AN EXPLORATORY STUDY OF THE INTERACTION BETWEEN
THE CRIMINAL JUSTICE SYSTEM AND
PERSONS WITH INTELLECTUAL AND
PSYCHOSOCIAL DISABILITIES
IN NAIROBI, KENYA
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THE INTERACTION BETWEEN THE CRIMINAL JUSTICE SYSTEM AND PERSONS WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES IN NAIROBI, KENYA

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ISBN: 978-0-620-95914-8
Cover Photograph: Mother sitting on a bench at Mathari Hospital (ADAT).

About Arthur’s Dream Autism Trust (ADAT)
ADAT is a not-for-profit organisation that advocates for the rights of children with intellectual disabilities and their caregivers by championing inclusive education, access to justice and the right to health. ADAT’s work has supported its vast grassroots network of adults and children with various disabilities and their caregivers to ensure that persons with intellectual disabilities achieve their best potential.

About Article 48 Initiative (A48)
A48 is a not-for-profit company limited by guarantee that strives to fill the gap in the justice system, which allows the systematic violation of the right to access to justice for persons with intellectual and psychosocial disabilities. A48 provides legal representation to persons with intellectual and psychosocial disabilities, capacity strengthening for stakeholders on disability rights and equips families and caregivers of persons with intellectual and psychosocial disabilities to support their access to justice.

About the Southern Africa Litigation Centre (SALC)
SALC, established in 2005, is a not-for-profit Trust that aims to provide support to human rights and public-interest advocacy and litigation undertaken by domestic lawyers and human rights organisations in Southern Africa. SALC works in Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Eswatini, Tanzania, Zambia and Zimbabwe.

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The report was written by Jacqueline (Jaki) Mathaga and Dr Jane Muiruri from ADAT, Esther Marigu & Sharon Ndor from Article 48, with additional chapters contributed by Iva Petkova, Colton Jackson and Taebryanna Sims, from SALC. Anneke Meerkotter, Tambudzai Gonese and Anna Mmolai-Chalmers edited the report. The research was made possible through the support of the Open Society Foundation’s Human Rights Initiative.

Electronic copies of this report can be found at:
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<td>Officer Commanding Station</td>
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<td>ODPP</td>
<td>Office of the Director of Public Prosecutions</td>
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<td>DPO or OPD</td>
<td>Organisation of Persons with Disabilities</td>
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<td>Speech Generating Device</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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EXECUTIVE SUMMARY

Access to justice has long seemed elusive for persons with various intellectual or psychosocial disabilities in Kenya. The fear of a child with an intellectual or psychosocial disability growing up and encountering the justice system only never to be heard from again is a frequent topic of discussion amongst caregivers. Safeguarding these children and their possible future interaction with the justice system then becomes of utmost importance. In 2018, a situational analysis was conducted on the status of access to justice for persons with intellectual and psychosocial disabilities.¹ The report identified barriers that prevented persons with intellectual and psychosocial disabilities from enjoying the right to access justice throughout the criminal process.

This report illustrates the impact that petty offence charges have on persons with intellectual and psychosocial disabilities and their caregivers. There is a need to understand how the decision to charge a person with an intellectual or psychosocial disability with a petty offence is arrived at, how the Office of the Director of Public Prosecution (ODPP) uses the decision to charge persons with intellectual or psychosocial disabilities and the criteria for delegating this decision to police officers.

The methodology used in this research acknowledges the importance of a human rights-based approach to disability. The Convention on the Rights of Persons with Disabilities (CRPD) states that “[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”² This approach is in opposition to the much-used medical model of disability that focuses on the impairment of the person. We use a social model of disability to underscore the current understanding of the barriers persons with disabilities encounter in the justice system.

The data collected for this research include both primary and secondary data using qualitative methods of data collection, including in-depth interviews, surveying, observation, and desk-top research.

Primary data was obtained through interviews with persons with intellectual and psychosocial disabilities, their caregivers, actors in the justice system and community allies (head teachers and community members), while the secondary data was obtained from available records on the incarceration of persons with intellectual or psychosocial disabilities for petty offences, reported cases and international and

regional law. This enabled us to compare the current situation in Kenya with the provisions of the international and regional conventions which Kenya has ratified.

The main purpose of this report is to identify the laws that discriminate against persons with intellectual and psychosocial disabilities within the criminal justice system. The field findings\(^3\) revealed that the most common petty offences that persons with intellectual and psychosocial disabilities get charged with are:

- Loitering,
- Being a disturbance,
- Indecent exposure,
- Causing public nuisance (e.g., misunderstood child or adult on the autism spectrum flapping or stimming),
- Urinating or defecating in public, and
- Drunk and disorderly conduct (e.g., person with an intellectual disability who is disoriented because of medication or non-responsive because of lack of speech).

**The field findings coupled with the desk review identified the need for legal and policy reforms:**

1. Sections of the ODPP Guidelines on the Decision to Charge and Alternative Dispute Resolution Guidelines to the extent that they do not recognise the rights of persons with disabilities in the criminal justice system.

2. Sections of the ODPP Guidelines on the Decision to Charge and Alternative Dispute Resolution Guidelines to the extent that they do not recognise or give guidelines on procedural reasonable accommodations and supports for alleged offenders with intellectual or psychosocial disabilities in the system.

3. Sections of the Persons Deprived of Liberty Act\(^4\) to the extent that they deny persons with disabilities privacy.

4. Sections of the Criminal Procedure Code to the extent that they allow detention based on disability.

5. Sections of the Mental Health Act\(^5\) to the extent that mental assessments are used to determine capacity to stand trial, instead of identifying accommodations and supports to stand trial.


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\(^4\) Persons Deprived of Liberty Act No. 23 of 2014.

\(^5\) Mental Health Act No. 10 of 1989 (Cap 248).

\(^6\) The Judiciary of Kenya, *Criminal Procedure Bench Book*. 
CHAPTER 1

INTRODUCTION

In 2018, a situational analysis was conducted on the status of access to justice for persons with intellectual and psychosocial disabilities. The report identified barriers that prevented persons with intellectual and psychosocial disabilities from enjoying the right to access justice throughout the criminal process. This is evident from the time a complaint is made against them at a police station to the person being arrested, detained, taken to court for trial, during the trial process, conviction, sentencing and even when seeking an appeal.

The biggest take-home from the situational analysis report that reinforced the need to conduct this research was discovering that most offenders with intellectual or psychosocial disabilities within the criminal justice system were charged with petty offences.

We conducted this research to understand the impact that arrests for petty offences have on persons with intellectual or psychosocial disabilities and their caregivers. There is a need to understand how the decision to charge a person with an intellectual or psychosocial disability with a petty offence is arrived at, how the Office of the Director of Public Prosecutions (ODPP) uses the decision to charge persons with intellectual or psychosocial disabilities and the criteria for delegating this decision to police officers.

Mental health can be defined as “a state of well-being in which the individual realises his or her own abilities, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to his or her community.” This includes “subjective well-being, perceived self-efficacy, autonomy, competence, intergenerational dependence, and self-actualization of one’s intellectual and psychosocial abilities.”

8 Joseph Melikino Katuta v Republic HCCA No. 12 of 2016 [2016] eKLR.
9 AOO & 6 Others v Attorney General & Another NRB Petition No 570 of 2015 [2017] eKLR.
10 Republic v SOM HCCC No 6 of 2011 [2018] eKLR.
emotional potential, among others.”¹⁴ Where any of this is lacking, one can be said to be suffering from an intellectual disability¹⁵ or a psychosocial disability.¹⁶ Many persons with psychosocial disabilities are deprived of their liberty in closed institutions and are deprived of legal capacity on the grounds of their medical diagnosis. This is an illustration of the misuse of the science and practice of medicine. It highlights the need to re-evaluate the role of the current biomedical model that dominates both the mental health scene and the criminal justice scene.¹⁷

Since time immemorial, issues surrounding mental health and the rights of persons with intellectual and psychosocial disabilities were not treated with the gravity they deserved. Owing to this, the right of access to justice for persons with disabilities has long been curtailed. Barriers to access to justice include lack of disability sensitivity, ignorance of legal provisions among service providers, inaccessibility to legal aid, limited awareness of needs and human rights of persons with intellectual and psychosocial disabilities in the justice system, and lack of financial capacity. Most persons with intellectual or psychosocial disabilities who were interviewed were charged with petty offences. Were it not for their disability; they would have been fined or given non-custodial sentences.

Through its grassroots network of parents and caregivers of persons with intellectual or psychosocial disabilities, ADAT observed the following challenges when accessing justice: lack of appropriate policies and guidelines; insufficient capacity of service providers; systemic challenges, including lack of coordination by criminal justice agencies during crime reporting, arrest, detention and release; lack of community-based care systems; stigmatization of victims with intellectual and psychosocial disabilities and lack of trained personnel in disability sensitivity. It is abhorrent that when a 12-year-old with diminished cognitive capacity and an intellectual or psychosocial disability is interviewed by a crowd of male police officers investigating suspected defilement, those officers laugh or make crude jokes in the process.

Based on these challenges, Article 48 and ADAT have partnered to identify gaps in the criminal justice system that lead to persons with intellectual or psychosocial disabilities being discriminatively charged with petty offences. Of interest are the Guidelines on the Decision to Charge of 2019 that were published by the Office of the Director of Public Prosecutions (ODPP). The Guidelines direct prosecutors as to how and when

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¹⁵ World Health Organisation Regional Office for Europe “Definition intellectual disability”: Intellectual disability means a significantly reduced ability to understand new or complex information and to learn and apply new skills (impaired intelligence). This results in a reduced ability to cope independently (impaired social functioning), and begins before adulthood, with a lasting effect on development.

¹⁶ Psychosocial disabilities are those disabilities that arise from barriers to social participation experienced by people who have or who are perceived to have mental conditions or problems. World Network of Users and Survivors of Psychiatry. *Implementation manual for the United Nations Convention on the Rights of Persons with Disabilities.*

to institute criminal charges. This report dives deeper into the use of petty offence charges against persons with intellectual and psychosocial disabilities.

**METHODOLOGY**

Our research was exploratory. Qualitative data collection methods were used, including carrying out in-depth interviews, surveying, observation, and secondary research. The data collected was both primary and secondary data. Primary data was obtained through interviews and focus group discussions with persons with intellectual and psychosocial disabilities, their caregivers, actors in the justice system and community allies (head teachers and community members), while the secondary data was obtained from available records on the incarceration of persons with intellectual or psychosocial disabilities for petty offences, reported cases and national, regional and international law. This enabled us to compare the current situation in Kenya with the provisions of the international conventions it has ratified.

The field study and data collection were carried out during February 2021 in the Kenyan counties of Nairobi, Nakuru, Kiambu and Kajiado. The interviews were conducted in a mix of English and Kiswahili and, on one occasion, in Kikuyu. Verbal consent was obtained where written consent was not accommodating.

In Nakuru, two Focus Group Discussions (FDGs) were held with 15 participants. Nine individual interviews were conducted. In Nairobi, one FGD and four individual interviews were conducted. The Nairobi interviews form the case study excerpts and videos in this report. In Kajiado, one FGD and two individual interviews were conducted. In Kiambu, one FGD and five individual interviews took place. The FGDs comprised all stakeholders, including persons with intellectual and psychosocial disabilities, caregivers, persons with lived experiences, persons who are re-integrating back into society, local administration, local leaders, local educators, and faith leaders. In a few of the FGDs, there were participants from the probation and aftercare services and the police. These two categories were adamant that they attended the FGDs for personal development and not on behalf of the State. This study also comprised interviews with the local chiefs, an education administrator, head teacher at a school for persons with intellectual and psychosocial disabilities and leaders of community organisations.

In Nairobi County, a magistrate observed in an interview that they did not know how to handle persons with intellectual and psychosocial disabilities and that they were simply referred for evaluation to the mental teaching and referral hospital. During the interview, they wondered out loud what happened to the individuals after their referral.

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LIMITATIONS

Courts, prosecutors, and police in Kenya are not required to document disability-specific data. This study was conducted during the COVID-19 pandemic when the government-imposed restrictions on movement at various times. Thus, the data is limited to Nairobi, Nakuru, Kiambu and Kajiado counties.

Given the broad spectrum of intellectual and psychosocial disabilities, some interviewees were non-verbal but not non-communicative. In such circumstances, researchers used intermediaries and support persons (who would include family members) to interpret the thoughts, perceptions, will and preferences of the person. On such occasions, caregivers frequently had to explain or interpret further what non-verbal persons had meant. This was evident when explaining the use of language and the lack of communication accommodations in the justice system. For example, one interviewee said the judge spoke: “githungu kia manyiuru” (in Kikuyu language) which loosely translated would be “English of the Nose” and meant to infer that the Judge spoke fluent English with an accent and big words. We realised he only comprehended his vernacular language and with severe limitation to meaning. Another interviewee had answered “yes” to the allegation of defilement, on further review, we found out he was asked if “he held” a child in Kiswahili “Ulishika Mtoto” (Swahili language), which is open to interpretation as “he held the child’s hand, held the child in his arms or defiled the child”. In his case, he understood and interpreted that he held a child’s hand to which he answered “yes” and was imprisoned on own admission of guilt.

CONCEPTS

CRIMINAL JUSTICE SYSTEM

Criminal justice is “the procedure by which criminal conduct is investigated, arrests made, evidence gathered, charges brought, defenses raised, trials conducted, sentences rendered, and punishment carried out.”¹⁹ The process consists of three major stages. First, the police investigate a crime and collect evidence to use against an alleged perpetrator in court. Next, the case goes to trial, during which the court weighs the evidence to determine if there is guilt beyond a reasonable doubt.

Finally, if found guilty, the defendant will be convicted and sentenced to serve a certain period of incarceration or non-custodial sentencing under probation to punish and correct the offender’s behaviour. The accused shall be set free if found innocent or the prosecution fails to prove the case beyond a reasonable doubt.²⁰ This definition assumes all things in the process chain will occur in the sequence outlined; that the police will investigate a crime, collect evidence and that the case will proceed to trial.

¹⁹ “Criminal Justice” Nolo’s Law Dictionary.
and that the defendant will get a fair hearing. Our research found that this is not the case for persons with intellectual or psychosocial disabilities. Cases brought forward by persons with disabilities are also often discarded.

LEGAL CAPACITY

Legal capacity is about what a human being can do within the framework of the legal system.\(^2\) It is the ability to hold rights and duties (legal standing) and exercise them (legal agency).

INTELLECTUAL DISABILITY

Intellectual disability “involves problems with general mental abilities that affect functioning in two areas: intellectual functioning (such as learning, problem-solving, judgement) and adaptive functioning (activities of daily life such as communication and independent living)”.\(^2\) A person with an intellectual disability may have limitations in language ability, comprehension, and communication skills. This can result in difficulty understanding and responding to questions. For example, they may agree to instruction but not comply because they did not understand it adequately. They may also take longer to process information and struggle to recall information and sequence events. They may also be acquiescent and suggestible. Under pressure, they may try to appease other people. For example, they might answer questions how they think the questioner wants them answered, regardless of their own opinion or understanding of the truth. These difficulties are likely to be exacerbated in stressful situations, such as contact with criminal justice services, especially during interviews with the police, court appearances, and in detention.\(^2\)

PSYCHOSOCIAL DISABILITY

Psychosocial disability refers to the interaction between psychological and social/cultural components of disability.\(^2\) It refers to a social rather than medical model of experiences. Psychosocial disability is seldom understood in the justice system. Culture also impacts the perception of psychosocial disability, with persons who fit this diagnosis labelled as “mad”.


\(^{22}\) “What is Intellectual Disability?” American Psychiatric Association (July 2017).


INTERMEDIARIES

Intermediaries are provided for in Article 50(7) of the Constitution of Kenya, 2010, as people are allowed by the court to assist a person to communicate with the court. The intermediary will ensure effective communication during legal proceedings. The intermediary supports persons with intellectual or psychosocial disabilities to understand and make informed choices, ensuring that things are explained and talked about in ways that they can understand. They also make sure that appropriate accommodations and supports are provided. Intermediaries are supposed to be neutral and do not speak for persons with disabilities or for the justice system, nor do they lead or influence decisions or outcomes. Where the use of intermediaries are needed but the intermediary is a family member or even an abuser, they are unlikely to be truthful or helpful and work to suppress information. Where this happens, the person with an intellectual or psychosocial disability will remain fearful throughout the process, resulting in a denial of justice.

PETTY OFFENCE

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

In Kenya, a petty offence refers to a minor crime punishable by paying a fine or short imprisonment. A petty offence is the lowest level of an offence. The Sentencing Policy Guidelines developed by the Kenya Judiciary recommend the avoidance of imprisonment of petty offenders, however the same Guidelines also allow for detention of persons with intellectual and psychosocial disabilities at the President’s pleasure. Our research indicates rampant abuse of petty offences to remove a person with an intellectual or psychosocial disability from the family and community through incarceration.

MEDICAL MODEL OF DISABILITY

The medical model of disability views disability as a ‘problem’ that belongs to the ‘disabled’ individual. It is not seen as an issue to concern anyone other than the individual affected.

SOCIAL MODEL OF DISABILITY

The social model views disability as an evolving concept which results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others. The social model of disability understands barriers in society as disabling – i.e., society limits the participation of persons with impairments by creating obstacles. These may take many forms, including legal, attitudinal and physical barriers, as well as communication barriers. For example, when a person who uses a wheelchair comes across a staircase, the result - that is, the interaction between the fact that the person is using a wheelchair and the inaccessibility of the staircase - is a disability. The social model of disability regards people living with disabilities as full members of society who make significant contributions to their families and community. It recognises that persons with disabilities should determine the course of their lives to the same extent as other members of society. It paves the way for social action by persons with disabilities to challenge barriers to participation and exclusionary practices.

