area of prosecuting

The widely differing trends in the courts suggest allocation of resources, in terms of magistrates and other infrastructure, does not match demand in the relevant courts. This requires further investigation to establish whether this is the case or whether other reasons underpin these trends. If resources are not the problem, magistrates should be held to account for poor time-keeping in their courts.

Finally, the true business of the courts in appropriately addressing crime requires attention. The recommendations relating to the prosecution in the section on police are relevant here. The very low conviction rates for sexual and violent offences are cause for concern. The data suggest the true crime concerns of communities in Kenya may be receiving less attention than is ideal and that court time is taken up with state regulation. Whether this is an appropriate use of state resources allocated to criminal justice needs carefully to be considered.

There is a need to interrogate the reasons for the high overturn rate on appeal in relation in particular to sexual offence cases. Does this point to inadequate justice in the lower courts? Are deserving cases not adequately supported by evidence? Or is there a tendency to prosecute cases which do not have merit? Depending on the outcome of such further research, interventions may be designed to ameliorate the situation. Possible interventions include review of the police curriculum and better training of police investigators to raise the quality of evidence before the courts.

The high rate of overturned cases suggests robust structures need to be put into place to ensure legal representation at the state expense is guaranteed to those persons who cannot afford it in the lower courts, thus raising the quality of justice, so that persons who should not have been found guilty do not need to wait until an appeal process is complete in order to receive a just outcome. Such legal counsel may need to be available at the police station.

Further research into delay is required. One of the known causes of delay in the appeals process is the need for the production of copies of the proceedings in the lower courts. Currently such

records are being typed manually. Expanding stenography skills may assist in the production of court records. Sometimes records are also missing. Standardised filing management system could help in ensuring security of the files.

The law provides for two types of time limits (1) the maximum period for which a child may be held on remand (90 days for all except death penalty offences, in which case 180 days) and (2) the maximum duration from plea to outcome is generally 90 days (save for serious cases) after which the child should be discharged and may not be prosecuted again. Stakeholders' discussions and administrative guideline development are needed to ensure compliance with time limits relating to children. Issues such as recording the date of plea-taking and tracking the duration of remand of children are issues which need to be addressed to ensure compliance with the law.

Sex education needs to be talked about openly, and further research needs to be done on the best approaches to adolescent sexuality. Boy children are more at risk of being in conflict with the law than girl children. While a range of programmes are available for vulnerable girls, there is an absence of programmes for boy children. Interventions which seek to reduce the vulnerability of boy children to being in conflict with the law should be investigated.

Although data was not presented on these issues, there is a need to employ a multi-sectoral approach in exploring avenues of ensuring children in conflict with the law have accessed sufficient legal representation. There is also a need to bridge the gap between discharge from Remand Homes and other placement centres, and a need to clearly define the role of probation department in relation to children on remand.

There is little the Kenya Prison Service can do to control the admissions of persons on remand to its institutions. However it can continue to facilitate the release of those admitted by ensuring such persons have access to paralegals that help to trace sureties and arrange cash bail for those for whom this is available or possible. During 2013 and 2014 around a third of admissions were released in this way, with 75% so being released within 25 days. This may have improved with the further expansion of paralegal services in 2015 and 2016. The Prison Service can also sensitise the magistracy to the burden on the prison service of processing the very high number of admissions on remand, and the problem of overcrowding within prisons, by inviting magistrates to observe the conditions.

There is a need to operationalise the Legal Aid Act No.6 of 2016 which provides for the establishment of National Legal Aid Services whose mandate includes but is not limited to "take appropriate measures to promote legal literacy and legal awareness among the public and in particular, educate vulnerable sections of the society on their rights and duties under the Constitution and other laws".

Many women on remand are typically held in relation to murder charges and these women are held for exceptionally long time periods, as emerges from the remand warrants which showed medians of more than a year for such women. Experience in other countries suggest such women often have valid defences to such charges, such as self-defence in the context of domestic abuse, and would secure release if their case were to come to trial. Presumptions of guilt often result in complacency in these cases. Means of expediting such cases should be explored by paralegals.