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CHAPTER 2

DISABILITY IN KENYA

DATA ON DISABILITY

Kenya lacks a comprehensive and consistent system for gathering data about disability, and the significant societal stigmas around disability discourage many from disclosing their disabilities. The 2009 census reported that 3.5% of Kenyans have disabilities, and the 2007 National Survey for Persons with Disabilities noted a rate of 4.6%31. Rates of disability vary widely across counties. The census indicated a higher prevalence of disability in rural areas (2.6%) than in urban areas (1.4%).32 The Kenya Integrated Household Budget Survey 2015/16 suggested a disability prevalence of 2.8%. The Kenya National Survey for Persons with Disabilities (KNSPWD) was conducted to obtain up-to-date information on persons with disabilities for purposes of planning, monitoring, and evaluation of programmes. The survey specifically estimated the number of PWDs, their distribution in the country, the nature, types and causes of their disabilities, the problems they face, and the coping mechanisms they use.33 Unfortunately, the data largely excluded persons with intellectual and psychosocial disabilities from the census.

According to the 2019 census, 2.2% of Kenyans, or nearly 1 million people, live with some form of disability.34 The census questions were, however, limited in the ambit of disabilities discussed. In the census data collection, the only questions asked concerning disability were: Do you or anyone in your family have albinism? Do you or any member of your family have the following blind, deaf, mutism, uses a wheelchair or needs assistance to walk? Are you or any member of your family above the age of five unable to dress themselves, bath themselves, feed themselves, walk unassisted?

The percentage of reported Kenyans with disabilities is much lower than the global average, which the World Health Organisation estimates to be around 15%.35 Experts agree that the total number of persons with disabilities is drastically underreported in Kenya. The 2.2% reported is likely to represent only the number of people with the most severe disabilities.36 Instead, Disability Rights Now suggests over 4.44 million

32 Id.
THE INTERACTION BETWEEN THE CRIMINAL JUSTICE SYSTEM AND PERSONS WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES IN NAIROBI, KENYA

Kenyans have some form of disability.\textsuperscript{37} A study conducted in 2018 by the Kenya Institute of Special Education (KISA) estimated that 11.4% of children had disabilities.\textsuperscript{38}

This underrepresentation in national statistics has potentially severe consequences. It excludes disability issues from the political agenda and negatively impacts the accurate design of policies and support programmes for individuals with disabilities.\textsuperscript{39} Accurate data is crucial to ensuring that the rights and dignity of people with disabilities are protected.

Several government agencies exist to support persons with disabilities, including the National Council for Persons with Disability, the Kenya National Commission on Human Rights, and the National Gender and Equality Commission. Though these groups have progressed in developing assistance programmes,\textsuperscript{40} there are still significant challenges facing persons with disabilities. 38.6% of Kenyans surveyed in 2019 indicated that the government is protecting rights and promoting opportunities for persons with disabilities very badly or reasonably badly.\textsuperscript{41}

The impact of the underrepresentation of people with disabilities in the official statistics is severe because the inaccuracy of the accepted statistics widely diverts the focus on disability-related issues. It further damages access to justice and Kenya’s response to justice system functionality and access by persons with disabilities.

**DISABILITY-RELATED STIGMA AND DISCRIMINATION**

Lack of accurate statistics, pervasive societal stigma and few comprehensive assistance programmes have resulted in a population of Kenyan persons with disabilities who face discrimination and barriers in all aspects of life. Fourteen per cent of Kenyans surveyed by Afrobarometer in 2016 and 2018 said that they had experienced discrimination based on their disability during the previous year.\textsuperscript{42} A 2021 study revealed that negative perceptions of persons with disabilities are prevalent.\textsuperscript{43} The majority of youth surveyed viewed persons with disabilities as burdens who cannot make substantial contributions to society, and would prefer not to have persons with disabilities at their workplace.\textsuperscript{44}

\textsuperscript{37} Global Disability Rights Now Infographics 2020
\textsuperscript{39} Development Initiatives, Status of Disability in Kenya: Statistics from the 2019 Census (6 May 2020).
\textsuperscript{40} K Kabare “Social Protection and Disability in Kenya” (October 2018) provides an overview of the current financial and other assistance programmes available for persons with disabilities in Kenya.
\textsuperscript{41} Institute of Development Studies University of Nairobi “Summary of Results: Afrobarometer Round 8” (2019).
\textsuperscript{42} Afrobarometer “All in this Together: Africans Tolerant on Ethnic, Religious, National, but not Sexual Differences” (19 May 2020) 19.
disabilities in roles such as doctor, teacher or landlord. There is also disinformation circulating about disability, for example, that it is a consequence of immoral behaviour or is caused by curses.\textsuperscript{44} Such negative attitudes and stigma contribute to the societal exclusion of individuals with disabilities, thereby denying them access to various fundamental rights. The various factors influencing stigma are interactional. Nevertheless, opportunities for positive intergroup exchanges have been shown to reduce stigma.\textsuperscript{45}

Stigma is also at times internalized by the family caregivers of persons with disabilities, contributing to social exclusion.\textsuperscript{46} Caregivers’ instinct to protect persons with disabilities from harm resulting from societal stigma and beliefs might also contribute to social exclusion.\textsuperscript{47}

\textbf{Case Study – The ‘problem’ of disability}

“My son (mother speaking) had a ‘problem’ since he was young. I took him to school, and later the teacher advised me to let my son stay at home after he finished class eight. He stammers and has a long speech. He also has temper issues and takes depression medicines. When he is angry, his nose bleeds. On 1 December 2020, he was walking along and was confronted by some people at the garage and asked where he was going. He replied to them using a long speech. He was asked what he was carrying, and he removed his identity card and the phone. Thereafter, he was beaten until he defecated on himself and broke his leg.

The matter was reported to the police station, and my son was able to identify the people who beat him, and two witnesses from the garage were ready to testify. The suspects were arrested and later released. I have since been following up on the case with the police officers, and there is no feedback. One police officer told me, ‘Even the people who have killed are also released from custody, and there is nothing I can do.’”

The case study raises various issues. These include the reference to the difficulties faced by people with disabilities as “problems” and the failure to address these difficulties by providing support needs, such as the use of an alternative way of communication that every individual can understand on an equal basis.

In addition, the respondents’ continuous use of the word “problem” also impacted the extent to which some of the respondents were able to articulate the barriers that exist in the justice system. For instance, during the focus group discussion and one-on-one interviews, most respondents placed the “problem”

\textsuperscript{44} Id 4279.
\textsuperscript{45} Id 4288.
of disability squarely on the people with intellectual and psychosocial disabilities, with limited focus on the barriers in the justice system. The respondents used the word “problem” (pointing to the fact that the person has “a problem of being slow”, “has a problem of poor memory”, or “has a problem understanding basic things”). They saw this as the reason the person is experiencing barriers in accessing justice on an equal basis.\(^{48}\) Hence, the word “problem” created an impression that persons with intellectual and/or psychosocial disabilities should be taken to an institution away from their families and communities on the assumption that the “problem” can be fixed.

There is a strong connection between disability and poverty. Social and cultural exclusion due to stigma leads to a denial of economic and social opportunities for persons with disabilities and their subsequent reduced capacity to make decisions and use their civil and political rights. As a result, more than half of persons with disabilities surveyed in 2015 and 2016 reported difficulties finding employment and engaging in economic activities.\(^{49}\) Two-thirds of persons with disabilities live below the poverty line, compared to 52% of people without disabilities.\(^{50}\) Due to the effective criminalisation of poverty in Kenya,\(^{51}\) this also disproportionately exacerbates contact between persons with disabilities and the criminal justice system.

Evidence provided by the Kenya National Commission on Human Rights shows that many persons with disabilities do not know their rights or the legislation to protect and promote their well-being, including the right to access social services such as education, health care and support with job training and employment.\(^{52}\) Even those who know their rights are often unable to exert their constitutional rights to access justice and due process because of financial constraints, the complexity of the criminal justice system, lack of legal counsel, court backlogs, or flawed rule of law.\(^{53}\)

“There are people (people with intellectual and psychosocial disabilities) should be taken to ‘children’s homes’ and provided with sheltered workshop so that the families can concentrate on economic empowerment and raising other children.”

(Focus Group Discussion 4, Kenya, 26 February 2021)

\(^{48}\) Focus group discussion contributions by families (Kenya, 26 February 2021).
\(^{49}\) K Kabare “Social Protection and Disability in Kenya” (October 2018).
\(^{50}\) K Kabare “Social Protection and Disability in Kenya” (October 2018) 5.
\(^{51}\) C Odote “Kenya: We Must Stop Criminalising Poverty” Business Daily, 22 July 2018.
\(^{52}\) K Kabare “Social Protection and Disability in Kenya” (October 2018) 10.
\(^{53}\) Afrobarometer “Most Kenyans seek – and find – justice outside formal court system” (16 Apr 2021) 2.
“I was told by an officer from the National Council for People with Disabilities to join group therapy as soon as my mother got a disability card. I have witnessed intellectual disability from my sister and psychosocial disability from my mother. My mother delivered in 2009 and developed postnatal trauma, which progressed into hallucinations for a period of 3 years. We have relocated from one house to another, and people used to ask me what’s wrong with my mother. By then, I was in high school and did not understand until I reached the college level when I eventually read and took my mother to the clinic in 2018. Her prescription was a moderate injection every three months. Later, the diagnosis changed to bipolar, and currently, no one notices my mother’s mental illness.”

(Focus Group Discussion 5, Kenya, 26 February 2021)

Stigmatising terminology continues to fuel discrimination against persons with disabilities. Kimani Ngogu explains how the media often perpetuates stigma since its images and language are entrenched in the medical model of disabilities. In Kiswahili, persons with intellectual or psychosocial disabilities are sometimes called “Mwenda wazimu” or mad persons.

“Most people with intellectual and psychosocial disabilities are always at the police station. Police officers, after noticing they are labelled as ‘mike papa’ to mean ‘mental patient’ and us (police officers) cannot arrest them.”

(Focus Group Discussion 4, Kenya, 26 February 2021)

Disability in Kenya has for a long time been seen as physical impairment or challenge that had to be hidden from society or pitied. Due to the biases on disability in Kenya, its laws have the effect of punishing, segregating, controlling and undermining persons with disabilities.

The development of knowledge and acceptance of disability in Kenya can be traced in a timeline trajectory from 1980 as follows:

- 1980: The government declares the National Year for People with Disabilities to promote awareness.
- 1984: Educational Assessments and Resource Services are introduced by the Ministry of Education to improve educational service for special education students.
- 1993: The Attorney General appoints a task force to review laws related to persons with disabilities and collect public views.

2003: National disability law is passed, the Persons with Disabilities Act, establishing a National Council for Persons with Disabilities whose mandate is to implement the Act.


2008: The CRPD is ratified by Kenya.

2008: Kenya National Survey for Persons with Disabilities estimates that 4.6% of Kenyans experience some form of disability.


The disability framework in Kenya is very well documented but unimplemented. This has been argued to be due to lack of skills, lack of goodwill, lack of funding, and set cultural biases. Whatever the reasons provided, the failure to implement the disability framework sets up persons with intellectual and psychosocial disabilities for incarceration.

**DISABILITY AND THE CRIMINAL JUSTICE SYSTEM**

The lack of understanding of disability and the purpose of the criminal justice system at times results in punitive responses shown by communities and the police towards persons with disabilities. Some authors suggest that underlying this is the failure to differentiate between challenging behaviour and offending behaviour, resulting in restrictive and aggressive responses where no offending behaviour took place.\(^{56}\)

In some cases, caregivers resort to producing a disability card from the National Council for People with Disabilities or a letter from government ministries like education and health to secure the release of an arrested person with an intellectual or psychosocial disability.\(^{57}\)

*“When my son was 25 years (son currently 39 years), he was arrested by two Nairobi City Council ‘Askaris’ for urinating beside a road. I (the mother) tried to explain that my son had an intellectual disability and takes medicine that makes him urinate often. However, Nairobi City Council ‘Askaris’ insisted that my son was a drunkard and handcuffed him. By good luck, I had a photocopy of the doctor’s prescription, which I presented to the Nairobi City Council ‘Askaris’. They were not convinced even though they released my son.”*

(Interview with a family, Kenya, 20 February 2021)

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\(^{57}\) Interview with a family (Kenya, 20 February 2021).
At times, the law itself fails to distinguish between challenging and offending behaviour. For example, section 16 of the Mental Health Act (Cap 248) gives significant discretionary power to the police to take a person with an intellectual or psychosocial disability into custody.

“(1) Any police officer of or above the rank of inspector, officer in charge of a police station, administrative officer, chief or assistant chief may take or cause to be taken into his custody—

(a) any person whom he believes to be suffering from mental disorder and who is found within the limits of his jurisdiction; and
(b) any person within the limits of his jurisdiction whom he believes is dangerous to himself or to others, or who, because of the mental disorder acts or is likely to act in a manner offensive to public decency; and
(c) any person whom he believes to be suffering from mental disorder and is not under proper care and control, or is being cruelly treated or neglected by any relative or other person having charge of him.”

At every stage of the criminal justice process, injustices occur when persons with intellectual and psychosocial disabilities are disadvantaged due to their disability.

DURING ARREST

Police respond in various ways to complaints about persons with intellectual and psychosocial disabilities, but this depends on the training received by police officers attending to matters involving persons with intellectual or psychosocial disabilities.

“Even though they (persons with intellectual and psychosocial disabilities) may sometimes become a nuisance, we (police officers) do not arrest them because the society knows the individual has an intellectual or psychosocial disability. Hence the society needs to work with the police officers in sensitisation.”

(Focus Group Discussion 1, Kenya, 26 February 2021)

“Normally, we (police officers) do not arrest people with intellectual or psychosocial disabilities for committing petty offences. However, some people with intellectual and psychosocial disabilities are still arrested and charged in court for a petty offence. This is because it is not written on an accused person’s face that they have an intellectual or psychosocial disability in one way or another, so a police officer does not know they have a disability. It is a matter of observation. There is no particular topic during police training on invisible disability, and I hope it will be incorporated into the police training curriculum in the future. In such an instance, the investigating officer shall withdraw the case.”

(Focus Group Discussion 2, Kenya, 26 February 2021)
At times, police officers conduct sweeping exercises at night, ostensibly for crime prevention purposes. These operations by police officers provide an opportunity to extort money from the public. For example, no law states that walking without an identity card is an offence, but this does not deter arrests. In case of an arrest, the charge sheet is later changed to a legally recognised petty crime such as idling, loitering, drunk and disorderly conduct, possession of drugs, or nuisance.

The interaction between persons with intellectual and psychosocial disabilities and the police can easily be misinterpreted depending on the person’s disability: Persons with intellectual or psychosocial disabilities might be prone to providing unreliable or self-incriminating information or might be suggestible or make false confessions. Persons on the autism spectrum might become distressed when interacting with the police. Studies further suggest that the usual criminal justice system safeguards such as cautioning a suspect about their rights, letting them read a notice about their rights, or signing a statement, might be particularly limiting for persons with intellectual and psychosocial disabilities. Where some reasonable accommodation protections are in place, they might not be utilised if police do not screen suspects to identify a person with an intellectual or psychosocial disability in need of support. This has further implications since the prosecutor’s decision to prosecute is informed by the information obtained by the police.

Such interactions are worsened in the absence of appropriate training and support for communication. In most cases, the community and actors in the justice system exclusively employ a question-and-answer form of communication. However, verbal communication in the form of questions and answers may not be the most suitable method of communication for some persons with intellectual and psychosocial disabilities. It is the collective role of all the stakeholders, the families, and the community to be aware of how to effectively communicate with persons with intellectual and psychosocial disabilities in case of an arrest.

Most respondents indicated that data on disability is not captured in writing at the police station, and this makes it difficult to make the necessary adjustments to ensure equal access to justice for accused persons with intellectual and psychosocial disabilities. Once a case is brought to court, the court filing system only captures the accused person’s name, the date, the case number, and the nature of the charge, leaving out the disability unless documentary evidence is submitted. Thereafter, the decision to charge, which is the heart of prosecution, and the guidelines give

59 Id. 152.
60 Id.
61 Interview with a family (Kenya, 26 February 2021).
62 Focus Group Discussion contribution by police officer (Kenya, 26 February 2021).
63 Focus Group Discussion (Kenya, 26 February 2021).
prosecutors discretionary powers to decide whether to charge or not to charge persons with intellectual and psychosocial disabilities.

IN COURT

The lack of supports further disadvantages persons with disabilities during court proceedings. Persons with intellectual or psychosocial disabilities may fail to understand the seriousness of their situation or be unable to post bail. 64

Since petty cases do not attract a jail term of more than six months and include charges such as idling, loitering, drunk and disorderly conduct, possession of drugs, nuisance, or other petty offences, accused are sometimes charged en masse and most accused plead guilty. 65 This is a disadvantage to accused people with intellectual or psychosocial disabilities because they may express a response that is misunderstood by the court in instances where they are expected to answer a question with either “Yes” or “No”. 66

“N was born in 1976. He delayed going to the toilet by himself and talking. He started going to school when he was six years. His teacher noticed he had a disability in nursery school and recommended an assessment. After the assessment, he went to a special school for at least 14 years. He exited the education system without meaningful education and certificates even though N liked books and went to school with a uniform. Currently, N is living with me (the mother), and he is unemployed.