Legislative and practice reform could work to reduce the number admitted to prisons to encompass only those accused of traditional common-law offences. If this were done then the data here suggests that the remand population would reduce by approximately one-quarter. The official capacity of prison system in Kenya is 26,757 yet the current pre-trial population is approximately 22,000. This current Pre-trial population tranlates to 85% of the official capacity. Reducing remand numbers by one quarter would release almost 6 000 prison spaces. The data in the court and appeals section also suggests many held on common-law offences will never be convicted and many of those convicted will succeed on appeal. Further reductions can therefore be obtained if remand is viewed more as the exception than the rule. Even so, the conditions of detention section of this report makes clear the obligation on the state to improve conditions, which may well require additional prison capacity. If the state wishes to imprison even half those it currently does, additional capacity is required in order to hold people with dignity.

In courts, the widely varying demand, and widely varying completion rates, suggests allocation of resources needs to take into account variation in demand. Infrastructure and human resources should be reviewed in order to ensure trends are more similar across Kenya.

Remand of children should be avoided wherever possible and appropriate. However the state must make adequate provision for those instances where remand is necessary; the data here suggests that existing Remand Homes should ensure they have 60 beds for children on remand. There needs to be established at least one Remand Home in each County to prevent children being remanded in Police Stations and Prisons – in the section on Prisons, some 3% were under the age of 18. Where there are no remand homes, children must be placed in child-friendly institutions where their rights are upheld. In particular, the "best interest of the child principal" dictates that a child's education ought not to be disrupted by the fact that a child has been subjected to the Criminal Justice System.

Overall Conclusion on Conditions of Detention

Every year thousands of people spend shorter or longer periods in court holding cells waiting for their cases. It is inevitable that this volume of people have an erosive effect on infrastructure. Court holding cells are not designed and fitted to detain people for long periods and the intention is that they will arrive and leave on the same day. However, it remains necessary to set clear standards

in respect of court holding cells. Areas of focus include but are not limited to the following:

- feeding of detainees (food and water)
- provision of emergency medical services
- separation of men from women as well as other categories such as first time offenders versus repeat offenders
- separation of children from adults
- provision of clean sanitation facilities.

Despite these design and utilisation features it was found that infrastructure is lacking in a material manner and that detainees are held in some instances in place where they lack access to clean water, clean functional toilets, fresh air, and food. Court cells in particular do not cater for proper separation of categories and women and children are often held in hallways. The fact that detainees do not stay for very long in the holding cells is, however, no excuse for conditions that amount to an affront to human dignity.

It is recognised that the Kenyan government has embarked on an infrastructure improvement programme, but this needs to be expedited. It is also the case that many people appear in court, after having spent time in custody, on charges that probably did not warrant an arrests, or at least not detention. They could have been granted bail or some other measure of conditional release following arrest or shortly thereafter.

There appears to be some uncertainty as to which institution is responsible for the management of courts cells with respect to detainee management and the relevant regulatory framework. It is used by both the police and KPS, but a regulatory framework in respect of minimum standards appear to be absent. Presumably the Persons Deprived of their Liberty Act applies but little evidence was found that this is being adhered to. A shortcoming in the Persons Deprived of their Liberty Act is that it does not identify who is responsible for particular categories of detained persons and consequently does not state that, for example, the local head of police is responsible for the well-being of court cell detainees. This needs to be addressed.

It is furthermore recommended that the Ministry of Health conducts regular inspection of court cells to ensure that they are hygienic and safe for human occupation.

As part of infrastructure improvement, efforts should be made to ensure that legal representatives are able to consult their clients in private.

Overall Recommendations on Conditions of Detention

It was generally found that ageing, limited and/or dilapidated infrastructure present significant challenges to conditions of detention and the extent to which there is compliance with international as well as domestic human rights standards. Efforts by the Kenya government to address this are acknowledged, but the fact remains that it will take a significant effort and investment to address infrastructural shortcomings at police stations, prisons, CRH and court holding cells.

Kenya faces significant socio-economic and development challenges. These cannot be ignored. However, Kenya is also bound by human rights obligations and consensus need to be built around the absolute minimum standards of humane detention and an approach of progressive realization followed from there.