One day N and his brothers went to visit their grandmother. Instead of N going back home, he passed by a school that was on his way home. The guards of that school arrested him, beat him up and took him to the police station.

By that time, N had non-verbal communication. My family did not know that N had been arrested and accused of stealing books from that school. His brothers came back from the grandmother’s home and did not know the whereabouts of N, and we looked for him the whole night. After four days, another visiting parent came to visit us after hearing about our lost son whom we had started mourning because we had searched in all the areas, we thought N could be found, i.e., police, hospital, and morgue.

The visiting parent suggested we check the juvenile court. We found N in juvenile prison, serving a jail term. After seeking more information, we were informed that N accepted before the juvenile court that he had trespassed into the school with the intention to steal books.

65 Focus Group Discussion contribution by an advocate (Kenya, 26 February 2021).
66 Focus Group Discussion contribution by a family (Kenya, 26 February 2021).
N could not be immediately released as he had already been jailed, and the case concluded. We went to N’s special school, and the head teacher at the special school wrote a letter to notify the court that N was a pupil with special needs. The court relied on the school letter to release N and concluded the case within two weeks.”

The case identifies a significant gap in the justice system, which is the ability of the court to break down the contents of the charge sheet into plain and straightforward language so that an accused person with an intellectual or psychosocial disability can understand it and then subsequently plead guilty or not guilty. For instance, in the above case, the accused person (N) responded with “yes” to any question asked. In a case where the witness answers “yes” to every question posed to them, the problem may be that the person posing the questions is not using the correct communication mode, and it calls for the use of an intermediary.

“There are people (people with intellectual and psychosocial disabilities) who are imprisoned, and they are ‘not normal’. And they are not able to answer questions. They just say, yes, yes when they get to the judge. Even I was the same. When I got to the judge, I kept saying yes. Everything was yes. I was just accepting. You see, and it is not on purpose. Your head already exploded.”

(Focus Group Discussion 6, Kenya, 26 February 2021)

“Currently, we have introduced Augmentative and Alternative Communication (AAC) in the special School in Nakuru. Such ways of communication should be adopted by the actors in the justice system and the community.”

(Focus Group Discussion 3, Kenya, 26 February 2021)

People with intellectual and psychosocial disabilities who have difficulty communicating may need Augmentative and Alternative Communication (AAC) to support their communication. Some people may use AAC all the time. Others may say some words but use AAC for longer sentences. AAC can be an alternative way of communication in the justice system, school, at work and when communicating with friends and family. AAC can take various forms, for example, picture exchange communication systems (PECS), Makaton signing or speech-generating devices (SGDs). Section 126(1) of the Evidence Act (cap 80) makes provision for a witness who is unable to communicate verbally, to give evidence “in any other manner in which he can make it intelligible, as, for example, by writing or by signs; but such writing must be written, and the signs made, in open court.”

Persons with intellectual and psychosocial disabilities are further disadvantaged at the sentencing stage. For example, a judge might misinterpret the behaviour of a person on the autism spectrum to show a lack of empathy, for example, if they smile, sleep, fail to sit still or act agitated during court proceedings.\textsuperscript{68}

**IN CUSTODY**

Persons with intellectual disability and/or psychosocial disabilities are often in contact or in conflict with the law due to the nature of their disability. In most cases, person with disabilities will be picked by the police and:

- Sent to the nearest psychiatric facility as a patient even when they do not need medical attention;
- Taken directly to Mathari Teaching and Referral hospital for an evaluation where there is a criminal report; or
- End up as prisoners without trial where one is found unfit to stand trial.

In most cases, their arrival into the criminal justice system did not follow due process, they never had a case or had an offence to answer to and were never presented in court and yet they have prison numbers. Article 48 of the Constitution of Kenya guarantees everyone the right to a fair trial yet persons with disabilities are being held in prison without due process. The issue of due process is crucial as this leads to protection under Robben Island Guidelines or the Health Act. Persons with intellectual and/or psychosocial disabilities are not afforded due process because they are not patients, prisoners, accused, or suspects, thus they cannot get access to courts, legal representation or the protection afforded to inmates by the criminal justice system and health system. They remain “incarcerated” without due process indefinitely which means they are in the same category as Presidential pleasure inmates but have no access to that liberty if it was availed.

Examples of persons with intellectual and/or psychosocial disabilities detained irregularly at Mathari hospital at the time of the study, is illustrative of individuals who were arrested but never brought before court:

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<table>
<thead>
<tr>
<th>Person</th>
<th>Length of custody period (as at 1 August 2021)</th>
<th>Reason for police arrest</th>
</tr>
</thead>
<tbody>
<tr>
<td>PK</td>
<td>1928 days</td>
<td>Trespass</td>
</tr>
<tr>
<td>EK</td>
<td>2134 days</td>
<td>Stealing chicken</td>
</tr>
<tr>
<td>DR</td>
<td>983 days</td>
<td>Attempted suicide</td>
</tr>
<tr>
<td>NM</td>
<td>4185 days</td>
<td>Trespass</td>
</tr>
<tr>
<td>AM</td>
<td>2265 days</td>
<td>Defilement (undressed at the marketplace)</td>
</tr>
<tr>
<td>CO</td>
<td>5064 days</td>
<td>Disturbance</td>
</tr>
<tr>
<td>HW</td>
<td>1031 days</td>
<td>Defilement (undressed)</td>
</tr>
<tr>
<td>WK</td>
<td>3653 days</td>
<td>Usage of Cannabis Sativa</td>
</tr>
</tbody>
</table>

Even short periods of detention can undermine a person’s psychological and physical well-being and compromise cognitive development. Once a person with an intellectual or psychosocial disability is separated from their family and placed in an institution, they are subjected to an array of dangers that can be irreversible, including psychological damage caused by neglect and a lack of social stimulation.

Institutionalisation further deprives individuals of essential freedom, segregates them from their communities, suppresses their choice and personal expression, and fosters a perception that the person with an intellectual or psychosocial disability is different and unable to take their place in society. Persons with intellectual and psychosocial disabilities in institutions also face exploitation. They are at a heightened risk of violence, abuse, and acts of torture or cruel, inhuman, or degrading treatment or punishment.

On the contrary, Article 19 of the CRPD provides a clear guideline for deinstitutionalization. The Article highlights the role of the State Parties to recognise the equal right of all persons with disabilities to live in the community by first being able to choose their place of residence, with whom they live and not being obliged to live in a particular living arrangement. Secondly, they must have access to a range of in-home, residential, and other community support services, including the personal assistance necessary to support living and inclusion in the community and to prevent isolation or segregation from the community. Third, community services and facilities for the general population must be available on an equal basis to persons with disabilities and be responsive to their needs.

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69 J E Méndez, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (5 March 2015) at para. 16.
70 Id. at para. 53.
CHAPTER 3

PETTY OFFENCES AND THE KENYAN CRIMINAL JUSTICE SYSTEM

THE HISTORY OF PETTY OFFENCES & MENTAL HEALTH LAWS IN KENYA

Like most former British colonies, once Kenya gained independence, the new State retained English laws. The laws on petty offences in Kenya trace their origin to colonisation and English law, specifically England’s Vagrancy Act of 1824. However, the impact of rigid criminality, as opposed to Britain’s flexible common law approach, was faced disproportionately by the native African population.

The Penal Code was not the only source of codified criminal law introduced by Britain. Legal scholar Simon Coldham discussed the wide range of criminal liability imposed by the British in its colonies outside of the various Penal Codes:

“A wide variety of legislation was introduced to deal with specific issues, and it was the strict enforcement of these laws that most affected Africans in their everyday lives and represented for them the harshest aspect of colonial rule. In some countries the criminal law was used to promote government policies relating to land and labour, like the Master and Servant, Resident Labourers, Trespass, and Employment of Natives Ordinances of Kenya. Moreover, some legislation, like that relating to intoxicating liquors, firearms, and the protection of natural resources (forests, game etc.), frequently operated to criminalize traditional practices.”

For example, the Nairobi Municipality (Amendment) By-law 212 of 1944 prohibited a “native” from remaining in the municipality for more than thirty-six hours without employment or a permit. The by-law was declared unreasonable and unlawful by the Kenya Supreme Court in 1945 on the basis that it placed an undue burden on the accused person and had the effect of being unequal “between different classes of natives”. The Supreme Court in that instance did not, however, question the premise of the by-law itself, and commented that it was “no doubt, an honest attempt to fill the

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gap between unemployment on the one hand and vagrancy and destitution on the other."

Similarly, the manner in which youth are treated within the criminal justice system can be traced back to the colonial era, when youth who resisted colonialism were labeled as “problematic and law breakers” who were frequently arrested for petty offences and detained as an effort at “containment”. Arrest and detention for petty offences continues to be used against children who live and work on the streets in Kenya.77

Mental health laws also played an important role in the colonial system and were frequently used to detain persons who rebelled against colonialism,78 and persons who failed to comply with the colonial mindset.79 The discriminatory nature of mental health laws in Africa were supported by the abominable academic discourse of ethnopsychiatry. As early as 1937, it was recognised that persons might be subjected to serious charges without taking into account their intellectual and psychosocial disabilities, and affording them appropriate legal counsel.80

Considering a similar colonial era mental health law, the Zambia High Court noted that “the extensive use of terminology such as detention and control in the Act infers a punitive intent, and is based on an archaic understanding of persons with mental disabilities as threatening objects and not persons equal in human dignity.”81

Legislation enacted over the years has sought to thin colonial laws, but the most persistently used offences remain on the books.82 For instance, in Mbuti v Attorney General, the Kenya High Court concluded that the State blatantly disregarded the dignity and rights to due process, equality before the law, and freedom from cruel and degrading treatment by subjecting the accused to the Peace Bond provisions that have their roots in Eleventh Century British criminal procedure.83

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80 Circular to Magistrates, No. 2 of 1937 “Criminal Lunatics” Registrar, Supreme Court of Kenya.
THE ENFORCEMENT OF PETTY OFFENCES IN KENYA

A 2016 Kenyan criminal justice system audit found that the criminal justice system was skewed against the poor. The audit found that more poor people than rich people were arrested, charged, and sent to prison. The audit further found that economic driven and social disturbance offences such as those relating to lack of business licenses, being drunk and disorderly and creating disturbances comprise 70% of cases processed through the justice system. This is also reflected in the assistance a person is likely to get from the police – 64% of persons with high lived poverty whom Afrobarometer surveyed, indicated that it is challenging to obtain assistance from the police, compared to 38% of persons who experienced no lived poverty.

In the Penal Code, petty offences are known as misdemeanours, which means a lesser offence punishable by a fine or a jail term of up to two years as per section 36 of the Penal Code. All petty offences are heard and determined by Magistrates’ Courts. Typical petty offences include loitering, touting, hawking, and vending, begging, littering, being idle, being drunk and disorderly, causing a disturbance or public nuisance, spitting on a footpath, urinating, or defecating in public, use of abusive or threatening language in public, fighting or acting in a disorderly manner in public, using the public toilet without paying and simple assault. The people who are likely to be arrested and charged with petty offences include street vendors, persons who beg, persons who experience homelessness, sex workers and persons with intellectual and psychosocial disabilities. Thus, the enforcement of these offences punishes, segregates, controls, and undermines people’s dignity based on their status. These laws allow the arrest of the poor without a warrant, an investigation, or evidence of an intent to commit, or actual commission of an offence.

The offences are often vague and allow for arbitrary arrests as they give law enforcement officials broad discretion in enforcement.

Unnecessary arrests contribute to overcrowding in places of detention in violation of a person’s right to liberty and security and freedom from arbitrary arrest and detention. Section 49 of the Constitution of Kenya, 2010, outlines the rights of arrested persons. Section 49(2) further 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.” Many petty offences fall under this classification, yet people are

86 Which are subordinate courts as per Article 169 of the Constitution of Kenya 2010 and section 5 of the Magistrate Act 2015.
87 S Nyakio “Petty Offences are Biased against the Poor” www.pettyoffences.org (2019).
routines arrested and placed in detention, a disproportionate response to the supposed criminal behaviour. The ideal of proportionality is discussed in a case study by ICJ-Kenya:

“\textit{In seeking to impose what is a just and fair punishment for criminal offences, the mantra ‘the punishment must fit the crime’ must be taken into consideration. David Cameroon, in his speech on Prison Reforms, asserted that ‘the truth is that simply warehousing ever more prisoners is not financially sustainable, nor is it necessarily the most cost-effective way of cutting crime.’ The continued imprisonment of petty offenders is a mockery to the rule of law and the virtues of justice. It is indistinct that social problems are not solved by incarceration of petty offenders. A rational alternative should therefore be adopted alternate to imprisonment to prevent oppression and violation, hence the notion of justice.}”\textsuperscript{89}

In Kenya, the percentage of pre-trial detainees in the prison population hovers around 40 per cent. Even for petty offenders, their time spent in pre-trial detention can be extraordinarily long. Munting and Peterson looked at the length of pre-trial detention for petty offenders in Nairobi Central Remand and Thika Remand Prison, finding that detainees charged with misdemeanours can stay in prison for as long as 344 days, making the pre-trial detention longer than a judge-mandated sentence for the same charge. They also found the number of pre-trial detainees in these prisons to be inordinately high:

\textit{“[a]t Thika Remand Prison these admissions for petty offences constituted 38 per cent of admissions, and at Nairobi Central Remand, 7 per cent (the latter prison holds a wider range of offences and also more serious cases, such as murder).”}\textsuperscript{90}

Additionally, in 2013, the chairperson of the Community Service Orders programme sent a report to the Chief Justice showing that prisons were congested by over 94 per cent. However, of the 33,194 inmates then in prison, 12,704 of them are first-time light offenders who qualify for release under the Community Service Orders programme.\textsuperscript{91}

This raises the question of whether criminalising such conduct is appropriate or if, in fact, these laws overburden an already strained criminal justice system. Where a law fails to attain the object and purpose for which it was created and subsequently causes repression, then the question of its legality and legitimacy is inevitable. There is a need

\textsuperscript{90} \textit{Id} 52-3.
to build a more effective and efficient criminal justice system in Kenya, which goes beyond strengthening institutions and includes reforming the existing Penal Code.92

Persons with intellectual and psychosocial disabilities are often at increased risk of arrest and detention under petty offences due to the biases in law enforcement practices. For example, delayed speech is regularly interpreted to mean being drunk and disorderly. Behaviours such as taking clothes off due to tactile sensitivity may be interpreted as indecent exposure.

PENAL CODE OF 1930, CAP 63

Various offences in the 1930 Penal Code are the remnants of colonial criminal law in Kenya and have survived multiple legislative amendments over the years. These offences and their enforcement require further scrutiny.

Section 95 – Threatening breach of the peace or violence93

“(1) Any person who –
(a) uses obscene, abusive or insulting language, to his employer or to any person placed in authority over him by his employer, in such a manner as is likely to cause a breach of the peace; or
(b) brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace, is guilty of a misdemeanour and is liable to imprisonment for six months.

(2) Any person who –
(a) with intent to intimidate or annoy any person, threatens to break or injure a dwelling-house; or
(b) with intent to alarm any person in a dwelling-house, discharges a loaded firearm or commits any other breach of the peace, is guilty of a misdemeanour and is liable to imprisonment for three years, or, if the offence is committed in the night, to imprisonment for four years.”

The courts in other commonwealth jurisdictions have narrowly interpreted a breach of peace to mean that a suspect should only be charged in cases causing alarm or amounting to a threat of serious disturbance: Scottish courts have defined breach of peace as “conduct severe enough to cause alarm to ordinary persons and threaten serious disturbance to the community.”94 In the English case of R v Howell95 the Court of Appeal held that “there is a breach of peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of

being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance. Agitated or excited behaviour, not involving any injury or threat of injury, or any verbal threat, is not capable of amounting to a breach of peace.”

In the Malawian High Court case of Republic v Pitasoni, Justice Kapanda held that the sentence to be imposed was one of a fine or a maximum imprisonment of three months. He emphasised that the court should not rush into imposing imprisonment and should seriously consider all the other sentencing options available.

Case law on section 95 suggests that the threshold for finding criminality under this law can ensnare people who might not be doing anything per se illegal. In Jacob Nthiga Ngari v Republic, the Court held that the language of the statute required that behaviour creating a “… disturbance should have been likely to cause a breach of peace” and “[p]eace would, for instance, refer to the right of [anyone] to go about their daily activities without interference.” However, the judge did not go on to explain the level of interference constituting disturbance, furthering police discretion in interpreting conduct between citizens. In an earlier case, the High Court sought to limit the ambit of the offence to incidents likely to lead to physical violence, and that merely showing that an accused created a disturbance was insufficient. This definition of disturbance, involving an element of violence, was affirmed by the High Court in Fransisca Kiborus v Republic.

The same offence exists in Nigeria, Botswana, Zambia, Tanzania and Uganda.

**Section 131 – Disobedience of lawful orders**

“Everyone who disobeys any order, warrant or command duly made, issued or given by any court, officer or any person acting in any public capacity and duly authorized in that behalf, is guilty of a misdemeanour and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of the disobedience, to imprisonment for two years.”

The wording of the Kenya offence is the same as found in Botswana, Tanzania, Zambia, Uganda, Seychelles and Fiji.

At the trial, the focus of the attorney would be to show reasonable doubt about one of the elements of the offence, including whether: the accused acted willfully; the

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96 Jarrett v Chief Constable of West Midlands Police [2003] All ER (D). English courts have further held that there had to be an incident of violence for an arrest to be justified on the basis that actual breach of peace had taken place. J Richardson (ed) Archbold: Criminal Pleading, Evidence and Practice (2010), 2739-40.


98 Jacob Nthiga Ngari v Republic Criminal Appeal No. 48 of 2014.


100 Fransisca Kiborus v Republic Criminal Appeal No. 17 of 2017 [2017] eKLR.
accused failed or refused to comply with an order or direction of a police officer; the order was lawful at the time it was issued; and the police officer was vested by law with the authority to make such an order.

The primary concern with section 131 is its broad framing:

- It relates to “any order, warrant or command duly made” but does not define what “duly” means.
- It makes it an offence to disobey the order of any person “acting in any public capacity” even if the person who is alleged to have disobeyed the order was not aware of the public capacity of the person or his/her duty to obey that person’s orders.
- The penalty is for 2 years’ imprisonment.
- It amounts to a person being found guilty of conduct which might not have been an offence at the time.

Article 50(2)(n)(i) of the Kenya Constitution provides for the right “not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya.”

In the Supreme Court of Nigeria case of Chief Olabode George and Others v Federal Republic of Nigeria, the Court considered the offence of “Disobedience to lawful order issued by Constituted Authority” in section 203 of the Criminal Code of Nigeria:

> “Any person who without lawful excuse, the proof of which lies on him, disobeys any lawful order issued by any person authorized by any Order, Act, Law, or Statute to make the order, is guilty of a misdemeanour, unless some mode of proceedings against him for such disobedience is expressly provided by an Order, Act, Law, or Statute and is intended to be exclusive of all other punishment.”

The Court held that the section of the Criminal Code is at variance with provision of section 36(12) of the Constitution which provides:

> “(12) Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.”

Section 175 – Common nuisance\textsuperscript{102}

“(1) Any person who does an act not authorized by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the misdemeanour termed a common nuisance and is liable to imprisonment for one year.

(2) It is immaterial that the act or omission complained of is convenient to a larger number of the public than it inconveniences, but the fact that it facilitates the lawful exercise of their rights by a part of the public may show that it is not a nuisance to any of the public.”

This offence originates from the English common law offence of public nuisance. Under common law, a person who a) performs an act not warranted by law, or b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise or enjoyment of their rights, is guilty of a public or common nuisance.\textsuperscript{103} Under common law, an individual act causing nuisance to another may be liable for performing a private nuisance for which civil action is appropriate, but it does not amount to a criminal public nuisance.\textsuperscript{104} Interference with the public’s rights must be substantial and unreasonable.\textsuperscript{105}

Section 175 specifically states that it is immaterial that the act or omission complained of is “convenient” to a larger proportion of the public than to whom it is “inconvenient”, and further provides that if the act or omission facilitates the lawful exercise of their rights by a part of the public, a defendant may show that it is not a nuisance to any of the public.\textsuperscript{106}

Section 175 is clearly aimed at nuisances affecting the public at large. English jurist Lord Denning held that a “public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large”.\textsuperscript{107} Similarly, English jurist Charles Romer has noted that “it is not necessary in my judgment to prove that every member of the class has been injuriously affected; it is sufficient to show that a

\textsuperscript{102} SALC & CHREAA, No Justice for the Poor: A Preliminary Study of Enforcement of Nuisance-Related Offences in Blantyre, Malawi (2013) 30.

\textsuperscript{103} J Richardson (ed) Archbold: Criminal Pleading, Evidence and Practice (2010) 2864.


\textsuperscript{105} J C Smith & B Hogan Smith and Hogan Criminal law 9 ed (1999) 755.


\textsuperscript{107} Attorney General v PYA Quarries Ltd [1957] 2 QB 169.
representative cross-section of the class has been so affected for an injunction to issue.\textsuperscript{108}

For this offence to satisfy international human rights standards, observers contend that it should be invoked only in rare circumstances, such as when no other applicable statutory offence exists, where commission of the offence would have a sufficiently serious effect on the public, and/or where the defendant knew or should have known of the risk that his actions would result in a nuisance.\textsuperscript{109}

The same offence exists in many other countries including: Nigeria, Uganda, Tanzania, Zambia and Zimbabwe.

Section 182 – Idle and disorderly persons

\textit{“The following persons – (a) every common prostitute behaving in a disorderly or indecent manner in any public; (b) every person causing, procuring or encouraging any person to beg or gather alms, (d) every person who publicly conducts himself in a manner likely to cause a breach of the peace; … (e) every person who without lawful excuse publicly does any indecent act; (f) every person who in any public place solicits for immoral purposes; … shall be deemed idle and disorderly persons, and are guilty of a misdemeanour and are liable for the first offence to imprisonment for one month or to a fine not exceeding one hundred shillings, or to both and for every subsequent offence to imprisonment for one year.”}

The offence of being an idle and disorderly person is divided into sub-categories listing various acts bringing a person within the ambit of the statute. The threshold for finding criminality can be precarious, as demonstrated in \textit{Feisal v Kandie}.\textsuperscript{110} Nineteen people were arrested \textit{en masse} and held in a police vehicle for three hours, without being told of the reason for their detainment. They were then taken to Ongata Rongai police station, where an advocate speaking on their behalf was also detained for creating a disturbance. The nineteen individuals were not told of the reason for their arrest until they were charge with being idle and disorderly. The Court commented on the arbitrary nature of their arrests, as the section of the Penal Code allows for any ambiguous behaviour to be deemed criminal:

\textit{“From the perspective of the [State] we are not told what disorderly conduct any of the nineteen petitioners was involved in contravention of}
section 182 to warrant arrest and detention. The occurrence book extract relied upon by the [police] to justify their action remains vague and ambiguous as to which specific provision of the idle and disorderly offence was breached by the petitioners. What barometer did the police officers who arrested the [nineteen individuals] have to determine and read the difference between an idle thought from that of criminal thoughts[?] The question for me is whether the [State] acquitted themselves to prove to this court that the conduct of the [nineteen individuals] was incompatible with what is viewed by reasonable members of society to be good behaviour. The fact that they were found moving or, standing, or seated, in or in an open area, near a road, or premises within Ongata Rongai Township is no answer to the action taken by the arresting officers.”

Whilst case law provides some guide on the interpretation of the term “indecent act” it is important to recognise that contemporary Kenyan society does not have a uniform view on what constitutes an “indecent act”. The term “indecent act” is not defined in the Penal Code, and this creates the risk that the offence is applied arbitrarily and in instances where the indecent behaviour has not caused distress to any person. The term “indecent act” is vague and does not provide sufficient information for a person to know what behaviour would be unlawful. The offence does not differentiate between acts done with a sexual motivation, sexual acts in public and nudity.

NAIROBI CITY MUNICIPAL BY-LAWS

General nuisance

“General Nuisance: [m]aking any kind of noise on the streets; ... [s]pitting on any foot path or blowing the nose aimlessly other than into any suitable clothe or tissue; ... [c]ommitting any act contrary to public decency; ... [d]efecating or urinating on a street or any other space; ... [t]outing for passengers ...”

Since the 2010 Constitution, the Kenyan government has been in a state of devolution, with some functions previously held solely by the national government being passed to the newly created 47 lower-level county governments. Beginning in 2013, these county governments have enacted legislation specific to their municipalities. However, each have drafted and passed an act to regulate the production, sale, distribution and consumption of alcoholic beverages. The Kakamega County Alcoholic Drinks Control Act, 2014 is nearly identical to other acts in the country, with section 37 criminalising drunken behaviour in public, specifically “in or near a street, road, licensed premises, shop, hotel or other public place[s]”. This section maintains the ambiguity used in other

petty offences that allows for complete police discretion in determining what behaviour falls under the auspices of the offence.

In counties that have created an Inspectorate similar to Nairobi, legislation has been passed that gives these pseudo-police groups “the power to arrest without a warrant a person breaching any county law, or obstructs an Inspectorate officer in the performance of their duties, or whom the Inspectorate officer suspects on reasonable grounds of having committed or is about the commit a breach of a county law.” People are therefore at risk of warrant-free arrests for crimes they may not know they have been committing.

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113 Kenya Law Reform Commission “The status of publishing County Governments’ legislation in the Kenya Gazette”: Several counties have been found to have not published their legislation in the Kenya Gazette, meaning there are very few opportunities for citizens to learn of any new obligations.
CHAPTER 4

INTERNATIONAL LEGAL FRAMEWORK

International law on human rights is governed broadly by seminal documents like the Universal Declaration of Human Rights (UDHR) and other treaties.\(^{114}\) By automatic action of Article 2(6) of the Constitution of Kenya, 2010, treaties ratified by Kenya become law.\(^{115}\) In this regard, Kenya has ratified the following treaties that are important to this research:

- International Covenant on Civil and Political Rights (ICCPR);\(^{116}\)
- International Covenant on Economic, Social and Cultural Rights (ICESCR);\(^{117}\)
- Convention Against Torture (CAT);\(^{118}\)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);\(^{119}\)
- Convention on the Rights of the Child (CRC);\(^{120}\)
- Convention on the Rights of Persons with Disabilities (CPRD).\(^{121}\)

The inherent humanity, dignity and rights of persons with disabilities has been explicitly reaffirmed in the Convention on the Rights of Persons with Disabilities (CRPD).\(^{122}\) Additionally, UN comments, goals, and guidelines, while not always legally binding, can prove helpful for interpreting international agreements and their legal implications, including:

- The International Principles and Guidelines on Access to Justice for Persons with Disabilities;\(^{123}\)
- The United Nations Sustainable Development Goals;

\(^{114}\) UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
\(^{115}\) Constitution of Kenya, 2010 art 2(6): “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”
\(^{118}\) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
\(^{120}\) Convention on the Rights of the Child (1989).
In its recent periodic review before the Human Rights Committee, the Committee noted that:

“The Committee is concerned about the lack of comprehensive anti-discrimination legislation, in line with article 27 of the Constitution and the provisions of the Covenant, and whether that could impede access to remedies for victims of discrimination. The Committee also notes with concern a lack of information from the State party about the steps taken to address stigma and discriminatory attitudes towards multiple groups and promote sensitivity and respect for diversity among the general public (arts. 2 and 26).”

The Committee recommended that Kenya should:

“(a) Adopt comprehensive legislation prohibiting discrimination, including multiple, direct and indirect discrimination, in all spheres, in both the public and the private sectors, on all the grounds prohibited under the Covenant, including sex, sexual orientation, gender identity, religion,

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124 UN Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014) CRPD/G/GC/1.
disability, albinism, socioeconomic status, HIV/AIDS status, ethnic and political affiliation or other status.
(b) Guarantee effective remedies for victims of discrimination in judicial and administrative proceedings.
(c) Take concrete steps, such as comprehensive awareness-raising campaigns and sensitization activities, to address stigma and discriminatory attitudes and promote sensitivity and respect for diversity among the general public.”

The CEDAW Concluding Observations on Kenya only mention disability in the context of the collection of data and coordination of agencies. This is important as women and girls with disabilities tend to be victims of criminal activities, which puts them in contact with the criminal justice system. The lack of data means women and girls with disabilities end up lost in the system. The Committee recommended that Kenya should:

“15(c) Collect and publish data disaggregated by sex, gender, ethnicity, disability and age in order to inform policy and programmes on women and girls, as well as to assist in the tracking of progress in the achievement of the gender-related targets of the Sustainable Development Goals.”

The Convention on the Rights of Persons with Disabilities

The most authoritative document affirming and recognizing human rights for persons with disabilities is the Convention on the Rights of Persons with Disabilities (CRPD). The CRPD contains definitions, State obligations, human rights principles, and reporting obligations. Broadly, Article 4 of the CRPD states that:

“States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.”

This includes taking legislative and other measures to ensure the implementation of those rights, modifying or abolishing existing laws that discriminate against persons with disabilities and eliminating discrimination by private entities.

What follows is a selection of additional pertinent provisions in the CRPD relevant to this report.

\[128\] The Optional Protocol to the CRPD contains additional procedures for filing and considering complaints made against states who violate their obligations under the CRPD, but at this time Kenya has not signed the Optional Protocol.
The Right to Reasonable Accommodations

The right to reasonable accommodations, defined in the preamble of the CRPD and the International Principles and Guidelines on Access to Justice for Persons with Disabilities, is recognised repeatedly in the CRPD in articles 5, 14, 24, and 27. As stressed in the preamble to the CRPD, failure to provide reasonable accommodations constitutes discrimination. Reasonable accommodations include recognising “diverse communication methods of persons with disabilities standing in court”.

When reasonable accommodations are not provided, persons with disabilities cannot enjoy many of the rights guaranteed to them under international law. Article 4 obliges States to “ensure and promote” the realisation and enjoyment of human rights within their borders and to refrain from discrimination. Since failing to provide reasonable accommodations constitutes discrimination under the CRPD and prevents citizens from fully realising their human rights, States violate their international legal commitments when those accommodations are not provided.

Article 3: General Principles

This Article contains principles that guide the Convention, including recognition of dignity, autonomy, independence, non-discrimination, and equality of opportunity.

Article 5: Freedom from Discrimination

Under this Article, State Parties recognise equality before the law and the principle that each person is entitled to equal benefit of the law and equal protection without discrimination. State Parties must prohibit discrimination based on disability and guarantee access to effective legal protection against discrimination. This includes providing reasonable accommodations when necessary.

Crucially, this Article also states that “specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention,” preventing claims of reverse discrimination.

Article 12: The Right to Legal Capacity

This article reaffirms the right of persons with disabilities to “recognition everywhere as persons before the law”, including the right to legal capacity. General Comment 1 explains Article 12 in detail.

In sum, Article 12 states that persons with disabilities have the right to legal capacity, recognised as persons before the law. They have the right to enjoy this capacity on an equal basis with all persons, and the State is obligated to provide them with the supports needed to enjoy that right fully.

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129 UN Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018) on Equality and Non-Discrimination, CRPD/C/GC/6, para 51.
131 See UN Committee on the Rights of Persons with Disabilities, General Comment 1 (2014) CRPD/G/GC/1, section III.
In its explanation of Article 12, General Comment 1 makes a crucial distinction between mental capacity and legal capacity.

“Legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency)... Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors.”

The Committee also acknowledges that the concept of mental capacity is itself controversial and is not an objective or scientific phenomenon. Regardless, General Comment 1 stresses that differing mental capacities cannot be used as an excuse to take away someone’s legal capacity. Legal capacity is a distinct right to which all people are entitled under the UHDR, ICCPR, and URPD, regardless of differing mental capacities. Furthermore, legal capacity consists of both legal standing to hold rights and the legal agency to act upon those rights. All people are entitled to both legal standing and legal agency.

This is further re-iterated in the International Principles and Guidelines on Access to Justice for Persons with Disabilities, which states as its first principle that “all persons with disabilities have legal capacity and, therefore, no one shall be denied access to justice based on disability.”

General Comment 6 specifically calls on States to “reform existing legislation to prohibit discriminatory denial of legal capacity, premised on status-based, functional and outcome-based models”. Similarly, the International Principles also direct States to ensure that “constructs such as ‘cognitive incapacity’ and ‘mental incapacity’, as determined, for instance, by functional or mental status assessments, are not used to restrict a person’s right to legal capacity,” including repealing or amending laws to that effect. States have the obligation under the CRPD to abolish all denials of legal capacity that are discriminatory “in purpose or effect”.

**Article 13: Access to Justice**

Access to justice is defined as the ability to interact with and participate in the legal system, facilitated through the provision of all accommodations necessary to ensure the full participation of persons with disabilities in the justice system. In many cases, access to justice is impeded because persons with disabilities are denied legal capacity. However, this right is not entirely subsidiary to Article 12. General Comment

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132 Id, section II.
133 Id para. 14.
1 notes that “persons with disabilities have often been excluded from key roles in the justice system as lawyers, judges, witnesses or members of a jury.” Ensuring that persons with disabilities are able to fully participate in the legal system is required under Articles 13 and 19 (Living Independently and Being Included in the Community), as is ensuring that persons with disabilities have access to legal representation. Article 13 also requires State Parties to “promote appropriate training for those working in the field of administration of justice, including police,” to help ensure that full enjoyment of this right is realised.

Kenya was reviewed in 2015 by the UN Committee on the Rights of Persons with Disabilities. Amongst the recommendations in the Concluding Observations on Article 13 of the CRPD was:

“(a) Adopt measures to ensure that all persons with disabilities have access to justice, including by establishing free legal aid for persons with disabilities who claim their rights, and by providing information and communications technology in accessible formats, including the Kenyan sign language;
(b) Define explicitly in legal instruments the duty of the judiciary to provide procedural accommodations for persons with disabilities in accordance with article 13 of the Convention.
(c) Develop a capacity-building strategy within the judicial branch on the rights of persons with disabilities, including lawyers, magistrates, judges, prison staff and the police.”

Article 14: The Right to Liberty
Along with recognition of the right to liberty and security enjoyed by persons with disabilities, Article 14 also obligates States to ensure that persons with disabilities “are not deprived of their liberty unlawfully or arbitrarily and that any deprivation of liberty is in conformity with the law. Additionally, the existence of a disability shall in no case justify a deprivation of liberty.”