Kenya has a prison population of 57 000 and an imprisonment rate 121/100 000 of the population, the 17th highest imprisonment rate in Africa.[382] On an annual basis some 500 000 people move through the Criminal Justice System placing a significant burden on criminal justice resources. Some may be in detention for shorter or longer periods and some may be acquitted or convicted. The volume of detainees place a significant burden on the state, tapping scares resources and having significant adverse effects on conditions of detention. All efforts should be made to reduce the use of arrest and imprisonment by:

- utilising existing legal mechanisms to avoid arrest and detention
- expediting cases through the Criminal Justice System
- granting affordable bail
- decriminalizing certain petty offences
- using non-custodial sentencing option.

It is an overall finding of this project that inconsistencies in policy application and practice in nearly every aspect investigated present significant challenges in adhering to constitutional and human rights prescripts. This is in all likelihood attributable to insufficient staff training and lack of monitoring performance to ensure compliance with existing standards. To remedy this will require a significant investment in staff training and the updating of policies and procedures where there are deficiencies.

In respect of police and prison officials' training, the overall impression is that much reliance is places on the initial training that recruits receive and that there is little refresher training on specifically human rights standards to ensure that officials are reminded of basic training as well as receiving updated information on new developments in law, policy and practice.

382 *World Prison Brief http://www.prisonstudies.org/world-prison-brief*

People with disabilities are particularly vulnerable in custodial settings. The overall impression is that this group of detainees receive scant attention in law, policy and practice. As a State party to the Convention on the Rights of Persons with Disabilities, a concerted effort need to be made to strengthen compliance with treaty obligations and existing recommendations from the treaty monitoring body pertaining to people deprived of their liberty.[383]

Inspections, detention monitoring and oversight are essential functions for a transparent and accountable Criminal Justice System. The data collected indicate that detention monitoring (including inspections and oversight) is being done in an ad hoc manner and there is little consistency to ensure that all arms of the Criminal Justice System adhere to legal prescripts and procedural requirements. There is thus a need to strengthen capacity and ensure universal monitoring in a systematic manner.

The detention of children should only be used as a matter of last resort. It is encouraging that at least in the prisons surveyed there are indeed low number of children in conflict with the law detained. There are, however, significant numbers of children detained is CRH and often for very long periods in violation of legal requirements. This situation requires urgent attention to address blockages in the system.

While women constitute a relatively small proportion of the detained population, infrastructure and service limitation often result in them being worse off. Detention facilities without female staff, inadequate segregation of women from other categories of detainees and inadequate nutrition and health care place them in a particularly vulnerable situation. As noted above, arrest and detention should be avoided, especially when women are primary caregivers with young children dependent on them.

The Persons Deprived of their Liberty Act (2014) needs to be amended to provide more detailed standards and guidelines. Alternative, regulation need to be developed to guide practice in the various custodial settings.

383 CRPD/C/KEN/CO/1.

Annexures

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Kenya's Criminal Justice Audit Findings Implementation Matrix

Police: Case flow management								
	Problem/ Findings	**Desired situation/s**	**Intervention Strategy/s / Recommendation**	**Indicator/s**	**Means of verification**	**Agency responsible**	**Potential Partner**	**Time frame**
1.	Significant proportion of the population (1 in every 5 persons between 2013-2014) are held in police custody beyond the constitutional time limit (24 hour rule)	All persons arrested to be produced in Court within the 24 hours Constitutional time limit	Sensitization of the National Police Service on the 24 hours rule Strategic litigation	Percentage of arrested persons on conditional/ unconditional release Percentage of arrests which go to court within the constitutional timelines	Police Cell Register, Charge Register and Occurrence Book Court Admission Register	National Police Service Judiciary ODPP KNCHR	NCAJ Ombudsman IPOA CAJ Ministries responsible PBOs	

2.	63% of persons released from police cells had no reason for release recorded	All persons released from Police station to have reasons for release recorded in the Cell Register and Occurrence Book	Sensitization to the National Police Service on the need to ensure the reasons for release are recorded.	Percentage of persons released from police cells have reason/s for release recorded	Cell Register and Occurrence Book Human Rights and Justice Committee implementation reports	National Police Service Commission National Police Service Internal Affairs Unit IPOA KNCHR Human Rights and Justice Committee Efficiency Monitoring Unit ODPP	NCAJ PBOs	

3.	70% of the cases referred to court are petty offences and exceeds arrests and detention by Police by 2/3	Lower percentage of petty offences being referred to court	Fast track Court of Petty Sessions Promote alternative forms of dispute resolution mechanisms by courts[1] Structured mechanisms to be formulated by AJS(Alternative Justice Systems) taskforce to allow National Police Service divert cases away from the Criminal Justice System Sensitization of communities on alternative justice	Percentage of petty cases being dispensed at the police station. Increased use of Non-custodial sentences at the court. Alternative approaches active in the diversion and rehabilitation of petty offender. Reduced case backlog.	Courts of petty session law Reports on referrals to ADR/AJS	Local administration National Police Service Judiciary ODPP KLRC AG CSO Probation department	NCAJ PBOs	

4.	22% of offences likely to go to court are state regulated offences2	State regulated offences diverted away from the Criminal Justice System. [3]	Lobby for administrative action on state regulated offences research on social economic impacts of subjecting state regulated offences to the Criminal Justice System Strategic litigation/ PIL on social economic impacts of arrests and detention on state regulated offences	Percentage of state regulated offences dealt with administratively	Policy framework for diversion of state regulated offences	National government C.O.G. Parliament Judiciary, KLRC, AG, CJ,	NCAJ PBOs C.O.G.	

Judiciary: Case flow management								
	Problem/ Findings	**Desired situation/s**	**Intervention strategy/s/ Recommendation**	**Indicator/s**	**Means of verification**	**Agency responsible**	**Potential Partner**	**Time frame**
1.	Magistrate Courts handle high proportion of less serious offences4	Lower number of less serious offences being referred to court	Judiciary to manage case flow as per guidelines relating to active case management of criminal cases at Magistracy and High Court level [5] Sensitization of Judicial Officers and Prosecutions on case management Adoption and implementation of AJS taskforce policy	Number of less serious offences being referred to court and annexed to the court led mediation Reduced case load of less serious offences per Magistrate per year Number of less serious cases handled under AJS	Charge Admission registers AJS taskforce implementation reports Court returns	ODPP Judiciary National Police Service	NCAJ Judiciary Training Institute PBOs	

2.	4 out of 5 serious cases of Robbery with violence, grievous harm and sexual offences result in either acquittal or withdrawal	An efficient investigation and prosecutorial system	Improved investigations and evidence gathering Improved coordination between arresting, investigating and prosecution agencies Proper witness management Improved quality of justice through successful prosecution of serious offences on merit Community empowerment	Percentage of guilty verdicts on serious offences Number of witnesses under witness protection program	Charge registers Admission register	National Police Service ODPP All law enforcement agencies	NCAJ PBOs	
3.	44.8% of appeals results into either liberty, reduced/ increases sentence, retrial or change of conviction	There are high quality (just, fair, transparent, lawful, timely) criminal justice decisions	Training of police investigators, Prosecution counsels and Magistrates on case management High Court to exercise its supervisory mandate over the subordinate courts[6]	Percentage reduction of appeals resulting into either liberty, reduced/ increased sentences, retrial or change of conviction	Training reports Judgment and court decisions analysis report/ returns	Judiciary ODPP PBOs JTI	NCAJ	

Prison: Case flow management								
	Problem/ Findings	**Desired situation/s**	**Intervention Strategy/s / Recommendation/s**	**Indicator**	**Means of verification**	**Agency responsible**	**Potential Partner**	**Time frame**
1	High number of pretrial detainees on serious and violent offences arising from poor investigation and prosecution7	Low number of persons in pretrial detention	Enhance the quality of investigation and prosecution Enhance coordination between law enforcement agencies among themselves on one side and the community on the other side – Nyumba kumi initiative Targeted funding by Treasury	Number of admissions in prison on serious and violent offences against number of convictions.	Remand admission registers Court admission registers Judgements	Kenya Police Service ODPP Judiciary KPS	NCAJ PBOs	

2.	75% of pretrial detainees are persons below the age of 35	Low number of youth in Prisons	Legislative and practice reforms could work to reduce the number admitted to prisons to encompass only those accused of traditional common-law offences Consultative forums on youth empowerment and job creation amongst relevant government agencies and interest groups	Percentage reduction of youth in Pretrial detention	Remand admission registers Legislative documents	Ministry of Public Service, Youth and Gender Affairs Ministry of ;labor, Ministry of education NCAJ KLRC AG Faith Based Organization	NCAJ PBOs	