The Committee of the Rights of Persons with Disabilities has repeatedly condemned the practice of using intellectual or psychosocial disability as an excuse to deprive persons of their liberty and freedom of movement. Such action violates Articles 14 and 12 of the CRPD. Additionally, the Committee has stressed the importance of remembering that support – while legally required in order to ensure that the rights for

136 Id para. 38.
137 Id.
140 Id art 14.
141 See General Comment 6, General Comment 3.
142 UN Committee on the Rights of Persons with Disabilities, General Comment 1 (2014) CRPD/G/GC/1, para. 40.
persons with disabilities are realised – must not take forms that restrict the decision-making power or liberty of persons with disabilities.\textsuperscript{143}

In terms of the CRPD, there is a distinct link between Articles 12, 13, 14 and 19 that can lead one into the criminal justice system if not responsibly managed. For instance, as noted above, Article 12 of the CRPD recognizes the right to equal recognition before the law and the right to make decisions with supports. Unfortunately, this is curtailed through the notion of fitness to stand trial procedures. If one is found not fit to stand trial, they will be sent to a psychiatric facility, thus being denied liberty based on their disability. Ideally, what would be best is to provide supports for one to proceed through the criminal justice system.

Pertinent to this issue is the case of \textit{Marlon James Noble v Australia}\textsuperscript{144} where the author (an Aboriginal man with psychosocial and intellectual disabilities) requested communication from the Committee on the Rights of Persons with Disabilities on Article 14 of the CRPD. The author contended that he had exhausted all available and effective domestic remedies for what was deemed a petty offence in Australia. In March 2003, the District Court of Western Australia determined that he was unfit to plead to the charges against him to which he was held in detention. In August 2010, the author applied to the District Court to enter a plea of not guilty, but the Court determined that it did not have jurisdiction to deal with that application. In September 2010, the Western Australian Director of Public Prosecutions determined that he would not instigate further prosecution against the author, who can therefore not bring his case before any other court. The Review Board periodically reviewed the author’s case and recommended that the Governor of Western Australia release him unconditionally. It did not do so, despite the evidence that the author has been subjected to a gross injustice. It is on this basis that the Committee communicated the following:

\begin{quote}
\textit{That the State Party:}  
(ii) Ensure that adequate support and accommodation measures are provided to persons with mental and intellectual disabilities to enable them to exercise their legal capacity before the courts whenever necessary.  
(iii) Ensure that appropriate and regular training on the scope of the Convention and its Optional Protocol, including on the exercise of legal capacity by persons with intellectual and mental disabilities, is provided to staff of the Review Board, members of the Law Reform Commission and Parliament, judicial officers and staff involved in facilitating the work of the judiciary.
\end{quote}

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\textsuperscript{143} Id para. 29.  
\textsuperscript{144} Committee on the Rights of Persons with Disabilities, \textit{Views adopted by the Committee under Article 5 of the Optional Protocol, concerning communication No. 7/2012}.
\end{flushright}
When discussing denial of liberty, detention and discrimination based on disability, the CRPD Committee has issued Guidelines on Article 14.145 These guidelines specifically highlight the plight of persons with intellectual and psychosocial disabilities who are regularly denied liberty, legal capacity, right to community-based supports and inclusion based on disability:

“13. Throughout all the reviews of State party reports, the Committee has established that it is contrary to article 14 to allow for the detention of persons with disabilities based on the perceived danger of persons to themselves or to others. The involuntary detention of persons with disabilities based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty and amounts to arbitrary deprivation of liberty.

14. Persons with intellectual or psychosocial impairments are frequently considered dangerous to themselves and others when they do not consent to and/or resist medical or therapeutic treatment. All persons, including those with disabilities, have a duty to do no harm. Legal systems based on the rule of law have criminal and other laws in place to deal with the breach of this obligation. Persons with disabilities are frequently denied equal protection under these laws by being diverted to a separate track of law, including through mental health laws. These laws and procedures commonly have a lower standard when it comes to human rights protection, particularly the right to due process and fair trial, and are incompatible with article 13 in conjunction with article 14 of the Convention.

16. The Committee has established that declarations of unfitness to stand trial or incapacity to be found criminally responsible in criminal justice systems and the detention of persons based on those declarations, are contrary to article 14 of the Convention since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant. The Committee has also called for States parties to remove those declarations from the criminal justice system. The Committee has recommended that “all persons with disabilities who have been accused of crimes and...detained in jails and institutions, without trial, are allowed to defend themselves against criminal charges, and are provided with required support and accommodation to facilitate their effective participation,” as well as procedural accommodations to ensure fair trial and due process.”

Other Governing Documents

The provisions of the CRPD repeatedly refer to conformity with international human rights law and the provisions of other international agreements such as the UDHR, ICCPR, ICESR, CEDAW, and others. In other words, the CRPD in large part simply recognizes that previously established human rights principles also apply to persons with disabilities.

Each international framework, obligation or right must be viewed as interdependent to avoid creating a conflict of laws. Similarly, each mechanism should be viewed as an avenue to seek justice for violations against persons with disabilities where one framework falls short.

For example, the right to life emphasized in Article 10 of the CRPD is enumerated in Article 3 of the UDHR and Article 6 of the ICCPR. Similarly, the right to equality before the law is recognized in both the UDHR and the ICCPR and the CRPD.

The CRPD also hews closely to the ICESR in the economic, social, and cultural rights it recognises and in its language concerning their implementation. In Article 4(2), the CRPD states that “With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources,” language that mimics Article 2 of the ICESR. 146

The Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child make up an essential part of the international human rights legal framework when discussing this issue. The rights enumerated therein apply equally to women and children with disabilities. The unique struggles and discrimination faced by those groups have been noted by the Committee on the Rights of Persons with Disabilities. 147

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146 International Covenant on Economic, Social and Cultural Rights art 2: “Each State Party to the present Covenant undertakes to take steps… to the maximum of its available resources”.
In addition to its international and domestic legal obligations, Kenya is also subject to the duties and obligations of the African human rights system. This regional system's early history of disability rights has been described as one of “underutilised potential”. Though there was a growing international recognition of disability as a critical human rights concern beginning in the 1980s, the shift away from the medical model of disability and toward the human rights model was slow within the African system. Nevertheless, the system has progressively evolved in recent decades to include growing protections for persons with disabilities.

Kenya has been a member of the African Union (AU) and its predecessor, the Organisation of African Unity (OAU) since its independence in 1963. At the regional level, Kenya has ratified the following key human rights Instruments:

- The African Charter on Human and Peoples' Rights (African Charter);
- Protocol Establishing the African Court on Human and Peoples' Rights (ACtHPR);
- The African Charter on the Rights and Welfare of the Child (ACRW);
- The Protocol to the African Charter on the Rights of Women in Africa 2003 (Maputo Protocol);

Article 2, the African Charter’s non-discrimination provision, states:

“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”

Though disability is not one of the enumerated protected grounds, “other status” indicates that it is not a closed list, and so the provision can be read to cover disability-based discrimination, as confirmed by the African Commission on Human and Peoples’ Rights (ACHPR) in Purohit & Another v The Gambia.

Disability protections are also incorporated in Article 18(4) of the African Charter, which states that “[t]he aged and the disabled shall also have the right to special

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149 This is not a Convention thus does not need ratification. However, Kenya has signed onto these guidelines and is regularly monitored by the African Commission
measures of protection in keeping with their physical or moral needs." This Article has been correctly criticised for being vague and unclear and conflating older people’s rights with those of persons with disabilities.\textsuperscript{152} Nonetheless, it is significant in that it recognises persons with disabilities as a group in need of specific protection measures. The African Charter also guarantees equality and equal protection before the law, the right to dignity, liberty and security, and the right to have one’s cause heard.\textsuperscript{153}

The Protocol on the Rights of Persons with Disabilities in Africa (Protocol) was adopted in 2018 to supplement the provisions of the African Charter. Article 5 of the Protocol prohibits discrimination based on disability and guarantees equal protections for persons with disabilities. The Protocol also protects the right of persons with disabilities to equality and equal protection of the law, legal capacity, liberty and the right to access justice.\textsuperscript{154} Article 15 provides that all persons have the right to barrier-free access to the justice system and institutions and facilities around them. The Protocol goes further than the African Charter by creating a positive obligation for States to take measures to modify or abolish laws, policies or practices that constitute discrimination against persons with disabilities or limit their legal capacity, which includes modifying any harmful practice as applied to persons with disabilities.\textsuperscript{155}

Like many other African nations, Kenya has not yet ratified this Protocol. However, the African Court of Human and Peoples’ Rights has acknowledged in the past that some African Union Member States have not ratified all human rights instruments, but notes that under Article 3(h) of the Constitutive Act of the AU, all AU Member States have undertaken to “promote and protect human and peoples’ rights under the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.” By making this commitment, Member States have assumed the obligation to uphold human rights for all persons within their jurisdiction.\textsuperscript{156}

Kenya is a State Party to the Protocol Establishing the African Court on Human and Peoples’ Rights since 2004. However, it has yet to make the declaration under Article 34(6) of the Protocol establishing the African Court. Thus, individuals and NGOs do not have direct access to the Court on human rights cases.

\textsuperscript{153} African Charter arts 3, 5, 6, 7, 19.
\textsuperscript{154} Protocol on the Rights of Persons with Disabilities in Africa, 2018 arts 6, 7, 9, 13 (Protocol).
\textsuperscript{155} \textit{Id} arts 4(c)-(d), 7.

The Luanda Guidelines establish a detailed framework to promote a rights-based approach to decision-making concerning remand orders and safeguards for persons subject to such orders. As with police custody, the Guidelines emphasize that remand detention should only be ordered as an exceptional measure and encourages State Parties to the African Charter to establish and maintain alternatives to remand detention. There is also a focus on the judiciary, guiding the framework for decision-making in terms of judicial orders for remand and review of remand orders. It also sets out procedures in the case of delays in the investigation or judicial proceedings that may result in prolonged remand detention. Lastly, it establishes safeguards for persons subject to remand orders, including that remand detainees should be held in officially recognized places of detention and have access to a lawyer. In totality, the entire process seeks to ensure that the various actors within the criminal justice system observe and uphold the rights of an arrested person as they execute their mandates. The challenge with these provisions is that they are rarely applied for persons with disabilities in contact or conflict with the law.

Article 33 of the Luanda Guidelines contains specific provisions regarding persons with disabilities regarding pre-trial conditions, police custody and pre-trial detention. It focuses on four main areas: general principles, legal capacity, access to justice, accessibility, and reasonable accommodation. They seek to ensure that persons with disabilities legally deprived of their liberty are treated with respect, humanity and in a manner that considers their needs. Persons with disabilities are entitled to and eligible to benefit from all programmes and other services available to other persons, and their disability should not be a reason for deprivation of their liberty, discrimination or unequal treatment by others. However, a study conducted by NGEC, and APCOF found glaring gaps in the implementation of the Luanda Guidelines in Kenya. The key conclusions of the study are that:

“1. Absence or inadequate procedural or substantive guarantees for detainees with disabilities, including denial of reasonable accommodation, amount to violation of the right to access justice.

158 African Policing Civilian Oversight Forum (APCOF) and National Gender and Equality Commission (NGEC), Pre-Trial Detention for Persons with Disabilities in Correctional Institutions (2017).
2. *The law is not a neutral arbiter in ensuring the pre-trial detention rights of persons with disabilities. Inherent biases exist against prisoners with certain types of disabilities who by dint of such disabilities are incarcerated without recourse. This situation is illustrated aptly by the continuing denial of legal capacity for many persons with disabilities.*

3. *There is a willingness within the Kenya Prison Service to do the right thing. The Service therefore should be provided with technical support as well as resources to undertake needed reforms.*

The Lilongwe Declaration, which the African Commission urged all States Parties to consider when formulating policies and domestic legislation,\(^{159}\) states that legal aid should be provided at all stages of the criminal justice process. It notes that special attention should be paid to vulnerable groups, including persons with disabilities.\(^{160}\)

In the Principles on the Decriminalisation of Petty Offences (Principles), the African Commission makes clear their view that enforcement of petty offences reinforces discriminatory attitudes against marginalised persons by mandating a criminal justice response to what are socio-economic issues.\(^{161}\) Principle 6 notes that laws creating petty offences are inconsistent with Articles 2, 3 and 18 of the African Charter because they target or have a disproportionate impact on vulnerable persons. Principles 12 and 13 also find petty offences to be a violation of the right to liberty and security of persons, noting that to comply with Article 6 of the African Charter, petty offence laws must be necessary and proportionate, as well as clear, precise and accessible. Principle 14 urges States to decriminalise certain petty offences that criminalise the status of persons or criminalise conduct in broad, vague and ambiguous terms. It also recommends that States provide alternatives to arrest and detention for minor offences and that these alternatives be promoted in a framework that recognises the need for reasonable accommodations.

**COMPARATIVE JURISPRUDENCE ON PETTY OFFENCES & DISABILITY**

Despite the widespread ratification of regional instruments guaranteeing protections for persons with disabilities and attempting to limit their contact with the criminal justice system, laws criminalising petty offences remain on the books across the region.

Provisions criminalising petty offences have been challenged in African courts on several occasions. Domestic courts and regional bodies have found arrests of individuals for petty offences to be unconstitutional and a violation of the African Charter and international instruments. Courts have also found that broad and

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\(^{159}\) 100 Resolution on the Adoption of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System ACHPR/Res.100.

\(^{160}\) Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, 2004 principle 3.

unfettered discretion in the hands of police leads to discriminatory enforcement of petty offences that is incompatible with equality protections. However, this is still an evolving area of the law, particularly regarding persons with disabilities who are charged with petty offences.

In *Mayeso Gwanda v State*, the Malawi High Court reviewed the case of a street vendor who was charged with the petty offence of being a rogue and vagabond under section 184(1)(c) of the Malawian Penal Code. The Court found that his constitutional rights to dignity and freedom from discrimination were violated because the petty offence law fails to meet human rights standards. They also held that the police officers exercised too much discretion, negated his right to be presumed innocent and enforced the law in a discriminatory manner.

In *Dorothy Njemanze and Others v Federal Republic of Nigeria*, the ECOWAS Court reviewed the case of a group of women arrested and detained on suspicion of engaging in prostitution simply because they were found on the streets at night. The Court found multiple violations of Articles 1, 2, 3 and 18 (3) of the African Charter. The Court held that the arrest unlawfully violated their right to freedom of liberty, dignity and right to be free from cruel, inhuman or degrading treatment.

In *Zimbabwe Lawyers for Human Rights & IHRD in Africa v Zimbabwe*, the African Commission held that unfettered power in the hands of police officers based on vague and unsubstantiated reasons of a danger to public order destroys the right to equality before the law and is a violation of Article 2 of the African Charter. The Commission also noted that the Article 3 right to equality before the law applies not only to the content of legislation but also to the enforcement of the law, so judges and other officials may not arbitrarily enforce the law.

Most recently, in 2020, the African Court issued a groundbreaking advisory opinion holding that vagrancy laws are incompatible with African human rights instruments. The Court found that the overly broad petty offence of “vagrancy” disproportionately punishes the poor and underprivileged, including individuals with disabilities. The African Court notes that the use of terms like “rogue”, “vagabond”, “idle” and “disorderly” in petty offence laws degrade individuals with perceived lower status, in violation of the right to dignity. The Court found that vagrancy laws are incompatible with the African Charter’s provisions on non-discrimination, equality, dignity, liberty and protection of the family under Article 18. Such laws are prone to abuse due to their vague and imprecise language. The African Court also crucially notes that

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163 ECW/CCJ/JUD/08/17.
165 Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples’ Rights and Other Human Rights Instruments Applicable in Africa No 001/2018 (4 Dec 2020) at paras. 3-4, 70.
166 *Id* at para. 79.
167 *Id* at paras. 70, 79, 83-87, 104-105.
168 *Id* at para. 71.
under Article 1 of the African Charter, all States Parties are obligated to amend or repeal all their vagrancy laws, related by-laws and other laws and regulations so as to bring them in conformity with the provisions of the Charter.\textsuperscript{169}

In \textit{Purohit and Moore v The Gambia}, the African Commission concluded that the use of the words “lunatics” and “idiots” to refer to persons with intellectual or psychosocial disabilities dehumanises and denies them their dignity.\textsuperscript{170} The case highlights the principle of inherent dignity:

\begin{quote}
\textit{The African Commission maintains that mentally disabled persons would like to share the same hopes, dreams and goals and have the same rights to pursue those hopes, dreams and goals just like any other human being. Like any other human being, mentally disabled persons or persons suffering from mental illnesses have a right to enjoy a decent life, as normal and full as possible, a right which lies at the heart of the right to human dignity. This right should be zealously guarded and forcefully protected by all States party to the African Charter in accordance with the well-established principle that all human beings are born free and equal in dignity and rights.}
\end{quote}

Yet, in most cases where persons sought to assert the rights of persons with intellectual and psychosocial disabilities, the courts have been willing to declare outdated terminology unconstitutional, but have seldom been willing to struck down outdated laws.\textsuperscript{171}

The Lesotho High Court has held that section 219\textsuperscript{172} of the Criminal Procedure and Evidence Act is unconstitutional, not only because of the terminology used (“idiocy”, “lunacy” and “imbecility”) but the effect of the provision:\textsuperscript{173}

\begin{quote}
\textit{The effect of section 219 of the Criminal Procedure and Evidence Act is to render a victim of abuse, exploitation, humiliation and exploitation to all kinds of vulnerable treatment the worst kinds being sexual, financial and through other obnoxious methods. The victims of all these are human beings and deserve all the protection and equality under law. Even if the insolent or disrespectful words are removed from section 219, the}
\end{quote}

\textsuperscript{169} \textit{Id} at paras. 153-54.
\textsuperscript{171} \textit{Mwewa and Others v Attorney General and Others} (2017/HP/204) [2017] ZMHC 77 (9 October 2017) at J20.
\textsuperscript{172} “No person appearing or proved to be afflicted with idiocy, lunacy or inability or labouring under any imbecility of mind arising from intoxication or otherwise whereby he is deprived of the proper use of reason, shall be competent to give evidence while so afflicted or disabled.”
\textsuperscript{173} \textit{Koali Mshoeshoe and Others v Director of Public Prosecutions and Others}, Constitutional Case No. 14 of 2017 (16 May 2019), para 18.
negative effect to the disabled remains poignant and this is quite obnoxious and must be removed from the statute books.”