3.	47% of pretrial detainees are illiterate or have acquired elementary level of education The percentage above are unable to understand Criminal Justice System	Continuous education system in place for persons in detention There is affordable and accessible quality legal representation, assistance or advice for all pre -detainees	Roll out continuous education system in all Prisons administrative running of prison education programmes in line with mainstream educational programmes Expanding paralegal space through operationalizing of the Legal Aid Act 2016and increased use of Article 50 (7) of the Constitution[8]	Percentage number of established educational systems in prison for all category of prisoners Percentage Number of pretrial detainees accessing legal aid.	Status of legal aid reports	KPS Ministry of Education National Legal Aid Service9 PASUNE	NCAJ PBOs	

4.	68% pretrial detainees have been remanded in custody for less serious offences10	There exists a vibrant, rights based and integrated Alternative Dispute Resolution (ADR) mechanisms to divert less serious offences away from the formal system Promoting reconciliation within prison context through family open days	Increased sensitization of Judicial Officers to promote ADR Public sensitization on use of alternative forms of dispute resolution mechanisms other than the formal system	Percentage reduction of less serious cases in pre-trial detention number of cases referred for ADR by the Courts Number of cases addressed through ADR by the community	ADR referral reports Prison population reports	Judiciary ODPP Probation Community Directorate of Rehabilitation (KPS)	NCAJ PBOs	

Children Remand Home: Case flow management								
	Problem/ Findings	**Desired situation/s**	**Intervention Strategy/s / Recommendation**	**Indicator**	**Means of verification**	**Agency responsible**	**Potential Partner**	**Time frame**
1.	More Children (427) were admitted in Prison than in children remand homes (350);	No child should be remanded in Prison [11]	Increased sensitization of Police, Prosecution and Courts to exercise due diligence when dealing with children matters Prison heads to refer children matters back to court, for purposes of making relevant orders Fast tracking and streamlining age assessment process	Number of children remanded in Prison	Remand admission register Court admission register Remand warrants	Kenya Prison Service Children Services Judiciary National Police Service ODPP Ministry of Health	NCAJ PBOs	

2.	4% of recidivism and " revolving doors" cases (3% second offenders, 1% third, fourth and fifth offenders)	Released children are well re-integrated into the society	National and County Governments to develop societal interventions programs to address the plight of children in conflict with the law and at risk of committing crime There is need for advocacy targeting legislation on Rehabilitation and Aftercare Integrated data management system.	Number of rehabilitation and reintegration programs across board Numbers of re- entries into children remand homes	Remand admission registers Charge registers	Children Service National Police Services Probation Department COG	NCAJ PBOs	

3.	15% of children were remanded in children remand homes for either defilement or attempted defilement	Fewer cases of children charged with defilement or attempted defilement	Further research on the best and desirable approach to adolescent's sexuality without having to resort to criminal proceedings[12] National and County government to develop programs on reproductive health education in schools, and community Advocacy and promotion on good parenting skills in all existing community institutions	Reduced Number of children charged with defilement and attempted defilement	Reviewed Sexual Offences Law Juvenile Justice Bill Policies and guidelines streamlining issues of sexual and reproductive health.	Ministry of East African Community, Labor and Social Protection Ministry of Education C.O.G. Ministry of Health NACADA	NCAJ PBOs	

4.	Lack of legal representation	Legal representation to all children in conflict with the law	Compliance with gazette notice no. 370 [13] Compliance with Cection 36 (1) (b) of the Legal Aid Act of 2016 Compliance with section 77(1) of the Children Act[14] Increase Legal Aid Fund	Number of children afforded legal representation	Legal aid reports	Judiciary, LSK, Children Services National Legal Aid Service Treasury	NCAJ PBOs (Legal Aid Providers)	
5.	Non-compliance to the fifth schedule of child offender rules of the Children Act 15 (in all the institutions surveyed, remand duration was more than an year)	Total compliance to the fifth schedule of child offender rules of the Children Act	Compliance with PART VI – Children's Act CAP 141 Set up special CUC for children courts conducting audits on compliance	Percentage Number of cases completed within the specified time limits Number of children's court established and are operational[16].	Judiciary reports (Compliance reports)	Chief Justice Judiciary ODPP	NCAJ PBOs	

6	High number of children held in police stations under inhumane conditions (42 children in 15 Police stations i.e. 1260 children are held in police stations all over Kenya at any given time)	Children in police custody to be held in children friendly cells	Sensitization of communities on child protection Advocate for allocation of resources to put in place child friendly cells in police stations National Police Service Act to be amended to provide for CPUs[17] Compliance with Article 37(c) of the United Nations Convention on the Rights of a Child[18]	Number of children in police cells Number of children friendly cells in police Legislation of CPUs	Cell register	Inspector General of Police Director of Children Services	NCAJ PBOs	

Conditions of detention: Police cells, Court Holding Cells, Prisons and Children Remand Homes								
	Problem/ Findings	**Desired situation/s**	**Recommendation/s / Intervention strategy**	**Indicator/s**	**Means of verification**	**Agency responsible**	**Potential Partner**	**Time frame**
1.	Ageing, limited and/ or dilapidated Infrastructure, therefore presenting significant challenges to conditions of detention	Infrastructure that conforms to the United Nations Standard Minimum Rules on Treatment of Prisoners (UNSMR) and Persons deprived of their liberty Act 2014 (PDLA)	Significant effort and investment to address infrastructural shortcomings at Police Stations, Prisons, Children Remand Homes and Court Holding Cells Upgrade, renovate and redesign existing infrastructures to meet the bare minimum standards of conditions of detention	The number of institutions conforming to UNSMR and PDLA	Infrastructure development budgets and reports	State Department of Public Works under the Ministry of Transport, Infrastructure, Infrastructure and Urban Development National Treasury Inspector General of Police Commissioner General of Prisons Director of Children Services Chief Registrar of Judiciary KNCHR COG	NCAJ PBOs	

2.	High rate of imprisonment leading to congestions in Prisons (Prison population of approximately 57,000 measured against official capacity of approximately 26,000 and Imprisonment rate of 121/ 100,000, the 17th highest imprisonment rate in Africa)	Conforming to internationally accepted minimum space per prisoner (African context 3.334m2)[19] Compliance with Section 12 (2) of Persons Deprived of their Liberty Act (PDLA) 2014[20]; Fair Administrative Action Act.	Efforts be made to reduce use arrests and imprisonment by; Utilizing existing legal mechanisms to avoid arrest and detention Expediting cases through the Criminal Justice System implementation of bond and bail policy guidelines – cash bail in installments Decriminalizing some petty offences – state regulated offences increased use of non- custodial options e.g. fines, CSO, Probation Department e.t.c Prison led victim-offender mediation and reconciliation especially during family days	Number of people in prisons number of prisons conforming to minimum space per prisoner	Prisons admission registers Prisoners and Remand admission register	National Police Service ODPP Judiciary State Department of Public Works under the Ministry of Transport, Infrastructure, Infrastructure and Urban Development National Treasury Probation and aftercare services Judiciary Kenya Prison Service POMAC PBOs	NCAJ PBOs	

3.	Inconsistencies in policy and practice application in every aspect investigated posing significant challenges in adherence to Constitutional and human rights prescripts across board	Consistent policy and practice application and implementation across board	Significant investment in induction, orientation and staff training and the updating of policies and procedures where there are deficiencies Regular monitoring by internal and external bodies Amended PDLA to speak to specific places of detention. the act only talks of persons deprived of their liberty periodical policy reviews	Knowledge, Attitudes and Practice survey on policy and practice application and implementation	Survey reports State of the judiciary reports	KLRC Inspector General of Police Commissioner general of Prisons KNCHR Director of Children Services Judiciary	NCAJ PBOs	

4.	Conditions of detentions are not favorable for persons living with disabilities21	Conditions of detention favorable to persons living with disability and conforming to statutory provisions	As a State party to the Convention on the Rights of Persons with Disabilities, a concerted effort need to be made to strengthen compliance with treaty obligations and existing recommendations from the treaty monitoring body pertaining to people deprived of their liberty State to deliberately create an enabling environment for persons living with disabilities	Number of infrastructure that meets the needs of persons living with disability	Universal Periodical Reports (2015) on obligations by the State to special interest groups	National Council for Persons with disabilities KNCHR Inspector General of Police Commissioner general of Prisons Director of Children Services Judiciary	NCAJ PBOs	