The Constitutional Court of Uganda has noted with concern the ease with which the law facilitates accused persons with intellectual and psychosocial disabilities disappearing in the criminal justice system, without follow up and adequate procedures for review.174

174 Centre for Health, Human Rights and Development (CEHURD) and Iga Dniel v Attorney General, Constitutional Petition No. 64 of 2011 (October 2015), citing the example of Uganda v Tesimana HC Criminal Revision Case No. MSK-CR-CV-13 of 1999.
CHAPTER 6

THE KENYAN LEGAL FRAMEWORK

The laws, policies and guidelines that regulate the criminal justice system include:

- The Constitution of Kenya, 2010;
- The Penal Code (Cap. 63);
- The Criminal Procedure Code (Cap. 75);
- Persons with Disabilities Act No. 14 of 2003;
- The Mental Health Act No. 10 of 1989 (Cap. 248);
- Children’s Act No. 8 of 2001 (Cap. 141);
- Prisons Act (Cap. 90);
- Persons Deprived of Liberty Act No. 23 of 2014;
- Guidelines on the Decision to Charge, 2019;
- Bail and Bond Policy Guidelines, 2015;
- Diversion Policy, 2019;
- Sentencing Policy Guidelines.

The Persons with Disabilities Act of 2003 and Mental Health Act of 1989 are being amended to bring them in line with the CRPD.\textsuperscript{175}

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (ODPP)

The Diversion Policy developed by the ODPP emphasises the use of diversion as an alternative to prosecution principally when it comes to petty offences. Diversion has been defined by the Diversion Policy to mean a process for resolving criminal cases without resort to full judicial proceedings, which can take the form of a simple caution or warning, an apology to the victim, payment for damage done, or it may involve referral to a structured diversion programme, restorative justice process or similar scheme. The purpose is to enable the offender to avoid the negative effects of formal judicial proceedings, a criminal conviction, and a criminal record.\textsuperscript{176}

Guideline 2.8 of the Diversion Policy states:

“The Public Prosecutor must consider every offender’s potential eligibility for diversion. Each case must be decided on its merits. For the purposes of this policy, offenders fall into four categories:

a) Adult offenders who are alleged to have committed petty offenses.”

\textsuperscript{175} B Rohwerder (2020) *Kenya Situational Analysis*. Disability Inclusive Development.

\textsuperscript{176} Office of Director of Public Prosecutions *Diversion Policy* (2019) viii.
b) All child offenders irrespective of the nature of the offence.
c) Vulnerable persons irrespective of the nature of the offence.
d) Cases involving felony offences where exceptional circumstances exist.”

A vulnerable person has been defined by the Diversion Policy to include a person with a disability. The effect of the above policy is that a prosecutor, while exercising their decision to charge a person with an intellectual or psychosocial disability with a petty offence, is bound to divert the case as opposed to prosecuting it.

However, this provision is contradicted by Guideline A.6 of the Diversion Policy’s which states that it is not appropriate to prosecute persons with mental disabilities in the ordinary criminal justice process, but they must, instead, be subjected to section 162 of the Criminal Procedure Code. Section 162 discriminates against persons with intellectual and psychosocial disabilities as it denies them the right to a fair trial.

Guideline A.6 of the Diversion Policy states:

“21. The law makes provision for special treatment for vulnerable people in criminal cases:

a) Proceedings against a person with a mental disorder requires the consent of the DPP.
b) The DPP can discontinue proceedings or discharge and release an offender, although charges can be re-laid.

22. Clauses 32 and 33 of the General Prosecution Guidelines make special provision for the prosecution of persons with mental disabilities:

32. From time-to-time persons suffering from a mental illness, intellectual impairment or some other psychological problems are charged with criminal offences. It is often not appropriate for these matters to be prosecuted through the ordinary criminal justice process because the alleged offender may be incapable of understanding the charges or the procedures involved or cannot give instructions. The Criminal Procedure Code provides a special procedure for dealing with such cases.
33. Under section 162 of the Criminal Procedure Code, the court has a duty to inquire where it has reason to believe that an offender is of unsound mind and thus incapable of making his or her defense. However, this does not stop the Public Prosecutor from moving the court to order such an inquiry where there is reason to believe that an offender is suffering from mental illness.”

Sections 162, 163 and 164 of the Criminal Procedure Code are the most discriminatory for persons with intellectual and psychosocial disabilities going through the criminal justice system as accused persons. The legal procedure that these sections create
forms the anchor on which all the other discriminatory laws and policies are created and thrive. The sections state:

**Section 162 - Inquiry by court as to soundness of mind of accused**

1) *When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.*

2) *If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.*

3) *If the case is one in which bail may be taken, the court may release the accused person on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person, and for his appearance before the court or such officer as the court may appoint in that behalf.*

4) *If the case is one in which bail may not be taken, or if sufficient security is not given, the court shall order that the accused be detained in safe custody in such place and manner as it may think fit and shall transmit the court record or a certified copy thereof to the Minister for consideration by the President.*

5) *Upon consideration of the record the President may by order under his hand addressed to the court direct that the accused be detained in a mental hospital or other suitable place of custody, and the court shall issue a warrant in accordance with that order; and the warrant shall be sufficient authority for the detention of the accused until the President makes a further order in the matter or until the court which found him incapable of making his defence orders him to be brought before it again in the manner provided by sections 163 and 164.*

**Section 163 - Procedure where person of unsound mind subsequently found capable of making defence**

1) *If a person detained in a mental hospital or other place of custody under section 162 or section 280 is found by the medical officer in charge of the mental hospital or place to be capable of making his defence, the medical officer shall forthwith forward a certificate to that effect to the Director of Public Prosecutions.*

2) *The Director of Public Prosecutions shall thereupon inform the court which recorded the finding concerning that person under section 162*
whether it is the intention of the Republic that proceedings against that person shall continue or otherwise.

3) In the former case, the court shall thereupon order the removal of the person from the place where he is detained and shall cause him to be brought in custody before it, and shall deal with him in the manner provided by section 164; otherwise the court shall forthwith issue an order that the person be discharged in respect of the proceedings brought against him and thereupon he shall be released, but the discharge and release shall not operate as a bar to any subsequent proceedings against him on account of the same facts.

Section 164 – Resumption of proceedings or trial

“Wherever a trial is postponed under section 162 or section 280, the court may at any time, subject to the provisions of section 163, resume trial and require the accused to appear or be brought before the court, whereupon, if the court considers the accused to be still incapable of making his defence, it shall act as if the accused were brought before if for the first time.”

Section 280 - Refusal to plead

“(1) If an accused person being arraigned upon an information stands mute of malice, or neither will nor by reason of infirmity can, answer directly to the information, the court may order the Registrar or other officer of the court to enter a plea of “not guilty” on behalf of the accused person, and plea so entered shall have the same force and effect as if the accused person had actually pleaded it; or else the court shall thereupon proceed to try whether the accused person be of sound or unsound mind, and, if he is found of sound mind, shall proceed with the trial, and if he is found of unsound mind, and consequently incapable of making his defence, shall order the trial to be postponed and the accused person to be kept meanwhile in safe custody in such place and manner as the court thinks fit, and shall report the case for the order of the President.
(2) The President may order the accused person to be confined in a lunatic asylum, prison or other suitable place for safe custody.”

These sections cause the right to a fair trial of a person with an intellectual or psychosocial disability to be suspended until the court can inquire into their mental capacity. If the court finds them incapable of making their defence, it will commit them to a mental hospital. Section 162 dates to 1982 and has not been amended to reflect the spirit of the Constitution of Kenya, including the right to equality before the law, freedom from discrimination, the right to access justice and the right to a fair trial.

Further to this, these sections do not consider the imperatives of the CRPD on access to justice, legal capacity, and the right to reasonable accommodations. Sections 162,
163 and 164 shaped a discriminatory criminal justice process for accused persons with intellectual or psychosocial disabilities.

The inclusion of the President (the executive) in this “special” process laid down by subsection 2 defeats the separation of powers and the independence of the judiciary as stated in Article 160(1) of the Constitution, which provides that in the exercise of judicial authority, the judiciary shall only be subject to the Constitution and the law and not subject to the control or direction of any person or authority.
CHAPTER 7

RIGHTS OF PERSONS WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES WITHIN THE CRIMINAL JUSTICE SYSTEM

The fundamental rights and freedoms of persons with intellectual or psychosocial disabilities within the criminal justice system are primarily enumerated in the Constitution and the CRPD.

RIGHT TO LEGAL CAPACITY

Article 27(1) of the Constitution states that every person is equal before the law and has the right to equal protection and equal benefit before the law. Equality before the law is the ability to enjoy all rights and fundamental freedoms fully and equally. The Constitution of Kenya fully guarantees the right to legal capacity for persons with intellectual or psychosocial disabilities by ensuring that they can enjoy all rights enshrined in the Constitution. These rights include but are not limited to the right to access justice, rights of an arrested person and the non-derogable right to a fair trial.

Legal capacity is an elusive right for persons with intellectual or psychosocial disabilities where laws and policies do not differentiate between legal capacity and mental capacity, as is the case in most of the criminal laws in Kenya. This pattern creates legal loopholes violating the right to legal capacity for persons with intellectual and psychosocial disabilities. Even following the adoption of the CRPD in 2008, legal capacity remains incredibly difficult to implement. Policymakers and implementers have not fully understood its implications, and neither have they fathomed its impact once it is implemented.

Article 12 of the CRPD states that persons with disabilities have the right to be recognised as persons before the law. Persons with disabilities have the right to enjoy legal capacity on an equal basis with others in all aspects of life, and they also have a right to be given the necessary supports to exercise their legal capacity. Kenya is required to ensure that a person with an intellectual or psychosocial disability can exercise their right to legal capacity by ensuring that the person’s will and preferences are respected and free of conflict of interest and undue influence. The supports given to a person with an intellectual or psychosocial disability should be proportional and tailor-made to their circumstances.

A person with an intellectual or psychosocial disability can exercise their right to legal capacity in the criminal justice system when they can fully and actively participate in all court proceedings. A person with an intellectual or psychosocial disability has the legal capacity to exercise their right to a fair trial with the necessary supports, i.e.,

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reasonable accommodations and the use of an intermediary. Guideline 33 of the Luanda Guidelines further emphasises that persons with disabilities shall enjoy full legal capacity, access to justice on an equal basis with others, equal treatment before the law and recognition as a person before the law. It provides for the protection of persons with disabilities with respect to arrest and pre-trial detention. The Guidelines state that the existence of a disability can in no case justify a deprivation of liberty and that every person with an intellectual or psychosocial disability arrested or detained shall be treated with humanity and respect and in a manner that considers the needs of the person by including the provision of reasonable accommodations.

Principle 1 of the International Principles and Guidelines on Access to Justice for Persons with Disabilities states that all persons with disabilities have the legal capacity, and no one shall be denied access to justice based on their disability. Guideline 1.1 obligates Kenya to guarantee that persons with disabilities enjoy legal capacity on an equal basis with others and, where necessary, to provide the supports and accommodations necessary to exercise it and guarantee access to justice. Guideline 1.2 further states that all persons with disabilities shall be recognised and assumed to have the full capacity to participate in all court proceedings. The use of mental capacity determined by “mental status assessments” shall not be used to restrict a person’s legal capacity.

Article 50(7) of the Constitution states that the court may allow an intermediary to assist an accused person in communicating with the court. The right of a person with an intellectual or psychosocial disability to have an intermediary as a support person in communicating with the court is further provided for under Guideline 1.2(i) of the International Principles and Guidelines. It states that Kenya is obligated to ensure that the right to the individually determined procedural accommodations, including supports, necessary to enable persons with disabilities to participate effectively in all court proceedings must be actionable and enforceable.

The Kenya High Court has affirmed the right to legal capacity as entrenched in the CRPD.


180 Wilson Morara Siringi v Republic, HCCRA No. 61 of 2013 [2014] eKLR, para 15. ("In conclusion I would be remiss if I did not mention that the approach taken by the prosecution and the learned magistrate is that the complainant is an object of social protection rather than a subject capable of having rights including the right to make the decision whether to have sexual intercourse. This approach is consistent with the provisions of Article 12 of the Convention on the Rights of Persons with Disabilities which requires State parties to recognise persons with disabilities as individuals before the law, possessing legal capacity to act, on an equal basis with others. Kenya ratified the Convention in 2008 and by the dint of Article 2(6) of the Constitution it forms part of the law of Kenya.")
RIGHT TO ACCESS JUSTICE

Access to justice for persons with disabilities refers to how the person should be able to participate, on an equal basis with others, in the formal and informal judicial system. This includes the ability to seek remedies, receive a fair trial and exercise other legal functions, such as being a witness.

Article 48 of the Constitution requires that the State ensure access to justice for all persons, including persons with intellectual and psychosocial disabilities. Article 13 of the CRPD requires the State to ensure adequate access to justice for persons with disabilities on an equal basis with others by providing procedural and age-appropriate accommodations. This will facilitate their effective participation in the legal proceedings.

The factors that contribute to equal access to justice for persons with disabilities are:  

- A sound legal system, including the recognition of basic rights in legislation, enforcement and judicial practices, and the establishment of legal institutions featuring cooperation and checks and balances. This includes the building of judicial supervisory procedures, provision of equal public services, inclusion of social forces, and the recognition of informal justice;  
- Understandable legal information;  
- Legal awareness and positive attitudes of the rights-holder;  
- Accessible legal services;  
- Support of accessibility and reasonable accommodations throughout the whole judicial process.

Effectively, if one cannot give instructions to a lawyer, it means they have no access to justice as well. In Kenya’s criminal justice system, legal aid lawyers are only provided in capital offence cases. This means persons with intellectual or psychosocial disabilities charged with petty offences or who are found unfit to stand trial and cannot express themselves will not have access to a lawyer.

The Committee on the Rights of Persons with Disabilities recommends that the State Party:

- Adopts measures to ensure that all persons with disabilities have access to justice, including by establishing free legal aid for persons with disabilities who claim their rights, and by providing information and communications technology in accessible formats, including the Kenyan sign language.  
- Defines explicitly in legal instruments the duty of the judiciary to provide procedural accommodations for persons with disabilities in accordance with article 13 of the Convention.

182 Id.
Develops a capacity-building strategy within the judicial branch on the rights of persons with disabilities, including lawyers, magistrates, judges, prison staff and the Police.\textsuperscript{183}

Guideline 33 of the Luanda Guidelines obligates Kenya to ensure that persons with intellectual or psychosocial disabilities are informed about and provided access to appropriate supports to exercise their legal capacity. The support needs include the provision of interpreters, information in accessible formats and independent third parties who are not employed by the law enforcement authority and are appropriately qualified.

Despite the national, regional, and international laws, barriers to accessing justice for persons with intellectual or psychosocial disabilities are present in every aspect of Kenya’s criminal justice system. These overarching barriers often manifest themselves in particular and pervasive ways. Social stigma predisposes stakeholders in the justice system against persons with intellectual or psychosocial disabilities. Police may dismiss or misinterpret any statement from a suspect with an intellectual or psychosocial disability. In most cases, the law enforcement’s unfamiliarity with the behaviour of persons with intellectual and psychosocial disabilities may be misconstrued and may lead them to criminalise a victim mistakenly.

\textbf{THE RIGHT TO REASONABLE ACCOMMODATIONS}

Reasonable accommodations are at the heart of access to justice for persons with intellectual or psychosocial disabilities. Without the necessary and appropriate modifications and adjustments to the criminal justice system, persons with intellectual or psychosocial disabilities will not enjoy their right to legal capacity, access to justice, right to a fair trial and other rights on an equal basis with others. The key to achieving equal access to justice for persons with intellectual and psychosocial disabilities is to provide more significant accessibility supports and procedural and reasonable accommodations throughout the whole judicial process.

Accommodations for persons with intellectual and psychosocial disabilities within the criminal justice system are crucial to ensure freedom from discrimination. Article 5(3) of the CRPD requires Member States to take all appropriate steps to ensure reasonable accommodations to promote equality and eliminate discrimination. Accommodations also guarantee full and effective participation and inclusion of a person with an intellectual or psychosocial disability in court proceedings. The denial of reasonable accommodations is a form of discrimination.\textsuperscript{184} Guideline 33 of the Luanda Guidelines has further emphasised the obligation of the State to provide reasonable and procedural accommodations and substantive due process.


Principle 3 of the International Principles and Guidelines guarantees the right of persons with disabilities to appropriate procedural accommodations. Kenya should provide gender and age-appropriate individualised procedural accommodations for persons with disabilities. Such accommodations encompass all the necessary and appropriate modifications and adjustments needed in a particular case. These may include intermediaries or facilitators, procedural adjustments and modifications, adjustments to the environment and communication support to ensure access to justice for persons with disabilities. To the fullest extent possible, accommodations should be organised before the commencement of proceedings.\textsuperscript{185}

The right to use an intermediary has been provided for by Article 50(7) of the Constitution. This is, however, qualified and subject to the discretion of the court. Article 50(7) states that “in the interest of justice, a court may allow an intermediary to assist an accused person in communicating with court”.

**FREEDOM FROM DISCRIMINATION**

Article 27(4) of the Constitution provides that the State shall not discriminate directly or indirectly against any person on the ground of disability. Article 260 defines “State” to mean a government office, while a “State office” refers to judicial offices, office of public prosecutions, police, and any other office established as a State office. Therefore, every government agency involved in the criminal justice system is prohibited from discriminating against a person based on their disability.

Article 3 of the CRPD states non-discrimination as one of the general principles of the Convention. In addition, Article 5 requires States to recognise all persons as equal before and under the law and maintains that they are entitled to equal protection and equal benefit of the law without discrimination. States are also expected to prohibit discrimination based on disability and to guarantee persons with disabilities equal and effective legal protection against discrimination on all grounds.

Under Principle 2, Guideline 2.1 of the International Principles and Guidelines,\textsuperscript{186} Kenya is required to ensure that her facilities and services are universally accessible to ensure equal access to justice without discrimination against persons with disabilities. Kenya is further required to guarantee equal access to justice and non-discrimination and ensure that the facilities and services used in legal systems are built, developed, and provided based on universal design principles. Courts, police stations, police cells and detention facilities (remand and prison) should be accessible and habitable for persons with intellectual and psychosocial disabilities.


National and international laws protect persons with intellectual and psychosocial disabilities against discrimination as they go through the criminal justice system. However, this right remains elusive. The lack of awareness of these rights by service providers within the criminal justice system coupled with systematic and entrenched stigma creates a significant barrier to the full enjoyment of freedom from discrimination by persons with intellectual and psychosocial disabilities.

**RIGHTS OF AN ARRESTED PERSON**

Article 49 of the Constitution of Kenya provides for the rights of an arrested person:

“(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
(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.”

In Kenya, arrests and detention are made by law enforcement officers, i.e., the Kenya Police, who are tasked with collecting evidence that will eventually guide the prosecution on whether to make the decision to charge.

In *Anthony Njenga Mbuti & 5 Others v Attorney General & 3 Others,*¹⁸⁷ the High Court of Kenya viewed the practice of profiling by police as a violation of the right to equal protection before the law. They noted that the provisions of the Kenyan Criminal Procedure Code that allow for the profiling and arrest of individuals based on their economic or other status are arbitrary and discriminatory.

¹⁸⁷ Constitutional Petition No 45 of 2014 [2015] eKLR.
As a result of the limitations persons with intellectual and psychosocial disabilities have in terms of communication, their interaction with the police may result in violation of these rights. Police officers need to be aware that persons with intellectual and psychosocial disabilities might respond in a manner that suggests guilt for several reasons: They might not understand their rights, they might not understand the instructions of the police, they might be overwhelmed by the situation and police presence, they might be upset and want to run away, they might say what they think the police want to hear, they might have difficulty describing what happened, or they might confess even though innocent.188

When a person with an intellectual or psychosocial disability is arrested and detained, the arresting officer ought to provide necessary supports and reasonable accommodations. Accommodations may involve the police repeating or rephrasing a question, stopping the questioning if the suspect is distressed or unable to concentrate or simply contacting a lawyer, family member or a friend. Persons with an intellectual and psychosocial disabilities may need more time to process information; this calls for plain and straightforward language. The police officers are usually not trained on disability inclusivity and may not understand how to communicate with persons with intellectual or psychosocial disabilities detained at a police station.

B is a boy aged 15 years with an intellectual disability. He is registered as a person with a disability under the National Council for Persons with Disabilities and has the registration card. On the material day, B’s mother was working when neighbourhood children came and informed her that B was being arrested and beaten by police officers. At the police station, she was informed that B was accused of raping a child aged five years. B’s mother requested to see the charge sheet, but this was denied. She also requested to see B, and this request was also denied. She was, however, informed that the report was made by a man and a police officer as witnesses. She was then asked to leave the police station and come back later when the victim report is brought.

B’s mother returned to the neighbourhood and asked about the whereabouts of the purported victim and was informed that the girl had been taken for a medical exam. The next day, B’s mother went back to the police station, where she met the mother of the purported victim, who had a medical report indicating that there were no signs of defilement of the child. Both parents requested B’s release at this point. The OCS told her to leave and come back at 2 p.m. without stating a reason. B’s mother returned at 1 p.m. with food, medication and a sweater for B. However, the OCS was not present, and instead she found two police officers who denied her access to B and the charge sheet. The police officers also refused to take the birth certificate and disability card for B as evidence. She was also denied access to the medical report and recorded statements.

The next day B was arraigned in court. This was done via Zoom at the police station. The mother was not allowed to attend court. The Prosecutor who had been given copies of the birth certificate and disability card did not present them before the court either. A government social worker familiar with B’s disability was, however, given audience by the court to present evidence that he is a minor and a person with a disability and should be released on bail/bond to the mother. Instead, the court asked for a mental assessment, and B was to be remanded at Industrial Area Prison, a facility for adults, until his mental assessment.

Article 49(2) of the Constitution states that a “person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.” However, section 162 of the Criminal Procedure Code (CPC) violates this right by giving the court the discretion to remand a person with an intellectual or psychosocial disability in custody for an unspecified period as the court enquires into the mental capacity of the person. Guideline 3.2.2.1 of the Decision to Charge Guidelines abides by section 162 of the CPC and states:

“Where a suspect is of unsound mind, it may not be appropriate to prosecute through the ordinary criminal justice system where it appears that the suspect may be incapable of understanding the charges or the procedures involved or cannot give instructions. The Criminal Procedure Code (CPC) gives guidance on how to deal with such cases, in particular section 162 of the CPC states that it is the duty of the court to inquire where it has reasonable grounds to believe that an accused person is of unsound mind and thus incapable of making his/her defence. Prosecutors should not wait for the court to inquire but should be proactive in seeking such an inquiry where it is clear that one is required.”

The above guideline does not stipulate how a prosecutor should deal with suspects with intellectual or psychosocial disabilities in a manner that upholds their right as an arrested person. A prosecutor has the discretion to decide whether to continue remanding a suspect with an intellectual or psychosocial disability until such a time as the court may decide as per section 162 of the CPC, in violation of the rights of persons with intellectual and psychosocial disabilities.

The Persons Deprived of Liberty Act of 2014 details the rights of arrested persons, those held in lawful custody and those detained or imprisoned in execution of a lawful sentence. Section 23 provides that persons with disabilities lawfully deprived of liberty shall be treated equally with others in terms of the Constitution and other relevant laws,
considering the condition and nature of their disabilities.\(^{189}\) On the contrary, section 4 of the Act reiterates Article 31 of the Constitution which states that the right to privacy of persons with mental or sensory disabilities can be limited solely based on disability.\(^{190}\)

The Act requires competent authorities to act appropriately to facilitate humane treatment and respect for the privacy, legal capacity, and inherent dignity of persons with disabilities deprived of liberty.\(^{191}\) Section 3(3) of the Act requires places of detention to maintain a register noting the sex, gender, age, physical condition, and medical history of persons detained.

### RIGHT TO FREEDOM AND SECURITY OF THE PERSON

Article 29 of the Constitution provides for a person’s right to liberty. It states that:

> “Every person has the right to freedom and security of the person, which includes the right not to be—
> a) deprived of freedom arbitrarily or without just cause.
> b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58.
> c) subjected to any form of violence from either public or private sources.
> d) subjected to torture in any manner, whether physical or psychological.
> e) subjected to corporal punishment; or
> f) treated or punished in a cruel, inhuman or degrading manner.”

This right is to be enjoyed by all persons, and there should be no discrimination against persons with intellectual and psychosocial disabilities. However, the Criminal

\(^{189}\) “(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 Authority 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.”

\(^{190}\) “The right to privacy set out in Article 31 of the Constitution, may be limited in respect of a person deprived of liberty—
> (c) where the enjoyment of that right prejudices or is likely to prejudice the rights and fundamental freedoms of others;
> (d) ……
> (e) where there is need for psychiatric treatment of persons with mental, or sensory disabilities; or
> (f) if the limitation of the right is for the purposes of the security and safety of children, elderly persons and persons with disability.”

\(^{191}\) Section 5, Persons Deprived of Liberty Act:

> “(1) A person deprived of liberty shall at all times be treated in a humane manner and with respect for their inherent human dignity. (2) Any person who subjects a person deprived of liberty to cruel, inhuman or degrading treatment commits an offence and shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding two years, or to both.”
THE INTERACTION BETWEEN THE CRIMINAL JUSTICE SYSTEM AND PERSONS WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES IN NAIROBI, KENYA

Procedure Code provides for the detention of persons with mental disabilities at the President’s pleasure, where these persons were found to be culpable for a crime or unfit to stand trial.\(^{192}\)

The High Court in \textit{AOO and 6 Others v Attorney General and Another},\(^{193}\) dealt with a case relating to the sentencing of a child found guilty of murder to an indeterminate sentence at the President’s pleasure. The presiding Judge noted that the provisions were unconstitutional in that they interfered with the independence of the Judiciary as provided for in Article 160 of the Kenyan Constitution, 2010.

In recent years, the courts declared sections 166 and 167 of the Criminal Procedure Code unconstitutional.\(^{194}\) In the case of \textit{Republic v E N W}\(^{195}\) the presiding Judge acknowledged that these sections are not only unconstitutional but also that it was expedient and judicious to give a determinate sentence in cases concluded under section 166(1) of the CPC rather than have these persons detained for undetermined periods at the President’s pleasure.

To date, the judicial system has failed to facilitate the release of the numerous persons who were previously detained based on those sections. These persons continue to serve undetermined terms and there appears to be no mechanism to facilitate their release. For example, in the case of \textit{Sammy Musembi Mbugua & Others v Attorney General and Another}\(^{196}\) the Petitioners argued that the Prisons Act discriminated in the prisoners who would be entitled to be considered for remission of sentence. Section 46 of the Prisons Act prohibits remission of sentence in cases where a person was sentenced to the President’s pleasure, and in cases where the person committed an offence in terms of section 296(1) of the Penal Code. The Petitioners fell under the latter category, and the Court held that there is no reason not to allow for remission of sentence in cases where persons serve a determinate sentence. The Court noted that serving at the President’s pleasure is unconstitutional and determined that “it is no longer available as a punishment” but ignored the many prisoners who are currently in detention at the President’s pleasure and the need for a mechanism to secure their release.

The Committee on the Rights of Persons with Disabilities also commented on the right to liberty and security for the person in its Concluding Observations on the Initial Report of Kenya:

\(^{192}\) Criminal Procedure Code s 166 and 167.
\(^{193}\) \textit{AOO v Attorney General} NRB Petition No. 570 of 2015 [2017] eKLR.
\(^{194}\) \textit{Republic v SOM} Criminal Case No. 6 of 2011 [2018] eKLR.
\(^{195}\) HCCC No 78 of 2015 [2019] eKLR.
\(^{196}\) \textit{Sammy Musembi Mbugua and Others v Attorney General and Another}, Petition No. 16 of 2019 [2019] eKLR.
“The Committee recommends that the State party:
(a) Amend its legislation to prohibit involuntary placement, in particular, to repeal provisions of the Mental Health Act (1989), amend the Persons Deprived of Liberty Act 2015, which allows detention for the purpose of psychiatry treatment, and ensure that new legislation is fully compatible with article 14 of the Convention in all cases.
(b) Repeal the provisions of the Criminal Procedure Code, Section 166, concerning the declaration of “insanity” and reaffirm the right to a fair trial of persons with disabilities, in accordance with the Convention.”

Kenya is yet to implement these recommendations.

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Article 157 of the Constitution establishes the Office of Director of Public Prosecutions (ODPP). The ODPP may institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed. The decision whether to charge or not to charge is the hallmark of the institution of criminal proceedings and at the heart of the State’s criminal justice system. It thus behooves the prosecutor to act with independence, integrity, impartiality, and professionalism in the administration of justice.

On this premise, the ODPP developed Guidelines on the Decision to Charge that are anchored in Article 157 of the Constitution, the National Prosecution Policy, and the General Prosecution Guidelines. The Guidelines provide the framework for exercising the State’s powers of prosecution, ensuring justice is served to all. In the criminal justice system, it is the investigator’s responsibility to investigate offences and the DPP’s responsibility to ensure the right person is charged with the correct offence and that cases are withdrawn when it becomes clear that there is no realistic prospect of conviction.

According to Guideline 3.1.1 of the ODPP’s Guidelines on the Decision to Charge, prosecutors are required to make an independent analysis of the case and be objective in deciding whether to charge or not to charge. The investigator and prosecutor’s roles are complementary, but the final decision to charge rests with the prosecutor, who must assess whether it is appropriate and what charges to consider. A prosecutor must ensure that the right person is prosecuted for the right offence, correctly applying the law, and ensuring that relevant evidence is submitted before the court and that disclosure obligations are complied with.

When making decisions to charge, prosecutors must be fair and objective. They must be apolitical and not let personal views based on ethnic or national origin, gender, disability, age, religion or belief, sexual orientation, status, or gender identity of a suspect, accused person, victim or any witness influence their decision. Prosecutors must also act in the interest of justice and not solely to obtain a conviction. According to Guideline 3.1.2.2, if a prosecutor decides not to charge, reasons should be given in writing and where appropriate, the Investigating Officer and the victim should be consulted.

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THE STANDARD REQUIRED IN DECIDING TO CHARGE

The standard required in deciding whether to charge or not to charge is whether there is a reasonable prospect of conviction. Guideline 3.2 of the Guidelines on the Decision to Charge provides for a two-stage test: an evidential test followed by a public interest test. In the evidential test, “[p]rosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge”, i.e., an objective, impartial and reasonable court is more likely than not to convict the accused.\(^{200}\)

The second test to apply before deciding to charge is the public interest test, which considers “what is in the interest of the broader administration of justice.” The prosecutor should exercise discretion since not every suspected criminal offence will be the subject of prosecution. In determining the public interest, the prosecutor should consider the seriousness of the offence, which can be ascertained by considering the suspect’s culpability and the hardship caused. The more serious the offence, the more likely it is that prosecution is required.\(^{201}\)

Guideline 3.2.2.1 outlines the culpability of the suspect as one of the factors to consider under the public interest test. This relates to the level of guilt or blameworthiness that a suspect has in the commission of an offence. One of the factors that is to be considered by prosecutors which directly affects suspects with intellectual and psychosocial disabilities is “the suspect’s age and maturity”. The question should be whether “maturity” here suggests the suspect’s mental capacity and if so, if it is a violation of the right to legal capacity.

The Guideline further directs prosecutors to consider whether the suspect is, or was at the time of the offence, affected by any significant mental or physical ill-health or disability, as in some circumstances, this may mean that it is less likely that a prosecution is required. Where a suspect is of “unsound mind”, it may not be appropriate to prosecute through the ordinary criminal justice system where it appears that the suspect may be incapable of understanding the charges or the procedures involved or cannot give instructions.

The use of the terms “unsound mind”, “suspect may be incapable of understanding the charges or procedures involved”, as well as “cannot give instructions” in Guideline 3.2.2.1 is a violation of the right to legal capacity, the right to a fair trial and the right to access justice for persons with intellectual and psychosocial disabilities. The Constitution of Kenya has guaranteed the right to equality before the law as well as freedom from discrimination; the CRPD, on the other hand, has provided for the right to legal capacity, the right to supported decision-making, the right to reasonable accommodations and the right to access justice. The denial of rights for persons with intellectual and psychosocial disabilities by the ODPP Guidelines on the Decision to Charge shows how embedded the violations at the heart of criminal prosecution are.

\(^{200}\) Id 35.  
\(^{201}\) Id 38.
The Guidelines focus almost entirely on the capacity of persons with intellectual and psychosocial disabilities to stand trial. This reflects a lack of alternative approaches such as the provision of reasonable and procedural accommodations and the use of intermediaries to ensure their effective participation in court proceedings, as this is guaranteed under the right to a fair trial. Despite coming into force in 2019, the Guidelines have failed to precisely outline how to manage suspects with intellectual and psychosocial disabilities. This, even though the High Court had already declared the verdict “guilty but insane” and the sentence of being held “under the pleasure of the President” unconstitutional. Courts continue to find persons “guilty but insane”.

Section 167 of the Criminal Procedure Code, relating to the verdict “guilty but insane” was held to be unconstitutional in Hassan Hussein Yusuf v Republic and Joseph Melokino Katuta v Republic:

“Section 167(1) of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides that a convicted accused person who has a mental condition is held at the President’s pleasure. However, this provision found itself in the Criminal Procedure Code before the promulgation of the Constitution of Kenya, 2010, that guarantees the right of liberty to every person. As it is possible that a mentally challenged person who is convicted of an offence may be detained longer than the period stipulated in the law as the time is indefinite or indeterminate, section 167(1) of the Criminal Procedure Code is clearly unconstitutional as it contravenes a person’s right to liberty as enshrined in Article 29(a) of the Constitution of Kenya.”

Justice Majanja in Republic v SOM declared section 166 of the Criminal Procedure Code relating to the sentence of being held “under the pleasure of the President” unconstitutional, and ordered that the constitutional defect be remedied by replacing the reference to the “President” with review by the “Court”:

“I therefore find and hold that the provisions of section 166 of the CPC are unconstitutional to the extent that they take away the judicial function to determine the nature of the sentence or consequence of the special finding contrary to Article 160 of the Constitution by vesting the

202 Republic v IKI Criminal Case No. 7 of 2018 [2019] eKLR.
203 Hassan Hussein Yusuf v Republic Meru HC Criminal Appeal No. 59 of 2014 [2016] eKLR. (“It is my opinion that keeping a sick person for an indeterminate period in a prison is cruel, inhuman and degrading treatment... The order envisaged under section 167(1) of the Criminal Procedure Code is a punishment. Any punishment that cannot be determined from the onset is cruel, inhuman and degrading. I therefore make a finding that this section is unconstitutional to the extent that it offends the said articles of the Constitution.”)
204 Joseph Melikino Katuta v Republic HC Criminal Appeal No. 12 of 2016 [2016] eKLR.
205 Republic v SOM Criminal Case No. 6 of 2011 [2018] eKLR, para 12.
discretionary power in the executive. It also violates the right to a fair trial protected under Article 25 of the Constitution.”