5.	Conditions of detention do not favor children accompanying their mothers, expectant and nursing mothers	Enabling conditions of detentions for children accompanying their mothers, expectant and nursing mothers	Ensuring Early Childhood Development Centers in Prisons are operational and meets the bare minimums Allocation of adequate resources to cater for the needs of children, expectant and nursing mothers Compliance with UNSMR[22] and PDLA[23]	Places of detention facilities that meets the needs of children accompanying their mothers, expectant and nursing mothers	Monthly returns	COG Commissioner General of Prisons Inspector General of Police Judiciary KNCHR Commission on Administrative Justice (CAJ)	NCAJ PBOs	
6.	Court holding cells are generally not supported by any legal or policy prescripts	Court holding cells anchored under legal and policy framework	Set up clear administration standards guidelines to address court holding cells	Legal mechanisms in place for management of court holding cells	Legal and policy framework for the management of court holding cells	Judiciary National Police Service KNCHR CAJ	NCAJ PBOs	

(Footnotes)

1. Article 159 (2)(c) of the Constitution of Kenya 2010.

2. A category of some prominence in Kenya (as opposed to similar studies in Malawi, Zambia and Mozambique in which they were all but absent) was the category of "state offences", which arose out of analysis of the data. Grouped into this category are all offences where the offence has been defined by the state in terms of legislation, mostly in legislation outside of the Penal Code. These offences typically do not have a complainant other than the state itself and typically relate to the regulation of formal or informal economic activity, where a particular state interest is being protected, such as regulation of alcohol use and protection of the environment.

3. For example, In South Africa, a contravention of a local by-law (regulation) results in the following sets of actions against the offender: Notice- giving notice of the infringement; Notice results in the issue of a fine; Failure to pay the fine would result in summons being served; Failure to respond to summons requesting the offender to appear before court would result in the issues of a warrant of arrest by the Magistrates Court. In Canada, the Uniform Regulatory Offences Procedure Act (1992) provides that there is no general power of arrest in respect of the commission of a regulatory offence, except in specified circumstances, such as where the arrest is necessary to preserve evidence or identify the defendant. Where such an exceptional arrest occurs, the arresting officer must soon as is practicable, release the person from custody after serving the person with a summons or offence notice, except in specified circumstances. In Australia, Those accused of breaches of environmental regulations or corporate laws or charged with minor drug offences, taxation evasion and social welfare fraud, receive a summons from an agency (to whom regulatory responsibility has been delegated) and face civil proceedings or an administrative tribunal rather than face a criminal court.

4. Data from the 14 Magistrates' Courts surveyed found 75 000 accused persons in two years, with a high proportion of less serious offences. There are 116 court stations in Kenya which suggests more than 600 000 accused in the country every two years, or 300 000 accused per year and 230 000 cases. If all cases were to be resolved in a year it would require the current 455 magistrates to resolve 500 cases per year. This illustrates the pressure placed on the system by the high number of referrals of petty offence.

5. Gazette Notice No. 1340, 2016.

6. Section 362 of the Criminal Procedure Code - The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

7. The data suggests admissions on remand for serious offences far in excess of the number

who will ever be convicted. For example, each year there are approximately 2000 admissions on remand for sexual offences in 14 prisons, but only around 35 convictions in the same category in 14 courts; and 10 000 admissions on remand for violence offences, compared to 900 convictions of the same type.

8. In the interest of justice, a court may allow an inter-mediary to assist a complainant or an accused person to communicate with the court.

9. Established by section 5 of the Legal Aid Act 2016.

10. From the context of the audit report, less serious offences are offences that do not fall under the category of violent, sexual cluster of offences.

11. Article 53(1)(f) Constitution of Kenya 2010- Every Child has the right not to be detained, except as a measure of last resort, and when detained, to be held – Article 53 (1) (f) (i) for the shortest appropriate period of time; and (ii) separate from adults and in conditions that take account of the child's sex and age.

12. Petition number 6 of 2013 *"While the petitioner is persuaded that consensual sexual activity between adolescents should not be condoned or regarded as the acceptable norm, he believes that a more effective intervention than the criminalization of consensual sexual acts is likely to be secured if the response was changed from a criminal one to a more child friendly response"*

13. Pro bono services shall be offered in capital cases and cases of children in conflict with the law in the Magistrate Court. All stations shall form pro bono committees chaired by the Registrar, Deputy Registrar or Head of Station and the member shall include; Court Administrator, a representative of the Law Society of Kenya, and two nominees of the Court User's Committee that shall allocate pro bono briefs.

14. Where a child is brought before a court in proceedings under this Act or any other written law, the court may, where the child is unrepresented, order that the child be granted legal representation.

15. (4) Remand in custody shall not exceed:-

(a) six months in the case of an offence punishable by death; or

(b) three months in the case of any other offence.

12. (1) every case involving a child shall be handled expeditiously and without unnecessary delay.

(2) Where the case of a child appearing before a Children's Court is not completed within 3 months after his plea has been taken he case shall be dismissed and the child shall not be liable to any further proceedings for the same offence.

(3) Where, owing to its seriousness, a case is heard by a court superior to the Children's

Court the maximum period of remand for a child shall be six months, after which the child shall be released on bail.

(4) Where a case to which paragraph (3) of this rule applies is not completed within twelve months after the plea has been taken the case shall be dismissed and the child shall be discharged and shall not be liable to any further proceedings for the same offence.

16. Section 73 and 74 of the Children Act.

17. Child protection unit is a formalized structure at the police stations for the protection and care of children held in police station. The units serve as holding facilities for children for the shortest time possible as cases are being processed totally separating children from the rest of the prisoners in order to enhance protection, privacy and a child friendly environment.

18. Every child deprived of his or her liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so.....

19. There is no universally accepted minimum space norm per prisoner and it varies from country to country. 3.334m2. South Africa uses 3.334m2, which is still very small but at least a norm from an African Country.

20. The Cabinet Secretary shall by Regulations determine the maximum number of persons deprived of liberty that may be accommodated in any given facility or prison and the minimum space or area of such accommodation.

21. Section 23(2) of Persons deprived of their liberty act: Persons with disabilities deprived of liberty shall be accommodated in facilities that adequately meet their personal needs, taking into account the condition and nature of their disability.

22. Rule 28 and 29 of United Nations Standard Minimum Rules on Treatment of Prisoners (Mandela Rules)

23. Section 22(1) of Persons Deprived of their liberty act: A mother deprived of liberty is entitled to take personal care of the child until such child attains the age of four years.

Section 22(2) of Persons deprived of their liberty act: A mother and child held in detention are entitled to diet, clothing, healthcare and facilities necessary for the developmental needs of the child

CRIMINAL JUSTICE SYSTEM IN KENYA:
An Audit

Under the umbrella of National Council on Administration of Justice (NCAJ) and with financial support from Open Society Foundations; Legal Resources Foundation Trust (LRF) and Resources Oriented Development Initiatives (RODI-Kenya) partnered to conduct an audit study on conditions of pre-trial detention and case flow management in the Kenya Criminal Justice System. The audit was premised on the need to provide an exhaustive overview of human right standards in the Criminal Justice System measured against the African Commission Guidelines on Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa and the United Nations Standard Minimum Rules on Treatment of Prisoners and also provide a symbolic picture of the number, nature and speed at which criminal matters flow through the Criminal Justice System, particularly where the matters involve deprivation of liberty. The audit targeted 18 Counties which were purposefully sampled to represent the 47 Counties. The audit was commissioned by the NCAJ on 15th May, 2015 and thereafter conducted under the watchful eye of a National Steering Committee seconded by the NCAJ, comprising of members drawn from the Criminal Justice System.

Key finding of the audit confirms that, Kenya's Criminal Justice System is largely skewed against the poor. It is an indictment of a system that is expected to guarantee justice to people from all walks of life including all forms of vulnerabilities. The findings of the study will go a long way in providing recommendations towards improved service delivery and both legislative and policy reforms to key stakeholders in the Criminal Justice System.

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