More recently, in Charles Kipkoech Chirchir v Republic, the High Court again emphasized that being detained for an indefinite period at the President’s pleasure, was unconstitutional because it disregarded the rights of an accused person as a person with a disability. Despite these judgments, courts continue to sentence persons to be detained at the President’s pleasure.

The Judgment in John Muriu Njeri v Republic of Kenya

The Appellant (Muriu) was born with an intellectual disability that is life long and it limited his ability to understand the nature of the offence he was charged with as well as the consequences of pleading guilty. The Appellant was convicted on his own plea of “guilty but insane” and sentenced to be detained in prison at the pleasure of the President on 20 September 2016. Several issues were raised on appeal:

- The sections in the law that were used to convict the accused person (Muriu), section 166 and 167 of the Criminal Procedure Code, were declared unconstitutional.
- The sentence imposed on him was for an undetermined and undefined period, amounting to a cruel, inhuman, and degrading punishment.
- The trial court failed to appreciate the intellectual and psychosocial disability of Muriu that limited his understanding of the trial process and instead used it to punish him for it.
- The sentence was discriminatory to the Appellant (Muriu) as it was based on his disability, yet the Constitution is clear on discrimination based on any form of disability.
- The Appellant (Muriu) was and is still unable to understand the court proceedings as well as make a reasonable judgment.

On 11 June 2019, Justice Kimaru ruled in favour of the Appellant (Muriu) - the Appellant Court allowed the appeal, quashed the conviction and set aside the sentence imposed.

The Court agreed with the submissions made on behalf of the Appellant (Muriu), that he lacked the ‘mental capacity’ to understand the nature of the charges and the consequences of pleading guilty. The Court further proceeded to reject the call for a retrial by the prosecutor and held that a retrial would imply that the Appellant will permanently be in court neither taking plea nor being tried as he lacks the requisite ‘mental capacity’ to plead to the charges being tried.

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207 Republic v ENW, Criminal Case No. 78 of 2015 [2019] eKLR.
208 John Muriu Njeri v Republic Misc Cr Application No 395 of 2016 [2016] eKLR.
The Court highlighted the legal lacuna created when sections 166 and 167 were declared unconstitutional, but no mechanism had been set in place to deal with persons with intellectual or psychosocial disabilities.

The Court noted that it had been left with no statutory guidance on how to deal with persons with intellectual or psychosocial disabilities and called for enactment of the appropriate statutory instrument to address the change and challenges imposed when persons with intellectual or psychosocial disabilities like the Appellant (Muriu) are in the criminal justice system.

The Appellant Court further held that the four years that the Appellant (Muriu) had served as an inmate precludes the court from directing him to be further detained. Muriu was discharged into the custody of his family, who were ordered to ensure that he is attended to ‘medically’ and does not pose a danger to society.

The Court acknowledged that Muriu had an intellectual disability and took note of it in setting aside the judgment. The Court clearly indicated why a re-trial is not an option in a case involving a person with an intellectual disability. Unfortunately, the Court still took a medical view of disability instead of a human rights approach that would have factored in the reasonable accommodations needed. The Court ordered Muriu to be released to the family, which clearly affirms the need and the role of family and community-based services. The case has been a test case that can now be used as legal precedent in magistrate courts in cases where an accused person has an intellectual disability. Had the trial court observed that the accused had an intellectual or psychosocial disability, then he might not have been convicted on his own plea of guilty and sentenced to serve under the President’s pleasure under sections 166 and 167 of the Criminal Procedure Code despite the clauses being declared unconstitutional.

**THE EFFECT OF THE DECISION TO CHARGE ON PERSONS WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES**

The decision to charge is at the heart of prosecution, and the Guidelines have given prosecutors discrentional powers to decide whether to charge persons with intellectual and psychosocial disabilities. The decision being discrentional, a prosecutor will decide to charge based on their assessment of a person’s ability to understand the charges or the court procedure. The culpability test is unconstitutional as it violates the right to equality, freedom from discrimination, and the right to a fair trial. All these constitutional rights are guaranteed irrespective of a person’s ability to understand the nature of the offence, their soundness of mind or their ability to give instructions.

The CRPD has authoritatively pointed out that persons with intellectual and psychosocial disabilities have the legal capacity to act on an equal basis with others. In the context of criminal proceedings, the UN Office of the High Commissioner for
Human Rights has deemed it discriminatory and unlawful to exculpate persons automatically from criminal liability based on disability and that, instead, “disability-neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant.”

The decision to declare that a person is “unfit to stand trial” due to their unsound mind and inability to understand the charges is a determination of a person’s lack of mental capacity. This decision leads to the application of section 162 of the Criminal Procedure Code, in terms of which the court shall inquire into the facts of the accused person’s unsoundness. If the court finds the accused person is of unsound mind, they will be deemed unable to make their defence, and the case shall be postponed. The accused person shall further be placed in “safe custody”, which includes a mental hospital, until the President makes further orders. Section 164 provides for a resumption of trial for the court to ascertain whether the accused person can make their defence. If the person is deemed unable to defend themselves, they are returned to safe custody, and the cycle continues.

The consideration of a person’s mental capacity as opposed to legal capacity by both the court and the prosecution results in a custodial order in psychiatric facilities or other forms of deprivation of liberty for indefinite periods. A decision to charge and retain the said charges based on a person’s intellectual or psychosocial disability is contrary to Article 14(1)(b) of the CRPD, which states that “States Parties shall ensure that persons with disabilities…[a]re not deprived of their liberty…. and that the existence of a disability shall in no case justify a deprivation of liberty”. When the discretionary decision to charge based on a person’s disability is made by a prosecutor, it puts in motion a sequence of events that leads to a violation of the right to a fair trial.

Article 50(2) of the Constitution guarantees the right to a fair trial, and it is one of the most important rights under the Constitution by virtue of it being unlimited, as provided for by Article 25 of the Constitution.

Despite the presumption of innocence guaranteed under the right to a fair trial, persons with intellectual disabilities are often denied this right on the premise of their “unfitness to stand trial”. Section 11 of the Penal Code states that everyone is presumed to be sane until the contrary is proved. For persons with intellectual and psychosocial disabilities, when they are proved to be insane, the right to a fair trial as provided for under Article 50(2) is suspended.

209 “In the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability.” Human Rights Council Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities (26 January 2009) at para. 47.

The reliance on mental capacity to determine whether the court will uphold the right to a fair trial is a clear violation of the right, as well as the right to legal capacity, as provided by Article 27 of the Constitution.

UNFITNESS TO STAND TRIAL

The long-standing English doctrine of “unfitness to plead” has been incorporated into the Kenyan jurisprudence.211 The justification for unfitness to stand trial laws is that “the integrity of a criminal trial (and, arguably, the criminal law itself) would be prejudiced if the defendant cannot understand and participate in a meaningful way.”212 The unfitness to stand trial doctrine was primarily incorporated into modern law as a humanistic measure to protect accused persons with disabilities, offer a mechanism to test the prosecution, and divert individuals to appropriate treatment. In practice, however, findings of unfitness to stand trial can lead to “extremely deleterious consequences” that include indefinite detention of persons with cognitive disabilities for longer than if they had been convicted and sentenced following trial.213

The legal test of a person’s fitness to stand trial is based on principles elucidated in the English case of R v Pritchard214 and requires that the accused be able to:

- Understand the nature of the charge,
- Plead to the charge and to exercise the right of challenge,
- Understand the nature of the proceedings,
- Follow the course of the proceedings,
- Understand the substantial effect of any evidence that may be given in support of the prosecution, and
- Make a defence or answer the charge.215

The outcome of a finding of unfitness to stand trial is indefinite detention in prison or a forensic facility with no judicial scrutiny of the facts.216 This violates the right to a fair trial as the accused person cannot exercise the rights guaranteed in Article 50 of Kenya’s Constitution discussed above.

Before the CRPD, the justifications that were made for the existence of unfitness to stand trial were premised on the notion that a person should not be put on trial if they

211 Criminal Procedure Code s 162 – 167 (“Procedure in case of the lunacy or other incapacity of the accused person”).
214 (1836) 7 C & P 303, 304; 173 ER 135, 135 (Alderson B).
are unable to understand the legal process and the case against them. Reasons to enable findings of unfitness to stand trial included avoiding inaccurate verdicts and unfair trials, upholding the “moral dignity” of the trial process and ensuring the community is protected from dangerous individuals. In addition, it was considered important to provide appropriate treatment that contributes to the successful rehabilitation of mentally impaired accused persons and ensure efficient court proceedings.

These justifications prompted the legal response to substituted decision-making for persons with intellectual and psychosocial disabilities. This resulted from attributing incapacity to an individual, which happened through status attribution or applying the outcome test or the functional test. A cognitive disability’s very existence is sufficient to strip a person of legal capacity regardless of the actual individual’s capacity with or without supports or accommodations.

Under the **outcome test**, the attribution of incompetence is made based on the person’s decision-making. Hence, if a person makes a decision that is viewed as not conforming to “normal” or “societal values”, then the person is regarded as lacking capacity. This approach to capacity is now outdated, as it is recognised that “we all have the right to make our own mistakes” and that it is unjust to set the decision-making bar higher for persons with disabilities.

Under the **functional test**, disability is treated as a threshold condition in that only persons with such conditions run the risk of having their capacity questioned. This approach assesses capacity on an “issue-specific” basis. The approach enables capacity to be determined on a particular matter. Hence, the person with disabilities is considered incapable if, because of the disability, he or she cannot perform a specified function. The focus is on the individual’s cognitive capacities, i.e., their ability to understand the nature and consequences of a particular decision. There has been a shift from the status attribution, with the functional test being accepted and used widely. However, the functional test still does not wholeheartedly accept the existence of legal capacity for persons with intellectual and psychosocial disabilities.

Once a person is deemed to lack capacity, another person is appointed to make decisions for the person. In Kenya, the person so appointed is termed a “guardian” or “manager”, where the person is appointed for the management of the estate of the

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person with disabilities. The guardian or manager then makes decisions for the person with disabilities based on the “best interest” principle.\textsuperscript{222}

Article 12 of the CRPD does not deny that there are still decision-making deficits that must be addressed. In this regard, it creates a shift from substituted decision-making to supported decision-making. For persons with intellectual and psychosocial disabilities in the criminal justice system, supported decision-making entails being afforded an intermediary to aid communication in court and reasonable procedural accommodations.

The UN Committee on the Rights of Persons with Disabilities as held that a decision that a person is unfit to plead due to intellectual or psychosocial disability, results in “a denial of his right to exercise his legal capacity to plead not guilty and to test the evidence against him”.\textsuperscript{223}

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\textsuperscript{223} Committee on the Rights of Persons with Disabilities, \textit{Views adopted by the Committee under Article 5 of the Optional Protocol, concerning communication No. 7/2012}, para 8.5.
\end{flushright}
CONCLUSIONS & RECOMMENDATIONS

REASONABLE ACCOMMODATIONS

Regarding accused people with intellectual or psychosocial disabilities, there is confusion on whose role it is to ensure that reasonable and procedural accommodations are provided when necessary. It is the prosecution that has the burden of proving to the court that the accused person has an intellectual and/or psychosocial disability and should be provided with reasonable accommodations.

INTERMEDIARY

Article 50(7) of the Constitution provides that “in the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.” An intermediary should be someone close to the accused person, understand the unique way the accused person communicates and should not distort any fact of the case, whether intentionally or unintentionally.

HUMAN RIGHTS APPROACH TO DISABILITY

It was disappointing that some actors in the justice system are still using a medical model and derogatory terms to refer to people with intellectual or psychosocial disabilities, as opposed to a human rights approach. The human rights approach to disabilities emphasises the provision of individual support needs that will enable people with disabilities to participate in the justice system on an equal basis with others. It is important to note that support needs are not “one size fits all” and must be tailored to the specific individual that needs them.

ROLE OF FAMILIES IN COMMUNITY-BASED SERVICES

Family is a cornerstone of our community. A strong and vibrant family is built on healthy reciprocating relationships. It is built on trust and respect for each family member. The family should promote the human rights of the person with intellectual or psychosocial disabilities and build upon the spirit of the CRPD. “Families” refers not only to parents and siblings but also to the extended family and institutions which the person with an intellectual and/or psychosocial disability chooses to be their place of residence and with whom they live on an equal basis. The family empowerment program aims at fostering healthy families by creating conditions that allow the family to be agents of positive change in their community. This program consists of a wide range of interventions tailored specifically to the family needs. These include seminars to educate families, counselling, home visits for psychosocial support, and economic empowerment to help people start businesses.

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224 Focus group discussion contribution by a police officer (Kenya, 26 February 2021).
BEST PRACTICES

The court can also borrow from other countries where persons who have little speech or communications skills are able to testify and describe complex events if provided with professional speech therapy tools. These enable the lawyers and the court to effectively communicate with the accused person with an intellectual or psychosocial disability and reliably convey their answers. Possible accommodations could include an interpreter who will deliver the words that the accused person has said, a speech-to-speech transmitter or assistive technology tools, such as a communication board, which is a visual way of representing speech, words, or sentences. The accused person will therein point to the symbols on the board to structure a sentence and can be assisted by a speech therapy professional.

LEGAL CAPACITY

Regarding one-on-one interviews held with people with intellectual or psychosocial disabilities and their families, it was clear that in many instances, the family members are the “voice” of the person. Even when questions were directed at the individual, family members kept answering on behalf of the person, and it was a struggle to get the individual's response. Often, the researcher had to intervene to ask the family to give the person time to express themselves. The same cannot happen in a court for accused persons with intellectual or psychosocial disabilities. Hence, there is a need for training on legal capacity in which people with intellectual and psychosocial disabilities are empowered to speak for themselves and make their own decisions. It is about having a voice (even when it is non-verbal), being listened to and taking control of one’s own life with the proper support in decision-making.

DECISION TO CHARGE

The justice system needs to administer new perspectives of interpreting and applying the decision to charge persons with intellectual and psychosocial disabilities. This calls for advocacy initiatives for legal reform and raising awareness of magistrates and the ODPP on petty offences and disability. It is further essential to develop oversight mechanisms on the procedures of charging persons with intellectual and psychosocial disabilities.

TRAINING OF JUSTICE SERVICE PROVIDERS

The Office of the Director of Public Prosecution, Police Service Commission and the Judicial Service Commission need to be trained on the handling of persons with intellectual and psychosocial disabilities in the prosecutorial process and arriving at the decision to charge.
PSYCHOSOCIAL SUPPORT

There should be a concerted increase in psychosocial support, education, and families’ support rather than increasing forensic jails for individuals with intellectual and psychosocial disabilities and psychiatric care.

ENABLING ENVIRONMENT

There is a need for an enabling space for proper police investigations. Kenyan police officers are competent to undertake in-depth investigations. The challenge is that their desks are often full of petty offences, which deny them adequate time and resources to investigate other serious crimes.

TRANSPARENCY

An interparty team should design adequate and transparent systems to support persons with intellectual and psychosocial disabilities in the judicial system and bring on board other related special groups.

COMBAT IMPUNITY

It is vital to combat the impunity of justice system personnel, including the police, judges, prosecutors, probationary staff, and prisons. Acts of torture should be prosecuted. At the same time, procedural safeguards need to be ensured at all stages of the criminal justice system to protect persons with intellectual and psychosocial disabilities from rights violations. Complaints procedures should accommodate persons with intellectual and psychosocial disabilities, and investigations should be ensured where a complainant is a person with an intellectual or psychosocial disability.

LITIGATION INVOLVING PERSONS WITH INTELLECTUAL OR PSYCHOSOCIAL DISABILITIES

Strategic litigation on carefully identified cases can challenge discriminatory enforcement of petty offences and gaps and prejudice within the law itself. By challenging these laws in court and having them declared unconstitutional, legal reform will be hastened.

LAW AND POLICY REFORM

The following laws and policy documents would benefit from reform:

- Sections of the ODPP Guidelines on the Decision to Charge and Alternative Dispute Resolution Guidelines to the extent that they do not recognise the rights of persons with disabilities in the criminal justice system.
- Sections of the ODPP Guidelines on the Decision to Charge and Alternative Dispute Resolution Guidelines to the extent that they do not recognise or give guidelines
on procedural reasonable accommodations and supports for alleged offenders with intellectual and psychosocial disabilities in the system.

- Sections of the Persons Deprived of Liberty Act\textsuperscript{226} to the extent that they deny persons with disabilities privacy.
- Sections of the Criminal Procedure Code to the extent that they allow detention based on disability.
- Sections of the Mental Health Act\textsuperscript{227} to the extent that mental assessments are used to determine capacity to stand trial, instead of identifying accommodations and supports to stand trial.
- Sections of the Sentencing Policy Guidelines and Judges and Magistrates Handbook\textsuperscript{228} to the extent that they do not comply with CRPD standards on procedural accommodations for offenders with disabilities.

\textsuperscript{226} Persons Deprived of Liberty Act No. 23 of 2014.
\textsuperscript{227} Mental Health Act (1989) Cap 248.
\textsuperscript{228} The Judiciary of Kenya, Criminal Procedure Bench Book.